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# Recent Decisions

Edward J. Flattery

John E. Cosgrove

Thomas Broden

Richard H. Keen

unmarketable. A general view is that a marketable title need not be a perfect title of record.

There have been several devices developed to give force to the coined term of Equity "marketable titles." Through the use of affidavits some existing or potential defects may be remedied. The legislatures have provided statutes of limitation and also quieting title actions as aids in making more titles marketable. Judicial precedent has been an aid with regard to the interpretation of the general terms employed by the legislatures and the courts.

*Leonard D. Bodkin.*

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## RECENT DECISIONS

EVICTION — BIRTH OF CHILD NO CAUSE FOR EVICTION.—Lamont Building Co. v. Court, 66 N. E. (2d) 522, Feb. 25, 1946.—This was an action in forcible entry detainer by Lamont Building Company against Marvin Court to recover possession of suite in plaintiff's apartment. The Court below rendered judgment for defendant and Lamont Building Co. has appealed from the decision.

The facts: On February 19, 1945, the defendant leased from the plaintiff a suite in its apartment building in the city of Cleveland, Ohio. The defendant was notified by plaintiff's agent that the suite was to be occupied by adults only. Defendant upheld that "he did not have children or pets." Defendant and his wife entered into possession of the leased suite shortly thereafter. On August 8, 1945, a child was born of that marriage. Defendant testified that his wife was pregnant when he rented the suite and he did not inform plaintiff's agent that they expected a child. On August 24, 1945, the defendant received a letter from plaintiff's attorney saying that he had violated their contract of tenancy by keeping an infant in the apartment and served notice on the defendant to vacate the premises. The defendant did not vacate the apartment and the plaintiff filed this action in forcible entry and detainer on two grounds: 1. Tenant violated substantial obligation of his tenancy. 2. Tenant committed and permitted a nuisance in the use of said premises. The particular section of the O.P.A. regulations under which the plaintiff seeks its remedy in this action provides a penalty if "the tenant has violated a substantial obligation of his tenancy other than an obligation to pay rent, and has continued or failed to cure such violation after legal notice by the landlord to make violation cease." The jury rendered a verdict for the defendant and on appeal the higher Court affirmed the decision.

The Court held that the "no pets — adults only," was a substantial condition in the lease and if the defendant and his wife had had a

child at the time the lease was made, and had concealed this fact from the landlord, such an occupancy would have been a violation of a substantial obligation of the lease, which would warrant eviction.

The last question considered by the Court was the condition that there should be only adults occuping the premises. It was held void as against public policy insofar as the birth of the child to these parents sometime later would be held to be such a violation of the terms of the lease as to warrant an eviction. The Court went on to say that there were no cases on which this point was decided but after weighing the matter carefully, a majority of this court are of the opinion that the condition and obligation "adults only" is against public policy and void. It pointed out the danger of race suicide and the inducement for the parents to resort to an unnatural means to avoid and prevent the birth of the child. The power and influence of the law should be exerted in the direction of encouraging and not discouraging married couples to have off-spring.

One of the plaintiff's contentions was that the defendant was guilty of fraud in failing to disclose to the plaintiff that his wife was three months pregnant. Justice Morgan in the majority opinion held, the fact the defendant did not disclose his wife's pregnancy to the plaintiff, does not establish that he deliberately intended to defraud the plaintiff and with a bit of humor added, "After all, there is many a slip twixt the cup and the lip." There was no certainty that a child would be born to the couple in six months. It is a matter of common knowledge that a couple like the defendant and his wife might have children and of this fact the plaintiff's agent could hardly have been ignorant.

In summing up the case we see the Court of Appeals of Ohio holds that it is against public policy to provide a lease that an apartment should be occupied by adults only and attempt to apply the provision so as to give the landlord the right to evict a couple who had a child born to them six months after they entered possession; nor was fraud practiced on the landlord by the failure of the couple to disclose the wife's pregnancy when they rented the premises.

Since this is one of the first cases of its kind to be treated by a high court, it will probably be considered of paramount importance to many people throughout the United States who are experiencing so-called "landlord trouble" regarding the maintenance of their leases.

*Edward J. Flattery.*

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COMMERCE—STATE'S JIM CROW LAW VIOLATES COMMERCE CLAUSE. —Morgan, Appellant, v. Commonwealth of Virginia, 66 Sup. Ct. Rep. 1050; 90 L. Ed. Adv. Ops. 982; 14 U. S. Law Week 4395. (No. 704, argued March 27, decided June 3, 1946).—An appeal by defendant from a judgment of the Supreme Court of Appeals of the State of

Virginia,[1] affirming a conviction in the Circuit Court, of violating a statute [2] requiring bus passengers to follow the driver's directions as to seating, in order to segregate whites and negroes.

Appellant, Irene Morgan, a negress, while traveling interstate on a bus in Virginia, was asked by the driver to move to a different seat, in conformance with the state statute requiring the segregation of races on such carriers. Upon her refusal she was arrested and convicted of a misdemeanor.

The appeal questioned the constitutionality of the Virginia statute, alleging it was repugnant to the Commerce Clause of the Constitution. The statute was held unconstitutional as an undue burden on interstate commerce, by the Supreme Court of the United States, and the decision of the Virginia court was reversed.

Justice Reed delivered the opinion of the court. His major premise, speaking of interstate commerce, was that "state legislation is invalid if it unduly burdens that commerce where conformity is necessary — necessary in the constitutional sense of useful in accomplishing a permitted purpose." And each case turns upon its facts, he continued, as this criterion is applied. He noted that in the field of transportation the rule is, that, where Congress has not acted, a state may validly legislate even if the statute affects interstate commerce, provided it has "predominately only a local influence on the course of commerce." But, even where Congress has not acted, a state statute or a final court order is invalid if it materially affects interstate commerce. Mr. Justice Reed said that the position of the Virginia court, that the statute is the exercise of police power to prevent friction between the races, was destroyed by an earlier decision [3] which held that "a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power." The appellant's charge of a "burden" upon commerce is defined as those actions of a state which directly "impair the usefulness of its facilities for such traffic." [4] Thus the minor premise of Mr. Justice Reed's reasoning was that the necessity of passengers changing seats in conformity with local rather than national requirements imposed a very real burden on interstate commence. It forces travelers, passing through Virginia on these vehicles, to be aroused and disturbed, day or night, on the basis of constantly changing seating arrangements. The opinion observes that eighteen states prohibit racial segregation on public carriers while ten require motor carrier segregation, concluding that "seating arrangements for the different races in interstate motor travel require a single, uniform rule

1 184 Va. 24, 34 S. E. (2d) 491.

2 Virginia Code of 1942, Sec. 40972 to 4097 DD inclusive.

3 Kansas City S. R. Co. v. Kaw Valley Drainage District, 233 U. S. 75, 79; 58 L. Ed. 857, 859; 34 Sup. Ct. 564.

4 Hall v. De Cuir, 95 U. S. 485, 24 L. Ed. 547.

to promote and protect national travel. Consequently, we hold the Virginia statute, in controversy, invalid."

Mr. Justice Rutlidge concurred in the result.

Mr. Justice Black, in a brief concurring opinion, observed that the pertinent clause of the Constitution provides that "Congress shall have power . . . to regulate commerce . . . among the several States." He held that this meant the power was to be that of Congress alone and not that of the courts. "Undue burden" ought to be defined by the Congress and not by the high court acting as a "super-legislature," the Justice believed. But, he concluded, if such is the formula, the legislation in question is unconstitutional.

Mr. Justice Frankfurter concurred, stating "the imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably." He based his concurrence upon *Hall v. De Cuir*,[5] decided nearly seventy years ago, which held that a State's Legislature which seeks to impose a direct burden upon commerce between the states, or to interfere directly with its freedom, encroaches upon the exclusive power of Congress. Mr. Justice Frankfurter, nonetheless, desclaimed the need for a national rule.

Mr. Justice Burton delivered a dissenting opinion, stating that the issue is not the desirability of the statute nor the constitutionality of racial segregation as such. He noted the significance of the majority decision, in that it "may eliminate state regulation of racial segregation." The wide variance in the segregation laws of the various states is evidence, Mr. Justice Burton argued, "against the validity of the assumption . . . that there exists today a requirement of a single uniform national rule." He concludes, "Uniformity of treatment is appropriate where uniformity of conditions exists."

Thus, this decision of the Supreme Court reaffirms the prerogative of the Federal Congress, and it alone, to regulate interstate commerce, as provided in Clause 3, Section VIII, Article I, of the Constitution of the United States. Statutes of the States inimical to that prerogative are, consequently, unconstitutional. A significant incident to this ruling is the blow it strikes in the struggle against the diabolical Jim Crow laws, those stains that remain from the days when one man was another's chattel.

*John E. Cosgrove.*

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[5] 4 Supra.

KICKBACK ACT HELD NOT TO APPLY TO LABOR UNION OFFICIALS.—United States v. Carbone et al., 66 S. Ct. 734, 61 F. Supp. 882 (1946). —This case raises an important question as to the meaning and scope of Sec. 1 of the Act of June 13, 1934, commonly known as the Kickback Act, making it unlawful to prevent any person employed in government construction and repair from receiving the full compensation to which he is entitled.

This case was originally adjudicated in the First District Court of the United States and the following facts were found: the defendants, four labor union officials, were indicted for conspiring to violate Sec. 1 of the Kickback Act. It was found that two contractors were engaged in the construction of various public buildings for the United States at Fort Devens, Mass. on a cost plus fixed fee contract. The defendants, by virtue of their positions as local labor union officials, made an agreement with the contractors by virtue of which the contractors agreed to hire as laborers on the job only individuals who were approved by the defendants and to discharge any of those employed at the request of the defendants. The defendants approved for hire only those individuals who were members of the union or who agreed to join the union. These laborers, once hired, understood that discharge would result if either their labor union initiation fee was not paid, or, for members, if their dues became delinquent. These fees were also understood to be paid out of the salary that each laborer received for his work.

Non-members met the requirement of joining the union by paying their initiation fee with five dollar weekly installments. By presenting the weekly receipts, signifying his full payment of the initiation fee, the laborer was recorded by the union officials as a member. However, some laborers did not remain on the job long enough to pay their full initiation fee by this installment plan, consequently they were never recorded as members. The amount which they did pay toward their initiation fee was never accounted for by the defendants. As a result of this the United States brought this criminal action against the defendants on the grounds that they induced the laborers to give up part of the compensation to which they were entitled and pilfered transient laborers' fragmentary initiation payments.

The defendants made a motion to dismiss on the grounds that the indictment did not state an offense cognizable in law. They claimed that the Kickback Act was not violated by this method of collection of initiation fees from prospective union members. In this view the District Court agreed, holding the view that the facts as alleged in the indictment fell outside the scope of the Kickback Act, the history or purpose of which did not include these defendants in its scope.

This holding was affirmed by the Supreme Court of the United States by a vote of five to three and the opinion of the majority as

delivered by Mr. Justice Murphy emphasized the fact that the language of the Act must be read in the light of the evils giving rise to the statute and the aims its proponents sought to achieve. The Kickback Act which reads "whoever shall induce any person employed in the construction . . . of any . . . work, financed in whole or in part by loans or grants from the United States, . . . to give up any part of the compensation to which he is entitled under this contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined . . . or imprisoned . . . or both" grew out of an investigation which revealed that wages of American labor were being filched by contractors through a system whereby laborers were paid the prevailing rate of wages but were forced, upon threat of discharge, to pay to the contractors a certain percentage of the pay they lawfully earned. Thus on a government project, where the United States set the wages of the laborer, the kickback would render the contractor an unlawful profit at the expense of the laborer and taxpayer. The purpose of the Act, then, was to insure that workers on federal projects would receive the full amount of the stipulated wage. Viewed in this light, the Court pointed out, it is apparent that the statute was not instituted to affect every persor that fell in the sweep of its literal construction. And since the closed shop is a lawful union practice, this method of obtaining such a shop should not subject one to criminal prosecution.

It has been shown that the collection of initiation fees under the threat of discharge is ordinarily the method of attaining a lawful closed shop. However the indictment was directed at those cases where the fee was but partly collected and the funds that were received remained unaccounted for. Embezzlement and failure to obey union rules regarding the mishandling of initiation fees are vastly different from an unlawful demand upon an employee to return part of the wages he has earned. Subsequent wrongs do not render a previous lawful act unlawful, nor do the subsequent wrongs characterize said acts as kickbacks.

This opinion and decision were a complete departure from previous holdings of other federal courts which had prosecuted union officials under similar facts on the basis of the Kickback Act.

*Thomas Broden.*

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REJECTION OF RADIO SCRIPT MUST BE REASONABLE.—Rose v. Brown et al., Supreme Court, Monroe County, 58 N. Y. S. (2d) 654 (1945).—Action by Angelo A. Rose, against Gordon P. Brown, doing business as WSAY Radio Station, and others, for a mandatory injunction to compel the defendant to broadcast two fifteen minute political broadcasts in compliance with a contract.

On October 18, 1945, Angelo Rose as agent for the "Labor and Liberal Committee" entered into a contract with radio station WSAY whereby in consideration of $112 it agreed to broadcast two fifteen minute political programs on the afternoons of Sunday, October 28th, and Sunday, November 4, 1945. The point of the controversy hinges on this provision in the contract: "Copy of talks must be submitted to WSAY at least three days prior to broadcast dates. All material subject to approval of station manager." The plaintiff complied with this provision and on October 26th, two days before the initial broadcast, he was informed by telephone "that the script was not acceptable; that the plaintiff did not represent a legal political party, supported no candidates for office, and that he wanted to give him back the $112."

The plaintiff contends that the clause authorizing approval of script material does not give the station an arbitrary right to cancel the contract merely on grounds that he does not represent a legal political party. This was a matter of common knowledge to both parties concerned before the contract was made.

The radio station also contends that the material for the proposed broadcasts may be slanderous and unsuitable. In answer to this the plaintiff's counsel argues that the provision requiring the copy to be submitted three days in advance of broadcast time would give the plaintiff a chance to correct or substantiate the truth of the assertions. The defendant at no time called attention to such objections in the script but cancelled the whole contract. How could the defendant know what material would be unsatisfactory in the second Sunday's broadcast?

The court decided that a citizen acting for a group not actually a political party, did have the right to comment on acts or conduct of a public officer and since there was no actual proof of slander shown, the contract was deemed valid and enforceable. The mandatory injunction was granted to the plaintiff.

*Richard H. Keen.*

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THE UNITED STATES SUPREME COURT ON JURY SELECTION.—Thiel v. Southern Pacific Company.—Decided May 20, 1946; 66 S. Ct. 984. —Mr. Justice Murphy delivered the very interesting opinion of the court in this case. The petitioner, Thiel, brought the case to the Supreme Court on certiorari "limited to the question whether petitioner's motion to strike the jury panel was properly denied." The petitioner moved to strike out the entire jury panel because mostly business executives or those having employer's viewpoint were on the panel.

The American tradition of trial by jury contemplates impartiality irrespective of the economic, social, religious, racial, or political group. The evidence brought out by the petitioner shows that both the clerk of the court and the jury commissioner deliberately excluded from the jury list anyone working for a daily wage, because they usually offered reasonable excuses to the judge and were allowed to go. Those excluded were "men employed in the iron crafts, bricklayers, carpenters, and machinists," and therefore 50% of the selected jurors were business men and their wives. Thus, in the selection of jurors the daily wage earner, who might suffer a financial hardship, was excused. This exclusion is not warranted either under the federal or state statutes, and any systematic exclusion would injure the democratic nature of the jury system. The Supreme Court could never uphold any such cause which would tend to make the jury system an instrument of the economically and socially privileged. A federal judge would be justified in excusing a daily wage earner if the jury service would entail undue financial hardship, but no class distinction may be made wholesale and without any intention in advance of judging each person's case separately. Jury service is a duty, as well as a privilege, and cannot be abused. These practices, although innocently taken, may one by one lead to the impairment of substantial liberties to all.

On the basis of the facts shown in this case the majority of the court held that the judgment of the lower court should be reversed and a new trial ordered with a jury drawn from a properly chosen panel.

*Richard H. Keen.*

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REINSTATEMENT OF DISBARRED LAWYER ORDERED BY STATE COURT. —Preston v. State Bar of California, 171 P. (2d) 770 (1946) ....Cal..... This proceeding against the State Bar of California was brought by a disbarred lawyer to review an adverse seven to six vote of the Board of Governors who refused to recommend the subject's application for reinstatement to practice law in California.

On June 23, 1938 the applicant was disbarred following her conviction for felony. A hearing was denied by the Supreme Court. In September, 1941 the petitioner was paroled from prison. Following, in 1942 she received a full and unconditional pardon by unanimous recommendation of the Advisory Pardon Board. Then, in March, 1943 a petition was filed for reinstatement with the State Bar. A special committee appointed by the Board of Governors refused the petition since it came too soon after the applicant's release from prison — eighteen months — so as to support a finding of rehabilitation and recommendation for reinstatement by the Board of Governors. No review of this determination was asked by the petitioner.

Another petition was presented in August, 1945 for reinstatement and consideration before a special committee of the Board of Governors. A concise general conduct accounting of the applicant's business occupations and home activities was revealed to the committee. Favorable reports of her honesty, moral integrity and high employee aptitude were submitted from sundry employers and friends, including a judge, a minister, a lawyer, etc. A corporation head under whom the petitioner was promoted from a clerical to a managerial position, involving the handling of $30,000 to $40,000 a month, offered the petitioner a position as counsel for his firm — subject to her reinstatement to practice law by the State Bar.

Subsequently, on the basis of the aforementioned evidence, the Special Committee unanimously found the petitioner had rehabilitated herself since her disbarment, was a person of good moral character and integrity, and recommended that she be reinstated to the State Bar with waiver of bar examination.

But, when the Board of Governors received the Special Committee's advisement for reinstatement of the petitioner, they rejected by a seven to six vote a resolution that petitioner's reinstatement be recommended to the Supreme Court.

California's Supreme Court delineated its stand on the petitioner's application: "That this court has the inherent power and authority to admit an applicant to practice law in this state or to reinstate an applicant previously disbarred, despite an unfavorable report upon such application by the Board of Bar Governors of the state bar, we think is now well settled in this state." [1]

As to the Supreme Court's actions on disbarment matters considered by the respondent, in one case the Board of Governors ordered a year's sentence of disbarment which was reduced to three months by the Supreme Court.[2] Then, in 1930 it backed up the State Bar in refusing to grant a petitioner's reinstatement after ten years of disbarment.[3] In the *Brydonjack* case, *supra,* the Board of Governors had refused petitioner's application to practice law; while the Supreme Court, reviewing the petition, granted the application: "Our conclusion, then, is that the legislature in its wisdom has placed at the disposal of this court a competent and effective body to aid it in the important function of admissions to the bar. The applicants are to first submit themselves to the bureau for investigation, and after this is done, the power in this court is plenary to admit those who have in our

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1 Brydonjack v. State Bar, 208 Cal. 439, 446, 281 P. 1018, 66 A. L. R. 1507 (1929).

2 Fish v. State Bar of California, 4 P. (2d) 937 (1931).

3 Vaughan v. State Bar, 208 Cal. 740, 284 P. 909.

opinion met the prescribed test, whether the investigators do or do not agree with this conclusion."

However, while the recommendation of the board of bar governors for a disbarred lawyer's application for reinstatement to practice law is advisory only, the fact is that that body has been created by legislative enactment as an arm of the Supreme Court for the purpose of assisting in matters of admission and discipline for the legal profession.

The petitioner in the case before us successfully upheld the burden of proof by making a strong showing of rehabilitation as grounds for her reinstatement. After reference to claimant's fine character and employment references, coming from acquaintances, neighbors, associates and employers, the court attached extra weight to petitioner's lawyer witnesses who: ". . . are morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement unless they are satisfied of the rehabilitation of his character."

Finally, the court found no inconsistency in the petitioner's statements as set forth by respondent, wherein she stated at the time of her first petition for reinstatement that her conviction was unfair and then at the present trial she testified that the trial was fair. By explanation, petitioner testified conviction would have been unjust had all the facts been presented to the court, but that on the basis of the facts that were presented, the conviction was not unfair.

By court order petitioner is to be reinstated as a member of the State Bar of California upon payment of the fees and taking the oath required by law.

*Ralph L. Fenderson, Jr.*