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Abstracts of Recent Cases

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tended to be protected by the ordinance. There is certainly a contrast between the court's construction of the ordinance in the principal case and the strict and perhaps more reasonable construction given to statutes in the *Noonan* and *Davy* cases.

It is doubtful whether most courts would give such a broad interpretation to the ordinance in the principal case. The dissent expressed the opinion that the majority greatly expanded the purpose of the ordinance as to the nature of the injury sought to be prevented by the statute, in order to afford *P* redress. It would also seem that the class of persons contemplated by the statute was enlarged to benefit *P*. It appears that the ordinance was adopted primarily to protect the public at large in regard to sanitary conditions, that is to keep flies out and not children in. The three requirements, applied together, appear to be excellent guides in determining whether the violation of a statute or ordinance imposes liability. The uniform application of such guides would serve to eliminate much of the confusion which obviously exists in this area.

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ABSTRACTS

Constitutional Law—Discrimination in Selection of Grand Jurors

Appellant, a Negro, was convicted of rape in Louisiana. Six Negroes were purposely included in the list of twenty individuals from whom twelve were to be selected for the grand jury, although prior lists had contained no more than one. The state courts and the United States district court held this was not discrimination. *Held,* reversed. The deliberate inclusion of six Negroes in the list of twenty from whom the grand jury was to be picked and the knowledge of the jury commissioners that this grand jury was to consider appellant's case alone constituted discrimination against him because of his race, in violation of the equal protection guaranteed by the Constitution. *Collins v. Walker,* 329 F.2d 100 (5th Cir. 1964).

The decision in the principal case is consistent in principle with earlier decisions on impartiality in jury selection. It has been consistently held, since *Strauder v. West Virginia,* 100 U.S. 303 (1879),

that the intentional exclusion of Negroes from a grand jury denies a Negro indicted by such a jury the equal protection guaranteed by the fourteenth amendment. This has also been the result when persons of Mexican descent are denied the right to serve. *Hernandez v. Texas,* 347 U.S. 475 (1954). *Patton v. Mississippi,* 332 U.S. 463 (1947), held that no racial group might be deliberately excluded from jury service. Nor does an individual have the right to demand that members of his own race be included in the jury that indicts him. *State v. Stuart,* 2 N.J. Super. 15, 64 A.2d 372 (1949); *State v. Cook,* 81 W.Va. 686, 95 S.E. 792 (1918). Nor is it necessary that the jury be composed of proportionate representation of different groups or callings. *State v. Davis,* 146 Conn. 137, 148 A.2d 251 (1959). A grand jury should, however, be representative of the cross-section of the community, from which no group or class has been systematically or arbitrarily excluded. *Bary v. United States,* 248 F.2d 201 (10th Cir. 1957). The Ohio Court recently held that an individual was entitled to a grand jury picked at random. *State ex rel. Burton v. Smith,* 174 Ohio 429, 189 N.E.2d 876 (1963). Earlier in Maryland it was held that chance alone need not determine the make up of the jury. *Zimmerman v. State,* 191 Md. 7, 59 A.2d 675 (1948).

The standard, set forth in *Cassell v. Texas,* 339 U.S. 282, 287 (1950), is that, "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion or exclusion because of race." What is obviously required is that after the reasonable qualifications for service have been established, the selection of the individuals who will compose a particular jury must be without regard to their race, group, or calling or to that of the persons whom they may indict.

[The Supreme Court refused to hear an appeal from the decision in the principal case Nov. 9, 1964. N.Y. Times, Nov. 10, 1964, p. 39C, col. 4 (city ed.).]

Damages—Pain and Suffering Considerations in Blackboard Summation

P's attorney, in action for injuries resulting from an automobile accident, was permitted, over objection of *D,* to argue to the jury that one of the proper methods of computing compensation for

pain and suffering was the per diem formula. He did so by illustrating the formula on a blackboard. The jury found for *P* in the amount of $5,000.00 actual damages. *D* appealed on the question of error in allowing *P's* attorney to argue in this manner. *Held,* affirmed. In South Carolina the use of a blackboard in argument before a jury appears to be accepted practice. *P's* attorney was careful to point out to the jury that he was not giving his own opinion as to the per diem value of any pain and suffering, an amount that only the jury could establish. His purpose having been only to illustrate, the allowance of such method was not error. *Edwards v. Lawton,* 136 S.E. 2d 708 (S.C. 1964).

The principal case represents a change in the view of the South Carolina court on this subject. In an earlier case, *Harper v. Bolton,* 239 S.C. 541, 124 S.E.2d 54 (1963), it was held that when the attorney wrote the formula on the blackboard he had expressed his own opinion as to the value to be placed on the pain and suffering, thereby making an argument not founded on the record. The only distinction made between the *Harper* case and the principal is that in the latter the attorney carefully avoided giving any opinion of his own concerning the worth of pain and suffering.

West Virginia at the present time is in accord with the *Harper* case. *Crum v. Ward,* 146 W.Va. 421, 122 S.E.2d 18 (1961). It is interesting to observe the striking similarity in the language used by the attorney in presenting the formula to the jury in the *Harper* case and that which was used in the *Crum* case.

In the principal case the South Carolina court considers a new angle to this controversial problem and develops a corollary to the rule applied by the West Virginia court in the *Crum* case.

Social Security—Determination of Employee Relationship by Common Law Test

Ps, partners supplying bus service under a contract with the board of education, sought to recover money assessed by the Internal Revenue Service as due on the drivers under the Social Security Act. The district court found the drivers to be employees of the board of education for retirement purposes, and therefore, being

state employees covered by a retirement system, that they should be exempt from coverage under the Federal Social Security System. *Held,* reversed and remanded. The drivers were also employees within the meaning of the Social Security Act. The fact that under Ohio law the drivers were state employees "for retirement purposes" did not necessarily make them state employees for all purposes. *Brown & Bartlett v. United States,* 330 F.2d 692 (6th Cir. 1964).

It is a difficult and complex undertaking to attempt to determine whether an individual or group, not clearly within the broad coverage or the exemptions of the Social Security Act, are for its purposes employees. Congress defined an employee within the meaning of the Act as a person who under the usual "common law test" used to determine the employer-employee relationship would be an employee. 42 U.S.C.A. § 410(k) (2) (1957). This definition was adopted in 1948, to clear up the confusion that existed and to prevent the application of the more liberal "economic reality" test, by which employees are those who as a matter of economic reality are dependent upon the business. Unfortunately, Congress did not elaborate on the meaning of the "common law test" nor has the Supreme Court had an occasion to pass on it. As a result a certain amount of confusion and disagreement exists between the various jurisdictions as to what the test is and how to apply it.

A majority of the courts would make the right of the employer to control the work to be done by the alleged employee the determining or decisive factor. *Cody v. Ribicoff,* 289 F.2d 394 (8th Cir. 1961). This in effect is the common law master-servant relationship test. Other courts consider control as only one factor and look to the totality of the situation. *Flemming v. Huycke,* 284 F.2d 546 (9th Cir. 1960). In *Ringling Bros. Barnum & Bailey Combined Shows v. Higgins,* 189 F.2d 865 (2d Cir. 1951), the court asserted that a "realistic application" of the common law rules rather than a "restricted view" of the employer-employee relationship was desirable under the intent of the Act.

It is unlikely that any definition, either from the courts or the Congress, will so completely settle the question of inclusion or exclusion that disputes growing out of borderline cases will cease. However, as things now stand, the drivers in the principal case

might well be held to be employees within the meaning of the Social Security Act in one jurisdiction and not in another. A greater degree of uniformity in the application of the test, whatever it may be, would seem desirable.

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