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Right to Proceed in Forma Pauperis: Isrin v. Superior Court, The (Cal. 1965)

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Service Act the registrant must appear before several hearings, where he will be asked how his "faith" would direct him to act in certain hypothetical situations. Under the new test of the *Seeger* case, he may be asked to show the board just how his "faith" has guided and influenced his life, and its importance in his life.

It is submitted that the expansion of the Supreme Being requirement will not have a great effect on the number of registrants exempted from military service as conscientious objectors, and will not provide an easy means of avoiding military service to those disagreeing with the foreign policy of the United States.

Roger Sanborn

THE RIGHT TO PROCEED IN FORMA PAUPERIS: ISRIN V. SUPERIOR COURT (CAL. 1965)

INTRODUCTION

In California, an indigent plaintiff may be afforded the right to sue in forma pauperis at the discretion of the court and thus be exempted from the payment of all fees, including jury fees. This rule was established by *Martin v. Superior Court*,[1] in which the court found that this right was part of the English common law[2] and as such was adopted by the California legislature.[3] By reason of *Martin*, the same rights, including jury trial, are to be afforded an indigent suing in forma pauperis as would be allowed a plaintiff able to pay all fees required by law.

THE QUALIFICATION OF THE RIGHT

Shirley Isrin suffered personal injuries in an automobile accident allegedly caused by the defendant's negligence. As a result, she was unable to support herself. Having retained an attorney on a contingent fee basis, the attorney expressly refusing to advance money for costs, plaintiff Isrin requested a jury trial and petitioned to be allowed to proceed in forma pauperis on the ground that she was indigent, without the means to pay jury fees or any other fees. The trial court denied the petition, relying on the holding of *Gomez*

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[1] 176 Cal. 289, 168 Pac. 135 (1917).

[2] The statutory embodiments of the common law right were 11 Hen. 7, c. 12, (1495) and 23 Hen. 8, c. 15, (1531).

[3] CAL. CIVIL CODE § 22.2.

v. Superior Court[4] that an attorney acquires a contingent interest in the litigation by the execution of a contingent fee contract and that this is sufficient to bar his client from suing in forma pauperis. On appeal, the Supreme Court in *Isrin v. Superior Court*[5] found the *Gomez* rule to be supported neither by sound reason nor by authority and expressly overruled it, in effect returning to indigents their right to proceed in forma pauperis.

Gomez was the first California case to decide the particular issue of whether an indigent may sue in forma pauperis when his attorney has been retained on a contingent fee basis.[6] The court could cite no California authority for its position.[7]

Admitting the rule in California to be that indigents, in order to maintain and protect their rights, should be afforded the use of the courts to prosecute civil actions, *Gomez* premised its decision on the idea that this use should not be permitted where the situation in some manner indicated the constructive absence in the litigant of the essential quality of destitution, the entire lack of means to pay costs. It was apparent to the court that:

> . . . where the right sought to be enforced, or to be protected, is one in which some person who is financially responsible is either equally or partially interested with the litigant, as by a joint, a common or a community interest in the subject matter of the existing or proposed litigation, the rule should not be given application.[8]

This meant that if the indigent should enter into a valid agreement with a financially responsible person who proffers aid to the indigent in exchange for a portion of the proceeds of the litigation, that person acquired a contingent interest in the cause of action. The result was the loss to the indigent litigant of his right to sue in forma pauperis. Aid to the indigent need not have been money, so long as the contribution by the stranger to the suit was in aid of or incident to the contemplated or existing litigation. Services performed or to be performed in connection with the suit qualified as aid. The reason for the qualification of the right to sue in forma

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[4] 134 Cal. App. 19, 24 P.2d 856 (1933).

[5] 63 A.C. 149, 403 P.2d 728, 45 Cal. Rptr. 320 (1965).

[6] Admitting that no case had been decided on the issue, *Gomez* stated that in both Martin v. Superior Court, 176 Cal. 289, 168 Pac. 135 (1917) and Jenkins v. Superior Court, 98 Cal. App. 729, 277 Pac. 757 (1929), contingent fee contracts were discussed or alluded to as possible obstacles to a client suing in forma pauperis, but these cases were decided on other grounds. Though not cited by *Gomez*, Willis v. Superior Court, 130 Cal. App. 766, 20 P.2d 994 (1933) could have been considered in the same light as *Martin* and *Jenkins*.

[7] All the cases cited by *Gomez* as authority were from other jurisdictions. All either were not in point or have been overruled. Prior to *Isrin*, California was the sole jurisdiction supporting the rule as laid down in *Gomez*.

[8] 134 Cal. App. at 21, 24 P.2d at 856.

pauperis was the fear that unconscionable persons might acquire rights to virtually all of the sum to be realized upon successful prosecution of the suit by offering a destitute litigant possessed of a good cause of action a fraction of its potential worth.

By substituting an attorney's services for the monetary contribution, *Gomez* envisioned the attorney as the one who sought to derive advantage from the indigent's predicament. The suit, though prosecuted in the indigent litigant's name, would be for the benefit of the attorney and should not be allowed to proceed without payment of fees.

THE ISRIN CASE

While holding that the right to proceed in forma pauperis in appropriate cases may not be denied on the ground that the attorney for the indigent litigant is representing him pursuant to a contingent fee contract, *Isrin v. Superior Court*[9] agreed that the basic premise expounded in *Gomez* is sound. It serves to prevent abuse of the right to proceed in forma pauperis where the non-indigent party is the real party in interest to the suit, the indigent litigant being merely a representative plaintiff. *Isrin* disagreed with the application of the rule of *Gomez* with regard to the court's decision as to the nature of the attorney's interest in the litigation. The court sought to determine the precise nature of this interest under a contingent fee contract. In its analysis, the court scrutinized three areas of decision it felt would best reveal the nature of the attorney's interest. These were decisions involving proceedings to enforce a claimed attorney's lien, to compel substitution of attorneys and to settle a dispute over attorney's fees by intervention in the client's action.

Attempting to discern whether an attorney's lien exists by virtue of California decisions, the court found apparently conflicting bodies of case law.[10] Without attempting to resolve these conflicts, the court derived its own view of the attorney's lien, that whatever terms are utilized to characterize the attorney's lien under a contingent fee contract, the lien is no more than a security interest in the proceeds. For supporting authority, it relied on *Tracy v. Ringole*,[11] which stated that an attorney's lien is:

> . . . an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in the particular action, the attorney to the extent of such services being regarded as an equitable assignee of the judgment.[12]

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[9] 63 A.C. 149, 403 P.2d 728, 45 Cal. Rptr. 320 (1965).

[10] See generally Radin, *Contingent Fees in California*, 28 CALIF. L. REV. 587 (1940).

[11] 87 Cal. App. 549, 262 Pac. 73 (1927).

[12] *Id.* at 551, 262 Pac. at 74.

In California, the client has the right to change attorneys at any stage of the litigation, no matter what services the attorney has rendered or what sums he has advanced pertaining to the litigation.[13] This right may not be qualified unless the attorney possesses an irrevocable power of attorney (i.e., the attorney's power is coupled with an interest in the subject of his agency).[14] As it has been held that the mere execution of a contingent fee contract gives the attorney no interest in the subject of his agency,[15] the attorney in *Isrin* had acquired no interest in the litigation which would warrant the application of the *Gomez* rule.

Looking to the right of an attorney to intervene in litigation for the purpose of settling a dispute over attorney's fees, the court found that the right of intervention is limited to actions where by virtue of the contract between attorney and client, the attorney is given a specific present interest in the subject matter of the litigation.[16] In situations such as existed in *Isrin*, it has been determined that the interest required for intervention is not created by the execution of a contingent fee contract.[17]

From its analysis, the court's conclusion was that in any litigation which an attorney conducts for a client, he acquires no more than a professional interest. For clarity, the court adopted the view of *Clark v. United States*[18] that:

> . . . the attorney has no interest in the case as such. He is interested in it professionally, but in no sense as a party to it. He has no present pecuniary interest in the subject-matter. The fact that he has a right by contract to participate in the proceeds of any judgment that may be obtained does not make him in any true sense of the word a party in interest.[19]

The court further stated that to hold that a contingent fee contract makes an attorney a real party in interest and therefore responsible for advancing costs would be "to demean his profession and distort the purpose of the various acceptable methods of securing his fee."[20] Without attempting interpretation, this statement indicates the court's attitude toward the derogatory effect of *Gomez* on the widely accepted practices associated with the contingent fee contract.[21]

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[13] Meadow v. Superior Court, 59 Cal. 2d 610, 381 P.2d 648, 30 Cal. Rptr. 824 (1963).

[14] Todd v. Superior Court, 181 Cal. 406, 184 Pac. 684, 7 A.L.R. 938 (1919).

[15] Scott v. Superior Court, 205 Cal. 525, 271 Pac. 906 (1928).

[16] Meadow v. Superior Court, 59 Cal. 2d 610, 381 P.2d 648, 30 Cal. Rptr. 824 (1963).

[17] Kelly v. Smith, 204 Cal. 496, 268 Pac. 1057 (1928).

[18] 57 F.2d 214 (W.D. Mo. 1932).

[19] *Id.* at 216.

[20] 63 A.C. at 157, 403 P.2d at 733, 45 Cal. Rptr. at 325.

[21] Though speaking of aid in direct connection with the litigation, the language

Isrin also considered policy grounds for overruling *Gomez*. The court saw the result of *Gomez* to be that an indigent possessed of a cause of action with questionable possibilities of success if litigated may go without counsel and thus fail to assert his rights. When the indigent's claim is virtually assured of success, both in litigation and in payment of judgment, the indigent should have no problem in securing counsel on a contingent basis, even if the attorney must advance costs. But where the chances of successful litigation are uncertain and an attorney's chances of recouping advances are comparably lessened, an attorney might refuse to advance costs. This could lead to an attorney advising an indigent plaintiff not to pursue his claim, not based upon the attorney's evaluation of the merits of the case, but from a reluctance to advance costs. Such a circumstance, the court felt, should never be the cause for keeping an indigent litigant from the courts.

CONCLUSION

Under *Gomez*, the same poverty that compelled an indigent to assert his right to proceed in forma pauperis made it virtually impossible for him to hire counsel. It thus had the practical effect of restricting an indigent's access to the courts on the sole ground of his being indigent. This result contravened the idea found in the common law and California decisions that an indigent has the right to proceed in forma pauperis. *Isrin* restored this right to the position it was meant to occupy, as a part of the concept that persons who seek to remedy wrongs by use of the courts should not be limited in the enforcement of their rights because of financial standing. The fundamental ideas of fairness and equality found in the right to proceed in forma pauperis have again been asserted as the criteria for determining the rights of the indigent.

William Sullivan

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of *Gomez* intimated that the court sought to avoid the sale of a cause of action, particularly to an attorney. An attorney may sell his services but the idea that he buys an interest in the litigation by advancing costs and rendering services is fallacious. In California, an attorney may advance the costs of litigation, but he may not advance sums for any personal expenses incurred by his client (CAL. BUS. & PROF. CODE § 6076, Rule 3a of Rules of Prof. Conduct of the State Bar of Calif.). Whatever evil *Gomez* sought to avoid will not result from the legitimate practices connected with the contingent fee contract. Thus, *Gomez* was a mistake that required correction, which was done in *Isrin*.