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Cases Noted

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CASES NOTED

ARMED SERVICES

READY RESERVE — ENLISTMENT CONTRACT — *Morse v. Boswell*, 289 F. Supp. 812 (D. Md.), *stay denied*, 393 U.S. 802 (1968).— Petitioners were 113 members of the United States Army Reserve who had enlisted prior to the effective date of Pub. L. No. 89-687, § 101(e) (Oct. 15, 1968). Under authority of this law the President ordered petitioners' Ready Reserve unit to 24 months of active duty. The court rejected the contention that retroactive application of Pub. L. No. 89-687 abridged petitioners' contract with the government. Petitioners' enlistment agreements incorporated all laws in effect at the time of enlistment including the provisions of 10 U.S.C. §§ 262-63, 672-73 (1964). In denying petitioners' request for habeas corpus relief the court stated that Pub. L. No. 89-687 implemented and was in furtherance of those sections.

By its action the court established the proposition that entire reserve units may be activated under authority of legislation enacted subsequent to the enlistment of the members of the unit. This case adds to a growing line of authority enabling Congress to activate reservists by retroactive application of its legislation.

COMMON CARRIERS

RAIL — DEFINITION IN TERMS OF EXTENT OF OPERATIONS — *Ciaccio v. New Orleans Public Belt R.R.*, 285 F. Supp. 373 (E.D. La. 1968).— Plaintiff, an employee of Lykes Brothers Steamship Co., was injured while moving a railroad car onto his employer's wharf. The plaintiff sued Lykes Brothers and the New Orleans Public Belt Railroad who had moved the car to the wharf. Lykes Brothers sought summary judgment, alleging that they were not common carriers by rail as required under the Federal Employers Liability Act, 45 U.S.C. § 1 (1964). The court granted the motion, holding that Lykes could not be included within the scope of the act because of the small size of their rail system and because they did not hold themeselves out to the public as ready to transport goods for hire by rail.

The case clarifies the ruling in *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967), that to be a common carrier by rail a company must be a part of an interstate rail system, either through common ownership or through a contractual relationship with an interstate railroad.

CONSTITUTIONAL LAW

RELIGIOUS LIBERTY AND FREEDOM OF CONSCIENCE — *Honohan v. Holt*, 17 Ohio Misc. 57, 244 N.E.2d 537 (C.P. 1968).— Plaintiff alleged that an Ohio statute enacted in 1965 to provide free transportation for all school children, whether attending public, private, or religious institutions, violated the establishment clause of the first amendment. Although a similar New Jersey statute had been upheld against such constitutional attack in *Everson v. Board of Education*, 330 U.S. 1 (1947), plaintiffs argued that *Everson* no longer represented current constitutional interpretation of the issue. The Franklin County Court of Common Pleas rejected this argument, citing *Board of Education v. Allen*, 392 U.S. 236 (1968), to establish the continued doctrinal vitality of *Everson*. The court further ruled

that the bussing provision did not violate Ohio's constitutional interdiction against public "support [of] any place of worship," reasoning that the incidence of the benefits was too "indirect" to constitute support. The court indicated that Ohio's constitutional provision may be less restrictive than first amendment requirements.

The decision is consistent with the reasoning of the Supreme Court and the courts of a growing number of state jurisdictions. In addition, the case suggests that additional "indirect" assistance to Ohio parochial schools, such as a textbook "loan" program patterned after the one initiated in New York, would not be offensive to either the Ohio or Federal constitutions.

FEDERAL CIVIL PROCEDURE

SERVICE — MODE AND SUFFICIENCY — *Scher v. HMH Publishing Co.*, 289 F. Supp. 917 (D. Conn. 1968).— In a diversity action for breach of contract, the defendant moved to dismiss for lack of personal jurisdiction. The defendant corporation maintained no office or agents in Connecticut and relied instead on circulation of its *Playboy Magazine* to solicit promotional offers from local retailers. The negotiation and acceptance of the contract in issue took place in Illinois. In denying the motion to dismiss, the district court held that application of the Connecticut long-arm statute to a contract performed within the forum state was not unconstitutional under the minimum contacts test of due process.

While noting that the mere making of a contract to be performed in the forum state is not sufficient minimum contact, the district court rejected the defendant's contention that lack of physical contact with Connecticut was controlling. The court emphasized the continuing relationship with the forum state created by circulation of the national magazine, whereby the defendant solicited responses to promotional offers. This decision follows the recent movement away from a bias favoring defendants toward one requiring defendant to come to the plaintiff, when sufficient basis exists for having him do so.

INSURANCE

EXTENT OF COVERAGE — ARBITRATION — *Flood v. County Mutual Ins. Co.*, 41 Ill. 2d 91, 242 N.E.2d 149 (1968).— Plaintiff was the owner of a standard automobile insurance policy providing compensation for bodily injury arising out of an accident with an uninsured motorist and which contained a mandatory arbitration clause effective in case of disagreement between the insured and the insurer as to either liability or the extent of damages. Pursuant to the provisions of the policy, plaintiff sought damages from the insurer for the death of his son, arising out of a collision with an allegedly uninsured vehicle. The insurer disputed coverage and the insured demanded arbitration. Upon the arbitrator's ruling that coverage questions were within his power, the defendant sought to stay the proceedings until a court determined the issue. The Illinois Supreme Court, in reversing the denial of the stay by the lower courts, held that the arbitration clause did not relate to the issue of coverage, reasoning that the clause referred only to disputes of liability and amount of damages and could not by implication be extended to encompass all disputes between the insured and insurer.

By holding that such arbitration clauses must be construed narrowly, the court took a position consistent with the majority of jurisdictions that have

emphasized that parties must arbitrate only those issues which they have explicitly agreed to arbitrate.

INTERNAL REVENUE

ACCUMULATED EARNINGS TAX — DETERMINATION OF LIABILITY — *New England Wooden Ware v. United States*, 289 F. Supp. 111 (D. Mass. 1968).— Plaintiff brought this action to recover income taxes assessed on accumulated earnings under *Int. Rev. Code of 1954*, §§ 531-37. Plaintiff contended that it had allowed funds to accumulate instead of dividing and distributing them not for purposes of tax avoidance, but for expansion and diversification of its faltering business. After an extensive review of the corporation's history and prospects, the court held that its specific and definite plans for expansion warranted the accumulation of earnings for reasonably anticipated business needs. The court took special note of the fact that plaintiff had hired a well-known business consulting firm to explore avenues for expansion and diversification and had reached the stage of producing test samples and studying market potential and production feasibility for the proposed products.

This court followed the usual pattern in accumulated earnings cases of basing its conclusions on a close analysis of the particular business facts, rather than on the application of any general formula.

CARRIED INTEREST — DEDUCTIONS AND DEPLETION ALLOWANCE — *United States v. Cocke*, 399 F.2d 433 (5th Cir. 1968).— Defendant sought a deduction and depletion allowance for a sum of money used by his co-partner to pay taxpayer's share of the cost of an oil operation. Pursuant to a contract taxpayer's co-partner had agreed to pay and remain personally liable for all the costs of the operation in return for the right to reduce from taxpayer's share of the income a proportional share of taxpayer's cost of the operation. The Tax Court in upholding Cocke's contention that he had a right to the deduction relied on *Commissioner v. Abercrombie*, 162 F.2d 338 (5th Cir. 1947), in which it was held that the individual who has title to monies from producing oil property is entitled to the deduction and depletion allowance from the operational costs.

The court of appeals reversed the Tax Court, holding that the one who incurs the actual loss can avail himself of the deduction. Since Cocke had invested nothing in the cost of the operation, he could have no basis upon which to claim the deduction, or depletion allowance. This decision is consistent with decisions of the second and ninth circuits.

MINERAL DEPOSITS — ORDINARY INCOME — *United States v. White*, 401 F.2d 610 (10th Cir. 1968).— Taxpayers conveyed their uranium mine by warranty deed retaining a 10 percent royalty interest. The government treated the proceeds of the sale as ordinary income. Appellees paid the tax and filed for a refund which the district court allowed in part, giving the proceeds of the sale capital gains treatment. The circuit court reversed, holding that when the entire transaction was examined, the absence of a total price plus appellees' continued participation in the endeavor compelled the same treatment given oil and gas holdings.

The decision represents an extension of ordinary income plus depletion allowance treatment to mineral properties. The more significant im-

port, however, may come from the circuit court's theory that there is no logical ground for distinction between mineral and oil/gas properties. Such a belief could mean the termination of tax treatment by the kind of natural resource involved and result in more uniform tax policy.

MASTER AND SERVANT

FELA ACTIONS — SUFFICIENCY OF EVIDENCE — *Mills v. Pennsylvania N.Y. Cent. Transp. Co.*, 16 Ohio St. 2d 97, 243 N.E.2d 99 (1968).— Plaintiff, a brakeman, was injured when he fell in defendant's railroad yard. His state court action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1964), was withdrawn from the jury, and the defendant's demurrer to the evidence was sustained. The court of appeals affirmed. Reversing the lower courts, the Ohio Supreme Court held that under recent United States Supreme Court decisions holding that proof of the slightest employer negligence would sustain a jury case in FELA actions, the plaintiff had presented sufficient evidence to reach the jury. However, the Ohio court emphasized its disapproval of the liberal federal rule, which it said imposed liabilities never intended by Congress.

This case indicates that the Ohio Supreme Court has finally yielded to Supreme Court precedent on the minimal evidence necessary for a jury case in FELA actions. This decision was a marked departure for the Ohio court, whose restrictive FELA decisions have been reversed by the Supreme Court three times in the past 12 years.

MUNICIPAL CORPORATIONS

TORTS — IMMUNITY — *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968).— Plaintiff was injured when his motor vehicle was struck by a police car. The defendant demurred to plaintiff's complaint asserting its sovereign immunity. On appeal, the court reversed holding that the plaintiff had stated facts sufficient to constitute a cause of action against the city of Omaha. In so concluding, the court rejected the defense of sovereign immunity relying heavily on the theory that private interests should not be subordinated to the municipal weal when a government agent has been negligent.

In casting aside the sovereign immunity defense, the court reasoned it not only had the responsibility to reform the doctrine which had been judicially created, but that in the absence of legislative preemption or action to the contrary, it had the power to abrogate the rule. The decision represents a continuation of the trend rejecting the sovereign immunity doctrine, and in addition it suggests that court's have the power to amend common law rules which are no longer justified by sound reason.

PATENT LAW

COURT OF CUSTOMS AND PATENT APPEALS — WRIT OF MANDAMUS — *Loshbough v. Allen*, ____ C.C.P.A. ____, 160 U.S.P.Q. 204 (1969).— Appellant petitioned the Court of Customs and Patent Appeals to issue a writ of mandamus directing the Board of Patent Interferences to suspend proceedings in an interference and to grant the parties an opportunity to be heard on the questions of patentability and priority of invention. The court in denying the petition held that the writ was neither necessary or appropriate in aid of the court's jurisdiction in the priority appeal since the

appeal priority is a controversy subject to normal appellate review procedures.

The most significant aspect of the decision lies not in the denial of the petition, but rather in the determination of the court that it could, in an appropriate situation, issue a writ of mandamus pursuant to 28 U.S.C. § 1651(a) (1964). The position is consistent with the view expressed in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), that the Court of Customs and Patent Appeals is an article III constitutional court vested with full judicial powers, including the power to issue all writs necessary in aid of its jurisdiction.

SUBJECTS OF PATENTS — PATENTABILITY OF A MENTAL PROCESS — *In re Prater*, ____ C.C.P.A. ____, 159 U.S.P.Q. 583 (1968), *petition for rehearing granted*, ____ C.C.P.A. ____, 160 U.S.P.Q. 230 (1969).— Appellants, inventors of an apparatus and process to facilitate the spectrographic analysis of gaseous mixtures, failed to convince the Patent Office that their invention was patentable. The patent application, disclosing an analog computer program and a series of complex mathematical equations, was rejected as being a claim to a "mental process." The Court of Customs and Patent Appeals, however, reversed the Patent Board and held that the appellants' patent application should not be rejected because it could *alternatively* be carried out by mental steps. In allowing appellants' patent, the court gave its approval to the patentability of conventional digital computer programs. This new legal precedent, however, does not help resolve the more critical practical problems of how to handle the multitude of computer program applications that will soon confront the Patent Office.

PHYSICIANS AND SURGEONS

MALPRACTICE INSURANCE — COVERAGE OF INTENTIONAL CRIMINAL CONDUCT — *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968).— Mrs. Zipkin sued defendant Freeman, a psychiatrist, alleging that during the course of psychiatric therapy, the defendant caused Mrs. Zipkin to fall in love with him, to leave her husband and to become his mistress, to give him money, to file spurious law suits against her husband and brother, to steal her husband's property at gunpoint, and to attend nude swimming parties. The doctor's insurer refused to defend the suit or to pay the resulting $17,000 damage award, contending that Freeman's conduct was outside the scope of his malpractice insurance policy. The Missouri Supreme Court held the insurer liable, reasoning that the plaintiff's injuries were directly and proximately caused by the psychiatrist's mishandling of accepted psychiatric techniques.

Although in line with the trend to construe vague insurance policies against the insurer, this decision seems to thwart public policy considerations by allowing the defendant to pass on to an insurer liability for intentional, criminal conduct only tangentially related to his profession.

PROCEDURE

PERSONAL DISABILITIES AND PRIVILEGES — CONVICTION OR IMPRISONMENT FOR CRIME — *Grasso v. McDonough Power Equip. Inc.*, 264 Cal. App. 2d 723, __ __P.2d ____, 70 Cal. Rptr. 458 (1968).— Plaintiff, a life prisoner whose civil rights had been partially restored, brought a per-

sonal injury suit to which defendant demurred claiming that the 1-year statute of limitations barred the action. Appealing the order sustaining the demurrer, plaintiff asserted that the statute had tolled because of her incarceration during the 10 years between her injury and commencement of the action. Reversing the order, the court of appeals liberally construed the tolling statute which literally permits tolling only for prisoners serving a term of years.

The court indicated that the modern life sentence often results in less actual incarceration than the term of years so that the eradication of the life prisoner's rights imposed by the tolling statute is no longer cogent. In so holding the California court has set an example for other courts to liberally interpret tolling statutes to reflect modern rehabilitative practices.

SELECTIVE SERVICE

CIVILIAN WORK IN LIEU OF MILITARY SERVICE — QUESTIONS FOR THE JURY — *Elizarraraz v. United States*, 400 F.2d 898 (5th Cir. 1968).— Having classified the registrant I-0 (conscientious objector), his local draft board offered the registrant three types of civilian work in lieu of military service. In response, the registrant declared that his religion did not permit him to perform such work. Two years later upon being directed to report to a state hospital to perform civilian work, the registrant reported as directed but refused to sign an employment form required of all hospital employees. After leaving the hospital without performing any work, the registrant was convicted of knowingly failing, neglecting, and refusing to perform the duty required under the Military Selective Service Act of 1967, §§ 6(j), 12(a), 50 U.S.C.A. App. §§ 456(j), 462(a) (1968). In affirming the conviction, the court held that based on the evidence in the record, the jury could believe beyond a reasonable doubt that the registrant's refusal to fill in the employment form was a pretext in furtherance of his previous declaration not to do civilian work required of conscientious objectors. Although the dissenting justice made a forceful argument that the application contained an unconstitutional loyalty oath, the holding of the majority follows the firmly established rule of requiring the jury to make findings as to questions of pure fact.

SHIPPING

STEVEDORE COMPANY'S DUTY TO INDEMNIFY SHIPOWNER FOR COMPANY EMPLOYEE'S INJURY — RELIANCE AS A DEFENSE — *International Terminal Operating Co. v. N.V. Nederl. Amerik Stoomv. Maats.*, 393 U.S. 74 (1968) (per curiam).— A longshoreman, employed by International Terminal Operating Co. (ITO), suffered injuries as a result of carbon monoxide inhalation while working in the hold of defendant's ship. Defendant sought indemnification from ITO for an amount of damages equal to that recovered by the longshoreman on the theory that ITO had the duty to insure the safety of its workmen, and that it had failed to initiate the necessary measures to effectuate that end. The stevedore company asserted in defense that an officer of the defendant ship had promised to activate the ship's "cargocaire" ventilation system to remove the monoxide fumes from the hold. The court of appeals in reversing the district court decision for ITO reasoned that to exonerate ITO, the shipowner's conduct must prevent or seriously handicap the stevedore company's ability to provide safe working conditions. Such was not the case of ITO because it could have utilized its own blowers

to clear the air or have immediately ordered its men out of the ship's cargo hold. The Supreme Court in reversing and reinstating the verdict of the trial court held that reasonable reliance by ITO upon the promise of the ship's officer was sufficient to exculpate the stevedore company.

The case reaffirms the holding of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1955), that the stevedore company's obligation to the shipowner to unload a vessel in a "workmanlike manner" is founded upon contract, not tort, and may thus be altered by agreement between the parties.

UNIFORM COMMERCIAL CODE

BILLS AND NOTES — GOOD FAITH — *HIMC Investment Co. v. Siciliano*, 103 N.J. Super. 27, 246 A.2d 502 (1968).— In an action to recover on a legally deficient note for a second mortgage that was purchased from another finance company, the plaintiff failed to allege his good faith at the time of the transaction. In ruling for the defendant the court held that without plaintiff's allegation, his claim of being a holder in due course was insufficient under *UCC* § 3-302 and N.J. REV. STAT. § 12A:3-302 (1962). Recognizing a strong implication of collusion between another finance company, the payee loan company and the plaintiff, the court also concluded that the circumstances of the instant case indicated that the plaintiff had actual knowledge (rather than mere suspicion) of the note's legal deficiencies when the transaction occurred. This case is consistent with the language of section 3-302 which requires that in order for a party to qualify as a holder in due course, he must allege his good faith in accepting a deficient note.

WARRANTIES — SERVICES — *Newmark v. Gimbel's Inc.*, 102 N.J. Super. 279, 246 A.2d 11 (1968).— Plaintiff brought suit for breach of warranty for injuries to her scalp and loss of hair following a permanent wave treatment at defendant's beauty parlor. Defendant argued that plaintiff had no cause of action for breach of warranty because the transaction primarily involved the sale of a service and did not come under the sale of goods requirement of article 2 of the *Uniform Commercial Code* (*UCC*). Citing comment 2 of *UCC* § 2-313, the court held that implied warranties are not restricted to "sales" that fall within the meaning of article 2 of the *UCC* but that the same policy reasons supporting liability for breach of warranty in the sale of goods justify the extension of liability to other commercial transactions. In so ruling the New Jersey court followed the recent trend in that jurisdiction to reason by analogy from the *UCC* and to apply similar warranty principles to commercial transactions not exclusively confined to the sale of goods.