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Cases Noted

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BANKRUPTCY

RECLAMATION — UNPAID SELLER'S PRIORITY AGAINST LIEN CREDITOR — *In re Mel Golde Shoes, Inc.*, 403 F.2d 658 (6th Cir. 1968).— Appellant delivered shoes on credit to Golde. Subsequently, the appellee-creditors levied attachment liens against Golde's entire inventory. Appellant made a timely demand for the return of its shoes, and Golde filed a Chapter XI insolvency petition under the Bankruptcy Act, 11 U.S.C. § 721 (1964). The referee found Golde insolvent, appellant filed a reclamation petition, and the referee held him to be a secured creditor with rights superior to those of the appellees. The district court overturned the referee's findings, holding that the appellant had only an unperfected security interest. Reversing, the court of appeals held that the *Uniform Commercial Code* did not define the relative rights of the parties; rather, Kentucky common law was determinative and it upheld the superiority of the appellant's claim.

By so holding, the court affirmed that in the absence of statutory guidance, the *UCC* is to be supplemented by the common law of each jurisdiction in which it is enacted.

CIVIL RIGHTS

FAIR HOUSING ACT — RACIAL DISCRIMINATION IN PUBLIC HOUSING — *Gautreux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969). — This action was instituted by Chicago Negro tenants and applicants for public housing, alleging that, in violation of the Fair Housing Act, 42 U.S.C. §§ 1981, 1983 (Supp. III, 1969) and the 14th amendment, the Chicago Housing Authority had adopted tenant assignment and project location procedures for the purpose of maintaining racial segregation. Granting plaintiff's motion for summary judgment, the court held that the Authority's administration of a quota system limiting the number of Negro occupants in predominantly white neighborhood projects was discriminatory as a matter of law. Further, the court noted that the Authority must have realized that because 90 percent of the occupancy waiting list was comprised of Negroes, its policy of obtaining the approval of ward aldermen before selecting project sites would ultimately result in a "racial veto" of those sites recommended for predominantly white wards. The court held this 90 percent to be indicative of a deliberate policy to separate blacks from whites in violation of equal protection of the laws.

It is apparent that housing policies which tend to maintain de facto segregation will not be tolerated. While the court expressly imposed no affirmative duty upon the Chicago Housing Authority to develop programs designed to end de facto segregation, in disposing of similar discriminatory policies other courts have stated that the mere termination of those policies is not enough.

MODIFICATION OF VOTING PROCEDURES — REGULATION UNDER THE VOTING RIGHTS ACT OF 1965 — *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).— Four appellants brought individual suits in the district courts of Virginia and Mississippi alleging that various changes in state election procedures were unenforceable since the procedures had not been validated by the method required by the Voting Rights Act of 1965, 42

U.S.C. § 1973 (Supp. III, 1968). The new procedures included, *inter alia*, an amendment that prohibited one who had voted in a primary election from running as an independant candidate and a requirement that certain candidates previously elected by their district must now run at large. Although the respective lower courts concluded that these changes were not covered by the act, the Supreme Court disagreed and ordered the district courts to enjoin the enforcement of any election modifications.

In holding that the Voting Rights Act of 1965 regulates state laws which govern both an individual's right to vote and the effect of that vote, the Supreme Court has reiterated its intention to interpret the act so as to make the guarantee of the 15th amendment a reality for all citizens.

CONSTITUTIONAL LAW

DUE PROCESS OF LAW — REGULATION OF HIGH SCHOOL STUDENT'S APPEARANCE — *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis. 1969).— Plaintiff, an 11th grade high school student, was expelled from school for violating a regulation prohibiting male students from wearing their hair below a specific length. After his appeal to the state school superintendant was rejected, plaintiff brought this action in the federal court alleging that the regulation was a violation of due process of law as guaranteed by the Federal Constitution. The court agreed with the plaintiff's contention, ordered his reinstatement, and granted an injunction against the continued enforcement of the regulation. The court felt that neither the plaintiff's age nor his enrollment in a public school warranted an invasion of his right to present himself to the world in any reasonable manner.

This case is a gratifying example of judicial willingness to recognize that in education there are matters more important than conformity. It reiterates the premise of *Griswold v. Connecticut*, 381 U.S. 499 (1965), that the protected rights of an individual go beyond those expressly granted by the Constitution.

OBSCENITY — DICTUM AD NAUSEAM — *Miller v. Reddin*, 293 F. Supp. 216 (C.D. Calif. 1968).— Plaintiff, indicted under California and federal obscenity statutes for publication, possession, and distribution of allegedly obscene written material, sought declaratory relief, damages, and an injunction against his criminal prosecution. His claim was based on the protection of "free speech" found in the first amendment. However, following a careful, cover to cover scrutiny of the offensive material, District Judge Hauk, applying the United States Supreme Court test, found the material to be outside the protective purview of the first amendment. The cause was, therefore, dismissed and plaintiff's criminal prosecution was allowed to progress.

The case is notable, not for its application of the *Roth-Michkin-Ginzburg* standard of obscenity, but for the superfluous detail in which Judge Hauk graphically recapitulates for one-third of his opinion parts of plaintiff's books. Judging from the repetition and eye for detail evidenced in the court's opinion, plaintiff's books must be the most unprotected speech ever written, or Judge Hauk must be the hardest working federal district judge in the country.

RIGHT TO AVOID SELF-INCRIMINATION — USE BY VOLUNTARY PARTICIPANTS — *Simkins v. Simkins*, 219 So. 2d 724 (Fla. Ct. App. 1969).— Appellant, the initiator of divorce proceedings, refused to comply with a

court order to answer questions concerning alleged adulterous activities. When the trial court dismissed appellant's action for divorce, he appealed alleging that by conditioning his right to prosecute upon a waiver of his fifth amendment right to avoid self-incrimination, the *Florida Rules of Civil Procedure* made the exercise of the latter right costly. The Florida Court of Appeals held that the action by the trial court violated appellant's right to avoid self-incrimination.

The majority, citing *Spevack v. Klein*, 385 U.S. 511 (1967), and *Garrity v. New Jersey*, 385 U.S. 493 (1967), held that the exercise of the right to avoid self-incrimination cannot be penalized by the state in *any* way. The dissent contended that the no penalty rule enunciated in *Spevack* and *Garrity* applied only to persons involuntarily before the court, and that such a rule should not be used to immunize the initiator of a suit from the untoward effects of discovery proceedings. This is the first case to extend the no penalty rule to voluntary participants, and as the dissent observed, it is doubtful whether a close reading of either *Garrity* or *Spevack* would support such an interpretation.

SENTENCING — SELF INCRIMINATION — *Scott v. United States*, ____ F.2d. ____ (D.C. Cir. 1969).— A trial judge, after noting the failure of the convicted defendant to admit his guilt, sentenced an armed bank robber to from 5 to 15 years. Remanding for resentencing, the court of appeals found that the trial judge's expressed consideration of the lack of confession made the excercise of the defendant's fifth amendment rights costly since it could be shown that the defendant received harsher punishment than the court would have decreed had a post-conviction confession been made.

In so holding, the court gives approbation to the theory expressed in *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966), that equates a confession of guilt at allocution with a waiver of the self-incrimination privilege, and thereby imports the same strict standard of voluntariness as required for a plea of guilty. Although the case does not present the question, the court of appeals suggests that the contemporary practice of plea bargaining is not conducive to the voluntary waiver of a defendant's fifth amendment rights.

EVIDENCE

CRIMINAL LAW — IDENTIFICATION BY WITNESS — *Russell v. United States*, 408 F.2d 1280 (D.C. Cir. 1969).— Appellant sought relief from a conviction for housebreaking and petit larcency, contending that the conviction was violative of due process requirements. Specifically, he maintained that identification by a witness was inadmissible evidence because recent Supreme Court decisions made the presence of counsel mandatory at *all* pretrial confrontations and because *all* one-man lineups are unconstitutional. The court recognized that due process usually requires the presence of counsel at confrontations between witnesses and the accused, but held that when such confrontations occur only moments after the crime, the reliability of resultant indentifications outweighs the potential injustice. The court also held that because there are no viable alternatives to one-man lineups in the on scene confrontation situation, such lineups are not unconstitutional per se.

The decision represents an attempt to flesh out the skeletal doctrine espoused in *United States v. Wade*, 388 U.S. 218 (1967), wherein the Supreme Court held that pretrial confrontations must be carefully scrutinized to determine whether the presence of counsel is required in order to pre-

serve a defendant's basic fifth and sixth amendment rights. The court's refusal to extend *Wade* to the prearraignment stages of confrontation reflects judicial deference to the recent congressional approval of eyewitness identification prior to trial contained in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. § 3502 (Supp. 1969).

CRIMINAL LAW — INFORMING ACCUSED OF HIS RIGHTS — *Orozco v. Texas*, 393 U.S. 822 (1969).— Petitioner appealed from a murder conviction, contending that certain evidence admitted at trial was obtained in violation of the fifth amendment. Four police officers had followed petitioner to his boarding house shortly after the crime and, after gaining entry to his bedroom, awakened petitioner and asked him questions in response to which he gave incriminating answers. Petitioner argued that he should have been warned of his rights under the fifth amendment in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). The state responded that *Miranda* was inapplicable because the interrogation occurred in surroundings familiar to petitioner. The Court, in reversing the conviction, held that the warning was required whenever an individual's freedom of action is removed in any way.

This holding is a further indication that the Court's interpretation of fifth amendment requirements as announced in *Miranda* is broad in scope. Individuals in custody, even in apparently friendly surroundings, must be apprised of their constitutional rights prior to being questioned.

SCIENTIFIC ANALYSIS — ADMISSABILITY — *State v. Holt*, 17 Ohio St. 2d 81, 246 N.E.2d 365 (1969).— Holt was arrested in connection with the forceable rape of a 7-year-old girl. Pubic hair was taken from Holt's clothing and from the person of the girl. This was examined by neutron activation analysis and expert testimony was admitted pertaining to the findings. The analyst stated that the samples were similar and *likely* to be from the same source. The Supreme Court of Ohio reversed the conviction on the ground that it was prejudicial error to admit such testimony. The court stated that *likely* imports less than reasonable certainty or probability as required by law for such evidence to be admitted.

By refusing to admit this evidence the court has departed from the generally accepted standard that any relevant conclusions which are supported by a qualified expert should be received. The accuracy of the test is determinative of weight and not the admissibility of the evidence.

FEDERAL CIVIL PROCEDURE

HABEAS CORPUS — DISCOVERY — *Harris v. Nelson*, 393 U.S. 814 (1969).— Pursuant to a habeas corpus evidentiary hearing, petitioner, a district court judge, had authorized a prisoner's issuance of interrogatories to the warden of the penitentiary in which the prisoner was confined. The United States Court of Appeals for the Ninth Circuit held that the authorization was invalid because neither the discovery provisions of the *Federal Rules of Civil Procedure* nor 28 U.S.C. § 2246 (1964), the sole statutory provision delineating the use of discovery in habeas corpus proceedings, authorized the issuance of the interrogatories. Although the Supreme Court concurred with the Ninth Circuit's statutory interpretations, it reversed, holding that where specific allegations before the court indicate that a petitioner may be able to demonstrate the illegality of his confine-

ment, the All Writs Statute, 28 U.S.C. § 1651 (1964), empowers federal courts to fabricate the necessary facilities and procedures to insure that an adequate inquiry will precede the habeas corpus evidentiary hearing.

The decision resolves the diversity of views as to the applicability of the *Federal Rules of Civil Procedure* to habeas corpus proceedings expressed by the lower federal courts and appears to invite those lower courts to create a system of discovery for such proceedings. The Court indicated, however, that it considered a case by case rule formulation by the lower courts to be inadequate and that, pursuant to its rule-making power, 28 U.S.C.A. § 2072 (Supp. 1969), it intends to launch proceedings to formulate a *comprehensive* set of rules for the conduct of habeas corpus litigation rather than merely the discovery aspects thereof. No indication was given as to when the rule-making proceedings would be convened.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS — REVIEW OF DECISIONS OF THE SECRETARY OF COMMERCE — *Varian Associates v. United States* ____ F.2d __ __(C.C.P.A. 1969).— Illinois State University, pursuant to item 851.60, of the tariff schedules established by the Educational, Scientific and Cultural Materials Importation Act of 1966, 19 U.S.C. § 1202 (Supp. III, 1968), applied to the Secretary of Commerce for duty-free entry of a Hitachi Perkin-Elmer nuclear magnetic resonance spectrometer which the university proposed to purchase from the Japanese manufacturer. Varian Associates filed comments before the Secretary opposing the application, asserting that it manufactured apparatus equivalent in scientific value to the proposed import. The Secretary, basing his decision upon advisory memoranda from the Department of Health, Education, and Welfare, and the National Bureau of Standards, approved the application, finding that no instrument equivalent in scientific value to the foreign model is being manufactured in the United States.

On appeal, the United States Court of Customs and Patent Appeals affirmed the Secretary's decision, holding that the Secretary's findings were supported by substantial evidence. This decision represents the first instance in which the Court of Customs and Patent Appeals has asserted jurisdiction under 28 U.S.C. § 1544 (1964) to review a decision of the Secretary of Commerce under the 1966 Act.

NAVIGABLE WATERS

LANDS UNDERWATER — OWNERSHIP BY STATES — *United States v. Louisiana*, 393 U.S. 811 (1969).— In an attempt to resolve a coastal boundary dispute continuing since 1950 between the Federal Government and Louisiana, the Supreme Court held that "coastline" and "inland waters" as used in the Submerged Lands Act of 1953 shall be given definition by the Convention on the Territorial Sea and Contiguous Zone. Reversing its position taken in an earlier decision involving the State of Texas, not to use international law and treaties to decide domestic disputes, the Court stressed the desirability of a single coastline both for administration of the Submerged Lands Act and for international relations.

The decision, however, will not put to rest this seemingly endless series of disputes, for the coastline by Convention definition will be ambulatory. In view of the frequently changing nature of the Gulf coastline, it would seem that there may continue to be controversies over boundary definition, especially in the area of established offshore oil leases.

PROCEDURE

COMPUTATION OF PERIOD OF LIMITATION — ACCRUAL OF RIGHT OF ACTION — *Heyer v. Flaig*, 74 Cal. Rptr. 225 (1969).— In a suit for malpractice against an attorney for allegedly failing to carry out the testamentary wishes of his client, the defendant asserted that the action was barred by a 2-year statute of limitations. Although the testatrix's will was drafted more than 2 years before this action, the plaintiffs, daughters of the testatrix, contended that the statute of limitations did not bar their action because the statutory period was measured from the date of the death of the testatrix, rather than from the date of the attorney's negligent act.

In affirming the plaintiffs' position, the California Supreme Court distinguished as "inappropriate" cases holding that the statute of limitations in legal malpractice suits begins at the commission of the negligent act. Since the plaintiffs could not have brought suit before the death of the testatrix, a literal application of the statute of limitations would have reduced the effectiveness of the court's decisions that have recognized an attorney's duty of care toward intended beneficiaries.

REAL PROPERTY

CONTRACTS OF SALE — STRICT TORT LIABILITY — *Kriegler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (Ct. App. 1969).— Plaintiff Kriegler bought a 5-year-old house built by Eichler Homes, a mass builder. Two years later the house's heating system failed as a result of tubing corrosion, causing a $5000 loss. The homeowner sued the builder on a theory of strict tort liability, a doctrine accepted in the field of personal property but rarely applied in real property. The trial court found the heating system defective as installed and held the builder strictly liable. Affirming this first impression case, the California court of appeals held that there was no meaningful distinction between Eichler's mass production and sale of homes and the mass manufacture of personalty such as automobiles, long subject to strict liability. Because a buyer relies on the skill of a mass builder to produce a house reasonably free from defects, the court held that the builder should be strictly liable for construction flaws which were unknown to the buyer.

With this case, California joins the growing minority of forward-looking jurisdictions which have jettisoned the outdated notion of caveat emptor in the field of real estate. In addition, by relying on strict tort, rather than implied warranty, the court managed to avoid any problems of privity.

SECURITIES

PROXY STATEMENT — MISSTATEMENT AND OMISSIONS — *Gerstle v. Gamble-Skogmo Co.*, CCH FED. SEC. L. REP. ¶ 92,367 (S.D.N.Y. Mar. 7, 1969).— Plaintiffs, minority shareholders of the former General Outdoor Advertising Company (General), brought suit against Gamble-Skogmo Company (Skogmo) alleging violations of sections 10(b) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j, 78n(a) (1964), and rules 10b-5 and 14a-9, 17 C.F.R. §§ 240.10b-5, 240.14a-9 (1969). The court held that Skogmo's proxy statement omitted the material facts that (1) the liquidating value of General's plants prior to the merger far exceeded the book value, and that (2) Skogmo intended to sell these assets immediately after the merger, thereby depriving General's stockholders of an undiluted interest in capital gains realized on the sale.

In so holding, the court defined the concept of materality under rule 14a-9 as a fact or omission in a proxy statement which a reasonable man would consider important in determining his choice in the particular transaction. In basing its decision on rule 14a-9 rather than on rule 10b-5, the court was able to effectuate the policy of informed stockholder enfranchisement unhampered by the more traditional deceit concepts of rule 10b-5 relied upon by some courts.

REGISTRATION — MAILING CONFIRMATION SLIPS — *United States v. Wolfson*, 405 F.2d 888 (2d Cir. 1968).— The defendant appealed from a criminal conviction arising out of a violation of section 5(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77(e) (1964). Section 5 makes it unlawful for any person to use the mails or interstate commerce to sell unregistered securities. In affirming the conviction, the court rejected the contention that the mailing of confirmation slips from the broker to the defendant-seller was too tangential a use of the mails to satisfy the jurisdictional means requirement of section 5(a)(1). While recognizing that prior cases had held that the mailing of confirmation slips from a broker to a buyer was within the jurisdictional means requirement, the court reasoned that confirmation to a seller is as essential to a valid sale as confirmation is to a buyer.

In refusing to strictly construe the jurisdictional means requirement of section 5 in a criminal action, the court espoused the liberal interpretation that the jurisdictional means requirement of that section is met when the use of the mails is merely facilitative of a sale, or is reasonably foreseeable that it will lead to a sale of unregistered securities.

TENDER OFFERS — STANDING — *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969).— Plaintiff, the target corporation of a tender offer, sought an injunction against defendant corporation for alleged misrepresentation and nondisclosure of material facts, a violation of the 1968 amendments, subsections (d), (e), and (f), to section 14 of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78n(d), (e), (f) (Supp. 1969). In a case of first impression, the court of appeals reversed the order of the district court granting injunctive relief and dismissed the complaint. More significantly, however, the court, reasoning by analogy from section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1964), found that pursuant to the newly enacted provisions of section 14 both the target corporation and nontendering stockholders have standing to maintain separate actions.

The decision follows the increasing trend in the Court of Appeals for the Second Circuit to expand the scope of civil remedies and thereby provide for speedy and forceful remedial action against alleged violations of securities law.

TORTS

BAILMENT — SPACE LEASE DISTINGUISHED — *Wall v. Airport Parking Co.*, ____ Ill. 2d ____, 244 N.E.2d 190 (1969).— The insurer of an automobile stolen from a self-parking lot at O'Hare Airport received judgment based on the lot operator's negligence. In ascertaining whether the evidence supported this finding, the Illinois Supreme Court had to determine whether a bailment or merely a lease of space was created by parking in

such a lot. Because the motorist retained his keys and did not surrender custody of the automobile to a lot attendant, the court found a bailment was not established and observed that even though the mechanized parking lot offers a high degree of security, its primary purpose is to provide space. Accordingly, the court held that the insurer had to prove specific negligent acts and that the record, while establishing the prima facie negligence of a bailee, did not sustain this greater burden of proof.

While the automated parking lot presents a unique twist, in this case of first impression the court observed the traditional distinction between bailment and space lease, the presence or absence of the owner's surrender of control. In view of the proliferation of automated parking facilities, the court's adoption of the stringent burden of proof traditionally associated with space lease arrangements effectively forces the Illinois motorist to assume the costs of insuring against all auto thefts. It would seem that the court ought to have departed from the traditional distinction because of the modern motorist's increasingly frequent inability to choose between bailment and space lease and because, of the two concerned parties, the lot owner is the one who is best able to economically prevent auto theft.

UNIFORM COMMERCIAL CODE

ASSIGNMENT OF SECURITY AGREEMENT — WARRANTIES — *Public Finance Corp. v. Furnitureland*, 17 Ohio App. 2d 213, 245 N.E.2d 740 (1969).— Buyers purchased merchandise and signed a security agreement which was then assigned by the defendant seller "without recourse" to plaintiff, Public Finance Corporation. Following the buyer's return of the defective merchandise and subsequent refusal to accept the seller's tender of replacement, plaintiff brought suit on the security agreement, claiming breach of warranty. Defendant argued that the assignment was governed by article 3 of the *Uniform Commercial Code (UCC)*, and that under section 3-417 of the *UCC*, when a transfer is "without recourse," the transferor warrants only that he has no knowledge of any defense good against him at the time of transfer. The court, finding that article 2 of the *UCC* was sufficiently analogous to govern the transaction because transfer of the security agreement constituted a "sale" between merchants, held that defendant breached the implied warranty of merchantability under section 2-314 of the *UCC*.

The decision follows the trend to reason by analogy from the *UCC* and to apply warranty principles to commercial transactions not expressly covered by the *Code*. However, the court's failure to explain the significance of the "without recourse" provision in its article 2 context renders the decision of questionable value for precedent.

WILLS

CLASS GIFTS — ADOPTED CHILDREN — *In re Thompson*, 53 N.J. 276, 250 A.2d 393 (1969).— Testator died 1-year after the execution of his will which directed the bequest of a class gift to his issue. Appellant was adopted by testator's daughter 7 years after testator's death. In this contest against his natural-born brother, appellant asserted a claim to one-half of his deceased mother's share of the corpus and the retained income therefrom. The Supreme Court of New Jersey held that the term "lawful issue" included adopted children, overruling cases in that state equating "issue" with "heirs of the body" under the preclusion clause of the New

Jersey adoption statute. The decision illustrates the trend evident in several states to protect the inheritance rights of adopted children by presuming their inclusion unless the testator demonstrates a clear intent to limit the inheritance to those in his direct bloodline. *See* 20 CASE W.RES.L. REV. 694 (1969).