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Cases Noted

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ADVERSE POSSESSION

EXTENSION OF POSSESSION TO BOUNDARIES OR FENCES — REIMBURSEMENT OF BACK TAXES — *Gary v. Dane*, 411 F.2d 711 (D.C. Cir. 1969). — In an action for damages and for an injunction based on the fencing-out of land, appellants, record title holders, sought to prevent appellee, an adjacent home owner, from using a disputed strip of land between the two houses. The district court granted judgment for the appellee, holding that his title to the strip was established by adverse possession, but inserted a condition requiring appellee to reimburse appellants for back taxes.

In affirming, the court of appeals reasoned that the record owner's payment of taxes attributable to a small border strip did not negate another's adverse possession of that strip. However, the court held that reimbursement for back taxes was required by the maxim that he who demands equity must do it. This latter position does not reflect the general practice in adverse possession cases.

ARMED SERVICES

CONSCIENTIOUS OBJECTORS — JUDICIAL REVIEW OF DISCHARGE REQUEST — *Brooks v. Clifford*, 412 F.2d 1137 (4th Cir. 1969).— Appellant, a conscientious objector on active duty in the Army, requested a discharge by the Adjutant General. When his request was rejected he sought habeas corpus relief in federal district court, thus failing to exhaust his administrative remedies which included petitioning the Army Board of Correction of Military Records. Discounting traditional principles of administrative exhaustion, the United States Court of Appeals for the Fourth Circuit held that when a member of the armed forces on active duty is denied a request for discharge as a conscientious objector, in spite of his failure to exhaust available administrative remedies authorized by 10 U.S.C.A. § 1552 (1964), the federal courts have jurisdiction to order the appellant's discharge.

This case is consonant with the current expansion of federal court jurisdiction into military matters as evidenced by *Oestereich v. Selective Serv. Sys. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967). However, by so holding, the Fourth Circuit is presently in direct conflict with *Claycroft v. Ferrall*, 408 F.2d 587 (9th Cir. 1969), and, therefore, Supreme Court review of the issue is probable.

COURT MARTIAL JURISDICTION — LIMITATIONS — *O'Callahan v. Parker*, 395 U.S. 258 (1969).— Petitioner, a sergeant in the Army, while on leave from his base and dressed in civilian clothes, allegedly broke into the hotel room of a young girl and attempted to rape her. Subsequently, petitioner was convicted by a court-martial and sentenced to 10 years imprisonment; he was denied relief in the lower federal courts on his application for a writ of habeas corpus. In reversing, the Supreme Court held that for court-martial jurisdiction to attach, not only must the accused be a present member of the Armed Forces, but also the alleged offense must be service-connected.

The decision introduces the concept of a service-connected crime, but the Court chose not to define its exact limits. By so holding, the Court has underscored its determination to limit the scope of military jurisdiction, a trend which began with *Reed v. Covert*, 395 U.S. 1 (1957).

ASSAULT

NATURE AND ELEMENTS — INTENT — *McDonald v. Ford*, 38 U.S.L.W. 2037 (Fla. Ct. App. July 4, 1969).— A passionate swain inflicted injuries upon his beloved during a vigorous attempt to kiss her. Alleging negligence, the damsel sued her lover for damages. The court dismissed the complaint, holding that assault and battery involves intentional, not negligent acts. The opinion emphasized that there is nothing inadvertent about the physical contact involved in an amorous wrestling match.

Recognizing a dearth of Florida law regarding nonconsenting females, the court followed the firmly entrenched Ohio precedent, *Williams v. Pressman*, 69 Ohio L. Abs. 161, 113 N.E.2d 395 (P. Ct. 1953), in deciding that the issue of intent rather than due care was more germane to the facts.

BANKRUPTCY

DISTRIBUTION OF ESTATE — PREFERENCES AND TRANSFER — *Dubay v. Williams*, ____ F.2d ____ (9th Cir. 1969).— There has been much confusion concerning the relationship between the federal law of bankruptcy and security interests created pursuant to sections 9-108, 9-204, and 9-205 of the UNIFORM COMMERCIAL CODE (UCC). In the instant case, a creditor claimed such a security interest in the accounts receivable of the bankrupt Portland Newspaper Publishing Co., Inc. Noting that the creditor was first assigned the accounts in a security agreement executed *eleven months* prior to the adjudication in bankruptcy, the circuit court allowed the creditor's claim, holding that the transfer of the accounts took place *at the moment of the initial assignment*, and, therefore, the security interest was not voidable under the provisions of section 60(a) of the Bankruptcy Act, 11 U.S.C. § 96(a)(1) (1964), which precludes all preferential transfers made within *four months* of an adjudication in bankruptcy. In determining the timing of the transfer of the accounts, the court looked to the Bankruptcy Act which provides that the secured creditor's rights are perfected when no subsequent creditor can acquire a superior right, a moment defined by the Oregon statute (UCC) to be when the financial statement is filed.

The court's statutory dovetailing continues the trend of validating UCC security interests in future accounts, so-called "floating liens," in the face of preference attacks under the Bankruptcy Act. By so holding, the *DuBay* court indicates, contrary to the opinion of many legal writers, there is no real conflict between the two laws.

CIVIL PROCEDURE

PRELIMINARY AND INTERLOCUTORY INJUNCTIONS — TRADE SECRETS — *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108 (8th Cir. 1969). — Appellees, manufacturers of solid-state electronic equipment, sought injunctive relief against several of their former employees and their new employer, appellant, to restrain the unauthorized use of appellees' trade secrets. The district court issued a preliminary injunction, but on appeal the injunction was set aside and the case remanded on the ground that the order violated FED. R. CIV. P. 65(d), in that it did not mention the proscribed conduct with specificity. By setting aside the order, the court of appeals is requiring that to protect trade secrets, preliminary injunctions must disclose the trade secrets so that the persons being enjoined may carry on their activ-

ities without violating the injunction. Previous cases have clearly held that an injunction may issue to protect trade secrets, but by strictly interpreting FED. R. CIV. P. 65(d), the Eighth Circuit has negated the protection afforded through injunctive relief.

CIVIL RIGHTS

PUBLIC ACCOMMODATIONS — EQUAL PROTECTION OF LAW — *Adickes v. S.H. Kress & Co.*, 409 F.2d 121 (2d Cir. 1968).— When plaintiff and her Negro students went to defendant's lunch counter, defendant's waitress claimed that although she had a duty to serve Negroes, she need not serve the whites that accompany them. Plaintiff brought an action claiming that because the statute upon which defendant was attempting to justify his waitress' action, MISS. CODE ANN. § 2046.5 (1942), a criminal trespass statute allowing business concerns to serve whomever they wish, violated the 14th amendment, he was entitled to damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964). A federal district court directed a verdict for the defendant, and, in a split decision the court of appeals affirmed, holding that plaintiff had proved neither the existence of a statute-based custom of refusing service in restaurants to whites accompanied by Negroes nor that such a custom was enforced by Mississippi courts.

The court's implication that the trespass statute does not constitute state action violative of the 14th amendment is in conflict with the rule established by the Supreme Court in *Peterson v. City of Greenville*, 373 U.S. 244 (1963), wherein the Court invalidated state legislation which either encourages or authorizes citizens to infringe upon the civil rights of others.

CONSTITUTIONAL LAW

DUE PROCESS OF LAW — DEPRIVATION OF LIBERTY — *State v. Scheetz*, ____ Iowa ____, 166 N.W.2d 874 (1969).— The defendant was confined pursuant to the Iowa Criminal Sexual Psychopath Law, IOWA CODE ANN. § 225A (1969), and subsequently appealed, contending that the incarceration violated his right to due process of law. A detective who had questioned defendant at the Cedar Rapids police station about a sex crime had not informed him of his right to court-appointed counsel. Although defendant was never charged with that particular sex crime, the detective did testify against him in the sexual psychopath hearing. In upholding the statute, the Supreme Court of Iowa called attention to the statute's provisions which afforded the defendant the right to both counsel and a jury trial, and reasoned that these provisions protected defendant's right to due process of law. The court distinguished *Miranda v. Arizona*, 384 U.S. 436 (1966), holding that because the instant action was a rehabilitative civil proceeding, *Miranda's* protections were not applicable. The court rejected the contention that the spirit of *Miranda* should be applied to a noncriminal proceeding as was done in *In re Gault*, 387 U.S. 1 (1967), wherein the Supreme Court held that whether criminal or *civil*, a deprivation of liberty could be effected only in accordance with due process of law.

In refusing to apply the *Gault* protections by analogy the Supreme Court of Iowa has made an unjustifiable distinction which, as a strong dissent points out, fails to comport with the spirit of the Supreme Court's delineation of the scope of due process.

DUE PROCESS OF LAW — OHIO IMPLIED CONSENT STATUTE — *In re Williamson*, 18 Ohio Misc. 67, 246 N.E.2d 618 (C.P. 1969).— Appellant was

arrested and charged with driving while under the influence of alcohol. After having refused to take a chemical test to determine the percentage of alcohol in his body, appellant was prosecuted in the county court and entered a plea of guilty. In accordance with the usual sentence imposed for the first offense of driving while intoxicated (DWI), appellant received a 30-day suspension of his driving privileges. After surrender of his license, appellant received notification from the Bureau of Motor Vehicles that by reason of Ohio's Implied Consent Statute, OHIO REV. CODE ANN. § 4511.191 (Page Supp. 1967), and his refusal to submit to a chemical test, his operator's license was to be suspended for a period of 6 months. Upon this notification, plaintiff appealed to the Paulding County Court of Common Pleas which held that the action of the Bureau of Motor Vehicles was a denial of appellant's constitutional right to a remedy by due course of law as provided by OHIO CONST. art. I, § 16.

In the past, irrespective of the outcome of a proceeding before a court, refusal to submit to a chemical test has automatically resulted in a 6-month loss of driving privileges as prescribed by the Implied Consent Statute. However, by allowing a DWI violator to choose between administrative and judicial sanctions, the court has engrafted upon the Ohio statute an unwarranted proviso which may encourage certain magistrates to perpetuate their lenient sentencing of such offenders.

EQUAL PROTECTION OF LAWS — CONTROL OVER GOVERNMENTAL AGENCIES — *In re Wickstrum*, 454 P.2d 660 (Okla. Sup. Ct. 1969).— Petitioners challenged an order of the county superintendent annexing Unity School District to two adjacent districts; one was an independent district accredited by the State Board of Education, the other was an unaccredited, dependent district. Petitioners, parents of Unity school children, contended that the parents and children transferred to the dependent district were denied equal protection of the law. The Supreme Court of Oklahoma held that the annexation procedure, initiated by petition and approved at a special election, conformed to applicable State statutes. Affirming the annexation order, the court acknowledged that students at the independent school might receive a better education, but it could find no authority to suggest that the parents and children sent to the dependent school would be denied equal protection of the law.

Apparently the Oklahoma court tacitly recognized that the prime target of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and subsequent federal school decisions has been inequality of education *among races*. In the absence of racial inequities, the courts have *not required* that all citizens receive equal educational opportunities.

FREEDOM OF SPEECH — REGULATIONS AND RESTRAINTS — *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).— When Red Lion Broadcasting Co. refused to grant free reply time to an author who felt he had been personally attacked in a broadcast, the FCC declared that the company had failed to meet its obligation under the fairness doctrine to provide reply time, whether or not paid for. Red Lion challenged the constitutional and statutory bases of the doctrine and its attendant regulations, claiming the first amendment gave it the right to broadcast what it chose and to exclude anyone from using the frequency. Reversing an earlier Seventh Circuit position taken on a similar case and affirming the Court of Appeals for the District of Columbia in *Red Lion*, the Supreme Court held that the doctrine

and regulations were valid and constitutional, that they enhanced rather than abridged freedoms of speech and the press.

Red Lion reflects a reaffirmation by the Court that because private rights of licensees to limited public resources such as radio frequencies cannot take priority over the public good that is derived from adequate and fair coverage of matters of public interest, they are subject to at least some regulation.

STATE POLICE POWER — MOTORCYCLIST'S HEADGEAR — *State v. Fetterly*, ____ Ore. ____, 456 P.2d 996 (1969).— Appellant was convicted for operating a motorcycle on a state highway without wearing protective headgear as required by ORE. REV. STAT. § 483.443(1) (1967). Appellant alleged that the statute was an improper exercise of the state's police power, and, as such, was a restraint upon his personal liberty in contravention of due process clauses of both the Oregon and Federal Constitutions. The supreme court, citing *Liggett Co. v. Bladridge*, 278 U.S. 105 (1928), held that by prohibiting the use of state highways to a motorcyclist who is not wearing protective headgear, the statute bore a real and substantial relationship to public safety, and, therefore, was a valid exercise of the state's police power.

Recently, legislatures have recognized the importance of enacting new safety statutes to meet the vast increase in the number of motorcycles on our nation's highways. The Oregon decision reaffirms the position taken by the majority of the courts which have had occasion to pass upon similar statutes.

SEARCH AND SEIZURE — FINGERPRINTING — *Davis v. Mississippi*, 394 U.S. 721 (1969).— Petitioner was convicted of rape based on fingerprint evidence obtained when police detained petitioner without probable cause and without a warrant for his arrest. The Supreme Court of Mississippi affirmed the conviction, holding that the trustworthiness of such evidence renders inapplicable the proscriptions of the fourth and 14th amendments.

In reversing, the Supreme Court of the United States further delineated the holding of *Mapp v. Ohio*, 367 U.S. 643 (1961), wherein the Court applied the federal exclusionary rule to the states. In addition to this definitional expansion, the decision reaffirms the extension of fourth amendment strictures into the prearrest stage of criminal investigation, including any involuntary detention. Interestingly, the Court *intimated* that the fourth amendment requirements could be met by narrowly circumscribed procedures, allowing the fingerprinting of individuals *without* probable cause during the course of a criminal investigation. Perhaps the Court imposed this modicum of self-restraint in deference to those who have characterized its recent decisions as shackles upon our law enforcement agencies.

CRIMINAL LAW

INCOME TAX EVASION — PRELIMINARY PROCEEDINGS — *United States v. Tarlowski*, 38 U.S.L.W. 2133 (E.D.N.Y. July 22, 1969).— In a criminal tax evasion investigation, the taxpayer's accountant was asked to leave the room on two occasions while a revenue agent conducted an interview and examined the financial books of the prospective defendant. Although the taxpayer was advised of his right to *counsel* on both occasions, the federal district court held that the evidence gathered at the interviews must be sup-

pressed because by refusing the taxpayer the right to the presence of his *accountant*, the agent denied the taxpayer a liberty without due process of law in violation of the fifth amendment. After noting that a taxpayer need not be warned of his right to counsel in noncustodial tax evasion investigations under the rule of *United States v. Squeri*, 398 F.2d 785 (2d Cir. 1968), the court indicated that this did not mean that a taxpayer could not of his own accord retain counsel or its equivalent in a criminal tax evasion investigation.

The court adopted the rationale of *Haynes v. Washington*, 373 U.S. 503 (1963), that if there is no reasonable basis for claiming that an unfair method of investigation is in any way essential to the detection of a crime, the method should be vitiated. The court recognized that the defendant's request was well founded because of the advice and protection afforded by one's accountant in tax evasion cases.

JUDGMENT, SENTENCE, AND FINAL COMMITMENT — CONDITIONS — *In re Allen*, ____ Cal. App. 2d ____, 455 P.2d 143, 78 Cal. Rptr. 207 (1969). — After petitioner's conviction for possessing dangerous drugs without a prescription, her sentence was suspended and she was placed on probation. By application for habeas corpus, the petitioner challenged that condition of her probation order which directed her to repay the county for court-appointed counsel. The Supreme Court of California held that a condition ordering the accused to reimburse the county for court-appointed counsel was improper. The court reasoned that it was inconsistent to provide an accused indigent with free court-appointed counsel, and then to condition her probation upon payment of counsel fees. The court projected, in dictum, that had the defendant been previously advised that her probation *might* be conditioned on payment of counsel fees, this notification could have deterred her from accepting court-appointed counsel.

In so holding, the California court has extended the rule of *Griffin v. California*, 380 U.S. 609 (1965), that a condition which makes costly an individual's free exercise of a constitutional right is invalid.

PUNISHMENT AND PREVENTION OF CRIME — CRUEL OR UNUSUAL PUNISHMENT — *Vick v. State*, 453 P.2d 342 (Alas. 1969).— Vick, a chronic alcoholic, was convicted by the district court of appearing in public in a drunken condition and was given a 90-day jail sentence. The superior court upheld the conviction and Vick appealed, claiming that the conviction of a chronic alcoholic for being drunk in public violated the prohibition of cruel and unusual punishment contained in U.S. CONST. amend. VIII, and ALAS. CONST. art. 1, § 12.

Holding that the imprisonment of Vick was not cruel and unusual punishment, the Supreme Court of Alaska followed the ancient common law rule which was perpetuated in *Powell v. Texas*, 392 U.S. 514 (1968). The court noted that even a chronic alcoholic may have the requisite *mens rea* because loss of self-control once an individual has started to drink, differs from the loss of control which makes it impossible for him to abstain from drinking in the first place. To rule otherwise would be to abandon the traditional concept of free will and lead to a virtual abandonment of criminal law. By its decision, the court chose to ignore the mounting pathological data on chronic compulsive alcoholism, thereby preserving a medieval tenet of criminal justice.

INSURANCE

CONTRACTS — DISCLAIMER AND ARBITRATION CLAUSES — *Heisner v. Jones*, ____ Neb. ____, 169 N.W.2d 606 (1969).— Plaintiff's insurance contract both provided for compulsory arbitration of the insured's claims under the contract's uninsured motorist provision and disclaimed any liability of the insurer for judgments rendered in suits brought without its written consent. In affirming the rule of *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N.W. 406 (1889), the Supreme Court of Nebraska held that these two provisions were void as against public policy. The court characterized the contract as one of adhesion, noting that the inferior bargaining position of the motorist who purchases liability insurance forces him to accept a policy as offered and that the motorist is often unaware of the small print by which he relinquishes his right to the procedural safeguards of a court of law.

The decision follows the majority of jurisdictions which invalidate provisions for compulsory arbitration of the *liability* issue, but it departs from that facet of the majority rule which validates arbitration for fixing the *amount* of loss. The minority position followed by Ohio permits compulsory arbitration of both liability and amount, OHIO REV. CODE § 2711.01 (Page 1954).

MUNICIPAL CORPORATIONS

SOVEREIGN IMMUNITY — INJURIES FROM DEFECTS OR OBSTRUCTIONS IN HIGHWAYS — *Fankhauser v. Mansfield*, 19 Ohio St. 2d 102, 249 N.E.2d 789 (1969).— In an action against a municipal corporation for personal injuries and death, appellants, injured in an automobile accident, alleged that the municipality had failed to repair a traffic signal after receiving reasonable notice that the signal was not functioning properly, thereby maintaining a nuisance in violation of OHIO REV. CODE ANN. § 723.01 (Page 1954). The trial court sustained a demurrer to the petition and dismissed the case, and the judgment was affirmed by the court of appeals.

In reversing, the Supreme Court of Ohio overruled its own prior decisions and held that a nonfunctioning overhead electric traffic signal on a municipal street affects the physical condition existing in or on highways, and is a nuisance. The decision is a new thrust in the street safety exception to the doctrine of sovereign immunity, and may well trigger litigation on this point in other states.

PATENTS

MISUSE OF PATENTS — CONTROL OF UNPATENTED GOODS — *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).— In a patent infringement action the defendant, Zenith, counterclaimed under section 16 of the Clayton Act, 15 U.S.C. § 26 (1964), to enjoin the plaintiff from requiring that royalties on the manufacture, sale, or use of any article not covered by the patent be included in the patent license agreements with Zenith. The court of appeals reversed the district court's granting of the injunction on the ground that such a license agreement had been given the Supreme Court's sanction in *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950), wherein the Court upheld a percent-of-sales license which provided for royalties based on the total volume of a product even though not all the manufactured units were to include the patented device. Zenith appealed.

In reinstating the district court's judgment, the Court distinguished the holding in *Automatic Radio* on the ground that by using its patent as a lever to force Zenith to accept a percent-of-sales license, Hazeltine had unlawfully abused its patent privilege during the license negotiations. Although the Court may have satisfactorily resolved the present case, their rather tenuous distinctions will be of little help to attorneys trying to draft acceptable patent license agreements.

TAXATION

DEDUCTIONS — BUSINESS EXPENSES — *Tyne v. Commissioner*, 409 F.2d 485 (7th Cir. 1969).— Petitioner had claimed as an ordinary business deduction under INT. REV. CODE of 1954, § 162, 100 percent of his automobile expenses in transporting two hundred pounds of tools to and from work each day. He asserted that he would not have used his automobile "but for" the necessity of transporting his tools. The court of appeals reversed the Tax Court which had upheld the Commissioner's determination that 50 percent of the driving expenses were allocable to the transporting of tools, and remanded the case to give petitioner an opportunity to establish at trial the necessity for driving to work. If successful, petitioner would be entitled to deduct 100 percent of his automobile expenses.

By permitting a taxpayer a 100 percent deduction if he can establish the "but for" issue, the court has created another exception to the general rule that commuting expenses are nondeductable personal expenses.

JOINT RETURN — LIABILITY FOR TAXES ON ILLEGALLY OBTAINED FUNDS — *Scudder v. United States*, 405 F.2d 222 (6th Cir. 1968), *rehearing denied*, 410 F.2d 686 (6th Cir. 1969).— Petitioner's husband illegally withdrew large sums of money from the family partnership and invested it without his wife's knowledge. Because of the dual responsibility incurred in a joint return, when the husband could not be located, the Commissioner assessed the petitioner for income taxes and penalties due. The Tax Court determined that the illegally obtained money was taxable income and imposed liability on the petitioner by virtue of the joint return. On review, the court of appeals remanded the case, relieving her of liability for taxes on the funds themselves, *but not for taxes realized from profits therefrom.*

The court distinguished this case from *James v. United States*, 366 U.S. 213 (1961), wherein embezzled funds were designated taxable income, by characterizing this money as an "unauthorized loan" and therefore not taxable. This euphemistic equivocation allowed the court to avoid the *James* rationale and decide the case on a more equitable ground.

PROFESSIONAL CORPORATIONS — DEFERRED COMPENSATION PLANS — *O'Neill v. United States*, 410 F.2d 888 (6th Cir. 1969).— After operating as a partnership for about 55 years, Drs. Hill & Thomas was reorganized in 1963 as Drs. Hill & Thomas Company under the Ohio Professional Association Law, OHIO REV. CODE ANN. §§ 1785.01-.08 (Page 1964). Dr. O'Neill, a shareholder, reported and paid taxes on the amount of income which would have been taxable to him had the Company remained a partnership. After having been denied a refund, petitioner brought an action to recover the tax paid on the difference between the amount reported as partnership income and his corporate salary for the taxable year.

In affirming the opinion below, the court of appeals allowed the refund

and held that a professional business organization incorporated under the Ohio Professional Association Law was a corporation for federal income tax purposes. Holding Treas. Reg. §§ 301.7701-1(c) and 301.7701-2 invalid, the court impliedly permits a professional corporation to create a deferred compensation plan with its resultant tax advantages. *See* 20 CASE W. RES. L. REV. 260 (1968).

USE TAXES — INCIDENCE — *Colonial Stores, Inc. v. Tax Comm'n*, ___ S.C. ___, 168 S.E.2d 774 (1969).— Colonial Stores, a grocery chain which self-redeemed trading stamps, brought an action to recover a use tax paid on premium merchandise at redemption. The trial court granted recovery and held that any taxes due had been paid on the original transaction in which the customer received the stamps. On appeal, the Supreme Court of South Carolina reversed, holding that the use tax was properly levied because the merchandise was transferred in a separate transaction not constituting a part of the original sale.

The court analogized to the rationale of the Supreme Court of Arizona in *Tax Comm'n v. Ryan-Evans Drug Stores*, 89 Ariz. 18, 357 P.2d 607 (1960), wherein that court labeled a redemption plan as a promotional scheme and refused to allow the taxpayer to deduct the cost of its stamp program under the cash discount provisions of the Arizona *sales* tax. The decision runs counter to the position taken by the few courts that have considered the point.