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Cases Noted

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ADOPTION

JUDICIAL PROCEEDING — ADJUDICATION OF UNFITNESS — *Wilson v. Barnet*, 144 N.W.2d 700 (Minn. 1966).—In a proceeding on a petition of adoption, the trial court held that defendant, the natural father, in failing to support his children in disregard of a support decree was guilty of unjustified neglect. Such finding was held tantamount to a finding of misconduct which warranted permanent termination of the parental right; hence defendant could not withhold consent to the adoption. On appeal defendant urged that because the question of his fitness was not adjudicated at the divorce proceedings, a later finding of unfitness by the trial court would improperly extinguish his parental rights. Judgment was affirmed for plaintiff.

According to the Minnesota statute, a non-custodial parent who withholds consent to an adoption has the right to a hearing to determine his fitness when his parental rights have not been permanently extinguished in divorce proceedings by a finding of unfitness. The court adopted the majority rule, construing the statute to mean that such a hearing may be properly joined with the hearing on the adoption petition. In such a case, the standard to be applied in determining fitness is the same as that used to determine fitness in a divorce hearing. The court commented that the better practice is to determine fitness prior to the adoption hearing so as to avoid basing the decision on a comparison of the qualifications of the natural and foster parents. The real question is the natural parents' fitness to retain their parental rights, not whether one home is preferable to another.

ALIENS

EXPULSION — CONSTITUTIONALITY — *Boutilier v. INS*, 363 F.2d 488 (2d Cir. 1966). — The defendant was admitted into the United States in 1955. In 1963 he submitted a petition for citizenship, at which time he stated that he was and had been a homosexual since 1950. The immigration authorities, after further inquiry, determined that he should have been excluded from entry in 1955 and therefore was deportable as a psychopathic personality under the Immigration and Nationality Act of 1952, section 24(a)(1). The defendant, relying on *Lavoie v. INS*, 360 F.2d 27 (4th Cir. 1962), appealed the case on the ground that the phrase "psychopathic personality" was unconstitutionally vague and therefore denied him due process. The court held that it was a legal rather than a medical term and was constitutional. The defendant was granted certiorari by the Supreme Court.

Today there are two rules as to the right of an alien to constitutional protection. In regard to exclusion and pre-entry status, an alien has no constitutional rights, but in deportation and post-entry status, he does have such protection. Expulsion is deportation for exclusion reasons, and the law in this area is unsettled.

APPEAL AND ERROR

AFFIRMANCE — EFFECT OF AFFIRMANCE — *City of Tyler v. St. Louis So. W. Ry.*, 405 S.W.2d 330 (Tex. 1966). — A railroad brought an original action in the Supreme Court of Texas for dissolution of an injunction for changed conditions. In 1920 the court, acting in its capacity as a court of review, reversed the trial court which had refused to grant an injunction and, without remanding, enjoined the railroad from removing its offices and facilities from the city of Tyler. In a separate action the city sought to hold the railroad in contempt for violation of the 1902 injunction despite the fact that the railroad was removing its facilities under the authorization of the ICC. The Texas Supreme Court held that although the decree was entered by itself rather than by the trial court, the near-universal rule that the trial court has exclusive jurisdiction to vacate or modify a judgment for changed conditions still applied.

The court in support of its decision stated that the trial court alone has the power necessary in such an action to subpeona witnesses, hear and weigh evidence, and make findings of fact; the court of review has the power to enforce, but not to alter such a decree.

CRIMINAL LAW — RIGHT OF PROSECUTION TO REVIEW — *State v. Whitney*, 418 P.2d 118 (Wash. 1966). — In a criminal prosecution for auto theft, counsel for defendant advised the trial court that he would object to admission into evidence of the accused's fingerprints. After the trial judge signed an interlocutory order denying admission of the fingerprints, the prosecution applied to the Washington Supreme Court for a writ of certiorari to review the trial court's ruling. The supreme court observed that it had been unusual to review either final judgments or interlocutory rulings in criminal cases at the behest of the state. However, the court held that certiorari should issue and went on to consider the merits of the state's case. In dissolving the trial court's order, the court found that the use of defendant's fingerprints as evidence was an "official use" as authorized by statute, and that they were thus admissible.

The supreme court indicated that an earlier decision denying review had been overturned by recent legislation. The power to grant or disallow review to the prosecution in criminal cases was thus shifted from the legislature to the judiciary. The effect of the legislation has been to broaden the state's right of review which, according to the court, is part of a trend reflected by recent decisions throughout the United States. The court warned that its decision was limited to the problem raised by the errant interlocutory order and that it did not warrant unlimited appeals by the state. Despite the caveat, the court in dictum demonstrated its willingness to continue broadening the state's right to review in order to balance the interest of the prosecution with that of the defendant.

ATTORNEY AND CLIENT

COMPENSATION AND LIEN OF ATTORNEY — SERVICES UNDER ASSIGNMENT BY COURT — *United States v. Kingston*, 256 F. Supp. 859 (W.D. Pa. 1966). — In issue was the application of counsel assigned by the court for compensation under 18 U.S.C. 3006A(d) (1964). Two attorneys jointly assigned to a case contended that the statutory maximum was insufficient because of extraordinary circumstances, relief from which is

provided in the statute. They sought payment of approximately four times the maximum because of forty-six hours spent in open court and 136 hours spent in preparation. In limiting compensation to the statutory maximum, the court stated that the intended extraordinary circumstances, lengthy trial or complex issues, were not present and that since the case did not concern a capital offense, the two attorneys would not share the statutory maximum.

This case is among the first to construe the language of this section of the Criminal Justice Act passed in response to recent Supreme Court rulings on the right to counsel.

PRACTITIONERS NOT ADMITTED OR NOT LICENSED — GIVING ADVICE OR OPINION — *Grievance Committee of the Bar of Fairfield County v. Dacey*, 222 A.2d 339 (Conn. 1966). — Plaintiff initiated an action to restrain defendant from the illegal practice of law. Defendant was engaged in selling mutual funds and estate planning, in the course of which he prepared wills and trust agreements for his clients. Plaintiff alleged that by varying the forms of his "Dacey" will and "Dacey" trust to meet the needs of the client, defendant gave advice which constituted the exercise of legal judgment. The Connecticut Supreme Court affirmed the lower court's ruling that defendant's activities constituted the illegal practice of law as prohibited by the Connecticut statute.

Connecticut, like many states, has a statute prohibiting the illegal practice of law without specifically defining the phrase. Thus, courts generally must look to defendant's conduct to determine if it falls within the meaning of "the illegal practice of law." This case presents a standard to which other courts can look when faced with a similar problem.

AUTOMOBILES

LICENSES — CONDITIONS — *People v. Erickson*, 273 N.Y.S.2d 7 (1966). — Defendant moved to dismiss a charge citing him for violation of section 501 of New York's Vehicle and Traffic Law which prohibits the holder of a junior license from operating an automobile during the nighttime hours unaccompanied by a parent or one in loco parentis. Defendant's junior license had been lost, and the duplicate license held by defendant at the time of arrest did not contain the restrictive conditions of the original junior license.

The court denied the motion, holding that the statutory limitations were fixed when the junior license was issued and that any subsequent duplicate of that license failing to state the statutory conditions could not cause an invalidation of the limitations. The court reasoned that a license is only a privilege extended by the state and that the certificate of license is mere evidence of a license.

BANKRUPTCY

DISCHARGE OF BANKRUPT — BURDEN OF PROOF — *Michigan Consol. Gas Co. v. Wilson*, 144 N.W.2d 682 (Mich. Ct. App. 1966). — Plaintiff brought suit for the unpaid balance of a refrigerator sold to defendant in March 1963. Defendant testified that he phoned plaintiff corporation to notify it to repossess the refrigerator since he had filed bankruptcy proceedings. Defendant did not know to which of plaintiff's employees he had spoken nor the department with which he had been connected. There-

after, defendant published notice of bankruptcy proceedings in the *Legal News*. The trial court held that defendant did not have the burden of proving notice of bankruptcy and dismissed the suit on the ground that the debt was discharged by defendant's bankruptcy.

In reversing, the court of appeals followed the predominant case law of its own and other jurisdictions and found that defendant had the burden of proving the creditor corporation's notice. It held that defendant had not met this burden by his failure to establish the authority of plaintiff's agent to receive notice of bankruptcy. The court also ruled that a publication of notice was inadequate where the creditor was a corporation whose claim was unscheduled.

CONFLICT OF LAWS

ACTIONS — AUTOMOBILES — *Clark v. Clark*, 222 A.2d 205 (N.H. 1966). — Husband and wife, domiciliaries of New Hampshire, left for a short trip that was to begin and end in their home state. Their trip took them into Vermont where an automobile accident occurred, whereupon the wife brought an action for personal injuries against the husband in New Hampshire. The court held that New Hampshire law would govern, rather than that of Vermont, and that the wife, as guest passenger, could recover for any injuries from her husband, as host.

New Hampshire had previously applied the "mechanical test" for choice of law adjudication — the governing law is that of the place where the injury occurred. Later decisions had modified this rule to a limited extent, due to dissatisfaction with it, but had not completely renunciated the rule for want of a better test. This case extends prior decisions and breaks away from the "mechanical test." A new test of considering various policy factors was adopted. The factors included predictability, maintenance of orderliness and good relations among the states, simplification of the judicial task, and the advancement of the state's own interest. The court, applying these factors "objectively" to the facts of the case, brought New Hampshire into accord with many jurisdictions and with almost all modern authorities on conflicts of law.

CONSTITUTIONAL LAW

CRIMINAL PROSECUTIONS — JUDGMENT AND SENTENCE — *Patton v. State*, 256 F. Supp. 225 (W.D.N.C. 1966). — After being convicted of armed robbery and serving almost five years of his sentence, plaintiff was granted a second trial because he had not been represented by counsel at his first trial. He was again convicted, and the effect of the sentence was to deprive him of credit for time already served.

Although the North Carolina courts would not afford him any relief, the federal district judge felt that there was a violation of plaintiff's rights under the fourteenth amendment. The violation resulted from the trial judge's failure to credit plaintiff with time served. The court asserted that only by stating valid reasons can a trial judge impose a harsher sentence in the second trial. However, the district court felt the circuit court must decide whether a proper result had been reached and thus granted time for defendant to appeal.

PERSONAL CIVIL AND POLITICAL RIGHTS — FREEDOM OF SPEECH AND OF THE PRESS — *City of Cincinnati v. Black*, 8 Ohio App. 2d 143 (1966). — Defendant was convicted and fined under a Cincinnati ordinance which made it a crime to give away, sell, or offer for sale any pamphlet or paper which subjects any group of citizens or class to ridicule or contempt because of their or its race or religious belief or which "tends to promote racial hatred or religious bigotry." The court of appeals reversed defendant's conviction, holding that the ordinance was unconstitutional under both the Ohio and the United States Constitutions as an invasion of the freedoms of religion, assembly, speech, and press.

In its discussion of the applicable cases, the court noted *arguendo* that *De Jonge v. Oregon*, 299 U.S. 353 (1937) overruled *Burke v. American Legion*, 14 Ohio App. 243 (1920) which held that it was an act of criminal syndicalism to distribute Communist literature and that therefore such an act would place the person beyond the protection of civil law.

POST-CONVICTION PROCEEDING — RIGHT TO COUNSEL — *State v. Mattox*, 8 Ohio App. 2d 65 (1966). — Appellant, an inmate of the Ohio Penitentiary, brought an appeal pursuant to OHIO REV. CODE § 2953.23 after having been denied post-conviction relief under § 2953.21 of the code by the common pleas court. Appellant alleged he fired his counsel before his criminal trial began and was forced to go to trial without the aid of counsel. The prosecutor at the post-conviction hearing called no witnesses but introduced documents and testimony not of record in the original trial. The judge at the post-conviction hearing, who was also the judge at the trial, relied on his personal recollection of what occurred at the trial in considering the truthfulness of appellant's testimony.

The appellate court held that the litigant was entitled to a rehearing because the judgment of dismissal by the lower court was not supportable by the evidence, for the records showing appointment of an attorney and certain pretrial steps taken by the attorney did not refute the testimony of appellant that he had fired his counsel and was forced to go to trial without counsel. The court documents and testimony could be given no credence inasmuch as they were not of record in the original trial and were not placed in evidence at the post-conviction proceeding. More significantly, the court held that reliance by a trial judge on his own recollection of events concerning a trial as a basis for rejecting evidence constituted a denial of the litigant's rights of confrontation, cross-examination, and an impartial trial. The court adopted the view that a defendant is entitled to a hearing where the judgment of dismissal by a lower court was not supportable by the evidence.

RULES OF EVIDENCE — CONSTITUTIONALITY OF STATE SECURITIES ACT — *United States ex rel. Shott v. Tehan*, 365 F.2d 191 (6th Cir. 1966). — Appellant, unlicensed as a security dealer, issued a promissory note for $2,250. He was indicted under the Securities Act requiring licensing for sales to the public. The statute created a presumption of an unlawful sale unless the seller proves his sale fell within the statutory exemption of non-public sales; appellant, however, introduced no evidence regarding this question. He appealed his conviction, asserting that the statutory presumption of illegality unconstitutionally required him to prove his innocence. The court held the statutory scheme constitutional because the state is still required to prove essential elements of the indictment as well as guilt

beyond a reasonable doubt. Here there was a general prohibition applicable to everyone unable to bring himself within the range of an exemption.

The constitutionality of Ohio's Blue Sky Law had previously been upheld in *Hall v. Geiger Jones*, 242 U.S. 539 (1916). The specific statutory provisions had previously been declared within the legislative power of the state in *Catterlin v. State*, 128 Ohio St. 110, 190 N.E. 578, *appeal dismissed for want of substantial federal question*, 292 U.S. 614 (1934). Thus, the decision here signifies that reinterpretation of certain constitutional concepts of due process has not effected a change in the constitutionality of Ohio's Blue Sky Laws.

SEARCH AND SEIZURE — EXCLUSIONARY RULE IN CIVIL CASES — *Williams v. Williams*, 8 Ohio Misc. 156 (C.P. 1966). — A motion for a new trial, premised on newly discovered evidence, was made after a decree for divorce had been granted to plaintiff, defendant's wife. This evidence, defendant claimed, would show bad conduct on the part of plaintiff. It consisted of four envelopes containing letters written by plaintiff to a former fiancee and present friend. Defendant illegally removed these from plaintiff's car without her consent. In denying the motion, the court, relying upon *Mapp v. Ohio*, 367 U.S. 634 (1961), held that papers illegally seized by an individual were not admissible as evidence in civil cases. The court reasoned that if the federal government and the State of Ohio cannot use illegally seized papers in court proceedings, a private individual should not be granted a greater privilege.

Prior to *Mapp v. Ohio*, Ohio had vascillated regarding the exclusion of illegally obtained material as evidence in court proceedings. Afterward, however, Ohio vigorously adopted the Supreme Court's rule that evidence obtained by illegal searches and seizures is inadmissible in state courts. A 1964 Ohio case commented that all such evidence was inadmissible. The instant case appears to be the first one in Ohio to apply the exclusion rule in a civil case as a direct holding. Dictum in one New York case is in accord, but the federal courts and the remaining state courts generally hold the exclusionary rule is applicable only to criminal proceedings or to proceedings which are criminal in nature.

CONTRACTS

DURATION — WHAT CONSTITUTES TERMINATION — *Read v. Gulf Oil Corp.*, 150 S.E.2d 319 (Ga. Ct. App. 1966). — The oil company sued to recover the amount of purchases made by an unauthorized user of a customer's credit card. The contract required that the customer accept responsibility for all purchases made with the card and that theft or loss of the card should be reported to the company immediately. On trial the customer offered uncontradicted evidence that prior to the unauthorized use she had given written notice to the company to cancel the card. The trial court found for the customer but allowed a motion by plaintiff for a new trial.

On appeal the court reversed the granting of a new trial, stating that generally the grant of a new trial would not be disturbed except where it could be shown that the trial court abused its discretion. Herein, the uncontradicted testimony stated that the oil company had been notified to cancel the card, and this was a valid method of terminating the agreement between the customer and the company; this evidence required a verdict for the defendant.

GENERAL RULES ON CONSTRUCTION — CONSTRUCTION TO GIVE VALIDITY AND EFFECT — *Ford Motor Co. v. John L. Frazier & Sons Co.*, 8 Ohio App. 2d 158 (1966). — Plaintiff brought suit, claiming that defendant was liable as indemnitor for damages paid by plaintiff to a third party in settlement of an earlier suit. Defendant had agreed to perform certain construction for plaintiff, contracting to assume liability for the negligence of plaintiff's employees "arising out of or in connection with" its work. The contract also stipulated that defendant would supply all labor and materials in performing the contract. The injury to the third party was negligently caused by an employee *not* working on defendant's project. The Ohio court of appeals affirmed the trial court's judgment awarding expenses and interest to the plaintiff in addition to the dollar amount paid out by plaintiff in settling the prior suit with the third party.

The appellate court rejected as being too narrow defendant's contention that damages caused by plaintiff's employees had to occur during the performance of defendant's work before contractual liability would result. The court reasoned that the effect of the clause holding defendant liable for the negligence of plaintiff's employees would be nugatory if defendant's assertions were accepted, because plaintiff, by the terms of the contract, had no role in the performance of defendant's job. In so ruling, the court cited the time-honored contract principle that each clause of a contract will be given reasonable effect in construing the agreement.

PERFORMANCE OR BREACH — DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE — *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966). — Plaintiff filed a claim against the United States for additional expenses incurred in the execution of a charter party for the carrying of wheat from Texas to Iran when the Suez Canal became closed. The court of appeals affirmed a dismissal of the libel, holding that performance of the contract was not rendered "commercially impracticable" by the closing of the canal where the charter did not specify the route to be taken and where there was evidence of plaintiff's willingness to assume abnormal risks.

According to the more modern application of the contract principle of "impossibility of performance," a promisor may be excused from performance where such performance is made impossible, illegal, or merely more difficult and expensive by the occurrence of some unexpected contingency. While the court seems wholly consistent with modern authority on the subject, it is significant that although the holding was based on general contract principles, constant reference was made to Uniform Commercial Code §§ 2-614 and 2-615.

PERFORMANCE OR BREACH — DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE — *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966). — Plaintiff sought damages for the delay in delivery and ultimate nondelivery of a computer which defendant had contracted to sell. The defense was that "basic engineering difficultues" had made the contract impossible to perform. The court held that the Uniform Commercial Code should be considered as a source in determining the federal law of sales and, according to code § 2-615, the alleged difficulties did not relieve defendant of its duty to perform on the ground of "practical impossibility."

The Uniform Commercial Code § 2-615 dealing with the excuse of performance by "failure of presupposed conditions" excuses performance in

cases of extreme commercial impracticability. As the first judicial voice on the subject, the court's application of this section indicates that the provision is a codification of pre-code contract principles rather than a departure from existing notions of the doctrine of impossibility of performance.

CRIMINAL LAW

MOTIONS FOR NEW TRIAL — CONSIDERING MATTERS NOT IN EVIDENCE — *People v. Cox*, 220 N.E.2d 7 (Ill. App. Ct. 1966). — During the course of the trial, a newspaper article presenting matter prejudicial to defendant was published, and he moved the court to inquire of the jury as to whether they had read the article. The motion was denied. The trial judge on four occasions cautioned the jury about reading newspapers, and the record did not indicate that any of the jurors had read the article. Judgment was rendered against defendant.

The appellate court reversed, holding that it is the duty of the court to determine, if alerted, whether an article contains improper matter which, if read by jurors, might affect the verdict. Furthermore, the court must determine if in fact the article was read by jurors.

NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL — IMMUNITY TO ONE FURNISHING INFORMATION OR EVIDENCE — *Rutherford v. United States*, 365 F.2d 353 (9th Cir. 1966). — Defendant was held in contempt of court for invoking his fifth amendment privilege against self-incrimination in a civil damage action brought by the federal government under the antitrust laws and the False Claims Act. The decision was affirmed on appeal with the court holding that the government's suit for damages was an enforcement proceeding, rather than a remedial action and was therefore covered by the immunity statute of the antitrust laws (32 Stat. 904 (1903), 15 U.S.C. § 32 (1964)).

The court cited and relied on one of its recent decisions in holding that the joinder of the claim under the False Claims Act, to which the immunity statute did not apply, did not render the immunity statute inapplicable to the whole case. In so deciding, the court conclusively presumed that the testimony sought from defendant would be germane to the antitrust claim and that he would therefore be immune as to all of his testimony in the case. The question of the applicability of the immunity statute to a civil damage suit brought by the government was deemed a novel one, but the court had little difficulty in finding the statute applicable.

PUNISHMENT AND PREVENTION OF CRIME — CRUEL AND UNUSUAL PUNISHMENT — *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Calif. 1966).— Plaintiff, an inmate of a California penal institution, sought an injunction to restrain defendant institution from allegedly subjecting him to cruel and unusual punishment stemming from his confinement, pursuant to the order of a lower level official, for twelve days in one of the institution's "strip cells." The cell, six feet by eight feet, was devoid of furnishings except for a toilet which could be flushed only from the cell's exterior. Plaintiff was forced to remain in the cell absolutely naked for the first eight days and was provided only coveralls for the remaining four days. He had to sleep on the cold, concrete floor with only a stiff canvas mat for cover. For the entire period he was not able to wash his hands or body or brush

his teeth. No interior light was provided, and closed flaps outside the cell prevented the admission of exterior light and air. Plaintiff was denied medical care prior to, during, and subsequent to his confinement.

The court held that the punishment was shocking to the general conscience and incompatible with developing concepts of elemental decency. The court's holding states one of three tests of cruel and unusual punishment.

TRIAL — RECEPTION OF EVIDENCE — *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966). — In a multi-defendant trial for various crimes of burglary, the confession of one defendant was admitted into evidence and read to the jury with the names of the other defendants deleted. The trial court in allowing the confession denied a motion by the other defendants for severance but did instruct the jury not to draw any inferences from the blanked-out confession other than those relating to the one defendant. The court of appeals held that the admission of the confession went beyond the point where it would seem practical that the jury could stay within the limits set by the court's instructions and therefore reversed and remanded for retrial as to the other defendants.

The court further noted that there is no conclusive presumption "that a jury will follow a proper instruction to consider a confession only against the confessor and to ignore its significance as to other defendants." A test for such a determination must consider "whether the instructions were sufficiently clear" and "whether it was reasonably possible for the jury to follow them."

WITNESSES — UNFAIR TRIAL TACTICS — *United States v. Compton*, 365 F.2d 1 (6th Cir. 1966). — Defendant was convicted of travelling in interstate commerce with the intent to promote, manage, and establish a gambling establishment in violation of the federal and state statutes. The question was defendant's intent to establish a gambling place. The jury inferred such intent from circumstantial evidence. Counsel for plaintiff examined a witness whose attorney had previously informed the court that the privilege against self-incrimination would be claimed by asking him if he had ever made money in the operation of a gambling place *other* than the defendant's and by reading, under the guise of a question, a statement made by the witness to FBI agents that defendant on one occasion had been in the witness' gambling establishment. On appeal the court reversed the conviction on the ground that counsel's examination of the witness was an unfair trial tactic, used only to induce the witness to invoke the fifth amendment and thereby prejudice the defendant in the minds of the jury.

It is established that counsel may call a witness who he knows is going to invoke the privilege against self-incrimination. However, in doing so, counsel must have an honest belief that the witness has pertinent information which would be admissible under the rules of evidence if no privilege were claimed. To call such a witness merely for the purpose of inducing him to invoke the privilege is an unfair procedural tactic. The court here, while establishing no new law, reaffirms the old interpretation of the nature of the privilege against self-incrimination, in reasoning that because the privilege is strictly personal, the exercise of it cannot be used to prejudice any third party by inference.

DEATH

ACTIONS FOR CAUSING — WRONGFUL DEATH — *Jones v. Pledger*, 363 F.2d 986 (D.C. 1966). — Here a wrongful death action was brought by the administratrix of the wife's estate against the husband's estate for the benefit of their minor son. The husband had killed his wife and then had taken his own life. The principle issue at trial was that of interspousal immunity, which is recognized in the District of Columbia. The trial court held that such immunity barred this action.

On appeal the case was reversed and remanded; the appellate court ruled that in this case the reasons for the immunity had disappeared and thus should be given no effect. The court noted that there had been a prior separation, that both spouses were dead, and, most important, that the benefit of the right of action here accrued to the son. In so holding, the court adopted the majority view that interspousal immunity will be given no effect where the preservation of marital harmony has no pertinence. Other jurisdictions, including Ohio, have gone one step further and have rejected the doctrine of interspousal immunity in toto.

DIVORCE

JUDGMENT OR DECREE — MODIFICATION — *Fisher v. Fisher*, 8 Ohio App. 2d 105 (1966). — One year after obtaining an uncontested divorce decree from defendant in which a separation agreement was incorporated, plaintiff sought to vacate the decree and modify the court's order. Plaintiff alleged that by defendant's failure to fully disclose assets, she was fraudulently induced to acquiesce in the separation agreement. The trial court, in giving judgment to the plaintiff, declared the separation agreement void, but did not vacate the divorce decree. These determinations were made by a hearing on the merits. The court of appeals in reversing held the trial court did have jurisdiction but committed prejudicial error by hearing the controversy on its merits. Applying OHIO REV. CODE §§ 2325.06-.07, it asserted that it was the duty of the court to first try the grounds for vacation or modification, then to determine whether plaintiff had a good cause of action, and if both are determined in the affirmative to suspend the earlier judgment; this would then result in a determination, as a matter of law, of the validity of the defenses raised by defendant.

By holding that the court did have jurisdiction, the court followed the majority rule that concealment of assets and misrepresentations is not intrinsic fraud and that they furnish the basis for reopening a divorce decree.

FEDERAL CIVIL PROCEDURE

INTERPLEADER — RIGHT TO INTERPLEAD — *Underwriters at Lloyd's v. Nichols*, 363 F.2d 357 (8th Cir. 1966). — Plaintiff insurer had issued a twenty-thousand-dollar liability policy to an Arkansas crop spraying company. Spraying operations damaged several cotton fields. There were eighteen possible claimants whose claims totaled near fifty thousand dollars; of these, two suits had been filed in Arkansas courts totaling twenty-five thousand dollars. The insurer could not be sued directly by the claimants since Arkansas does not have a direct action statute. Plaintiff filed a bill in the nature of interpleader under FED. R. CIV. P. 22(1) alleging it might be required to pay sums in excess of the policy limits if it paid the

initial successful claimants from the policy funds and it was later determined that the claimants should have shared in the insurance on a pro rata basis. The circuit court, reversing the district court, allowed the bill.

In *Pan Am. Fire & Cas. Co. v. Revere*, 188 F. Supp. 474 (E.D. La. 1960), interpleader was allowed on similar facts although Louisiana did have a direct action statute. However, the only other case on similar facts, and where a direct action statute was not involved, *National Cas. Co. v. INA*, 230 F. Supp. 617 (N.D. Ohio 1964), refused to allow interpleader. The Eighth Circuit refused to follow the *INA* rule because of its lack of cogent reasoning.

INSURANCE

INDEMNITY INSURANCE — LIABILITY OF INSURER — *Harleysville Mut. Cas. Co. v. Nationwide Mut. Ins. Co.*, 150 S.E.2d 233 (S.C. 1966). — The insured, driving without the owner's consent, was involved in a collision. Three lines of the liability policy, encompassing the omnibus clause, stated the coverage as extending to "(1) the named insured, (2) any relative, provided" the car was being driven with the owner's consent. The word "provided" began line three and was located directly beneath the "(2)" of line two.

Finding an ambiguity as to whether the "provided" in line three modified line one, the court construed the contract against its draftsman, the insurer, holding that line three did not modify line one and that the insurer would thus be liable for all valid claims against the driver. The court applied basic insurance law in reaching its decision. However, only two other cases have considered similar factual situations and they are split in their determinations.

JOINT TENANCY

CREATION — EXISTENCE — *In re Estate of Svab: Beaver v. Redmond*, 8 Ohio App. 2d 80 (1966). — The financial affairs of decedent, an elderly woman, were managed by her daughter, the appellant. Bank accounts had been opened in the name of decedent, and several weeks later, joint and survivorship cards signed by decedent and appellant were filed with the bank. The bank did not add appellant's name to the passbook, nor did it follow any particular procedure for creating a joint and survivorship account. The only notation other than the decedent's name made on the account card was the original deposit. The probate court upheld the administrator's claim of the accounts for the estate. It further held the bank had not accepted them as joint and survivorship accounts and that the intent of the decedent to create such accounts had not been shown.

In affirming the probate court, the court of appeals, not finding any cases in point, set forth the following requirements for the creation of a joint and survivorship account: a bank must affirmatively accept the contract, and the acceptance must be indicated on the bank's records, the passbook, the ledger card, or by a notation made by a bank official on a joint or survivorship signature card. Furthermore, the court said that when a confidential relationship exists between the depositor and the beneficiary of this type of account, a presumption of undue influence arises which must be rebutted by the beneficiary.

LABOR

CONTRACTS — CAPACITY TO SUE — *Brown v. Sterling Aluminum Prods. Corp.*, 365 F.2d 651 (8th Cir. 1966). — Plaintiffs, members of the employees' shop committee, filed an action under § 301 of the Labor Management Relations Act of 1947 claiming breach by defendant company of their collective bargaining agreement. Due to adverse economic conditions, the company had closed and relocated the plant wherein plaintiffs worked and had refused to bargain with the shop committee concerning relocation of the plant. The union had brought suit against the company, alleging a breach of the collective bargaining agreement, but the action was dismissed with prejudice to the union. In affirming the district court's decision in the instant case, the Eighth Circuit followed the prevailing view in holding that individual employees lack standing to compel discussion of broad collective bargaining principles such as relocation of a plant and, under the circumstances, the company could close its plant and relocate elsewhere without incurring individual liability to each of its employees.

The federal courts have allowed individual members of a union to bring actions under LMRA § 301 to enforce their individual rights when certain prerequisites have been met, such as seeking use of established grievance machinery and affording the union an opportunity to act on the employees' behalf. However, the individual must be seeking to enforce a personal right rather than one possessed by the bargaining unit as a whole.

LIBEL AND SLANDER

CORPORATIONS — DUE PROCESS — *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966). — Appellant, a New York newspaper publisher with a circulation in Alabama of 395 daily copies out of a 650,000 national circulation was sued for libel by appellee, a City Commissioner of Birmingham, Alabama. Appellant had no offices or agents in Alabama and mailed all papers to its readers. Appellee contended that appellant's writer had maliciously defamed his official conduct in an article about racial fear and hatred in Birmingham prior to and during civil rights sit-ins.

In reversing a forty-thousand-dollar judgment for appellee, the court of appeals found that appellant's business in Alabama lacked sufficient minimum contacts for service of process under the state's long-arm statute and that the tort of libel requires a greater showing of contacts than other tortious activity because of due process clause and first amendment considerations.

LICENSES

OCCUPATIONS AND PRIVILEGES — TRANSACTIONS SUBJECT TO TAX IN GENERAL — *Community Telecasting Serv. v. Johnson*, 220 A.2d 500 (Me. 1966). — Plaintiff filed a complaint to review the action of the state tax assessor in imposing a sales tax on art work and slides prepared by plaintiff for their advertising customers and in imposing a use tax on market surveys purchased by plaintiff. The supreme court held that, under Maine's Sales Tax Act, the art work and slides were subject to the sales tax whereas the market surveys, being the performance of a service, were not subject to the use tax.

Each state which has adopted some form of sales tax has also adopted its own definition of the term "sale" or "retail sale." The state's taxing policies, along with the statutory definition of "sale," determine which transactions are held subject to the tax. While no general rule exists in this area of law, the Maine court's classification of a professional market survey as a service and the preparation of art work and slides as a sale, is in accord with the prevailing notions of "service" and "sale."

LIENS

MECHANICS' LIENS — INTEREST AND COSTS — *Capital City Lumber Co. v. Ellerbrock*, 7 Ohio App. 2d 202, 220 N.E.2d 141 (1966). — Appellee was a subcontractor who had furnished labor and material to the prime contractor who had been hired by appellant to construct a house. The prime contractor failed to pay appellee, and he filed a mechanic's lien against appellant's house. The trial court entered a judgment for appellee in the amount of the debt plus interest thereon at the rate of six percent per annum and foreclosed the lien. On appeal the judgment was modified to disallow the claim for interest (which amounted to over twelve hundred dollars) and affirmed as modified.

The court held that under Ohio law the foreclosure proceeding was *in rem* rather than *in personam* and that the statute which allegedly gave appellee the right to interest was inapplicable since there was no privity of contract and no personal obligation between appellant and appellee. The court found no Ohio cases in point and recognized that numerous decisions of other jurisdictions had allowed similar interest claims, but it found that the allowance of interest was not authorized by the Ohio statute.

MUNICIPAL CORPORATIONS

CONSTITUTIONAL LAW — STATUTORY AND MUNICIPAL REGULATION — *Leet v. City of Eastlake*, 7 Ohio App. 2d 218, 220 N.E.2d 121 (1966). — A city ordinance required real estate brokers to obtain a permit for displaying "for sale" signs which served as advertising. The permit cost twenty-five dollars, and it was contended that this was a valid exercise of the municipality's police power. The court, in passing on the validity of the ordinance, agreed that the municipality could regulate the broker's advertising, but because the ordinance was not designed to effectuate its goals, the court found it was unconstitutional.

The decision is supported by the fact that the purpose of the ordinance was to regulate advertising, but the interpretation of the ordinance was such that, without obtaining a permit, the broker could place his name in front of houses which were for lease or for rent. Thus, the effect of the ordinance was questionable.

POLICE POWER AND REGULATIONS — PROHIBITORY ORDINANCES — *City of Eastlake v. Ruggiaro*, 7 Ohio App. 2d 212, 220 N.E.2d 126 (1966). Conviction of a parent for violation of a municipal curfew ordinance was appealed on questions of law. The ordinance makes it unlawful for parents to "allow" a minor to violate the curfew. Defendant's son, age sixteen, was arrested for breaking and entering a gas station at 3 a.m., but defendant believed that his son was spending the night at the home of a friend. The court held that curfew ordinances do not violate constitutional rights

of minors if the curfew is "within the bounds of reasonableness." The court also held the ordinance to be valid as applied to parents when "allow" is interpreted to mean "permit" or "neglect to restrain or prevent," which requires actual or constructive knowledge on the part of the parent. Under this interpretation, defendant's conviction was against the manifest weight of the evidence. Therefore, the conviction was reversed.

Although many cities have curfews, litigation has been infrequent and the results inconsistent. The court in the instant case emphasized the necessity of reasonableness in interpretation of such ordinances to prevent possible violation of constitutional rights. This requires that curfews not be absolute but should allow justified exceptions as applied to both the minors and their parents.

NEGLIGENCE

AUTOMOBILES — MASTER AND SERVANT — *Weber v. Stokely-Van Camp, Inc.*, 144 N.W.2d 540 (Minn. 1966). — Plaintiff-employer was riding in his truck, operated by an employee during the course of his employment, and there was a collision between the vehicle and one operated by defendant's agent. Plaintiff suffered personal injuries along with damage to his truck and sued defendant for the negligence of his agent. Defendant denied his agent's negligence and alleged that the contributory negligence of plaintiff's employee, when imputed to plaintiff, would bar recovery.

The Supreme Court of Minnesota refused to sustain the trial court's instructions on imputed negligence and held that the contributory negligence of plaintiff's servant was not as a matter of law imputed to plaintiff so as to bar his recovery. The court abandoned the "both-way test," previously followed and still adhered to in other jurisdictions, which holds that if the master is vicariously liable to a third party, his servant's negligence is imputed to him to bar recovery. The rule was considered illogical since the reasons for holding the master liable for his servant's negligence fail when the faultless master seeks recovery against a negligent third party.

CARE AS TO LICENSEES OR PERSONS INVITED — IN GENERAL — *Gorby v. Yeomans*, 144 N.W.2d 837 (Mich. Ct. App. 1966). — Plaintiff, while a customer in defendant's tavern, sustained personal injuries when another of defendant's patrons assaulted him. A barmaid was the tavern's only personnel on duty at the time of the assault. Even though the argument and physical altercation between plaintiff and the patron lasted at least five minutes, no steps whatever were taken by the tavern to stop the disturbance.

The court upheld a verdict for plaintiff on the ground that there was sufficient evidence for the jury to find that defendant had breached a common law duty to plaintiff by failing to provide him with a safe place. This duty arose when the tavern failed to provide an adequate staff to police the premises and failed to take any measures to stop the disturbance.

DEFECTS IN PREMISES — QUESTIONS FOR JURY — *Seelbach v. Cadick*, 405 S.W.2d 745 (Ky. 1966). — A family checked into appellant's hotel and were told that the hotel could not provide a baby bed for their eight-month-old infant. In order to secure the infant, the parents pushed one of two double beds against the wall and placed upon this bed a suitcase to protect the infant from exposure to a hot radiator which extended from an opening in the wall. The infant evenutally fell or crawled off the bed and sustained severe burns. The court held that there was sufficient evidence

for the jury to conclude that the hotel failed to furnish reasonable accommodations for the infant since the presence of an instrumentality of potential danger in the room made necessary a provision for the infant's bed. In addition, the court ruled that the jury could find appellant's negligence a proximate cause of the injury even if the parents should be found concurrent joint tort-feasors, since the liability of the original wrongdoer will not be cut off by the negligent act of another performed in response to existing negligent conditions.

The court restated the majority rule which places upon innkeepers the duty of exercising a higher standard of care toward infants than toward adults. In addition, Kentucky precedents and the instant case are in accord with many jurisdictions which do not require a wrongdoer to foresee a subsequent negligent act but only *some* act in response to the negligent condition.

PRECAUTIONS AGAINST INJURY — DUTY OF INSPECTION — *Metz v. Haskell*, 417 P.2d 898 (Idaho 1966). — A radio and television service employee brought this action to recover damages for injuries caused by his falling from a defective ladder supplied by defendant motel owner. In reversing the lower court, the Idaho Supreme Court held that the "simple tool" doctrine, which relieves the supplier of the duty to inspect, is not applicable in situations where the supplier is in a superior position than the user to observe defects.

Generally, the "simple tool" doctrine is a well-established bar to recovery in negligence cases and remains so in this state. However, *Metz* establishes an important precedent by placing the duty of inspection on the supplier in certain situations.

PARENT AND CHILD

CUSTODY OF CHILD — "BEST INTEREST" TEST — *Halstead v. Halstead*, 144 N.W.2d 861 (Iowa 1966). — Petitioner brought a habeas corpus proceeding to obtain custody of her twelve-year-old son who had been living with his grandparents for the past ten years. During this period, the mother had been married several times and had visited her son only infrequently. The trial court found for the mother, but the supreme court, on appeal, held that since the proceedings involved the custody of a child it could hear the case de novo and was not bound by the findings of the lower court, although they were to be given weight.

The supreme court reversed the trial court and remanded for a decree in accordance with its opinion that while the statute called for the parents, when qualified, to be preferred over all others, the ultimate test must be what was in the best interest of the child. In utilizing this "best interests" test, the court followed a new trend in the law away from the strict parental theory. This new test is in use in about half the states and has been adopted by the American Bar Association in its Model Custody Act.

SALES

WARRANTIES — IMPLIED WARRANTY OF MERCHANTABILITY — *Miller v. Preitz*, 221 A.2d 320 (Pa. 1966). — Suit was brought in assumpsit for breach of an implied warranty of merchantability on a defective vaporizer-humidifier which had caused appellant's death by spraying boiling water on him. Appellant was the nephew and next-door neighbor of the pur-

chaser. The court held that whether a party is within the meaning of family under section 2-318 of the Uniform Commercial Code was a question of fact as were such inquiries as remoteness of family relationship, geographical connection between the buyer and the member, and the nature of the product. The court held that appellant was within the family, thus giving him the right to recover. However, the court limited this right to a suit against the immediate seller and affirmed the lower court's decision for the manufacturer and the distributor because of lack of vertical privity.

This is the first Pennsylvania decision allowing a member of the family to recover under implied warranties under the UCC. However, against the well-argued opinions of the dissenting judges who desired the abolition of privity entirely, the majority stepped back from the national trend into the settled case law of Pennsylvania by requiring vertical privity in the distributive chain except in food and drug cases.

TAX

INHERITANCE AND GIFT TAXES — RATE OF TAXATION — *Depositors Trust Co. v. Johnson*, 222 A.2d 49 (Me. 1966). — The assessment of inheritance tax due the state from plaintiff was based on the assessor's ruling that plaintiff was not the testator's stepchild at the time of death because the child's natural mother, a former wife of decedent, had died and the testator had subsequently remarried. The child was thus denied the preferential inheritance tax rate given stepchildren by Maine's inheritance tax statutes. The supreme court held the ruling to be incorrect. The clear legislative intent, the court stated, was equality of treatment of stepchildren for inheritance tax purposes in light of the continuance of affinity between the stepparent and stepchild subsequent to any dissolution of the marriage which had created the relationship.

The court's construction of the Maine statute, which on its face is in derogation of the common law rule that the "step" relationship confers no rights nor imposes any duties, is in line with the majority of jurisdictions and adds to the modern trend towards construing statutory language so as to grant the same benefits to both stepchildren and natural children.

WILLS

CONSTRUCTION — VESTED OR CONTINGENT ESTATES AND INTERESTS — *Northern Trust Co. v. North*, 220 N.E.2d 28 (Ill. App. Ct. 1966). — By the terms of a will establishing a trust fund, a life estate in the proceeds was bequeathed to a friend of the testatrix with a remainder interest in the testatrix's son or his descendants, but if the son were to leave no descendants, the remainder was to be subject to an executory interest in her brother and sister. The will contained a spendthrift provision that distribution must be made to each beneficiary personally. In this action by the trustee to construe the will, it was contended on behalf of the son, a defendant, that the operation of the spendthrift clause postponed the vesting of the remainder interest of the testatrix's brother and sister until actual distribution upon the death of the life tenant and that, since neither survived the distribution, their remainders never vested and the proceeds of the trust passed to the estate of the son by intestacy. As an alternative construction, it was contended that the spendthrift clause required that the brother and sister survive the son and that since the brother predeceased the son, one half of the son's remainder interest was never divested. In answer to these

contentions, the court held that the spendthrift clause, not dispositive in character, must yield to the intention of the testatrix as evidenced by the will as a whole; accordingly, distribution was awarded to the sister and the deceased brother's estate as holders of an executory interest.

In so holding, the court reached the classical result that a construction is preferred which leads to a vested and not a contingent interest. Examining earlier Illinois cases, the court determined that in no prior case had such a construction as urged by the son been allowed to fly in the face of other provisions showing an opposite intent of the testator. The court's opinion followed the well-established rule that no provision, including a spendthrift clause, will prevail over the testator's intent.

WITNESSES

PRIVILEGES OF WITNESS — PERSONS ENTITLED TO CLAIM PRIVILEGE — *United States v. Cogan*, 257 F. Supp. 170 (S.D.N.Y. 1966). — Respondent claimed fifth amendment privileges against self-incrimination in refusing to comply with a grand jury subpoena duces tecum commanding him to deliver financial records of six small general partnerships of which he was a partner. When petitioner sought a court order compelling production, respondent resisted and asked that the subpoena be quashed. In granting respondent's cross-application, the district court held that respondent had a personal rather than "custodial" interest in the documents, enabling him to invoke the "personal" privilege of the fifth amendment to avert disclosure.

Petitioner rested its case on the authority of *United States v. White*, 322 U.S. 694 (1944), which had disallowed fifth amendment objections of a union officer to the production of union records. The Supreme Court in *White* had reasoned that the union was an "impersonal organization" representing the interests of its membership as a group rather than as individuals. The union and its representatives had only a custodial interest in the documents, which could not prevent disclosure. In distinguishing later cases in which it had held that "quasi-corporate" limited partnerships were sufficiently "impersonal" as to fall within the *White* rule, the district court denominated respondent's partnerships as a "personal organization." The court warned that the actual organization of a business group, *not* its nominal classification or its economic success, was determinative of "impersonality" for fifth amendment purposes.

WORKMEN'S COMPENSATION

INJURIES WHILE GOING TO OR COMING FROM WORK — FURTHERANCE OF EMPLOYER'S BUSINESS — *Burchett v. Delton-Kellogg School*, 144 N.W. 2d 337 (Mich. 1966). — Plaintiff, a Michigan school teacher, attempted to collect workmen's compensation for injuries incurred in an automobile accident on her way home. She pleaded and proved that doing work at home was a required part of her job since teachers have no time during the school hours to grade papers and prepare future lessons. The court held that the "dual purpose" doctrine should be considered as to those injured going to or coming from work.

In overruling a prior case which denied compensation under similar facts, the court asserted that although this exception for teachers has not been widely considered, the requirement of doing homework necessitated an extension of the "dual purpose" doctrine to Michigan teachers.