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Cases Noted

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APPEAL AND ERROR

MANDATE AND PROCEEDINGS IN THE LOWER COURT — COMPLIANCE WITH MANDATE OR DIRECTIONS — *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 87 Sup. Ct. 932 (1967). — In a prior decision involving the same matter, the United States Supreme Court held that acquisition of a pipeline corporation by one of the appellees violated the antitrust laws. Consequently, the Court directed the district court "to order divestiture without delay." Subsequent to this decision the Department of Justice settled with the party. However, this settlement did not fully satisfy the Supreme Court's mandate that a new company be created to compete with the appellee. The district court seemingly approved this agreement and denied appellants intervention in the case.

With two Justices dissenting, the Supreme Court reversed the lower court by granting intervention and abrogating the settlement agreement. Furthermore, it set up guidelines for the district court to follow in fashioning its decree. In so doing, the Court commented that it did not question the authority of the Justice Department to settle suits both before and after they reached the high Court. However, it did question the Attorney General's authority to circumscribe the power of the lower courts to carry out the Court's mandates. Therefore, the Supreme Court held that only it, and not the Department of Justice, had the authority to alter or modify its decrees, thus following the general rule that a lower court on remand must comply with the mandate of the appellate court and obey its directions without variations.

AUTOMOBILES

PRODUCTS LIABILITY — SAFETY DEVICES — *Schemel v. General Motors Corp.*, 261 F. Supp. 134 (S.D. Ind. 1966). — Plaintiff was seriously injured when the car in which he was riding was rear-ended by an automobile travelling at 115 mph. Suit was brought against defendant for manufacturing vehicles, without governors, that are capable of attaining excessive speeds and for advertising these automobiles to people who could be irresponsible. Defendant moved to dismiss for failure to state a claim upon which relief could be granted.

In holding that defendant was not liable, the court stated that where the peril is obvious to everyone, a manufacturer's only duty is to make his product reasonably fit for its intended use; it is to be anticipated that irresponsible people will drive at unreasonable speeds. As for equipping cars with governors, the court found that there is no provision for this device in the National Traffic and Motor Safety Act. Further, finding the manufacturer not liable for making cars capable of attaining high speeds, the court held that the defendant could not be liable for advertising its product.

BANKRUPTCY

CLAIMS AGAINST AND DISTRIBUTION OF ESTATE — PROVABLE CLAIMS — *In the Matter of I. J. Knight Realty Corp.*, 370 F.2d 624 (3d Cir. 1967). —

On November 16, 1962, the I. J. Knight Corporation filed a petition for arrangement, and a receiver was appointed under Chapter XI of the Bankruptcy Act. On April 3, 1963, appellant filed a claim alleging that the receiver was negligent in permitting a fire to start and spread, causing personal and property damage to appellant. The claim stated it was "for administrative expenses due to the negligence of the Receiver in operation of the business of the debtor." In May of 1963 the debtor was voluntarily declared a bankrupt.

The court, in affirming the referee's decision, held that appellant's claim was not entitled to the priority accorded costs of administration by section 64 sub. a(1) of the Bankruptcy Act. The court stated that in order to give a meaningful construction to congressional intent, they would follow the rule that expenses unrelated to the development and preservation of the bankrupt's assets are not within the phrase "cost of administration." The dissent felt that the intent of Congress was not so clear as to require that section 64 sub. a(1) immunize from tort liability a business operated by a receiver under a Chapter XI proceeding.

BANKS AND BANKING

BANKING ACT — SECURITIES AND INVESTMENTS — *Baker Watts & Co. v. Saxon*, 261 F. Supp. 247 (D.D.C. 1967). — Section 21 of the Banking Act of 1933 is designed to prohibit commercial banks from investing in anything but public securities. Until 1963 the Federal Reserve System and the Comptroller of the Currency construed the statute as permitting investment only in securities of political subdivisions which have the power of taxation. In 1963 the Comptroller formulated a regulation permitting national banks to invest in public securities regardless of whether they were supported by the taxing power. This action was brought by plaintiff-investment bankers for a declaratory judgment adjudicating the regulation invalid and an injunction prohibiting the allowed practice as being illegal competition.

In granting plaintiff's motion for summary judgment, the court held that the regulation was invalid. The words "general obligations" used in the statute had always been understood to mean obligations supported by the taxing power. The court felt that since it was the congressional intent to allow only a very narrow exception to the prohibition, the exception provision must be narrowly construed.

JOINT DEPOSITS — RIGHT OF SURVIVORSHIP — *Estate of Stamets*, 148 N.W.2d 468 (Iowa 1967). — In an action for a declaratory judgment, the administratrix of an estate sought to have the money in a bank account declared an asset of the estate as against defendant, the joint payee of the account, who claimed by right of survivorship. The decedent had opened the account in his name and defendant's, but defendant had never signed the bank's signature card. Decedent had specified in the deposit agreement that a joint tenancy with right of survivorship was intended.

In affirming the district court's judgment for the joint payee, the state supreme court found that the contract between decedent and the bank was sufficient to create a joint tenancy with the joint payee as donee-beneficiary of the contract. Under Iowa Code section 528.64, which regulates the creation of a joint tenancy in a bank account, the signatures of both payees are not required. Going further, the court said that the defendant's right to the money in the account could be upheld by finding that a valid contract

was entered into with the bank to create a joint tenancy and that the defendant's signature as donee-beneficiary was not required. Here the evidence clearly rebutted the presumption that a tenancy in common was intended.

CIVIL PROCEDURE

DIVERSITY — FEDERAL TORT CLAIMS ACT — *Black v. United States*, 263 F. Supp. 470 (D. Utah 1967). — Plaintiff sought damages under the Federal Tort Claims Act for injuries allegedly due to the negligence of defendant's employee. In an amended petition, plaintiff's husband sued for loss of consortium as a result of the injury. Defendant moved to strike the husband's claim for failure to state a cause of action upon which relief could be granted.

The court granted the motion, stating that under the law of the forum state, Utah, loss of consortium was not compensable in negligence actions. Although the high court of Utah had not passed on the matter, the district court felt that the language of the relevant state statutes indicated that a spouse could not recover for loss of consortium under the circumstances. Admitting that Utah's view was contrary to the weight of authority and to the common law, the court averred that the rule announced in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) required it to discern the law of the forum jurisdiction although that law might appear unreasonable.

JURISDICTION — LIMITATION OF ACTIONS — *Newman v. Freeman*, 262 F. Supp. 106 (E.D. Pa. 1966). — In an action for injuries sustained in an automobile accident, plaintiff moved to amend his complaint to include his father's claim for medical expenses and loss of services. Objection was made on the grounds that diversity existed only as between defendant and plaintiff and that more than two years had passed after the accident so as to bar the father's claim via the statute of limitations. The district court overruled the objection and granted leave to amend.

In reaching its decision the court ruled that although joinder of the father would destroy diversity between plaintiff and defendant, the additional claim for relief came within the court's pendent jurisdiction. It is significant that the court refused to limit the application of pendent jurisdiction to cases involving a federal question, thus somewhat mollifying the requirement of complete diversity where diversity of citizenship is the basis of federal jurisdiction. Also, the court, in applying Rule 15 of the Federal Rules of Civil Procedure to the procedural issue regarding the statute of limitations, concluded that since the father had filed a timely claim in a state court, justice required that the amendment relate back to the original pleading.

TRIAL — ADVISORY JURY — *Poston v. United States*, 262 F. Supp. 22 (D. Hawaii 1967). — In an action under the Federal Tort Claims Act against the United States and in a diversity suit against several other defendants, the court granted plaintiff's request for a jury trial against the other defendants and on its own motion stated that it would permit the jury to act in advisory capacity as to the defendant United States. The United States objected on the ground that the act only authorized a trial without a jury. In overruling the objection the court pointed out that Rule 39(c) of the Federal Rules of Civil Procedure permits the court on its own motion to

allow an advisory jury in all actions not providing for a jury trial as a matter of right.

The two federal courts which have previously decided the same question are split. The court which took the opposite view in *Honeycutt v. United States*, 19 F.R.D. 229 (W.D. La. 1956) did so on the basis that the act forbids the use of a jury of any type, whereas the court in *Schetter v. Housing Authority*, 132 F. Supp. 149 (W.D. Pa. 1955) and the instant court believe that Rule 39(c) clearly permits the use of an advisory jury and that the act prohibits only the ordinary jury.

CONSTITUTIONAL LAW

ADMINISTRATIVE LAW — COUNTY DISMISSAL — *Rosenfield v. Malcolm*, 55 Cal. Rptr. 505 (1967). — Petitioner held a provisional position as assistant county health officer. When he refused to resign from a lawful, voluntary organization called the "Ad Hoc Committee To End Discrimination," he was dismissed. Upon his writ of mandate to compel reinstatement, the trial court upheld defendant county's contention that a county employee who has not yet attained protected civil service status is subject to dismissal without notice or hearing. The California Supreme Court reversed, holding that even though an employee has not yet attained protected status he may not be summarily dismissed for political activities displeasing to his superior.

The court reasoned that an employee's political rights are not set by the rules of the county's civil service commission but by the United States Constitution. Unquestionably, governmental agencies retain broad discretion as to which provisional employees they will retain; however, public employment may not be conditioned upon a waiver of constitutional rights.

COURSE AND CONDUCT OF TRIAL — PRIOR CONVICTIONS — *Spenser v. Texas*, 87 Sup. Ct. 648 (1967). — Petitioners challenged the constitutionality of Texas' procedure in the administration of its recidivist statute. Essentially the procedure permitted introduction of proof of a defendant's past convictions, thereby fully informing the jury of previous derelictions. The jury was then charged that such matters were not to be taken into account in determining guilt or innocence but were to be used only in fixing the punishment if the defendant was found guilty under the current indictment. The majority of the United States Supreme Court held that this procedure was not so fundamentally unfair as to render it violative of the fourteenth amendment.

The dissent was of the opinion that the use of prior convictions did not meet the requirements of due process because it prejudiced the accused without advancing any legitimate state interest. The dissent favored first having a trial to determine guilt or innocence and then, if guilt was determined, having a second hearing at which evidence of prior convictions would be admitted in order to determine the penalty.

HABEAS CORPUS — PROCEEDINGS AND RELIEF — *Shear v. Boles*, 263 F. Supp. 855 (N.D.W. Va. 1967). — Petitioner had been indicated for two attempted armed robberies to which he pleaded guilty and was sentenced to ten years. His habeas corpus petition was successful since his pleas had been involuntary, but he was retried by a jury and given consecutive fifteen-year sentences. Petitioner again sought habeas corpus, claiming that the increased sentence was unconstitutional.

In rejecting petitioner's claim, the court distinguished *Green v. United States*, 355 U.S. 184 (1957), where the petitioner had been acquitted before retrial and proceeded to establish standards to determine whether a habeas corpus court should interfere with the sentencing court's punishment. The district court found that the judge had not assumed the role of an inquisitor, and, in applying its standards, decided that with no indicia of personal hostility by the second judge, petitioner was not entitled to habeas corpus. In reaching its conclusion, the court distinguished a recent case, *Patton v. North Carolina*, 256 F. Supp. 225 (W.D. N.C. 1966), by finding that the second judge in that case had exhibited personal hostility toward the petitioner.

HABEAS CORPUS — SUSPENSION OF REMEDY — *Smartt v. Avery*, 370 F.2d 788 (6th Cir. 1967). — The Tennessee Pardon, Parole and Probation Board had adopted a rule that any inmate who unsuccessfully sought release by habeas corpus should not be granted a parole hearing until at least one year after his regular parole date. Appellee had failed in an attempt to win release by habeas corpus and brought the present habeas corpus proceeding to restrain the board from enforcing its rule against him and all those similarly situated. The district court found the rule unconstitutional and granted an injunction.

In affirming that decision, the court of appeals found that appellee had the required standing under section 1983 of the Civil Rights Act and ruled that the Board's regulation was unconstitutional because it acted as a deterrent to the right of prisoners to seek habeas corpus.

MUNICIPAL CORPORATIONS — SUSPICIOUS PERSONS ORDINANCES — *City of Cleveland v. Forrest*, 223 N.E.2d 661 (Cleveland Munic. Ct. 1967). — Defendant was charged with violating a City of Cleveland suspicious persons ordinance which made it a misdemeanor for any person to be found "wandering about the streets, either by day or by night, without being able to give a reasonable and satisfactory account of themselves." Defendant had been observed standing at a bus stop with several other persons for a period of less than five minutes.

The Cleveland Municipal Court granted defendant's motion for discharge, holding that the ordinance violated the fourth, fifth, and fourteenth amendments to the United States Constitution. The court held that in permitting "compulsory interrogation" of persons by placing the burden on them to justify their presence on the public streets, the ordinance violated the procedures defined in *Miranda v. Arizona*, 384 U.S. 436 (1966) and the right to remain silent guaranteed by the fifth amendment as applied to the states through the fourteenth amendment. The court further found the ordinance unconstitutional for it permitted the police to seize a citizen without probable cause in violation of the rights secured by the fourth amendment.

PERSONAL, CIVIL, AND POLITICAL RIGHTS — FREEDOM OF SPEECH — *Reed v. Gardner*, 261 F. Supp. 87 (C.D. Cal. 1966). — Plaintiff, in her application for Medicare benefits, refused to answer whether or not she was a member of any organization required to register under the Internal Security Act of 1950. Her application was delayed for six months, and, when it was finally approved, she was singled out for warnings not given to other applicants who had answered such questions. Section 103(b)(1) of the Medicare Act operates to deny benefits to certain applicants who are members of or-

ganizations required to register under the 1950 act. After resolving the issue of plaintiff's standing to sue in her favor, the court upheld plaintiff's contention that section 103(b)(1) violated her first amendment rights of freedom of speech, assembly, and association.

The court, in reaching its conclusion, relied upon United States Supreme Court cases which establish the rule that a statute which sweeps too broadly and which punishes for knowing but guiltless behavior is invalid.

SEARCH AND SEIZURE — PROPERTY IN POSSESSION OF THE PRISONER — *State v. Elkins*, 422 P.2d 250 (Ore. 1966). — Incident to a lawful arrest for intoxication and a subsequent lawful search, a police officer seized a bottle containing pills and which had been found in defendant's possession. Although the officer was unaware of the pills' composition, a laboratory analysis proved them to be a narcotic, and on this evidence defendant was indicted for the possession of narcotics. In a five-to-two decision, the Oregon Supreme Court upheld a motion to suppress, holding that the arresting officer had no grounds for a reasonable belief that the pills were contraband, and since they thus could not be seized, they were not admissible into evidence pursuant to requirements of the fourth amendment and the Oregon Constitution.

While the court's interpretation is in accord with the views of many who claim that even under stop-and-frisk laws a police officer must have a reasonable belief that seized material is contraband, there are those who claim that an arresting officer may temporarily seize any property incident to a lawful search, for the purpose of determining if it is stolen or contraband. Thus, until the Supreme Court renders a decision, the issue of the seizability and subsequent admissibility into evidence of articles, the legal right to the possession of which is unknown, is open to speculation.

SEPARATION OF CHURCH AND STATE — BUSING OF PRIVATE SCHOOL CHILDREN — *Rhoades v. School Dist. of Abington Township*, 226 A.2d 53 (Pa. 1967). — A Pennsylvania statute required the provision of free transportation for students attending private, nonprofit elementary and high schools if similar transportation was provided for public school children. In upholding the statute's constitutionality, *Everson v. Board of Education*, 330 U.S. 1 (1947) was cited for the proposition that the act did not violate federal first amendment prohibitions against state establishment of a religion. Similarly, state constitutional provisions were not violated since: (1) the buses were only to traverse "established public school bus routes"; thus no preference was given to any religion; (2) no direct financial benefits were received by non-public schools; and (3) the protection of all school children through a proper transportation system served the same public function as does the state's provision of lunches and health care for all students.

However, in light of the divided opinions in other jurisdictions over the constitutionality of similar acts, there is clear justification for the dissent's position that the *Everson* doctrine has been so undermined by recent Supreme Court decisions that it is no longer viable.

CONTRACTS

SUBCONTRACTING — MASTER AND SERVANT — *New York, C. & St. Louis R.R. v. Heffner Constr. Co.*, 9 Ohio App.2d 174, 223 N.E.2d 648 (1967). — Plaintiff brought an action for damages when its freight train was de-

railed in a collision with a truck driven by an employee of defendant's subcontractor. Plaintiff contended that a hauling contract between the subcontractor and defendant, and a contract for construction of a highway between the state of Ohio and defendant, raised a jury question as to an existing agency relationship.

The court, after carefully examining the terms of the various contracts, followed the general rule that where contract terms are clear and unambiguous, the contract's interpretation is for the court and not the jury. The court said that the contract with the state providing that subletting a portion of the contract "shall relieve the contractor of *no responsibility*" did not as a matter of law create liability in defendant for the negligence of the subcontractor when such negligence was not related to the method or manner of highway construction, nor did certain rights reserved in the contract between the subcontractor and defendant change that relationship from one of employer and independent contractor to a relationship of master and servant.

CRIMINAL LAW

CRIMINAL PROCEDURE — PRE-TRIAL DISCOVERY DEPOSITIONS — *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159 (1967). — Defendants, indicted for first degree murder, applied for a commission to take discovery depositions of certain witnesses. The Supreme Court of Ohio, reversing an appellate court's writ of prohibition, held that a trial judge has the power to commission pre-trial discovery depositions in a criminal case when such procedure is not prohibited by the state or federal constitution and that such discretion, tempered by judicial and statutory guidelines, does not constitute an unlawful delegation of legislative powers.

The Ohio court's decision is supported by the general view that a state's constitution is primarily a limitation rather than a grant of authority on the state legislative power. Unless limited at the state or federal level, the state legislature has plenary power to provide for the controlled, discretionary judicial taking of discovery depositions in criminal cases.

HOMICIDE — FELONY-MURDER — *People v. Butler*, 421 P.2d 703, 55 Cal. Rptr. 511 (1967). — Defendant was convicted of first degree felony-murder. He had gone to the deceased's home to collect a debt owed to him by the deceased. During a discussion between the two, the deceased produced a gun. Defendant also produced a gun, a struggle ensued and a gun went off, killing the deceased. Defendant thereafter searched for money to pay the debt owed to him and, finding none, took a wallet and fled. Being charged with first degree felony-murder, the defendant argued that intent was a necessary element of robbery, but this was overruled by the court.

In a decision of first impression, the California Supreme Court held that where a finding that the defendant had killed the deceased in perpetration of a robbery was necessary to convict the defendant of first degree felony-murder, the defendant is entitled to the defense that he honestly believed the deceased owed him the money and that denial of the defense is reversible error.

PROBABLE CAUSE — INFORMANTS — *McCray v. Illinois*, 87 Sup. Ct. 1056 (1967). — Petitioner was arrested for the possession of heroin. The arresting officers had acted without an arrest warrant and solely on information given them by an undisclosed informer. Petitioner's motion to sup-

press was denied by the Illinois Supreme Court on the basis of an Illinois evidentiary rule which grants governmental privilege to the identity of informers when the issue is merely probable cause for arrest and not guilt or innocence.

The majority of the United States Supreme Court upheld the state court and distinguished *Roviaro v. United States*, 353 U.S. 53 (1956) on the basis that in *Roviaro* the informer played a material part in bringing about the illegal possession of narcotics and was essential to the merits of the case and not merely for determining probable cause. Justices Douglas, Brennan, Fortas, and the Chief Justice dissented on the basis that the fourth amendment requires police to obtain a warrant unless they have personal knowledge which gives them probable cause.

TIME OF TRIAL AND CONTINUANCE — RIGHT TO A SPEEDY TRIAL — *Klopfer v. North Carolina*, 87 Sup. Ct. 988 (1967). — Petitioner was indicted for unlawful trespass, but the jury was unable to reach a verdict, whereupon a mistrial was declared and the case continued for the term. The state then made a motion for a nolle prosequi with leave, a North Carolina procedure which allows the case to be restored to the trial docket at a later date. Petitioner applied for an immediate trial and was refused. On appeal, the Supreme Court of North Carolina refused to interfere with the discretion vested in the prosecutor and the trial judge.

The Supreme Court of the United States reversed, deploring the extended anxiety, uncertainty, and public scorn which the petitioner must suffer when unable to clear himself of criminal charges. The Court held that it was just such situations that the sixth amendment was designed to prevent and that the sixth amendment was made obligatory on the states by the fourteenth amendment. Mr. Justice Harlan, concurring in the result, felt that the North Carolina provision was fundamentally unfair and a violation of due process under the fourteenth amendment.

DESCENT AND DISTRIBUTION

HEIRS AND NEXT OF KIN — INFANT EN VENTRE SA MERE — *Estate of Wolyniec v. Moe*, 226 A.2d 743 (N.J. Super. Ct. 1967). — Defendant's mother murdered the intestate grandfather of defendant two months prior to his birth. The administratrix contested defendant's right to share in the estate of the grandfather. In a case of first impression, the court held that defendant should share in the grandfather's estate as next of kin.

It was first held that the mother was properly barred from sharing in the estate because she had murdered the grandfather. The court then applied the New Jersey doctrine by which, for the purpose of taking property, a child *en ventre sa mere* is considered to have been born at the time of the intestate's death and held that the child replaced the mother as next of kin. The court indicated that a contrary result would have been unconscionable, because it would have penalized the innocent defendant for the crime of his mother.

DIVORCE

JURISDICTION, PROCEEDINGS, AND RELIEF — JUDGMENT OR DECREE — *Turner v. Turner*, 192 So. 2d 787 (Dist. Ct. App. Fla. 1966). — In an appeal by the wife from a divorce decree, defendant husband cross-assigned error to that portion of the decree which ordered him to "cooperate with

plaintiff in obtaining a Jewish divorce." Without reaching the constitutional questions involved, the District Court of Appeals held that since Florida law provides only for a civil divorce, the chancellor had no power to require a party to cooperate in securing a religious divorce.

This is the second reported case to bear upon the religious divorce question. The other case, *Koeppel v. Koeppel*, 138 N.Y.S.2d 366 (Sup. Ct. 1954), *rev'd on other grounds*, 3 App. Div. 2d 953 (1957), held that an agreement in which the husband promised the wife to take part in a Jewish religious divorce was in fact enforceable where a separate action was brought by the wife for specific performance.

EMINENT DOMAIN

PROCEEDINGS TO TAKE PROPERTY — CONDITIONS PRECEDENT — *Iowa State Highway Comm'n v. Hipp*, 147 N.W.2d 195 (Iowa 1966). — Employees of plaintiff highway commission attempted, without statutory authorization, to enter upon lands owned by defendant for the purpose of conducting surveys prior to the commencement of eminent domain proceedings. When defendant resisted the intrusion, plaintiff sought a declaratory judgment to establish its right to enter. The trial court held that plaintiff's proposed entrance would be unlawful and would constitute a trespass.

In a case of first impression, the Supreme Court of Iowa affirmed the trial court's decision, holding that plaintiff commission did not have a right incident to its power of eminent domain to conduct preliminary surveys. The court strictly construed the right of eminent domain against plaintiff, ruling that the power to institute preliminary surveys must be based upon clear statutory authorization and could not be implied by judicial decision. In so holding, the court contravened *Thomas v. City of Horse Cave*, 249 Ky. 713, 61 S.W.2d 601 (1933), the only decision squarely on point with the instant case.

INSURANCE

CONSTRUCTION OF EXCLUSIONARY CLAUSE — AUTOMOBILES — *Great Central Ins. Co. v. Marble*, 369 F.2d 615 (8th Cir. 1966). — In a diversity suit plaintiff insurance company sought to avoid liability to the insured defendant for damages arising when an automobile struck a modified stock car which defendant was towing to a stock car race. Under the policy's exclusion clause, the insurance company was not liable for damages arising from the "maintenance, operation or use of any structurally altered or specially designed automobile" while involved in or "going to" any race or speed contest.

In affirming the district court's decision for the insured, the appellate court re-affirmed the general principle or insurance law that a policy's words of exclusion are to be narrowly interpreted. Here the act of towing was not included in the words of the clause. Further, the reason for excluding modified racers from coverage — the increased risk — was not present where the car was in a dead tow. Nor was the car, while in tow, being "operated" within the meaning of the clause.

LIFE INSURANCE — ACCIDENTAL MEANS — *Beckham v. Travelers Ins. Co.*, 225 A.2d 532 (Pa. 1967). — The decedent, whose life was insured under a policy issued by defendant, died as a result of a self-administered overdose of narcotics. Plaintiff, the named beneficiary under the policy, sought to

recover on a "double indemnity" provision which became operative if the decedent succumbed "through accidental means." From a reversal of a favorable verdict at trial, plaintiff appealed to the state supreme court which reinstated the judgment for plaintiff on the ground that the decedent's death fell within the coverage of the policy.

The court overruled its prior holdings and joined the trend of decisions throughout the United States by rejecting a distinction between deaths that are accidental results and deaths that result from accidental means. Prior to the instant case, Pennsylvania had followed the rule of *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491 (1934), which limited recovery under "accidental means" insurance clauses to instances where the proximate cause of death was the result of an unexpected event. The court in the instant case relied upon the strong dissent in *Landress* by Mr. Justice Cardozo, who claimed that the common understanding of accident provisions did not distinguish between accidental means and accidental results.

LABOR RELATIONS

UNFAIR LABOR PRACTICES — COERCION — *NLRB v. Hobart Bros. Co.*, 372 F.2d 203 (6th Cir. 1967). — During an organizational campaign defendant employer sent letters to its employees stating that authorization cards were not always kept in the "strictest" confidence as the union had previously promised. Included in the letter were admonitions to the workers urging them to weigh the consequences of their signing. The National Labor Relations Board found that this activity constituted coercion under section 8(a)(1) of the National Labor Relations Act and sought enforcement of its order.

The court denied enforcement, holding that the Board had failed to show substantial evidence of employer coercion. Considering that the union had raised the secrecy of authorization cards, the court held that the employer was not precluded from stating its views on the matter. Further, there was no showing of a threat or reprisal, and the Board's construction of the letter to the contrary was found to be erroneous. The dissenting opinion stated that the Board is best able to interpret letters of this type and that the majority's opinion amounts to a review de novo of the Board's construction of written communications.

LICENSES

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY — TRANSFER OF PART OF LICENSE FOR CONSIDERATION — *Harold D. Miller, Inc. v. PUC*, 10 Ohio St. 2d 53 (1967). — Plaintiff sought reversal of an order of the Public Utilities Commission granting transfer of part of a license of public convenience and necessity from one transport company to another pursuant to a contract between the parties. The agreement was expressly conditioned upon the granting of the transfer by defendant commission. Defendant argued that its "drop and pick up" procedure was a valid exercise of administrative authority.

The Ohio State Supreme Court unanimously ruled that the "drop and pick up" procedure was violative of the Commission's power. A license was held not to be an asset which can be thus negotiated, defendant's acquiescence in a procedure whereby the certificate acquires such an attribute being unlawful. According to the strict language of section 4121 of the Ohio Revised Code, the Commission is only authorized to transfer part of a

certificate upon the death of a holder, upon dissolution of a partnership operating under such a license, or by the request of a receiver or trustee of a transport company.

LIMITATIONS OF ACTIONS

COMPUTATION OF PERIOD — ACCRUAL OF RIGHT OF ACTION OR DEFENSE — *Rosenau v. City of New Brunswick*, 224 A.2d 684 (Super. Ct. N.J. 1966). — Defendant manufacturer sold a water meter to defendant city in 1942. It was installed by the city in plaintiff's home in 1950. In 1964, the meter burst and caused property damage for which plaintiff sued both the city and defendant manufacturer. The superior court held that under the New Jersey six-year statute of limitations, the cause of action for breach of implied warranties of merchantability and fitness for purpose and the cause of action based on strict liability in tort both accrued when the meter was delivered, and plaintiff's action resting on those grounds was barred. However, plaintiff's claim based on negligence was held not to accrue until damage occured and thus was not barred.

A fundamental principle of the law governing limitation of actions is that the period of limitations begins to run when the cause of action accrues. It is upon this latter phrase that courts have differed. The case at bar applies the Uniform Commercial Code section 2-725(2) which states that, in regard to sales contracts, a cause of action accrues when the breach occurs and that breach of a present warranty occurs when tender of delivery is made.

NEGLIGENCE

FLIGHT INSURER'S LIABILITY TO THIRD PERSONS — DUTY TO SCREEN APPLICANTS — *Galanis v. Mercury Int'l Ins. Underwriters*, 55 Cal. Rptr. 890 (Ct. App. 1967). — Plaintiffs brought an action against several insurance companies who, by means of automatic vending machines, had sold flight insurance to a suicide-murderer who caused the crash of the plane upon which plaintiffs' decedents were passengers. The complaint alleged that defendants were negligent in failing to screen, interview, or investigate the financial condition of Gonzales the suicide-murderer and that this negligence was the proximate cause of the airplane crash and the deaths of plaintiffs' decedents. The trial court sustained defendants' demurred to the complaint and entered a judgment of dismissal.

In affirming this judgment, the court of appeals found that defendants were under no duty to protect the insured's fellow airplane passengers by following an investigatory procedure in selling flight insurance. After determining that there is but a minimal risk that a purchaser of insurance will cause a plane crash, the court reasoned that the great social utility of flight insurance would be defeated by a rule requiring that all applicants be screened and interviewed prior to the issuance of their policies.

RES IPSA LOQUITUR — MANAGEMENT AND CONTROL — *Cusumano v. Pepsi-Cola Bottling Co.*, 9 Ohio App. 2d 105, 223 N.E.2d 477 (1967). — Plaintiff was seriously injured when, in attempting to remove a case of Pepsi-Cola from the top of a stack of such cases, the case collapsed. The defendant's driver-salesman had stacked the cases in plaintiff's stockroom two days earlier. Evidence at trial demonstrated that no one had disturbed the cases from the time they were stacked until the time of the accident.

The court, while reversing a judgment for plaintiff on other grounds, held that under the facts, the doctrine of res ipsa loquitur was applicable.

Ohio, as do many jurisdictions in dealing with res ipsa loquitur, recognizes an exception to the general rule that the defendant's actual control and management of the injury-producing instrument is required. The exception states that if the instrument causing the injury has not been out of the hands of the defendant for more than a reasonable time and if the plaintiff can show that there has been no intervening force affecting the instrument, the doctrine is applicable.

SCHOOLS AND SCHOOL DISTRICTS

MARRIED STUDENTS — REGULATION OF EXTRACURRICULAR ACTIVITIES — *Board of Directors v. Green*, 147 N.W.2d 854 (Iowa 1967). — Pursuant to defendant board's rule excluding married high school pupils from participation in extracurricular activities, plaintiff, who knew of the rule before his marriage, was not allowed to play on the high school basketball team. Following an equity court's ruling enjoining enforcement of the rule, plaintiff graduated from high school, thereby making the issue moot. However, the appellate court heard the question because of the great public interest involved in having a determination made as to the enforceability and legality of the rule.

A reversal of the trial court's decision resulted because plaintiff had not established that the board abused its broad discretion by adopting the rule. Since participation in extracurricular activities is a privilege which must be regulated, the present rule's "mere differentiation" of students was held to be not so invidiously discriminating as to constitute a denial of equal protection of the laws.

SECURED TRANSACTIONS

CREDITORS' RIGHTS — PERFECTED SECURITY INTEREST — *National Shawmut Bank v. Vera*, 223 N.E.2d 515 (Mass. 1967). — Plaintiff, assignee of a vendor's conditional contract of sale of an automobile upon which a balance was due, sued defendant for conversion of the automobile after defendant had purchased it for his personal use at an execution sale resulting from a judgment which he had obtained as an attaching creditor of the vehicle's vendee. Plaintiff had not recorded a financing statement covering the contract. The trial court rendered judgment for defendant, finding that he had no notice of plaintiff's unrecorded security interest.

The Supreme Court of Massachusetts, reversing the trial court's decision, stated that under Massachusetts law, which follows the Uniform Commercial Code, the filing of a financing statement is not necessary to perfect a security interest in consumer goods. Although under section 9-307(2) of the Massachusetts General Laws a good faith purchaser in a voluntary transaction can prevail over one who has failed to file his perfected security interest, the court held that an execution sale is not a "voluntary transaction" and that defendant, an attaching creditor, was not a good faith "buyer" within the meaning of the statute and thus could not prevail over plaintiff's perfected security interest.

RIGHTS AND LIABILITIES OF PARTIES — USE AND DISPOSAL OF COLLATERAL — *Evans Prods. Co. v. Jorgensen*, 421 P.2d 978 (Ore. 1966). — Appellant, a secured creditor, brought an action to foreclose a lien on a

manufacturer's inventory in possession of appellee, a supplier of raw materials. The Supreme Court of Oregon held that appellant's security interest in the inventory was not defeated when appellee delivered veneer to the manufacturer and accepted inventory plywood as payment. The transaction was not a sale in the ordinary course of business despite appellees' novel contention that they received the plywood in consideration for relinquishing their "reclamation rights" under section 72.7020(2) of the Oregon Revised Statutes. Appellees did nothing which could reasonably be construed as exchanging the plywood for their right to reclaim, and therefore the lower court judgment in their favor was reversed. The court's decision represents the policy of upholding those who have availed themselves of the protection offered by the Uniform Commercial Code.

TAXATION

COST OF SERVICE — REAL OR HYPOTHETICAL TAX ALLOWANCES — *Federal Power Comm'n v. United Gas Pipe Line Co.*, 87 Sup. Ct. 1003 (1967). — This case presented the issue of whether the Federal Power Commission, in determining United's future rate base, made proper allowance for federal income taxes. The Commission contended that since United was a member of an affiliated group which had elected to file consolidated tax returns, the actual tax paid by United was to be used in calculating its cost of service rather than the standard fifty-two percent tax allowance. United argued that, notwithstanding the consolidated returns, its allowance should be at the full fifty-two percent rate.

The United States Supreme Court, in accepting the Commission's view and in reversing the Fifth Circuit Court of Appeals, concluded that it was unacceptable to determine the cost of service on a hypothetical figure. The Court cited the well-established principle that when Congress has failed to provide a formula to follow, a court should not reject the one employed unless it plainly contravenes the statutory scheme of regulation. Four Justices dissented, contending that the Commission's formula undermined general tax law by placing a penalty on the decision to file a consolidated return.

EXEMPTIONS — PUBLIC PURPOSE — *Graf v. Warren*, 10 Ohio St. 2d 32 (1967). — Plaintiff appealed from a decision of the Ohio Board of Tax Appeals which had allowed an exemption for the State Underground Parking Commission, a legislatively created commission. The Commission issued bonds to pay for parking facilities, and the bonds were repaid out of the earnings. Appellant claimed that the exemption should not be granted since the parking facilities were not a "public purpose" within the meaning used in the Ohio Constitution because of the operation's proprietary nature and the fact that the revenues were to be used to retire the debt rather than for general expenditures. Appellant further argued that granting an exemption to a governmental organization competing with similar private operations was a violation of the equal protection provisions of both the United States and Ohio Constitutions.

The Ohio Supreme Court, in affirming the Tax Board's decision, relied on a series of cases which held that, despite the proprietary nature of an operation, if it was for the public welfare, the operation was a "public purpose" within the constitutional meaning. In a split decision the majority stated that because the debt was to be retired first the public interest was being served by reduction of the ultimate debt. The court also held that the state did not violate the equal protection provisions by taxing a private

operation which was similar to a state operation as long as the state operation was for a "public purpose."

LIABILITY OF PERSONS AND PROPERTY — EXEMPTIONS — *Maxwell v. Good Samaritan Hosp. Ass'n, Inc.*, 195 So. 2d 255 (Fla. Dist. Ct. App. 1967). — Plaintiff hospital is a tax exempt nonprofit hospital. Defendant-county tax assessor refused to recognize plaintiff's duly filed application for exemption on the ground that plaintiff had violated the civil rights of individuals by refusing "admission to Negro patients" and by denying "the use of its facilities to Negro physicians and dentists solely on the basis of race."

The Florida District Court of Appeals held that denying exemption to plaintiff was an exercise of power in excess of that granted to defendant because a tax assessor has no authority to impose additional conditions or restrictions upon those shown to be entitled to an exemption as established by statute. The court further held that defendant may not plead as an affirmative defense the individual civil rights of others because they are the only ones who can seek redress of such rights.

SECTION 302(1)(b) — REDEMPTION ESSENTIALLY EQUIVALENT TO A DIVIDEND — *Commissioner v. Berenbaum*, 369 F.2d 337 (10th Cir. 1967). — A closely held corporation's redemption of one hundred shares of non-voting preferred stock (fourteen percent of the total issue) from a shareholder who owned eighty percent of the common stock and over seventy percent of the preferred stock was held by the Tax Court to be nontaxable as a dividend under section 302(1)(b) of the Internal Revenue Code because: (1) the percentage of ownership of the preferred stock was sufficiently reduced by the redemption, and (2) the amount received from the redemption was less than the amount that would have been received had the corporation distributed such amount as a common stock dividend.

In overruling the Tax Court, the appellate court, after examining all the surrounding facts and circumstances, held that the distribution was taxable as a dividend because: (1) no dividend had been declared since the corporation's formation in 1948; (2) no substantial change in proportionate control or ownership in the corporation had resulted from the redemption; (3) the corporation had continued to operate at a profit after the redemption; and (4) no corporate business purpose was served by the redemption.

TORTS

DEFENSES TO STRICT TORT LIABILITY — ASSUMPTION OF RISK — *Ferraro v. Ford Motor Co.*, 223 A.2d 746 (Pa. 1966). — Soon after purchasing a dump truck from a Ford dealer, plaintiff encountered malfunctions in the vehicle's operation; however, he was assured by the dealer's employees that these malfunctions were not serious or dangerous. A short time later, the malfunctions caused the truck to become involved in an accident, seriously injuring plaintiff. Although Pennsylvania courts recognize the theory of strict tort liability for the sale of defective products, it had not been decided whether a buyer who voluntarily and unreasonably uses a defective product and encounters a known danger is precluded from recovery for his injuries.

The state supreme court held that the defense of assumption of the risk is available to a defendant in suits based upon strict tort liability and that upon a showing that reasonable minds could differ as to whether the plaintiff's use was reasonable or not, the question of the defense's applicability

is one for the jury. In so holding, the court followed the majority view and the one enunciated in RESTATEMENT (SECOND), TORTS § 402A, comment *n* (1965).

WORKMEN'S COMPENSATION

APPLICATION FOR MODIFICATION OF AWARD — STATUTE OF LIMITATIONS —*Kittle v. Keller*, 9 Ohio St. 2d 177 (1967). — An employee filed a claim for workmen's compensation and was awarded benefits for an injury received while moving a desk, such activity being within the scope of his employment. More than two years after the original injury, plaintiff filed an application for modification of the award in order to secure compensation for a subsequently developing disability directly caused by the original accident but which was not described in the original application.

The court held that section 4123.84 of the Ohio Revised Code did not bar the employee from such modification because section 4123.52 gives the Industrial Commission jurisdiction to modify its former findings up to ten years from the last payment awarded under the finding. This decision clarifies the court's position and puts to rest previously inconsistent statements on the question.

COURSE OF EMPLOYMENT — EMPLOYER'S PREMISES — *Marlow v. Goodyear Tire & Rubber Co.*, 10 Ohio St. 2d 18 (1967). — After completing his work day, plaintiff was injured in a collision involving his automobile and that of a fellow employee in a parking lot owned, maintained, and controlled by defendant employer. Plaintiff applied for workmen's compensation, claiming that his injuries were sustained in the course of his employment. The Ohio Supreme Court agreed, holding that plaintiff was within the zone of his employment and that he suffered injuries proximately caused by a natural hazard of that zone.

This case presents more of a clarification than an extention of Ohio's workmen's compensation coverage and is in accord with many states which have heretofore declared that employees travelling to and from the situs of employment are within the zone of employment and are thus entitled to workmen's compensation.