Case Western Reserve Law Review

Volume 19 | Issue 2 Article 19

1968

Cases Noted

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ADMINISTRATIVE LAW

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS — SUBSTANTIAL EVIDENCE — *Mead Johnson & Co. v. Borough of South Plainfield*, 95 N.J. Super. 455, 231 A.2d 816 (1967). — Appellant corporation appealed two judgments of the New Jersey State Division of Tax Appeals which held it was not entitled to tax exemptions under a New Jersey statute providing exemptions for goods stored in a warehouse of any person or corporation "engaged in the business of storing goods for hire." The court held that the warehouse in question, although previously owned by appellant, was not in fact a public warehouse and that the division had no substantial evidence adequate to support its conclusion.

In New Jersey, as in most American jurisdictions, the factual findings of administrative agencies are generally not reviewable. A notable exception to this general rule is when such findings are not supported by substantial evidence. Though judicial restraint is generally exercised in this area, the present case clearly illustrates that agencies and boards are not immune from judicial review in matters of their discretion.

APPEAL AND ERROR

BRIEFS — DEFECTS, OBJECTIONS, AND AMENDMENTS — *Pope v. Huffman*, 228 N.E.2d 886 (Ind. Ct. App. 1967). — Plaintiff was granted foreclosure of a mortgage against the defendant and defendant appealed. In his brief to the appellate court the defendant failed to comply with the rules of the Indiana Supreme Court regarding brief writing in two respects: (1) no summary preceded the argument section of his brief and (2) no authority was cited in the argument section which contained merely a recital of the evidence found by the lower court. The court held that defendant's failure to "substantially comply" with the rules of the supreme court regarding brief writing would operate as a waiver of any alleged error relied upon in his appeal.

This case constitutes a reaffirmation of a rule strictly adhered to by the State courts that any "gross disregard" or "flagrant violation" of the appellate rules regarding brief writing will result in the appellant waiving any alleged error he relied upon for reversal. If the appellant had made a "sincere effort to comply" with the rules, any minor defects not prejudicial to the appellee would probably have been overlooked.

ARMED SERVICES

COMPULSORY SERVICE OR DRAFT EVASION — DEFENSES — *Thompson v. United States*, 380 F.2d 86 (10th Cir. 1967). — The defendant, a conscientious objector, failed to appeal his 1-A status within 10 days of classification as required. When he refused to submit to induction, he was convicted for a violation of the Universal Military Training and Service Act. In upholding the conviction, the court of appeals held that the defendant was no longer entitled to assert invalid classification as a defense.

In reaching this decision, the court furthered the Government's policy of giving the local draft board autonomy concerning extension of appeal rights. Although the board has the power to grant extensions on the right to ap-

peal, the courts will not inquire into the correctness of decisions refusing to grant extensions.

ATTORNEY AND CLIENT

SUSPENSION AND DISBARMENT — REINSTATEMENT — *Barash v. Association of the Bar*, 20 N.Y.2d 154, 228 N.E.2d 896 (1967). — Plaintiff, a member of the New York Bar, was convicted of a felony. Under New York law he was automatically disbarred. On appeal, a United States court of appeals reversed the felony conviction and remanded for a new trial. Before the new trial, plaintiff petitioned the appellate division for reinstatement but his petition was denied.

In reversing the appellate division, the New York Court of Appeals stated that although the plaintiff did not have an automatic right to reinstatement, it was not within the discretion of the appellate division to deny it simply because the plaintiff was under indictment. Reinstatement could, of course, be denied if the conduct of the plaintiff warranted it on other grounds. However, since the conviction had been completely abrogated, mere indictment could not be a ground for denying the privileges of the bar. This decision partially overrules the leading New York case on the subject, *Matter of Ginsberg*, 1 N.Y.2d 144, 134 N.E.2d 193, 151 N.Y.S.2d 361 (1956), which allowed broad discretion in reinstatement proceedings.

AUTOMOBILES

INJURIES FROM OPERATION — WHAT LAW GOVERNS — *Farber v. Smolack*, 282 N.Y.S.2d 248 (1967). — The defendant loaned his car to his brother to drive to Florida. On the brother's return to New York, his negligent driving caused an accident to occur in North Carolina in which his wife was killed and his children injured. The wife's administrator and the infants' guardian brought this action against the owner under a New York statute rendering the negligence of an automobile driver attributable to the owner.

The court of appeals reversed the lower court's dismissal of the action and granted a new trial, holding that the New York statute applied notwithstanding the language of the statute that it was applicable to use and operation of a vehicle "in this state." The court noted that all of the parties involved were citizens and domiciliaries of New York, the car was registered in New York, and it was being driven back to New York when the accident occurred. The court held that New York is the jurisdiction having "the most significant relationship" with the issue presented. The decision is consistent with the common tendency of courts to find the law of the forum controlling.

BASTARDS

EVIDENCE — BLOOD TEST — *Jackson v. Jackson*, 60 Cal. Rptr. 649 (1967). — Plaintiff-husband, having cohabited with his wife for less than 4 days before she left him, filed suit for annulment. During the period that the court's jurisdiction continued, the defendant gave birth to a child. Plaintiff claimed results of blood tests demonstrated that he could not have fathered the child and moved that the court terminate all prior court orders for support. The trial court refused to admit the blood tests as evidence and denied the motion to terminate support payments.

The trial court instructed that the "conclusive presumption of legitimacy" applied if the husband had access to his wife during the period of conception. The Supreme Court of California reversed, holding that if the husband and wife are not residing together, an exception to the application of the conclusive presumption arises; the presumption becomes rebuttable and blood test evidence may be admitted to rebut it. The case restates the law of California allowing blood tests as admissible evidence when the issue is whether the child could have been conceived during the period of cohabitation.

CONSTITUTIONAL LAW

COURSE AND CONDUCT OF TRIAL — JUDGMENT AND SENTENCE — *Commonwealth v. Dooley*, 232 A.2d 45 (Pa. Super. Ct. 1967). — Appellant pleaded guilty to a charge of assault with intent to ravish and was sentenced under the Barr-Walker Act, which provided for indeterminate sentencing of sex offenders, to a term of 1 day to life. Subsequently, a new hearing was ordered to meet the due process requirements for such proceedings. Upon rehearing, appellant's original sentence was reinstated and the court reaffirmed the constitutionality of the Barr-Walker Act.

After comparing the Barr-Walker Act with the Colorado Sex Offenders Act, which was held to deny due process in *Specht v. Patterson*, 386 U.S. 605 (1967), the superior court in reversing and remanding, reluctantly ruled that the Barr-Walker Act was similarly deficient. The significance of the *Specht* decision, as borne out in the instant case, is that sentencing under an act that provides for the study, attempted cure, and rehabilitation of sex deviates is a separate criminal proceeding at which the defendant is entitled to the full protection of the due process guarantees.

DUE PROCESS OF LAW — JUDGMENT AND SENTENCE — *People v. Bailey*, 282 N.Y.S.2d 303 (App. Div. 1967). — Defendant pleaded guilty to a charge of second-degree assault with intent to commit rape. Prior to sentencing the court received a psychiatric report, probation reports, medical reports, and other relevant information pursuant to New York statutes. On the basis of the psychiatric report and other information filed with the court, an indeterminate sentence of 1 day to life was imposed on the defendant.

After distinguishing similar Colorado and Pennsylvania statutes, the appellate court affirmed the lower court decision and held that the 1-day to life sentence did not violate due process and was valid despite the fact that the defendant was not afforded a hearing to controvert the psychiatric report. The court reasoned that the report was merely an amplification of existing sentencing procedures and not the institution of a new or independent criminal proceeding. The dissent found no material difference between the New York statute and the Colorado and Pennsylvania statutes which have been declared invalid.

FREEDOM OF SPEECH — DEPRIVATION OF PERSONAL RIGHTS — *People v. Street*, 20 N.Y.2d 231, 282 N.Y.S.2d 491 (1967). — Defendant was convicted of violating a New York statute prohibiting the public desecration of the American flag. The defendant appealed and the judgment was affirmed. The court held that the defendant's burning of the American flag as a protest against the shooting of a civil rights leader was an act of incitement

which was fraught with as much danger to public peace as if he had stood on the street corner shouting epithets at passing pedestrians. The court said the State could legitimately curb such activities in the interest of preventing violence and maintaining public order, even though defendant's acts could be considered a "nonverbal expression" and therefore a form of speech that would fall within the meaning and protection of the first and 14th amendments.

This decision is consonant with prior New York decisions holding that if the State can show that the prohibition of certain conduct is designed to promote the public health, safety, or well-being, then the fact that such prohibition has an impact on speech or expression does not render the legislation violative of the first amendment, providing, of course, that other channels of communication are open and available.

CONTRACTS

JURISDICTION — FACTS AND CIRCUMSTANCES CONFERRING JURISDICTION — *Roche v. Floral Rental Corp.*, 232 A.2d 162 (N.J. Super. Ct. 1967). — Plaintiff's decedent was killed in New Jersey when his car collided with a truck, allegedly as a result of negligence on the part of defendant J.C. Truck Equipment, Inc. in the installation and maintenance of the truck body. Defendant was a New York firm that installed truck bodies for customers from various States but all phases of its business were conducted in New York. Defendant was served in New York in accordance with N.J.R. CIV. P. 4:4 (d), which restricts New Jersey jurisdiction over foreign corporate defendants to the requirements of due process.

The court reversed the decision to set aside the service and held that, considering the convenience of the forum, the nature and extent of defendant's business, its geographic location, and the fact that defendant could forsee that the normal use of its product would almost inevitably bring it into New Jersey, the requirements of due process were met. The case makes New Jersey a leading State in extending jurisdiction over foreign corporations, even when the product is brought into the State indirectly.

PERFORMANCE OR BREACH — EXCUSES FOR NONPERFORMANCE — *Security Sewage Equipment Co. v. McFerren*, 11 Ohio App. 2d 229 (1967). — The defendants, developers of a residential subdivision, contracted to build a sewage treatment plant on their property for the plaintiff. They were soon notified by State and county officials that they would have to comply with OHIO REV. CODE § 3701.18 which requires approval by the State Department of Health of plans for any sewage plant. The defendants were unable to obtain this approval and the plaintiff sued for breach of contract. The defendants alleged impossibility of performance. The court of appeals reversed the trial court, holding that the defendants had the responsibility to obtain approval for the sewage plant, and in contracting for this duty assumed the risk of inability to obtain approval.

This case affirms the general rule that where a person enters into a contract knowing that permission of the government will be required during the course of performance, it is his duty to obtain the permit.

RESTRAINT OF TRADE OR COMPETITION IN TRADE — RESTRICTION NECESSARY FOR PROTECTION — *Shakey's Inc. v. Martin*, 430 P.2d 504 (Idaho 1967). — Appellant granted respondent a 20-year franchise to operate a

pizza parlor restaurant and to use the service mark "Shakey's," along with its designated techniques of doing business, in return for a fixed fee and a percentage of gross food sales. The franchise included a noncompetitive clause in which respondent agreed not to sell pizza products within a 30-mile radius for 1 year after the franchise terminated. Respondent subsequently sold his holding to his partners (codefendants) who continued operations under a new name. In reversing a judgment denying injunctive relief to the appellant, the court held that he had a legitimate, recognizable, and existing business property interest in the franchise that warranted protection.

The decision affirmed Idaho's previous position with regard to the protection of franchises. The court adopted the majority view in holding that restraints in noncompetitive clauses must be reasonably necessary to protect the interests of a covenantor and that franchises are a sufficient interest to be protected.

COURTS

COURTS OF APPEALS — DISCOVERY, PRODUCTION, AND EXAMINATION OF DOCUMENTS — *American Express Warehousing, Ltd. v. Transamerican Insurance Co.*, 380 F.2d 277 (2d Cir. 1967). — In this case the district court ordered appellant to turn over all nonprivileged documents in conformity with discovery procedures. Appellants claimed that investigations performed under control of counsel were privileged work-products and the district court erred in requiring production of such documents. Appellants appealed this order and asked for a writ of mandamus to decide whether work-product immunity extends to work done by agents of an attorney. The Second Circuit held that orders requiring production of documents in discovery process were not final decisions and therefore were not reviewable. It also held that writs of mandamus may not be utilized in these circumstances.

This case reaffirms the court's practice of denying interlocutory review of discovery orders. Whether work-product immunity from discovery extends to work done by agents or investigators of an attorney is left undecided and conflicts in its application remain.

NUMBER OF JUDGES NECESSARY FOR ADJUDICATION — INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTE — *Lamont v. Commissioner*, 269 F. Supp. 885 (S.D.N.Y. 1967). — Plaintiff asked for declaratory judgment, injunctive relief, and money damages. He complained that his constitutional right of privacy was violated by postal and telephone solicitations which were the result of the sale of motor vehicle registration lists by the Commissioner of Motor Vehicles to a private corporation. The sales were authorized by State law. Plaintiff moved for a three-judge panel pursuant to 28 U.S.C. §§ 2281, 2284 (1964), to consider the question. The motion was denied and the complaint dismissed by a single district judge.

The district court affirmed, stating that the plaintiff's complaint, although novel, was unsubstantial and an unwarranted extension of the right of privacy. The court also affirmed the power of a single judge to decide whether a plea for injunction against the enforcement of a State statute should be considered by a three-judge panel.

PROCEDURE — EFFECT OF REVERSAL OF PREVIOUS DECISION — *State v. Vigliano*, 232 A.2d 129 (N.J. 1967). — Based heavily upon a confession obtained by in-custody interrogation, the State obtained a first-degree murder

conviction of defendant. The first trial was held prior to the *Escobedo* decision. On appeal the defendant obtained a retrial which was held between the *Escobedo* and *Miranda* decisions. Again the defendant appealed a conviction and won another new trial to commence after the effective date of the *Miranda* decision. The appellate court was asked to determine which rule should be applied to determine the admissibility of the defendant's confession — *Miranda, Escobedo,* or the old voluntariness rule.

The United States Supreme Court's determination that the *Escobedo* and *Miranda* rules were to apply only to "cases commenced" after the dates of decision of these cases was interpreted by the New Jersey Supreme Court to mean "cases *first* commenced" and not to apply to retrials when the original trial was held prior to the effective date in question. The States are about evenly split on the point.

CRIMINAL LAW

APPEAL AND ERROR — PROCEEDING IN FORMA PAUPERIS — *State v. Smith*, 12 Ohio St. 2d 7 (1967). — In February, 1949, the petitioner, without the aid of counsel, pleaded guilty to a charge of robbery. After serving a portion of his sentence he filed a petition alleging the deprivation of his constitutional right to counsel. The State conceded that the petitioner was not represented by counsel at the time he pleaded guilty and that the record was silent as to whether he was advised of his right to counsel. The court of common pleas denied the petition without a hearing.

The Ohio Supreme Court reversed, holding that the petitioner in a post-conviction relief proceeding must have a hearing and be represented by counsel if he alleges violations of his sixth amendment rights and the record of the trial proceeding supports his allegations. However, the court further noted that when the State did not propose to present any evidence which would refute any of the allegations set forth by the petitioner, the appointment of counsel would not be necessary. In adopting this position Ohio joins a minority of States.

GAMING — SEARCHES AND SEIZURES — *Commonwealth v. Newman*, 232 A.2d 1 (Pa. Super. Ct. 1967). — Defendant appealed from a conviction on a lottery charge claiming that evidence used against him was obtained in violation of his constitutional privilege against unreasonable searches and seizures. Three detectives armed with search and arrest warrants saw the defendant in a second story window as they approached his house. When they reached the front door they banged on it, announced their presence, but after waiting 20 seconds without receiving a response, they forcibly entered.

In affirming the conviction the court held that it was not unreasonable under the circumstances that the officers failed to announce their purpose prior to the forceful entry. Citing *Ker v. California*, 374 U.S. 23 (1963), the court reasoned that even though the States are bound by the federal standard of reasonableness implicit in the fourth amendment, they are not precluded from making exceptions to the notice requirement where exigent circumstances are present. The decision is consistent with that of other States.

INDICTMENT AND INFORMATION — STATUTE OF LIMITATIONS — *Commonwealth v. Howard*, 232 A.2d 207 (Pa. Super. Ct. 1967). — In 1958 appellant signed a waiver of indictment by grand jury, a waiver of counsel,

and entered guilty pleas to four bills of indictment charging larceny and receiving stolen goods. At that time he was not represented by counsel. Appellant's petition for a writ of habeas corpus was granted in 1965 on the ground that appellant had not intelligently and understandingly waived his constitutional right to counsel in 1958. Appellant was again indicted in December 1965, and in January 1966 he was found guilty on all four indictments and sentenced.

At the 1966 trial appellant moved to quash the 1965 indictments on the ground that they were barred by the statute of limitations and he later asked for a new trial on the same ground. The court refused to quash the indictments and denied appellant's motion for a new trial. The instant case restates the law of Pennsylvania which gives a district attorney's bill of indictment, presented to the court after waiver of indictment by the grand jury, although not knowingly and intelligently made by a defendant, the effect of tolling the statute of limitations.

POST-CONVICTION RELIEF — NECESSITY FOR HEARING — *State ex rel. Roy v. Tahash*, 152 N.W.2d 301 (Minn. 1967). — Petitioner, convicted of burglary, filed a writ of habeas corpus while serving a sentence, alleging violation of his constitutional rights during trial. The trial court dismissed the petition without affording petitioner an evidentiary hearing. Petitioner appealed, charging that under recent United States Supreme Court decisions, an evidentiary hearing is necessary on all post-conviction proceedings where a deprivation of constitutional rights is alleged. The Supreme Court of Minnesota affirmed the trial court's decision, stating that the evidentiary hearing is mandatory only where there are material facts in dispute which have not been resolved in the proceedings resulting in conviction, which facts must be resolved in order to determine the issues raised on the merits. In all other cases, the holding of a hearing is in the discretion of the trial court.

In so holding, the Minnesota Supreme Court adopted the federal standard for habeas corpus proceedings and construed its recently enacted supervening post-conviction remedy statute as conforming to this federal standard.

SEARCHES AND SEIZURES — VOLUNTARY CHARACTER OF CONSENT — *Gorman v. United States*, 380 F.2d 158 (1st Cir. 1967). — Appellants were convicted of bank robbery in Rhode Island. Five weeks after the robbery, appellant Gorman was arrested in New York City on a narcotics charge. An FBI agent asked Gorman, who had been repeatedly advised of his constitutional rights, if he had any objection to having his motel room searched. Gorman replied that he had none. In searching Gorman's room, FBI agents discovered a telephone number which led them to appellant Roche and eventually culminated in appellants' conviction. On appeal, appellants contended that Gorman's consent to the search was not voluntary.

In affirming the convictions, the court of appeals repeated the established rule that when an accused is asked directly whether he objects to a search and is given adequate warning concerning his rights to remain silent and to counsel, his consent to the search is voluntary. Noteworthy was the court's rejection of the recently suggested rule that a specific warning of fourth amendment rights is necessary to validate a warrantless search.

DAMAGES

AGGRAVATION, MITIGATION, AND REDUCTION OF LOSS — REDUCTION BY INSURANCE — *Thompson v. Ohio Fuel Gas Co.*, 11 Ohio App. 2d 212, 229 N.E.2d 756 (1967). — In an action for damages for personal injury, the lower court refused to allow appellant to introduce in evidence bills for medical services which were paid by the Industrial Commission in connection with an award under the Ohio Workmen's Compensation Act, thus preventing appellant from recovering the reasonable value of those services. The exclusion was based on the theory that the direct payment of the medical bills by the commission, and the fact that appellant paid nothing for the insurance, rendered the services a gratuity. Therefore they should not be included in damages.

In reversing, the appellate court found that payments for medical services are an obligation of the patient, whether or not they are paid directly by the commission. Also, the court reaffirmed the rule that, in Ohio, workmen's compensation awards fall within the collateral doctrine, and cannot be used by a defendant to reduce damages. In this view of workmen's compensation, Ohio stands with the great majority of the States.

DECLARATORY JUDGMENT

STATUS AND LEGAL RELATIONS — LEGITIMACY AND PARENTAGE — *Baston v. Sears*, 11 Ohio App. 2d 220, 229 N.E.2d 847 (1967). — Pursuant to OHIO REV. CODE § 2721.02, appellant sought a declaratory judgment establishing his status as appellee's minor son. The petition alleging bastardy, his mother's subsequent marriage to a man other than appellee, and an inadequate legal remedy to establish the relationship, was dismissed upon demurrer. On appeal it was held that a child born out of wedlock may bring a declaratory judgment action to declare his status as a son of the man alleged to be his father and thereby secure an order for his support and maintenance.

Noting first that the marriage of appellant's mother barred an action in bastardy and second that it might be appellant's desire to avoid subjecting his reputed father to the punishment which could attend criminal proceedings, the court established a third right of action whereby parenthood of an illegitimate child might be determined. The position of the court prevails in a majority of jurisdictions.

DIVORCE

CUSTODY AND SUPPORT OF CHILDREN — ON DISMISSAL OF ACTION OR DENIAL OF DIVORCE — *Holderle v. Holderle*, 11 Ohio App. 2d 148, 229 N.E.2d 79 (1967). — The order of the trial court in a divorce action included the denial of a divorce to either of the parties and a provision for the custody and support of the minor children. The court of appeals reversed, holding that when a trial court denies a divorce without dismissing either the petition or the cross-petition, the court lacks jurisdiction to award custody. The court reasoned that OHIO REV. CODE §§ 3109.03, 3109.04 could not be invoked after a denial of divorce, unless a separate action was commenced, because the parties are still married and have equal rights to the children.

The result places Ohio in a minority position and restricts judges from applying the seemingly incidental relief of custody in divorce cases merely because the facts do not justify an outright divorce.

HABEAS CORPUS

DISMISSAL — HEARING ON WRIT AND RETURN — *Wilson v. Anderson*, 379 F.2d 330 (9th Cir. 1967). — Appellee was convicted of forgery in the California Superior Court. There, the trial judge instructed the jury that it could consider the prosecutor's comments concerning appellee's failure to testify. Recognizing the instruction as erroneous, the California District Court on appeal held that the error was harmless and affirmed the judgment. The United States district court set aside appellee's conviction on the grounds that it violated the rule in *Griffin v. California*, 380 U.S. 609 (1965).

In a reversal, the United States court of appeals narrowed the rule in *Griffin* by basing its decision on *Chapman v. California*, 386 U.S. 18 (1967). As stated in *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The court went so far as to state that if the error had not been committed, appellee would still have been found guilty. The dissenting opinion urged that the error was not harmless beyond a reasonable doubt.

INSURANCE

APPLICATION — EFFECT OF DELAY — *Rasmussen v. Prudential Life Insurance Co.*, 152 N.W.2d 359 (Minn. 1967). — Plaintiff's decedent applied for a life insurance policy with the defendant through a local agent. Although part of the premium was paid at that time, it was understood by the parties that the policy would not become effective until approved by the home office, and that this procedure usually took about 30 days. About a month later the home office notified the agent that the application had been rejected and proposed another policy. Ten or eleven days later the agent went to the home of the deceased to tell him of the rejection and to present the alternative proposal, but there learned of the applicant's death that same morning. Plaintiff brought a negligence action for damages. The Minnesota Supreme Court held that there was not a cause of action *ex delicto* in favor of the applicant against the insurer for the failure of the agent to promptly notify the applicant of the rejection of its application and to submit the counterproposal authorized by the home office.

The court said that to hold otherwise would be to engage in judicial legislation. Since there was no legal duty on the part of the insurance company to accept or reject an application for insurance or to submit a counterproposal, there could be no tort liability for the negligent delay. Hence, the court rejected what appears to be the emerging doctrine that an insurance company ought to be held to a higher standard than those who engage in other types of commercial transactions because of the public character of insurance.

LABOR

STRIKEBREAKING — DUTY TO BARGAIN COLLECTIVELY — *Building Service & Maintenance Union Local 47 v. St. Luke's Hospital*, 11 Ohio Misc. 218, 227 N.E.2d 265 (C.P. 1967). — Plaintiff sought an injunction against defendant hospital for breach of a Cleveland ordinance against strikebreaking and to force the hospital to bargain collectively with the plaintiff. The injunction was denied because the plaintiff failed to prove the intent neces-

sary to constitute a violation of the ordinance and, at common law, strike-breaking gives no rise to a cause of action on behalf of the striker replaced. The court also held that the hospital could not be forced to bargain collectively because nonprofit hospitals are not affected by federal law and under the common law the employer has no duty to bargain collectively with his employees.

In noting that nonprofit hospitals are not affected by federal law and that Ohio has no statute dealing with mandatory collective bargaining, the court did not wish to extend, but rather to merely reaffirm the Ohio common law. In dicta the court stated that it is the problem of the legislature to find a solution and not the courts.

LANDLORD AND TENANT

RIGHT OF ACTION AND DEFENSES — EXISTENCE OF RELATION OF LANDLORD AND TENANT — *Davis v. Boyajian, Inc.*, 11 Ohio Misc. 97, 229 N.E. 2d 116 (C.P. 1967). — The defendant-lessees were in exclusive possession of premises since the execution and recording of their lease, which was subsequent to the plaintiff's mortgage from defendant's landlord. Thereafter the mortgage was foreclosed and the lessees were not made parties to the action. The plaintiff-mortgagee purchased the land at the judicial sale and obtained a judgment for forcible entry and detainer against the lessees in municipal court.

In reversing the lower court's decision, the common pleas court ruled that because the lessees were not joined in the foreclosure action, their lease was not terminated in that action. The decision of the court is in line with the law in all heavily populated States where the question has been litigated. The court also ruled that the lower court erred in exercising jurisdiction because title to the premises was drawn into question.

LIBEL AND SLANDER

PRIVILEGED COMMUNICATIONS AND MALICE THEREIN — REPORTS OF JUDICIAL PROCEEDINGS — *American District Telegraph Co. v. Brink's, Inc.*, 380 F.2d 131 (7th Cir. 1967). — In a separate law suit Brink's, Inc. had charged American District Telegraph Co. (ADT) with fraudulent misrepresentations. Before any judicial determination in this case was made, Brink's prepared a press release and distributed it to various newspapers and news services who then published that the suit had been filed along with some of the allegations made by Brink's. ADT sued Brink's for libel. The district court of Illinois sustained Brink's motion for summary judgment.

In affirming the district court's decision, the circuit court held that Illinois law provided adequate authority for the privilege of the press to publish pleadings before a judicial determination to constitute a defense in the instant case. In a majority of States there is no privilege to publish pleadings before a judicial determination. This latter view prevents the initiation of untenable law suits for the purpose of effecting defamatory harm on the defendant before dismissal of the action.

LIMITATION OF ACTIONS

MALPRACTICE — DISCOVERY RULE — *Owens v. White*, 380 F.2d 310 (9th Cir. 1967). — Based upon the appellee-physician's diagnosis of a lump on appellant's breast as a malignant cancerous growth, appellant underwent a

radical mastectomy and radiation treatments. Four years after her last contact with appellee and after she had moved from Idaho to California, appellant was advised that she had never been afflicted with cancer. Idaho's discovery rule in "foreign object" cases is that an action for malpractice accrues when the patient knows or should know of the alleged malpractice. Contrary to a prevailing tendency to allow an aggrieved party his day in court, the district court concluded that in tempering the discovery rule with equitable considerations an Idaho court would not toll the 2-year statute of limitations in cases of alleged misdiagnosis. On appeal, *held*, affirmed.

The dissent, concededly upon the premise that the discovery doctrine concerns itself with the point in time at which an action accrues and not with problems of proof, could find no basis for distinguishing cases involving alleged misdiagnosis from those in which a foreign object is negligently left in the patient's body.

MECHANICS' LIENS

ENFORCEMENT — PERSONAL LIABILITY ON FAILURE TO ESTABLISH LIEN — *McDonald v. Filice*, 60 Cal. Rptr. 832 (Ct. App. 1967). — Plaintiff performed architectural services for the defendant. This employment agreement was terminated by mutual consent before any improvements were constructed on defendant's land but after plaintiff had drawn both preliminary and working plans. The appellate court reversed the trial court in part holding that no mechanic's lien attached to the land since no improvements were made thereon, and affirmed in part saying that "[o]nce a court acquires jurisdiction in a suit to enforce a mechanic's lien it has jurisdiction to render a personal judgment for the amount claimed against any party liable therefore, even if the right to a lien is denied."

Most courts adhere to the rule announced in the instant case where the plaintiff in his pleading asks for both a personal judgment and foreclosure of a mechanic's lien. Yet this court takes a more liberal stand and states that even where a plaintiff does not include a demand for a personal judgment in an action to foreclose a mechanic's lien, such an exclusion does not preclude or dissolve the defendant's personal liability to plaintiff for services rendered.

MUNICIPAL CORPORATIONS

SUSPENSION AND REMOVAL OF POLICEMEN — GROUNDS FOR REMOVAL — *Gardner v. Broderick*, 282 N.Y.S.2d 487 (1967). — Appellant, a New York City policeman, was dismissed from his position when he refused to waive his constitutional privilege against self-incrimination and to answer questions concerning the conduct of his office. The lower court dismissed the petition for an order to reinstate appellant to his position. The court of appeals affirmed, reasoning that since appellant had refused to waive and had refused to testify, his conduct constituted employee insubordination, and the city charter provision authorizing his dismissal was proper.

Distinguishing the case from *Garrity v. New Jersey*, 385 U.S. 493 (1967), the court reasoned that if the appellant had executed the waiver and had testified as to his misconduct, his testimony, although inadmissible in a criminal prosecution, would have justified his dismissal from the police force. The decision reaffirms the majority position which is increasingly coming under attack.

TORTS — ACTS OR OMISSIONS OF OFFICERS OR AGENTS — *Hall v. Youngstown*, 11 Ohio App. 2d 195, 229 N.E.2d 660 (1967). — The city fire department answered a fire call at the home of the plaintiff. When the hydrant across the street did not operate, and until hoses could be connected to another hydrant, water from tanks was sprayed on the fire. The plaintiff's son perished in the fire. The city alleged it was not liable because it was acting in a governmental, nonproprietary capacity. The common pleas court agreed. Reversing the lower court, the appellate court held that the city would be liable in tort, if proximate cause were shown, because the city, through its water department, was acting in a proprietary capacity.

The case is one of first impression in Ohio. The majority of jurisdictions hold a municipality liable in tort when it acts in a proprietary capacity, but not when it acts in a governmental capacity. When the issue is in dispute, the trend has been to hold the city liable.

OFFICERS

RESTRICTIONS ON CIVIL SERVICE LAWS OR RULES — TRANSFER AND PROMOTION — *State ex rel. Marshall v. Civil Service Commission*, 228 N.E.2d 913 (Ohio Ct. App. 1967). — Plaintiff, who had 18 years of service as a fireman and about 5-months service as assistant fire chief, was denied approval of his application to take a promotional civil service examination to attain the rating of fire chief. Approval was denied by the Civil Service Commission personnel director on the ground that plaintiff did not possess the qualification of 6 months as assistant fire chief. The court of appeals reversed the trial court's dismissal of the complaint, holding that the Civil Service Commission rule giving the personnel director discretion to reject an application for any "just and reasonable cause" was invalid because unreasonable, arbitrary, and discriminatory.

Reasoning that the city charter grants such power only to the Civil Service Commission officers and not to the personnel director, the decision further advances the effort to define the scope of powers in administrative law.

SALES

WARRANTIES — EXCLUSION BY EXPRESS WARRANTY — *Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967). — Plaintiff, the purchaser of a new Lincoln Continental, claimed that the vehicle failed to operate properly, and gave him no useful service despite many attempts at repair by the dealer. Plaintiff alleged that he relied upon the representations and warranties in the various advertising media that the car was of excellent workmanship and suitable for use as a motor vehicle. The defendant-manufacturer made certain warranties of workmanship and freedom from defects to the dealer, but expressly stated that these warranties were in lieu of any implied warranties of merchantability or fitness. The contract between manufacturer and dealer specifically denied authority to the dealer to bind the manufacturer and disclaimed liability to the ultimate consumer.

The Supreme Court of Florida held unanimously that neither lack of privity between the manufacturer and the ultimate purchaser nor a written warranty between manufacturer and dealer specifically disclaiming implied warranties would preclude recovery here. This decision supports the rapidly growing tendency in the United States that under proper circumstances, such as a purchaser's reliance on advertisements, the ultimate purchaser may recover from the remote vendor.

TAXATION

LEVY AND APPORTIONMENT — DETERMINATION OF RATE OF TAXATION — *Cambridge City School District v. Guernsey County Budget Commission*, 11 Ohio App. 2d 77, 228 N.E.2d 874 (1967). — Appellant complains of reduction of its minimum levy from 4.4 to 4.0 mills as a result of the partial annexation of another school system. The court held that under OHIO REV. CODE § 5705.3(D) the minimum levy prescribed by law for appellants was 4.4 mills and could not be reduced by the Budget Commission or the Board of Tax Appeals. The majority found this statute clear and unambiguous needing no construction or interpretation of its legislative intent.

The dissenting opinion, on the other hand, could find no statutory provision governing a combining of territories with different mandatory minimum levies. The dissent claimed that legislative intent dictated that the levy be somewhere between 4.0 and 4.4 at the discretion of the commission and board. The majority held to a literal and strict interpretation of the statutes, while the minority took a more liberal and flexible approach.

WILLS

ELECTION BY SURVIVING SPOUSE — ELECTION BY COURT FOR INCOMPETENT SPOUSE — *In re Estate of Stranch*, 11 Ohio App. 2d 173, 229 N.E.2d 95 (1967). — Testator died leaving 10 percent of an $88,205 net estate to his surviving spouse in his will. By statute in Ohio the surviving spouse is entitled to 50 percent of the net estate or may take under the provisions of the will, but an election must be made. Because the surviving spouse had been adjudged incompetent and unable to make a valid election, the probate court was required to make the election for her. Taking into account the spouse's age, her own personal estate of $153,000, the tax circumstances, and the provisions of the mutual wills, the probate court held that it was better for the spouse to take under the will. Legatees appealed claiming that the election was an abuse of discretion.

The court of appeals, in reversing, stated that the probate court when making an election for an incompetent spouse is bound to the statutory criteria and must choose the provision that is "better for" the surviving spouse. The court held that the larger sum was the "obvious" choice. This position is contrary to the enlightened approach of an increasing number of courts which goes beyond strict monetary considerations in determining what is "better for" the surviving spouse.

WORKMEN'S COMPENSATION

ACTION AGAINST PHYSICIAN OR SURGEON FOR MALPRACTICE — RIGHTS OF EMPLOYEE OR HIS DEPENDENTS — *Jones v. Bouza*, 152 N.W.2d 393 (Mich. Ct. App. 1967). — Plaintiff sustained a back injury while doing manual labor as an employee of the Ford Motor Company. He alleged that the injury was aggravated by negligent treatment he received from the staff physician, a full-time, salaried employee of the company. Although plaintiff had been receiving workmen's compensation benefits from the date of the injury, he claimed that a suit against the physician was not barred by the provisions of the workmen's compensation act. The statute confers immunity from suit by an employee on natural persons in the same employ. The Michigan Court of Appeals upheld the trial court's dismissal of the action, reasoning that the statute intended to confer this immunity on all

persons carrying on activities of the employer, regardless of their nature. The court further held that the inclusion of full-time staff physicians, but not other physicians recommended by an employer, did not violate the equal protection clauses of the Michigan and United States Constitutions.

Although decisions in other jurisdictions seem not to be in accord, it must be noted that State workmen's compensation laws vary considerably, and in most cases, the physician involved was not an exclusive employee of the company.