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Cases Noted

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ADOPTION

CONSENT OF PARTIES — *Williams v. Pope*, 203 So. 2d 271 (Ala. 1967). — Appellee separated from her husband, gave birth to her seventh child, and 2 days after the birth executed a written consent for the adoption of her baby. A petition for adoption was filed by appellant and was granted. Two weeks later appellee filed a petition to have her consent declared null and void, alleging that she would not have signed the consent had she not been under emotional strain. A decree was entered dismissing the adoption petition on the ground that the written consent of the child's mother was withdrawn. The prospective parents appealed.

The Supreme Court of Alabama held that the consent could not be revoked except for legal cause. The fact that the separated mother was emotionally upset when she consented to the adoption of her child provided no legal cause to justify the attempted revocation.

AUTOMOBILES

UNATTENDED VEHICLES — NEGLIGENCE OF OWNER — *Sailor v. Ohlde*, 430 P.2d 591 (Wash. 1967). — Plaintiff, owner of a service station, brought an action for damages against the owner of a pickup truck which was stolen by a 9-year-old boy who crashed the truck into the service station. Defendant had parked the truck on private property, left the doors unlocked, and the keys in the ignition switch. The lower court directed a verdict for defendant.

Affirming, the Washington Supreme Court adopted the majority position of no liability where the owner parks the vehicle *off the street.* The court offered no opinion regarding the possible application of a statute or ordinance requiring that an automobile left unattended be locked and that the key be removed, since there was no such statute in existence at the time of the accident.

BANKRUPTCY

REORGANIZATION — NOTICE TO CREDITORS — *In re Harbor Tank Storage Co.*, 385 F.2d 111 (3d Cir. 1967). — Petitioner, a creditor of an oil storage company which was reorganized pursuant to the Bankruptcy Act, 11 U.S.C. §§ 501-676 (1964), appealed from a federal district court order denying its claim as a general creditor. The Act required that notice of reorganization proceedings be given to creditors and interested parties. Aware that appellant had actual notice of the proceedings, the trustee of the debtor failed to give the statutory notice to appellant. Reversing the lower court order, a United States court of appeals remanded the case to the district court with instructions to allow appellant to file its claim.

The court applied the rule set down in *City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293 (1953), which held that creditors having actual knowledge of reorganization proceedings enjoy an absolute right to assume that reasonable notice will be given before their claims are to be forever barred. Despite the fact that *City of New York* was decided under a different section of the Bankruptcy Act, the case was

controlling because it involved the identical issue concerning notice to creditors.

CIVIL PROCEDURE

CAUSES OF ACTION — SUMMARY JUDGMENT — *Marsden v. Patane*, 380 F.2d 489 (5th Cir. 1967). — The facts in this case were undisputed. The appellant failed to observe a stop sign, struck the automobile in which the appellee's minor daughter was riding, and the girl died from injuries suffered in the accident. There was no evidence of contributory negligence, and the appellant could only offer as evidence circumstances that indicated that she may not have known that the stop sign was there. In a wrongful death action instituted by appellee for appellant's negligence in causing the accident, the federal district court granted summary judgment for the appellee on the issue of liability.

In affirming the summary judgment, the Court of Appeals for the Fifth Circuit determined that the decision was proper under FEDERAL RULE OF CIVIL PROCEDURE 56(3). The case is unusual because issues of negligence are not generally susceptible to summary adjudication. In labeling this case a classic exception to the rule, the court found undisputed and unrebutted evidence of negligence and proximate cause which as a matter of law could not admit to any other reasonable interpretation.

CIVIL RIGHTS

ACTIONS FOR DAMAGES — PUBLIC OFFICIAL ACTING UNDER COLOR OF LAW — *Delatte v. Genovese*, 273 F. Supp. 654 (E.D. La. 1967). — Plaintiff brought an action for damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964), against the coroner of Tangipahoa Parish, Louisiana. Plaintiff alleged the defendant had falsely signed a mental commitment certificate pursuant to which plaintiff was confined in a State hospital. A United States district court denied the defendant's motion for summary judgment, holding that the coroner, who allegedly certified that he had observed and examined the plaintiff as required by State law when he had not actually done so, acted under "color of law," and was not entitled to judicial immunity.

The decision affirms the view that a public official misusing power granted by State law acts under "color of law" and is liable for his excesses, and that a coroner acting in an administrative capacity cannot assert judicial immunity as a defense.

CONSTITUTIONAL LAW

DUE PROCESS OF LAW — ASSOCIATION'S RIGHT TO EMPLOY ATTORNEY FOR MEMBERS— *UMW District 12 v. Illinois State Bar Association*, 88 S. Ct. 353 (1967). — On a claim that the union was engaging in the unauthorized practice of law, a lower court in Illinois issued a permanent injunction to prevent the union from paying a straight salary to an attorney who handled the workmen's compensation claims of the union members. The State supreme court, in rejecting the constitutional claims of the union, upheld the decree of injunction. Under the union plan all injured workers were advised to file a report with the union's legal department, and the union secretaries were to prepare and file a claim with the State Industrial Commission. The attorney would handle the claim solely on information

obtained from these filings; and his remuneration for such services was in no way dependent upon the outcome of any claim.

In reversing the decision, the United States Supreme Court held that the freedoms of speech, assembly, and petition guaranteed by the first and 14th amendments gave the petitioner union the right to hire attorneys on a salary basis. A strong dissent enumerated the possible dangers to the interests of both the client and the legal profession inherent in such a union plan and asserted that the States have a legitimate right to regulate this type of legal practice.

EQUAL PROTECTION OF THE LAWS — CLASSIFICATION OF WELFARE RECIPIENTS — *Williams v. Shapiro*, 234 A.2d 376 (Conn. Cir. Ct. 1967). — Benefits under the aid to dependent children (ADC) program were discontinued by the Welfare Commissioner when it was discovered that plaintiff's husband and children had life insurance policies with an aggregate cash surrender value in excess of $250, the statutory limit for such holdings by ADC recipients. Plaintiff appealed to a Connecticut circuit court contending that since the $250 limitation on the cash surrender value of insurance held by ADC beneficiaries was substantially less than the maximum allowed under other welfare programs, the limitation denied her equal protection of the laws in violation of the 14th amendment. Plaintiff also argued that the $250 limitation was so low as to deprive her of property without due process of law.

The circuit court upheld the constitutionality of the $250 limitation, observing that since the State is not constitutionally obligated to support the poor, welfare recipients acquire no vested property rights in welfare assistance and therefore the 14th amendment does not limit the State's power to classify welfare recipients where such classification reflects a rational plan for the distribution of benefits. The decision is in accord with the prevailing view which allows the States great discretion in the classification and regulation of welfare recipients.

FREEDOM OF RELIGION — NAMES — *Application of Green*, 283 N.Y.S.2d 242 (N.Y. City Civ. Ct. 1967). — A convert to the Islamic faith petitioned to have his name legally changed from Earl Green to Merwon Abdul Salaam. The New York City Civil Court denied the application, holding that the constitutional right to freedom of religion bears no reasonable relationship to a change of name.

Summarily rejecting petitioner's contention that confusion would result if he were known by two different names, the court emphasized that Green is an "honored name," and "strange and foreign adaptions" would despoil the "blood spilled by the great American patriots" named Green. The court concluded that "This birthright should not conceal itself behind such an alien shield." Since the court was preoccupied with the war glories of the name Green, it logically gave little weight to the fact that the English derivative of the name Salaam is "peace." The legal community might be surprised to discover an incipient judicial trend that American citizens should have only "American" names.

FREEDOM OF SPEECH — COLLEGES AND UNIVERSITIES — *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967). — Plaintiff, a student newspaper editor, was expelled from Troy State College for "willful and deliberate insubordination" in refusing to print an editorial furnished by a faculty adviser to replace an editorial critical of State legislators who had chastised the University of Alabama president for sup-

porting academic freedom. The basis for the denial of the right to publish was a college rule that no editorials critical of the Governor or legislature could be published in a State-supported student newspaper.

A United States district court ordered plaintiff's immediate reinstatement, holding that the first and 14th amendments were violated by the restraint on editorials because school discipline was not materially and substantially affected. The court said greater damage to college students would result from intellectual restraints than from possible discipline difficulties caused by readmission. In recognizing the importance of academic freedom, the court continued the trend established by the United States Supreme Court that the government should be extremely reticent to invade the individual liberty of free speech. (*See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

PERSONAL, CIVIL, AND POLITICAL RIGHTS — RELIGIOUS LIBERTY AND FREEDOM OF CONSCIENCE — *Community Council v. Jordan*, 432 P.2d 460 (Ariz. 1967). — The Arizona Department of Welfare entered into a contract with petitioner — a nonprofit corporation organized for the purpose of centralizing the distribution of charitable funds in Arizona. The contract provided that petitioner would be reimbursed by the State for 40 percent of the funds that petitioner distributed in emergency situations. Petitioner designated the Salvation Army as a referral center for the ultimate distribution of emergency relief funds to needy recipients. The respondent State auditor refused to reimburse the petitioner on the ground that payment would be in conflict with provisions of the State constitution which prohibited the use of public funds for religious purposes. Upon respondent's refusal, petitioner sought a writ of mandamus compelling reimbursement.

In ordering the issuance of the writ, the Supreme Court of Arizona carefully noted that no monetary benefit would be conferred upon the Salvation Army and that the amount to be reimbursed was approximately what the State would have otherwise directly distributed to emergency victims. Thus, Arizona has joined the growing number of jurisdictions which permit the distribution of public funds through denominational or sectarian institutions under carefully controlled circumstances.

PERSONAL, CIVIL, AND POLITICAL RIGHTS — STATE AID TO NONPUBLIC SCHOOLS — *Opinion of the Justices*, 233 A.2d 832 (N.H. 1967). — The Governor of New Hampshire sought the opinion of the New Hampshire Supreme Court as to the constitutionality of a State statute providing for the distribution of public funds to nonpublic as well as to public schools. The majority found the statute violative of the first amendment because the statutory scheme would have provided direct support for such religiously oriented schools.

Although the United States Supreme Court has tolerated similar statutes on the "aid to the pupil" theory — for example, transportation at public expense of parochial students on the basis that the aid is extended to their parents and not to their schools — nevertheless, this decision appears to be comfortably within the lines prescribed by the Supreme Court.

STATES — LEGISLATIVE DISTRICTS AND APPORTIONMENT — *Opinion of the Justices*, 230 N.E.2d 801 (Mass. 1967). — The Senate of the State of Massachusetts submitted a proposed reapportionment bill to the Massachusetts Supreme Judicial Court for evaluation. The new bill provided for distribution of 238 of the 240 representative seats on a strict population basis. The remaining two seats were to be given to the two Massachusetts

island counties regardless of population. This bill was examined by the justices in view of the 21st article of the Massachusetts constitution which provides for apportionment on the basis of legal voter population in the districts.

The justices held that in view of *Reynolds v. Sims*, 377 U.S. 533 (1964), nothing other than strict population reapportionment would be proper. The court felt that article 21 of the State constitution was unconstitutional and that the bill and all subsequent apportionment legislation should be patterned after the "one man — one vote" concept.

CORPORATIONS

INCORPORATION AND ORGANIZATION — DISREGARDING THE CORPORATE ENTITY — *Zubik v. Zubik*, 384 F.2d 267 (3d Cir. 1967). — Tort claimants in an admiralty action asked the Third Circuit Court of Appeals to disregard the corporate entity of a close corporation and find its president personally liable for a corporate employee's negligence. The president's and corporation's assets were, to some extent, intermingled. The corporation omitted certain formalities, such as failing to call annual shareholder meetings. The court refused to disregard the corporate entity, even though the corporation had not conformed to these requirements, because the claimants were unable to prove that the corporation had fraudulently or unjustly induced them to rely on the business' corporate form.

The court, with incisive and persuasive reasoning, has continued the prevailing rule that owners of small, informally operated corporations should be protected from unlimited tort liability.

TRANSFER OF SHARES — RIGHTS AND REMEDIES OF PLEDGEES — *Rosenthal & Rosenthal, Inc. v. Wolfe*, 283 N.Y.S.2d 315 (N.Y. City Civ. Ct. 1967). — Defendant pledged, assigned, and transferred 46 shares of American Telephone and Telegraph Co. stock to the plaintiff as collateral security for a loan. In 1964 this stock split in the ratio of two for one. After the plaintiff requested the new issue of 46 shares from the defendant, and his request was denied, he sued the defendant for damages. The New York City Civil Court held that the defendant's actions amounted to a wrongful conversion and that the plaintiff could sue for damages. The pledgee had a lien on the stock and when the defendant refused to give up the stock acquired by the split, he became a convertor.

COUNTIES

MUNICIPAL CORPORATIONS — IMPROVEMENTS BEYOND MUNICIPAL LIMITS — *McDonald v. City of Columbus*, 12 Ohio App. 2d 150, 231 N.E. 2d 319 (1967). — The city of Columbus began construction of a trailer camp within one of its parks. The property was located outside of the city limits, but within Franklin County. Relying on a county zoning ordinance and the fact that the park was not within the municipal limits, plaintiff sought to restrain the city. The trial court denied plaintiff's complaint and an Ohio court of appeals affirmed.

Counties derive whatever power they have from the legislature. Municipal corporations, however, are authorized by the State constitution to exercise all powers of local self-government. The providing of parks is such a power. The court held that the exercise of local self-government is not limited to the geographical boundaries of the municipal corporation. Since

the park was owned and controlled by the city in the exercise of a constitutionally derived power, the county ordinance was superseded and inapplicable to the property in question.

COURTS

CONCURRENT AND CONFLICTING JURISDICTION — EXCLUSIVE OR CONCURRENT JURISDICTION — *Lucas County Commissioners v. Lucas County Budget Committee*, 12 Ohio St. 2d 47, 231 N.E.2d 472 (1967). — Appellant filed an appeal from an order of the Board of Tax Appeals in the Supreme Court of Ohio 1 day after other parties to the order of the Board had filed an appeal in the court of appeals. OHIO REV. CODE § 5717.04 states that appeal from an order of the Board of Tax Appeals can be made in either the supreme court or the court of appeals and that the court in which notice of appeal is first filed shall have exclusive jurisdiction. The appellee moved for dismissal on the grounds of lack of jurisdiction.

The Ohio Supreme Court held that the Ohio statute was merely a codification of the rule that where there are two courts of concurrent jurisdiction, the court in which jurisdiction is first invoked obtains exclusive jurisdiction. The instant decision merely extends this rule of concurrent jurisdiction to cases involving tax appeals.

JURISDICTION OF THE PERSON — ACTIONS BY OR AGAINST NONRESIDENTS — *Poindexter v. Willis*, 231 N.E.2d 1 (Ill. Ct. App. 1967). — Defendant, an Ohio resident, fathered plaintiff's illegitimate child while defendant was attending college in Illinois. Upon learning that she was pregnant, plaintiff, an Illinois resident, requested that defendant provide support and maintenance for the child. Defendant refused and subsequently returned to Ohio. Plaintiff then brought an action pursuant to the Illinois paternity statute. Jurisdiction was based on defendant's alleged "commission of a tortious act" in Illinois. After being served in Ohio, defendant objected to the court's jurisdiction on the grounds that he was an Ohio resident and that he had not committed a "tortious act" within the meaning of the Illinois jurisdictional statute.

In denying defendant's motion for a dismissal, an Illinois appellate court reasoned that "tortious acts" are not limited to those acts that might technically be categorized as torts, but include any act which entails a breach of a duty to another with a concomitant liability in damages. The defendant's refusal to support and maintain the child was a breach of a duty imposed upon defendant by the paternity statute and was thus a "tortious act." In so holding the appellate court broadened the class of acts which will confer extraterritorial jurisdiction over nonresidents.

RULES OF COURT AND CONDUCT OF BUSINESS — CONSTITUTIONAL AND STATUTORY PROVISIONS — *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E. 2d 64 (1967). — An action was instituted against appellant in the Common Pleas Court of Butler County, Ohio, to recover damages for injuries received in an automobile accident. Pretrial proceedings began on November 8, 1965, and trial date was set for November 18, 1965. Request for a jury trial was first made on November 18 and this was denied in light of the Butler County Common Pleas Court Rule 22 which provides that in all civil cases a request for jury must be made not later than 3 days before the trial date. Verdict was rendered for the plaintiff and was affirmed by the court of appeals. Defendant appealed.

The Ohio Supreme Court in affirming the decision held that courts have an inherent power to establish procedural rules if they are reasonable and do not conflict with any statute. A rule requiring a demand for jury trial is procedural and does not deny a party his right to a jury trial under the Ohio constitution. Although OHIO REV. CODE § 2315.20 provides that jury trial may be waived only by consent of the parties involved in the trial, there is no language that prohibits the courts from making their own rules concerning waiver of jury trials.

CRIMINAL LAW

EVIDENCE — VOLUNTARY CHARACTER OF STATEMENT — *Schaumberg v. State*, 432 P.2d 500 (Nev. 1967). — Appellant, a slot machine repairman for a casino, adjusted a machine to produce a jackpot for his brother-in-law. The two were observed by a pit boss and taken to two separate rooms. Schaumberg admitted rigging the machine to the casino manager, and this evidence was admitted at his trial. The Supreme Court of Nevada upheld appellant's conviction stating that *Miranda* and *Escobedo* were meant to apply only when suspects are being interrogated by officers of the law or their agents, and there was no proof offered by appellant to suggest that his detention or statement was accomplished by threat, compulsion, or force.

The court suggested that even though NEV. REV. STAT. § 199.460 (1958) makes inadmissible those confessions obtained by force or compulsion *when under arrest*, it would be willing to rule inadmissible those involuntary confessions made to private individuals before arrest if proved that the detainment and statements were accomplished through fear, compulsion, or force. Nevada would then join New York and California in this respect.

DEATH

ACTIONS FOR CAUSING DEATH — VIABLE INFANT'S RIGHT OF ACTION — *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex. 1967). — The parents of an infant who died 2 days after birth brought a wrongful death action against the defendant, asserting that the negligence of its truck-driver in causing a collision with the parents' automobile resulted in prenatal injuries to the viable infant that were responsible for the death. At the time of the collision the mother was 7 months pregnant. Both the trial court and the appellate court dismissed this cause of action, although the latter court upheld a finding of liability for property damage to the automobile and injury to the parents. The parents appealed to the State supreme court.

Under the Texas wrongful death statutes, a right of action exists only where the injured party could have maintained an action for damages had death not ensued. Early decisions interpreted this statutory mandate to mean that an infant viable at the time of a negligent action inflicting injuries, and subsequently born alive, could not have maintained such a suit. In overruling this precedent and granting the parents a right of action, the Supreme Court of Texas held that a cause of action does vest in a viable infant for prenatal injuries. The court, in reaching its decision, accorded much weight to the fact that at the time of this suit Texas was one of but three States that refused to grant relief for prenatal injuries.

ACTION FOR CAUSING DEATH — WHAT LAW GOVERNS — *Reich v. Purcell*, 63 Cal. Rptr. 31 (1967). — In an action for wrongful death arising from an automobile accident in Missouri a dispute arose over which State's law would govern the damage issue. The plaintiffs at the time of the accident were residents of Ohio, but later moved to California. The estate was being administered in Ohio. The lower court held that Missouri law would control, and thereby followed the rule that the law of the place where the tort occurred controls.

The California Supreme Court, in overruling earlier cases, held that Ohio law should apply. The court, considering all foreign and domestic interests involved, found Missouri law inapplicable because neither party was a resident of that State and because Missouri law was designed to limit only the damages of its own residents. The court found that Ohio's interest in allowing full recovery to injured parties was not in conflict with Missouri's interests. The decision is compatible with the developing trend in conflict of laws that emphasizes a more refined analysis of the interests of the respective States involved in transactions from which legal consequences flow.

DIVORCE

FOREIGN DIVORCES — MODIFICATION OF FOREIGN DECREES — *Schoenbrod v. Siegler*, 283 N.Y.S.2d 881 (1967). — Plaintiff, attempting to avoid the consequences of a separation agreement entered into with his wife prior to their Mexican divorce, sought a declaratory judgment that their marriage was invalid because it was performed by an unauthorized official. The wife moved to dismiss, asserting that litigation of the marriage's validity was barred by the Mexican divorce decree. The New York Court of Appeals denied defendant's motion, and held that because the Mexican jurisdiction permitted a collateral attack of the separation agreement incorporated into the divorce decree, the decree likewise could be attacked in the New York courts and the issue of the marriage validity raised.

The New York view is in accord with the generally accepted position that a foreign decree may be modified if it can be attacked through a separate proceeding in the court originally granting the divorce.

EMINENT DOMAIN

NATURE, EXTENT, AND DELEGATION OF POWER — ACTS CONSTITUTING APPROPRIATION OF PROPERTY — *In re Altshuler*, 12 Ohio App. 2d 169, 231 N.E.2d 476 (1967). — A landowner's property was taken by the State for highway purposes, and was notified that he must vacate within 60 days which he did. Subsequently, after the 60-day period but before the valuation trial, a third party, without authority from the State or the landowner, demolished a structure on the premises. In an appeal from the valuation trial, an Ohio court of appeals rejected the State's contention that the date for assessment should be the date of trial and not of the owner's vacation.

The court, following the policy analysis of the United States and the Ohio Supreme Courts, reasoned that compensation should be based on the value at the time of taking, and that "taking" should be defined broadly enough to mean such interference with the owner's possessory rights that he can no longer quietly enjoy use of his property.

FOOD

LIABILITIES FOR INJURIES — RESTAURANTS — *Zabner v. Howard John-*

sons', Inc., 201 So. 2d 824 (Fla. Ct. App. 1967). — Plaintiff injured her teeth on a walnut shell while eating walnut ice cream at the defendant's restaurant. The trial court in granting a summary judgment for the defendant applied the "foreign-natural" test, relieved the defendant of liability, and noted that a walnut shell is a natural object in walnut ice cream.

On appeal, a Florida court of appeals rejected the "foreign-natural" test, holding that the test in Florida should be what is "reasonably expected" by the consumer in the food as served and not what might be natural to the ingredients of the food prior to preparation. A majority of courts in other jurisdictions apply the "foreign-natural" test.

INTERNAL REVENUE

ADDITIONAL TAXES — PURPOSE AND NECESSITY FOR ACCUMULATION — *Donruss Co. v. United States*, 384 F.2d 292 (6th Cir. 1967). — Section 531 of the INTERNAL REVENUE CODE OF 1954 imposes accumulated earnings taxes on every corporation which is "availed of for the purpose of avoiding . . . income tax." In reversing the trial court's decision to refund such taxes to the appellee, the Sixth Circuit held that the trial judge's failure to explain in his charge the meaning of the word "the" as used in section 531 might have led the jury to believe that tax avoidance must be the sole purpose — rather than the dominant purpose — behind an accumulation in order to impose the additional tax.

There has been a division of authority with respect to the interpretation of section 531. One court has held that tax avoidance must be the dominant purpose and other courts, although disagreeing, have not provided a satisfactory interpretation. On the basis that there is some support in the case law for the "dominant purpose" test, and that the same test obtains in analogous areas, this court has provided a meaningful interpretation.

EXPENSES — ENTERTAINMENT AND TRAVEL — *United States v. Correll*, 88 S. Ct. 445 (1967). — Respondent, a traveling salesman, regularly left home early in the day, ate breakfast and lunch on the road, and returned home for dinner. He attempted to deduct the expense of lunch and breakfast from his income tax under § 162(a)(2) of the INTERNAL REVENUE CODE OF 1954 which allows a deduction for traveling expenses in pursuit of trade or business. The Commissioner denied the deductions and construed travel "away from home" to exclude all trips requiring neither sleep nor rest. The respondent paid the tax, sued for a refund in the district court, and received a favorable jury verdict. The Court of Appeals for the Sixth Circuit affirmed, holding that the Commissioner's "sleep or rest" rule was not a valid regulation under the present statute.

The Supreme Court in reversing held that when Congress promulgated § 162(a)(2) in 1954, it was aware that the Commissioner had construed its statutory predecessor to limit deductibility to "overnight" business trips and that the case thus came within the rule that treasury interpretations and regulations long continued without substantial change are deemed to have received congressional approval and have the effect of law as they apply to unamended or substantially reenacted statutes. The dissent argued that the statutory words "while away from home" may not be reduced to "overnight" by administrative construction.

INTOXICATING LIQUORS

ABATEMENT AND INJUNCTION — RELIEF AWARDED — *Commonwealth*

v. Tick, Inc., 233 A.2d 866 (Pa. 1967). — Respondents' restaurant and bar was found to be a public nuisance. In Pennsylvania, by statute, a chancellor has the discretion to enjoin use of a bar or to allow the business to continue provided that the operators file a penal bond. The chancellor in this case required bond, allowing the business to continue. On appeal the Pennsylvania Supreme Court reversed, holding that the chancellor abused his discretion by not enjoining operation of the bar.

Three dissenting justices, while recognizing circumstances which vindicated the chancellor's decision, suggested an analogy to criminal sentencing. The criminal trial judge's discretion is never questioned if he prescribes a sentence within the penalties provided for by statute. The dissenters argued that even though the procedural setting is different, this action is functionally the same as a criminal proceeding and that, following the analogy, the chancellor must have complete discretion — within statutory bounds — to set the "relief."

LABOR RELATIONS

DESIGNATION OF REPRESENTATIVES — USE OF IMPROPERLY PROCURED SIGNATURE CARDS — *NLRB v. S.E. Nichols Co.*, 380 F.2d 438 (2d Cir. 1967). — During an organizational campaign at defendant's store, the union obtained employee signatures on union authorization cards by assuring the employees that there would be an election before union action was taken and that the cards were not binding in any way. There was no explanation by the union that the cards could be used to establish majority status for the union and that no election would be needed or required for union recognition. Defendant refused to bargain with the union and the union filed charges with the National Labor Relations Board alleging violation of § 8(a)(5) of the National Labor Relations Act.

In holding that fraudulently obtained authorization cards were invalid to establish union recognition, the Second Circuit imposed a future good faith requirement on labor organizations. The court cautioned that the manner in which authorization cards are drafted, and the terms which union organizers use in dealing with employees should be subject to strict regulation.

DISPUTES AND CONCERTED ACTIVITIES — PUBLIC EMPLOYEES — *Board of Education v. Shanker*, 283 N.Y.S.2d 548 (Sup. Ct. 1967). — Plaintiff sued to have the defendant teachers' union and its president declared guilty of criminal contempt for disobeying a court injunction forbidding strike action. A New York supreme court held that the statute prohibiting public employees from striking and providing for court enforcement by way of contempt proceedings was supported by sound public policy. Both defendants were found guilty of contempt and fined. The court rejected their contention that the teachers had actually resigned because the resignations were merely given to the union and never tendered to the employer.

In finding the defendants guilty and upholding statutes prohibiting strikes by public employees, the court reiterated New York's adherence to the majority view concerning strikes by public employees.

LICENSES

CONTRACTORS — ESTOPPEL — *Herman Chanen Construction Co. v. Northwest Tile & Terrazzo Co.*, 433 P.2d 807 (Ariz. Ct. App. 1967). — Chanen

was a general contractor to construct a public building. Appellee was a subcontractor for a certain portion of the work. Appellee contacted the Registrar of Contractors and was told that it did not have the proper license to do the work in total. Appellant then agreed to allow appellee to subcontract, not assign, the portion of work not covered in its license to a licensed contractor. The building was not completed on time. Appellee sued for money due and damages because of the delay. Appellant denied liability on the contract on the ground that appellee did not have the proper license.

An Arizona appellate court held that appellant was estopped from denying liability on the contract. Prior cases had denied the right to sue on a construction contract if the person doing the work did not hold the proper license. But here appellant had agreed to the subcontracting to a licensed contractor. All work was done by licensed contractors. The policy of the licensing statute was to protect the public from bad construction policies and the policy was complied with when all the contractors were licensed.

FOR OCCUPATIONS AND PRIVILEGES — MERCANTILE BUSINESSES — *Long v. City of Anaheim*, 63 Cal. Rptr. 56 (Ct. App. 1967). — The plaintiff, highest ranking member of the California Socialist Party, sought an injunction against the cities of Anaheim and Garden Grove to enjoin them from exacting a business license tax from the sellers of the party newspaper. A California appellate court reversed the trial court and granted the injunction, holding that the ordinances must be construed to exempt organizations whose primary purpose was not to make a profit, even though the ordinances made no differentiation between profit and nonprofit businesses. The fact that the newspaper was sold was not enough to justify the withholding of the exemption when the paper had always had an operating deficit and its primary purpose was the dissemination of political views and not to make a profit.

The California court extended the majority rule which exempts sellers of religious and political literature. The statutes were construed in light of overall legislative intent and the constitutional issue was avoided.

MORTGAGES

ASSIGNMENT OF MORTGAGE OR DEBT — ESTOPPEL OR WAIVER — *Harrison v. Galilee Baptist Church*, 234 A.2d 314 (Pa. 1967). — The purchase agreement entered into by the church and the seller of a factory building referred to an "addendum" that required the seller to make necessary improvements. On the ground that the seller failed to comply, the mortgagor-church sought to open a judgment entered on a mortgage bond held by the assignee of the purchase money mortgage. In reiterating the majority view, the Pennsylvania Supreme Court held that the mortgagor was estopped from defending on the basis of its claim against the seller because it had notice of the assignment; because it gave a declaration of no setoff to the assignee; and because there was no notice to the assignee of any claims against the mortgage.

A vigorous dissent sought to place the majority rule in its proper perspective by pointing out that the assignee's agent, an attorney, knew that the extensive repairs were a major part of the consideration for the mortgage, and that, consequently, the fact that the mortgagor agreed to a "no setoff" would not bar those equities of which the assignee had notice or of which it was put on inquiry.

MOTOR VEHICLES

DUTY TO DRIVE ON THE RIGHT HALF OF ROADWAY — BAD ROAD CONDITIONS NO EXCUSE — *Oechsle v. Hart*, 12 Ohio St. 2d 29, 231 N.E.2d 306 (1967). — While driving on a 4-lane road after dark, defendant hit a patch of ice and skidded across the centerline crashing into plaintiff's automobile causing him serious injury. Plaintiff claimed that defendant's failure to keep to the right side of center was negligence per se. Defendant contended that the "sudden emergency" of the icy patch was an issue which should be submitted to the jury. The trial court submitted the requested instruction and the defendant won the verdict and judgment. The judgment was affirmed by the court of appeals.

In reversing, the Ohio Supreme Court overruled precedent and held that bad weather alone does not excuse a driver from keeping his vehicle on the right side of the road. The defense of "sudden emergency" is not available to such a driver.

NEGLIGENCE

RES IPSA LOQUITOR — EXCLUSIVE CONTROL — *Boyer v. Iowa High School Association*, 152 N.W.2d 293 (Iowa 1967). — Plaintiff, a spectator at a basketball game, sued to recover for personal injuries sustained when bleacher seats suddenly folded back into the wall causing plaintiff to be thrown to the floor. Although unable to establish specific acts of negligence, plaintiff was allowed recovery under the doctrine of res ipsa loquitor. Defendant objected to the allowance of the res ipsa loquitor plea, contending that plaintiff had equal access to the bleachers to discover any defects, so that defendant was not in exclusive control of the instrumentality causing injury and that res ipsa loquitor should not apply.

The Iowa Supreme Court affirmed, holding that plaintiff's limited access to the instrumentality causing the injury was not sufficient to deprive her of res ipsa loquitor. The decision reflects the position of *Restatement of Torts* § 238 whereby exclusive control is only one fact which establishes the responsibility of the defendant, and if defendant's responsibility can otherwise be established (here, duty to inspect), exclusive control is not essential to a res ipsa loquitor case.

REGISTERS OF DEEDS

DUTIES AND PERFORMANCE THEREOF — IN GENERAL — *Nineberg v. Cook County*, 229 N.E.2d 904 (Ill. Ct. App. 1967). — In an action for damages brought by co-conservators of an incompetent's estate against Cook County for the alleged negligent issuance by the registrar of deeds of a new torrens certificate of title, an Illinois appellate court held that the registrar of deeds was not required to investigate the propriety of a court order directing him to issue a new certificate of title, notwithstanding the fact that the original certificate had never been surrendered and that the records of the probate court of the registrar's own county revealed the fact of the incompetency of the ward, the appointment of conservators, and the filing of an inventory listing the property as an asset.

This interpretation of the Illinois statute limits the responsibilities of the registrar and the possibility for recovery. This approach rejects the view of those jurisdictions which hold that the indemnity fund provided by statute is a strict insurance provision.

TELECOMMUNICATIONS

SPECIAL SERVICE — EFFECT OF STATE FRANCHISE — *City of Waterville v. Bartell Telephone TV Systems*, 233 A.2d 711 (Me. 1967). — The plaintiff municipality wanted to prevent the defendant from operating a CATV service without a municipal franchise. The city passed an ordinance to exercise control and issue franchises for the right to provide CATV service. The defendant was going to provide the service through the existing facilities of the New England Telephone & Telegraph Co. The defendant asserted that New England's public franchise was broad enough to include the CATV service.

The Maine Supreme Judicial Court agreed with the defendant. The service could be operated along the public ways through existing equipment. The court approved a line of decisions to the effect that "television transmission is an integral part of the telephone and telegraph business." The rates and service are subject to the Public Utilities Commission and not subject to municipal regulation.

TRADE REGULATION

STATUTORY UNFAIR TRADE PRACTICES — DEALERS' FRANCHISES — *American Motors Sales Corp. v. Semke*, 384 F.2d 192 (10th Cir. 1967). — The plaintiff, an automobile dealer, terminated his franchise contract with the manufacturer-defendant and then brought this action against the defendant under the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25. The Act enables a dealer to recover damages because of the failure of the manufacturer to act in good faith in performing, complying with, or terminating the franchise agreement. The Tenth Circuit allowed the action.

Previously the courts allowed recovery for the dealers when the manufacturer terminated the franchise contract in bad faith. This case extends recovery to dealers when they are forced to terminate the franchise agreement due to coercive or intimidating acts of bad faith on the part of the manufacturer.

WEAPONS

LIABILITIES FOR INJURIES FROM ILLEGAL OR NEGLIGENT MANUFACTURE, SALE, OR USE — *Taylor v. Webster*, 12 Ohio St. 2d 53, 231 N.E.2d 870 (1967). — Defendant had for some time permitted her 10-year-old son to use a Daisy B B gun unattended but with instructions to be careful in its handling. Defendant knew that children visited her home to play with her son. When, in spite of the boy's care, a schoolmate took and discharged the gun at plaintiff, another playmate, and damaged his eye, defendant was held liable by the Supreme Court of Ohio under OHIO REV. CODE § 2903.06 which forbids the owner or one having control of an air gun to knowingly permit its use by a minor under 17 years of age.

This case follows the pattern of other jurisdictions which find negligence per se under similar statutes. Because the statute was previously applied only to sellers, this case is an extension of the Ohio law. That the intervening act of the playmate was no defense follows the regular Ohio rule that there may be more than one proximate cause of an injury.

WORKMEN'S COMPENSATION

DAMAGES — CORRECTING DEVICES AND SURGICAL OR MEDICAL TREATMENT — *Lindsay v. Glennie Industries, Inc.*, 153 N.W.2d 642 (Mich. 1967). — An employee engaged in the course of his employment sustained an eye injury that required surgical removal of the lens of the injured eye. The operation left him without vision in the lensless eye, but a special contact lens virtually restored full vision. Plaintiff brought an action for damages for "loss of eye" under the provisions of the Michigan workmen's compensation statute. The Supreme Court of Michigan reversed the decision of the Workmen's Compensation Appeal Board and held that an employee is entitled to a full measure of damages for an injury sustained in the scope of employment regardless of any restorative effects of surgical corrective devices.

Most compensation statutes simply provide in tabular form the measure of damages for each given injury. In view of the advances made in corrective medicine, these statutes fail to guide the courts as to specific loss awards where restoration of the use of the involved member or organ is virtually complete.

PRESUMPTIONS AND BURDEN OF PROOF — DIMINUTION OF EARNING CAPACITY AND AVAILABILITY OF SUITABLE WORK — *Petrone v. Moffat Coal Co.*, 233 A.2d 891 (Pa. 1967). — A Pennsylvania coal miner suffering from anthracosilicosis was denied total disability benefits by the Workman's Compensation Board because medical evidence showed the claimant was still capable of performing light work of a general nature and it was presumed that such work was available to the claimant.

The Pennsylvania Supreme Court reversed, holding that the mere fact that a disabled employee is still capable of performing light work cannot support a presumption that such work exists and that under such circumstances the employer has the burden of establishing the existence of suitable work in order to prevent full recovery for total disability. Under prior decisions the employer was obligated to establish the existence of suitable work only where the claimant's disability was so severe that he could only handle a specially created job. The decision is consonant with the rule formulated by the federal courts under the disability provisions of the Social Security Act which hold that when a claimant is found physically capable of performing light work of a general character, the burden is on the party from whom compensation is sought to show that such work is available to the claimant.