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ATTORNEY AND CLIENT

THE OFFICE OF ATTORNEY — REGULATION OF PROFESSIONAL CONDUCT — *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967). — Defendant had been convicted for violations of the federal tax law and an investigator, employed by the law firm of which defendant was a member, had been questioning jurors concerning the reasons for their verdict. On the basis that such questioning tended to harass the jurors and that it contravened the public policy that jurors must be secure in the belief that their deliberations will be free from involuntary public disclosure, the federal district court granted plaintiff's motion to enjoin the questioning.

By so holding, the court clarified the majority position that questioning of jurors concerning their verdict may be permitted for the purposes of research in trial technique and for determining whether grounds for a new trial exist where there is reason to suspect that the jury acted improperly — provided such questioning does not harass the jurors. At the same time, the opinion providently serves as a medium for reconciling conflicting opinions of the American Bar Association and local bar associations on this question.

BROKERS

DUTIES AND LIABILITIES TO PRINCIPAL — SKILL AND CARE REQUIRED — *Hartford Accident & Indemnity Co. v. Walston & Co.*, 21 N.Y.2d 219, 239 N.E.2d 230, 287 N.Y.S.2d 58 (1967). — An employee of Bache & Company, plaintiff's assignor, embezzled certain stock certificates after having them transferred to an apparently fictitious person. An unknown party, claiming to be the fictitious person, employed defendant, a stockbroker, to sell the certificates. After the defendant sold the certificates, which it did after minimal examination of the unknown party's identity, the plaintiff brought an action claiming that defendant failed to act in a commercially reasonable manner to discover the seller's identity and was therefore liable for the loss. The New York Court of Appeals accepted plaintiff's view, holding that the law in effect at the time of the transaction represented a policy that owners of stolen shares were to be protected by holding selling brokers to a high duty to verify the identity of the share sellers.

The dissenting opinion, noting that the *Uniform Commercial Code* became effective 1 month after the illegal transaction, argued that the policy of section 3-405 would place the burden of the loss on the employer, Bache, as a risk of doing business, and that the policy should be implemented in this case even though the *Code* was not in effect at the time of the transaction.

COMMERCIAL LAW

NEGOTIABLE INSTRUMENTS — AGENT'S PERSONAL LIABILITY — *Pollin v. Mindy Manufacturing Co.*, 4 U.C.C. Reporting Serv. 827 (Pa. Super. Ct. 1967). — Defendant, president of a small manufacturing company, signed his own name to the corporation's payroll checks without indicating his office or representative capacity. The payee-employees endorsed the checks to plaintiff, and when the drawee bank refused payment because of insuf-

ficient funds, plaintiff brought suit on the checks against the corporation and its president. Judgment by default was entered against the corporation and summary judgment was entered against the individual defendant on the authority of UNIFORM COMMERCIAL CODE § 3-403(2) which provides that "[a]n authorized representative who signs his [own] name to an instrument .... (b) ... is personally obligated if the instrument names the person represented but does not show that the representative signed in his representative capacity ...."

On appeal the decision against the individual defendant was reversed by a Pennsylvania Superior Court. The court held that the checks, viewed in their entirety, sufficiently disclosed that the signature was in a representative capacity where the name and address of the corporation were imprinted at the top of each check, the checks indicated that they were payable from a special corporate account, and the name of the corporation was imprinted above two lines in the lower right hand corner clearly intended for the signatures of corporate officers. The decision appears to be the first under the *Code* holding that consideration may be given to the entire instrument where the drawer's agent failed to expressly indicate that he signed as a representative.

NEGOTIABLE INSTRUMENTS — DEFENSES — *Brotherton v. McWaters*, 438 P.2d 1 (Okla. 1968). — Defendant endorsed a check, of which he was the payee, to the plaintiff in partial payment for certain repairs made upon his truck. The drawer stopped payment and the defendant refused to pay the amount of the check. At trial the defendant raised the defense of failure of consideration on the grounds that the truck had not been properly repaired. This issue was found in the defendant's favor and judgement was entered accordingly. Affirming the decision of the trial court, the Oklahoma Supreme Court held that the plaintiff was not a holder in due course, and as such was subject to this defense by an endorser.

This reconciliation of section 3-414 (contract of the endorser) and section 3-408 (consideration) of the *Uniform Commercial Code* is consonant with the law as it existed under section 28 of the old Negotiable Instruments Law and, as such, is supported by decisions arising under the prior law.

CONSTITUTIONAL LAW

CLASS LEGISLATION — DISCRIMINATION AGAINST PARTICULAR CLASSES OF PERSONS — *Ramos v. Health & Social Services Board*, 276 F. Supp. 474 (E.D. Wis. 1967). — A mother and her five children moved back to the mother's family home in Wisconsin after being deserted by the father. With no job and no one to support the family, the mother applied for benefits under the aid to dependent children program. This aid was denied her by welfare authorities because she did not meet the statutory requirement of 1 year's residency within the State for the year immediately preceding application for aid. The mother brought an action to enjoin enforcement of the residence requirement on the theory that it denied her equal protection of the laws. Adopting the plaintiff's argument, a federal district court held that even if there were a legitimate legislative purpose for the statute, the statute nevertheless was too broad in that it excluded certain classes of persons without a valid reason.

The court noted a recent trend of federal district courts to enjoin en-

forcement of such legislative requirements because of their apparent failure to provide equal protection of the laws.

DUE PROCESS OF LAW — ADMINISTRATIVE PROCEEDINGS — *United States v. Freeman*, 388 F.2d 246 (7th Cir. 1967). — Upon initially being classified I-A for the draft, defendant failed to exercise his right to a personal appearance and appeal. When ordered to report for a physical examination 1 year later, defendant requested conscientious objector status but his local board refused to reopen his classification. Defendant ultimately refused to submit to induction and was sentenced to prison.

In reversing defendant's sentence, the Court of Appeals for the Seventh Circuit pointed out that if a registrant's request to have his classification reopened is denied, the Selective Service regulations do not afford him the right to an administrative appeal. The court therefore reasoned that the local board must not be arbitrary in its refusal to reopen a person's classification. The court held that in the defendant's case the refusal was arbitrary and thereby a denial of due process. In reaching this conclusion the court took a position consonant with that taken by the Fifth Circuit in *Olvera v. United States*, 223 F.2d 880 (5th Cir. 1955).

PERSONAL, CIVIL, AND POLITICAL RIGHTS — DEFINITION OF OFFENSE — *Cleveland v. Andersons*, 13 Ohio App. 2d 83, 234 N.E.2d 304 (1968). — In appealing a conviction for participating in a disorderly assembly, appellant challenged the constitutionality of CLEVELAND PENAL CODE § 13.1124. This section provides that it is a crime for any person to "knowingly and willfully constitute or make himself a part of any noisy, boisterous or disorderly assemblage of persons, countenancing the same by his presence, which annoys the inhabitants of the city . . . ." The appellate court, in reversing the conviction, held that the ordinance violated appellant's rights to due process of law and freedom of assembly guaranteed by the United States and Ohio Constitutions.

As to the first defect, the court reasoned that the language of the ordinance was too vague to provide an ascertainable standard of behavior to govern its enforcement. As to the second, the court held that the city abused its police power by making mere presence at a noisy assemblage a crime. In reaching its conclusion, the court has required the city of Cleveland to bring its ordinance into conformity with the unlawful assembly legislation of most other jurisdictions. This latter legislation requires that the intent to achieve a purpose which will interfere with the rights of others be proven to sustain a conviction.

CONTRACTS

PARTNERSHIP — PROVISIONS DELINEATING INTERESTS OF PARTIES UPON THE WITHDRAWAL OF ONE — *Blount v. Smith*, 12 Ohio St. 2d 41, 231 N.E.2d 301 (1967). — The plaintiff and defendants entered into a medical partnership agreement. The provision for withdrawal provided that any withdrawal for reason other than death or total disability must be preceded by 6 months notice. In the absence of this notice, the withdrawing partner was to lose all his accounts receivable and his capital investment. Plaintiff gave notice of only 1 month and demanded his accounts receivable and capital investment contending that the provision calling for their forfeiture was unenforceable because it was a penalty. The Ohio Supreme Court, however, held that the withdrawal clause was valid because there was noth-

ing in the record to indicate that the forfeiture of the accounts receivable and the capital investment did not bear a relationship to the loss which would reasonably be sustained by the partnership.

The decision reiterates the familiar judicial doctrine of contract law that liquidated damages in a contract will not be deemed a penalty when the court is unable to determine the amount of damages sustained by a breach. The court assumed the parties to have taken the uncertain and speculative character of the damages into consideration.

COUNTIES

LIABILITIES FOR TORTS — INJURIES BY MOBS OR OTHER WRONGDOERS — *Kelly v. Beckman*, 13 Ohio Misc. 219, 234 N.E.2d 624 (Cinc. Mun. Ct. 1967). — During the riots which rocked Cincinnati, Ohio during June 1967, plaintiff, a taxicab driver, was pulled from his vehicle by an angry mob and severely beaten. Plaintiff brought an action for damages under OHIO REV. CODE § 3761.03 which provides that a person "assaulted and lynched by a mob may recover from the county in which such assault is made."

By sustaining the county's demurrer to the petition, the Cincinnati Municipal Court adhered to the State doctrine which imposes a strict construction on the 70-year-old statute. Plaintiff failed in his attempt to meet the burden of establishing the second statutory requirement of being "lynched." That term, it was held, encompasses the concept of an unruly mob of private individuals violently and unlawfully attempting to exercise correctional powers over a real or supposed wrongdoer to punish him for his actions. Significantly, however, the court conceded that the statute was archaic and should be repealed because it exonerates county governments from their protective responsibilities. A doubt was also expressed by the court as to the law's constitutionality inasmuch as it limits the class of people who may recover.

CRIMINAL LAW

OBJECTION TO VENUE — WAIVER — *United States v. Rivera*, 388 F.2d 745 (2d Cir. 1968). — Acting through an informant, federal narcotics agents apprehended defendant in the eastern district of New York and seized nine packages of cocaine from his automobile, none of which bore the required federal tax stamps. Defendant was indicted in the eastern district for illegal purchase of narcotics under 26 U.S.C. § 4707(a) (1964) which provides that mere possession of narcotics without the appropriate tax stamps is prima facie evidence of illegal purchase. At the close of the government's evidence, defendant's motion for acquittal on three specified grounds — none of which included any express objection to venue — was denied and he was found guilty of illegal purchase.

On appeal, defendant objected to venue contending that although proof of mere possession of narcotics in the eastern district might create a presumption of an illegal purchase, such proof could not, consistant with the Constitution, create a presumption of *purchase in the eastern district* where the government's own testimony tended to show a prior possession in the southern district. Defendant's conviction, however, was affirmed by the Second Circuit Court of Appeals. The court held that although an objection to venue is preserved by a general motion for acquittal, nevertheless, where counsel moves for acquittal on specific grounds without any mention of venue, objection to venue is waived and cannot be raised on appeal. The

decision is in accord with *Gilbert v. United States*, 359 F.2d 285 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966), which held that a waiver is presumed where the movant fails to mention venue among his specific grounds in support of a motion for acquittal.

DESCENT AND DISTRIBUTION

PROPERTY SUBJECT TO DESCENT OR DISTRIBUTION — BANK ACCOUNT PAYABLE ON DEATH TO NAMED BENEFICIARY — *In re Estate of Tonsic*, 13 Ohio App. 2d 195, 235 N.E.2d 239 (1968). — Mr. Tonsic had entered into a contract with his bank whereby he created three savings accounts made payable to his children on his death. OHIO REV. CODE § 2131.10 grants the right to an Ohio citizen to create such accounts notwithstanding any requirements of the statute of wills. The probate court held that section 2131.10 was ineffectual and that the savings accounts were therefore part of Tonsic's estate. The court of appeals reversed, holding that the statute was clear and the decedent having met the requirements was entitled to have the accounts pass to the named beneficiaries.

The court of appeals, in sustaining the statute, recognized that it was supporting a minority position. Previous to the passage of section 2131.10 no such procedure would have been sustained. New Jersey seems to be the only other State providing for such accounts in its statutes.

DISCOVERY

STATUTORY PROVISIONS ON EXAMINATION OF PARTIES — CORPORATE OFFICERS, AGENTS, AND EMPLOYEES — *Lewis v. Atlanta-Charlotte Airline Railway Co.*, 159 S.E.2d 243 (S.C. 1968). — Plaintiff's intestate was allegedly killed when struck by defendant's train. In a wrongful death and survivor action, plaintiff, prior to trial, requested a court order requiring the defendant to submit to an examination by and through its engineer. It was stated that the engineer was the sole person having knowledge of the pertinent facts of the accident. A State circuit court issued the order and defendant appealed.

The Supreme Court of South Carolina, in affirming the order, stood unimpressed by defendant's citations to the *Federal Rules of Civil Procedure* and the statutes of other States which limit the pretrial examination of corporate parties to managing officers and authorized agents. The court reasoned that since the South Carolina statute did not provide specifically for such examination and since the reason for the limiting rule in the other jurisdictions was due to fear that a corporation would be bound by the testimony of a low ranking employee adverse to its interests, it should give greater weight to the fact that essential and pertinent information remained peculiarly within the knowledge of defendant's engineer. Having determined that it could, until such time as it might arise, defer the question as to the binding effect of the engineer's testimony, the court could find no compelling reason for disturbing the long followed State practice of requiring the examination of any employee who possessed the information sought.

ELECTIONS

LEGISLATIVE APPORTIONMENT — EQUAL PROTECTION CLAUSE — *Avery v. Midland County*, 88 S. Ct. 1114 (1968). — The one man, one vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), applies to local governing

units. So held the United States Supreme Court in vacating and remanding a Texas Supreme Court decision which had held that selection of the Midland County Commissioners Court from districts of substantially unequal size did not necessarily violate the 14th amendment. By so ruling, the Court extended the principle to an estimated 80,000 units of local government across the nation.

The lengthy and vigorous dissents argued that the Court lacked jurisdiction, that the administrative feasibility of the application of *Reynolds* to State legislative apportionment had not been demonstrated, and most importantly, that problems of this nature will be adequately solved only when units of local government are properly defined, with due attention being given to their specialized and diverse natures.

EMINENT DOMAIN

COMPENSATION — LAYING UNDERGROUND PIPES AND SEWERS — *Ziegler v. Ohio Water Service Co.*, 14 Ohio App. 2d 1, 235 N.E.2d 243 (1968). — Appellee obtained an injunction ordering the appellant to cease entering upon appellee's land. Appellant had been installing a water line on a portion of the land subject to a highway easement. An Ohio Court of Appeals, in affirming the order, held that the construction of a water main in a highway easement outside a municipality for the purposes of supplying water for domestic uses and fire protection constituted an additional burden upon the fee of the abutting owner.

The decision followed the precedent set down by the Ohio Supreme Court in *Hofius v. Carnegie-Illinois Steel Corp.*, 146 Ohio St. 574, 67 N.E. 2d 429 (1946), which held that the fee to a county highway is in the abutting landowner and that the public has only the right to improvement of, and uninterrupted travel over, such highway until a specific easement has been acquired by negotiation or eminent domain.

INFANTS

CUSTODY AND PROTECTION — EVIDENCE — *In re Urbasek*, 232 N.E.2d 716 (Ill. 1967). — Upon the preponderance of the evidence, pursuant to the Illinois Juvenile Court Act, Robert Urbasek, a minor, was adjudged to be a juvenile delinquent for murdering his playmate. The Illinois Supreme Court reversed and remanded the judgment, stating that the recent United States Supreme Court decision of *In re Gault*, 387 U.S. 1 (1967), required that the State must prove beyond a reasonable doubt a charge of delinquency where the acts constituting the alleged delinquent conduct would amount to a crime if charged against an adult.

By so holding, the court adopted what was formerly the minority view with respect to quantum of evidence in delinquency proceedings. While this decision voided the provisions of the Illinois Juvenile Court Act which incorporated the preponderance standard, nevertheless it modified that statutory scheme in such a way that the Act could well become a model among the States for protecting the rights of juvenile court defendants.

INTERNAL REVENUE

CRIMINAL PROSECUTION — LIMITATION OF PROSECUTIONS — *United States v. Habig*, 389 U.S. 810 (1968). — The defendants were indicted for crimes related to allegedly false income tax returns. A federal district

court dismissed two of the counts of the indictment on the ground that the 6-year statute of limitations in the *Internal Revenue Code* barred prosecution. The defendants had been granted an extension beyond the filing deadline for the return in question. The district court, in calculating the 6-year limitation, used the deadline date as the start of the period and not the extended date on which the return was filed. The United States Supreme Court reversed the district court and held that Congress did not intend that the limitation period should begin to run before the defendant committed the acts upon which the crimes were based. Under the *Code*, the statute of limitations begins to run on the deadline date for administrative convenience and it does not apply when an extension of time is granted.

The Supreme Court, in making this statutory interpretation, continues the overall tax policy of construing the *Code* against any taxpayer who fraudulently tries to evade the payment of income tax.

INCOME TAXES ON CAPITAL INCREASE — TRANSACTIONS IN MINERALS AND MINERAL INTERESTS — *Coleman v. United States*, 388 F.2d 377 (Ct. Cl. 1967). — In 1935, taxpayer corporation's predecessor in interest agreed with Shamrock Gas and Oil Corp. to a long-term purchase sales contract by which Shamrock would sell to it a certain amount of residue gas daily in exchange for the carbon minerals produced by the predecessor in its burning of said gas. Subsidiary agreements granted to the predecessor purchase priority rights in Shamrock's natural gas and a qualified right to resell the residue gas. In 1946, after the taxpayer had succeeded to all other rights under the 1935 agreements, its right to resell the residue gas was made absolute as to three-fourths of the amount it acquired from Shamrock. In 1952 the taxpayer ceased all operations and the parties entered into a new contract which revoked all previous agreements. As consideration for the release from its obligation to sell, Shamrock agreed to pay the taxpayer 6 cents per 1000 cubic feet on that fraction of its residue gas over which the taxpayer had had an absolute right of resale. These payments amounted to $207,948 in 1953, and plaintiff, as trustee of the then dissolved taxpayer corporation, filed a petition for a refund on income taxes paid thereon.

In denying recovery and dismissing the petition, the United States Court of Claims found that, under the controversial doctrine of essentiality, the taxpayer had no "economic interest" in Shamrock's processing of gas and was thus not entitled to a refund by way of a deduction for percentage depletion. Furthermore, it was determined that the taxpayer's contractual rights under the 1935 agreements did not constitute a "capital asset" such that a "sale or exchange" thereof would confer upon plaintiff a recovery by treating payments under the 1952 contract as a long-term capital gain. A strong dissent rebuked the majority for exercising the ploy of "essentiality" to defeat congressional purpose and ignoring the Supreme Court's broad interpretation of the term "economic interest."

LABOR RELATIONS

INJUNCTIONS — TEACHERS' STRIKES — *Board of Education v. Ohio Education Association*, 13 Ohio Misc. 308, 235 N.E.2d 538 (C.P. Belmont County 1967). — Plaintiff sought to continue a temporary injunction restraining defendant from carrying on activities in aid of a local teachers' strike. Defendant contended that a local board of education may not obtain an injunction against the activities of a statewide teachers' association

and that such an injunction would be violative of defendant's rights of freedom of speech and assemblage.

In ordering the injunction to be continued, an Ohio Common Pleas Court said that OHIO REV. CODE §§ 4117.01-.05 prohibits strikes by public employees and that it necessarily follows that any organization representing teachers does not have the right to aid and encourage such a strike. The court held that an injunction restraining such illegal activities is a reasonable restriction and not violative of any constitutional guarantees.

MENTAL HEALTH

CONSTITUTIONAL AND STATUTORY PROVISIONS — *State v. Marion County Criminal Court, Division One*, 234 N.E.2d 636 (Ind. 1968). — Plaintiff sought to compel the Marion County Criminal Court to expunge from the record an order for plaintiff to answer all questions put to him by two court appointed physicians in a hearing to determine whether or not he was a sexual psychopath. Plaintiff contended that although the defendant court was acting pursuant to a statute, the statute was unconstitutional because it violated his privilege against self-incrimination.

The Indiana Supreme Court, in a split decision, held that the defendant court had properly instructed plaintiff to answer all questions. After reviewing the decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966), and *In re Gault*, 387 U.S. 1 (1967), the court concluded that since no criminal liability can be attached to the status of a sexually dangerous person, the evil at which the privilege against self-incrimination is aimed is not present when the compelled examination shows no more than the existence or nonexistence of this status.

NEGLIGENCE

CONDITION AND USE OF BUILDINGS — PRECAUTIONS AGAINST INJURY TO BUSINESS INVITEE — *Pribble v. Safeway Stores, Inc.*, 437 P.2d 745 (Ore. 1968). — Plaintiff was injured when water on defendant's supermarket floor caused her to slip and fall. When testimony disclosed that the water had accumulated from the shoes and garments of customers entering the store and that the floor had been mopped several times before plaintiff's entry, the trial court granted defendant's motion for nonsuit.

In reversing, the Oregon Supreme Court held that in view of the increased use of mats and rugs in entrance ways to avoid the consequences of a wet surface, a jury could reasonably find that a storekeeper could make his floor safe from the danger of water being tracked in by customers coming in from the rain. The decision overruled former case law to the effect that a storekeeper could not reasonably make his store safe when customers constantly bring in water on their shoes and clothing.

QUESTIONS FOR THE JURY — KNOWLEDGE OF DEFECT OR DANGER — *Carrano v. Scheidt*, 388 F.2d 45 (7th Cir. 1967). — The plaintiff, a licensee in the defendant's home, slipped and fell on a throw rug. Evidence tended to indicate that the defendant had knowledge of the danger created by the rug. A federal district court granted summary judgment for the defendant on the ground that the licensee accepted all risks when she entered the premises.

The Seventh Circuit Court of Appeals reversed upon finding that Indiana substantive law required an owner or occupier to warn unaware licensees of

known hidden dangers. Since only a jury is competent to decide the factual issues concerning the existence of an owner's duty, the breach of that duty, and the result of the breach, the court held summary judgment was improperly granted. The case follows the majority doctrine that the existence of the duty to warn and the result of the breach of the duty are factual issues for the jury.

PATENTS

APPLICATIONS AND PROCEEDINGS — IN GENERAL — *In re Natta*, 338 F.2d 215 (3d Cir. 1968). — Appellee was a senior party in a patent interference proceeding. In an effort to rebut the attempts by junior parties to establish an earlier patent application date, appellee moved pursuant to FED. R. CIV. P. 34 for the production of certain information within the exclusive knowledge and possession of appellant. A federal district court granted the motion. In appealing, the appellant alleged that the discovery provisions of rule 34 were not applicable; and even if they were, appellee had not shown good cause for discovery. The Third Circuit Court of Appeals, in sustaining the motion, held that rule 34 applies in a patent interference proceeding where the moving party has shown that without the aid of a court order, documents in the possession of his adversary, relevant to the issue of priority and patentability, would be inaccessible.

The holding is in accord with other decisions applying federal discovery rules to patent proceedings.

PROCESS

SERVICE — MODE AND SUFFICIENCY OF SERVICE — *Krabill v. Gibbs*, 14 Ohio St. 2d 1, 235 N.E.2d 514 (1968). — Pursuant to OHIO REV. CODE § 2703.23, appellant sought residence service on appellee by mailing a summons to the appellee's usual place of abode. The statute requires mail service to be by registered or certified letter, but appellant had sent the process by ordinary mail. Reversing a decision in favor of the appellee, the Ohio Supreme Court held that irregularity of the summons will not defeat the process so long as the statutory objectives of notice and an opportunity to be heard have been met.

The court noted that the appellee admitted by stipulation the receipt of the summons at his usual place of residence, thereby supplying proof that the statutory objectives of process had been fulfilled. The decision affirms the prevailing trend to validate process when the requirement of substantial fairness has been met.