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Cases Noted

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AUTOMOBILES

CONTROL, REGULATION, AND USE — LIABILITIES OF MANUFACTURERS — *Larsen v. General Motors*, 391 F.2d 495 (8th Cir. 1968).— Plaintiff was injured in a head-on collision in which his car was struck in the left front. The solid piece steering assembly was pushed rearward into plaintiff's head. In finding that the design of the steering assembly was dangerous to the driver, and that the manufacturer was liable for the injury, the court held that although the intended use of a car was not to have accidents, the possibility of an accident should be considered by the manufacturer, and the car designed to minimize the risk of injury.

The decision reaffirms the majority rule that a product should be safe enough to meet any situation which could reasonably be foreseen in the product's normal environment.

BANKRUPTCY

CHAPTER X REORGANIZATION — SEC PARTICIPATION IN INVESTIGATION UNDER SECTION 167 OF BANKRUPTCY ACT — *In Re Commonwealth Financial Corp.*, 288 F. Supp. 786 (E.D. Pa. 1968).— Petitioner challenged the SEC's right to participate in an investigation under section 167 of the Bankruptcy Act, 11 U.S.C. § 567 (1964). The court held that it was authorized to permit SEC participation under certain circumstances in a chapter X reorganization. Examining the act, the court pointed out that although SEC participation is not expressly authorized, the trustees may, with court approval, employ individuals deemed necessary to assist in an investigation and that under section 208 of the act, the SEC, again with the approval of the court, may proceed as a party in interest "with a right to be heard in all matters."

The decision is consistent with the policy of an involved and cooperative working effort between the SEC and the bankruptcy courts.

CIVIL RIGHTS

PUBLIC ACCOMODATIONS — GENERAL — *Nesmith v. YMCA*, 397 F.2d 96 (4th Cir. 1968).— Defendant YMCA was operated in a building complex consisting of two structures connected by a breezeway. One building contained dining and lodging accommodations and the other athletic facilities. Plaintiff, a Negro, was denied the use of the latter. A federal district court held that the athletic facilities of the YMCA were not covered by section 201 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(a) (1964), because they were separate and distinct from the dining and lodging areas. The court of appeals in a split decision reversed, holding that all of the YMCA facilities were a single establishment covered by the act. Therefore, racial discrimination in purveying any of its facilities was forbidden.

This decision extends the meaning of "public accommodation" under the Civil Rights Act of 1964 to include facilities not only physically within the premises of a public accommodation but also those that are physically, administratively, financially, and conceptually connected.

CONSTITUTIONAL LAW

PERSONAL, CIVIL, AND POLITICAL RIGHTS — RELIGIOUS LIBERTY AND

FREEDOM OF CONSCIENCE — *Mayock v. Martin*, ____ Conn. ____, 245 A.2d 574 (1968).— Plaintiff, a mental patient in a state hospital, contended that his confinement constituted a violation of his first amendment guarantees by discriminating against his religious beliefs. Plaintiff's prior history revealed that in response to religious feelings he had severed his right arm, put out his right eye, and admittedly was willing to cut off his right foot either as a free-will offering or in response to a revelation. The trial court found the plaintiff's bizarre conduct inconsistent with the peace and safety of the state.

In affirming, the supreme court followed the interpretation of the religious clauses of the first amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940); that while the freedom to believe and to adopt a chosen form of religion is an absolute right, the freedom to act in accordance with one's religious beliefs necessarily remains subject to regulation for the protection and welfare of society.

PROCEDURE — SENTENCE AND JUDGMENT — *State v. Forcella*, ____ N.J. ____, 245 A.2d 181 (1968).— Defendant alleged the New Jersey homicide statutes, which permit the imposition of the death penalty upon all murder defendants except those pleading guilty, abridged his right against self-incrimination and his right to a jury trial by improperly inducing him to waive those rights and plead guilty. In upholding these statutes, the Supreme Court of New Jersey stressed both the desirability of giving consideration to those admitting their guilt and the humanity of not requiring all murder defendants to face death. The court reasoned that an individual indicted for murder under these statutes, in effect, risks his life by pleading not guilty. This decision is in conflict with the trend established by the Supreme Court decisions to invalidate legislation which makes the exercise of a constitutional right costly or unnecessarily burdensome.

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MOTION PICTURES — CATV SYSTEMS — *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).— Petitioner operated a CATV system which received broadcast signals of five television stations and transmitted them to its customers by cable. Respondent licensed these stations to broadcast its motion pictures. Respondent sought damages and injunctive relief, claiming infringement of its right of performance under the Copyright Act of 1909, 17 U.S.C. § 1(c)-(d) (1964). The Supreme Court held that a CATV system which transmits program signals originally broadcast under license and which did not itself originate programs was not a "performer" and thus petitioner was not in violation of the act.

The Court applied a functional test in determining whether a transmission is a "performance" under the act. It viewed the CATV system's function as analogous to that of a cooperative antenna rather than that of a broadcaster. The Court refused to extend its holding in *Buck v. Jewell-LaSalle Realty*, 283 U.S. 191 (1931), which concerned retransmission of radio broadcasts.

CRIMINAL LAW

STATUTE OF LIMITATIONS — BAR TO PROSECUTION — *Akron v. Akins*, 15 Ohio App. 2d 168, 239 N.E.2d 430 (1968).— In 1967 the defendant was charged with failing to file a 1963 municipal income tax return. He

pleaded guilty, and a continuance was obtained to allow him to pay the tax. Subsequently, *Smith v. Akron*, 14 Ohio St. 2d 247, 237 N.E.2d 396 (1968), established a statute of limitations of 1 year for such offenses. The defendant sought to change his plea to not guilty in order to attack the trial court's jurisdiction. The trial judge refused to vacate the guilty plea and sentenced the defendant. The appellate court reversed on the ground that the running of the statute of limitations caused the lower court to loose its jurisdiction over the matter.

The decision clarifies the purpose of the statute of limitations in Ohio criminal actions. Its expiration grants immunity from prosecution and cannot be waived by a guilty plea.

FEDERAL CIVIL PROCEDURE

DEPOSITIONS AND DISCOVERY — ADVERSE PARTY'S CASE, MATTER RELATING TO — *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968).— In a condemnation proceeding, defendant landowner sought discovery of the federal government's expert witnesses' opinions relating to the value of the property in issue. The government requested a broad protective order which would have virtually precluded all such inquiry by the defendant, but the distirct court denied the motion. When the government's witnesses refused to answer questions or produce documents (at the discovery proceeding) that would have been barred by the proposed protective order, the court dismissed the government action.

In affirming the lower court's order to dismiss, the Ninth Circuit Court of Appeals supported the current trend toward requiring full pretrial disclosure of expert appraisers' opinions in condemnation proceedings. The court rejected arguments that sought to bring expert information and opinions within the protective folds of the "attorney's work product" doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947), and lent its support to the Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 43 F.R.D. 211 (1967), which specifically authorizes such discovery.

PRODUCTION AND INSPECTION OF WRITINGS AND OF OTHER MATTERS — PRIVILEGE OF PARTY AS WITNESS — *Freeman v. Seligson*, 37 U.S.L.W. 2022 (D.C. Cir. June 28, 1968).— The Secretary of Agriculture refused to comply with a bankruptcy trustee's subpoena duces tecum arguing that since section 8 of the Commodity Exchange Act, 7 U.S.C.A. § 12 (Supp. 1967), prohibited him from publishing trade secrets, business transactions, or customer names, he was privileged to refuse compliance. Directing the Secretary to comply, the court held that section 8 did not indicate congressional concern over disclosure in judicial proceedings but only widespread dissemination of private information. The decision illustrates the great importance accorded the discovery procedure by the federal courts and reaffirms the rule that discovery devices should not be thwarted by conflicting statutes, at least where the intent of Congress is unclear.

REMOVAL — FRAUDULENT JOINDER — *Howard v. General Motors Corp.*, 287 F. Supp. 646 (N.D. Miss. 1968).— Plaintiff, the buyer of a truck without a collapsible steering assembly, initiated a personal injury action against the out-of-state manufacturer, General Motors, and joined the resident car dealer. General Motors claimed that the joinder of the dealer, which destroyed the diversity necessary for the manufacturer's removal to

the federal court system, was fraudulent. The court held that the law of Mississippi tended toward strict liability for retailers as well as manufacturers, therefore, the joinder was not fraudulent.

In remanding, the court followed the prevailing rule in the fifth circuit, that there is no fraudulent joinder unless it is clear that the plaintiff cannot recover from the joined defendant under state law on the alleged cause of action, as was held in *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962).

HUSBAND AND WIFE

DIVORCE — TORT LIABILITY — *Gaston v. Pittman*, 285 F. Supp. 645 (N.D. Fla. 1968).— Plaintiff sued her former husband for the wrongful death of her minor child which occurred prior to the plaintiff and defendant's marriage. The district court held that the divorced wife could not maintain the suit even though the tort was committed prior to their marriage. The court reasoned that the common law doctrine of the unity of husband and wife as one person during coverture extinguished any right of action which the wife had against her spouse and that the parties' subsequent divorce did not revive such right. Although the particular question had not previously been before the Florida courts, the decision was a logical extension of existing Florida law. The court remarked that any change in this area of the law would have to come "clearly and unequivocally" from the legislature.

INTERNAL REVENUE

DEDUCTIONS AND CREDITS — INTEREST — *Plastic Toys, Inc.*, P-H TAX CT. REP. & MEM. DEC. (1968 P-H Tax Ct. Memo) ¶ 68, 143 (Aug. 8, 1968). — Petitioners were successors to a partnership that transferred its assets and liabilities to two corporations. In consideration, petitioners issued stock, mortgage bonds, and debentures to each of the two former partners. The mortgage bonds and debentures were later transferred to each partner's wife as trustee for the benefit of their respective children. The Commissioner disallowed petitioners' deductions for interest paid on the debt obligations. In reversing, the Tax Court noted the existence of a realistic creditor-debtor relationship and held that procedures followed in the issuance, transfer, and recording of the bonds, and provisions contained in the instruments were valid indications of a bona fide indebtedness and, therefore, payments were deductible in accordance with the *Internal Revenue Code of 1954*.

The Tax Court, in so holding, continued the policy of deciding debt-equity issues upon the specific facts of each case.

LABOR RELATIONS

EQUAL OPPORTUNITY — DISCRIMINATION BASED ON SEX — *Dodd v. American Airlines, Inc.*, 37 U.S.L.W. 2133 (EEOC June 20, 1968).— Respondent imposed a maximum age restriction of 33 years on its stewardesses. Plaintiff had declined to accept reassignment to nonflight employment at age 33 and was subsequently discharged from defendant's employment. The Equal Employment Opportunity Commission (EEOC), after considering the past and current practices and policies of the airline industry and the respondent's failure to apply the same restriction to its male flight personnel, found the age restriction was not related to satisfactory job

performance, but rather to the sexual identity of the individual. Consequently, the sex-based condition of employment was held violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000(e) (Supp. 1967).

This decision is consistent with the conclusions previously reached by the Departments of Labor and Defense, and follows recent decisions of the EEOC banning sex discrimination in the airline industry.

UNFAIR LABOR PRACTICES — PROHIBITING UNION ACTIVITY — *Darlington Mfg. Co. v. NLRB*, 397 F.2d 760 (4th Cir. 1968).— Milliken, the majority stockholder in two textile mills, gained control of 66 percent of Darlington Manufacturing stock. Darlington embarked upon a $400,000 capital improvements program during the first 9 months of 1956; however, 1 month before its employees joined a union, the Darlington treasurer projected a loss of $40,000 for the current year and a $240,000 loss for the following year. The court of appeals affirmed the NLRB finding that a subsequent decision to close Darlington was not based on economic factors, but was a single employer's attempt to chill unionism at the other two mills.

The general rule in this area requires that there be valid and honest economic reasons for a shutdown. The trend toward judicial discretion has been strengthened by this court which, according to the dissent, has substituted its own economic judgment for that of the Darlington directors.

LANDLORD AND TENANT

LANDLORD'S LIABILITY FOR TENANT'S INJURY — KNOWLEDGE OF DEFECT — *Reitmeyer v. Sprecher*, ____ Pa. ____, 243 A.2d 395 (1968).— In this case the Supreme Court of Pennsylvania reversed the dismissal of the tenants' complaint in trespass against their landlord and held that a landlord is liable in tort for physical harm caused to his tenant by a dangerous condition on the leased premises which existed when the written lease was executed, and which the landlord orally promised to repair both prior and subsequent to the execution of the written lease.

The court, finding that modern housing shortages contribute to unequal landlord and tenant bargaining positions, overruled previous case law and placed Pennsylvania in the small but growing number of jurisdictions which are equalizing the legal obligations of landlord and tenant by placing responsibility on the landlord for injury resulting from the condition of the premises.

LIBEL AND SLANDER

PRIVILEGE — PUBLIC OFFICIAL — *Coursey v. Greater Niles Township Publishing Corp.*, ___ Ill. 2d ___, 239 N.E.2d 837 (1968).— Plaintiff, an Illinois patrolman, brought suit to recover damages suffered from allegedly defamatory falsehoods made by defendant. The patrolman's main contention was that, as a patrolman, he was "the lowest rank of police official," and this status placed him outside the catagory of "public official" as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), thus, he would not have to prove actual malice as required by the *Times* decision in order to recover. However, due to his function as a law enforcement officer and the potentialities for social harm inherent in the abuse of such a position, the Illinois Supreme Court held that his status was within the meaning of the *New York Times Co.* definition of "public official." Therefore, a police patrolman, like other public officials, must show actual malice in order to recover under state libel laws.

This case is in accord with the prevailing view that, due to the unique social position of public officials, actual malice must be alleged and proved in order for the official to recover in a libel action, and extends the *New York Times Co.* definition of "public official" to include even "the lowest rank of police officials."

MOTOR VEHICLES

CONTROL, REGULATION, AND USE — POWER TO REGULATE — *Commonwealth v. Howie*, ____ Mass. ____, 238 N.E.2d 373 (1968).— Defendant was prosecuted for failing to wear protective headgear while operating a motorcycle. Upon appeal, defendant's motion to dismiss was denied. The Supreme Judicial Court of Massachusetts affirmed the conviction on the theory that such an exercise of police power is necessary for the health and welfare of Massachusetts' citizens.

This Massachusetts decision along with a similar one in Rhode Island are the first decisions handed down by state supreme courts determining the validity of recent headgear statutes enacted in a number of states. Lower courts in other states, particularly New York, have upheld these statutes. The only court to attack the validity of the headgear requirement is the Court of Appeals of Michigan which held in a recent decision that the requirement bore no relationship to the state's police powers. Nevertheless, the weight of recent judicial decision is in support of statutes requiring headgear.

MUNICIPAL CORPORATIONS

WATER SUPPLY — DUTY OF DEVELOPER TO PAY COST OF ONSITE WATER MAINS — *Crownhill Homes Inc. v. City of San Antonio*, 433 S.W.2d 448 (Tex. Civ. App. 1968).— Plaintiff, a subdivider and developer of property within the city limits of San Antonio, protested a city regulation requiring him to donate his onsite water mains to the city in order to obtain water service. The court, by a majority of 2 to 1, held that since a large part of the expense of furnishing water to a subdivider was in the "back-up" facilities, the city's regulation was a reasonable exercise of its governmental discretion and not an unlawful taking of private property without compensation. The majority relied on the many cases which have upheld the discretion of a municipality in refusing to extend water mains; however, other jurisdictions not mentioned by the court have distinguished regulations requiring a developer to pay the costs of such extention as an abuse of governmental powers.

PRODUCTS LIABILITY

LIABILITIES TO PERSONS PURCHASING OR USING ARTICLES SOLD OR DISPENSED — PRIVITY — *Tinnerholm v. Parke Davis & Co.*, 285 F. Supp. 432 (S.D.N.Y. 1968).— Plaintiff sued a drug manufacturer for breach of warranty when his son was injured after being innoculated with Quadrigen, a drug which the defendant had sold to the physician. The evidence showed that the drug was defective and was the proximate cause of the injury. In holding the defendant liable for breach of implied warranty the court observed that the requirement of privity had recently been dealt some crushing blows by the New York Court of Appeals and was not a bar to recovery. The court also indicated that the necessity of a sale to impose warranty lia-

bility was satisfied by the sale of the drug to the doctor. This decision is in accord with the growing number of decisions rejecting the doctrine of privity in the area of products liability.

SECURED TRANSACTIONS

PERFECTION OF SECURITY INTEREST — NECESSITY OF FILING — *Levine v. Pascal*, 94 Ill. App. 2d 43, 236 N.E.2d 425 (1968).— Respondents, who were assignees of a beneficial interest in a land trust as security for a loan, claimed that their interest was in real property and therefore not governed by the *Uniform Commercial Code* (*UCC*). Alternatively, respondents claimed that by recording the assignment with the land trustee they had perfected their security interest without filing under section 9-302 of the *UCC*. The court held that the interest was a "general intangible" which, pursuant to section 9-302, could only be perfected by meeting the filing requirements established in section 9-401.

In so holding, the court affirmed the rule adopted by other jurisdictions under the *UCC* that the burden of proof was on the holder of an unperfected security interest to show that the judgment creditor had knowledge of the interest when the latter obtained his lien. However, the court's use of a relatively peculiar Illinois common law rule in determining the applicability of the *UCC* appears inconsistent with the goal of uniformity thereunder.

SECURITIES

INVESTMENT COMPANIES — REGISTRATION UNDER THE INVESTMENT COMPANY ACT — *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3 (S.D.N.Y. 1968).— Defendant corporation possessed liquid resources which it was using to purchase stock from other companies. The SEC alleged that defendant had failed to register as an investment company under the Investment Company Act, 15 U.S.C. § 80(a)(1) (1964). The court held that the corporation became an investment company under the act when its other business activities became negligible compared to its large purchases of securities. The court further held that the sale of corporation stock by an officer, without director approval, constituted fraud under the Securities Act of 1933, 15 U.S.C. § 77(q) (1964), and the Securities Exchange Act of 1934, 15 U.S.C. § 78(j) (1964).

In so holding, the court established judicial criteria for determining the status of an investment company, as well as continuing the trend in expanding the meaning of fraud in the sale of securities.

RULE 10B-5 — IMPLIED RIGHT OF ACTION — *Jordan Building Corp. v. Doyle, O'Connor & Co.*, CCH FED. SEC. L. REP. ¶ 92,256 (7th Cir. Aug. 14, 1968).— Plaintiffs brought suit against defendant stockbrokers for alleged fraudulent misrepresentations and nondisclosure of material facts which induced plaintiffs to buy convertible debentures. The court of appeals reversed the interlocutory order of the district court and held that a civil remedy exists under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(r) (1964), and rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5 (1967). In holding that a civil remedy is implied under rule 10b-5 the Court of Appeals for the Seventh Circuit has joined the increasing number of circuits providing investor protection against the fraudulent sale or purchase of securities.

TAXATION

FRANCHISE TAX — PROPER OCCASION — *Cooper-Jarrett v. Porterfield*, 15 Ohio St. 2d 54, 238 N.E.2d 554 (1968).— Appellant, who conducted a purely interstate trucking business in Ohio, was assessed a franchise tax for the years 1961-1964, which it refused to pay. The assessment was based upon the company's own estimate of the tax. The appellant's sole contention was that the state restricted its federally granted right to engage in interstate business by exacting such a tax. The Ohio Supreme Court held that the tax was nondiscriminatory and reasonable and, as such, did not restrict appellant's constitutional rights.

The decision affirms the rule stated by the Supreme Court in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and reemphasizes the need for precision in choosing "precedent" in an area of law where there are many tenuous distinctions.

TELECOMMUNICATIONS

TELEVISION AND RADIO — POWERS OF OFFICERS, COMMISSIONS AND AGENCIES — *Black Hills Video Corp. v. Federal Communication Comm'n*, 399 F.2d 65 (8th Cir. 1968).— Black Hills Video Corporation was owner and operator of a microwave television system serving affiliate and coplaintiff Midwest Video Corporation at Rapid City, South Dakota. In its first report and order the Federal Communications Commission (FCC) sought to regulate community antenna television systems (CATV) employing microwave transmission, 38 F.C.C. 683 (1965). Petitioner asserted that the FCC lacked the necessary statutory authority to regulate CATV microwave systems. Expanding the recent Supreme Court decision in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the court held that the Communication Act of 1934, 47 U.S.C. § 151 (1964), conferred jurisdiction upon the FCC to regulate microwave as well as off the air CATV systems. The growing complexity of technology in an expanding economic system has induced Congress to invest broad powers in specialized agencies. As was the case here, the federal courts have been loath to interfere when the regulations are reconcilable with statutory directions.

WORKMENS COMPENSATION

DEATH BENEFITS — SCOPE OF EMPLOYMENT — *Wheatley v. Adler*, 36 U.S.L.W. 2738 (D.C. Cir. May 17, 1968).— While urinating behind the shop on a cold morning, a lame truck mechanic collapsed and died. Appellants brought an action to obtain workmen's compensation death payments. The lower court ruled that the connection between the injury and the deceased's job was insufficient to warrant a judgment in the appellant's favor. On appeal, the district court reversed, holding that the death arose out of and during the course of decedant's employment, and arguing that the deceased had not chosen an abnormal means of relieving himself. The decision indicates the continuing trend to grant awards in arguable cases, placing the burden upon the employer to show that the injury arose beyond the scope of the employee's work.

PARTICULAR EMPLOYMENT — LONGSHORE WORK — *Marine Stevedoring Co. v. Oosting*, 398 F.2d 900 (4th Cir. 1968).— Four longshoremen were injured or killed while working on a pier. Three fell on the dock, but one fell into the water. The appellee contended that the Longshoremen's and

Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1964), applied to the longshoreman who drowned, but not to those injured on the dock on the theory that such injuries are not "upon the navigable waters of the United States" within the meaning of the act. The court of appeals held that the injuries of all four were embraced by the act.

In reaching its conclusion the court rejected the traditional view that piers are extensions of the land, and took the more liberal position that Congress intended the benefits of the act to apply to all longshoremen injured in the course of their employment, regardless of where the injury occurred.