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### Cases Noted

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## CASES NOTED

### ANTITRUST

**RESTRAINT OF TRADE — INTRACORPORATE CONSPIRACY —** *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969).— The plaintiff, Hawaiian Oke, had been a wholesale distributor of liquor for three *unincorporated* sales divisions of the defendant House of Seagram. Pursuant to an agreement with the codefendant McKesson, another distributor of Seagram liquor, the Seagram sales divisions terminated their separate contracts with the plaintiff and transferred their business to McKesson. In an action for treble damages, the district court, *inter alia*, instructed the jury to determine whether the unincorporated sales divisions of Seagram had conspired among themselves to illegally restrain the plaintiff's business. In reversing a judgment for plaintiff, the Court of Appeals for the Ninth Circuit held that Seagram's unincorporated divisions were not capable of conspiring among themselves in violation of the Sherman Antitrust Act, 15 U.S.C. § 1 (1964).

Significantly, this is the first case to consider the novel issue of horizontal conspiracy among *unincorporated* divisions of a single company, and it impliedly restricts the application of the "intra-enterprise" conspiracy doctrine to companies using *incorporated* subsidiaries as a form of business organization.

### CIVIL PROCEDURE

**DISCOVERY — WAIVER OF PATIENT-PHYSICIAN PRIVILEGE —** *Lambdin v. Leopard*, 20 Ohio Misc. 189, 251 N.E.2d 165 (C.P. Montgomery Cty. 1969).— In this personal injury action the defendant moved for pretrial discovery of the medical and hospital records of the plaintiff's attending physician. Ohio's privileged communication statute, OHIO REV. CODE ANN. § 2317.02 (Page 1953), provides that a physician cannot reveal his patient's medical communications unless the patient consents or voluntarily testifies about his injuries. In granting the defendant's motion, the court noted that in view of plaintiff's allegations, it would be necessary for him to eventually testify on the same matters sought to be discovered, and thus it would be unfair and inconsistent to let a pretrial claim of privilege inhibit the defendant's right to discovery.

The court's holding reflects the growing concern to expedite protracted personal injury litigation and is consistent with the more liberal discovery permitted under Ohio's proposed rules of civil procedure.

### CIVIL RIGHTS

**CIVIL RIGHTS ACT OF 1964 — DISCRIMINATION BASED ON SEX —** *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).— Plaintiff charged that Colgate violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, -3 (1964), by maintaining a system of job classification that excluded women from jobs requiring lifting over 35 pounds and that resulted in the laying off of females with more seniority than men who were retained. Defendant argued that the Act permits discrimination on the basis of sex if sex is a "bona fide occupational qualification." The court held that female employees must be judged on their individual abilities and

ordered an injunction against future classification on the basis of sex. It also awarded back pay — at the highest rate — to all women who had been illegally laid off, whether or not they had filed charges.

The decision follows the Equal Employment Opportunity Commission's guidelines, but for the first time relief was awarded to all parties whose rights were violated, without regard to their participation in the action. The court stated that suits under Title VII are class suits because the Act seeks to end discrimination on the basis of a class characteristic. It also noted that no procedural purpose would be served by requiring the filing of identical grievances when a single charge would be sufficient to bring an action before the court.

#### CONSTITUTIONAL LAW

DUE PROCESS — GARNISHMENT — *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).— Respondent, claiming \$420 due on a promissory note, instituted a garnishment action against petitioner. In moving for a dismissal of the garnishment proceedings, petitioner claimed that the Wisconsin statute, which provided for freezing of the debtor's wages subject to a judgment on the claim, violated the notice and hearing requirements of the 14th amendment's due process clause. The statute permitted the clerk of the court, at the request of the creditor's lawyer, to institute the garnishment proceedings by service of summons on the garnishee and allowed the creditor 10 days following service in which to serve the debtor. The Court held that garnishment was a significant taking of property which could be constitutionally accomplished only through a prior hearing on the validity of the creditor's claim, and, consequently, that the summary proceedings authorized by the Wisconsin statute failed to adequately protect the petitioner's property rights.

The Court departed from its decision in *McKay v. McInnes*, 279 U.S. 820, *aff'g per curiam* 127 Me. 110, 141 A. 699 (1928), which held that the temporary loss of the *use of property through attachment* as part of a legal proceeding was not a significant taking of property as contemplated by the due process clause. Declining to overrule *McKay v. McInnes*, the Court stated that garnishment is not governed by attachment law in general, reasoning that the loss of livelihood, drain on family financial resources, and possible loss of job attendant upon garnishment serve to elevate that type of "taking" to the level encompassed by the due process clause.

DUE PROCESS — ADMISSION TO PRIVATE ASSOCIATION — *Pinsker v. Pacific Coast Society of Orthodontists*, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969).— Where a dentist had been denied membership in orthodontic associations without a showing by the associations of a cause for rejection, the Supreme Court of California held that the dentist had a judicially enforceable right to have his application considered under the principles of due process.

In so holding, the court rejected the rule that in order to have a judicially enforceable right against a voluntary association an applicant must show an *economic necessity*. The court pointed out that although it may not be economically necessary for a dentist to belong to the defendant organizations, it was a *practical necessity* because the orthodontic associations had a virtual monopoly to determine the standards for practice by orthodontists. This creates a public interest in and of itself, and thus, the associ-

ations have a fiduciary responsibility to comply with the principles of due process when considering an application for membership.

**RIGHT TO PRIVACY — STATE INTELLIGENCE GATHERING SYSTEM —** *Anderson v. Sills*, 106 N.J. Super. 545, 256 A.2d 298 (Super. Ct. 1969).— New Jersey instituted an intelligence gathering system to compile information on individuals and organizations that had been involved in civil disorders or that had the potential to become involved in civil disorders. Citizens and a civil rights organization sought a judgment declaring the intelligence system to be in violation of the first amendment and injunctive relief against its continuance. As a result of the far-reaching nature of the files, the lack of standards for their use, and the inherent danger that the secret files would tend to restrict those who would advocate social and political change, the court held that the intelligence system violated the first amendment.

The court's refusal to recognize a state need sufficient to justify the chilling effect of such files is a forewarning to other states that anticipatory intelligence gathering may not be permitted.

#### CONTRACTS

**UNIFORM COMMERCIAL CODE — DISTRIBUTORSHIP AGREEMENTS —** *Division of the Triple T Service, Inc. v. Mobil Oil Corp.*, —Misc. —, 304 N.Y.S.2d 191 (Sup. Ct. 1969).— Plaintiff, the lessee-franchisee of certain premises operated as an automobile service station, sought a permanent injunction to restrain defendant, the lessor-franchisor, from terminating a distributorship agreement. Without cause, defendant gave notice of its intention to terminate the agreement in accordance with the terms of the contract. Plaintiff contended that under the *Uniform Commercial Code (UCC)* defendant was required to exercise "good faith" in terminating such an agreement and that the clause in the agreement permitting defendant to terminate "without cause" was unconscionable. The court held that the *UCC* was not applicable to such an agreement and that in the absence of legislation defendant could terminate the distributorship agreement without cause. Although the *UCC* may be extended by analogy to transactions in the nature of franchises, leases, and distributorship agreements involving the sale of goods, it does not directly cover an agreement wherein the sale of goods is *indivisibly* tied to the leasing of real property.

The court recognized that unjust results may arise from strict enforcement of such hybrid distributorship agreements and emphasized the necessity for enactment of ameliorative legislation, similar to the proposed Fairness in Franchising Act, H.R. 12074, 91st Cong., 1st Sess. (1969), to remedy the apparent inequities which might be imposed by the courts in upholding the "sacredness" of such contractual obligations.

#### CRIMINAL LAW

**ACTION OF COURT — COMMENTS ON FAILURE OF ACCUSED TO TESTIFY —** *State v. Ashley*, — Wash. 2d —, 459 P.2d 403 (1969).— Convicted on two counts of grand larceny, defendant (who had refused to testify) appealed, arguing that he was entitled to a new trial because the prosecutor, in closing argument, had referred to him by questioning whether *anyone* had disputed the incriminating evidence. The Supreme

Court of Washington disagreed, applying the rule of *State v. Litzenberger*, 140 Wash. 308, 248 P. 799 (1926), which held that a prosecutor may comment upon the fact that certain testimony is undenied, so long as no reference is made to who may or may not be in a position to deny it. Since the accused has the option of whether or not to testify in his own behalf, he must accept the burden of repudiating any resulting unfavorable inference.

In so holding, the court impliedly distinguished the prosecution's *indirect* reference in the instant case from the Supreme Court's position, enunciated in *Griffin v. California*, 380 U.S. 609 (1965), that the prosecutor may not call attention *directly* to a defendant's silence, since the exercise of the basic right to remain silent must not be made costly to the defendant.

HOMICIDE — UNBORN CHILD — *Keeler v. Superior Court for County of Amador*, — Cal. App. 2d —, 80 Cal. Rptr. 865 (1969).— Petitioner Keeler, on trial in the respondent court, was charged with aggravated assault and battery upon his ex-wife and the murder of her unborn child. Keeler sought a writ of prohibition to restrain prosecution of the murder charge claiming that the fetus, which died in the mother's womb, was not a human being for the purpose of CAL. PENAL CODE § 187 (West 1955), which defines murder as "the unlawful killing of a human being with malice aforethought." Denying Keeler's request, the court of appeals rejected the common law "born alive" doctrine and held that for the purpose of the murder statute a fetus is a human being when it has reached the stage of viability, generally associated with the third trimester of pregnancy.

In so recognizing the viable fetus test, California has significantly extended the protection afforded by *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (1947), which held that the requirements of the "born alive" doctrine were met once the actual birth process of a viable fetus had commenced. As a consequence of the instant case California becomes one of the first states in which the "born alive" doctrine has been judicially rejected, although the legislatures of several jurisdictions have declared feticide to be a lesser crime.

JUVENILE DELINQUENCY — THE M'NAGHTEN RULE — *In re Interest of H.C.*, 106 N.J. Super. 583, 256 A.2d 322 (Juv. & Dom. Rel. Ct. 1969).— A 15-year-old boy was apprehended and charged with delinquency for the killing of two girls. At the juvenile court hearing, it was concluded that the juvenile did strike the blows which resulted in the girls' deaths. Moreover, psychiatric testimony indicated that the juvenile was schizophrenic, and that the M'Naghten rule would effectively bar penal sanctions if an adult were involved. The New Jersey juvenile court held that proof of defense of insanity under the M'Naghten rule does not bar a finding of delinquency in the adjudicatory phase of a juvenile proceeding, but it does bar the imposition of penal sanctions in the dispositional phase.

In so holding, the court chose not to follow a Wisconsin Supreme Court decision to the contrary, and reasoned that, absent such an adjudication, the court could not properly exercise its role of *parens patriae* to aid the emotionally ill juvenile.

INDIGENCE — RIGHT TO COUNSEL — *Hendrix v. City of Seattle*, — Wash. —, 456 P.2d 696 (1969).— Appellant, an 18-year-old indigent defendant charged with two violations of Seattle's disorderly conduct ordi-

nances, was denied his request to have free counsel appointed. The superior court, setting aside the convictions on the ground that free counsel should have been provided, was reversed by the Supreme Court of Washington in a 5-4 decision. Noting that the United States Supreme Court had twice denied certiorari on the question of free counsel for alleged *misdemeanants*, the court construed *Gideon v. Wainwright*, 372 U.S. 335 (1963), as limiting the right to free counsel to *felony* prosecutions. Declaring that the legislative and executive branches of government are best able to decide priorities for public expenditures and that, in fact, the judiciary does not have this power, the court relied heavily on the *in terrorem* argument of overwhelming loads on trial courts. Consistent with the views of Mr. Justice Harlan in *Gideon*, two stinging dissents reasoned that constitutional interpretation ought not to be guided by financial considerations, and espoused the view that the *Gideon* rule ought to include "serious misdemeanors."

As this close decision indicates, there is strong and highly emotional disagreement among the judiciary over extending the right of free counsel to indigents accused of misdemeanors. Although the Supreme Court has not rendered an opinion on the subject and state courts have thus far refused to go beyond a narrow reading of *Gideon*, several federal court decisions have held that counsel should be provided in such cases. *E.g.*, *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965); *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965); *Arbo v. Hegstrom*, 261 F. Supp. 397 (D. Conn. 1966).

SEARCH AND SEIZURE — RETROACTIVITY — *Scott v. State*, — Md. —, 256 A.2d 384 (1969).— Incident to a lawful arrest, a search was made of appellant's third floor room. Heroin was discovered in three places: in a jacket laying on the bed; in a coat on the rear of the bedroom door; and in a metal clothes closet. The appellant alleged that the search was unreasonable in light of *Chimel v. California*, 395 U.S. 752 (1969). The court held that the standard set forth in *Chimel* — that only the area within the "immediate control" of the defendant may be searched — is to be applied only to cases where the controversial search was conducted after the date of that decision, June 23, 1969. The instant search, conducted on June 4, 1969, would have been unreasonable under the *Chimel* standards, but the conviction was affirmed and the search held reasonable under the pre-*Chimel* standards.

As authority for holding *Chimel* prospective from the date of the decision, the court relied on the guiding considerations stated in *Stoval v. Denno*, 388 U.S. 293 (1967). The retroactive application of *Chimel* has not been previously decided in a state court, and it was expressly avoided in two recent Supreme Court decisions, *Von Clef v. New Jersey*, 395 U.S. 814 (1969), and *Shepley v. California*, 395 U.S. 818 (1969).

#### EMINENT DOMAIN

URBAN RENEWAL — TIME OF VALUATION — *City of Cleveland v. Hurwitz*, 19 Ohio Misc. 184, 249 N.E.2d 562 (P. Ct. 1969).— In 1961, the City of Cleveland announced approval of plans for an urban renewal project covering 1,633 acres of blighted land; the undertaking was to be divided into four phases to begin at 18-month intervals and be completed in 9½ years. The defendants' apartment buildings, located within what was to

be Phase III of the project, drastically declined in value from 1961 until 1968, at which time the city acquired the properties by eminent domain. The city claimed that under Ohio law the value of the acquired properties should be computed as of *the date the jury was impanelled* in the condemnation proceedings. Observing, however, that defendants' properties had rapidly changed from occupied, income-producing apartment buildings to vacant, vandalized structures following announcement of the renewal plan, the probate court concluded that the neighborhood's decline resulted directly from loss of stable residents and merchants who were driven out by fear of widespread demolition under the renewal plan, inadequate police protection and rubbish removal, and by sporadic enforcement of Cleveland's building code. The court held that the decline in property values was the natural consequence of the cumulative effect of the city's acts or failures to act and constituted a taking for purposes of valuation as of August 31, 1965.

In previous Ohio cases which fixed fair market value as of a time prior to the impanelling of the jury, the deterioration of appropriated properties had resulted from *destruction of surrounding buildings* previously acquired under an urban renewal project. The instant case considerably broadened the circumstances under which a city may be charged with a taking before the actual condemnation proceeding, by requiring only an *announced intent* to acquire the property for urban renewal purposes *plus other acts which contribute* to an accelerated depreciation of the property.

#### LABOR LAW

UNFAIR LABOR PRACTICES — CONDUCT CONSTITUTING REFUSAL TO BARGAIN — *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969).— General Electric has long been recognized as the leading proponent of taking a hard line at the bargaining table. The International Union of Electrical, Radio, and Machine Workers charged that General Electric pursued several unfair labor practices; among other allegations, the IUE specifically cited GE's unyielding bargaining position and the intensive communication of that position to their employees. The Court of Appeals for the Second Circuit held that these practices violated the National Labor Relations Act (NLRA) § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964), which states that an employer practices unfair labor tactics if he refuses to bargain collectively with union representatives.

It is noteworthy that the Second Circuit has denounced the unyielding approach — often termed "Boulwareism" — in a case involving the originator of that tactic. However, as the dissent points out, in light of section 8(d) of the NLRA, which states that the employer need not make concessions at the bargaining table to evidence his good faith, and absent corporate attempts to bargain with local union leadership rather than national officials, the standard for determining when a legally firm position becomes illegally "Boulwareistic" is yet to be enunciated by the courts.

UNFAIR LABOR PRACTICE — RACIAL DISCRIMINATION — *Packhouse Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).— After a certification election was won by the plaintiff union, the employer refused to participate in meaningful bargaining concerning economic conditions and discriminatory racial practices. The union charged that the employer's refusal violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5). The NLRB

found a violation of section 8(a)(5) only and ordered the company to negotiate. Plaintiff appealed, saying that the company's policy of discrimination was an interference with the employees' rights in violation of section 8(a)(1). Agreeing with the plaintiff, the court found that racial discrimination sets up a clash between the white and non-white workers and creates apathy in the non-whites, thus deterring them from engaging in concerted activities: Such interference is an unfair labor practice.

For the first time a court has found racial discrimination to be a violation of the NLRA. Because the steward of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (1964), the Equal Employment Opportunity Commission, has no enforcement powers, the NLRB — with its power to issue cease and desist orders under the NLRA — may now prove to be the most effective agency for ending illegal discrimination in employment.

#### SALES

BREACH OF CONTRACT BY PURCHASER — FORFEITURE OF PARTIAL PAYMENTS — *Linster v. Regan*, 108 Ill. App. 2d 459, 248 N.E.2d 751 (1969). — Making a \$500 downpayment, plaintiff contracted to purchase defendant's restaurant for \$8,500. Subsequently, plaintiff refused to complete the transaction and brought suit to recover her downpayment. The contract contained no provisions for forfeiture in the event of a breach by the plaintiff. Although the defendant suffered actual damages of only \$100, the court held that when a vendee defaults the vendor is entitled to retain all money paid to him on the contract. It reasoned that such a rule would encourage contracting parties to carry out their obligations and would protect sellers, who are willing and able to perform, from suits by defaulting buyers.

Authorities such as Williston, Corbin, and official comments *d* and *e* to the RESTATEMENT OF CONTRACTS § 357 (1932), have taken the view that, at least where the breach is not willful, the defaulting purchaser is entitled to restitution of the portion of the downpayment in excess of the seller's actual damages. Section 2-718(2) of the *Uniform Commercial Code (UCC)* — applicable only by analogy as it applies exclusively to the *sale of goods* — takes a middle position, allowing the seller to keep 20 percent of the defaulting buyer's payments up to \$500 unless the seller is able to show more than that amount in actual damages. When removed from its merchant context, however, neither the *UCC's* rule of forfeiture (up to \$500 regardless of damages) nor the *Linster* court's rationale for total forfeiture in spite of excess over damages seems apropos in all cases. A forfeiture rule cannot encourage performance by a party who is genuinely incapable thereof, and the better approach would seem to be that of Williston and Corbin.

SECURITY AGREEMENTS — RETENTION OF SECURITY INTEREST IN COLLATERAL — *Vermillion County Production Credit Association v. Izzard*, 111 Ill. App. 2d 190, 249 N.E.2d 352 (1969). — The plaintiff lent \$14,710 to a farmer who executed a security agreement and financing statement, covering a certain corn crop and other personal property. The farmer sold the corn to defendants for \$12,828.26. The security agreement contained no direct language either permitting or prohibiting the crop's sale, and the plaintiff had given no specific consent to the sale. The plaintiff brought this action to recover the proceeds of the corn from defendants.

Although a clause in the financing statement extended its coverage to products and proceeds of the collateral, the court interpreted this language as a protection to the lender in case of sale, not as permission to sell. Finding further that the plaintiff had not waived its lien by reason of a course of dealing between itself and defendants, the court affirmed the trial court's judgment on the pleadings for plaintiff.

Section 9-306(2) of the *Uniform Commercial Code (UCC)* provides that a security interest continues in collateral after sale or other disposition thereof by the debtor, unless his action was authorized by the secured party. However, official comment 3 to section 9-306 states that "[a] claim to proceeds in a filed financing statement might be considered as impliedly authorizing sale . . . of the collateral depending upon the circumstances of the parties, the nature of the collateral, the course of dealing of the parties and the usage of trade." The *Izzard* court, the first to deal with this question, evidenced a reluctance, at least in the area of farm products, to find any "implied authority" to sell, in the face of the *UCC's* express provision protecting the creditor's security interest.

#### SECURITIES REGULATION

DISCLOSURE — INSIDER TRADING — *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*, 38 U.S.L.W. 2279 (2d Cir. Nov. 6, 1969).— Before registration with the SEC, the offeror, Bangor Punta and its target company, Piper Aircraft Corp., issued a joint press release announcing Bangor Punta's intention to offer a package of securities worth "not less than \$80" in exchange for each share of Piper stock. At the same time, Bangor Punta was buying Piper stock for cash on the open market. The court held that by announcing a definite price in its press release, Bangor Punta had violated section 5(c) of the Securities Act of 1933, 15 U.S.C. § 77e (1964), which prohibits "offers to sell" securities before a registration statement has been filed with the SEC.

This decision is illustrative of the dilemma in which companies trading in securities may find themselves: The 1933 Securities Act prohibits offers of securities before registration with the SEC, while Rule 10b-5 promulgated under the Securities Exchange Act of 1934 requires disclosure to the public of "insider information" affecting the value of securities. The problem, therefore, is locating the elusive point at which disclosure under the 1934 Act becomes an "offer to sell," violative of the 1933 Act. A reasonable solution is embodied in the SEC's proposed amendment to Rule 135 under the 1933 Act (SEC, Release No. 5010, Oct. 7, 1969) which would allow an insider to disclose the price which he expects to offer for target company shares, so long as he makes it clear that the price is an approximation. If such approximations should prove to be unfailingly accurate, however, the whole issue would appear to be reduced to one of semantics, rather than continuing to meaningfully limit preregistration offers to sell.

SECURITIES EXCHANGE ACT OF 1934 — RULE 10B-5 — TENDER OFFERS — *Iroquois Industries, Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969).— Iroquois Industries offered to purchase from the stockholders of Syracuse China all shares of stock tendered by them up to 50,000 shares. The defendants — officers and directors of Syracuse China, plus two other corporations — prevented Iroquois from obtaining the shares by misrepre-

sending to Syracuse stockholders that a merger would soon take place with Towle Manufacturing Co. Iroquois brought an action under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1964), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1949), which together make it unlawful to employ fraud "in connection with the purchase or sale of any security." The Court of Appeals for the Second Circuit affirmed the district court's dismissal of the complaint for failure to state a claim, thus refusing either to overrule or distinguish *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), which held that a civil action under section 10(b) may be maintained only by a purchaser or seller of securities.

By so holding, the court revitalized the rule that standing to sue under section 10(b) and Rule 10b-5 is extended only to purchasers and sellers of securities. In the present context, this question may well have been rendered moot by the addition of section 14(e) to the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) (Supp. IV, 1968), which makes it unlawful for any person to make any misrepresentations of a material fact in connection with a tender offer.

#### TAXATION

**INCOME TAX — ORDINARY AND NECESSARY BUSINESS EXPENSES —** *Ryman v. Commissioner*, 51 T.C. No. 78 (1969).— Pursuant to INT. REV. CODE OF 1954, § 162(a), petitioner, an attorney and full-time Associate Professor of Law at Drake University Law School, attempted to deduct as ordinary and necessary business expenses for 1963 both a \$126 fee paid for admission to the Iowa Bar and the \$177.17 cost of a reception held on the occasion of his admission to the Bar. Since membership in the Iowa Bar was not required for his teaching position, the petitioner is to be commended for the thoroughness and optimism with which he computed \$303.17 worth of business expense deductions for a law practice which yielded a \$95 average yearly income.

Following its decision in *Grace National Bank v. Commissioner*, 15 T.C. 563 (1950), the court analogized the bar admission fee to the \$5,000 New York Clearing House Association Admission fee claimed as a section 162(a) deduction in *Grace*, and reasoned that membership in the Iowa Bar, carrying with it benefits extending beyond the year in which the deduction was claimed, was a capital asset. Thus, the admission fee could not be deducted as a business expense for the year. The Tax Court also disallowed petitioner's deduction for his reception, affirming its requirement that the taxpayer must show that his entertainment expenses were incurred for business purposes. Because the reception was informal and the guests were not prospective clients, the court stated that this was a nondeductible personal expense under section 262 of the *Code*.

#### TORT

**CONTRIBUTORY NEGLIGENCE — FAILURE TO WEAR SEAT BELT —** *Bertsch v. Spears*, 20 Ohio App. 2d 137, 252 N.E.2d 194 (1969).— Plaintiff, an automobile passenger, was injured in a collision with the defendant's car. The trial court refused to admit evidence that plaintiff was not wearing her seat belt, and the defendant appealed. Noting that neither the defendant's answer, a general denial, nor any proffered evidence raised the issue of contributory negligence, the court denied defendant's assignment of error.

In a most confused attempt to provide guidance to the lower courts and the bar, the court — in dictum which was described as the "holding" — opined that OHIO REV. CODE ANN. § 4513.262 (Page 1953), which provides for safety belt installation in passenger cars, does not require the wearing of those belts and that the failure to do so is not negligence per se.

As a matter of first impression, the court's statutory interpretation parallels that of a number of jurisdictions that have not construed mandatory installation statutes as requiring the *use* of seat belts. Because the concept of negligence per se requires that the person invoking the doctrine be within the group of persons which the statute seeks to protect and because it is doubtful whether mandatory installation statutes were passed to protect negligent (defendant) motorists, the preferred treatment of this problem seems to be that accorded by the several jurisdictions which admit evidence as to seat belt use in connection with the issue of injury causation.

HUSBAND AND WIFE — WIFE'S RECOVERY FOR LOSS OF CONSORTIUM — *Thill v. Modern Erecting Co.*, — Minn. —, 170 N.W.2d 865 (1969).— Appellant's husband received an award of \$375,000 for industrial injuries that had rendered him a paraplegic. Subsequently, appellant sued the same corporate defendants to recover for negligent interference with the marital consortium of her injured husband. Reversing the trial court's grant of summary judgment for the defendants, the Supreme Court of Minnesota held that a wife has the right to recover for negligent interference with the marital consortium of her husband, and that such a determination was based on the judicial sense of public policy rather than on logic or a constitutional mandate.

In recognizing a wife's proprietary interest in the services of her husband and thus partially overruling *Eschenback v. Benjamin*, 195 Minn. 378, 263 N.W. 154 (1935), Minnesota has joined 16 other states that allow a wife to recover in such circumstances.

WRONGFUL DEATH — STRICT TORT OVER BREACH OF WARRANTY — *Keener v. Dayton Electric Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969).— Widow brought a strict liability action against a wholesale distributor for the wrongful death of her husband, electrocuted while trying to repair a neighbor's allegedly defective sump pump. The Supreme Court of Missouri reversed a judgment for plaintiff and remanded because of a prejudicially erroneous jury instruction. In explaining its decision the court expressly adopted the RESTATEMENT (SECOND) OF TORTS § 402A (1964), and its rule of strict liability which dispenses with the requirement of privity between user and seller and imposes liability on the seller of a "product in a defective condition reasonably dangerous to the user" which causes the user physical harm when used as reasonably anticipated.

By officially adopting the rule of the *Restatement*, the court seems to have replaced available statutory remedies (UNIFORM COMMERCIAL CODE (UCC) § 2-318) with a strict tort approach to products liability. This is another example of Professor Shanker's "eclipse" theory — see Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5 (1965) — where the courts blot out valid statutory provisions of the UCC in favor of strict tort.