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Cases Noted

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CASES NOTED

ADMIRALTY

TORT — MARITIME LIEN — *California v. S.S. Bournemouth*, 38 U.S.L.W. 2367 (C.D. Cal. Dec. 18, 1969).— After the defendant vessel discharged bunker oil into navigable California ocean waters, the state instituted an in rem action against the vessel for damages resulting from the harm to its water and marine life. The district court determined that the cause of action constituted a tort that gave rise to a maritime lien on the vessel. The court reasoned that although this was not an ordinary maritime tort involving accident or personal injury, there could be no logical distinction between existing common law actions for damage to a ship or person and the instant injury to the water itself. In fact, since liability of vessel owners traditionally is limited to their interest in the vessels, there are strong reasons for allowing the injured a maritime lien on that property. By allowing a lien the court has created a small deterrent to future torts of this nature at a time when the destruction recently caused by marine oil spills indicates a need for much more stringent deterrent-remedies.

ANTITRUST

CLAYTON 7 — CONGLOMERATE MERGER — *Allis-Chalmers Mfg. Co. v. White Consolidated Industries, Inc.*, 414 F.2d 506 (3d Cir. 1969).— Allis-Chalmers (Allis), threatened by White Consolidated's purchase of 31.2 percent of its outstanding stock, sought injunctive relief in the district court to restrain White from effecting a complete takeover. Allis alleged that the proposed merger, if allowed, would result in product extension (the effects of which would eliminate Allis as a potential competitor) and be conducive to reciprocal dealing in violation of section 7 of the Clayton Act, 15 U.S.C. § 18 (1964). The district court denied the injunction, holding that Allis had failed to demonstrate a reasonable probability of success upon a final hearing. The court of appeals, citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), reversed and granted a preliminary injunction.

For the first time in any action where the legality of the conglomerate merger has been challenged under Clayton 7, a court discussed each of the anticompetitive effects which may ensue from such a combination. The court's limited analysis of the anticompetitive issues, however, adds little to the development of legal standards to appraise the conglomerate merger and applies a rationale whereby any person seeking to enjoin a merger involving large firms in a diversified industry may succeed with little difficulty.

CIVIL RIGHTS

DAMAGES — ACTS OF PUBLIC OFFICERS — *Westberry v. Fisher*, 38 U.S.L.W. 2426 (D. Me. 1970).— In *Westberry v. Fisher*, 297 F. Supp. 1109 (D. Me. 1969), Maine's regulations limiting the amount of benefits a family could receive under the state's Aid to Families With Dependent Children program were declared unconstitutional. The families involved in that action then brought suit under the Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1964), seeking damages from the state officials who administered the unconstitutional regulations. Recovery was sought against the defend-

ants both personally and in their official capacities. The district court denied personal relief, holding that "good faith" was a valid defense in a section 1983 action. Further, because any recovery against the defendants in their official capacities would be paid out of public funds, the action was, in reality, a suit against the state. The court, therefore, dismissed it for lack of jurisdiction, holding that a state is not a "person" for purposes of section 1983, and that the suit was barred by the 11th amendment.

The court's recognition of a "good faith" defense in this case was a logical extension of the Supreme Court's holding in *Pierson v. Ray*, 386 U.S. 547 (1967), which made "good faith and probable cause" an available defense to police officers in a section 1983 action. The administration of state welfare programs would be an impossibility if the officials in charge were required to determine the constitutionality of each regulation before acting, with the consequence of personal liability if the courts should reach a different conclusion.

NAMES — THE RIGHT TO CHANGE, *Application of Middleton*, 60 Misc. 2d 1056, 304 N.Y.S.2d 145 (N.Y. Civ. Ct. 1969).— Robert Lee Middleton, an American-born citizen, intended to instruct the world as to the attitudes and behavioristic patterns of the African people. As a student of Africa and its culture, he thought it fitting to have a name based on its heritage. Under N.Y. CIV. RIGHTS LAW § 60 (McKinney 1948), he applied for leave to change his name to Kikuga Nairobi Kikugus. Noting that Robert Lee Middleton is a fine American name, the court denied petitioner's application, holding that to permit this name change would mislead those he would instruct. Although section 60 may give the court the power to deny name changes which it feels will defraud or deceive the public, this statutory authority does not override the common law doctrine that one legally acquires the name he uses. To the rest of the world he may be Kikuga Nairobi Kikugus, but in New York he is still Robert Lee Middleton.

CONSTITUTIONAL LAW

DUE PROCESS — NOTICE AND HEARING — *McConaghley v. New York*, 60 Misc. 2d 825, N.Y.S.2d 136 (N.Y. Civ. Ct. 1969).— Because of her confusion and apparent inablility to care for herself, plaintiff was transferred by New York City's Welfare Department to the Psychiatric Division of Bellvue Hospital, from which she was discharged after 2 weeks observation. The hospital, acting pursuant to General Order No. 681 of the Department of Hospitals, retained $442 of the money found in her possession as payment for her maintenance and care. The Civil Court of New York ordered repayment, however, analogizing General Order No. 681 to the Wisconsin statute struck down in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), wherein it was held that garnishment of a debtor's wages without notice or hearing violates the due process clause of the 14th amendment.

In *Sniadach*, the special hardships brought about by garnishment without prior hearing prompted the Court to carve out an exception to the general law of attachment. Although the New York court *appears* to have extended this exception, General Order No. 681, since it provided for neither prior nor subsequent hearing, fell directly within the language of *Sniadach*.

FREEDOM OF SPEECH — CRIMINAL SYNDICALISM — *Brandenburg v. Ohio*, 395 U.S. 444 (1969).— Reversing the conviction of a Ku Klux Klan speaker, the Supreme Court in a per curiam opinion struck down Ohio's Criminal Syndicalism Statute, OHIO REV. CODE ANN. § 2923.13 (Page 1953), on the ground that it defined the crime "in terms of mere advocacy not distinguished from incitement to imminent lawless action." In ruling that the statute was a violation of the first and 14th amendments, the Court specifically overruled its holding in *Whitney v. California*, 274 U.S. 357 (1927).

The decision portends that similar state statutes will now be ruled unconstitutional where they make advocacy alone sufficient for conviction. The real import of this decision, however, may be its impact upon the similarly worded Smith Act, 18 U.S.C. § 2385 (1964), which was used throughout the 1950's to convict Communists and Communist sympathizers.

RIGHT TO COUNSEL — PREINDICTMENT LINEUPS — *People v. Fowler*, —— Cal. 2d ——, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).— Defendant was convicted of first-degree robbery and committed to the California Youth Authority after he had been positively identified at a *preindictment* lineup by the two complaining witnesses. At the lineup defendant was neither represented by counsel nor was he told that counsel would be appointed for him if he so desired. In reversing the judgment of commitment, the Supreme Court of California held that, unless there is an intelligent waiver, the presence of counsel is necessary at a preindictment lineup to preserve one's right to a fair trial and to ensure reliability of witnesses' testimony. The court also noted that admission of evidence of the lineup was error which could not be cured by subsequent in-court identification by a source independent of the lineup. The opinion drew upon the principles enunciated in *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), which guaranteed the right to counsel at *post-indictment* lineups unless local regulations are protective enough to withdraw the lineup as a "critical stage" in the proceedings. In this case the local police regulations, promulgated after *Wade* and *Gilbert*, provided only that counsel would be present at lineups when the person "has" an attorney. The court emphasized that it did not intend to extend the rules of *Wade* and *Gilbert* to all pretrial confrontations, but only to those where the facts and circumstances indicate that the presence of counsel is "necessary."

COURTS

APPELLATE JURISDICTION — MAYOR'S COURT NOT COURT OF RECORD — *Greenhills v. Miller*, 20 Ohio App. 2d 313, 253 N.E.2d 311 (1969).— Appellant was convicted in mayor's court of violating a municipal ordinance, and he appealed to the Ohio Court of Appeals. The court held that because OHIO CONST. art. IV, § 3(b)(2) limits its appellate jurisdiction to hearing appeals from final judgments of inferior courts of record and because in Ohio a mayor's court is not a court of record, it could not hear the appeal. In what may have been an attempt to elicit legislative response, the court noted that because a 1968 state constitutional amendment eliminated the other avenue of appeal from a mayor's court — the court of common pleas — the defendants were effectively denied any right to appeal within the state court system.

Thus, in Ohio, the only possibility of review from a mayor's court may

be to the United States Supreme Court under 28 U.S.C. § 1257 (1964), for the Court has not heretofore declared that a *state* must guarantee a defendant the right to appeal.

RULES OF COURT AND CONDUCT OF BUSINESS — POWER TO REGULATE PROCEDURE — *Peck v. Stone*, —— Misc. 2d——, ——N.E.2d ——, 304 N.Y.S.2d 881 (App. Div. 1969).— When petitioner, a young female attorney, wore a mini-skirt during an in-court appearance the respondent judge issued an order prohibiting her from reappearing until her attire was "suitable, conventional, and appropriate." On appeal from Special Term's refusal to vacate the order, the Appellate Division held that the order was an abuse of discretion absent a showing that the attorney's appearance created a distraction or disrupted orderly court processes. While agreeing that membership in the bar imposes conditions and at the same time grants privileges, the court noted that any judicially imposed condition must bear a reasonable relation to the end served.

Ordinarily, an allegation of arbitrariness and caprice must be proven by the party attacking such an order, but here the defendant judge was required — and failed — to show that the "long-skirt" rule was necessary to preserve courtroom decorum. Thus, it would seem the power of a judge to control the personal appearance of court officers has been curtailed, and fashion is alive and well in the courtrooms of New York.

CRIMINAL LAW

ARRAIGNMENT AND PLEAS — IN GENERAL — *United States v. Lucia*, 416 F.2d 920 (5th Cir. 1969).— Lucia was convicted for violating the federal statutes taxing illegal wagers, 26 U.S.C. §§ 4401, 4403, 7201 (1964), because he failed to file the required tax return, to keep the required records, and to report other aspects of his wagering. Lucia moved to set aside the judgment and sentences, basing his motion on *Marchetti v. United States*, 390 U.S. 39 (1968), wherein the Court held that a defendant's assertion of the fifth amendment privilege against self-incrimination is a bar to prosecution for nonpayment of the federal wagering tax.

The Fifth Circuit examined each element of the tripartite retroactivity test enunciated in *Stovall v. Denno*, 388 U.S. 293 (1967), and concluded that the *dominant* element, the Court's "purpose" in establishing the *Marchetti* rule, dictated that untoward effects of convictions for wagering tax violations could and should be eliminated by *Marchetti's* retroactive application. This case is in direct conflict with *Graham v. United States*, 407 F.2d 1313 (6th Cir. 1969), which held *Marchetti* prospective. Therefore, Supreme Court review of the issue is likely.

DOMESTIC RELATIONS

ALIENATION OF AFFECTIONS — RIGHT TO DISSEMINATE RELIGIOUS BELIEFS — *Bradesku v. Antion*, 21 Ohio App. 2d 67, 255 N.E.2d 265 (1970).— After his second wife sued for divorce, plaintiff brought suit for alienation of affection against the Radio Church of God, claiming that the church disrupted his home by preaching the fundamentalist doctrine that a divorced man commits adultery by remarrying. Judgment for plaintiff was reversed by the court of appeals, which followed the general rule requiring *wrongful* conduct by the defendant to be the cause of the alienation of affection.

Since the defendant's conduct was well within the constitutionally protected areas of religion and speech and consequently not *wrongful*, the decision merely reinforces the traditional judicial resistance to curtailment of first amendment rights, but does so within a *unique* factual context.

HOUSING LAW

STANDING TO SUE — SPECIAL INTEREST GROUP — *South Hill Neighborhood Ass'n, Inc. v. Romney*, 38 U.S.L.W. 2413 (6th Cir. Nov. 24, 1969), *cert. denied*, 38 U.S.L.W. 3388 (U.S. April 6, 1970).— An historical association and a neighborhood group petitioned the district court to enjoin a federally financed, urban renewal agency from demolishing several historic buildings in Lexington, Kentucky, which were supposed to be given special protection by virtue of being on the National Register [*see* 16 U.S.C. § 470 (Supp. II, 1966)]. The plaintiffs claimed that the agency had not afforded the Advisory Council on Historic Preservation an opportunity to make recommendations regarding the disposition of the buildings, as required by section 470f. However, the court of appeals held that the associations lacked standing to sue, both because they did not have a *personal* stake in the litigation and because they did not qualify under the "private attorney general" doctrine as recently interpreted in *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608(2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), and *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967).

In the instant opinion, the Sixth Circuit seems to have sacrificed sound legal analysis for verbal brevity. The *Scenic Hudson* and *Road Review* cases held that groups which could demonstrate that their special interests coincided with those protected by federal statutes had standing to sue. It is arguable that the associations' *raisons d'être* paralleled the federal statutory policy of preserving historical landmarks and therefore should have provided a sufficient basis for standing. This decision represents a departure from the more realistic position of the Second Circuit which recognized that groups sensitive to infringements on particular facets of the national interest can most appropriately intercede to protect that interest.

INTERNATIONAL LAW

SOVEREIGN RIGHTS — CONTINENTAL SHELF — *United States v. Ray*, 38 U.S.L.W. 2427 (5th Cir. Jan. 20, 1970).— The United States sought to enjoin two private groups from constructing settlements atop several submerged reefs located 4½ miles southeast of the Florida coast. Rejecting the defendants' contention that these reefs were newly colonized island nations, the court of appeals upheld the district court's injunction, holding that the reefs were part of the seabed, and thus within the United States jurisdiction under the Outer Continential Shelf Lands Act, 43 U.S.C. § 1332 (1964).

An island is a "naturally-formed area of land surrounded by water, which is above the level of mean high water." *United States v. California*, 382 U.S. 448 (1966). However, as the *Ray* court recognized, artificial islands, the seabed, and the subsoil come within the long-standing rule of international law which allows a sovereign nation to explore, exploit, and/or conserve the natural resources of the contiguous continental shelf. 43 U.S.C. § 1332 (1964); Geneva Convention on the Continental Shelf, art. 2, U.N. Doc. A/CONF. 13/38 (1958); Truman Proclamation of 1945, 10 Fed. Reg. 12303 (1945). But for this principle, it is highly probable that the

continental shelf would veritably bristle with "nations" dedicated to the cultivation of various pleasurable pursuits.

MUNICIPAL CORPORATIONS

LANDLORD AND TENANT — DUTY OF PROTECTION — *Bass v. New York*, —— Misc. 2d—— ——N.E.2d ——, 305 N.Y.S.2d 801 (Sup. Ct. 1969).— Pursuant to N.Y. PUB. HOUSING LAW § 402 (McKinney 1957), the New York Housing Authority provided a police force to protect its 10-building, 16-acre complex in which plaintiff's daughter was brutally murdered. In the subsequent wrongful death action, plaintiff prevailed on the theory that because the Housing Authority had assumed a duty of adequate protection toward its tenants and was aware of the high crime rate in the project, its negligence in providing needed protection substantially contributed to the child's death.

This decision significantly broadens the responsibility of the municipality *qua* landlord. Prior to *Bass*, a housing authority owed its tenants the same duty as that of a private landlord — maintenance of the facility — not protection from criminal activity. Now, however, when the municipality *voluntarily assumes* the affirmative duty of protecting its tenants, it must perform that duty adequately.

PATENT LAW

SUBJECTS PATENTABLE — COMPUTER PROGRAMS — *In re Prater*, 415 F.2d 1393 (U.S.C.C.P.A. 1969).— Appellants invented a method for analyzing a mixture of gases which could be performed by a properly programed digital computer, and filed a patent application which was rejected by both the Patent Office examiner and the Patent Office Board of Appeals. The application's failure resulted from the Office's determination that the claim stating the method of computer analysis was too broad in scope to comply with the "specificity" requirement contained in 35 U.S.C. § 112 (1964). The Court of Customs and Patent Appeals affirmed the action of the Board and rejected the appellants' application.

The real significance of the case lies in the dictum which makes it clear that the court is willing to *allow* patents to issue for computer programs that are the subjects of properly drawn claims. This is a significant step forward in patent law, which hitherto denied protection to the core of modern computer science — the program.

PHYSICIANS & SURGEONS

NEGLIGENCE AND BREACH OF WARRANTY — DAMAGES — *Jackson v. Anderson*, 38 U.S.L.W. 2417 (Fla. Ct. App. Jan. 9, 1970).— After the unplanned birth of their child, plaintiffs, husband and wife, brought a negligence and breach of warranty action against the physician who performed a "sterilization" operation on the wife. The physician asserted that a cause of action could be maintained only *prior* to the birth of the child, because the allowance of damages for a normal birth was against public policy. The Florida Court of Appeals, in holding that plaintiffs had stated a cause of action, declared that recovery could be granted *following*, as well as before, the child's birth.

Although courts have consistently denied recovery in similar situations by accepting the argument that any *normal* birth was a "blessed event," the

instant decision follows a trend initiated by *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), which held that in these circumstances public policy did not preclude the possibility of recovery *after* birth of the child.

PRIVATE ASSOCIATIONS

HOSPITAL STAFF MEMBERSHIP APPLICATIONS — JUDICIAL REVIEW — *Davidson v. Youngstown Hospital Ass'n*, 19 Ohio App. 2d 246, 250 N.E. 2d 892 (1969).— Appellants, licensed podiatrists, applied for hospital privileges and staff membership at a private, nonprofit hospital. Upon rejection by the hospital, they petitioned the trial court for an order compelling the hospital to approve their applications. The trial court denied relief, reasoning that the decision by the appellee was not subject to judicial review. Although it affirmed the denial of the mandatory order, the court of appeals significantly overruled the lower court's rationale, noting that the judiciary may grant equitable relief where a *private* hospital has unreasonably and discriminatorily excluded medical practitioners from its staff. Since a hospital is primarily a servant of the public, the appellate tribunal concluded that the discretionary powers with respect to staff membership were fiduciary in nature, to be exercised in trust for the benefit of the public.

This case places Ohio among the enlightened minority of jurisdictions which allow judicial review of a private hospital's discretionary power to pass on staff membership applications. By reviewing *all* the factors on which the hospital made its decision, the court extended the holding of the leading case, *Greisman v. Newcomb Hospital*, 40 N.J. 389, 192, A.2d 817 (1963), which had held unreasonable a private hospital's refusal to even consider a doctor's application.

SALES

HUSBAND AND WIFE — NECESSARIES AND FAMILY EXPENSES — *Dudley v. Montgomery Ward & Co.*, —— Md. ——, 257 A.2d 437 (1969).— In a merchant's action for the cost of goods purchased by defendant's wife after she had committed adultery and voluntarily separated from him, Maryland's highest court ordered summary judgment for the defendant, since he had not consented to the purchases. The merchant's lack of knowledge of the separation and the question of whether the goods were necessaries, the court held to be irrelevant.

The decision affirms the established rule that a husband is not liable for the necessaries of his separated wife, when such separation is the wife's fault. It can be argued, however, that the rule has an unjustly harsh effect upon merchants who generally lack personal knowledge of their customers' current marital status. Since many states, by statute, have softened the effect of the analogous common law rule which provided for immediate termination of an agent's authority upon the unknown death of the principal, under the instant facts a similar modification seems in order.

SCHOOLS & SCHOOL DISTRICTS

TEACHERS — REVOCATION OF LICENSE — *Morrison v. State Board of Education*, —— Cal. 2d ——, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).— During a period of emotional strain, petitioner, a male school teacher, allegedly engaged in limited noncriminal homosexual acts with another

teacher. Prior to this, petitioner had never engaged in homosexual acts and his record as a teacher was above reproach. Acting on a report filed by the other teacher, the State Board of Education removed petitioner's life teaching diploma under a state statute authorizing revocation of a teacher's life diploma for immoral or unprofessional conduct and acts involving moral turpitude. The superior court upheld the board, but the supreme court reversed, restricting the meaning of "immoral conduct" to actions which indicate that one is no longer qualified to perform the duties of a teacher, and holding that absent evidence of such conduct petitioner was still fit to teach.

By interpreting the statute in this manner, the court overruled precedent and adopted the standards of interpretation set forth in the Ohio case, *Jarvella v. Willoughby-Eastlake City School Dist.*, 12 Ohio Misc. 288, 233 N.E.2d 143 (1967), which held that only conduct hostile to the school community can be considered "immoral."

SECURITIES REGULATION

SECURITIES ACT OF 1933 § 17(a) — PUNITIVE DAMAGES — *Globus v. Law Research Services, Inc.*, 418 F.2d 1276 (2d Cir. 1969).— As a result of certain nondisclosures in the offering circular, under the implied civil fraud action of section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q (1964), the lower court held the underwriter and president of the issuer liable for punitive damages. The Second Circuit reversed the award, reasoning that punitive damages were not necessary for the effective enforcement of the Act.

A recent decision, *deHaas v. Empire Petroleum Co.*, 302 F. Supp. 647 (D. Colo. 1969), allowed punitive damages in an implied civil fraud action under Rule 10b-5, 17 C.F.R. § 240.10b-5 (1969), promulgated under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1964). In contrast, the Second Circuit has consistently interpreted the Securities Exchange Act § 28(a) prohibition against recovery in excess of actual damages, as controlling both express and *implied* rights. *E.g.*, *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). In disallowing punitive damages in the instant case, the court has continued to construe the two acts *in pari materia*, demonstrating its belief that punitive damages are not apposite to implied rights under the federal securities acts.

TAXATION

ESTATE TAX VALUATION — MUTUAL FUND SHARES — *Davis v. United States*, 306 F. Supp. 949 (C.D. Cal. 1969).— Decedent's shares in an open-end mutual fund were valued by the Commissioner for estate tax purposes at the current "asked" price (the cost to buy a share in the public sales market) according to Treas. Reg. § 20.2031-8(b) (1963). The taxpayer urged that the current "bid" price (a figure based on net asset value at which the fund will redeem its shares) was more appropriate in valuing the shares. Because the "bid" price was the *only* market price for fund shares, the court noted that "bid" reflected the true value of the shares, and, therefore, held for the taxpayer.

This case conflicts with the recent decision in *Ruehlmann v. Commissioner*, 418 F.2d 1302 (6th Cir. 1969), which held that because mutual fund shares are analogous to insurance and annuity contracts, they should be

valued at the asked price, a figure representing all the benefits of ownership including the redemption rights. In contrast, the *Davis* court reasoned that because mutual fund shares have no incidents of ownership which could justify valuing them at a price in excess of their redemption price, they were more closely analogous to corporate shares covered by a mandatory repurchase agreement, which, under Treas. Reg. § 20.2031-2(h) (1958), are valued at the repurchase price. The district court's analogy is precise and should become the accepted valuation figure.

EXEMPTIONS AND DEDUCTIONS — PRIVATE SEGREGATED SCHOOLS — *Green v. Kennedy*, 38 U.S.L.W. 2418 (D.D.C. Jan. 12, 1970).— A class of Negro children and parents sought to enjoin the Internal Revenue Service from granting tax benefits in the form of exemptions and deductions to segregated private schools. The Commissioner took the view that, unless the operation of the schools was unconstitutional by virtue of state involvement, tax benefits could not be denied the schools or their contributors. The plaintiffs claimed that, unless a temporary injunction were granted, they would suffer irreparable injury, even if a final decree were later rendered in their behalf. A three-judge panel from the District Court for the District of Columbia issued a preliminary injunction, reasoning that racial segregation in the school system was encouraged and supported by the tax benefits.

The court has extended the principle enunciated in *Coffey v. State Educ. Fin. Comm.*, 296 F. Supp. 1389 (S.D. Miss. 1969), where the court held unconstitutional state tuition grants to Mississippi children attending private segregated schools. Now, both direct and *indirect* governmental assistance to these quasi-governmental "private" schools is proscribed.

TORTS

NEGLIGENCE — DANGEROUS INSTRUMENTALITIES — *McKenzie v. Fairmont Food Co.*, 305 F. Supp. 163 (N.D. Ohio 1969).— After defendant removed this wrongful death action from the Common Pleas Court of Lucas County to federal district court, the plaintiff contended that the defendant food company was negligent when a 10-year-old boy entered upon defendant's land and inhaled gas fumes from the open and exposed gas tank of defendant's truck. Notwithstanding the plaintiff's allegations of negligence, the court sustained the defendant's motion under FED. R. CIV. P. 12(b)(6), noting that the plaintiff failed to state a claim upon which relief could be granted.

In sustaining the defendant's motion, the court interpreted Ohio law as rejecting application of the dangerous instrumentality doctrine to automobiles and reaffirmed the inapplicability of the attractive nuisance doctrine in Ohio. Applying ordinary principles of negligence, the court noted that the defendant property owner owed only a duty not to willfully injure the child, and that the child's intervening act was the proximate cause of his own death.

WORKMEN'S COMPENSATION

RIGHT TO COMPENSATION — ASSAULTS BY COEMPLOYEES — *Lofland Co. v. Simpkins*, —— Ark. ——, 448 S.W.2d 39 (1969).— Simpkins sought recovery under workmen's compensation for injuries sustained during normal working hours when horseplay in which he had participated culminated in his being assaulted — *after* he had resumed his normal duties — by his

protagonist, a fellow employee. The workmen's compensation commission had disallowed recovery because, in its view, the assault had not arisen "in the course of employment." Finding that because the employer knew that his prohibition of such horseplay was ineffective the assault was sufficiently related to the claimant's work to warrant recovery, the Supreme Court of Arkansas affirmed the lower court's reversal of the commission order. Because it had previously awarded compensation for injuries resulting directly from an assault where the employer had *acquiesced* in the horseplay, the court reasoned that Simpkins should not be penalized where the employer had given warnings against horseplay, but such warnings were known by him to be ineffective.

Amid the divergent interpretations of what injuries are "sustained in the course of employment," the *Simpkins* decision represents a most liberal construction. Most courts have allowed recovery for assault by coemployees only when the employer could have reasonably foreseen that the nature of the work or the general character of the guilty employee might lead to such an assault. Although the instant decision conforms to the trend of interpreting workmen's compensation statutes in favor of the employee, by placing upon the employer the duty to prevent horseplay, it effectively renders him an insurer against personally motivated acts of his employees which happen to occur on his premises.