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Cases Noted

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Erratum

PAGE 626, SIXTH CASE, LINE 2: change "App." to "App. Div." PAGE 627, SECOND CASE, LINE 8: delete.

CASES NOTED

HABEAS CORPUS — CRIMINAL PROCEDURE — RIGHT TO COUNSEL — *Lester v. Haskins*, 3 Ohio St. 2d 205, 210 N.E.2d 264 (1965). — Petitioner, without aid of counsel, pleaded guilty to a felony indictment. The record did not indicate whether he was informed of his right to have counsel provided at the state's expense. The court in a per curiam opinion held that the conviction must be set aside in the absence of (1) evidence of the petitioner's knowledge of his right to have counsel provided by the state; (2) an inference that the trial judge performed his statutory duty to inform petitioner of his right to counsel; and (3) evidence that the petitioner thereafter waived his right to counsel. Two justices concurred in the result, but not in the reasoning and urged that the judicially created presumption of waiver from a silent record be abolished.

PROCESS — SERVICE ON CONSTITUENT CORPORATION AFTER CORPORATE MERGER — *Nationwide Ins. Co. v. New York, Chi. & St. L. R.R.*, 4 Ohio App. 2d 167, 211 N.E.2d 872 (1965). — Plaintiff had a tort claim against the defendant corporation but did not file its petition until after the defendant effectuated a merger with another corporation. The merger agreement and the Ohio statutes dealing with merger provide that the constituent corporation (the defendant here) shall cease to exist as of the merger date. The court held that since Ohio Revised Code Section 1701.81(A)(6) provides for service of process on constituent and resulting corporations, it appears that the legislature intended that legal actions can be commenced against constituent corporations after the effective date of merger notwithstanding that other statutory provisions and the merger agreement provide for the demise of the constituent corporation.

AUTOMOBILES — CERTIFICATE OF TITLE — RIGHT OF ORIGINAL OWNER AGAINST A BONA FIDE PURCHASER — *Buckeye Union Cas. Co. v. Nichols*, 4 Ohio Misc. 131, 212 N.E.2d 685 (1965). — Plaintiff, holding the original Ohio certificate of title to a stolen car, sought to replevy the vehicle from a bona fide purchaser who also held an Ohio certificate of title on the vehicle on which the manufacturer's serial number had been changed. The court, distinguishing *Commercial Credit Corp. v. Pottmeyer*, 176 Ohio St. 1, 197 N.E.2d 343 (1964), held that where both parties hold an Ohio certificate of title, the Ohio title statute (OHIO REV. CODE § 4505.19) is neutralized and common law principles apply. Under such circumstances, the bona fide purchaser obtains no better rights than the thief who stole the car.

PLEADING — AMENDMENT — SUBSTITUTION OF REAL PARTY IN INTEREST — *Stauffer v. Isaly Dairy Co.*, 4 Ohio App. 2d 15, 211 N.E.2d 72 (1965). — After the statute of limitations had expired on her cause of action, plaintiff moved to substitute as defendant the name of the corporation which was the real party in interest in a suit for which the petition had been timely filed. The defendant corporation and the corporation named in the petition had characteristic words in their names that were nearly identical, had intermingled officers, and were located at the same address. The court held that in the interest of justice the motion should be granted under such circumstances since the plaintiff had exercised reasonable diligence in ascertaining the identity of the real party in interest.

HABEAS CORPUS — PAROLE — PROCEEDINGS TO DETERMINE VIOLATION — IMPRISONMENT DURING — REASONABLE TIME — *Gooch v. Hixon*, 237 F. Supp. 104 (S.D. Ohio 1964). — Petitioner, while on parole, was arrested and indicted. Bond was set but tender of the amount was refused because the parole commission filed a "holder" on petitioner. Petitioner was held incarcerated and was not permitted to post bond for a period of four months. The court held that within the meaning of Ohio Revised Code Section 2965.21 four months was an unreasonable period of time for the petitioner to be held in jail without a determination by the pardon and parole commission of the charge that he had violated his parole.

CONSTITUTIONAL LAW — DAMAGES — LOSS OF CONSORTIUM OF HUSBAND — *Clem v. Brown*, 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. 1965). — Plaintiff instituted a negligence action for injury to her husband and alleged that "she has lost . . . consortium." The defendant moved to have the allegation stricken from the record on the basis that Ohio law does not permit the wife to recover for loss of consortium of her husband. In denying defendant's motion the court held that the Ohio rule deprives the wife of equal protection of the law guaranteed by the fourteenth amendment of the federal constitution. The court's interpretation of the constitutional guarantee abrogates the effect of Ohio Revised Code Section 3103.01 and the mandate of Article I, Section 2 of the Ohio Constitution which requires a legislative, rather than a judicial determination of policy.

CRIMINAL LAW — TRIAL — ARGUMENTS AND CONDUCT OF COUNSEL — *Keeble v. United States*, 347 F.2d 951 (8th Cir. 1965). — Petitioner appealed from a perjury conviction on the basis of a prejudicial and improper closing argument by the prosecuting attorney. In his closing argument, the United States attorney had urged the credibility of the government witnesses, stating that his faith in them stemmed from facts not admitted in evidence. The court held that since the trial judge had admonished the jury after the improper statements to base their opinion of credibility of witnesses only on the admitted evidence, it was not an abuse of discretion to fail to reprimand the prosecutor or to grant a new trial.

INTERNAL REVENUE — PENALTIES — ACTION TO RECOVER PENALTIES PAID — *Cellura v. United States*, 245 F. Supp. 379 (N.D. Ohio 1965). — A restaurant manager sued to recover payments which had been assessed as a penalty under Section 6672 of the Internal Revenue Code of 1954 because of the taxpayer's wilful failure to pay withholding and social security taxes. The district court held that the plaintiff was not liable for the penalty since she did not have control over what debts should be paid because the owner of the business had directed that trade creditors should be preferred over all other creditors.

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — SUPPRESSION OF EVIDENCE — *People v. Olszowy*, 47 Misc. 2d 859, 263 N.Y.S.2d 221 (Erie County Ct. 1965). — Police, armed with a valid arrest warrant and accompanied by complainant, broke into defendants' apartment. Unable to find the defendants, the police nevertheless seized certain articles indicated by the complainant to be evidence of a rape allegedly committed by defendants in the apartment. Defendants were subsequently arrested. The court held that every search is not unreasonable simply because it precedes an arrest, and that the police properly entered the apartment. The court refused to rule that where police officers are legally on the premises they must ignore evidence of a crime and await a suspect's return to make a formal search and seizure in his presence.

STATUTE OF LIMITATIONS — COMMENCEMENT OF ACTION — FEDERAL RULES OF CIVIL PROCEDURE — *Sylvestri v. Warner & Swasey Co.*, 244 F. Supp. 524 (S.D.N.Y. 1965). — Plaintiff filed a complaint in the Federal District Court for the Southern District of New York. New York law provides that an action is not commenced until the defendant is served with process. Rule 3 of the Federal Rules of Civil Procedure provides that an "action is commenced by filing a complaint with the court." Thus, under New York law the statute of limitations would have expired while under Rule 3 it would not have expired. The court held that Rule 3 is applicable in determining the expiration of the statute of limitations in a diversity case, especially where the defendant had full notice of the claim before the statute of limitations had run under either law, and where it would be unjust to permit the claim to be defeated by maneuvers, particularly where no public policy of New York was shown to be involved.

CRIMINAL LAW — ASSIGNMENT OF COUNSEL — RIGHT TO BE RELIEVED — *People v. Maybusher*, 24 App. 2d 765, 263 N.Y.S.2d 625 (1965). — An attorney, assigned to represent an indigent on a criminal appeal, moved to be relieved of the assignment on the ground that he had no experience in criminal and appellate work. The court granted the motion on the ground that since the attorney had communicated his feel-

ings of incompetence to the indigent defendant it destroyed the defendant's confidence in him and, in addition, destroyed the attorney's usefulness in safeguarding the defendant's interests. However, the court stated that it would consider the attorney for future assignments of a similar nature and, moreover, stated that an assigned attorney's lack of experience in criminal and appellate work does not in itself justify relieving him from his duty to represent an indigent. The court observed that the large number of indigent assignments made it imperative that the burden should not fall solely on the limited membership of the Bar specializing in criminal law.

TORT — LIBEL AND SLANDER — WORDS AND ACTS ACTIONABLE AND LIABILITY THEREFOR — *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Civ. App. 1965). — Plaintiff filed a petition alleging that a press association article accusing him of assuming command of a crowd and leading a charge against federal marshals was libelous. The article was a news account of activities relating to riots that occurred over the admission of a Negro to the University of Mississippi. The court held that since the statements did not constitute fair comment, were not substantially true, inferred the commission of a crime by the plaintiff, and imputed the crime of insurrection against the United States, to the plaintiff, they were libelous per se.

UNAUTHORIZED PRACTICE OF LAW — BANK AND TRUST COMPANY — PROVIDING SPECIAL LEGAL INFORMATION — *Green v. Huntington Nat'l Bank*, 4 Ohio St. 2d 78, 212 N.E.2d 585 (1965). — Plaintiff brought an action to enjoin the defendant bank from practicing law. The defendant offered an "estate analysis" program to its customers which consisted of providing specific legal information relating to a particular person's estate. The court held that by systematically engaging in such activities with the expectation of being compensated, the defendant engaged in the practice of law. The lower court's judgment enjoining the defendant from offering such advice was affirmed. The lower court's judgment enjoining the defendant from offering such advice was modified to permit the defendant to deal with an attorney but to prevent direct bank-customer consultations.

COMMON-LAW MARRIAGE — ELEMENTS — CONTRACT IN WORDS OF PRESENT TENSE — *In re Soeder*, 4 Ohio Misc. 96, 209 N.E.2d 175 (C.P. 1965). — Plaintiff filed a petition contesting the validity of decedent Soeder's will and subsequently filed exceptions to the inventory and appraisal in the probate court demanding her lawful rights as surviving spouse. Plaintiff and decedent had engaged in a long and intimate relationship during the course of which they exchanged marriage vows in front of two witnesses and at the same time stated that they desired to make their marriage a "legal affair." The court held that a mutual agreement to marry made in words of present tense by persons competent to marry are the only requisites for effectuating a common-law marriage and when these elements are established by direct evidence which is clear and convincing, a common-law marriage is created.

INSURANCE — RIGHT OF SUBROGATION — PREJUDICE OF RIGHT BY INSURED — *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418 (Mo. Ct. App. 1965). — Plaintiff insurance company brought an action against its insured and against a tort-feasor who caused personal injuries to the insured. The plaintiff paid the insured's medical expenses and sought to recover that amount based on its subrogation claim as provided in the insurance contract with the insured. The defendant-insured and the defendant-tort-feasor entered into an agreement to settle the insured's claim against the tort-feasor, after notice had been given by the plaintiff that it was subrogated to the insured's right to damages to the extent of its disbursements for the insured's medical expenses. The court held that the insured did not prejudice the plaintiff's subrogation rights by entering into the agreement with the tort-feasor to settle all claims, and therefore dismissed the cause of action against the insured. More significantly, the court held that the insured's right to recover medical expenses against the tort-feasor was part of the insured's cause of action arising out of a personal injury and was consequently not assignable under Missouri law; therefore, the court also dismissed the cause of action against the tort-feasor.