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## Cases Noted

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## CASES NOTED

### ATTORNEY AND CLIENT

**FEES AND OTHER REMUNERATIONS — SERVICE UNDER ASSIGNMENT BY COURT** — *State v. Pruett*, 10 Ohio App. 2d 218, 227 N.E.2d 261 (1967). — Court-appointed counsel, representing an indigent defendant on appeal from a first-degree murder conviction, submitted an application to the court for attorney fees in an amount usually charged nonindigent clients. The appellate court held that the statutory provision (OHIO REV. CODE § 2941.51) giving courts discretion to set compensation for court-appointed counsel in murder cases was not intended to permit full compensation. The maximum allowable compensation for an appeal in a first-degree murder case was set at \$2000.

The decision is analogous to the construction given to the Criminal Justice Act of 1964 by several federal district courts. Whether this and similar decisions will ultimately be overturned to assure the indigent accused "effective" counsel will depend upon a future ruling by the United States Supreme Court.

**SUSPENSION AND DISBARMENT — MISAPPROPRIATION AND FAILURE TO ACCOUNT** — *Columbus Bar Association v. Edwards*, 11 Ohio St. 2d 171, 228 N.E.2d 626 (1967). — Where an attorney misappropriated clients' funds while mentally ill, the Supreme Court of Ohio held that the absence of any effort to make restitution, after his mental rehabilitation, justified the Columbus Bar Association in suspending him from practice for an indefinite period.

In so holding, the court affirmed the widely held principle that disciplinary proceedings are civil in nature, and are for the protection of the public rather than the punishment of the attorney. Although mental incompetence is usually a defense in such a proceeding, and limits the suspension to the period of the mental illness, the court distinguished the instant case because rehabilitation had been psychiatrically certified, and the attorney still failed to adhere to the Canons of Professional Ethics.

### AUTOMOBILES

**CONTROL, REGULATION, AND USE — CERTIFICATE OF TITLE** — *Hardware Mutual Casualty Co. v. Gall*, 11 Ohio App. 2d 217 (1967). — Plaintiff, an insurance company, obtained a certificate of title from the owner of a stolen car. Four months later defendant innocently purchased the stolen car from an Ohio automobile dealer. Because the metal plates carrying the car's serial number had been altered, the certificate of title issued to defendant carried an incorrect serial number. In granting plaintiff's action of replevin, and disregarding decisions protecting bona fide purchasers, the court ruled that defendant's false certificate of title with an altered serial number could not prevail over the owner's true certificate carrying the correct number. Recognition of defendant's false certificate, the court reasoned, would encourage traffic in stolen automobiles.

The dissent, relying on an earlier Ohio Supreme Court ruling to the effect that one cannot prevail in an action of replevin against an innocent purchaser of a motor vehicle who acquired possession in Ohio with an ostensibly valid Ohio certificate of title, reasoned that defendant's certificate of

title appeared valid and corresponded with the serial numbers on the car and other identifying nomenclatures, and therefore, defendant should have been accorded bona fide purchaser protection.

**INJURIES FROM OPERATION — PERSONS OTHER THAN OWNERS OR OPERATORS —** *Fuller v. Standard Stations, Inc.*, 58 Cal. Rptr. 792 (Ct. App. 1967). — The plaintiff, a minor, appealed from a judgment sustaining the general demurrer of service station operators who sold gasoline to a recognizably intoxicated driver, thereby supplying him with the motive power with which he subsequently caused the deaths of the appellant's immediate family in an ensuing accident. The court held that the gasoline vendors were exempt from liability as a matter of law, reasoning that because tavern-keepers who supply tortfeasors with liquor are exempt from liability to third persons in California, so too must be service station operators whose commodity is more remote from causation than alcohol.

Although the court was reluctant to adhere to stare decisis and noted with favor other states' progress in the area, the decision carries California law in this area even farther across the grain of modern tort doctrine than previously.

**RIDING WITH RECKLESS, INEXPERIENCED, OR INTOXICATED OPERATOR — ASSUMPTION OF RISK —** *Chalmers v. Willis*, 231 A.2d 70 (Md. Ct. App. 1967). — Plaintiff volunteered to instruct defendant in the operation of a motor vehicle. During the second lesson defendant failed to negotiate a left turn and struck a telephone pole causing plaintiff's injuries. The trial judge ruled in defendant's favor n. o. v. holding that plaintiff, as a matter of law, was not entitled to recover because she had assumed the risk of the learner's negligence. The appellate court reversed and held that the assumption of risk by a licensed operator for a learner's negligence is a question of fact which a jury must determine.

State courts that have encountered this problem are divided on its solution. New York and Kentucky hold that, as a matter of law, an experienced operator who accompanies a learner assumes the risk of the learner's negligence. However, Massachusetts, South Dakota, California, Louisiana, and Pennsylvania adhere to the rule announced by the Maryland court.

#### BANKRUPTCY

**ATTORNEY'S FEES — REASONABLENESS —** *Jacobowitz v. Double Seven Corp.*, 378 F.2d 405 (9th Cir. 1967). — Appellant, trustee's attorney in bankruptcy, requested a fee based upon the recommended minimum fee schedule of his local bar association. The referee's order reducing the requested fee was affirmed by the district court. Although expert witnesses testified without contradiction that the fee requested was reasonable, the referee held the Bankruptcy Act to demand that attorneys in bankruptcy receive an appreciably smaller amount than they could command in purely private practice. On appeal, *held*, reversed. A legal determination of reasonable attorney's fees in bankruptcy cases is no different from a similar determination in private employment except that a court should, in fixing fees, be predisposed to moderation.

The dissent, while stressing the necessity of preserving the res of bankruptcy proceedings, indicated that reviewing courts traditionally deferred to the lower court's discretion. The fact that the majority chose not to con-

sider the referee's exercise of discretion suggests a departure from the earlier rule announced in *In re Owl Drug Co.*, 16 F. Supp. 139, 144 (D. Nev. 1936).

**RELIEF OF DEBTORS — WAGE EARNERS' PLANS** — *In re Bradford*, 268 F. Supp. 896 (N.D. Ala. 1967). — A retired worker, whose only sources of income were social security and a state pension, filed a plan under Ch. XIII of the Bankruptcy Act of 1964 whereby he proposed to pay his debts through a period of extension. A creditor objected, alleging that the debtor was not a "wage earner" as defined by the Act, and therefore, not entitled to relief under Ch. XIII. The court, in affirming the decision of the referee, held that a person whose only source of income is social security is a "wage earner" as defined in Ch. XIII, and is entitled to relief under that section of the Act.

By including social security beneficiaries, the court has greatly expanded the Ch. XIII definition of wage earner. This is consistent with the legislative history of Ch. XIII, which shows an intent to make the wage earners' plan available to as many of the working class as possible.

#### CONSTITUTIONAL LAW

**EQUAL PROTECTION OF LAWS — POLICE POWER** — *Farrell v. Drew*, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967). — In a summary eviction proceeding brought against the defendant for nonpayment of rent, the plaintiff challenged the constitutionality of N.Y. SOC. WELFARE LAW § 143-b, which provides a rent abatement for welfare recipients who live in buildings which contain a "violation of law . . . which is dangerous, hazardous or detrimental to life or health." The trial court found that the door to the apartment of a nonwelfare tenant, required by statute to be "self-closing," was not properly functioning, and constituted a hazardous condition that rendered the building unsafe for all tenants because of the possibility of fire originating there. Affirming the decision of the trial court in the defendant's favor, the court, on appeal, held that the remedy of a rent abatement did not deny the plaintiff equal protection of the laws, deprive him of property without due process of law, or unconstitutionally impair contractual obligations.

In accord with previous decisions construing this Act, the court reasoned that "such legislation is not unconstitutional as long as a 'reasonable basis' exists for differentiating among members of the same class." The court conceded that landlords of welfare recipients are not the only ones who violate the building codes, but noted that landlords of welfare tenants have been "conspicuous offenders."

**EQUAL PROTECTION OF LAWS — RACIAL DISCRIMINATION** — *Loving v. Virginia*, 388 U.S. 1 (1967). — Petitioners, a white man and a Negro woman, both residents of Virginia, were married in the District of Columbia. After their return to Virginia, they were convicted of violating Virginia's ban on interracial marriages. The State contended that because its antimiscegenation laws punished white and Negro alike, its racial classification was not discriminatory. Rejecting this contention, the Supreme Court said all classifications based upon race constitute invidious racial discrimination in violation of the 14th amendment, unless some legitimate,

independent, and overriding state purpose justifies it. The Court found no such purpose.

Virginia had been one of 16 states still prohibiting interracial marriages. Within the last 15 years, 14 states have lifted antimiscegenation laws. By holding Virginia's statutory scheme in violation of the equal protection and due process clauses of the 14th amendment, the Court has sounded the death knell of the states' antimiscegenation statutes.

JUDICIAL POWER — POLITICAL QUESTIONS — *Powell v. McCormack*, 266 F. Supp. 354 (D.D.C. 1967). — An action was brought by Congressman Adam Clayton Powell against the officers and members of the United States House of Representatives for an injunction, declaratory judgment, and mandamus enjoining the enforcement of House Resolution No. 278 excluding Powell from Congress. The complaint alleged that the resolution violated the Congressman's constitutional rights because it was based on racial discrimination, violated procedural due process, and constituted cruel and unusual punishment, an ex post facto law, and a bill of attainder. Powell also petitioned for a three-judge panel to hear the case.

The court denied the request for a three-judge panel stating that a resolution is not an act of Congress under 28 U.S.C. § 2282 (1964), and therefore a three-judge panel is not necessary. The court noted that the controversy in question was political and held that under the doctrine of separation of powers, the district court did not have jurisdiction to hear the complaint. The right of Congress to punish its members remains, and it appears that the courts should not question or interfere with this right.

#### CONTRACTS

ACTIONS FOR BREACH — CONSTRUCTION OF CONTRACT — *Canney v. New England Telephone & Telegraph Co.*, 228 N.E.2d 723 (Mass. 1967). — Plaintiff, while employed as an installer and repairman for defendant company, fell from a telephone pole and received permanent injuries to his spine. On the day of the accident, July 7, 1945, company representatives visited the plaintiff and assured him that if he did not sue the company, he would receive full pay as an installer and repairman as long as he lived. The plaintiff agreed, but no written contract was signed or offered. On July 25, 1945, the plaintiff signed defendant's "disability plan," which provided for 13 weeks full pay, and one-half pay for the duration of his disability. Eventually, the plaintiff returned to work, where he served in routine functions at the higher rate of an installer and repairman, until his release from the company in 1959. In reversing the decree of the lower court, the supreme judicial court held that the defendant was not bound by the oral promises of July 7th, but rather by the provisions of the signed agreement.

Although the evidence indicated that the company recognized the earlier promises and paid the plaintiff higher wages for many years, the court applied the rule that an oral agreement is superseded and merged into a written contract, and, therefore, the defendant could not be held to the oral promises.

#### COUNTIES

COUNTY EXPENSES, CHARGES, AND STATUTORY LIABILITIES — CRIMINAL PROCEEDINGS — *Abodeely v. County of Worcester*, 227 N.E.2d 486 (Mass. 1967). — Plaintiff, an attorney appointed by a judge to represent an indigent criminal defendant, rendered services until the defendant decided to

plead guilty to lesser charges. Plaintiff then submitted a bill for services rendered to the presiding judge who approved the bill and submitted it to the county treasurer who refused payment.

Contrary to the great weight of authority, the court held that the state statute requiring counties to absorb the costs of criminal prosecution should also be extended to cover the costs of defense. The court reasoned that it is inequitable for a few attorneys, skilled in criminal prosecution and defenses, to alone bear the burden of representing indigent defendants when this responsibility is properly that of all the bar, and, indeed, of the entire community.

#### COURTS

**EXERCISE OF JURISDICTION — DOMICILE OR RESIDENCE OF PARTY —** *Foye v. Consolidated Bailing Machine Co.*, 229 A.2d 196 (Me. 1967). — Plaintiff brought an action for personal injury alleged to have been sustained as a result of a defective and dangerous paper press. The defendant-vendor, a New York company, was not the manufacturer of the press. On orders from the purchaser, a Massachusetts company, the defendant shipped the press directly to plaintiff's employer in Maine. Jurisdiction was based on this single transaction under ME. REV. STAT. ANN. tit. 14, § 704(1).

In denying defendant's motion to dismiss on jurisdictional grounds, the court held that the direct shipment of the dangerous press into the state constituted a tortious act committed "within the state," under the statute. Considering the convenience of the forum to the parties, and the nature of the activity of the defendant, the court concluded that the single transaction in this case was enough to confer jurisdiction without violating the requirements of due process. The court has thus assumed the maximum possible jurisdiction over nonresident parties in civil actions.

**OHIO'S LONG-ARM STATUTE — TRANSACTING OF BUSINESS —** *American Compressed Steel Corp. v. Pettibone Mulliken Corp.*, 11 Ohio Misc. 1 (S.D. Ohio 1967). — Defendant, a foreign manufacturer of custom-designed machinery, had on two occasions come to Ohio to negotiate a sale. Plaintiff signed the agreement in Ohio while defendant executed the contract in Iowa. Subsequently, defendant returned to Ohio to deliver drawings of the proposed machine. In an action for damages for breach of contract, the federal district court held that defendant had "minimal contacts" with Ohio and that the maintenance of an action would not violate the due process guarantees of the 14th amendment. Ohio's long-arm statute was held to contemplate defendant's activities.

Carefully defining defendant's post-contract excursion to Ohio as the transacting of "business," the court rested its decision upon *Liquid Carriers Corp. v. American Marine Corp.*, 375 F.2d 951 (2d Cir. 1967), in which substantial preliminary negotiations alone constituted a transaction of business and were sufficient to bring the defendant within the jurisdiction of New York courts.

#### CRIMINAL LAW

**ADMISSIONS, DECLARATIONS, AND HEARSAY — PROOF AND EFFECT —** *State v. Gresham*, 10 Ohio App. 2d 199, 227 N.E.2d 248 (1967). — In a trial which came after the *Escobedo* case but before the *Miranda* case, defendant was convicted of second-degree murder. After the defendant had

been taken into custody and to the police station, he was questioned by detectives and made certain admissions. Defendant had not requested counsel. The court of appeals held that the trial court had committed prejudicial error in permitting the prosecution to use these admissions against the defendant on direct examination of the interrogating detectives without proving that the defendant had been warned of his constitutional right to remain silent and that he had waived this right.

This decision clearly establishes that the prosecution has the burden of proving that the accused was warned of his constitutional right to remain silent and be assisted by counsel, and that the accused waived this right; and further, that the defense need only make, at most, a *general* objection to the admission of statements made by defendant.

CO-DEFENDANTS — NUMBER OF COUNSEL — *People v. Kessee*, 58 Cal. Rptr. 780 (Ct. App. 1967). — Appellant and one McLeod, together represented by one attorney, were jointly tried for robbery. The facts indicated that McLeod's role was purely a passive one, but that the appellant wielded a chain. During argument, defense counsel, in an effort to help McLeod, disparaged appellant by saying, "the case that is made out, if any is made out, is to Kessee, not as to McLeod." An appeal was taken from the verdict of guilty. The court of appeals reversed the conviction, holding that appellant had a constitutional right to separate counsel because the facts indicated a heavier involvement by one defendant than the other.

The immediate decision will only apply in rare instances where the criminal involvement of the two parties varies substantially in degree, and where an effective defense cannot be made on behalf of one defendant without prejudicing the other. The decision also rejects the general rule that a defendant cannot appeal if he does not complain that his counsel is inadequately representing him at the trial level.

EVIDENCE — CHILDREN'S CONFESSIONS — *State v. Francois*, 197 So. 2d 492 (Fla. 1967). — Defendants, two 16-year-old boys, were tried and found guilty of first-degree murder and sentenced to life imprisonment. Signed confessions were introduced as evidence over the protest of counsel. The confessions had been obtained after advising the defendants of their rights, but while they were under the jurisdiction of the juvenile court. The Florida Supreme Court, in upholding the trial court's decision, held that a minor's confession freely given with notice of constitutional rights is admissible as evidence regardless of the juvenile court jurisdiction factor.

The Florida Supreme Court adopts the majority position that in spite of juvenile jurisdiction, a minor's confession is subject to the same tests for admissibility as that of an adult, as long as it can be shown that the minor was mentally capable of understanding the significance of his actions.

FAILURE OF ACCUSED TO TESTIFY — NECESSITY AND PROPRIETY OF INSTRUCTIONS — *State v. Wallace*, 152 N.W.2d 266 (Iowa 1967). — Defendant was convicted of shoplifting. During the trial defendant refrained from testifying in her own behalf. The trial judge gave an instruction to the jury to the effect that defendant was not required to take the stand and that no inference of guilt was to be drawn from this failure. Defendant neither requested nor objected to this instruction. On appeal, however, defendant claims error in that the instruction violated her fifth amendment right against self-incrimination.

The Supreme Court of Iowa, in a case of first impression, adopted the federal court position that such an instruction, even though not requested by defendant, could not adversely prejudice the jury by drawing attention to defendant's failure to testify. The court, although it felt that such an instruction would even tend to be beneficial to the defendant's case, did admit that it would have been better practice if the trial judge had not given an instruction on this issue.

INDIGENT CLIENT — COMPENSATION FOR COUNSEL — *Henderson v. State*, 11 Ohio App. 2d 1, 277 N.E.2d 814 (1967). — Defendant, tried and convicted of a felony, petitioned the court for post-conviction relief and for compensation for counsel under OHIO REV. CODE §§ 2953.21, 2953.24. The trial court summarily dismissed the petition. The court of appeals, considering only the question of whether the indigent petitioner had the right to compensation for counsel to prosecute an appeal pursuant to § 2953.24, affirmed on the ground that the petition did not state facts which would entitle the petitioner to relief.

But, by interpreting the statutes to mean that an indigent petitioner is entitled to compensation for counsel in post-conviction relief if the trial judge feels that the petition alleges facts which, if proved, would entitle the petitioner to such relief, and that if files and records of the case do not negate these facts, the court places Ohio in a minority of states which allow compensation for counsel in post-conviction proceedings.

POST-CONVICTION RELIEF — NECESSITY FOR SANITY HEARING — *People v. Pridgen*, 37 Ill. 2d 295, 226 N.E.2d 598 (1967). — In 1959 Charles Pridgen was convicted of burglary. He later petitioned for a sanity hearing under the Illinois Post-Conviction Hearing Act. The Supreme Court of Illinois affirmed the trial court's judgment dismissing the petition and held that a bona fide doubt about defendant's sanity at the time he was tried for burglary was not raised by his statement that, at the time of trial, because of a recent gunshot wound in the head, he had been unable to recall any of the events surrounding the alleged burglary, or, by his counsel's statement that the defendant had been unable to give him any information that might help in the preparation of a defense.

This case affirms the result in *People v. Lego*, 32 Ill. 2d 76, 203 N.E.2d 875 (1965), where a self-serving note by the defendant which stated, "I feel I am not competent to stand trial due to the fact that I suffer from black-out spells," was not sufficient to create a bona fide doubt as to the defendant's sanity. The court in the instant case found it unnecessary to consider the contention that amnesia is a form of insanity within the meaning of the law. However, it is still clear that the defendant is entitled to a sanity hearing on the issue of his competency to stand trial if facts have been presented to the court which raise a bona fide doubt of the defendant's sanity.

#### DEATH

ACTIONS FOR CAUSING DEATH — DAMAGES, FORFEITURE, OR FINE — *Lockhart v. Besel*, 71 Wash. 109, 426 P.2d 605 (1967). — Appellant, whose minor son was killed when his motorcycle was struck by an automobile, initiated a wrongful death action against the driver and the driver's parents. The trial court refused to instruct the jury to grant compensation



for loss of companionship. On appeal, the supreme court reversed the trial court's decision and held that loss of companionship should be considered in computing damages in an action for the wrongful death of a minor child.

This decision signals a change of view by Washington courts toward the validity of lost companionship as a measure of damages. All previous cases that had denied damages for lost companionship were expressly overruled. Although only a slim majority of states take this position, the recent activity of courts and legislatures throughout the country hallmarks the trend toward allowing consideration of lost companionship in a suit for wrongful death.

**ACTIONS FOR CAUSING DEATH — WHAT LAW GOVERNS —** *Thomas v. United Air Lines, Inc.*, 281 N.Y.S.2d 495 (Sup. Ct. 1967). — In a wrongful death action arising out of an airplane crash in the navigable waters of Illinois, defendants claimed that the Illinois law should be followed under maritime law. The trip originated in New York and New York citizens were involved. The court held that under its choice-of-law rule, the action is properly brought under New York law, and maritime law is not applicable.

New York holds that the local law of the state which has the most significant relationship with the occurrence and parties concerned prevails. The common law traditionally has held that the law of the situs of the wrong should apply. Federal maritime law had previously applied to such cases, but since *Tungus v. Skovgaard*, 358 U.S. 588 (1959) the Supreme Court has held that the applicable state statute applies. This decision follows the *Tungus* case and the choice-of-law rule of New York.

#### DECLARATORY JUDGMENT

**MANDAMUS — COPYRIGHTS —** *Public Affairs Associates v. Rickover*, 268 F. Supp. 444 (D.D.C. 1967). — Plaintiff, a publisher, desired to quote from or publish two of defendant's speeches. Defendant's publisher informed plaintiff that these speeches were protected by copyright and that suit would be brought to protect defendant's legal rights if the copyright was not observed. Plaintiff instituted an action for declaratory judgment contending that the speeches resulted from defendant's official duties, were partially prepared on government time and with government facilities, and were in the public domain. Defendant stated that the two speeches were not within the context of his official duties and that it was his legal right to protect his proprietary interest in the speeches by copyright. The court held that the writing and the delivery of the two speeches formed no part of the defendant's official duties and that the speeches were the defendant's private property which he was entitled to copyright.

The court restated the standards to be applied in determining the proprietary rights of a speech by a government official. The test is whether the speeches were written and delivered as a part of the defendant's official duties. Because of the difficulty in determining what the exact duties of a high government official are, the court will examine the preparation and delivery of a speech and the speech itself as aids in determining whether a government official was acting in his public or private capacity.

**PARTIES — INTEREST IN SUBJECT MATTER —** *Protestants and Other Americans United for Separation of Church and State v. United States*, 266 F. Supp. 473 (S.D. Ohio 1967). — Plaintiffs, contending that the Elementary

and Secondary Education Act of 1965 is unconstitutional, brought an action for declaratory judgment, injunction, and damages. The court sustained the defendant's motion to dismiss on the grounds that the plaintiffs lacked the requisite standing to challenge the constitutionality of the Act because of plaintiffs' failure to allege an immediate and direct infringement of their religious freedom under the first amendment.

The court considered controlling *Frothingham v. Mellon*, 262 U.S. 447 (1923) which stated that the mere fact that funds are being expended in an unconstitutional manner and such expenditures deplete the federal treasury to the ultimate detriment of the individual plaintiffs and all other persons similarly situated is insufficient to establish standing to challenge the constitutionality of the Act. Consequently, the *Frothingham* standard, although frequently challenged, is still the rule in federal courts.

#### HUSBAND AND WIFE

TORTS — PERSONAL INJURIES TO HUSBAND — *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967). — Plaintiff was injured by an electric shock from a power line. The circuit court found in favor of his cause of action for personal injuries, but sustained the demurrer to his wife's joined cause of action for her "loss of consortium and society and companionship." On appeal the Supreme Court of Wisconsin reversed the ruling on the demurrer and held that a wife may maintain an action for loss of consortium against a negligent tortfeasor provided that her cause of action is joined with the action of her husband.

This case reverses the holding in *Nickel v. Hardware Mutual Casualty Co.*, 269 Wis. 647, 70 N.W.2d 205 (1955), and brings Wisconsin into the growing number of states that recognize that a wife's interest in the undisturbed relation with her consort is as worthy of legal protection as the husband's similar interest. The court solved the problem of double recovery by requiring the wife's cause of action to be joined in her husband's suit for injuries.

TORTS — PERSONAL INJURIES TO HUSBAND — *Umpleby v. Dorsey*, 10 Ohio Misc. 288 (C.P. 1967). — The plaintiff, a married woman, sought recovery for loss of the consortium of her negligently injured husband. The court, observing the 14th amendment due process and equal protection clauses, and noting the incongruity in sustaining recovery in such cases to the husband and denying same to the wife, held that a wife is entitled to recover for loss of consortium.

The established Ohio rule states that the wife may not recover for the loss of the consortium of her husband based on negligent injury to her husband. This rule is supported by the common law and the majority of states. The federal courts, however, since 1950, have afforded the wife recovery in such cases. The decision of the court, if sustained on appeal, would change the law in Ohio.

#### INTERNAL REVENUE

SALARIES AND WAGES — BUSINESS EXPENSES — *Disney v. United States*, 267 F. Supp. 1 (C.D. Cal. 1967). — In this action, Roy O. Disney, president of Walt Disney Productions, and his wife sought to recover money and interest claimed to be overpayments of income taxes. The sums claimed were taxes levied on money paid to Mr. Disney to reimburse him for money

spent by his wife when she accompanied him on numerous business trips. Mr. Disney claimed these travel deductions were valid since his wife assisted him in his business activities on these trips.

The court found that because of the taxpayer's unique position as head of Disney Productions, he was entitled to these deductions for his wife's expenses. The court recognized that the directors of Walt Disney Productions thought that in order to promote the "family image" of the corporation, the wives of the executives should accompany their husbands on business trips. On the trips in question, Mrs. Disney entertained customers and generally added to the social aspects of the trips. Consequently, these expenses were for a valid business purpose, and therefore deductible. The decision reflects the established attitude toward extraordinary business expenses — that each case will be decided on its own peculiar facts within the "valid business purpose" framework.

#### LABOR RELATIONS

ARBITRATION AGREEMENTS — MATTERS SUBJECT TO ARBITRATION — *Butchers' Union Local 229 v. Cudahy Packing Co.*, 59 Cal. Rptr. 713 (1967). — Pursuant to a collective bargaining agreement, appellant petitioned for an order to compel appellee, who was engaged in interstate commerce, to arbitrate a pension eligibility grievance and to appoint an arbitrator. Appellant contended that the dispute, which involved the age qualification of a member, came within the ambit of the agreement, thus permitting arbitration. The trial court, in rejecting appellant's argument, ruled that the pension agreement was collateral to the collective bargaining agreement and not a matter for arbitration.

The California Supreme Court, in reversing, held that the trial court erred in failing to apply the required federal standard which commands arbitration unless after resolving all doubts in favor of arbitration it can, with positive assurance, determine that the dispute is not covered by the arbitration agreement. The dissenting opinion accepted the logic of the trial court.

#### LICENSES

OCCUPATIONS AND PRIVILEGES — VALIDITY OF ACTS AND ORDINANCES — *City of Bowling Green v. Lodico*, 11 Ohio St. 2d 135, 228 N.E.2d 325 (1967). — Appellant, while promoting the candidate of the Socialist Workers Party for President of the United States, was convicted of selling pamphlets in violation of a city ordinance which required the obtaining of a solicitor's license. The ordinance granted complete discretion to the licensing official to determine the solicitor's moral character and whether the enterprise involved was lawful. The Supreme Court of Ohio reversed the conviction and declared the ordinance violative of the constitutional guarantees of freedom of the press, reasoning that because the publication was wholly political, the charge of 25 cents per copy did not render the distribution a "commercial" venture not subject to the guarantees of free speech and press.

The decision is another step in the effort to define the boundaries of freedom of the press. While recognizing that freedom of the press is subject to reasonable police restraint to protect equally the right of privacy, the court condemns the practice of censorship in the form of strict ordinances which reserve to the grantors of the licenses the sole discretion of determining who shall receive them.

## MASTER AND SERVANT

MASTER'S LIABILITY FOR INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE OF SERVANT — *Alber v. Owens*, 59 Cal. Rptr. 117 (1967). — Plaintiff, a subcontractor, sued the owner and general contractor for personal injuries sustained in a fall at a construction site. California Workman's Compensation statutes impose a high standard of care on employers to provide a safe place to work. Although the trial court found that the condition of the balcony from which plaintiff fell was negligence per se under the statutes, the court, persuaded by the argument that plaintiff's employer status required that his conduct be judged by the same rigorous standards, held that plaintiff was contributorily negligent as a matter of law, and entered a nonsuit.

The Supreme Court of California, realizing that the lower court's decision would establish a rule of concurrent obligation and insulate all employers from liability to any employee except one bearing no responsibility whatsoever for direction or control, reversed. Taking a pragmatic approach to both job safety and compensation for injury, the supreme court observed that the general contractor is in a better position to supervise and provide for needed safety requirements. The decision continues the trend limiting the class of persons deemed "masters" for tort liability purposes.

## MUNICIPAL CORPORATIONS

DESTRUCTION OF PROPERTY — FAILURE TO PROTECT AGAINST FIRE — *Veach v. City of Phoenix*, 427 P.2d 335 (Ariz. 1967). — Appellant, seeking damages, alleged that, as a municipal corporation, appellee had an obligation to supply water for the fire protection of appellant's property and that appellee failed to supply such water despite appellant's request for the installation of a fire hydrant. In dismissing appellant's complaint, the trial court ruled that appellee had no duty to supply such water.

The Arizona Supreme Court reversed and held that although a municipality has no absolute duty to provide water for fire protection purposes, once it has assumed the responsibility of furnishing fire protection, it then has the burden of providing its inhabitants with such reasonable protection as others within a similar area are accorded. Since a municipality exercises discretion in determining what is reasonable protection, when such discretion is challenged as to its reasonableness, it is a question for the jury to decide. The decision affords a substantial inlet through the characteristic wall of immunity that prevails in most jurisdictions.

## NEGLIGENCE

STORE OWNERS — FAILURE TO REMOVE ICE AND SNOW — *Debie v. Cochran Pharmacy-Berwick, Inc.*, 11 Ohio St. 2d 38, 227 N.E.2d 603 (1967). — Plaintiff, a customer in the store of the defendant, slipped and fell on an ice and snow covered sidewalk adjacent to the premises. Plaintiff contended that defendant either knew of the slippery and hazardous condition of the sidewalk or, by the exercise of due care, should have known of the danger.

The supreme court held that where the owner or occupier of business premises is not shown to have had notice, actual or implied, that the natural accumulation of snow and ice on his premises had created a condition substantially more dangerous to his business invitees than they would have anticipated by reason of their knowledge of conditions prevailing generally

in the area, there is a failure of proof of actionable negligence. The position taken by the court is consonant with the established Ohio rule.

#### PAYMENT

REQUISITES AND SUFFICIENCY — PAYMENT BY CHECK — *Bass v. Olson*, 378 F.2d 818 (9th Cir. 1967). — Respondent, an attorney, sought payment of his fee under section 60(d) of the Bankruptcy Act for legal services rendered to a company-client just prior to filing for bankruptcy. Within 3 months he received a check from a third party made payable to the company and claimed it as payment of his fee pursuant to an agreement with the company's president. The receiver challenged the claim but agreed to deposit the check in a joint account pending final judicial settlement. Although subsequently the receiver relinquished his claim, the trustee in bankruptcy asserted a claim over the money. The referee denied the claim of the attorney, but was overruled by the district court.

In reversing the district court's decision, the court of appeals applied the governing California law of payments made by check for payments of attorney's fees under the Bankruptcy Act. The record showed that the check was cashed on behalf of the company and for the benefit of the company. The court ruled that the check would not be considered payment under the prevailing law until it had been cashed on behalf of the person claiming it as payment, and money once deposited must be held for the benefit of the one claiming it as payment in order for it to constitute payment.

#### SALES

MODIFICATION OR RECISSION OF CONTRACT BY BUYER — DEFENSES OR OBJECTIONS — *Wilson v. Scamporrì*, 228 A.2d 848 (D.C. Ct. App. 1967). — Plaintiff, purchaser of a new color television from defendant, complained that the set did not function properly. Defendant promised to repair the set or to replace it if repair was impossible. Plaintiff refused to permit defendant to remove the chassis and demanded a new set. Plaintiff brought an action to recover the purchase price. The appellate court, reversing the trial court, held that where the buyer rejects a nonconforming tender, which the seller had reasonable grounds to believe would be acceptable, the seller will be given a reasonable time to cure any minor defects; if this is impossible, or if the defects are of a major proportion, the seller must substitute conforming tender.

Case law substantiates this initial interpretation of the UNIFORM COMMERCIAL CODE § 2-508. Prior to the adoption of the Uniform Commercial Code, the majority of the states held that minor repairs or reasonable adjustments are methods through which a seller may perfect tender. It is important to note, however, that if the seller's efforts to perfect tender by minor repairs or adjustments are unsatisfactory, or if they cause the buyer an unreasonable inconvenience, the buyer will then be justified in demanding substitute tender. The importance of this decision is that it may serve as a guide to other states in interpreting UNIFORM COMMERCIAL CODE § 2-508.

#### VENDOR AND PURCHASER

RIGHTS AND LIABILITIES OF PARTIES — POSSESSION UNDER UNRECORDED INSTRUMENTS — *Engel v. Tinker National Bank*, 269 F. Supp. 199

(E.D.N.Y. 1967). — Petitioners, contract vendees, and one of the defendants, the contract vendor, executed an unrecorded, conditional sales contract. The contract provided for the right to accelerated payments. Petitioners took immediate possession. Increasingly beset by creditors, the contract vendor assigned her contract and executed a quit claim deed to the Tinker National Bank. When petitioners attempted to exercise their option of accelerated payments, the bank refused to convey a deed saying it held the deed solely as collateral security. The court held the equitable interest of a contract vendee in possession took priority over the docketed judgment and tax lien interests of subsequent purchasers (defendants) without knowledge, even in the absence of recording.

In its decision the court adhered to the law of New York and the majority view by favoring the protection of the contract vendee in possession from docketed judgments. The true significance of the decision lies in the priority given to the equitable interest of a contract vendee in possession under an unrecorded, conditional sales contract over government tax liens. Before the Federal Tax Lien Act tax liens were entitled to priority. However, as this decision indicates, the Act makes clear that a purchaser who has not taken title to, or fully paid for, property is protected as if he were a purchaser with title.

### ZONING

VARIANCES OR EXCEPTIONS — GROUNDS FOR GRANT OR DENIAL — *Broadway, Laguna, Vallejo Association v. Board of Permit Appeals*, 59 Cal. Rptr. 146 (1967). — Plaintiffs sought writ of mandate to order the Board of Permit Appeals to reverse its decision in granting a variance from floor-area ratio requirements to a developer. The variance was granted upon the developer's showing that unusual subsoil conditions had created exceptional circumstances which made a complying structure less profitable than anticipated and that literal enforcement of the zoning regulations would cause an unnecessary hardship.

In its reversal, the California Supreme Court held that the Board exceeded its statutory authority in granting a variance. San Francisco's municipal planning code outlines five requisites that must be met before a variance can be granted, and evidence of difficulties due to subsoil conditions and a lower profit margin were legally irrelevant to meeting the requirements. San Francisco's legislative scheme, by providing concrete standards that can be tested on review, provides a method of defining administrative discretion.