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Cases Noted

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CASES NOTED

ADMIRALTY

PERSONAL INJURY — CONFLICT OF LAWS — *Tsakonites v. Transpacific Carriers Corp.*, 368 F.2d 426 (2d Cir. 1966). — Plaintiff, a Greek seaman, was injured on board a Greek vessel berthed at a pier in Brooklyn and brought suit in federal court under the Jones Act. Notwithstanding the situs of the accident and the residence in the United States of the principal stockholder of the defendant corporation, the federal district court dismissed the action and ruled that plaintiff’s employment contract limited his rights to those arising under Greek law.

In affirming, the court of appeals balanced the legitimate interests of plaintiff and the United States against the policies underlying international comity and deemed the law of the flag “to be of cardinal importance.” The dissenting opinion considered the defendant’s contact with the United States sufficient to warrant jurisdiction and argued that shipowners who are resident aliens and shipowners who are United States citizens should be subject to the same liabilities while their vessels are at United States piers.

AUTOMOBILES

UNINSURED MOTORISTS — REQUIRED MINIMUM COVERAGE — *Allstate Ins. Co. v. Fusco*, 223 A.2d 447 (R.I. 1966). — A Rhode Island statute requires a $10,000-$20,000 minimum provision for uninsured automobiles in all policies of insurers who are authorized to do business in the state and who voluntarily contract with an insured. Plaintiff, who had provided for the statutory minimum in its policy, sought to enjoin defendant-appellant from proceeding to arbitration. Defendant’s deceased was killed while a passenger in an automobile whose owner had contracted with another insurer for a $5,000-$10,000 coverage limitation. The state supreme court held that defendant could recover the difference in the two policies from decedent’s insurer.

Although plaintiff defined “uninsured automobile” as one having no insurance coverage, the court concluded that it must have been the legislative intent to consider “uninsured automobile” as one which did not meet the statutory minimum amount. Thus, the decision embraces the general rule that an insurer’s construction of its policy is subject to the legislative fiat and must be construed in light of social policy.

BANKRUPTCY

PROPERTY SUBJECT TO POSSESSION — LICENSES — *Kennedy v. Powell*, 366 F.2d 346 (9th Cir. 1966). — Under Arizona law, deposits by contractors to the state before issuance of a license were withdrawable one year after termination of the license if no claims against them existed. In the case at bar, after revocation of a contractor’s license, joint judgments against him and the state treasurer were obtained by various creditors prior to and after his filing of a petition in bankruptcy.

Affirming the district court’s decision that the deposit should be surrendered to the referee in bankruptcy, the Ninth Circuit Court of Appeals,
treating the deposit as one for the protection of third persons rather than as a performance bond, held that such a deposit "might have been . . . seized, impounded, or sequestered" by either the state or the contractor's creditors, thereby fulfilling the requirements of "property" as defined by section 70(a)(5) of the Bankruptcy Act. By so deciding, the rights of creditors injured by the contractor's failure to perform his duties under a particular construction contract were relegated to the same position as those of the bankrupt's general creditors.

CIVIL PROCEDURE

MANDAMUS — EXISTENCE AND ADEQUACY OF OTHER REMEDIES — State ex rel. Fed. Homes Properties, Inc. v. Singer, 9 Ohio St. 2d 95, 223 N.E.2d 824 (1966). — In a mandamus action originating in the court of appeals, relators sought to compel the Cleveland building commissioner to issue a building permit for the construction of a twenty-seven suite apartment. Subsequent to the filing for this permit, the property in question was rezoned for two-family use. After the commissioner had ruled that the relator's specifications did not conform to the municipal building code, the court of appeals issued a writ of mandamus conditioned upon compliance with the code, and the commissioner appealed.

In a per curiam opinion the Ohio Supreme Court held the writ to be improper, its true function being to compel the performance of a pre-existing duty after all other remedies have been exhausted. The dissenting opinion found the writ to be proper because of the "inaction and dereliction" by the commissioner. These two opinions thus reflect differing views within the court as to the relevancy of the prospective likelihood of success when considering whether all other remedies have been exhausted.

MANDAMUS — JURISDICTION AND AUTHORITY — State ex rel. Durek v. Matheter, 9 Ohio St. 2d 76, 223 N.E.2d 601 (1967). — Relator, owner-operator of a grocery and carryout store, brought an action for mandamus to compel respondent, the director of highways, to institute appropriation proceedings in order to compensate for an alleged "taking" of property. The court of appeals, exercising original jurisdiction, denied the writ, holding that there was no "taking" of the relator's property.

The supreme court held that mandamus was properly denied but intimated that the lower court's holding was not necessarily correct. The court stated that mandamus must not issue when there is a plain and adequate remedy at law and that whatever remedy the relator had should have been asserted in the court of common pleas by an appropriate form of action — mandatory injunction or statutory mandamus. In a concurring opinion, Mr. Justice Herbert agreed that an ordinary legal remedy was available to relator but indicated that the majority failed to realize that their suggested appropriate forms of action were extraordinary remedies and that if the availability of mandamus in a lower court affected the authority of the court of appeals or the supreme court, then those courts had lost part of their constitutional grant of jurisdiction.

brought an action for breach of warranty, alleging loss of profits. The trial court allowed defendant to inspect the machine but provided no safeguards as to the means by which the inspection was to be carried out. The appellate court agreed that inspection should be allowed in a loss of profits action even though the inspection was ordered on a motion rather than a petition. However, the court stipulated that the party seeking examination of the chattel must sustain the cost of an independent testing laboratory's inspection and of all other costs which arise from disassembling the machine.

The case represents an extension of the right of inspection to situations in which economic loss is suffered. However, the court was careful to restrict the right of investigation to one carried out under proper safeguards.

**CONSTITUTIONAL LAW**

**FREEDOM OF THE PRESS — RIGHT TO REFUSE ADVERTISING — Bloss v. Federated Publications, Inc., 145 N.W.2d 800 (Mich. Ct. App. 1966).** — Plaintiff, owner of a motion picture theater, claimed damages against defendant newspaper for refusing to publish an advertisement. Plaintiff's suit was based on an Ohio case [Uhlman v. Sherman, 31 Ohio Dec. 54 (1919)] holding that newspapers are affected with a public interest and as such must accept advertising. Defendant raised the freedom of contract theory as a defense, claiming that it was under no duty to accede to plaintiff's demand.

The court granted summary judgment for the defendant, holding that a newspaper is not affected with a public interest. After distinguishing the Ohio case, the court noted that the weight of authority supports the conclusion that a newspaper is a private corporation and freedom of the press is best served if newspapers are left free from public regulation.

**HABEAS CORPUS — RIGHT TO COUNSEL — People ex rel. Harris v. Ogilvie, 221 N.E.2d 265 (Ill. 1966).** — Defendant was arrested in Illinois pursuant to a rendition warrant issued by the governor of Texas. Defendant was advised of his right to demand and procure counsel as stipulated in the Illinois Uniform Criminal Extradition Act. The act did not stipulate that defendant had an absolute right to counsel. At trial it was successfully argued that a habeas corpus proceeding is civil in nature and therefore the constitutional right to counsel does not exist.

The Illinois Supreme Court, recognizing the importance of a pre-conviction hearing to the defendant and the expertise required to maintain a proper defense, held that the distinction made — considering habeas corpus proceedings to be civil in nature — was incorrect and that a fair interpretation of the act requires the court to appoint counsel.

**RIGHT OF PRIVACY — Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 221 N.E.2d 543 (1966).** — Defendants published a biography of plaintiff, a famous baseball player, without his consent. The work contained factual errors, distortions, and fanciful passages. Section 51 of New York's Civil Rights Law authorizes the double remedy of money damages and injunctive relief where a person's "name, portrait or picture is used within the state for advertising or for purposes of trade" without written consent.

By holding that plaintiff was entitled to relief under the statute, the New York Court of Appeals limited its prior holdings to the effect that now
only truthful accounts of public figures such as plaintiff would escape statutory liability.

In disposing of the contention that such a ruling would deny defendant's rights guaranteed by the first and fourteenth amendments, the court distinguished the instant case from New York Times Co. v. Sullivan, 376 U.S. 254 (1964), defendant's primary support, by saying that Sullivan only prohibited a state from awarding damages for libel in actions brought by public officials against critics of their official conduct, whereas it would serve no useful public purpose to protect a fictionalized biography.

**TAXATION — PRIVILEGES AND IMMUNITIES —** Borden v. Selden, 146 N.W.2d 306 (Iowa 1966). — Plaintiffs, individual nonresident owners of agricultural land in Iowa, brought suit for a declaratory judgment to determine the constitutionality of an amendment to the Iowa Agricultural Land Tax Act of 1945 making agricultural land tax credit available only to land owned by residents. The trial court held that the statute was constitutional.

In reversing, the Iowa Supreme Court held that the act violated the privileges and immunities clause of the United States Constitution because the classification into residents and nonresidents made by the statute was not a reasonable means of accomplishing its purposes. The court adopted the well-established rule that the privileges and immunities clause bars discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the fact that they are citizens of other states.

**CONTRACTS**

**MENTAL HEALTH — DISABILITIES AND PRIVILEGES OF MENTALLY DISORDERED PERSONS —** Edmunds v. Equitable Sav. & Loan Ass'n, 223 A.2d 630 (D.C. Cir. 1966). — Plaintiff was appointed by a Maryland court as conservatrix of the estate of Vivian Edmunds, who, with a Miss Lupton, held a joint savings account in the defendant District of Columbia bank. At the time of her appointment, plaintiff notified defendant of this fact and also that the passbook was missing. The bank thereafter permitted Miss Lupton to withdraw money from the account upon presentation of a withdrawal slip and a lost passbook receipt signed by both Lupton and Edmunds. Plaintiff, after the death of Edmunds, sued the bank to recover the withdrawn sum on the theory that Edmunds lacked the capacity to sign for the withdrawal.

In affirming the summary judgment for defendant, the court of appeals held that the ward's signature was valid and enforceable. The court found no Maryland cases on point but decided that the Maryland statutes providing for the appointment of a conservator clearly indicate that the ward is not a person of unsound mind and do not affect his capacity to contract.

**RIGHTS AND LIABILITIES OF PRINCIPAL — SUIT AGAINST THE UNITED STATES —** United States v. Acme Process Equip. Co., 87 Sup. Ct. 350 (1966). — Respondent, a prime contractor, brought an action against the United States in the Court of Claims to recover damages for breach of a contract under which respondent undertook through itself and subcontractors to manufacture recoilless rifles. The United States alleged it had rightfully canceled the contract because three of respondent's principal employees had accepted compensation for awarding subcontracts in violation of the Anti-Kickback Act of 1946. The Court of Claims, relying on
its findings that none of the respondent's officers were aware of the kickbacks, construed the act as not authorizing government cancellation.

In reversing, the United States Supreme Court held that since kickback devices increase the cost of the prime contract to the government, public policy requires that the United States be able to annul a contract tainted by kickbacks. The Court also stated that because the three principal employees were in the upper echelon of management, the corporation was responsible for their conduct.

CORPORATIONS

CORPORATE PRACTICE — COMPLIANCE WITH APPLICATION RULES — Application of Community Action for Legal Servs., Inc., 274 N.Y.S.2d 779 (1966). — Petitioners, made application to the court, in a procedure authorized by statute, for permission to incorporate to practice law. The three groups of petitioners were independent entities but were to be related through a pyramid-like administrative structure for the channeling of federal legal aid funds to area agencies. The boards of directors were to have both lay and professional members. The applications were rejected by the court.

Numerous defects and errors were noted in the proposed structures as the court attempted to provide clear guidelines for future use. The major defects were the overlapping of control, the excessive layers of organization, and the inherent incentive to competitive anti-poverty law offices which, the court felt, would preclude effective professional and disciplinary supervision. The laymen on the boards of directors were also objected to as a possible intervening factor between attorneys and clients. The decision's exhaustive analysis of the many problems relating to the organization of effective legal aid corporations brings some clarity to an area of the law that is presently chaotic.

CRIMINAL LAW

FORGERY — STATE EXPENSES AND CHARGES — People v. Watson, 221 N.E.2d 645 (Ill. 1966). — Defendant, an indigent, was found guilty of attempting to commit forgery by delivery of a forged traveler's check. Prior to trial, defendant's attorney filed a motion requesting the court to provide him with funds in order to obtain the services of a document examiner. The motion was denied.

In reversing and remanding for a new trial, the court ruled that in order to receive a fair trial, defendant had the constitutional right to a reasonable fee allotted by the state for the purpose of having an expert document examiner testify concerning defendant's handwriting. This is one of the first decisions in which a state court has extended the payment of expert testimony fees to a noncapital case where expert testimony is deemed crucial to a proper defense.

HOMICIDE — CAUSE OF DEATH — Commonwealth v. Cheeks, 223 A.2d 291 (Pa. 1966). — Defendant was convicted of first degree murder for stabbing his victim in the abdomen, although death was not immediate. An operation was performed whereby a tube was inserted in the victim's stomach to prevent post-operative complications. Following the operation, the victim, in a disoriented mental state, pulled out the tube, eventually causing his death.
The state supreme court upheld the conviction, stating that the victim's act of pulling out the tube did not create an independent intervening cause. One dissent was filed, stating that the majority had violated state precedent by applying the tort concept of proximate cause to a homicide prosecution even though proof of homicide requires a more direct causal connection. Other courts, however, have followed the majority rationale and have not distinguished between the tort and criminal concepts of proximate cause.

**Indigents — Funds Provided for Taking Depositions — State v. Stark, 9 Ohio App. 2d 42, 222 N.E.2d 794 (1966).** — An indigent defendant in a criminal case sought to have her assigned counsel take the deposition of a material witness who could not be subpoenaed. The trial court twice overruled her motion and suggested that either the witness be made available at trial or the deposition be taken as an interrogatory.

On appeal the defendant was found to have a constitutional right to have the deposition taken by assigned counsel with compensation provided by the state. However, to save the state a financial burden, the court held that the applicable statute did not prohibit the court from appointing a special or additional assigned counsel, in this case a military commission, to represent the accused at the taking of the deposition.

**Procedure — Jurisdiction Over a Minor — State v. Peterson, 9 Ohio Misc. 154 (Cincinnati Munic. Ct. 1966).** — Sentenced in traffic court on a plea of guilty, a minor moved for a new trial, alleging that the court lacked jurisdiction over her. In denying the motion the municipal court held that even if defendant's guilty plea did not preclude her motion for a new trial, she had waived her right to question the court's jurisdiction.

Ohio statutes vest juvenile courts with exclusive jurisdiction over juveniles, but the court held that the statutory provisions apply only to cases in which minority is discovered or disclosed before trial. Following the majority rule the court held that the same standard as to waiver of jurisdiction applies equally to juveniles and adults and that by failing to seasonably question the court's jurisdiction, defendant had waived the right.

**Divorce**

**Allowance for Counsel Fees and Expenses — Decree — Wong v. Superior Court, 54 Cal. Rptr. 782 (Dist. Ct. App. 1966).** — Petitioner was originally represented in a divorce action by the real party in interest in the instant case. After receiving testimony as to the value of the services of the respective attorneys for the petitioner and his wife, the court advised both counsel to amend their pleadings to conform to this testimony and to include a prayer for attorney fees. Accordingly, petitioner's attorney filed an amendment for the reasonable value of his services, and on the same day petitioner discharged the real party in interest and engaged his present counsel. Later, an interlocutory judgment of divorce was decreed in which the community property was evaluated. Out of the community property in his possession, petitioner was ordered to pay the attorney fees, which were enumerated in the amended complaint. To prevent the respondent superior court from enforcing this portion of the decree, the petitioner requested the court of appeals to issue a writ of prohibition.

The court of appeals granted the writ and held that the respondent exceeded its jurisdiction in this divorce suit by entering a judgment in
favor of the petitioner’s attorney who was not a party to the action. In so holding, the court followed the general rule that a judgment may not be recorded either for or against a person who is not a party to the proceeding. Any judgment which does so is void to that extent.

**FOREIGN DIVORCE — FULL FAITH AND CREDIT — Weber v. Weber, 274 N.Y.S.2d 791 (Family Ct. 1966).** — This action was brought to compel a father to comply with an agreement incorporated in a Mexican divorce decree. The agreement was that the father would provide support and maintenance to the child “while he is attending and is a fulltime student at a college or school, even though he shall be twenty-one or over. . . .” The father relied upon section 443 of the Family Court Act which, as amended in 1966, limited his liability for the support of a child to the latter’s minority. From an adverse judgment, the father moved to vacate.

In denying the motion, the court held that the statute did not indicate an intent of the legislature to restrict enforcement of agreements incorporated into decrees by courts of competent jurisdiction outside New York. The court further held that full faith and credit should be afforded the divorce decrees of foreign states where both parties have been represented.

**PARTIES — STATE’S INTEREST — McLean v. Grabowski, 224 A.2d 157 (N.J. Super. Ct. 1966).** — Plaintiff brought suit for custody and support after receiving a one-day divorce in Alabama, in which defendant had filed an appearance through his wife. Defendant counterclaimed to void the divorce decree and to secure a divorce on the ground of adultery. The parties settled their differences and plaintiff moved for dismissal. The court denied the motion and appointed counsel to contest the divorce decree.

On appeal, the court affirmed the inherent power of the chancery division to appoint counsel to represent the interests of the state, holding that the state is a third party to every divorce and is represented by the court, which can, to satisfy its judicial conscience, actively participate in the proceedings.

**EMINENT DOMAIN**

**MEASURE AND AMOUNT OF COMPENSATION — TIME WITH REFERENCE TO WHICH COMPENSATION MAY BE MADE — Housing Authority v. Schroeder, 151 S.E.2d 226 (Ga. 1966).** — Plaintiff condemned defendant’s apartment building as part of an urban renewal project. The trial court charged the jury that, in determining just compensation for the property, it could consider the fact that the news that the building was to be taken for urban renewal purposes led several of defendant’s tenants to vacate their apartments early and thus caused defendant’s property to depreciate in value before the taking.

In reversing the judgment for plaintiff, the Georgia Supreme Court held that the court’s charge was erroneous in that it allowed the jury to consider the value of the property at a time prior to the taking. The court thus refused to make an exception to the well-settled general rule that compensation for condemned property is to be measured by the value of the property at the time of the taking, that is, at the time of title transfer.
**Evidence**

Documentary Evidence — Private Memoranda and Statements in General — Arnovitz v. Wozar, 9 Ohio App. 2d 16 (1964). — The case arose out of an automobile collision which occurred at a highway intersection, the traffic through which was controlled by a traffic light. Both plaintiff and defendant claimed that they entered the intersection while the traffic signal was green, and plaintiff offered an eye witness to the accident. On cross-examination, defendant's counsel questioned the witness from a written statement made by the witness one month after the accident. Prior to re-direct, counsel for plaintiff moved the court to permit plaintiff to inspect the statement. The motion was granted but defendant refused to comply with the court's order, and judgment was subsequently entered for defendant.

Claiming that it was misconduct on the part of defendant's counsel to refuse to allow him to inspect the statement, plaintiff appealed. The appellate court reversed, holding that counsel has a right to the exclusive possession of a witness' prior statement but when the writing is used for any evidential purpose, fairness requires that he submit it for the opponent's inspection. The position of the court is that followed by a majority of the courts in the United States.

**Insurance**

Consent Judgment — Subrogation Rights — Nationwide Mut. Ins. Co. v. Canada Dry Bottling Co., 151 S.E.2d 14 (N.C. 1966).—Defendant's truck damaged the car of a third party who was insured by plaintiff. Under an insurance policy it had issued, plaintiff was obligated to pay the insured the cost of the damage less a fixed deduction and upon payment was subrogated to the claim of the insured. After receipt of the payment, the insured brought an action against defendant for the full amount of the damage. The defendant, with knowledge of plaintiff's subrogation rights and without its consent, entered into a settlement with the insured in the form of a consent judgment which included a full release of all subsequent claims. Plaintiff sued the defendant to recover the amount of its payment to the insured.

The court, in finding that the release would not bar the subsequent suit by plaintiff, followed the rule that a settlement made with full knowledge of the subrogation rights of another and without the consent or participation of the subrogated party will not defeat the claim of the subrogee even though the tort-feasor is entitled to have the total amount of damages against him ascertained in one action.

**Judgment**

By Default — Opening or Setting Aside Default — United Accounts, Inc. v. Lantz, 145 N.W.2d 488 (N.D. 1966). — The Supreme Court of North Dakota affirmed an order vacating a default judgment which had been entered for plaintiff six and one-half years before. Under North Dakota law when a defendant fails to make an appearance within the allotted time, the plaintiff may move for a default judgment without giving notice to the defendant, but where there has been an appearance, notice is required. The appearance in this case was after the prescribed time but before plaintiff had moved for a default judgment.
The court held, that where there had been no attempt to enforce the judgment, the defendant's motion to vacate would not be considered untimely even though made some six and one-half years after the default judgment was entered. It further held that where the defendant served an answer after the prescribed time but before the plaintiff moved for a default judgment, the defendant had made an "appearance" sufficient to entitle him to written notice prior to a hearing on the motion for a default judgment.

Satisfaction — Entry of Credits on and Proceedings to Compel Satisfaction — Edwards v. Passarelli Bros. Automotive Serv., 8 Ohio St. 2d 6, 221 N.E.2d 708 (1966). — Defendant's vehicle struck plaintiff's automobile, thereby causing bodily injury to plaintiff and property damage. Thereafter, defendant's insurer on separate occasions paid money either to plaintiff or towards his hospital bill. For each of these payments, plaintiff signed a written agreement which stated that the sum received would be credited to the total amount of any final settlement or judgment in favor of plaintiff for the damages caused by the accident. Afterwards, the case went to trial and resulted in a judgment for plaintiff. After the judgment had become final, defendant paid into court a sum representing the judgment in full with interest and costs less the total amount of the advance payments. Defendant then filed a motion for the entry of an order of satisfaction of judgment. The trial court entered this motion and the court of appeals unanimously affirmed.

The Supreme Court of Ohio, while noting that the case presented a novel problem to Ohio and perhaps to the whole country, also affirmed. It was held that where an advance payment is made to a possible tort claimant with the understanding that such payment is to be credited to the amount of any final judgment, the proper procedure to effect this agreement is by a post-judgment motion for a credit toward satisfaction of the judgment.

Labor Law

Unfair Labor Practice — Joint Employer Bargaining — NLRB v. Checker Cab Co., 367 F.2d 692 (6th Cir. 1966). — The Checker Cab Company and its member owners refused to bargain collectively following the National Labor Relations Board's (NLRB) certification of a union because the bargaining unit required 286 employers to bargain jointly. The union filed an unfair labor practice charge with the NLRB.

The court of appeals enforced the NLRB's unfair labor practice finding on the basis that it had properly taken into consideration the past history of the employers — banding together to provide joint machinery for the hiring of employees, establishing work rules, giving operating instruction, and disciplining — and held that the NLRB has the power to create a multi-employer bargaining unit when historically the indicia of control warrants joint bargaining.

Licensces

thereby failing to deliver the stock. Plaintiff brought a class action against defendant, alleging that by its failure to report the brokerage firm’s violations of section 10(b) of the Securities and Exchange Act of 1934, it had aided and abetted the utilization of fraudulent schemes in the sale of stock. Defendant moved to dismiss the suit for failure to state a claim on which relief could be granted. The district court denied the motion, holding that a valid claim was stated and that relief could be granted if facts were proven supporting the allegations.

In so holding the court refused to draw any inferences from congressional non-action on proposed amendments to the act and found justification for its decision in the remedial nature of the statute which called for a flexible interpretation of its provisions.

LIMITATIONS OF ACTIONS

COMPUTATION OF PERIOD — IGNORANCE OF CAUSE OF ACTION — Houston v. Florida-Georgia Television Co., 192 So. 2d 540 (Fla. Dist. Ct. App. 1966). — A federal moonshine raid was covered by agents of defendant. While photographing the activities, the agents also photographed plaintiffs, owners of adjoining land, who were watching the raid. The pictures were televised that same day. Plaintiffs sued for invasion of privacy, and although a four-year statute of limitations governed the action, plaintiffs sought to avoid its effect by arguing the statute should not start to run until their alleged date of first knowledge of the tort. The trial court rejected this argument and dismissed the complaint; this holding was affirmed on appeal.

The court noted that the statute did not provide that the period begins only when the injured party obtains knowledge or notice of the invasion and, applying an expressio unius argument, rejected plaintiff’s argument. Case law from other jurisdictions was also used. The result, although harsh, is supported by the great weight of authority.

INJURIES TO PROPERTY — La Tray v. Mannix Elec. Co., 419 P.2d 744 (Mont. 1966). — Plaintiffs instituted an action to recover for the loss of services of their minor children caused by a collision with a truck operated by defendant’s servant. The defense of the statute of limitations was interposed, giving rise to issues concerning the nature of the cause of action itself and the correct statute of limitations to apply. The court, approving an Indiana court’s resolution of the problem, held that such an action is one to protect an intangible property right and is governed by the statute of limitations for actions to recover for loss of personal property. Plaintiffs were thereby barred by operation of that statute for failure to bring the action within two years.

In so holding, the Montana court followed the traditional view that the right in question, absent a specific statutory definition to the contrary, is a property right governed by the personal property statute of limitations.

ISSUANCE OR SERVICE OF PROCESS — SERVICE ON PART OF THE DEFENDANTS — Cook v. Sears, 9 Ohio App. 2d 197, 223 N.E.2d 613 (1967). — In a will contest service was had on several but not all of twelve organizational legatees within six months of the will’s admission to probate. OHIO REV. CODE § 2305.17 provides, in part, that civil actions commence as to all defendants united in interest upon the date of service of process upon any one of the defendants so united, or upon the date of the first diligent
but unsuccessful attempt to serve, if service is perfected within sixty days. Some of the legatees were not so served within sixty days. Before trial, the court granted the motion of one of the defendants to dismiss the action for failure to join all necessary parties.

Plaintiff appealed and the court of appeals reversed, holding that the statutory provision requiring service upon a defendant within sixty days of the first diligent attempt has no application to that portion of the statute which places the commencement of the action at the date of service upon any one of the defendants united in interest. The court stated that the action commenced as to all organizational legatees when the first such legatee was served and that plaintiff had until the trial date to effect service upon the others.

**Municipal Corporations**

**Ordinances — Publication** — *Tirpack v. Maro*, 9 Ohio App. 2d 76, 222 N.E.2d 830 (1967). — Plaintiff sought to enjoin the defendants from operating a gasoline station in violation of a zoning ordinance. The ordinance did not contain any language which defined the boundaries of the respective zones. Instead, a map which set forth the boundaries was incorporated by reference into the regulation but was not published with the text of the ordinance.

Upon appeal on questions of law and fact, the court denied the injunction on the grounds that the publication of the map was mandatory and failure to do so created a defense to any suit or prosecution. In so holding, the court followed the majority rule that the entire zoning ordinance, including maps, must be published; otherwise, the zoning resolution becomes invalid, ineffective, or unenforceable.

**Suspension of Employees — Freedom of Speech** — *Beishaw v. City of Berkeley*, 54 Cal. Rptr. 727 (Dist. Ct. App. 1966). — Plaintiff fireman petitioned for mandamus to direct the city of Berkeley to vacate and expunge from the city's records his thirty-day suspension and to pay him the salary which would have been due him had he not been suspended. The city's ground for suspension was a "letter to the editor" written by plaintiff criticizing a salary distinction between beginning policemen and beginning firemen. The city alleged that this letter breached its personnel rules and regulations; the trial court granted judgment for plaintiff and the city appealed.

The appellate court affirmed the decision, reasoning that a public employee cannot be barred from employment in violation of his constitutional rights. The constitutional right to free speech with respect to a municipal employee is that he may speak freely as long as he does not impair the administration of the public service in which he is engaged. The court concluded that the plaintiff's letter was nothing more than an exercise of free speech with no showing of impairment to the police or fire department.

**Negligence**

**Proximate Cause — Lack of Seat Belts** — *Mortenson v. Southern Pac. Co.*, 53 Cal. Rptr. 851 (Dist. Ct. App. 1966). — Decedent was killed in a highway accident while driving a company truck which was not equipped with seat belts. An action for wrongful death was brought under
the Federal Employer's Liability Act (FELA). Defendant railroad contended that the lack of seat belts was not the cause of the accident and therefore no proximate cause was established between its failure to install seat belts and the accident which caused death. Plaintiff presented the testimony of a physicist and two highway patrolmen to substantiate his contention that seat belts are effective in reducing fatalities and minimizing injuries. The trial court sustained defendant's motion to nonsuit plaintiff, holding that there was no issue of negligence to go to the jury.

The appellate court interpreted the FELA as expressly holding the defendant liable if death was caused even in the slightest part by its negligence. Reasoning that the number of highway collisions in the area afforded a basis for finding that a collision could foreseeably force a car off the road, the court held that recovery under the FELA was not precluded by lack of evidence as to proximate cause.

**STANDARD OF CARE — GAS — Roberts v. Indiana Gas & Water Co., 221 N.E.2d 693 (Ind. Ct. App. 1966). —** Appellant was injured in the explosion of a building in which gas lines were being bled. Workmen bleeding the lines used their sense of smell to determine whether gas was leaking. The effectiveness of this common and accepted practice relied upon the customary odorization of the gas by appellee, a practice which had been discontinued without notice.

The court in a split opinion overruled appellee's demurrer, stating that while there was no original duty to odorize the gas, once this was undertaken the gas company was bound to exercise reasonable care. The court thus followed the reasoning of many cases which hold that one who voluntarily undertakes a duty is held to a reasonable standard of care in its discontinuance.

**STANDARD OF CARE — SEAT BELTS — Brown v. Kendrick, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966). —** In a negligence action plaintiff, a minor guest passenger riding in an automobile owned by defendant and driven by his minor son, recovered a sixteen-thousand-dollar judgment. A Florida district court of appeals affirmed the decision of the lower court and ruled that defendant could not offer, as a basis for contributory negligence, the failure of plaintiff to use a seat belt.

In its decision the appellate court arrived at a directly contrary result to that reached by the Supreme Court of South Carolina in Sims v. Sims, 148 S.E.2d 154 (S.C. 1966). It thus appears that the few jurisdictions that have considered this modern safety device as a proper standard of care are in conflict.

**PARENT AND CHILD**

**CUSTODY AND CONTROL OF CHILD — PERSONS ENTITLED — Smith v. Painter, 408 S.W.2d 785 (Tex. Civ. App. 1966). —** An injunctive action was brought by a child's maternal grandfather to compel the child's natural father and adoptive mother to permit him visitation rights. The court held that in the absence of any showing that the parents are unfit and that their continued control is not in the best interest of the child, the parents may exclude anyone from visiting the child, and no cause of action arises in favor of the grandparents.

This was a case of first impression in Texas, and the court's rationale stresses the right of the natural parents over all third parties. However,
the observation by the court that there had been no showing of unfitness of the parents, suggests that the modern view — that the best interests of the child is the paramount consideration — prevails and that given a clear showing of the unfitness of the parents, third parties may intervene.

**UNEMANCIPATED CHILD — TORT LIABILITY OF PARENT — Briere v. Briere, 224 A.2d 588 (N.H. 1966).** — Defendant attempted to dismiss an action brought by his unemancipated children for personal injuries arising out of an automobile accident. The Supreme Court of New Hampshire sustained plaintiffs' exceptions and held that unemancipated minor children can maintain a tort action against their father for their injuries.

It has been generally accepted in a majority of American jurisdictions that an unemancipated minor child has no cause of action against a parent for negligence. However, the existence of an additional relationship or of a malicious intent to injure has supported the minor's suit in some jurisdictions. This appears to be the first case where a court allowed a minor to sue a parent for simple negligence within the pure family relation.

**SURETYSHIP**

**SURETY'S LIABILITY — United States Fire Ins. Co. v. McDaniell, 408 S.W.2d 134 (Tex. Civ. App. 1966).** — Appellant surety company executed a statutory real estate bond with appellee but did not participate in any activity with the broker which would give rise to an action for damages. In the lower court an amount was recovered from appellant which included compensatory and exemplary damages, the total amount being within the bond's limits. The broker's statute provided that the principal "shall pay any judgment recovered by any person in any suit for damages or injuries caused by violation of this act." In holding that appellant was not liable for exemplary damages, the court relied on attachment and sequestration bond cases as precedent even though these statutes have no provision for recovery of "any judgment." The court reasoned that "any judgment" was only a condition of liability, in that judgment must first be obtained against the principal before the surety becomes liable. The extent of coverage is defined by the words "for damages or injuries caused by violation of this act."

The court thus followed the majority rule by awarding compensatory but denying exemplary damages even if within the limits of the bond, as long as the surety is not a participant in the malicious and/or fraudulent conduct of the broker.

**TORTS**

**CHARITIES — RIGHTS, DUTIES, AND LIABILITIES — Bell v. Presbytery of Boise, 421 P.2d 745 (Idaho 1966).** — Plaintiff sued a church and a non-profit corporation controlling several churches for injuries suffered by his minor son when he fell from a cliff during an outing being supervised by volunteer church members. Plaintiff alleged that defendants were covered by insurance up to $100,000 and that the payment of plaintiff’s medical bills by the insurer constituted a waiver of any immunity which existed. The trial court struck these allegations and rendered summary judgment for defendants.

In reversing and remanding, the Idaho Supreme Court held that the doctrine of charitable immunity was abolished in the state. The court
cited earlier Idaho cases which had eliminated charitable immunity except where the plaintiff was a nonpaying recipient of the benefits of the charity, and by this decision joined the modern trend of decisions toward the total abrogation of charitable immunity.

**IMMUNITY — PARENT AND CHILD** — *Kemp v. Rockland Leasing, Inc.*, 274 N.Y.S.2d 952 (Sup. Ct. 1966). — Plaintiff was the unemancipated daughter of the driver of the automobile in which she was riding when she sustained injuries. Defendant corporation employed the mother and claimed that the mother's parent-child immunity required the court to dismiss a personal injury suit brought against it as owner of the automobile. The court denied the motion to dismiss, reasoning that the defense of parent-child immunity is to prevent family disruption and that since the reason for the immunity is not present in a suit by the child against the parent's employer, the employer may not assert immunity as a defense.

The court noted previous cases where liability of the employer had been upheld on the basis of respondeat superior, but denied that the existence of statutory liability insurance was a controlling factor in the case. While it is true that the existence of liability insurance has no effect upon the merits of the cause of action, the court cited New York precedent as well as leading cases of other jurisdictions which enumerate the requirement of automobile liability insurance as an important reason for not extending parent-child immunity to the parent's employer.

**TRUSTS**

**TERMINATION — RULE AGAINST PERPETUITIES** — *Green v. Green*, 9 Ohio Misc. 15 (P. Ct. 1966). — In a declaratory judgment action, plaintiff sought to have a trust created by his father's will declared void as violating the rule against perpetuities. The trust was to terminate upon the last to occur of certain specified events, one of which was, "The day the youngest living child of my son . . ., in being on the date of my death, attains twenty-five (25) years of age." The rule against perpetuities requires all interests to vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. The plaintiff argued that since it was possible for the children to die before attaining the age of twenty-five the interest would never vest, thereby violating the rule against perpetuities.

The court held that attainment of age twenty-five was not a condition precedent to the vesting of the remainder and that therefore the possible failure of the remainder to vest was unrelated to the rule against perpetuities.

**WILLS**

**ELECTION — NATURE AND GROUNDS IN GENERAL** — *In re Estate of Moseley v. Moseley*, 9 Ohio St. 2d 13, 222 N.E.2d 639 (1966). — This case was instituted as a probate proceeding in Ohio by the surviving spouse of a deceased New Jersey resident. At the time of the testator's death, he owned real estate in Ohio. The spouse, likewise a resident of New Jersey, filed in the Ohio courts an election not to take under her husband's will but rather to take her distributive share of the real estate under the Ohio statute of descent and distribution — an election not available in New Jersey. The court held that the nonresident widow could make such an election.
The court in reaching its decision used the rationale that to allow the laws of another state to govern this area would destroy the certainty and convenience in determining title to land in Ohio. Such certainty was a strong reason for construing the statutes so as to allow the widow to elect to take under the statute rather than being forced to take under the will.

**Workmen’s Compensation**

**Limitations on Right to Award — Municipal Pension Funds —**

*City of Akron v. Thomas-Moore, 9 Ohio App. 2d 33, 222 N.E.2d 787 (1967).* — Decedent, husband of the claimant, sustained a serious injury in the course of his employment as a fireman which accelerated his death. After the injury, decedent sought and received payments from both the state workmen’s compensation fund and a municipal pension fund. In accordance with **Ohio Rev. Code § 4123.02**, the dollar amounts of periodic municipal pension fund payments are deductible from state workmen’s compensation fund payments. After the decedent’s death, claimant filed for and received the full statutory death award from the state and continued receiving the municipal pension. The municipality unsuccessfully contested the claimant’s right to participate in the state’s compensation fund without deduction.

The court of appeals, without citing authority, held that the statutory provisions authorizing the deduction patently apply only to policemen and firemen and that therefore their widows are eligible to receive the full death award in addition to the municipal pension.