Maryland Law Review

Volume 16 | Issue 1 Article 9

Recent Decisions

Recent Decisions

Adverse Possession — Grantor Remaining In Possession By Mistake Of Boundary Location Is Not Hostile. *Vlachos v. Witherow, 118 A. 2d 174 (Pa. 1955).* In an ejectment action, defendants claimed title by adverse possession. The common owner of both parcels involved conveyed one to his daughter (predecessor in title to plaintiffs) in 1927, but remained in possession of that portion adjoining the land he retained and separated from the rest of the conveyed land by a fence. He was not aware at the time that he had conveyed any land on his side of the fence. In 1931 he devised to his son for life, remainder to his son's children (defendants herein), both the land to which he held title and the portion mistakenly included in the deed to his daughter, of which he retained possession. The daughter died in 1936 and it was not until 1948 that anyone discovered that she had been deeded the disputed portion, the possession of which by father, son, and defendants was continuous, actual, and exclusive until the filing of ejectment in 1952. On appeal from a verdict directed for plaintiffs, *held,* affirmed. Hostility of possession is an essential element to adverse possession, and when the area of actual possession of the title holder is restricted by a mistaken belief as to the location of the boundary, and the possession of the adverse party is likewise extended as a result of the same mistake, that hostility is abent. Where the grantor continues in possession, his possession is considered that of the grantee until some unequivocally hostile act occurs which, being brought home to the grantee, will support an adverse claim. Here, the devise of the disputed portion to the son and defendants was not such an act.

While the Court of Appeals has never decided a case in which the claim of adverse possession depended upon

the grantor's holding adversely to the grantee by continuing his possession, a series of recent cases has decided that a mistake as to the location of the boundary with reference to which the adverse party has taken possession of the disputed land and the failure of the adverse party to claim under color of title will not keep the statute of limitations from running against the title holder, at least where "the limits of the [adverse] occupation [are] fixed with the intention of claiming them as *the* boundary line . . ." *Tamburo v. Miller,* 203 Md. 329, 336, 100 A. 2d 818 (1953). See also *Hub Bel Air, Inc. v. Hirsch,* 203 Md. 637, 102 A. 2d 550 (1954); *Ervin v. Brown,* 204 Md. 136, 102 A. 2d 806 (1954); *Ridgely v. Lewis,* 204 Md. 563, 105 A. 2d 212 (1954). *Bishop v. Stackus,* 206 Md. 493, 112 A. 2d 472 (1955) applied the *Tamburo* rule in the absence of clearly defined boundaries, though the limits of adverse user were reasonably easy to ascertain. As to the basic inapplicability of the mistake element in adverse possession cases, see 4 TIFFANY, REAL PROPERTY (3d ed., 1939), Sec. 1159.

Animals—Hammering Dog's Head With Fists Is "Abuse" Under Statute Fixing Liability Of Dog Owners. *Schonwald v. Tapp, 118 A. 2d 302 (Conn. 1955).* In trying to break up a fight between her dog and that of defendant, plaintiff belabored defendant's dog about the head with her fists. She was bitten. On appeal from judgment in favor of defendant, *held,* affirmed. Passing over the trial judge's finding that, in voluntarily intervening in a dog fight, plaintiff assumed the risk, under the statute permitting one injured by a dog to recover damages from the owner, except where the injured was "teasing, tormenting, or abusing such dog", plaintiff's action was clearly an abuse barring recovery.

Maryland dog owners are not burdened by such comprehensive liability. The state retains the common law rule that, in absence of the owner's knowledge of the animal's disposition to injure, "every dog is entitled to one bite", and, even if that bite has already been taken, the injured may be barred from recovery by contributory negligence short of "abuse" or assumption of the risk. See generally *May Co. v. Drury,* 160 Md. 143, 153 A. 61 (1931).

Bailments — Lessee Of Chattel Who Warrants Return In Good Condition Is Insurer Thereof. *St. Paul Fire & Marine Ins. Co. v. Chas. H. Lilly Co., 286 P. 2d 107 (Wash. 1955).* Defendant leased an earth moving machine from plaintiff's insured by a lease-purchase option contract under which he warranted, if he failed to purchase, to return the

machine in good mechanical condition, except for reasonable wear and tear. The machine was destroyed by fire without fault of defendant and the lessor recovered his loss from plaintiff-insurer, who brought this action as assignee of the contract seeking recovery on the warranty. On appeal from judgment for plaintiff, *held* (5-4), affirmed. The warranty extended defendant's liability beyond that of common law bailment and constituted him an insurer of the machine for its full value. Weaver, J., among others, dissented, saying that a bailee may, by contract, make himself an insurer, but the warranty to return in good condition is merely declarative of the common law liability, which assumes the continued existence of the chattel and does not make a bailee liable when, through no fault of his own, return is impossible.

See Annotation, 150 A. L. R. 269-305, 277, which points out the close division of courts on the question of whether a promise to return "in good condition" amounts to a waiver of the defense of impossibility of performance and thus constitutes the bailee an insurer.

Criminal Law — Theft Of Money From A Corpse By Undertaker's Servant Is Larceny And Not Embezzlement. *Edwards v. State, 286 S. W. 2d 157 (Tex. Cr. App. 1955).* Defendant, employed by a funeral home as an embalmer, found $580 in a cloth container pinned to the clothing of a corpse on which he was working. He took the money. On appeal from a conviction for felony theft, *held,* affirmed. The money on the body did not belong to the funeral home, and defendant's act, as its employee, of converting the money to his own use was not an embezzlement from his employer. The funeral home's taking custody of the corpse for embalming did not "constitute a contract to borrow or hire the body for its own use and benefit and is therefore not a bailment" (159).

There appear to be no Maryland cases on this point.

Firearms — Statutory Provision For Forfeiture Of Arms Upon Criminal Conviction Inapplicable To Civil Convictions For Violation Of The Game Laws. *Sawran v. Lennon, 118 A. 2d 10 (N. J. 1955).* Upon pleading guilty to hunting deer out of season, illegal possession of a deer, and possession of an illegal deer hunting missle, plaintiffs were convicted and fined. Their guns were confiscated, and this action was brought against the sheriff and game warden to recover same. On appeal from judgment for plaintiffs, *held,* affirmed. The statutory forfeiture provision applies to

criminal proceedings, but proceedings under the fish and game laws are summary suits for the imposition of penalties for mere civil, as distinct from criminal, wrongs. "The Legislature intended to cover only criminally unlawful acts, and not acts which were less than criminal or which carried only pecuniary penalties."

The Maryland Legislature has left no doubt that it intends a sweeping forfeiture of firearms for *any* violation of the deer hunting laws. Md. Code (1955 Supp.) Art. 66C, Sec. 195(h). Duck hunters are subject to section 150(a), which provides for confiscation of guns "which cannot be habitually raised and fired from the shoulder", or guns larger than ten gauge, or rifles "found in the vicinity of areas of wildfowl". Evidently section 195(h) would apply to shotguns loaded with buckshot rather than a rifled slug, while section 150(a) would not apply to "unplugged" shotguns (those capable of firing more than three shots without reloading), which are unlawful hunting pieces under that section. The Maryland situation seems to be not one of too little confiscatory power under the game laws but perhaps of too much. Aside from the strictness as to deer violators, section 121(b) (1951 Code) gives game wardens powers of seizure of ". . . any . . . device being used unlawfully so found in possession in violation of the law . . ." and provides that such ". . . shall be disposed of by the Game Warden as he may deem advisable for the best interests of the State". This might be understood to apply to such situations as posed in section 131(g) (1955 Supp.) making it unlawful to carry a loaded gun in a car, but providing for no forfeiture. The federal migratory bird laws illegalize certain fowling pieces, but provide for no forfeiture. 16 U. S. C. A. (1941), Secs. 704, (sec. 6.3, p. 181, 1955 Supp.), 707.

Garnishment — Service Upon Agent Of Garnishee Voids The Cause For Want Of Jurisdiction. *Hollywood Credit Clothing Co. v. Hundley, 118 A. 2d 515 (D. C. Mun. App. 1955).* Plaintiff directed a garnishment against a tire dealer, instructing the marshal to serve the dealer's bookkeeper as agent. The bookkeeper filed an answer that nothing was due the judgment defendant, and plaintiff caused the issue of a subpoena directing the bookkeeper to appear for oral examination and to bring certain documents. A motion to quash was granted. On appeal, *held,* affirmed. There was no error, and the entire proceeding could have been declared a nullity. Garnishment is a proceeding *in personam,* not *in rem,* and, since there is nothing in the District Code

permitting constructive service, only actual service on the person of the garnishee will give jurisdiction.

To the same effect, as regards Art. 9, Sec. 11 of the Maryland Code (1951), see *Wilmer v. Epstein,* 116 Md. 140, 81 A. 379 (1911). For a survey of Maryland attachment law, see Rhynhart, *Attachments in the People's Court of Baltimore City,* 14 Md. L. Rev. 235, 258 (1954).

Motor Vehicles — Pedestrian Crossing Intersection With Light Must Exercise Continuing Due Care. *Poulos v. Cassara, 118 A. 2d 130 (Pa. 1955).* Plaintiff, while crossing an intersection with a green light in his favor, was struck by an automobile, driven by defendant, which was proceeding through the intersection. Judgment was entered on a verdict for defendant. On appeal, *held,* affirmed. There was no error in instructing the jury that, if plaintiff did not continue to exercise vigilance while crossing, he was contributorily negligent. A pedestrian cannot cross a street wholly in reliance upon the green light which favors him, for that light gives him only a permissive license to cross. "He must look, keep looking, as he crosses."

The rights of motorists and pedestrians, one against the other, are apportioned by statute. Md. Code (1951), Art. 66½, Sec. 157 (at intersections regulated by traffic lights), 201 (at unregulated intersections and between intersections). As to the historical confusion of trying to determine what degree of care shall be required of preferred and unpreferred parties in the various statutory situations, see Due and Bishop, *Motorists and Pedestrians — A Study of the Judicial Process In Relation to the Statutory Right of Way Law in Maryland,* 11 Md. L. Rev. 1 (1950); *State v. Belle Isle Cab Co.,* 194 Md. 550, 71 A. 2d 435 (1950), noted in 13 Md. L. Rev. 63 (1953). A pedestrian crossing an unregulated intersection, though "favored" by the statute, must exercise due care. *Chasanow v. Smouse,* 168 Md. 629, 178 A. 846 (1935). A pedestrian crossing against a light or crossing between intersections, though "disfavored" by the statutes, is held only to the exercise of due care. *Weissman v. Hokamp,* 171 Md. 197, 188 A. 923, 189 A. 813 (1937). A motorist favored by a green light cannot "blindly" enter an intersection. *Valench v. Belle Isle Cab Co.,* 196 Md. 118, 75 A. 2d 97 (1950), noted in 13 Md. L. Rev. 350 (1953). This is probably true as to pedestrians, since "blindly" suggests some sort of reckless conduct beyond mere negligence. Though the Court of Appeals has not decided a case on all fours with the present one, there is at least some sug-

gestion that the statutory "right of way" given a pedestrian crossing with a green light may relieve him of the head-swivelling duties required of him in other crossing situations. In *Caryl v. Baltimore Transit Co.*, 190 Md. 162, 170, 58 A. 2d 239 (1948), it was said that a pedestrian in such situation is not bound to anticipate that a streetcar would fail to respect such "right of way", and in *Baltimore Transit Co. v. Castranda,* 194 Md. 421, 71 A. 2d 442 (1950), it was held not error to refuse an instruction that, if a pedestrian failed to look for approaching vehicles, where a look would have appraised him of their approach, that failure would constitute contributory negligence even if the light favored the pedestrian. It was said at page 435 that "The judge properly refused to give that instruction, because it ignored the testimony that [plaintiff] was crossing the street in the crosswalk and that the light was green when he started across."

Real Estate Agents — Licensing Requirement Of Corporate Bond Not Unconstitutional. *Cyphers v. Allyn, 118 A. 2d 318 (Conn. 1955).* Plaintiff real estate broker brought this action for a declaratory judgment that the portion of an act of 1953 requiring the posting of a corporate surety bond as a prerequisite to mandatory licensing of realtors by the insurance commissioner was unconstitutional as (1) an illegal delegation of power to a corporation whose bonding whim is beyond the reach of the law and capable of denying him the right to carry on his business, and (2) a provision amounting to an unreasonable and arbitrary licensing standard. On certification, *held,* judgment for defendant. The Legislature, in the exercise of its police power, might reasonably believe that corporate surety bonds, being in the nature of insurance contracts, will afford the public greater protection than that offered by private surety bonds, and, in view of the competition between bonding companies for business, there is no reason to believe a bond will be refused "in a worthy case".

The same requirement in Maryland has never had its constitutionality challenged. Md. Code (1955 Supp.), Art. 56, Sec. 224(b).

Sales — Where Written Contract Contains Disclaimer Of Warranty, Parol Evidence Rule Bars Evidence Of Implied Warranty Of Quality. *Gagnon v. Speback, 118 A. 2d 744 (Pa. 1955).* Seller had 18,000 bushels of potatoes stored twelve feet deep in his warehouse. Buyer looked at the pile, agreed to take them "as is", rather than pay seller for

grade sorting. He paid $15,000 in cash and executed a $15,000 judgment note, receiving a bill of sale stating that seller made no warranty of quantity or quality. Seller knew, but buyer did not, that the potatoes had been exposed to frost, snow, and rain in the field. When buyer began hauling the potatoes away, he discovered that the under layers were in an advanced stage of rot; most of the potatoes were unfit even for consumption by cattle. After seller got judgment on the note, buyer moved for a rule to show cause why it should not be opened. On appeal from discharge of the rule, *held,* affirmed. The action is brought upon the written contract expressed in the bill of sale; since there is no evidence of fraud or mistake as to the disclaimer of warranty therein, and since buyer had an opportunity to inspect the potatoes and determine their merchantability, buyer cannot be permitted to set up an implied warranty of quality. Musmanno, J., dissented: Buyer should be permitted to present to a jury the question of whether seller deceived him in selling potatoes he knew to have been exposed to rot-producing weather so as to render them unusable as food, because: (1) inspection was impossible; (2) this was a bulk sale by sample; under the Sales Act there is an implied warranty that the bulk will correspond to the quality of the sample and that the bulk will be free of any defect rendering it unmarketable which cannot be discovered by reasonable inspection of the sample; (3) these warranties arise by operation of law upon the circumstances of the sale, are independent of the written contract and not subject to the parol evidence rule; no disavowal of warranty can permit one to sell something other than that which he contracted to sell, and here the rot was so advanced that what was actually sold "had lost all standing as potatoes".

While the Court of Appeals has apparently not decided what effect the parol evidence rule has on a dealer's implied warranty of quality, *Buchanan v. Dugan,* 82 A. 2d 911 (D. C. Mun. App. 1951), ruled that such warranties arise independently of the contract, but that this does not affect the right of the parties to exclude any implied warranty by a merger clause. See 1 WILLISTON, SALES (Rev. ed., 1948), Sec. 239. As to bulk sales by sample, see Md. Code (1951), Art. 83, Sec. 34; *Gunther v. Atwell,* 19 Md. 157 (1862). That, in order for an implied warranty of fitness to arise, buyer must not have examined the goods where such examination should have revealed the defect, see *ibid,* Sec. 33. For the most important Maryland cases on implied warranties of fitness, see Note, 7 Md. L. Rev. 82 (1942). There is consider-

able juridical disagreement as to what constitutes a reasonable opportunity to inspect, what effect that opportunity has on buyer's rights for breach of implied warranty, and what constitutes a sale by sample when the goods are in bulk. See Note, 23 Minn. L. Rev. 941 (1939). Aside from the parol evidence question, the facts of this case present a very close series of problems as to whether buyer had an opportunity to inspect, whether this was a sale by sample of bulk, and whether there was not a mutual mistake in that the subject matter of the contract was materially different from that received.

Workmen's Compensation — Employer Must Contribute To Unemployment Fund For Home Workers Not Engaged In Independently Established Trade. *Weiss-Lawrence, Inc. v. Riley, 118 A. 2d 731 (N. H. 1955).* Petitioner shoe manufacturing company sought declaratory judgment against Commissioner of Labor to establish its non-liability for unemployment compensation contributions for certain "home workers" who were trained by petitioner in the lacing and beading of moccasins, supplied by it with materials, and paid weekly on a piece-work basis, the workers being under no obligation to accept or continue work but agreeing to finish accepted work in compliance with petitioner's standards. Upon findings of the trial court, *held,* judgment for respondent. The statute is not a mere codification of common law distinctions between employees and independent contractors, for the purpose of those distinctions was to determine the tort liability of masters, while the statute has the broader aim of distributing and easing the burden of unemployment of those attached to the labor market. Under the statute, petitioner had the burden of proving the home workers were "customarily engaged in an independently established trade"; its failure to meet the burden is fatal to its cause.

Md. Code (1951), Art. 95A, Sec. 19(g)(6)(C), requires that the workers be engaged in an "independently established trade" in order for the employer to avoid contribution.