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Recent Decisions

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Recent Decisions

Administrative Law — State Courts Have No Power To Review Rent Schedules Fixed By F.H.A. Administrator Under National Housing Act. *Fieger v. Glen Oaks Village, 132 N. E. 2d 492, 309 N. Y. 527 (1956).* Plaintiffs, tenants in F.H.A.-insured housing project, sued landlords in state court to recover allegedly excessive rent, maintaining that defendants, by fraud in overestimating construction costs, procured excessive mortgage insurance from F.H.A. with the result that the rent schedules set under the Housing Act, 12 U. S. C. A. §1743 (1945 ed. and 1955 Supp.), were greatly in excess of reasonable rentals. On appeal from dismissal for want of jurisdiction, *held,* affirmed. (1) The determination of F.H.A. authorities represents federal governmental action by authorized federal officers, and state courts have no power to revise or review such official acts; (2) In New York, a tenant claiming to be deprived of rights under rent laws by fraudulent misrepresentations made to government authorities has no remedy unless a specific statute gives him such; (3) Plaintiffs were not third party beneficiaries under the doctrine of *Laurence v. Fox,* 20 N. Y. 268 (1859).

Under the National Housing Act, 12 U. S. C. A. Sec. 1702 (1945 ed. and 1955 Supp.), and the Administrative Procedure Act, 5 U. S. C. A. Sec. 1009 (1950 ed.), there would seem to be a suggestion that the Federal Housing Commissioner's rent schedules might be reviewed by state courts exercising jurisdiction concurrent with federal courts. However, the Administrative Procedure Act, 5 U. S. C. A. Sec. 1001 (1950 ed.), excepts administrative acts made pursuant to Sec. 1743 from its operation and, thus a review was denied in *Choy v. Farragut Gardens,* 131 F. Supp. 609 (S. D. N. Y. 1955).

Constitutional Law — Statute Providing For Automatic Dismissal Of City Employee Who Invokes Privilege Against Self-Incrimination Is Void As A Violation Of Due Process. *Slochower v. Board of Higher Education of City of N.Y., 76 S. Ct. 637 (1956).* Appellant, a teacher at city-operated Brooklyn College, invoked the fifth amendment privilege against self-incrimination when asked by the Senate Internal Security Subcommittee whether he had been a Communist Party

member prior to 1941. He was summarily dismissed under §903 of the New York City Charter, providing for the automatic termination of employment of any city employee making use of the privilege. On appeal from an affirmance of the dismissal by the New York Court of Appeals, *held* (5-4), reversed. Since from invocation of the privilege neither guilt of the conduct inquired into nor perjury for false invocation of the privilege can be inferred, such invocation has no reasonable relation, of itself, to appellant's fitness to hold his job; to summarily terminate that job on the sole basis of such invocation, without inquiring into the circumstances, shows a denial of " 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process" (641). Mr. Justice Reed dissented: on the ground that the city may require an employee as a condition of employment either to give information pertinent to official inquiries or to give up his job. The privilege protects one against prosecution, not against loss of job. "A denial of due process is 'a practice repugnant to the conscience of mankind.' Surely no such situation exists here." (*Dis. op.*, 642, 643.)

In *Garner v. Los Angeles Board,* 341 U. S. 716 (1951), the Court upheld the right of Los Angeles to require an affidavit stating whether the applicant had ever been a Communist Party member and, if so, full particulars thereof, as a pre-requisite to continued or prospective employment, such membership being possible grounds for dismissal. But this case is distinguishable from the present one in that refusal to make the affidavit *can* lead to an inference of guilt without running afoul of any specific constitutional guaranties. *Adler v. Board of Education,* 342 U. S. 485 (1952), upheld the Feinberg Law, but the machinery for dismissal on grounds of membership in a subversive organization provided for a hearing, with right to counsel and judicial review. In *Wieman v. Updegraff,* 344 U. S. 183 (1952), the Court decided negatively the question whether due process permits a state to bar one from its employ purely on the basis of membership, innocent or otherwise, in groups dubbed "subversive" by the United States Attorney General. Due process was said to proscribe guilt by association. *Ullmann v. United States,* 76 S. Ct. 497 (1956), indicated that a majority of the Court will not broaden the interpretation of the self-incrimination privilege to include anything more than protection against actual prosecution. A consideration of these decisions, cited by

the justices as relevant authority, and of the sharp division of the Court on the proper limits to the scope of due process, leads to a conclusion that the present case, in oracular fashion, raises a question by answering one, *i.e.*, it being decided that a governmental employee is at least entitled to a hearing before dismissal for assertion of the self-incrimination privilege, then if, after a hearing, such employee is removed on the sole ground of his use of the privilege, has the due process clause been violated?

Corporations — General Manager Has Implied Power To Bind Corporation To Charitable Gifts. *Memorial Hospital Ass'n. v. Pacific Grape Products Co., 290 P. 2d 481 (Cal. 1955).* Plaintiff, a non-profit hospital association which had been soliciting construction funds, brought this action to recover against defendant corporation $5,000, pledged in writing by Triplett, president, general manager, and owner of 73% of the stock of defendant. The board of directors, which evidently convened only at Triplett's call, had never been consulted on the matter, though it had acquiesed for many years in small contributions made by Triplett to the Community Chest. On appeal from judgment for plaintiff, *held* affirmed. A general manager has greater powers than the president and pursuant to his authority to conduct the business, he has implied power to bind the corporation to any act appropriate to the ordinary course of business. Reasonable charitable gifts are within this course of business and the differential between the size of the gift and that of former donations does not make it unreasonable. A local hospital could be a benefit to the corporation not only for good will but as a ready haven for its employees.

Penowa Coal Sales Co. v. Gibbs & Co., 199 Md. 114, 119, 85 A. 2d 464 (1952), stated that a general manager has authority to do any act which is usual and necessary in the ordinary course of its business, and may exercise all the powers which the board of directors could exercise or authorize under the same circumstances. Md. Code (1951) Art. 23, Sec. 9 (10), permits boards of directors to authorize charitable gifts if reasonable, and the concept of "reasonableness" has been steadily expanding in American law.

Damages — Award Of $750 For Slight Illness Resulting From Consumption Of Contaminated Soft Drink Held Excessive. *Leathers v. Sikeston Coca-Cola Bottling Company, 286 S. W. 2d 393 (Mo. App. 1956).* The plaintiff con-

sumed a substantial portion of soft drink bottled by the defendant company before she noticed a photograph film in the bottle. She became nervous, and suffered headaches; upon the advice of her physician, she drank milk exclusively and in large quantities for the following six days. Six months later she broke out in a rash of pimples. On appeal from judgment for the plaintiff for $750, *held,* affirmed upon condition of remittitur of $500. The plaintiff lost no wages, showed no medical expense, suffered no lasting effects, and failed to establish a causal connection between the event and nervous symptoms. An award of the sum of $250 would be fair.

For cases involving impurities in beverages see 47 A. L. R. 153 and 88 A. L. R. 532.

Elections — When Voting Machines Are Mandatory, Failure To Use Them Invalidates The Election. *Isgitt v. Jackson, 85 So. 2d 290 (La. App. 1956).* Plaintiff was defeated in a municipal election in which voting machines were not used. A statute provided that such machines were to be used "throughout the entire state of Louisana in all elections provided by law" (291). Plaintiff sought a judgment declaring the election null and void. Defendant's demurrer was sustained. On appeal, *held,* reversed. Failure to use voting machines as required by law necessarily involves the absolute nullity of the election.

In Maryland, beginning with the 1956 general election, use of voting machines in all elections is mandatory. Md. Code Supp. (1955) Art. 33, Sec. 92(g). Protection of the voter's free choice was the principal concern of the Court of Appeals in *Wilkinson v. McGill,* 192 Md. 387, 393, 395, 64 A. 2d 266 (1949).

> ". . . when an election has been held and it is not shown that the failure of the officials to observe the requirements of the law has interfered with the fair expression of the will of the voters, courts have generally held that the result of the election will not be disturbed.
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> "These principles do not apply to a situation where there is a preemptory requirement designed to safeguard the integrity of elections, the neglect of which presents an apparent opportunity for fraud."

Evidence — State Cannot Call Defendant's Wife To Stand Where Wife Is Incompetent To Testify Against Husband. *Caldwell v. State, 287 S. W. 2d 176 (Tex. Crim. App. 1956).* Defendant was convicted of statutory rape of his stepdaughter. Defendant's wife's sister, who lived with defendant's family, testified that she had never seen any improper conduct of defendant toward his stepdaughter, and in testimony frequently referred to defendant's wife by name. On rebuttal, the state called defendant's wife to the witness stand, whereupon defendant objected to her testimony on the grounds that she as wife of defendant was incompetent to testify. By statute in Texas, a husband or wife are incompetent to testify against one another in all criminal actions except in a criminal offense committed by one against the other. Tex. Code Crim. Proc. (1944), Tit. 8, Art. 714, 2 Vernon's Texas Stat. (1948), p. 433. On appeal, *held,* reversed and remanded. Forcing defendant to object to his wife's testimony gave rise to the inference that she could have refuted her sister's testimony if permitted to testify. Allowing the tender of this witness permitted the state to prove indirectly what it is prohibited from doing directly.

This case is in accord with the usual view that where a husband and wife are incompetent to testify against each other, it is inconsistent with the full exercise of the privilege of exclusion of a spouse's testimony for a court to allow an unfavorable inference to be drawn against the defendant by his objection to proposed testimony of his spouse called to the stand by the state. See 8 WIGMORE, EVIDENCE (3rd ed. 1940) Sec. 2243.

This problem would not arise in Maryland since the witness-spouse is competent to testify against the other (Md. Code (1951) Art. 35, Sec. 4); the privilege not to testify is extended to the witness-spouse only, and the defendant cannot object to proposed testimony of his spouse if she chooses to testify against him. *Raymond v. State ex rel. Younkins,* 195 Md. 126, 72 A. 2d 711 (1950). As to whether one spouse can be compelled to testify against the other, see Moser, *Compellability of One Spouse to Testify Against the Other in Criminal Cases,* 15 Md. L. Rev. 16 (1955).

Insurance — Refusal Of Insurer To Tender Return Of Premium After Knowledge Of Breach Waives The Defense. *Connecticut Fire Insurance Company v. Johnson, 293 P. 2d 607 (Okl. 1955).* Plaintiff brought action against defendant insurer on an automobile collision policy, maintaining that

defendant's refusal to tender a return of the premium amounted to a waiver of all defenses. Defendant claimed that the policy was void for by material and fraudulent misrepresentation in that plaintiff, representing himself as an electrical contractor was in fact a bootlegger, and that it was not obliged to return the premium until it had final judgment entered in its favor. On appeal from a judgment entered on the pleadings for plaintiff, *held,* affirmed. Refusal to tender return of the unearned premium was inconsistent with an intent, expressed in the pleadings, to void the policy, and amounted to a waiver of defense. The fact that defendant insurer did not know of the fraudulent misrepresentation until after the loss had occurred is immaterial.

As a general rule, the retention of unearned premiums by the insurer does not amount to waiver or estoppel when the insurer was without knowledge of the breach until after the loss. 16 APPLETON, INSURANCE (1944) Sec. 9303; 45 C. J. S. 693, Insurance, Sec. 716. See *Automobile Insurance Exchange v. Wilson,* 144 Md. 249, 255, 124 A. 876 (1923); *Stiegler v. Eureka Life Ins. Co.,* 146 Md. 629, 127 A. 397 (1925).

Motor Vehicles — Nonresident Motorist Statute Held Not Applicable To Accidents On Private Property. *Langley v. Bunn, 284 S. W. 2d 319 (Ark. 1955).* This was an action by a filling station attendant who sustained injuries while servicing the car of defendant, a nonresident motorist. An order sustaining the defendant's motion to quash service of process, *held,* affirmed. Substituted service under the Nonresident Motorist statute does not extend to actions arising out of accidents on private property involving the nonresident's automobile.

The Maryland Nonresident Motorist statute until 1956, was substantially the same as the one construed by the Arkansas court. Md. Code (1951) Art. 66½, Sec. 113, provided that a nonresident using the roads and highways of Maryland appoints by law the Secretary of State his lawful attorney, upon whom may be served processes in an action "growing out of any accident in which the nonresident may be involved while operating . . . a motor vehicle on such *public highway*". (Emphasis supplied.) *Rilling v. Jones,* 130 F. Supp. 834 (Md. 1955) quashed process against defendant nonresident motorist in an action arising out of a collision on a private road, saying that the Maryland legislature did not intend to apply the statute to accidents

occurring on private roads and driveways. However, by Chapter 83 of the Laws of 1956, the Legislature amended subsection (a) of Sec. 113 of Article 66½, by adding after the words "public highway", the following:

> "... or elsewhere within the boundaries of the State of Maryland, including but not limited to property owned by individuals, firms, corporation or the Federal government: ..."

Statutes of other states also provide for substituted service from accidents involving nonresident motorists *within the state*. Purdon's Pa. Stat. Tit. 75, Sec. 1201 (1936); Ohio Rev. Code, Sec. 2703.20 (1953). The New York legislature amended its statute by substituting the words "in this state" for the words "on such a public highway". N. Y. Vehicle and Traffic Law, Sec. 52 (1952).

Workman's Compensation — Murder Of Watchman Getting Coffee Off The Premises Arose Out Of His Employment. *United States Fidelity & Guarantee Company v. Croft, 91 S. E. 2d 110 (Ga. App. 1955).* Plaintiff's husband, a night watchman who had been granted permission by his employer to make coffee at a certain place on the premises, was murdered over a cup of coffee in a "drive-in" located 100 yards from the premises, apparently by someone trying to rob the "drive-in". Plaintiff filed a claim under the Workman's Compensation Act. On appeal from a judgment for plaintiff, *held*, affirmed. To be compensable under the Act, injuries must have been sustained within the course of employment, and must, as a matter of causation, have arisen out of that employment. (1) Personal acts of an employee such as quenching thirst, eating, protecting himself from the elements, etc., which are reasonably necessary for his health and comfort are incidents within the scope of his employment. Temporary inattention of a night watchman is to be expected and does not amount to an abandonment of his employment. (2) Since a common hazard of a night watchman's work is that he will be set upon by robbers, the murder arose out of his employment and was not the result of a third party act involving matters disassociated with his work. Felton, J., dissented: the fact that plaintiff's decedent was a night watchman was not a legal cause of his demise; even if it were, he absented himself from his employer's premises to such a degree as to have effected a temporary abandonment of his employment.

Maryland determination of the causation prerequisite to recovery — that the injury "arise out of" the employment

(Md. Code (1951) Art. 101, Sec. 14) — has opened and closed like an erratic bellows. The consistent lack of discoverable pattern to the cases leads to the necessary conclusion that each case, as it comes up on its facts, is, for all practical purposes, one of first impression. See *Perdue v. Brittingham,* 186 Md. 393, 401, 47 A. 2d 491 (1946); compare *Schemmel v. T. B. Gatch & Sons Co.,* 164 Md. 671, 683, 166 A. 39 (1933), ("The causative danger must be peculiar to the work and not common to the neighborhood.") To *Watson v. Grimm,* 200 Md. 461, 465, 90 A. 2d 180 (1952), ("An injury to an employee arises out of his employment when it results from some obligation, condition or incident of the employment."); but contrast to these cases and to each other *Atlantic Refining Co. v. Forrester,* 180 Md. 517, 523, 25 A. 2d 667 (1942), and *Rumple v. Henry H. Meyer Company,* 118 A. 2d 486 (Md., 1955). In Maryland's "night watchman" case, it was decided that the employee's murder, for reasons unrelated to his work, might be found by a jury to have arisen out of his employment, for that the job brings extra exposure to danger, from personal as well as professional enemies. *Todd v. Easton Furniture Co.,* 147 Md. 352, 128 A. 42 (1925).

Wrongful Death — Statute Does Not Permit Minor To Sue Father For Death Of Mother. *Durham v. Durham, 85 So. 2d 807 (Miss. 1956).* The mother of plaintiff minor child was killed while riding in an automobile negligently operated by her husband, defendant herein. The child sued her father under the Wrongful Death statute. On appeal from an order sustaining defendant's demurrer, *held,* affirmed. Though the beneficiary under the act cannot bring an action which the deceased could not have brought had she lived, the relationship of wife and husband between deceased and defendant does not bar this action. However, there being no express assertion in the act of legislative intent to abrogate the common law rule barring a minor from suing his parent in tort, such rule does preclude this action.

The rise of family automobile accidents in recent years, and the possibility illustrated by this case that either the rule against wife suing husband, *Furstenberg v. Furstenberg,* 152 Md. 247, 253, 136 A. 534 (1927), or that against child suing parent, *Mahnke v. Moore,* 197 Md. 61, 68, 77 A. 2d 923 (1951), noted, 12 Md. L. Rev. 202 (1951), may be used to prevent any relief against the tort-feasor, make this problem a serious one, which Md. Code (1951) Art. 67, Sec. 1, essentially the same as the Mississippi statute, does not solve.