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Contracts — Anticipatory Breach Where One Party Has Fully Performed. *Phelps v. Herro,* 215 Md. 223, 137 A. 2d 159 (1957). In 1955 plaintiff contracted to sell to defendant certain interests in stock and realty for $37,500, defendant to pay $5,000 presently and issue to plaintiff a promissory note calling for payment of the balance in installments beginning in January, 1957. The $5,000 was paid and plaintiff transferred the interests to defendant. In 1956 defendant refused to execute the aforesaid promissory note and also notified plaintiff that he would not pay plaintiff the balance of the purchase price. Plaintiff thereupon filed suit in December, 1956 (before the next payment was due), to recover the $32,500. Plaintiff's motion for summary judgment was granted on the theory that defendant's repudiation amounted to a total breach entitling plaintiff to sue immediately for the entire sum due under the contract. The Court of Appeals of Maryland reversed, (4-1), without prejudice. The leading case on anticipatory breach of contract, *Hochster v. De la Tour,* 118 Eng. Rep. 922, 2 El. and Bl. 678 (1853), permitted *immediate* recovery to plaintiff on a contract of employment where defendant repudiated before the time fixed for performance. The weight of authority in this country has refused to apply the doctrine of anticipatory breach to unilateral contracts, or bilateral contracts that have become unilateral by full performance on one side, where the remaining act is solely the payment of money. (Citations in opinion.) This is the extent of the court's ruling, even though some jurisdictions refuse to apply the doctrine to any unilateral contract. The court noted that the rule is different where defendant's obligation is something other than or in addition to the payment of money; thus the contrary result in *Development Co. v. Bearing Co.,* 183 Md. 399, 37 A. 2d 905 (1944). There plaintiff recovered the full contract price, even though not yet due, for defendant had failed to execute a chattel mortgage.

In the instant case, defendant was to execute only a non-negotiable promissory note without additional security. Standing alone, this does not alter the character of defendant's obligation solely to pay money. Hammond, J., dissented on two principal grounds (233). First, the law pronounced in the majority opinion is at best an arbitrary exception to the general doctrine of anticipatory breach and is not based on any substantial reasoning. In support of this view, he cites such authorities as Corbin, Judge

Learned Hand, and Justice Cardozo. Second, even if the exception be conceded, it should not be applied in the instant case. The majority opinion acknowledges the applicability of the doctrine where the agreement requires the execution of a note with security, and numerous cases have sustained the doctrine where there has been a failure to give a negotiable note. No apparent reason exists why a different rule should pertain to a non-negotiable note. The provision for the execution of the note in the agreement in question was undoubtedly a material part of the contract, and the measure of damages for the breach should be either the amount of the note, properly discounted, or the value of the goods sold. Judge Hammond concluded that the majority opinion determined by mechanical formula what should have been decided only after consideration of the contract reason for the execution of the note and the wilfulness of the breach.

Judge Hammond also called attention to 1 RESTATEMENT, CONTRACTS (1932) Sec. 317, which states the rule that *present partial* breach plus a repudiation of the remainder of the contract amounts to a total breach; and to *Sagamore Corporation v. Willcutt,* 120 Conn. 315, 180 A. 464 (1935), applying the Sec. 317 rule to a contract which had become unilaterial by full performance on one side. Judge Hammond would adopt this Connecticut ruling in Maryland.

Contracts — Memorandum Sufficient To Satisfy Statute Of Frauds. *Preis v. Eversharp, Inc.,* 154 F. Supp. 98 (E. D. N. Y. 1957). Plaintiff brought this action to recover certain sums alleged due him pursuant to a contract with defendant corporation. The only evidence of the agreement was the duly recorded minutes of the meeting of defendant's board of directors. The minutes stated that the board unanimously agreed to pay plaintiff stipulated amounts over a twenty-four month period. Defendant contended that since the contract was not to be performed within one year, it was unenforceable under the Statute of Frauds, there being no adequate written memorandum of the agreement. The District Court found for the plaintiff. The minutes of a meeting of the board of directors of a corporation, signed by the secretary, constituted a memorandum sufficient to satisfy the Statute of Frauds.

Although the Maryland Court of Appeals has not yet passed on this specific point, two principles have been enunciated which are implicit in the result of the instant case. Delivery of the memorandum is not necessary to take

the contract out of the Statute of Frauds; *Drury v. Young,* 58 Md. 546 (1882). Nor is it relevant for what purpose the memorandum was executed, so long as the formal requirements of the Statute of Frauds are satisfied; *Crawford v. Obrecht,* 171 Md. 562, 570, 189 A. 809 (1937). At least two courts in this country have reached the same result as the principal case; *Lamkin v. Baldwin & Lamkin Mfg. Co.,* 72 Conn. 57, 43 A. 593, 596 (1899), and *Louisville Trust Co. v. National Bank of Kentucky,* 3 F. Supp. 909, 917 (W. D. Ky. 1932), [reversed on the ground that the Kentucky statute of frauds peculiarly requires delivery of the memorandum] 67 F. 2d 97 (6th Cir. 1933), *cert. den.* 291 U. S. 665 (1934). See 37 C. J. S. 654, Statute of Frauds, Sec. 176, for a list of the numerous types of documents in which a sufficient memorandum can be contained (*e.g.,* checks, stock certificates, deeds, wills, pleadings, and depositions).

Criminal Law — Felony-Murder Doctrine. *Commonwealth v. Redline,* 391 Pa. 486, 137 A. 2d 472 (1958). Defendant was convicted of first degree murder for the death of his co-felon, which occurred during a gunfight with the police and was initiated by defendant while fleeing the scene of an armed robbery. The fatal shot was unquestionably fired by one of the policemen. The trial court's decision was based on two prior Pennsylvania cases, *Commonwealth v. Thomas,* 382 Pa. 639, 117 A. 2d 204 (1955), and *Commonwealth v. Almeida,* 362 Pa. 596, 68 A. 2d 595, 12 A. L. R. 2d 183 (1949). *Thomas* sustained a murder conviction where the defendant's co-felon was killed by the victim of the robbery; *Almeida* held the robber accountable for the accidental killing of an innocent bystander by the police or robber. The Supreme Court of Pennsylvania reversed (6-1). After an extensive summary of the felony-murder doctrine and a review of the cases in other jurisdictions, the Court concluded that the general, if not unanimous requisite for felony-murder (except for the *Thomas* and *Almeida* cases, *supra*) has been that the killing must be done by the defendant or an accomplice to the felony. *Commonwealth v. Thomas, supra,* was therefore expressly overruled (482) as an unwarranted judicial extension of the felony-murder doctrine. Under no rational theory can a person be criminally charged for the consequences of the lawful conduct of another person. The Court did not overrule *Commonwealth v. Almeida, supra,* however, but distinguished it on the basis that there the killing was only *excusable* (the victim being a non-felon), whereas the killing in the in-

stant case was *justifiable* (the victim being a felon). One judge, concurring (500) sought express repudiation of *Almeida* also. Justice Bell, dissenting (483) favored the expansion of the doctrine for the further protection of society and decried the majority for overruling law established in Pennsylvania by five decisions in the past ten years.

Commonwealth v. Thomas, supra, is noted in 16 Md. L. Rev. 249 (1956). The article reviews the felony-murder doctrine in Maryland and elsewhere. A recent case, *People v. Podolski,* 332 Mich. 508, 52 N. W. 2d 201 (1952) cited with approval the Pennsylvania rule repudiated in the principal case and sustained the first degree murder conviction of a robber for the death of a police officer who was killed by a bullet from the gun of a fellow officer in a gun battle with the robber. The cases are collected in 12 A. L. R. 2d 210.

Due Process — State Jurisdiction Over Foreign Corporation. *McGee v. International Life Insurance Company,* 355 U. S. 220 (1957). Respondent, a Texas Corporation, offered by mail to insure X, a California resident. X accepted and mailed the premiums from his California home to respondent in Texas until his death. Upon respondent's refusal to pay the beneficiary, plaintiff, suit was filed in California pursuant to a California statute subjecting foreign corporations to suit in California on insurance contracts made with California residents. Service of process was had by registered mail. Respondent had no offices or agents in California; the only business ever solicited in California was with X. Judgment was rendered in California for plaintiff, who then filed suit in a Texas court on the judgment. The Texas courts considered the judgment void upon the theory that the service of process outside of California was a violation of Due Process. The Supreme Court granted certiorari and reversed. The limits placed on the jurisdiction of a state court over persons served with process outside its borders were in the past measured by such criteria as "doing business," "consent," and "presence," but these have largely been abandoned. *International Shoe Co. v. Washington,* 326 U. S. 310, 316 (1945), required only that the defendant have "minimum contacts" with the state. Recognizing that the trend is toward increasing state jurisdiction in this area, the Court in the instant case concluded that Due Process is not violated if the contract sued on had a "substantial connection"

(222) with the state in which suit was brought. This requirement was met by (1) delivery of the contract in California, (2) payment of the premiums from that State, and (3) residence of the insured in California.

2 MD. CODE (1957) Art. 23, Sec. 92(d) subjects foreign corporations (whether or not doing business in Maryland) to suit in Maryland on contracts made *within* Maryland. In view of the present decision, the constitutionality of this statute seems certain. See 17 Md. L. Rev. 140 (1957) for a discussion of state jurisdiction over foreign corporations not "doing business" in the state. The noted case, *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir. 1956), denied North Carolina jurisdiction over a New York corporation which shipped goods into North Carolina pursuant to a contract entered into in New York. *Quaere:* Whether this result is affected by the instant case?

Estate Tax — Marital Deduction — Quality Of Power Of Appointment As Defined By Maryland Law. *Estate of Allen v. Commissioner*, 29 T. C. No. 52 (Dec. 19, 1957). Testator left the income from a trust to his wife for life, corpus to those persons she shall appoint by her will. Testator died a resident of Baltimore County, Maryland, and the will was there probated. The executors computed the estate tax by deducting the value of the aforementioned trust from the gross estate. The assumption was that the testamentary power of appointment in the wife was an "interest" in property allowable as a marital deduction under Sec. 812(e)(1)(F), INTERNAL REVENUE CODE OF 1939 (now Sec. 2056(b)(5) of the 1954 CODE. This section reduces the taxable estate of decedent to the extent of the property over which the surviving spouse has a life interest plus the power to appoint the corpus to herself or her estate. The Tax Court upheld the Commissioner's disallowance. Whether the widow had the power to appoint to herself or her estate is to be determined by local law. At least two Maryland cases have held that a donee cannot appoint to his estate or creditors unless the power has been *expressly* conferred. *Lamkin v. Safe Deposit & Trust Co.*, 192 Md. 472, 479, 482, 64 A. 2d 704 (1949), and *Connor v. O'Hara*, 188 Md. 527, 530, 53 A. 2d 33 (1947). Due to the evident absence of such express language, the widow's interest does not qualify for the marital deduction.

This Maryland attitude toward "general" powers is also relevant with respect to Sec. 2041 of the INTERNAL REVENUE CODE OF 1954, which includes in the gross estate of the

donee the value of any property over which he has a power of appointment if it is exercisable in favor of himself, his estate, his creditors, or the creditors of his estate. The Maryland rule prevails in only Kentucky and Rhode Island, 97 A. L. R. 1072 and *Connor v. O'Hara, supra.* At least one writer has predicted its advance in the future, 99 A. L. R. 1156, but due to the tax considerations presented above, this seems unlikely.

Negligence — Standard Of Care Imposed On Owner Of Firearm. *Kuhns v. Brugger,* 390 Pa. 331, 135 A. 2d 395 (Pa. 1957). Plaintiff and X, 12 year old grandchildren of defendant, were frequent guests at defendant's cottage, located in a somewhat isolated area. Defendant kept a loaded gun in an unlocked drawer in his bedroom. Defendant was aware that the youths knew the location of the loaded gun. Although the youths were allowed to play in the bedroom, they had been ordered not to touch any gun. One afternoon, during defendant's absence, X took the gun from the drawer and negligently discharged it, seriously wounding plaintiff. Defendant's position was that he had a right to keep a loaded pistol in his home to protect himself against nocturnal prowlers; to be required to keep the drawer locked in the daytime but unlocked at night (so that the pistol would be readily accessible) exceeded the exercise of reasonable prudence under the circumstances. Judgment for the plaintiff was affirmed, (5-2), on appeal. Although defendant was not an insurer, possession of a loaded gun placed upon him the duty of exercising extraordinary care to prevent harm to others. Since it is common knowledge that children are attracted to firearms, defendant could have reasonably anticipated "the likelihood of harm resulting from leaving the loaded pistol in an unlocked drawer in a bedroom frequented by children." X's negligence did not break the chain of causation between defendant's negligence and the resulting injury. Under the circumstances defendant was under a duty to keep the drawer locked during the day. The dissent felt that the majority decision would necessarily require a parent to keep under lock and key every type of possibly dangerous household article, such as kitchen knives.

For a discussion of the degree of care required under varying factual circumstances, see 12 A. L. R. 812, 56 Am. Jur. 1008, Weapons and Firearms, Sec. 25, and the cases cited in note 15 of the instant decision.

Taxation — Swimming Pool Club Is Social. *United States v. McIntyre,* 26 L. W. 2493 (4th Cir., 1958). 26 I. R. C. (1954) Sec. 4241, imposes a 20% tax on dues paid by members to any "social club". Plaintiff members sought to recover said tax which they paid under protest, contending that their club was not "social" within the meaning of the statute. The only activity of the club was to provide and operate a community swimming pool and bath house facilities for its members. The District Court for Maryland, in exempting the members from the tax, concluded that an organization is not "social" if its primary purpose is the promotion of some common interest or objective, social contacts are only incidental, and the social intercourse of the members was only a casual incident of the primary activity of the club, which was to provide *recreational* facilities, a swimming pool (151 F. Supp. 388). The judgment was reversed on appeal. The record showed that the club served the social purposes of its members, affording them a place to meet and converse. The use, not the facility, determines the result.

There appears to be no simple test for classifying organizations as social or non-social for purposes of Sec. 4241. A club was social where the members, local businessmen, met only at noontime to hold business conferences or converse about whatever they pleased while they lunched. *Duquesne Club v. Bell,* 127 F. 2d 363, 143 A. L. R. 1377 (3rd Cir., 1942). But *Rockefeller Center Luncheon Club v. Johnson,* 131 F. Supp. 703 (S. D. N. Y., 1955), held that a luncheon club for tenants of an office building development was not social. The primary purpose was to provide adequate eating facilities, and the social intercourse was incidental. The cases are collected in 143 A. L. R. 1381.

Trusts — Cash Dividend Distributions To Life Beneficiary — Income Or Principal. *Third National Bank & Trust Co. v. Campbell,* 145 N. E. 2d 703 (Mass. 1957). X's will created a trust, income to W for life, then to X's daughters for life, with remainder over to persons not yet ascertainable. The trust held 300 shares of a corporation, which paid out cash dividends, which in turn were distributed to W. For federal income tax purposes, these dividends were treated as a return of capital and, therefore, tax exempt income. Subsequently, the trustee sold these shares at substantial profit. In determining the capital gains tax on the transaction, the trustee was required to reduce the cost basis of the stock by the amount of the tax exempt

income paid to the widow. Petitioner, representing the remaindermen, contended that since the life tenant received the benefit of the tax exempt dividends, she should likewise share the burden of the increased capital gains tax to the extent that said dividends caused the reduction of the cost basis of the stock. The Supreme Judicial Court of Massachusetts charged the entire tax to the principal. The Massachusetts rule is that all cash dividends are treated as income in the absence of facts showing that the dividends are a return of capital. The record does not show that the distributions were from capital rather than earnings. The virtue of the rule is its simplicity, whereas allocation of the trust expenses between the life tenant and remaindermen poses many difficulties: estimation of future capital gains, offset of capital losses to gains, possible carry over of capital losses, and death of one of a series of life tenants before sale.

The Massachusetts rule of awarding cash dividends to income (except disbursements "designated by the corporation as a return of capital") has been adopted in Section 5 of the Uniform Principal and Income Act, thereby rejecting the so-called Pennsylvania rule of apportionment between the two funds. 9B U. L. A. 365, 366 (1957), Commissioner's Prefatory Note. The Act was adopted in Maryland 1939, 7 MD. CODE (1957) Art. 75B, Secs. 1-10, and twenty other states. 9B U. L. A. 365 (1957). Note also Section 7(2), requiring that all taxes on gains on certain types of principal be paid out of principal, regardless of how defined by the taxing authorities. Prior to the passage of the Act the Pennsylvania rule of apportionment was the rule in Maryland. *Lindau v. Community Fund of Baltimore,* 188 Md. 474, 478, 53 A. 2d 409 (1947).

The instant Massachusetts case might be a good guide in Maryland as to the application of Section 5 of the Act which is patterned on the Massachusetts rule. But it should be borne in mind that since the Act is in derogation of the prior Maryland law of apportionment, it may be more narrowly construed.

Unemployment Compensation — Recovery Barred By Participating In Or Financing Labor Dispute. *Soricelli v. Bd. of Review, etc.,* 46 N. J. S. 299, 134 A. 2d 723 (1957). Twelve unions represented the various employees at the plant of claimant's employer. When the members of Union A went out on strike, claimant, a member of Union B, voluntarily refused to cross the picket line and remained away

from work for the duration of the strike. He also contributed one dollar to Union A's strike fund. By contract between the employer and Union B, no employee who was in Union B was required to cross a duly established picket line. Over 90% of the employees in the plant continued to work during the strike; and there was no threat of violence to those crossing the picket line. Work was available to claimant throughout the strike. This suit was brought to recover unemployment compensation under N. J. S. A. (1950) 43:21-5(d), which precludes recovery to individuals "participating in or financing . . . [a] labor dispute". [Brackets added.] The Employment Security Division held that claimant was disqualified from benefits, and the Superior Court of New Jersey, Appellate Division, affirmed. (1) Voluntary refusal to cross a picket line constitutes "participation" in a labor dispute. (2) The employer — Union B contract is of no avail to claimant. To hold otherwise would allow one disqualified by statute to nevertheless recover unemployment compensation. Public policy as pronounced in legislation cannot be circumvented by private agreements. (3) Claimant's one dollar contribution to the strike fund constitutes a "financing" of a labor dispute. The act of contribution, not the amount, is the test for disqualification.

The Maryland Unemployment Compensation Law is substantially identical to the statute construed in the instant case. MD. CODE (1951) Art. 95A, §2 (purpose of the Act) and §5(e). It is well settled in Maryland that voluntary refusal to cross a picket line is participation in a labor dispute. *Mitchell, Inc. v. Maryland Emp. Sec. Bd.*, 209 Md. 237, 243, 121 A. 2d 198 (1956). Accord: 28 A. L. R. 2d 287, 333. Note *Brown v. Maryland Unemp. Comp. Board*, 189 Md. 233, 55 A. 2d 696 (1947), which held that claimant's refusal to cross a picket line was voluntary even though the union's constitution expressly prohibited its members from crossing picket lines. No Maryland case at the appellate level has yet construed the scope of the term "financing . . . [a] labor dispute".

Wills — Reservation Of Right To Amend Document Incorporated By Reference. *In Re Protheroe's Estate*, 85 N. W. 2d 505 (S. D. 1957). Testator executed a formal will, making disposition of his real and personal effects "in accordance with the attached list of assets (*made current by subsequent lists*)." (507). [Emphasis supplied]. A legatee sought to vacate the county court's decree admitting the will to probate. Petitioner contended that the testator's

reservation of the right to amend the list of assets rendered the will void, even though no changes had in fact been made. The county court's dismissal of the petition was affirmed by both the circuit court and the Supreme Court of South Dakota. By the doctrine of incorporation by reference, an extrinsic document takes effect as part of the will if such document was in existence at the time of the execution of the will and has been adequately described therein. The mere reservation of the right to alter the extrinsic writing is not fatal where this right has not been exercised, because the essential requirement that the extrinsic writing be in existence at the time the will is executed has not yet been violated. The actual subsequent exercise of the right is the controlling question.

The problem in the instant case is usually presented where an amendable or revocable *inter vivos* trust has been incorporated by reference into a will. There is a split of authority in this country as to whether such incorporation is effective where the power of amendment has not been exercised as of the testator's death. For contradistinctive analyses see Palmer, *Testamentary Disposition to the Trustee of an Inter Vivos Trust,* 50 Mich. L. Rev. 33, 36-49 (1951), and Lauritzen, *Can a Revocable Trust Be Incorporated by Reference?,* 45 Ill. L. Rev. 583 (1950). The doctrine of incorporation by reference is recognized in Maryland. Hull's Estate, 164 Md. 39, 163 A. 819 (1933). The cases are collected in 21 A. L. R. 2d 220.

Workmen's Compensation — Assault — Course Of Employment — "But For" Test. *Howard v. Harwood's Restaurant Co.,* 25 N. J. 72, 135 A. 2d 161 (N. J. 1957). Claimant, employed as assistant manager in appellant's restaurant, was attacked and beaten by a co-employee on appellant's premises. The attack was motivated by the assailant's insane delusion that he was punishing his common law wife for wrongs done him. Appellant contended that an attack by an insane co-employee was not one arising out of the employment. The trial court's award was sustained by the appellate division and affirmed by the Supreme Court of New Jersey. An accident arises out of the course of employment where, but for the employment, the accident would not have happened. This "but for" test is applicable only where (1) the injury is one which would more likely than not have occurred during the time and place of employment rather than elsewhere, and (2) the nature of the risk bears a sufficient causative relation to

the employment. This includes neutral risks, such as acts of God, but precludes risks arising out of personal relationships between employees. An attack by an insane co-employee is a neutral risk of the employment and therefore compensable.

Although the Maryland Court of Appeals has not expressly adopted the "but for" test to determine causation of an accident, note the language in *Watson v. Grimm,* 200 Md. 461, 466, 90 A. 2d 180 (1952). There the claimant, while riding on the running board of employer's truck, became dizzy, fell off and was fatally injured. The dizziness was caused by an idiopathic condition not connected with the employment. It was held that the injury arose out of the employment for it was contributed to by some factor peculiar to the employment and would not have occurred "if it had not been for the employment" (466). A more extreme case is *Todd v. Easton Furniture Mfg. Co.,* 147 Md. 352, 128 A. 42 (1925). A night watchman, while making his rounds, was killed. The attack was motivated by personal animosity toward him by the assailant. The death was held compensable for the position of night watchman exposed him to increased danger of injury.

The cases are collected in a series of A. L. R. annotations, culminating with 112 A. L. R. 1258.