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Estate Taxation—Marital Deduction And Claims Against The Estate. *Lindsey v. United States, 167 F. Supp. 136 (D.C. Md. 1958).* Decedent and wife held five parcels of real property as tenants by the entireties. Decedent executed a will under which the residue of his estate was left in trust to pay the net income to his wife for life with remainders over. One day after the will was executed, decedent and his wife entered into a contract by the terms of which the wife agreed that if she should survive her husband, she would accept his will, waive her rights to a legal share of dower or a legal share of decedent's estate and that immediately after the probate of decedent's will would transfer all the fee simple and leasehold property which she would then own to the decendent's testamentary trustees. Decedent, in turn, agreed to endorse certain insurance policies to provide interest income to the wife for life. The wife survived decedent and shortly after his death fulfilled her agreement by transferring the parcels of real estate to the testamentary trustees. The testamentary trustees then sold the property and retained the proceeds as part of the trust corpus.

The plaintiff's, executors of decedent's estate, filed a refund claim under which they sought: (1) to have the value of the five parcels allowed as a marital deduction and (2) to have the gross estate reduced by the amount of the value of the five parcels as a claim against the estate. The District Court held (1) "that the value of the five parcels should be included in the gross estate and should not be deducted as a marital deduction or as a claim against the estate, but (2) that for income tax purposes the parcels acquired a new basis, the value at which they were included in the federal estate tax return, so that no gain was realized when they were sold by the trustees, and no income tax was payable by them" [138].

The Court disallowed the marital deduction on the ground that the substance of the transaction between the decedent and his wife was that the wife received no more than an equitable life estate in the parcels without a power of appointment. The wife's interest in the parcels thus was a "terminable" one and did not qualify as a marital deduction. I.R.C. 1939 §812 (e) (1) (B), I.R.C. 1954, §2056 (b) (1).

The Court also disallowed a deduction for a claim against the estate, holding that the wife's claim was a claim to a distributive interest *in* the estate and not a claim *against* the estate within the purview of the tax laws" [139] I.R.C. 1939, §812 (b) (3), (4), I.R.C. 1954, §2053, *Latty v. Commissioner of Internal Revenue,* 62 F. 2d 952 (6th Cir. 1933). *Markwell's Estate v. Commissioner of Internal Rev.,* 112 F. 2d 253 (7th Cir. 1940).

See also *Awtry's Estate v. Commissioner of Internal Revenue,* 221 F. 2d 749 (8th Cir. 1955) distinguished in the present case.

Insurance — Excessive Coverage. *Kelley v. American Insurance Company, 316 S.W. 2d 452 (Tex. 1958).* Plaintiff took out a standard fire insurance policy with A Company which contained the following clauses: (1) "No other fire insurance is permitted on items insured hereunder unless permission is endorsed hereon;" (2) ". . . this Company shall not be liable for any loss occurring: * * * while any stipulation or condition of this policy is being violated." One month later plaintiff entered into a second fire insurance policy with B Company, covering the same property and containing the same prohibition against other insurance. The Texas Appellate Court, in permitting plaintiff to recover upon his original policy, held insured's second policy was void *ab initio* and thus could not constitute "other insurance" within the meaning of the prohibition against "other insurance" in the first policy.

Maryland for some time has followed the view expressed by the Texas Court on "other insurance" provisions in fire insurance policies. The Texas Court, in fact, based its holding in part upon the leading Maryland case of *Sweeting v. Mutual Fire Ins. Co.,* 83 Md. 63, 34 A. 826 (1896). Here the Maryland Court of Appeals held that the second policy was void *ab initio* because of non-disclosure of the existence of the first policy and thus did not constitute "other insurance" within the prohibition of the first policy.

It is important however to distinguish these cases from those where the original policy contains a term stating the policy is to become void if "any other contract of insurance, whether valid or not" is procured. For instance, in *Fire Ins. Co. v. Menke,* 166 Md. 513, 171 A. 719 (1934), where the original policy contained a term stating it became void if "any other contract of insurance, whether valid or not" was entered into, it was held as a matter of law

that the insured, who had entered into a second policy containing the same terms as the original policy, was not entitled to recover under the first policy or second policy. Thus recovery under a policy where additional insurance has been procured, against the express terms of said policy seems to rest primarily upon the wording used in the prohibition of the first policy.

Insurance — Insurer's Liability For Failure To Appeal. *Hawkeye-Security Ins. Co. v. Indemnity Ins. Co., 260 F. 2d 361 (10th Cir. 1958).* Defendant insurance company issued a liability policy to insured for $10,000 maximum coverage. Plaintiff indemnity company agreed to indemnify insured against any losses in excess of $10,000. Shortly thereafter insured was sued for negligence, and defendant undertook its defense under the terms of the policy. The trial resulted in a judgment against the insured of over $22,000. Defendant, against the advice of its own counsel, refused to take an appeal, whereupon the plaintiff took the appeal in the name of the insured. The judgment of the trial court was affirmed. Plaintiff paid the judgment in excess of $10,000 and instituted the present action to recover costs of the appeal including a reasonable attorney's fee. Plaintiff's theory of recovery was that defendant was bound to take an appeal by the terms of its policy, and its failure to do so constituted a breach of contract which subjected it to liability for the cost of appeal to its insured. Plaintiff claimed that by taking the appeal in insured's name it became subrogated to certain rights of insured against defendant. Defendant's policy contained a provision requiring defendant to "defend any suit against the insured, . . . even if such suit is groundless, false, or fraudulent."

The appellate court held that the defendant under the facts in the present case was not liable for its refusal to appeal. The court concluded that any liability for defendant's refusal to appeal must be based on defendant's bad faith and that mere disregard of its counsel's advice to appeal did not constitute a showing of bad faith.

Pleading — Effect Of Plea Of Limitations On Amended Declaration. *Doughty v. Prettyman, ... Md. ....., 148 A. 2d 438 (1959).* Infant plaintiff filed a declaration claiming damages for personal injuries sustained in Virginia while riding in a motor truck owned by defendant's decedent and operated by decedent's agent Johnson. The original declaration contained two counts. The first alleged that the accident

was caused by Johnson's negligent operation of the truck and the second that the accident was caused by a defective condition of the truck about which decedent knew or should have known. Over a period of five years a series of amendments were made. A Virginia statute provided that a guest could only recover for injuries sustained through the gross negligence of the driver. Such gross negligence was alleged within the statutory period but the allegation that the status of the plaintiff was that of a guest was not. As to the second count, there was no allegation that decedent was grossly negligent in permitting the alleged defective condition of the truck to exist, until more than three years after the accident occurred nor was there an allegation that the plaintiff was a casual employee, until more than three years after the accident.

Defendant contended that adding these three allegations more than three years after the accident occurred, modified the causes of action set forth in the original declaration so that a new cause of action was actually alleged. The Court of Appeals held that no new cause of action had been stated by the amendments. The Court applied what seems to be a test of what constitutes a new cause of action by amendment, suggested previously by the Court in *Cline v. Fountain, Etc., Company*, 214 Md. 251, 134 A. 2d 304 (1957), noted, 18 Md. L. Rev. 161 (1958), i.e., whether or not it can be said that the evidence which would support one cause would support another or whether a judgment on one cause of action would preclude suit on the other. In the present suit the Court reasoned "Evidence of the negligence of Johnson, the driver of the truck, would have supported the first count in its original or its amended form, and evidence that the truck was defective and that the appellee's decedent knew or should have known of the defect would have supported the second count in all its variations" [442]. While it can hardly be said such a test will always be conclusive, it does offer some help in solving the riddle of when an amended declaration alleges a new cause of action.

Price Discrimination — Promotional And Advertising Allowances Under Robinson-Patman Act. *Atalanta Trading Corp. v. Federal Trade Com'n., 258 F. 2d 365 (3rd Cir., 1958).* In three small, isolated sales of meat products, defendant meat distributor gave spot promotional and advertising allowances which it did not extend to other customers. The Federal Trade Commission held this a violation

of § 2(d) of the Robinson-Patman Act, 15 U.S.C.A. (1951) § 13(d), which forbids suppliers to grant allowances to any customers without making these allowances available on proportionately equal terms "to all other customers competing in the distribution of such products or commodities." The Commission asserted in its finding that the defendant by granting allowances in three instances on canned hams, pork shoulders, and pre-cooked Canadian bacon, had obligated itself to offer similar allowances on "its entire line of products — here meat products." [368].

The Court of Appeals for the Fourth Circuit, in reversing, found that a supplier is only required to offer allowances to other customers selling products of "like grade or quality" as the goods on which it granted the disputed allowance. The court also found that because the favored sales occurred either months after or prior to any sale in which an allowance was denied the necessary factor of actual competition between favored and unfavored customers was missing. It seems fair to say that in the Third Circuit at least the court will require the F.T.C. to show that there is in fact competition between favored and unfavored customers and that similarity of products will be material to such determination. Any lapse of time between the making of the favored sale and the unfavored sale will also be a factor in determining whether competition does exist.

Real Property — Lessor's Covenant To Pay Taxes. *Crewe Corp. v. Feiler, 28 N.J. 316, 146 A. 2d 458 (1958).* Plaintiff executed a fifteen year lease to defendant lessee under which lessee held an option to purchase and under which the lessor covenanted to pay the annual municipal real estate taxes on the premises. Lessee shortly thereafter engaged in extensive building renovations whereby the premises were changed from a laundry to an office building. As a result of these improvements lessor was forced to pay an additional $2700 in taxes. The New Jersey Supreme Court held on appeal that the lessor could recover the excess taxes he had paid as a result of lessee's improvements despite the fact that the lessor had expressly covenanted to pay the taxes. The court found that the changes in question were not expressly authorized by the lease and concluded that the lessee's alterations constituted waste even though the actual value of the building was enhanced.

Maryland has no case directly in point. However, two early Maryland cases, *Maddox v. White,* 4 Md. 72, 79 (1853)

and *Baugher v. Crane,* 27 Md. 36, 42 (1867) allowed the lessor to enjoin the lessee, or one claiming under him, from converting the premises into uses inconsistent with the terms of the lease, "from making material alterations [and] . . . from committing other kinds of waste." The common law doctrine of waste, providing for forfeiture of a lease notwithstanding the beneficial effect of a tenant altering the premises was held inapplicable to the Baltimore City ground rent system in *Crowe v. Wilson,* 65 Md. 479, 5 A. 427 (1886). As long as the tenant pays the ground rent and does not impair the security of the reversioner by the former's alteration, there is no reason to prevent the tenant from improving or reconstructing the premises. The whole problem of improving the lessor out of his rent can be avoided by the insertion of a net rent clause which makes allowances for increased taxes.

Taxation — Place Of Filing Lien. *United States v. Delaware Trust Company, 167 F. Supp. 465 (D.C. Del. 1958).* Notice of federal income tax liens were filed in the districts where the taxpayer resided, i.e., in Maryland and in the District of Columbia. After said filing, the taxpayer, a beneficiary under a Delaware trust for valuable consideration, assigned to defendants all his share of income which would arise from the trust until payments to defendants totaled $3400. The District Court held that the filing of the liens at taxpayer's residences in Maryland and the District of Columbia was not sufficient notice to bind assignees of the taxpayer's beneficiary interest in a real property trust where the situs of the real property and the domicile of the trustee was located in Delaware.

The Court rejected the government's contention that the assignment of the beneficiary's interest in future income arising from the trust was merely inchoate and thus equivalent to an assignment of personal property located at the residence of the assignor. The Court likened the present case to *Blair v. Commissioner,* 300 U.S. 5 (1937) where it was held that the assignment by a beneficiary of income arising from trust property was an assignment of both the right to receive income and also of an interest in the trust itself.

The Court expressly declined to say what the result would be had the trust res consisted of part realty and part personalty. However, the rule for real property trusts such as this one is "that under these facts the plain intent of the

statute requires the filing of the notice of lien at the domicile of the trustee where the real property is located and not at the taxpayer's residence" [469].

Torts — Damages Without Impact. *Bosley v. Andrews, 142 A. 2d 263, 393 Pa. 161 (1958).* Defendant's bull strayed onto plaintiff's land and began to chase plaintiff. In the midst of the chase plaintiff collapsed upon the ground and suffered an attack of coronary insufficiency. Testimony by doctors tended to show that while the bull's action did not directly cause the coronary insufficiency, it was the event that "triggered" the attack. The Pennsylvania Court held that plaintiff could not recover for the injuries which resulted from fright and shock of being chased by the bull, since it concluded that the injuries were unaccompanied by physical injury or physical impact.

In Maryland it is a settled principle that "a plaintiff can sustain an action for damages for nervous shock or injury caused, without physical impact, by fright arising directly from defendant's negligent act or omission, and resulting in some clearly apparent and substantial physical injury, as manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological, or mental state." *Bowman v. Williams,* 164 Md. 397, 404, 165 A. 182 (1933). See also *Mahnke v. Moore,* 197 Md. 61, 69, 77 A. 2d 923 (1951), noted, 12 Md. L. Rev. 202 (1951) on a different point.

In *State v. Baltimore Transit Co.,* 197 Md. 528, 80 A. 2d 13 (1951) no damages were recoverable for shock, fright or emotional strain where the injury resulted from seeing one's property destroyed. A further distinction was made in *Resavage v. Davies,* 199 Md. 479, 86 A. 2d 879 (1951) where a mother was not permitted to recover for nervous and mental injury caused by shock and fright from seeing her two children struck and killed by an auto which jumped the curb. No duty to the mother was found to have been violated where the mother was not herself imperiled. See RESTATEMENT OF TORTS SECOND (Tentative Draft No. 4, 1959) §313(2).

Torts — Wife's Right To Sue Husband And Child For Personal Injury. *Silverman v. Silverman, 145 A. 2d 826 (Conn. 1958).* Plaintiff, mother-wife, sued her husband for personal injuries sustained while she was a passenger in a car driven by her son. Plaintiff was allowed recovery

against the husband-father under the family car doctrine for the tort of plaintiff's unemancipated son even though it was against public policy in Connecticut for a parent to maintain an action against an unemancipated minor child for personal injuries caused by the latter.

The Maryland Court of Appeals has rejected the family car doctrine, by which the owner of a car who provides it for his family is liable for an authorized family driver's tort while on family business, family business generally having been extended by the jurisdictions adopting the doctrine to any use for a family member's convenience or pleasure. Instead, the Court has required that a family driver be acting as the car owner's servant for the owner to be liable for the driver's torts. *Whitelock v. Dennis,* 139 Md. 557, 116 A. 68 (1921); *Myers v. Shipley,* 140 Md. 380, 116 A. 645 (1922); *Baitary v. Smith,* 140 Md. 437, 116 A. 651 (1922); *Schneider v. Schneider,* 160 Md. 18, 152 A. 498, 72 A.L.R. 449 (1930); *Rounds, Adm'r. v. Phillips,* 166 Md. 151, 178 A. 532 (1934). For discussions of this area, see 2 Md. L. Rev. 288, 290 (1938), and MARYLAND ANNOTATIONS, RESTATEMENT, AGENCY (1936) 147-148.

In Maryland, the action in the principal case could not have been maintained, since the Court of Appeals has consistently ruled that the Married Women's Property Act does not authorize a wife to sue her husband at law for a personal injury or for injury to property, although a court of equity will grant an accounting for injury to a wife's separate estate. *Furstenburg v. Furstenburg,* 152 Md. 247, 136 A. 534 (1927); *David v. David,* 161 Md. 532, 157 A. 755, 81 A.L.R. 1100 (1932), noted 1 Md. L. Rev. 65 (1936); *Riegger v. Brewing Company,* 178 Md. 518, 16 A. 2d 99, 131 A.L.R. 307 (1940).

The Court of Appeals has held, as in the principal case, that a suit by a parent against an unemancipated minor child is against public policy, on the ground that the parent's position as guardian of the child is incompatible with the position of a suitor attempting recovery from the child. *Schneider v. Schneider,* 160 Md. 18, 152 A. 498, 72 A.L.R. 449 (1930), discussed 1 Md. L. Rev. 65, 67 (1936). However, a suit by a parent against an adult son has been allowed on the ground that the parent and adult son "are free and separate persons having the right to sue and be sued." *Waltzinger v. Birsner,* 212 Md. 107, 126, 128 A. 2d 617 (1957). In the *Waltzinger* case the court stated that it was relevant that the son was not under the control of

the parent, and that he felt no antipathy toward the parent for bringing the suit.

See 18 Md. L. Rev. 326 (1958).

Unfair Competition — Misleading Labels. *Royal Oil Corporation v. F.T.C., 262 F. 2d 741 (4th Cir. 1959).* The Federal Trade Commission issued an order forbidding defendant oil corporation from advertising, or selling used motor oil, from which impurities have been removed, without disclosing that the oil had been previously used. Defendant had complied with the provisions of a North Carolina statute regulating the sale of reprocessed oil by labelling its product "reprocessed oil." The Commission asserted its right to regulate defendant's labelling despite the fact that Congress had not specifically indicated what disclosures are necessary when reclaimed oil is sold in interstate commerce. The Court of Appeals in affirming the order found that the Commission possessed the power to set up different label description standards than those required by state law. The Court concluded that the Commission's insistence on a more specific description than "reprocessed oil" did not conflict with, but merely added to the requirements imposed by the state statute. The Court added, however, that where the Commission felt a more precise labelling description was needed to avoid public deception, the Commission was not bound by the state statute but could go beyond it. It was held that the Commission's authority to designate labels on oil came from its general power to prevent use of unfair methods of competition in commerce.

Maryland is one of twenty-one states which has enacted legislation regulating the sale of reclaimed oil. 3 Md. Code (1957) Art. 27, §231(a) requires no specific words but provides that it will be unlawful to ". . . sell, expose for sale or offer for sale in any manner so as to deceive or tend to deceive the purchaser, any lubricating oil, lubricants, mixtures of lubricants, adulterated oils, or falsely labeled oils which had once been used for lubrication purposes and subsequently reclaimed, refined or reconditioned, without clearly indicating or setting forth such fact on the container, pump or distributing device used; . . . ."

It seems apparent that an oil label might well comply with the broad standard set in §231a and still fall short of the "used oil" label requirement set forth by the Federal Trade Commission in the present case.