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Recent Decisions

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Administrative Law — "Equal Time Act" Does Not Apply To Regular Weathercasts By Political Candidate. *Brigham v. F.C.C.*, 276 F. 2d 828 (5th Cir. 1960). Petitioner appealed from an F.C.C. ruling that the "equal time" clause of the Communications Act of 1934, 47 U.S.C.A. (Supp. 1959) § 315 (a), as amended by Pub. L. 86-274, § 1, 73 STAT. 557 (1959), did not apply to daily broadcasts by a radio-television station's regular weathercaster who was the political opponent of petitioner and who broadcast under the name "TX Weatherman". The Fifth Circuit Court of Appeals in affirming the F.C.C. ruling, *held* that the weathercaster's appearance was solely a bona fide effort to present the news and thus exempt from the "equal time" clause. The Court said that the weathercaster's employment was not something arising out of the election campaign, but rather, a regular job.

The instant case is the first appellate court decision under the "equal time" clause as amended. Prior to the 1959 amendment, § 315 (a) provided that a licensee who permitted a legally qualified candidate for any political office to "use" a broadcasting station must also afford "equal time" to all other such candidates for that office. After the F.C.C. ruling in the *Lar Daly* case, February 19, 1959, that the appearance of a candidate in filmed portions of a television news broadcast was within the purview of § 315 (a), Congress amended the section to exempt bona fide newscasts, news interviews, news documentaries, and on-the-spot coverage of news events. It thereby narrowed the scope of "use".

In the only previous appellate decision interpreting "use", the term had been construed to mean "use" by a candidate himself, and did not include "use" by those speaking in his behalf. *Felix v. Westinghouse Radio Stations*, 186 F. 2d 1 (3rd Cir. 1950), *cert. den.* 341 U.S. 909 (1951). The legislative history indicates that four different Senate bills proposing an amendment to § 315 (a) had contemplated the exempting of panel discussions, debates, and similar programs. At the core of the amended section is an attempt to preserve network discretion, but at the same time to eliminate favoritism and to require equal treatment of candidates. U.S. Code Cong. & Admin. News (1959), 86th Congress, 1st Session, p. 2564. See also 44 Am. Jur., Radio, § 1 *et seq.;* and 171 A.L.R. 765 (1947).

Conflict Of Laws — Alienation of Affections. *Albert v. McGrath,* 278 F. 2d 16 (D.C. Cir. 1960). Plaintiff brought suit in the District Court for the District of Columbia to recover for the alienation of her husband's affections, alleging that her husband and defendant engaged in actionable misconduct in the District of Columbia. Plaintiff and her husband were residents of Maryland. Since Maryland has abolished the action for alienation of affections, 7 MD. CODE (1957) Art. 75C, § 1, recovery had to be in the District of Columbia where such an action still exists. *Trenerry v. Fravel,* 10 F. 2d 1011 (D.C. Cir. 1926). The District Court denied recovery, 165 F. Supp. 461 (D.C. D.C. 1958), discussed in 19 Md. L. Rev. 82 (1959), but the Court of Appeals for the District of Columbia reversed and *held* that the Maryland statute abolishing alienation of affections did not preclude a recovery where the defendant resided in the District of Columbia and where the place of the wrong was the said District. The Court noted that the Maryland statute had no extra-territorial effect since it is expressly limited to acts committed within Maryland. Moreover, the Court said that the Maryland statute did not preclude a remedy in as much as the consortium disturbed by the acts is not necessarily localized in the married couple's common bedroom. It thus rejected the lower court's rationale that the situs of the domicile is the only place where injury can be sustained and that the law of the marital domicile should therefore govern.

For a case reaching the same result see *Gordon v. Parker,* 83 F. Supp. 40 (D.C. Mass. 1949). See also RESTATEMENT, CONFLICT OF LAWS (1934) § 377; RESTATEMENT, TORTS (1934) § 683; 27 Am. Jur., Husband and Wife, §§ 519-534; 36 Minn. L. Rev. 1 (1951); 62 Harv. L. Rev. 1065 (1949); 1 Stan. L. Rev. 759 (1949); 19 Tul. L. Rev. 4 (1944); 41 Mich. L. Rev. 83 (1942). *Cf. Adams v. Adams,* 101 Md. 506, 61 A. 628 (1905).

Constitutional Law — Maryland Statutes Requiring Segregation Of Races In State Training Schools For Juvenile Delinquents Declared Unconstitutional. *Myers v. State Board of Public Welfare, et al.,* Daily Record, July 11, 1960 (Md. 1960). Plaintiff, a thirteen-year old Negro, upon being adjudged delinquent in the Circuit Court of Baltimore City, Division for Juvenile Causes, contended in a later proceeding before the same court that the Maryland statutes segregating the State Training Schools, 3

MD. CODE (1957) Art. 27, §§ 657, 659-661, violated the Equal Protection and the Due Process Clauses of the Fourteenth Amendment. Although the parties agreed that the tangible facilities of these separate schools were equal, the Court *held* that such segregation violated the constitutional guarantees of equal protection and due process. The Court applied the rationale of *Brown v. Board of Education,* 347 U.S. 483 (1954), which held that segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment. The Court said that the legislative intent in founding Maryland's Training Schools, combined with their present policies of administration, primarily geared the institutions toward educational objectives rather than toward custody and thus brought them within the scope of public education as set forth in the *Brown* case. It thus distinguished *Nichols v. McGee,* 169 F. Supp. 721 (D.C. Cal. 1959), appeal dismissed 361 U.S. 6 (1959), which ruled that the *Brown* case did not extend to state penal institutions.

In the instant case it was noted that fourteen southern states had segregated training schools while of the remaining thirty-six states, only four, including Maryland, still maintained segregated training schools. For further analysis of this area see 15 Md. L. Rev. 221 (1955); 103 A.L.R. 706 (1936); 38 A.L.R. 2d 1180 (1954).

Criminal Law — The Diminished Responsibility Doctrine. *State v. Padilla,* 66 N.M. 289, 347 P. 2d 312 (1960). Defendant, a mental defective, was convicted of first degree murder. This conviction was reversed on appeal, the Supreme Court of New Mexico *holding* that a disease of the mind, short of insanity, can legally prevent a person from being capable of that deliberation and premeditation necessary to constitute murder in the first degree. The court applied the much disputed partial or diminished responsibility doctrine, under which proof of mental disorder short of insanity is admissible to negative specific intent. Under this doctrine, although the homicide defendant is not classified insane, the offense is reduced from first to second degree murder.

A majority of states still rely solely upon the M'Naghten test under which a person is legally sane if at the time of the offense he had the capacity to distinguish between right and wrong, *and* understand the nature and consequences of his act. Maryland adopted this test in *Spencer v. State,* 69 Md. 28, 13 A. 809 (1888). States which support the

diminished responsibility doctrine contend that the M'Naghten test often renders mentally deranged persons subject to full punishment. The doctrine does not purport to abolish the recognized legal tests for insanity, but rather to supplement their application in cases involving a requirement of specific intent. There are two reasons commonly advanced in justification of the doctrine. First, it is considered unjust to spare the voluntary drunkard on the basis of incapacity to form a specific intent which is an element of the offense, as is done in most of the cases, see HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960) 52-55, and yet to condemn the person suffering from a mental disorder having the same effect. Second, the doctrine keeps mentally disordered persons under guard of law where they might otherwise be turned loose in borderline cases. Twelve states, including New Mexico, have adopted the diminished responsibility doctrine, while a few others, although indicating possible adherence to it, have not taken a clear stand. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954) 174-195. A.L.I., MODEL PENAL CODE, (Tent. Draft No. 4) § 402(1), adopts the rule. A related doctrine of diminished responsibility was adopted for England and Wales in 5 & 6 Eliz. 2, c. 38 (Homicide Act, 1957), s. 101.

Although there were indications in *Spencer v. State, supra,* that Maryland would not be adverse to adopting the diminished responsibility doctrine, later decisions reveal Maryland's reluctance to supplement the M'Naghten test. *Cole v. State,* 212 Md. 55, 128 A. 2d 437 (1957); *Bryant v. State,* 207 Md. 565, 115 A. 2d 502 (1955); *Taylor v. State,* 187 Md. 306, 49 A. 2d 787 (1946). For further discussion in this area see Weihofen, *Partial Insanity and Criminal Intent,* 24 Ill. L. Rev. 505 (1930); and 30 Harv. L. Rev. 535, 552-554 (1917). Generally, See Thomsen, *Insanity as a Defense to Crime,* 19 Md. L. Rev. 271 (1959); 17 Md. L. Rev. 178 (1957); 15 Md. L. Rev. 255 (1955); 15 Md. L. Rev. 44 (1955); 45 A.L.R. 2d 1447 (1956).

Damages — A Court Sitting Without A Jury May Choose Between Different Measures Of Ex Contractu Recovery Where Plaintiff Fails To Make Election. *Petropoulos v. Lubienski,* 220 Md. 293, 152 A. 2d 801 (1959). Upon failure of the defendant-landowner to allow plaintiff-builder to complete work contracted for, defendant's refusal to pay for certain "extras", and defendant's rejection of arbitration award, plaintiff sought damages under

the theory of breach of contract as well as under claim of *quantum meruit* for value of services performed, outlays for materials furnished, and work done. At the completion of the testimony plaintiff made no election between his claims and the trial court, sitting without a jury, allowed recovery on the basis of *quantum meruit*. The Maryland Court of Appeals *held*, in light of plaintiff's failure to choose, that there was no reason why the trial court could not select the measure of damages to be applied to arrive at a judgment according to the evidence so long as only one measure of damages was used.

Although expressly stating that it was not deciding the point, the Court noted that the rule permitting joinder of causes of actions, MD. RULE 313a, apparently requires no election between theories at the close of all the evidence when the court is trier of the facts. The Court of Appeals spoke similarly in *Kirchner v. Allied Contractors*, 213 Md. 31, 131 A. 2d 251 (1957).

Under FED. RULE 18a, upon which the Maryland joinder rule is patterned, a plaintiff having two consistent, concurrent, or cumulative theories which can be urged without prejudice to the defendant's ability to defend is not required to choose between the theories; ". . . relief must not be denied through the vehicle of forced election." *Senter v. B. F. Goodrich Company*, 127 F. Supp. 705, 708 (D.C. Colo. 1954). In accord, *Griswold v. Dixie Foundry Co.*, 79 F. Supp. 79 (D.C. Tenn. 1948).

Domestic Relations — Presumption Against Awarding Custody Of Minor Child To Adulterous Parent Not Overcome. *Parker v. Parker*, 222 Md. 69, 158 A. 2d 607 (1960). The lower court granted an absolute divorce to the wife on the ground of three years' voluntary separation and awarded her custody of their eight year old son. The evidence showed that prior to this action the wife had lived in open adultery with her paramour for over a year. The chancellor felt, however, that the wife was sincerely repentant, that she would be a devoted mother, and that the welfare of the child would best be served by allowing her to retain custody. In reversing the ruling of the chancellor as to the custody award, the Court of Appeals *held* that the presumption against awarding custody to the wife, who had lived in open adultery while the child remained with her in the home, was not overcome by the evidence. The fact that the wife had married the paramour after

the divorce decree became final was said to be not controlling in deciding the right to custody of the child.

Whatever result is reached in such cases is at least purportedly based on the overriding consideration — the best interests of the child. The adultery of a parent seeking custody is merely one factor in determining such best interests. The question is whether the presence of such a factor in a particular case is to be taken as almost conclusively showing that it would not be in the child's best interest to live with the adulterous parent.

There is a strong tendency in Maryland to refuse to permit children to be awarded to or remain with a mother who has been guilty of adultery. *Swoyer v. Swoyer,* 157 Md. 18, 145 A. 190 (1929). Usually, the courts do not consider an adulterous mother to be a proper person to have custody, and a strong showing must be made to overcome the usual presumption against awarding custody to her. *Hild v. Hild,* 221 Md. 349, 157 A. 2d 442 (1960); 2 NELSON, DIVORCE AND ANNULMENT (2d ed. 1945) § 15:06. Maryland reached an unusual result in *Oliver v. Oliver,* 217 Md. 222, 140 A. 2d 908 (1958), noted in 19 Md. L. Rev. 61 (1959), where the Court of Appeals, in upholding an award of custody of a three year old daughter to the adulterous mother, decided that the mother had changed her previous way of living and repented her past indiscretions, and had thereby become a competent parent. See also *Trudeau v. Trudeau,* 204 Md. 214, 103 A. 2d 563 (1954).

In the instant case, the Court relied on the majority opinion in *Hild v. Hild, supra,* where on a similar set of facts it was held (3-2) that the presumption against awarding custody of a seven year old boy to his adulterous mother was not overcome. For a discussion of the Maryland cases in this area, see 19 Md. L. Rev. 61 (1959).

Motor Vehicles — Failure To Remove Ignition Key From Unattended Automobile. *Liberto v. Holfeldt,* 221 Md. 62, 155 A. 2d 698 (1959). In violation of 6 MD. CODE (1957) Art. 66½, § 247, defendant left her car unattended, with the key in the ignition switch. The vehicle was stolen shortly thereafter. Five days later, and at a considerable distance across the city of Baltimore, the car was involved in an accident with plaintiff's car. The Court of Appeals, resolving the questions of proximate cause and independent intervening cause on the basis of proximity in time and space to the owner's negligent conduct, *held,* as a matter of law, that defendant's violation of the motor vehicle

statute was not the proximate cause of the accident, and that the subsequent negligence of the thief was an independent intervening cause precluding recovery against defendant. The Court pointed out that while the issues of foreseeability and proximate cause are normally for the jury, they may be resolved as a matter of law when reasonable minds could reach only one conclusion.

The case is one of first impression in Maryland. In *Hochschild, Kohn & Co. v. Canoles,* 193 Md. 276, 66 A. 2d 780 (1949), noted 11 Md. L. Rev. 51 (1950), defendant violated the second clause of Art. 66½, § 247, which requires setting of the brake and turning the front wheels to the curb whenever a vehicle is left standing on a perceptible grade. This was considered evidence of negligence rendering defendant liable in tort to the plaintiff, who was injured by defendant's runaway truck. In Maryland, the violation of a statute normally creates a *prima facie* presumption of negligence and is not considered to be negligence *per se. Kelly v. Huber Baking Co.,* 145 Md. 321, 125 A. 782 (1924).

The area is analyzed in a Note, *Liability for Negligence in Parking — Effect of Statute,* 11 Md. L. Rev. 51 (1950). See RESTATEMENT, TORTS (1934), §§ 447 and 448; M.L.E. Automobiles §§ 16, 131, 250. Cases are collected in 51 A.L.R. 2d 633 (1957).

Practice — Motion To Vacate Decree Does Not In Itself Toll The Thirty-Day Appeal Period. *Monumental Engineering, Inc. v. Simon,* 221 Md. 548, 158 A. 2d 471 (1960). The decree of the equity court was filed on September 25, 1959, and enrolled on October 25, 1959. On October 19, 1959, appellant filed a motion to vacate the decree and for a reconsideration thereof. No order to suspend the operation and effect of the decree was sought by appellant. The motion to vacate the decree was overruled on November 6, 1959, and this appeal was filed November 30, 1959. Appellant contended that its motion to vacate the decree tolled the running of the thirty-day appeal period fixed by MD. RULE 812a. The Court of Appeals rejected appellant's contention and *held* that a motion to vacate a decree does not in itself toll the running of the thirty-day appeal period. Since no special order had been passed by the lower court suspending the operation of the decree before it became enrolled, the thirty-day period had expired and the claim was dismissed.

Prior to MD. RULE 812a there were inconsistencies within the statutes and rules relating to the time for taking appeals. An interesting discussion may be found in Invernizzi and Kaiser, *A Study — Conflicts Between Statutes and Rules as to Time for Appeals,* 11 Md. L. Rev. 325 (1950). The purpose of MD. RULE 812a is to harmonize the rules and statutes and to eliminate the inconsistencies. The rule provides that whenever an appeal is permitted by law, the order for appeal shall be filed within thirty days from the date of the judgment. This makes the time for appeal uniform in all cases, except where it is from a court of law to which issues have been sent for trial from an equity or an Orphans' Court. In those instances, if a timely motion for a new trial is filed, the order for appeal shall be filed within thirty days from the date such motion is decided. MD. RULE 812b. It is to be noted, however, that in a case at *law,* a motion for a new trial must be made within three days of a verdict in a jury case, and in the case of a trial by the court or of a special verdict, within three days after the entry of a judgment *nisi.* MD. RULE 567a. If no such motion is made within the time prescribed, a *final* judgment is entered. MD. RULE 567e. The thirty-day appeal period commences to run only upon the entry of a final judgment.

Other Maryland cases indicating that a petition for rehearing or a motion to vacate a decree in an equity proceeding does not in itself toll the thirty-day appeal period and that a decree may be suspended only by a special order, include *Hanley v. Stulman,* 216 Md. 461, 141 A. 2d 167 (1958); *Riviere v. Quinlan,* 210 Md. 76, 122 A. 2d 332 (1956); *Hancock v. Stull,* 199 Md. 434, 86 A. 2d 734 (1952); *Jacobs v. Bealmear,* 41 Md. 484 (1874). See also M.L.E. Appeals §§ 182-184.