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Bankruptcy — Theory Of Hypothetical Creditor In Strong Arm Clause Abrogated. *Lewis v. Manufacturers National Bank of Detroit, 364 U.S. 603 (1961).* Money was borrowed and a chattel mortgage given as security. The chattel mortgage was not recorded until four days after its execution. The transaction took place in Michigan where such mortgages were void, even though later recorded, as against creditors of the mortgagor who extended credit between the execution of a mortgage and its recording. Five months later the borrower filed a voluntary petition in bankruptcy and was adjudged a bankrupt. No creditor had extended credit to the bankrupt during the four days between the execution and recordation of the mortgage. The trustee in bankruptcy claimed that the mortgage was void as to him by virtue of the "Strong Arm Clause," § 70 (c) of the Bankruptcy Act, 11 U.S.C.A. (1952) § 110 (c). The Referee, sustaining the trustee's contention, ruled that since the mortgage had not been recorded immediately, a hypothetical creditor could have extended credit between the execution of the mortgage and its recordation, and therefore could have acquired a lien at the date of bankruptcy. Under the "Strong Arm Clause," as construed by the controversial case of *Constance v. Harvey,* 215 F. 2d 571 (2nd Cir. 1954), the trustee is put in the position of such a hypothetical creditor and therefore would prevail over the mortgagee. The District Court overruled the Referee and the Sixth Circuit Court of Appeals affirmed the District Court. The Supreme Court, in affirming, *held* that the mortgage was not void as against the trustee where no creditor had *actually* extended credit between the time of its execution and its recordation.

In reaching its result, the Court overruled the doctrine of *Constance v. Harvey, supra,* which purported to clothe the trustee under the "Strong Arm Clause" with the rights of a creditor who could have obtained a lien at the date of bankruptcy whether or not such a creditor actually existed. Although the effect of the instant case is one of great importance in states which have statutes similar to that of Michigan, it would seem to be minimized in Maryland because of 2 MD. CODE (1957) Art. 21, §§ 41, 66 which provide that in order for a creditor of a chattel mortgagor

or a conditional vendee to prevail over the mortgagee or conditional vendor, the creditor must not merely extend credit to the mortgagor or conditional vendee, as in Michigan, but must acquire a lien through legal proceedings before the mortgage or conditional sale contract is recorded.

Creditors Rights — Fi. Fa. Lien On Chattels Extinguished By Return Of Nulla Bona. *In Re Continental Midway Corporation, 185 F. Supp. 867 (Md. 1960).* Plaintiff got a judgment in Baltimore City against his debtor on July 19, 1956. On July 26, 1956, a writ of *fi. fa.* was issued on the judgment and delivered to the sheriff. A return of *nulla bona* was made. On December 13, 1956, an involuntary petition in bankruptcy was filed against the debtor and the trustee in bankruptcy took possession of and sold certain chattels of the debtor-bankrupt. Subsequently, plaintiff filed a petition in the bankruptcy proceedings to the effect that he was entitled to a priority in payment because the delivery of the *fi. fa.* to the sheriff had given him a lien on those chattels later sold by the trustee. The Referee determined that plaintiff had not obtained a lien and therefore was not entitled to a priority. On a petition to review the Referee's order, the United States District Court for the District of Maryland, in affirming the Referee's order, *held* that, in Maryland, when a writ of *fi fa.* is delivered to the sheriff for seizure of a judgment debtor's personal property it creates merely an inchoate lien which is extinguished by a return of *nulla bona.* In such a case, a new writ must be issued and delivered to the sheriff. If however, as the Court pointed out, the sheriff does seize the goods under a *fi. fa.*, the date of the lien relates back to the time the *fi. fa.* had been delivered to the sheriff, and the originally inchoate lien becomes consummate.

Although the Court of Appeals has adopted the rule that normally where a judgment creditor seeks to execute on personal property of his judgment debtor a lien dates from the time of delivery of the writ of *fi. fa.* to the sheriff, *Selby v. Magruder,* 6 H. & J. 454 (Md. 1825), our search reveals no Court of Appeals holding on the instant question.

See Rhynhart, *Execution and Fi. Fa. In the People's Court of Baltimore City,* 14 Md. L. Rev. 203 (1954); 2 FREEMAN ON EXECUTIONS (3rd ed. 1900) § 202.

Criminal Law — Prosecutor May Not Argue To Jury His Personal Belief As To Guilt. *Greenberg v. United States, 280 F. 2d 472 (1st Cir. 1960).* Defendant was convicted of wilfully attempting to evade payment of income taxes. During his final argument to the jury, the United States attorney vigorously expressed his personal opinion of the trustworthiness of the government's evidence and the consequent guilt of the accused. In reversing the conviction and remanding the case for a new trial, the Court of Appeals for the First Circuit *held* that such statements were improper and prejudicial, stating: "To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination." (475). The Court noted that since a certain degree of reliability and credibility attaches to the opinion or belief of a prosecuting attorney because of his official position, any statement of his personal belief in a defendant's guilt would prejudice defendant and therefore be improper. This strict holding represents a minority view.

The more prevalent view asks whether the prosecutor's expressed belief is or is not based solely upon the evidence before the jury, and allows a prosecutor to state his views as to what the evidence shows as long as there is nothing to indicate that his belief is based upon circumstances outside of the evidence. *Henderson v. United States,* 218 F. 2d 14 (6th Cir. 1955). In *Cicero v. State,* 200 Md. 614, 92 A. 2d 567 (1952), the Court of Appeals, following this view, said that since the argument of the prosecuting attorney was based upon the evidence in the case, it could not be considered prejudicial. See also *Apple v. State,* 190 Md. 661, 59 A. 2d 509 (1948); *Riggins v. State,* 125 Md. 165, 93 A. 437 (1915). *Cf.* Rule 15 of the Canons of Professional Ethics of the American Bar Association which reads: "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause." For further discussion see Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case,* 54 Col. L. Rev. 946 (1954); 6 WIGMORE, EVIDENCE (3rd ed. 1940) § 1806. The cases are collected in 50 A.L.R. 2d 766 (1956).

Criminal Law — Substitution Of Judges Valid On Defendant's Waiver. *Journigan v. State, 223 Md. 405, 164 A. 2d 896 (1960).* Defendant was accused of robbery. After the completion of the first day of his trial, the judge became ill. When he could not continue, the attorney for defendant, with defendant's consent, agreed to proceed with a substituted judge. Upon conviction, defendant appealed, contending that the right to have the same judge throughout the trial was one that could not be waived. The Maryland Court of Appeals, in affirming the conviction, *held* that defendant's waiver was valid since there was no constitutional bar to the consent to the substitution of judges.

It is generally held that one accused of a crime may waive almost every constitutional right or privilege, including a lawyer, a jury, confrontation of witnesses, and a speedy trial. *Adams v. U. S. Ex Rel. McCann,* 317 U.S. 269 (1942); *Morland v. United States,* 193 F. 2d 297 (10th Cir. 1951). However as late as 1915, it was held that a judge could not lawfully be substituted during the progress of the trial. *Freeman v. United States,* 227 F. 732 (2d Cir. 1915). The basis of this holding was later destroyed in *Patton v. United States,* 281 U.S. 276 (1930), where the Court indicated that the continuous presence of the same jury was not an imperative requirement, and thus could be waived. In *Simons v. United States,* 119 F. 2d 539 (9th Cir. 1941), cert. den. 314 U.S. 616 (1941), the Court, in allowing the substitution of a judge during a trial, said that a criminal defendant may waive the right to have the same judge throughout the entire trial. Various state courts have held that an accused can consent to the substitution of one judge for another during a trial. *State v. McCray,* 189 Iowa 1239, 179 N.W. 627 (1920); *Burrage v. State,* 101 Miss. 598, 58 So. 217 (1912); *contra, Henderson v. State,* 95 Okla. 342, 246 P. 2d 393 (1952).

For further Maryland cases involving waiver of constitutional rights in criminal proceedings see *Midgett v. State,* 216 Md. 26, 139 A. 2d 209 (1958); *Grammer v. State,* 203 Md. 200, 100 A. 2d 257 (1953); *Rose v. State,* 177 Md. 577, 10 A. 2d 617 (1940).

Domestic Relations — Annulment For Fraudulent Concealment Of Prior Insanity. *Holland v. Holland,* ..... *Md.* ....., *168 A. 2d 380 (1961).* Plaintiff sought to annul his marriage on the ground that his wife and her family

fraudulently concealed the wife's insanity prior to their marriage. At the time of the marriage, and for a short time thereafter, the wife appeared normal, but her premarital schizophrenic paranoid tendencies reoccurred, causing her to become violent. No children had been born of the marriage, and since the reoccurrence of the wife's insanity the parties had not cohabited. The lower court sustained the wife's demurrer to the bill of complaint, but the Court of Appeals *held* that the demurrer should be overruled and the case remanded to determine whether the evidence was sufficient to show fraud going to the essence of the marriage. The Court said: "We think the sound view is that concealment of prior insanity may amount to fraud invalidating a marriage." (382).

The general rule is that fraud which goes to the essence of the marriage warrants annulment. *Anders v. Anders,* 224 Mass. 438, 113 N.E. 203 (1916). The majority of jurisdictions take the view that concealment of prior insanity is not a sufficient ground for annulment, the theory being that it is merely a misrepresentation as to social status, temperament, or disposition, and as such, does not go to the essence of the marriage. *Robertson v. Roth,* 163 Minn. 501, 204 N.W. 329 (1925). The minority view is that such concealment may be such fraud as going to the essence of the marriage, and therefore ground for annulment. *Smith v. Smith,* 112 Misc. 371, 184 N.Y.S. 134 (1920). The instant case adopts the minority view. Maryland has long recognized that the procuring of a marriage by fraud may be grounds for annulment. *Ridgely v. Ridgely,* 79 Md. 298, 29 A. 597 (1894); *LeBrun v. LeBrun,* 55 Md. 496 (1881). The instant case placed great weight on the language in *Brown v. Scott,* 140 Md. 258, 117 A. 114 (1922), to the effect that where the facts are such that no person of ordinary prudence would have entered such a marriage had he known the facts, the marriage may be avoided if the relief is sought promptly on the discovery of the fraud, and where no children have been born of the marriage.

For further reference see Strahorn, *Void and Voidable Marriages in Maryland and Their Annulment,* 2 Md. L. Rev. 211 (1938); 3 NELSON, DIVORCE AND ANNULMENT (2nd ed. 1945) § 31.36. Cases are collected in 39 A.L.R. 1345 (1925).

Evidence — Lie Detector Results Admissible On Prior Stipulation. *State v. McNamara, ... Ia. ....., 104 N.W. 2d 568 (1960).* Defendant was convicted of murder in the

second degree. The Supreme Court of Iowa, in affirming the conviction, *held* that where, after negotiations between defendant's counsel and prosecutor, defendant agreed in writing to submit to a lie detector test and to allow the examiner to testify in court as to the results of the test, the results were admissible against defendant, notwithstanding his objection at the trial.

In the absence of stipulation, the courts uniformly reject the results of lie detector tests in criminal cases. *People v. Wochnick,* 98 Cal. App. 2d 124, 219 P. 2d 70 (1950); *State v. Lowry,* 163 Kan. 622, 185 P. 2d 147 (1947). The reasons normally assigned are that testing procedure, qualification of examiners, and the instrument itself have not yet become satisfactorily standardized.

Cases involving stipulations as to the use of the results in evidence, as in the instant case, are meagre. In *People v. Houser,* 85 Cal. App. 2d 686, 193 P. 2d 937 (1948), a case similar to the instant case, the court held that where defendant had agreed in writing that the results could be admitted into evidence, he could not later object to their admissibility. However, in *LeFevre v. State,* 242 Wisc. 416, 8 N.W. 2d 288 (1943), it was held that the findings of a lie detector test which were favorable to defendant were properly excluded on objection by the prosecution, the court failing to discuss the effect of defendant's agreement to allow the prosecution to use the test results as evidence. In a concurring opinion in *Boeche v. State,* 151 Neb. 368, 37 N.W. 2d 593 (1949), it was said that if sufficient foundation were laid to qualify the operator as an expert, and that defendant willingly submitted to the test, then the results should be admissible. The majority in the *Boeche* case thought that the lie detector had not yet gone beyond the experimental stage and that there was no error in excluding the proffered evidence. See Wicker, *The Polygraphic Truth Test and The Law of Evidence,* 22 Tenn. L. Rev. 711 (1953); 23 A.L.R. 2d 1306 (1952).

Evidence — Plea Of Guilty To Traffic Offense Admissible In Subsequent Civil Suit. *Ando v. Woodberry, et al., 8 N.Y. 2d 165, 168 N.E. 2d 520 (1960).* Since the publication of the above recent decision in 21 Md. L. Rev. 520 (1961), there has come to our attention the case of *Miller v. Hall,* 161 Md. 111, 155 A. 327 (1931), which ruled that a plea of guilty to a traffic offense was an admission of fault, relevant to the issue of negligence, and therefore admissible in a subsequent civil suit arising out of the same offense.

Infants — Tort Action Allowed Between Unemancipated Brothers. *Midkiff v. Midkiff, 201 Va. 829, 113 S.E. 2d 875 (1960).* Plaintiff, age thirteen, by next friend sued his brother, age seventeen, for injuries received while plaintiff was in a car operated by his brother which struck another car. The trial court dismissed plaintiff's action on the ground that an unemancipated infant cannot maintain an action against his unemancipated infant brother. In reversing, the Supreme Court of Appeals of Virginia *held* that the action by an unemancipated infant against his unemancipated infant brother for personal injuries should have been allowed.

In the few jurisdictions where the question has been directly involved or alluded to, it has been generally accepted that the fact of relationship by blood or marriage between the tortfeasor and the injured person, other than that of parent and unemancipated child or husband and wife, does not preclude an action by one against the other. Cases are collected in 123 A.L.R. 1020 (1939). Although the issue has seldom been litigated, a tort action by an unemancipated infant against his unemancipated infant brother has been allowed. *Herrell v. Haney,* .... Tenn. ...., 341 S.W. 2d 574 (1960). It is no defense to such an action that to allow it will encourage fraud and collusion because of the possible existence of liability insurance, since the interest of the child in freedom from personal injury caused by the tortious conduct of others sufficiently outweighs any danger of fraud and collusion. *Emery v. Emery,* 45 Cal. 2d 421, 289 P. 2d 218, 224 (1955). Nor will the action be defeated by the assertion that such actions will seriously disturb the family relationships. *Rozell v. Rozell,* 281 N.Y. 106, 22 N.E. 2d 254, 255 (1939). The principal case also refused to accept any of the above-mentioned arguments against recovery. No Maryland Court of Appeals ruling has been found on the instant question. See PROSSER, TORTS (2nd ed. 1955) 677.

Torts — Public Officer Not Liable For Malicious Acts. *Mills v. Smith,* ..... *Okla.* ....., *355 P. 2d 1064 (1960).* Plaintiff taxpayer brought action against defendant, a county assessor, alleging that defendant, prompted by wilful and malicious motives, unjustly increased the valuation of the plaintiff's property for tax purposes. The Oklahoma Supreme Court, in denying recovery, *held* that the county assessor was performing a quasi-judicial duty involving

discretion, and that so long as he did not exceed the scope of his authority, he was immune from liability regardless of his malicious motives.

The near unanimous view of the courts is that a public officer is not liable for mere negligence in performance of official duties involving discretion, but that he is liable for improper performance of ministerial duties which require no exercise of discretion. *Bradley v. Fisher,* 13 Wall. 335 (U.S. 1871). Even when the question of malice is specifically in issue, the federal courts and the majority of state courts have, as in the instant case, denied recovery. *Spalding v. Vilas,* 161 U.S. 483 (1896); *Matson v. Margiotti,* 371 Pa. 188, 88 A. 2d 892 (1952). In a minority of states liability has been imposed for malicious acts. *Hedgepeth v. Swanson,* 223 N.C. 442, 27 S.E. 2d 122 (1943). In many cases where malice was not involved, the courts have stated in *dictum* that public officers exercising discretion are not liable in the absence of proof of malice. In *State, use of Clark v. Ferling,* 220 Md. 109, 151 A. 2d 137 (1959), it was *held* that the superintendent of the Maryland State Reformatory for Males, in the performance of quasi-judicial duties involving the exercise of discretion, was not liable for injuries inflicted by one of his prisoners upon another, at least in the absence of malice. *Cf. Cocking v. Wade,* 87 Md. 529, 40 A. 104 (1898).

The cases are collected in 2 HARPER AND JAMES, TORTS (1956) § 29.10(3); Jennings, *Tort Liability of Administrative Officers,* 21 Minn. L. Rev. 263 (1937). Both sources indicate that the trend, if any, is away from immunity for malicious acts, but this view is based largely on the *dictum* in some of the more recent cases. See also PROSSER ON TORTS (2nd ed. 1955) § 109, p. 780.

Torts — Release To Original Tortfeasor Bars Recovery From Negligent Doctor. *Farrar v. Wolfe,* ..... *Okla.* ....., *357 P. 2d 1005 (1960).* Plaintiff nurse sustained injuries in a fall caused by a slick condition on the floor of the hospital in which she worked. Subsequently defendant doctor negligently treated plaintiff for these injuries. Plaintiff settled her claim against the hospital and gave a general release to it. Plaintiff later sued defendant, who contended that the release barred recovery from him. The Supreme Court of Oklahoma *held,* one judge dissenting, that the release barred plaintiff's suit.

The court adopted the majority view that a release to the original tortfeasor bars recovery against a doctor who subsequently treats plaintiff's injury in a negligent manner, thereby aggravating the injury. *Sams v. Curfman,* 111 Colo. 124, 137 P. 2d 1017 (1943); *Edmondson v. Hancock,* 40 Ga. App. 587, 151 S.E. 114 (1929). The dissent adhered to the minority view that a release does not bar recovery against the negligent doctor unless the plaintiff and the original tortfeasor so intended. *Couillard v. Charles T. Miller, Inc.,* 253 Minn. 418, 92 N.W. 2d 96 (1958); *Dailey v. Somberg,* 28 N.J. 372, 146 A. 2d 676 (1958).

The recent case of *Trieschman v. Eaton,* 224 Md. 111, 166 A. 2d 892 (1961), somewhat similar to the instant case, reviewed the majority and minority views, but found it unnecessary to adopt either, stating that a deferred payment arrangement made by plaintiff and the original tortfeasor did not amount to a release, since it was but a promise to release if and when all payments were made. See also *Cox v. Md. Elec. Rwys. Co.,* 126 Md. 300, 95 A. 43 (1915). Cases are collected in 40 A.L.R. 2d 1075 (1955).