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Criminal Law — Common Thief Statute Upheld. *State v. Cherry,* ..... *Md.* ....., *167 A. 2d 328 (1961).* Defendant was indicted under 3 MD. CODE (1957), Art. 27, § 558, for being a common thief. This provision, in part, authorizes police to arrest a person they know, or have good reason to believe, to be a common thief. The trial court, in granting a motion to dismiss the indictment, found the statute to be unconstitutional. In reversing, the Maryland Court of Appeals *held* that the statute was constitutional, saying that the word "common" when used in a penal statute such as § 558 has a technical and well-established meaning in law which sets an ascertainable standard of guilt. The Court indicated that several authorities show that the word "common" had at the time § 558 was enacted, and has now, a technical and well-known meaning in law. In *State v. Russell,* 14 R.I. 506 (1884), defendant was convicted of being a "common night walker"; in *Com. v. McNamee,* 112 Mass. 285 (1873), defendant was convicted of being a "common drunkard"; in *Levine v. State,* 110 N.J.L. 467, 166 A. 300 (1933), defendant was convicted of being a "common burglar." In the first two cases above, the constitutionality of the respective statutes was not attacked, but in the *Levine* case, the statute was upheld after being challenged on constitutional grounds. In *Lanzetta v. New Jersey,* 306 U.S. 451 (1939), a penal statute was *held* unconstitutional because the word "gang" was not defined in the statute and had no technical meaning in law. The case of *World v. State,* 50 Md. 49 (1878), which did not consider the constitutionality of § 558, held that the jury must be satisfied that the defendant is a thief by practice and habit, to warrant a conviction under the statute.

Generally, the courts hold that if penal statutes employ words or phrases of a technical meaning in law, they are sufficiently certain so as not to violate due process. *Connally v. General Const. Co.,* 269 U.S. 385 (1926). For Maryland cases in accord see *Miedzinski v. Landman,* 218 Md. 3, 145 A. 2d 220 (1958); *Glickfield v. State,* 203 Md. 400, 101 A. 2d 229 (1953); *State v. Magaha,* 182 Md. 122, 32 A. 2d 477 (1943). See also 1 WIGMORE, EVIDENCE (3rd ed. 1940), § 203; Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 Harv. L. Rev. 1203 (1953).

Evidence — False Claim Not Within Attorney-Client Privilege. *Fidelity-Phenix Fire Ins. Co. of New York v. Hamilton, 340 S.W. 2d 218 (Ky. 1960).* Plaintiff's barn was covered by a fire insurance policy issued by defendant company. The policy contained a provision which suspended liability while tobacco was being "fired." After plaintiff's barn was destroyed by fire, he consulted certain attorneys who refused to bring suit when plaintiff admitted the fire occurred during the suspension period. Plaintiff brought suit by other attorneys and defendant attempted to introduce as evidence the communication between plaintiff and the first attorneys. The trial court sustained plaintiff's objection on the ground the communcation was privileged. In reversing, the Kentucky Court of Appeals *held* that a communication with an attorney previously consulted in a matter is not privileged when the client persists in a suit after having been informed by that attorney that it clearly would be based on a dishonest cause of action.

The rule that a communication between an attorney and client is privileged is well recognized. *Chew v. Farmers' Bank of Maryland,* 2 Md. Ch. 231 (1848); 8 WIGMORE, EVIDENCE (3rd ed. 1940), § 2285. However, communication by a client to an attorney which will aid the client in establishing a false claim is an abuse of their relation, and therefore the privilege does not attach. *In re Selser,* 15 N.J. 393, 105 A. 2d 395 (1954); *Sawyer v. Stanley,* 241 Ala. 39, 1 So. 2d 21 (1941); UNIFORM RULES OF EVIDENCE, Rule 26 (2). For other Maryland cases involving the attorney-client privilege generally, see *Benzinger v. Hemler,* 134 Md. 581, 107 A. 355 (1919); *Lanasa v. State,* 109 Md. 602, 71 A. 1058 (1909). See also 8 WIGMORE, EVIDENCE (3rd ed. 1940), § 2298; MCCORMICK, EVIDENCE (1954), § 99. Cases are collected in 125 A.L.R. 508 (1940).

Insurance — "Loading" Clause Of Auto Liability Policy Covers Death By Accidental Discharge Of Shotgun. *Allstate Insurance Company v. Valdez,* 190 F. Supp. 893 (E.D. Mich. 1961). The insured, while standing twenty-five feet to the rear of his automobile, was ejecting shells from his shotgun preparatory to placing the weapon in the automobile. He slipped on the icy ground, and, while he was attempting to control his fall, the gun discharged and killed decedent who was sitting in the automobile. Plaintiff insurer, joining insured and decedent's admin-

istratrix, sought a declaratory judgment as to nonliability under an automobile liability policy. The policy provided for compensation for bodily injury ". . . arising out of the ownership, maintenance or use, including loading and unloading, of the owned automobile. . . ." On motions for summary judgment the District Court, finding no Michigan decision interpreting the scope of the "loading and unloading" clause, adopted the "complete operation" doctrine and *held* for the defendants.

In interpreting such "loading and unloading" clauses, more common to commercial than to private vehicles, the courts have developed two views on the scope of coverage. The "complete operation" test adopted in the instant case, representing the majority view, contemplates that loading commences when the items to be transported leave their original location, and, conversely, that unloading does not cease until they have actually reached their final destination toward which the transportation by automobile was a part. *Raffel v. Travelers Indemnity Co.*, 141 Conn. 389, 106 A. 2d 716 (1954). Since by this test there is no distinction between "loading" and its incident preparatory activities, the insured was given coverage in the instant case. The alternate, more restrictive view, is represented by the "coming to rest" doctrine. This rule contemplates that "loading" covers the period between the last resting place of the article and its placement in the automobile, and "unloading" covers from its removal to the first resting place. In the instant case since the insured was at rest with the gun, there would have been no coverage under this theory. No Maryland case has been found on point, but the Fourth Circuit in *American Auto Ins. Co. v. Master Bldg. Supply & Lbr. Co.*, 179 F. Supp. 699 (D.C.Md.1959) believed that Maryland would adopt the "complete operation" test. In that case the insured company delivered sheetrock which four hours later fell in the purchaser's store causing injury. The insurer was denied a declaratory judgment as to nonliability. For comprehensive discussion and cases see Risjord, *Loading and Unloading*, 13 Vand. L. Rev. 903 (1960); 160 A.L.R. 1259 (1946).

Motor Vehicles — No Appeal From Unsatisfied Claim And Judgment Award. *Simpler v. State of Maryland, to use of Boyd, 223 Md. 456, 165 A. 2d 464 (1960).* Plaintiff's decedent was killed by the negligent operation of an automobile by one Simpler. In a wrongful death action, plain-

tiff got a judgment for $23,956.98 against Simpler, who however, was uninsured. The judgment being unsatisfied, plaintiff, pursuant to 6 MD. CODE (1957) Art. 66½, §§ 150-179, filed a claim with the Unsatisfied Claim and Judgment Fund and received an award for the statutory maximum of $10,000 (less $100 as specified by § 162), plus costs and interest. The State appealed on the ground that the lower court should not have been granted interest and costs over and above the maximum amount. The Maryland Court of Appeals *held,* in dismissing the appeal, that the statute, which specified no right of appeal, conferred on the circuit courts only a special and limited jurisdiction from which no appeal lies, where that jurisdiction is not exceeded.

The basis for the holding is that where a statute confers a special or limited jurisdiction to be exercised in a particular mode, and not according to the common law, no appeal lies unless expressly provided for by that statute. 2 POE, PLEADING AND PRACTICE (5th ed. 1925), § 826; 2 M.L.E., Appeals, § 23. In *Johnson v. Board of Zoning Appeals,* 196 Md. 400, 76 A. 2d 736 (1950), it was held that protesting property owners had no right of appeal to the Court of Appeals from an adverse order of the Circuit Court for Baltimore County acting as an appellate court in reviewing an order of the Board of Zoning Appeals, where the relevant public local laws contained no provision for such appeal.

In disposing of the State's contention that where the lower court exceeds the authority conferred by the statute, an appeal will lie, *Johnson v. Board of Zoning Appeals,* 196 Md. 400, 76 A. 2d 736 (1950), the Court said that the lower court had not exceeded its authority, because the phrase in § 162, "exclusive of interest and costs," means that the interest and costs could be computed over and above the statutory maximum. In accord, *Lindsay v. Boles,* 61 N.J. Super. 516, 161 A. 2d 324 (1960); *Pistoria v. Buckowski,* 46 N.J. Super. 495, 134 A. 2d 830 (1957); *Rall v. Schmidt,* 104 N.W. 2d 305 (N.D., 1960).

Practice-Return Receipt Unnecessary In Substituted Service On Foreign Corporations. *Speir v. Robert C. Herd & Co., 189 F. Supp. 432 (Md. 1960).* Defendant, a Delaware corporation, committed a tort in Maryland. Defendant, although doing business in Maryland, had not appointed a resident agent as required by 2 MD. CODE (1957) Art. 23, § 90. Plaintiff filed suit against defendant in the United

States District Court for the District of Maryland and served process on the State Department of Assessments and Taxation. Defendant actually received notice of the suit but filed a motion to quash the return of service on the ground that 2 MD. CODE (1957) Art. 23, §§ 97, 98, pertaining to substituted service on foreign corporations, was unconstitutional, primarily because it does not provide for the securing of a return receipt, as does the Non-Resident Motor Vehicles Statute, 6 MD. CODE (1957) Art. 66½, § 115. The District Court, in denying the motion to quash, *held* that the form of service provided for in the statute satisfies due process in that it is reasonably calculated to bring notice of pending suits to the attention of foreign corporations. The District Court indicated that no cases had been found which require as a prerequisite to substituted service on foreign corporations, the securing of a return receipt. The Court noted a contrary ruling in an unreported opinion of the Baltimore City Court, dealing with §§ 97, 98, *Sheet Metal Fabrications, Inc. v. Newcomb Detroit Co.*, Docket 91, p. 849, which held those sections unconstitutional because they did not provide for sufficient notice in all cases, *i.e.*, where the mailing address of the foreign corporation was not on file with the Commission, and its place of incorporation was unknown.

See further, *Mullane v. Central Hanover*, 339 U.S. 306 (1950); *Wuchter v. Pizzutto*, 276 U.S. 13 (1928). See also, Reiblich, *Jurisdiction in Maryland Courts Over Foreign Corporations Under the Act of 1937*, 3 Md. L. Rev. 35, 72 (1938), where the author, in discussing §§ 107-108 of MD. LAWS 1937, Ch. 504, which were substantially similar to the present provisions, 2 MD. CODE (1957), Art. 23, §§ 97, 98, indicated that those provisions for notice did not appear to raise any valid constitutional objections.

Taxation — Sale of Surplus War Plant Subject To State Sales Tax. *Comptroller v. Kaiser Corp., 223 Md. 384, 164 A. 2d 886 (1960).* An agency of the federal government sold an aluminum extrusion plant to plaintiff. State sales and use taxes were paid by plaintiff on certain heavy machinery involved in the sale. Plaintiff sought a refund which was denied by the Comptroller. The Court of Appeals, in upholding the Comptroller's action, *held* (the Chief Judge dissenting), that under 3 MD. CODE (1951), Art. 81, §§ 321 and 322(e) (§§ 325 and 326(e) of the 1957

CODE), the sale was not exempt as a "casual or isolated" one and that the machinery was tangible personal property. The Court said that, although the government is not in the business of selling, the act of selling was enough to bring the transaction within the statute, and that this was merely one of a long series of war surplus transactions which was not exempt as a "casual or isolated" sale. As to plaintiff's contention that the machinery was no longer personal property, the Court cited *Anne Arundel Co. v. Sugar Ref. Co.*, 99 Md. 481, 58 A. 211 (1904), to the effect that the doctrine of fixtures had never been imported into the law of taxation. The dissent felt that the sale should have come within the exemption of a "casual or isolated" sale, because of the incongruity of equating prior sales of surplus mittens, blankets, etc., which would be subject to the tax, with the sale of heavy machinery constituting an integral part of an entire industrial plant.

Plaintiff relied on *Geneva Steel Co. v. State Tax Commission,* 116 Utah 170, 209 P. 2d 208 (1949), where it was held that the sale of a surplus steel plant by the government was not subject to the Utah sales tax. The majority in the instant case distinguished the *Geneva* case as having been decided on the basis that the Utah legislature had not intended to tax such a complex transaction involving the sale of both real and personal property, because of the difficulty of allocating a portion of the price to the tangible personal property. Cf. *Comp. of Treas. v. Thompson Tr. Corp.*, 209 Md. 490, 121 A. 2d 850 (1955).

Torts — Landowner Liable For Injury Resulting From Dangerous Artificial Condition. *Moore v. Standard Paint & Glass Co. of Pueblo, ... Colo. ....., 358 P. 2d 33 (1960).* A former basement, some nine feet below street level and adjacent to plaintiff's building, was converted by defendant into an open commercial parking lot. A heavy rain resulted in flooding of the excavation to a level of about eight feet. Plaintiff brought suit for damages to goods in its basement caused by water seepage from accumulations on defendant's lot. The lower court found defendant negligent in permitting the excavation to remain open for more than four years. The Supreme Court of Colorado *held,* three justices dissenting, that defendant was liable for the damage caused by the water which had entered plaintiff's building because of the excavation being flooded. The majority of the court felt that defendant was under an

affirmative duty not to permit its land to remain in an altered state where a condition was created, the natural and foreseeable result of which would cause injury to adjacent property.

Jurisdictions, including Maryland, which have been confronted with the issue, have recognized liability for allowing a dangerous artificial condition to exist on one's premises; *Ettl v. Land & Loan Co.*, 122 N.J.L. 401, 5 A. 2d 689 (1939); *Frenkil v. Johnson*, 175 Md. 592, 3 A. 2d 479 (1938). In the *Frenkil* case, a suit for personal injuries sustained by flying debris when leaking gas on defendant's property caused an explosion, the Court of Appeals pointed out that once a landowner knows or should know of the danger of an articifical condition and fails to exercise care in alleviating it, he may be liable to persons outside the land for injuries. For a general discussion of the reasonable use of one's property as a defense which may be asserted by the landowner, see 17 Col. L. Rev. 383 (1917). See also 2 HARPER & JAMES, THE LAW OF TORTS (1956) § 27.19; PROSSER, HANDBOOK OF THE LAW OF TORTS (2nd ed. 1955) § 75; 2 RESTATEMENT, LAW OF TORTS (1934) § 364.

Torts-Res Ipsa Loquitur Applicable To Tire Blowout. *Simpson v. Gray Lines Co.*, ... *Or.* ....., *358 P. 2d 516 (1961).* Plaintiff, a passenger on defendant's bus, was injured when a tire blew out and the bus overturned. The Supreme Court of Oregon *held* that due to the high degree of care owed by a common carrier to its passengers, the doctrine of *res ipsa loquitur* was applicable, but that it was not error to instruct the jury that plaintiff was entitled merely to an inference that the carrier was negligent. The court distinguished the cases involving actions against private automobile owners, where the courts normally refuse to apply *res ipsa loquitur* to tire blowouts, *Powlowski v. Eskofski*, 209 Wis. 189, 244 N.W. 611 (1932), on the ground that a common carrier has an extraordinary duty to inspect its equipment and maintain it in a safe condition.

Although the cases establish no clear trend, the doctrine has heretofore been applied to accidents resulting from tire blowouts on common carriers. In *Greyhound Corp. v. Brown*, 269 Ala. 520, 113 So. 2d 916 (1959), the court ruled that where a wreck was caused by a tire blowout, *res ipsa loquitur* applied, and placed the burden on the defendant to show that there was no negligence in the operation and maintenance of the bus. However, in *Cox v. Wilson*, 267

S.W. 2d 83, 44 A.L.R. 2d 830 (Ky. 1954), the court refused to apply *res ipsa loquitur* to a situation similar to that in the instant case.

The Court of Appeals, in *Baltimore and P.R. Co. v. Swan,* 81 Md. 400, 32 A. 175 (1895), although not discussing *res ipsa loquitur,* approved an instruction to the effect that proof that plaintiff was a passenger on defendant's train, that there was an accident, and that she was injured, gave rise to a presumption that defendant was negligent. The Court of Appeals has held that the doctrine of *res ipsa loquitur* did not apply to the collision of a taxicab with an automobile, where plaintiff was a passenger in the taxicab and asleep at the time of the collision and the evidence showed that his injury might have been caused either by the taxi driver's negligence or by the act of the other driver. *Klan v. Security Motors,* 164 Md. 198, 164 A. 235 (1933). See 4 M.L.E., Carriers, § 84; Kaiser, *Pleading Negligence in Maryland — Res Ipsa Loquitur as a Rule of Pleading,* 11 Md. L. Rev. 102 (1950); Farinholt, *Res Ipsa Loquitur,* 10 Md. L. Rev. 337 (1949); Thomsen, *Presumptions and Burden of Proof in Res Ipsa Loquitur Cases in Maryland,* 3 Md. L. Rev. 285 (1939); PROSSER, TORTS (2d ed. 1955) § 42; 44 A.L.R. 2d 835 (1954).

Trade Regulation — Corporation Cannot Conspire With Its Unincorporated Division. *Poller v. Columbia Broadcasting System, Inc., 284 F. 2d 599 (D.C. Cir. 1960).* Plaintiff filed suit against Columbia Broadcasting System, one of its unincorporated divisions, and certain officers of said division, charging them with conspiring to restrain trade in violation of the Sherman Anti-Trust Act, 15 U.S.C.A. (1951) § 1. The Court of Appeals for the District of Columbia, one judge dissenting, *held* that CBS, its unincorporated division, and its employees were incapable of conspiring to restrain trade in violation of the Sherman Act, since in order to constitute a conspiracy there must be two or more persons or entities. The court indicated that CBS, even though a corporation, could no more conspire with itself than a private individual could conspire with himself.

The majority opinion relied heavily on the case of *Nelson Radio and Supply Co. v. Motorola,* 200 F. 2d 911 (5th Cir. 1952), cert. den. 345 U.S. 925 (1953), which held that while a corporation could conspire with its subsidiaries (which were separate corporate entities) to restrain trade

in violation of the Sherman Act, it could not conspire with its employees. The majority in the instant case used this rationale in holding that a corporation could not conspire with its unincorporated division.

The dissent cited *Schine Chain Theatres v. United States,* 334 U.S. 110 (1948), which held that a parent company and its subsidiaries could conspire to violate the provisions of the Sherman Act, and *United States v. Yellow Cab Co.,* 332 U.S. 218 (1947), in which the Court said that common ownership and control could not protect corporate conspirators from prosecution for violations of the Sherman Act. By analogy, the dissent felt that CBS would be capable of conspiring with an unincorporated division since it is "as separate and distinct an organization as a wholly-owned subsidiary." *Poller v. Columbia Broadcasting System, Inc., supra,* 607.

In *Windsor Theatre Co. v. Walbrook Amusement Co.,* 94 F. Supp. 388 (Md. 1950), *aff'd.* 189 F. 2d 797 (4th Cir. 1951), the District Court for Maryland ruled that where the activities of two theatre corporations were managed solely by the same person, there was no basis for charging them with conspiracy in violation of the Sherman Act. The court indicated that there could only be a conspiracy if the two corporations had acted in concert through two or more officers or agents. The Maryland Court of Appeals has recognized that one person alone can not be guilty of a conspiracy, *Hurwitz v. State,* 200 Md. 578, 9 A. 2d 575 (1952).