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Recent Decisions

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Attorney-Client — Attorney May Be Liable To Beneficiaries For Negligence In Drafting Will. *Lucas v. Hamm,* 15 Cal. Rptr. 821, 364 P. 2d 685 (1961). Plaintiffs, beneficiaries under testator's will, brought an action for damages against the defendant, an attorney whom the testator had employed to draft the instrument. The attorney, in attempting to carry out the testator's directions, drafted a residual testamentary trust for the benefit of the plaintiffs which violated the Rule against Perpetuities. Due to this error, the beneficiaries entered into a compromise settlement with the testator's relatives whereby they received $75,000 less than they would have, had the residual trust been properly drafted. When a judgment of dismissal was entered on an order sustaining defendant's demurrer to their complaint without leave to amend, the plaintiffs appealed. The Supreme Court of California affirmed the lower court's decision on the ground that the Rule against Perpetuities was in such a state of perplexity and confusion in California that on the facts it was not negligence for defendant to have violated the Rule. However, the court expressly overruled a prior decision, *Buckley v. Gray,* 110 Cal. 339, 42 P. 900 (1895), that had held that an attorney was not liable to beneficiaries of a will for a mistake in drafting, and concluded (364 P. 2d 689) "that intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries," reasoning that "the main purpose of the testator in making his agreement with the attorney is to benefit the persons named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action. . . ." *Cf. Biakanja v. Irving,* 49 Cal. 2d 647, 320 P. 2d 16, 65 A.L.R. 2d 1358 (1958).

There is a paucity of authority on the attorney's liability to a beneficiary for negligence in drafting a will. In *Re Solicitor, ex parte Fitzpatrick,* 54 Ont. L. 3, 1 D.L.R. 981, 13 B.R.C. 146 (1924), it was said that where there is no privity of contract, an attorney is not liable to a beneficiary of a will which is negligently drafted. In *Schirmer*

v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930), a beneficiary was allowed to recover from an attorney with whom he contracted to draw his grandmother's will for the attorney's negligence in permitting a beneficiary to sign as a witness. *Cf. Ward v. Arnold,* 52 Wash. 2d 581, 328 P. 2d 164 (1958) (beneficiary who contracted with attorney to draw husband's will allowed recovery for attorney's negligence in advising her a will was not necessary). For further information see 65 A.L.R. 2d 1363 (1959); 43 A.L.R. 932 (1926). See also 7 C.J.S. 833, Attorney & Client, § 52; 3 M.L.E. 212, 217, Attorney & Client, §§ 31, 33.

Bankruptcy — Joint Creditor Can Have Bankrupt's Estate Reopened And Consolidated With Wife's Subsequent Bankruptcy Proceeding. *In Re Reid,* 198 F. Supp. 689 (W.D. Va. 1961). The bankrupt had obtained a discharge in bankruptcy on May 3, 1960 and the estate was closed on August 16, 1960. On October 18, 1960, his wife filed a voluntary petition in bankruptcy and shortly thereafter a joint creditor moved that the referee in bankruptcy reopen the bankrupt's estate and consolidate it with his wife's proceeding in order to reach property held by them as tenants by the entireties. The referee declined and on petition for review the court ordered that the bankrupt's estate be reopened and consolidated with his wife's. Pursuant to this order, the referee entered an order that property held as tenants by the entireties be sold in order to satisfy claims of joint creditors of the spouses. After a hearing on the bankrupt's petition for review, the court, in affirming the referee's order, *held* that under § 2(a)(8) of the Bankruptcy Act, 11 U.S.C.A. § 11(a)(8) (1961) which provides that courts of bankruptcy may "reopen estates for cause shown", the joint creditors showing that there was joint property which could only be reached by a reopening of the bankrupt's estate and consolidating it with his wife's was sufficient cause to warrant a reopening. The court reasoned that it would be inequitable to allow spouses to shield joint property from joint creditors by having one obtain a discharge and have his estate closed and shortly thereafter the other file a petition in bankruptcy when, had they both been in bankruptcy at the same time, the two cases could be consolidated and joint property could be applied to satisfy joint creditors. *Roberts v. Henry V. Dick & Co.,* 275 F. 2d 943 (4th Cir. 1960).

Prior to the Chandler Act of 1938, a court could only reopen bankruptcy estates whenever it appeared "they were closed before being fully administered." Thus, in *Phillips v. Krakower,* 46 F. 2d 764 (4th Cir. 1931) the court affirmed an order delaying the granting of a discharge in bankruptcy to a bankrupt husband until a joint creditor could subject property held as tenants by the entireties by the bankrupt to judgment and execution in a state court, on the ground that once the bankrupt had obtained a discharge the creditor could no longer subject the joint property to his claim. Generally it is said that the effect of the Chandler Act amendment, which provides for reopening for cause shown, is to give greater power to bankruptcy courts to reopen estates. *In Re Cirillo,* 102 F. Supp. 715 (M.D. Pa. 1952). See also *Baylor v. 1775 Broadway Corporation,* 146 F. 2d 487 (2d Cir. 1944). For further information see 6 REMINGTON ON BANKRUPTCY, 605, §§ 2973, 2974 (1952); COLLIER BANKRUPTCY MANUAL, ¶ 2.09 at p. 51 (2d ed. 1960).

Contempt—Failure Of Attorney To Appear As Ordered For Sentencing Of Client. *Chula v. Superior Court,* 18 Cal. Rptr. 507, 368 P. 2d 107 (1962). The Superior Court ordered the defendant, an attorney, to personally appear with his client on March 31, 1961, at a sentencing hearing. On the day of the hearing when the defendant failed to appear, the court issued an order to show cause why the defendant should not be cited for contempt. At the contempt hearing, after the defendant testified that he had been out of town on business on March 31 and that he had appointed a substitute to appear for him, the court issued an order stating that the defendant had had the ability to appear at the March 31 hearing, but failed to appear without sufficient reason or excuse and was thus guilty of contempt. The defendant petitioned for a writ of certiorari. The writ was granted and the California Supreme Court in affirming the Superior Court, in a 4-3 decision, *held* that the failure of an attorney to appear in court at the time directed by the court without valid excuse is a direct contempt and punishable summarily. CAL. CODE CIV. PROC. § 1211 (1957). The court reasoned that since the absence disrupted judicial proceedings it was therefore committed in the immediate view and presence of the court. The dissent felt that such conduct could only constitute an in-

direct contempt, and could not be punished summarily in that the failure of an attorney to appear as ordered is not a contempt unless unexcusable, and since the court does not know whether the absence is excusable until it has all the facts, notice and a hearing are required. Although the dissent felt that the Superior Court took adequate steps to satisfy the procedural requirements of a hearing for indirect contempt, they did not agree that the defendant was guilty of contempt in that the defendant had appointed an associate in his law firm to appear for him. *Cf. Lyons v. Superior Court,* 43 Cal. 2d 755, 278 P. 2d 681 (1955).

Other jurisdictions which have considered this problem have held that the failure of an attorney to appear when ordered by court is not a contempt summarily punishable because all the circumstances concerning the failure to appear do not occur in the presence of the court and therefore the contempt should only be punished after there has been an opportunity for a fair hearing. *Bowles v. U.S.,* 44 F. 2d 115 (4th Cir. 1930); *Weiland v. Industrial Commission of Ohio,* 166 Ohio St. 62, 139 N.E. 2d 36 (1956); *State v. Winthrop,* 148 Wash. 526, 269 P. 793, 59 A.L.R. 1265 (1928). In Maryland, 2 MD. CODE (1957) Art. 26, § 4 enumerates those contempts which may be summarily punished, one of which is "disobedience or resistance by any officer of the said courts . . . to any writ, process, order, rule, decree or command of the said courts." See also MD. RULE P1 (1961). 2 MD. CODE (1961 Cum. Supp.) Art. 26, § 5 provides for the different procedures to be used in prosecuting direct and constructive contempts. For further information see 59 A.L.R. 1272 (1929); 5 M.L.E. 329ff, Contempt, §§ 1, 2, 4, 6-8, particularly § 4; MD. RULES P3, P4 (1961); 5 Duke B.J. 155 (1956); 39 Minn. L. Rev. 895 (1955); 9 Vand. L. Rev. 93 (1955).

Contracts — Unpaid Pledges Subject To Garnishment By Creditors Of Non-Profit Corporation. *Petition of Upper Peninsula Development Bureau,* 364 Mich. 179, 110 N.W. 2d 709 (1961). The petitioner, a non-profit corporation, was engaged in promoting both the growth of industry and the tourist business in the Upper Peninsula of Michigan. When it discovered that it was financially embarrassed, it brought a proceeding for dissolution. The appellant, petitioner's creditor in connection with the promo-

tion of the tourist business, intervened and petitioned that a receiver be appointed to collect unpaid pledges of $18,353 which were made by individuals to aid in the promotion of industrial growth. The lower court denied the relief requested and the creditor appealed. The Supreme Court of Michigan, in modifying the lower court's decision, *held* that unpaid pledges due a non-profit corporation could be reached by the creditors of the corporation but that the proper procedure in the instant case was by way of garnishment and not by appointing a receiver to collect them. The Court reasoned that since these pledges were supported by a valid consideration, *i.e.,* the mutual pledges of others, as was plainly stated on the card signed by the pledgor, they were valid obligations due to the corporation and the creditor could reach them by garnishment proceedings.

Courts have usually sustained the suit of a non-profit organization on a subscription agreement on two theories; (1) that the promise of the charity to use the money for a specific purpose or to do a specific thing requested is sufficient consideration to support the promise to subscribe, *Allegheny College v. National Chautauqua County Bank;* 246 N.Y. 369, 159 N.E. 173 (1927); *In Re Couch's Estate,* 170 Neb. 518, 103 N.W. 2d 274 (1960); (2) that under the doctrine of promissory estoppel the promisor by his subscription should reasonably have expected to induce substantial action or forebearance on the part of the promisee and the subscription has induced such action or forebearance that injustice can only be avoided by enforcement of the subscription agreement; *Gittings v. Mayhew,* 6 Md. 113 (1854); *Thompson v. McAllen Federated Women's Bldg. Corp.,* 273 S.W. 2d 105 (Tex. 1954); *Lake Bluff Orphanage v. Magill's Ex'rs,* 305 Ky. 391, 204 S.W. 2d 224 (1947). Occasionally courts have indicated that the mutual promises of others to subscribe is sufficient consideration to support a subscription; *Sterling v. Cushwa & Sons,* 170 Md. 226, 183 A. 593 (1936) (subscription to guaranty fund of bank); *University of Southern California v. Bryson,* 103 Cal. App. 39, 283 P. 949 (1929). But *cf. American University v. Collins,* 190 Md. 688, 59 A. 2d 333 (1948) (particularly the dissent). This view may be more advantageous to the garnishing creditor of a defunct non-profit organization since it may only be necessary for him to prove the mutual subscriptions to support the enforceability of the pledges, whereas under the former theories, the failure of the non-profit organization to perform its promise will be a defense

available to the subscriber in any garnishment proceeding against him. See 11 M.L.E. 315, Garnishment, § 4. For further information see 151 A.L.R. 1230 (1944); 115 A.L.R. 589 (1938); 95 A.L.R. 1305 (1935); 38 A.L.R. 868 (1925); 83 C.J.S. 734, Subscriptions, § 5; RESTATEMENT, CONTRACTS (1932) § 90, p. 110 and 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 116, p. 403.

Creditors' Rights — Delivery Of Fi Fa To Constable Establishes Priority Of Judgment Creditor Over Subsequently Qualifying Trustee For Benefit Of Creditors Who Takes Possession Of Personalty Prior To Levy Of Writ. *Max Kohner Inc. v. Wiegman,* Daily Record, March 24, 1962 (Circuit Court of Baltimore City, 1962). The plaintiff who had previously recovered a judgment against the defendant placed a writ of *fi fa* in the hands of the constable of the People's Court of Baltimore City on November 28, 1961. Three days later on December 1, when the constable went to levy on defendant's personal property, he found the trustee for the benefit of defendant's creditors, who had qualified as trustee subsequent to November 28, 1961 in possession of the defendant's personalty. At the instruction of the People's Court and over the objection of the trustee, the constable levied on the property and it was sold. The Circuit Court of Baltimore City, Allen J., in holding that the judgment creditor had priority over the trustee, reasoned that, although a mere judgment creditor has no lien on personalty, a writ of *fi fa* creates a lien on personalty in favor of the judgment creditor from the date of delivery to the sheriff if due diligence is exercised and the constable has levied on the property no later than the next return day.

The Maryland Court of Appeals has said that a lien fastens upon personal property from the time of delivery of the writ of *fi fa* to the sheriff, *Prentiss Co. v. Whitman & Barnes Co.,* 88 Md. 240, 41 A. 49 (1898) (writ delivered at 11:30 a.m., receiver appointed at 1:00 p.m. and levy at 2:00 p.m.). See also *Furlong and Miller v. Edwards,* 3 Md. 99 (1852); *Selby v. Magruder,* 6 H&J 454 (Md. 1825) and *United States v. Levin,* 128 F. Supp. 465 (D. Md. 1955). *Cf. Myers & Co. v. Banking & Trust Co.,* 170 Md. 198, 183 A. 543 (1936) (judgment creditor's writ was not accorded priority over subsequently delivered writ where he had issued instructions not to levy which were followed by sheriff whereas subsequent writ of another was executed).

Where judgment creditor's writs of *fi fa* were returned *nulla bona* by sheriff, it was *held* that under Maryland law he only had an inchoate lien at the time of delivery, which was destroyed by return of *nulla bona*. *In re Continental Midway Corporation,* 128 F. Supp. 867 (D. Md. 1960) discussed in 21 Md. L. Rev. 173 (1961). For further information see 14 Md. L. Rev. 203, 211 (1954); 14 Md. L. Rev. 311, 318 (1954); 10 M.L.E. 356, Executions §§ 17, 18; 2 POE, PLEADING AND PRACTICE (Tiffany's ed. 1925) § 666 at p. 624, (*cf.* § 631 at p. 589); RHYNHART AND SCHLITZ, MARYLAND CIVIL PRACTICE BEFORE PEOPLE'S COURTS AND JUSTICES (1961) § 10.23.

Criminal Law — Sufficiency Of Instruction To Jury That Verdict Must Be Unanimous. *Coby v. State,* 225 Md. 293, 170 A. 2d 199 (1961). Defendant was convicted of rape in the Criminal Court of Baltimore City. Defendant appealed, contending that the trial court's instruction to the jury that, "whatever your verdict may be, it must be unanimous," did not guarantee the rights given to him by Article 21 of the Maryland Declaration of Rights, which states in part that every man has a right to a trial by jury "without whose unanimous consent he ought not to be found guilty." The Court of Appeals, in a case of first impression, *held* that in instructing the jury that their verdict must be unanimous, the trial court substantially complied with the requirements of Article 21 of the Maryland Declaration of Rights; 9 MD. CODE (1957) p. 38. The Court felt that the word "unanimous" which means "having the agreement and consent of all" was a complete explanation of the requirement that there be unanimous consent by the jury. In so holding the Court recognized that a number of older cases in other jurisdictions had held that failure to give an "individual juror" instruction was prejudicial error. *State v. Witt,* 34 Kan. 488, 8 P. 769 (1885). The "individual juror" instruction places emphasis on the individual duty of a juror to be convinced of the guilt of the defendant beyond a reasonable doubt before he consents to a verdict of guilty. See also, *Rhodes v. United States,* 282 F. 2d 59 (4th Cir. 1960).

In a number of the more recent cases the courts have refused to give the "individual juror" instruction stating that such an instruction is not to be recommended because it might instill in the juror's mind the idea that he should reach his own conclusion as to the guilt or innocence of the defendant without relying on the reasoning and con-

sideration of his fellow jurors, which may preclude the exchange of ideas that are oft-times necessary to a just verdict. *Green v. State,* 263 Ala. 324, 82 So. 2d 418 (1955). Further, some courts have indicated that such an instruction lends nothing to the case, the requirement of unanimity of verdicts being of such general knowledge that all men may be imputed to have knowledge of the requirement. *State v. Logue,* 204 S.C. 171, 28 S.E. 2d 788 (1944). For further information see 23 C.J.S. 875, 1069, Criminal Law, §§ 1295, 1391, 1392; 7 M.L.E. 404, Criminal Law, § 482; REID'S BRANSON INSTRUCTIONS TO JURIES (3d ed. 1960) § 75, p. 254.

Double Jeopardy — Attaches Where Court Erroneously Directs Verdict Of Acquittal During Presentation Of Government's Case. *Fong Foo v. U.S.; Standard Coil Products Co., Inc. v. U.S.,* ..... U.S. ....., 82 S. Ct. 671 (1962) (for prior treatment of this case in the United States Court of Appeals, First Circuit, see 21 Md. L. Rev. 365 (1961)). The petitioners, a corporation and two of its employees, were brought to trial before a jury in a district court upon an indictment charging a conspiracy and the substantive offense of concealing certain material facts concerning equipment being manufactured for the government. During a trial recess an Assistant United States Attorney refreshed a witness' recollection of an event, and upon learning of this conduct the trial judge granted a motion for acquittal and directed the jury to return verdicts of not guilty stating that the conduct of the Assistant United States Attorney was a deprivaion of defendant's civil rights and that the government's witnesses were unworthy of belief. The government then petitioned the United States Court of Appeals, First Circuit, for a writ of mandamus to vacate the judgment of acquittal. The writ was granted on the ground that the trial judge was without power to terminate the government's case in midstream and mandamus was the proper remedy. The Supreme Court of the United States granted certiorari in order to consider whether, for purposes of the constitutional double jeopardy prohibition as applied in the federal court system, jeopardy had attached in the proceeding. In a 7-1 decision the Supreme Court reversed the Court of Appeals and *held* that once a trial has been terminated by a judgment of acquittal, regardless of how improvidently or hastily granted, it could not be reviewed without putting

the defendant twice in jeopardy and thus violating the Fifth Amendment to the Constitution. The dissent reasoned that the majority put too much emphasis on the phrase "final judgment of acquittal" and that in reality since the trial judge had no power to direct an acquittal it was a nullity and the defendant could be retried. The dissent felt that the trial judge's actions violated the fundamental right of the public to have one who has been legally indicted, be publicly tried on the charge.

Generally in Maryland, a prior conviction or acquittal bars a second prosecution for the same offense. *Scarlett v. State,* 201 Md. 310, 93 A. 2d 753 (1953) cert. den. 345 U.S. 955 (1953); *State v. Rosen,* 181 Md. 167, 28 A. 2d 829 (1942). Jeopardy does not attach until a verdict is returned by the jury. *Anderson v. State,* 86 Md. 479, 38 A. 937 (1897). However, an old case states that the verdict returned must be valid. In *State v. Sutton,* 4 Gill. 494 (Md. 1846) the jury returned a verdict of guilty which was defective in that the jury, while finding defendant guilty on one count of the indictment, failed to make any finding on the other. The lower court, after discharging the jury, granted defendant's motion in arrest of judgment and released him. On appeal by the State, the Maryland Court of Appeals *held* that although the jury had returned a verdict which was bad for incompleteness, the lower court had erred in granting the motion in arrest of judgment and should have instead declared a mistrial. However, double jeopardy had not attached so as to prevent the State from trying the defendant again. The presence of a technical defect in the verdict itself, as opposed to an objection going merely to erroneous grounds for directing a verdict, may distinguish the *Sutton* case from the subject case. See also 22 C.J.S. 647, Criminal Law, § 245. For further information see 7 M.L.E. 195, Criminal Law, §§ 91-97; 12 Md. L. Rev. 68 (1951); 7 Md. L. Rev. 364 (1943); 4 Md. L. Rev. 303 (1940); 3 Md. L. Rev. 184 (1939); 15 Am. Jur. 50, Criminal Law, §§ 376, 377. See also 74 A.L.R. 803 (1931); 19 Md. L. Rev. 127 (1959).

Evidence — Dead Man's Act Does Not Bar Testimony Of Creditor Seeking To Administer Intestate Estate. *Soothcage v. King,* 227 Md. 142, 176 A. 2d 221 (1961). Appellant, an attorney, was prosecuting a suit for the decedent when the latter died intestate. After a conversation with the appellee, the sister of the decedent, the appellant filed an

application with the Orphans' Court describing himself as a creditor and asking for letters of administration, which were granted. Thereafter, the appellee filed a petition for removal of appellant as administrator. A hearing was held in the Orphans' Court and appellant was removed as administrator. He appealed to the Circuit Court of Baltimore County where a trial *de novo* was held pursuant to 1 MD. CODE (1957) Art. 5, § 25. At the trial the judge excluded testimony of the appellant concerning money he had advanced to the decedent by reason of the Dead Man's Act, 4 MD. CODE (1957) Art. 35, § 3, and, at the conclusion of the hearing, affirmed the ruling of the Orphans' Court and *held* that there was no admissible evidence to show that the appellant was a creditor of the decedent on the date of the grant of letters. On appeal the Maryland Court of Appeals reversed the lower court's ruling and *held* that the Dead Man's Act is not applicable in a proceeding where one is attempting to establish his rights as a creditor to letters of administration. The Court reasoned that the Dead Man's Act only excludes " 'testimony of a party to a cause which would tend to *increase or diminish the estate of a decedent by establishing or defeating a cause of action by or against the estate,*' " (150), citing *Riley v. Lukens Dredging & Contracting Corp.*, 4 F. Supp. 144, 147 (D. Md. 1933), and since the grant of letters to a creditor does not establish the enforceability of his claim (see *Emmert v. Stouffer*, 64 Md. 543, 551, 3 A. 293, 6 A. 177 (1886)) the Dead Man's Act was not applicable.

Previously the Maryland Court of Appeals has held that the Dead Man's Act was not applicable to parties in caveat proceedings as to transactions with the decedent. *Griffith v. Benzinger*, 144 Md. 575, 125 A. 512 (1924); *Hendrickson v. Attick*, 136 Md. 1, 109 A. 468 (1920); *Hamilton v. Hamilton*, 131 Md. 508, 102 A. 761 (1917). However, in *Redgrave v. Redgrave*, 38 Md. 93 (1873) in a suit by the plaintiff attempting to establish her priority as the wife of the decedent to act as administrator of his estate, the Maryland Court of Appeals *held* that under the Dead Man's Act she was not qualified to testify as to her relationship with the decedent. See also *Browning v. Browning*, 224 Md. 399, 168 A. 2d 506 (1961); *Whitehurst v. Whitehurst*, 156 Md. 610, 145 A. 204 (1929); *Bowman v. Little*, 101 Md. 273, 61 A. 223 (1905); *Denison v. Denison*, 35 Md. 361 (1872), but *cf. Ortel v. Gettig*, 207 Md. 594, 599, 116 A. 2d 145 (1955). For general information on the Dead Man's

Act see 21 Md. L. Rev. 60 (1961); 97 C.J.S. 581, Witnesses, §§ 142, 143; 115 A.L.R. 1425 (1938); 91 A.L.R. 1445 (1934); WIGMORE, EVIDENCE (3d ed. 1940) Vol. I, § 578, p. 695, Vol. V, § 1576, p. 435, Vol. VII, § 2065, p. 371.

Inheritance Tax — Limitations On Tax Due On Interest In Joint Tenancy Where No Formal Administration Or Inventory Filed In Orphans' Court. *State v. Cadwalader, Exec.*, 227 Md. 21, 174 A. 2d 786 (1961). In 1938, Caroline Hall and her sister, Henrietta Mitchell Smith acquired a fee simple title to certain realty as joint tenants. In 1952, Caroline Hall died intestate and no formal administration or inventory was filed in Court concerning her estate, nor was an inheritance tax paid on the interest passing to her sister by survivorship as provided by 7 MD. CODE (1957) Art. 81, § 151. In 1958 when Henrietta Smith died and the appellee was appointed executor of her estate, the appellant, Register of Wills of Harford County, first learned of the prior existence of the joint tenancy and he caused an appraisal to be made in 1959 and the tax to be ascertained. When the appellee refused to pay the tax, the appellant brought the present action for inheritance taxes, interest and penalty due by reason of the death of Caroline Hall. A special plea of limitations was filed by the appellee under Art. 81, § 212 which provides that "All . . . taxes . . . shall be collected within four years after they *shall have become due,* (emphasis added) or else shall be utterly barred; . . . . " A replication was filed to this plea and, on a set of stipulated facts, the Court entered judgment for the appellee. On appeal, the Maryland Court of Appeals reversed the lower court's decision and *held* that where an interest in a joint tenancy subject to tax passes without formal administration or an inventory being filed in Orphans' Court as provided in Art. 81, § 169, the inheritance tax does not become due so as to commence the running of limitations until the property passing has come to the attention of the register of wills and he has made an appraisal of its value.

In so holding, the Court rejected the appellee's contention that under Art. 81, § 167 (procedure when no administration has been taken out within 90 days of death — Orphans' Court may have appraisal of real property on application of interested party) and § 169 (duty of trustee or person distributing or receiving property subject to tax

to file inventory in Orphans' Court within 90 days of decedent's death) the tax became due 90 days after Caroline's death. It found that under § 170 which provides, "[w]henever any property shall pass subject to the inheritance tax . . . and there is no formal administration . . . and no inventory is filed as required by § 169, it shall be and become the duty of the register of wills . . . to apply for the appointment of at least two appraisers to value any such estate *that may come to this attention* (emphasis added) for the purpose of determining the amount of tax due and payable hereunder, and the tax so ascertained to be due shall become payable at once to register of wills . . . ," the tax in the instant case did not become due until the date of the appraisal. The Court felt that the legislature did not intend "to cast a burden on the register of wills to keep himself apprised of every death, within or without his jurisdiction, which might cause inheritance taxes to become due, whether the decedent was a resident or nonresident, or whether record title holder or not of taxable property within such jurisdiction" (at p. 26). For further information see 40 Ops. Atty. Gen. 542, 544 (1955); 32 Ops. Atty. Gen. 431, 467 (1947); 24 Ops. Atty. Gen. 942 (1939); 19 M.L.E. 318, Revenue and Taxes, §§ 281, 282. See also SYKES, MARYLAND PRACTICE, Probate Law and Practice (1956) §§ 791-795, pp. 716-719.

Restitution — To Accountant Of Benefit Conferred By Use Of His Working Papers During Time Of Wrongful Replevy. *Ablah v. Eyman,* 188 Kan. 665, 365 P. 2d 181 (1961). Plaintiff wrongfully replevied certain working papers prepared by the defendant-accountant as an independent contractor in connection with an audit he had prepared for the plaintiff four years previously. The defendant filed an answer and a cross-petition for damages based on the value the plaintiff had received by copying and using these papers, while wrongfully replevied, in preparing certain tax papers. The plaintiff filed a motion to strike parts of the cross-petition and answer, which was granted as to the allegations which based damages on the value of the use of the papers to the plaintiff, and defendant appealed. The Supreme Court of Kansas, in reversing the lower court's decision and allowing the defendant to recover damages based on the benefit conferred, reasoned that the allegations sounded in quasi-contract, not tort, and that "whenever one person commits a wrong or tort against

the estate of another, with the intention of benefiting his own estate, as is here alleged, the law will, at the election of the injured party, imply or presume a contract on the part of the wrongdoer to pay the party injured the full value of all benefits resulting to the wrongdoer." (p. 191). The court felt that had the tortfeasor acquired the papers rightfully, he would have had to pay an amount approximating their use value; therefore, it would be inequitable to allow him to wrongfully gain possession of property and receive a benefit from its use without paying the value of the use simply because the owner was not damaged to that extent.

The general trend of authority is in accord with the instant case and holds a tortfeasor liable for benefits received while wrongfully holding another's property. *Leitner v. G. Boromei Fish Co.*, 140 Fla. 74, 191 So. 76 (1939) (wrongful replevy); *Cottrel v. Gerson*, 296 Ill. App. 412, 16 N.E. 2d 529 (1938) aff'd 371 Ill. 174, 20 N.E. 2d 74 (1939) (wrongful distraint by landlord); *Riley v. Citizens Nat. Bank of Waco*, 210 S.W. 2d 224 (Tex. 1948) (real property-tenant wrongfully holding over). A recovery measured by the benefit conferred instead of merely compensating damage may be restricted to cases where there has been a deliberate tortious act. *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 173 P. 2d 652, 169 A.L.R. 139 (1946). However, there is authority that in the replevin action itself damages are not recoverable by way of rent as such by reason of the use of the property by the wrongdoer. *Myers v. Walker*, 173 Wash. 592, 24 P. 2d 97 (1933) (wrongful attachment). Likewise, in *Cumberland C. & I. Co. v. Tilghman*, 13 Md. 74 (1859) the Maryland Court of Appeals in a suit on a replevin bond for wrongful replevy said, "[h]is right to success in the action of replevin depending *entirely* on his right to possession, in reason, it follows, that his title to *damages* must be *confined* to the extent of the interference with that possession." (p. 84). For further information see 169 A.L.R. 143 (1947); 19 Yale L.J. 221 (1910); 21 Yale L.J. 533 (1912); RESTATEMENT, TORTS (1939) § 903, Com. b at p. 540; RESTATEMENT, RESTITUTION (1937) § 128, Com. i at p. 533; § 157 at p. 621. See also 18 Am. Jur. 164, Election of Remedies, § 46; 38 5th Dec. Dig. 1808, Replevin, Key no. 83 and 6th Dec. Dig. 1067, Contracts, Key no. 5; 19 M.L.E. 52, Replevin, § 22.

Torts — Res Ipsa Loquitur Not Available To Plaintiff Who Attempts To Prove Specific Acts Of Negligence. *Smith v. Bernfeld,* 226 Md. 400, 174 A. 2d 53 (1961). Plaintiff, a customer in defendant's beauty salon, brought a tort action for injuries sustained when one of defendant's chairs in which she was sitting toppled over causing her to fall to the floor and the chair to fall on her. Her declaration alleged that the accident occurred when she leaned forward to place her pocketbook on the counter in front of her while sitting in the chair. However, at the trial she testified that the accident occurred when she was settling back in the chair with her heels hooked under a tubular bar serving as a footrest. At the trial she attempted to prove that defendant was negligent in failing to have the chair properly attached to the floor or in failing to provide a chair of sufficiently balanced weight to withstand the weight of a customer leaning forward. After the jury returned a verdict for the plaintiff, the trial court entered a judgment *n.o.v.* for the defendant and the plaintiff appealed. The Maryland Court of Appeals upheld the lower court's decision that plaintiff had failed to meet her burden of proof to establish specific acts of negligence and, also, rejected the contention that *res ipsa loquitur* was available to the plaintiff. The Court reasoned that assuming that the plaintiff's failure to raise the issue of *res ipsa loquitur* did not prevent its consideration on appeal under MD. RULES (1961), Rules 885 and 554e, "the plaintiffs' attempt to establish specific grounds of alleged negligence precludes recourse to the doctrine of *res ipsa loquitur.*" (409)

Although the instant case indicates that recourse to *res ipsa loquitur* is precluded where there is an *attempt to establish* specific grounds of negligence, prior Maryland decisions had indicated only that recourse to *res ipsa loquitur* is precluded when the *cause* of the accident *has been proven or tended to be proven* by the plaintiff's or defendant's testimony. *Smith v. Baltimore Transit Co.,* 214 Md. 560, 566, 136 A. 2d 386 (1957); *Maszczenski v. Myers,* 212 Md. 346, 353, 129 A. 2d 109 (1957); *Coastal Tank Lines v. Carroll,* 205 Md. 137, 106 A. 2d 98 (1954). Where one wishes to rely on *res ipsa loquitur,* "it must not appear from his own evidence, or the evidence adduced in his behalf, that causes for which the defendant was in no way responsible produced the injuries for which damages are sought." *Hickory Transfer Co. v. Nezbed,* 202 Md. 253, 263, 96 A. 2d 241 (1953). The rationale of this rule is

aptly stated in *Strasburger v. Vogel,* 103 Md. 85, 63 A. 202 (1906) where the court stated that "to exclude, in the mental process of deduction, a consideration of the intervening, independent and efficient causes directly occasioning the injury and proven by a plaintiff himself and not attributable to a defendant, would be to predicate actionable negligence of a condition or event which in fact did not produce the injury and thus allow a recovery against a defendant on a ground for which he was in no way answerable." (at pp. 89-90). However, the doctrine of *res ipsa loquitur* had been held to be available to the plaintiff even though he had *pleaded* specific allegations of negligence. *Lawson v. Clawson,* 177 Md. 333, 343, 9 A. 2d 755 (1939) and cases cited therein. See also *Joffre v. Canada Dry, Inc.,* 222 Md. 1, 158 A. 2d 631 (1960). For further information see 11 Md. L. Rev. 102 (1950); 10 Md. L. Rev. 337 (1949); 3 Md. L. Rev. 285 (1939); 160 A.L.R. 1450 (1946) and 79 A.L.R. 48 (1932). See also 2 HARPER AND JAMES, THE LAW OF TORTS (1956) § 19.10, p. 1096 and 21 A.L.R. 2d 420 (1952).

Torts — Verdict Awarding Special Damages Without Damages For Pain And Suffering Upheld. *Leizear v. Butler,* 226 Md. 171, 172 A. 2d 518 (1961). Plaintiff, a passenger in a police vehicle driven by a fellow police officer, was injured as a result of a collision with defendant cab driver. The jury returned a verdict in favor of the plaintiff for his claimed special damages, consisting of hospital and medical expenses and loss of wages, but allowed nothing for pain and suffering. The plaintiff, contending that the omission of damages for pain and suffering created an inadequate and invalid verdict, made a motion for a new trial which was denied. On appeal, the Maryland Court of Appeals *held* that the disposition of a motion for a new trial is within the trial judge's discretion and is not reviewable as to the adequacy of a verdict on appeal even though the motion is based on the verdict's having omitted any compensation for pain and suffering. The Court declared that it is firmly established in Maryland that whether the verdict be excessive or inadequate, the action of the trial court in allowing or refusing a new trial will rarely, if ever, be reviewed on appeal. In *Chiswell v. Nichols,* 139 Md. 442, 115 A. 790 (1921) an attack on the verdict's adequacy as a basis for an appeal was answered

with a citation to 2 POE, PLEADING AND PRACTICE (Tiffany ed. 1925) § 349, which upholds the discretionary right of the trial court in granting or refusing a motion for a new trial. *Cf. Wash., B. & A. R. Co. v. Kimmey,* 141 Md. 243, 118 A. 648 (1922). See also *Elza v. Chovan,* 396 Pa. 112, 152 A. 2d 238 (1959) upholding a verdict awarding even less than the proven medical expenses.

Decisions concerning the validity of a verdict omitting pain and suffering but awarding medical expenses generally hold that such a verdict is invalid. Failure to follow the court's instructions was the ground for rejecting such a verdict in *Wall v. Van Meter,* 311 Ky. 198, 223 S.W. 2d 734, 20 A.L.R. 2d 272 (1949). In accord with this view is *Webster v. City of Colfax,* 250 Iowa 181, 93 N.W. 2d 91 (1958); *Gomes v. Roy,* 99 N.H. 233, 108 A. 2d 552 (1954). See 3 Am. Jur. 131, Appeal and Error, §§ 399-401; 53 Am. Jur. 762, Trial, § 1099; 15 Am. Jur. 663, Damages, §§ 231-239. Cases are collected in 20 A.L.R. 2d 276 (1951). See also 2 M.L.E. 332, Appeals, § 428, and 69 A.L.R. 2d 712 (1960).