Maryland Law Review

Volume 22 | Issue 4 Article 8

Recent Decisions

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Conflict Of Laws — A Maryland Divorce Decree Based On Finding Of Lack Of Bona Fide Domicile In Prior Nevada Default Decree Not Entitled To Full Faith And Credit In Nevada. *Colby v. Colby,* ..... Nev. Sup. Ct. ....., 369 P. 2d 1019 (1962). Defendant wife was granted a divorce *a vinculo matrimonii* by default decree in Nevada in 1955. Plaintiff husband was granted a divorce *a mensa et thoro* in 1957 by a circuit court of Maryland. Defendant appeared personally in the Maryland proceeding and pleaded the Nevada default decree as a defense. The Maryland court, after finding that the wife had not established a bona fide domicile in Nevada, declared the Nevada decree null and void due to lack of jurisdiction and handed down its own divorce decree. The Maryland Court of Appeals affirmed this ruling, 217 Md. 35, 141 A. 2d 506 (1958). Plaintiff then commenced this action in Nevada to set aside that state's prior default decree. The Nevada Supreme Court *held* that the Maryland decree was not entitled to full faith and credit, and that in Nevada the 1955 default decree, being lawfully entered, was the final determination of the marital status of the parties in Nevada.

In *Williams v. North Carolina,* 325 U.S. 226 (1945), the leading case in this area, the court did not definitely determine the status of a prior default decree in the state where it was entered. The Nevada court, however, relying on strong dicta in that case, said in effect that the Maryland Court of Appeals had no authority to decide for the state of Nevada on what basis it may or may not grant divorces, and further, that the question of domicile in Nevada was one on which the state of Nevada had complete authority. For further reference see, GOODRICH, CONFLICT OF LAWS (3d ed. 1949) § 127; 8 M.L.E. Divorce, § 172; 28 A.L.R. 2d 1303 (1953); Husserl, *Some Reflections on Williams v. North Carolina II,* 32 Va. L. Rev. 555, 980 (1946); Powell, *And Repent at Leisure,* 58 Harv. L. Rev. 930 (1945); Strahorn and Reiblich, *The Haddock Case overruled — The Future of Interstate Divorce,* 7 Md. L. Rev. 29 (1942).

Constitutional Law — Blanket Exemption In Blue Laws Not Violative Of Establishment Of Religion Clause In First Amendment. *Commonwealth v. Arlan's Department Store of Louisville,* ..... Ky. ....., 357 S.W. 2d 708 (1962). Appellants were convicted in quarterly court for violation of the Kentucky Sunday Closing Laws which, in substance,

prohibit all work or employment on Sunday with limited exceptions, and include a blanket exemption for "[p]ersons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday . . . if they observe as a Sabbath one day in each seven." KENTUCKY REVISED STATUTES (1955) 436:160. On appeal the Circuit Court held that the statute violated state and federal constitutional prohibitions against the establishment of religion. The decision in the Circuit Court was prior to four recent Supreme Court decisions upholding the validity of Blue Law Statutes in Maryland, Massachusetts, and Pennsylvania in the cases of *McGowan v. Maryland,* 366 U.S. 420 (1961); *Two Guys v. McGinley,* 366 U.S. 582 (1961); *Gallagher v. Crown Kosher Market,* 366 U.S. 617 (1961); and *Braunfield v. Brown,* 366 U.S. 599 (1961). In these decisions the Court examined the history of Blue Law legislation and concluded that although originally incorporated into law for religious purposes, these acts are now primarily of secular importance, enacted to preserve the public health by a mandatory day of rest, and that their aid to some religions and possible hardship on others (when containing no exception for those which have a different day of rest) is only incidental. The Kentucky Court of Appeals reversed, and *held* that the blanket exemption, for persons observing a Sabbath other than Sunday, is not unconstitutional as establishing religion, discriminating against those who celebrate the Sabbath on Sunday.

Although citing no cases directly in point, the Court cited dicta in *Braunfield v. Brown, supra,* pp. 608-609, where the majority of the Supreme Court recognized that such exemptions may well be a wise solution to the increased litigation claiming economic unfairness or the establishment of religion as inherent results of the Blue Laws. The concurring and dissenting opinion of Justice Brennan fully supports such a solution, and strongly questions the majority's concern that enforcement of this exemption would prove too great a hardship. Of the thirty-three states where Sunday Closing Laws are currently in force, twenty-one have special exemptions. Some of these are "blanket exemptions" as in Kentucky (see Appendix II to Opinion of Mr. Justice Frankfurter in *McGowan v. Maryland, supra,* pp. 551-560). Several states have "limited exemptions" for persons who observe another day as the Sabbath. See *e.g.,* 2A N.J.S.A. (1953) § 171-4; N.Y. Penal Law, § 2144. Maryland is among those states allowing no exemption to their Sunday Closing Laws for persons keeping another day as the Sabbath. See, 3 MD. CODE (1957) Art. 27, §§ 492-534.

Criminal Law — Assault — Mistaken Although Reasonable Belief That Another Is Being Assaulted Is Not A Defense To An Assault. *People v. Young,* 11 N.Y. 2d 274, 183 N.E. 2d 319 (1962). Defendant was convicted of third degree statutory assault. Evidence showed that defendant had attacked two plainclothes policemen attempting to arrest an 18 year old youth. Defendant testified that he did not know that the two men were policemen; that the youth had his pants nearly torn off and was crying; and that, without inquiring into the circumstances, he attempted to separate the two men from the youth. Supreme Court, Appellate Division, of New York reversed the conviction, holding that one is not criminally responsible for a third degree assault when he goes to the aid of another who he mistakenly, but reasonably, believes is being unlawfully attacked. The Court of Appeals of New York reversed (5-2), *holding* that a mistaken though reasonable belief is no justification for a third degree assault: (The Court reasoned that in a conviction of assault, unlike a case where the felony charged requires a specific intent, requires only a showing that the defendant knowingly struck the blow and; that motive or mistake of fact, therefore, is not material.) The dissent felt that an assault requires *mens rea* and, therefore, a reasonable mistake would be a defense.

As in the instant case, the courts are split between the view that a reasonable mistake of fact is a defense to the crime of assault, *Brannin v. State,* 221 Ind. 123, 46 N.E. 2d 599 (1943); *State v. Chiarello,* 69 N.J. Super. 479, 174 A. 2d 506 (1961) (assault with a deadly weapon); *Kees v. State,* 44 Tex. Cr. R. 543, 72 S.W. 855 (1903); and the view that one who goes to the aid of another does so at his peril and is in the same position as the person defended. *Commonwealth v. Hounchell,* 280 Ky. 217, 132 S.W. 2d 921 (1939). The position adopted by the Maryland Court of Appeals is unclear; however, the implication is that Maryland limits the reasonable mistake defense to a family relationship or close association to the party defended. See *Guerriero v. State,* 213 Md. 545, 550, 132 A. 2d 466 (1957); 2 M.L.E. 556, Assault and Battery, § 32. While the *Guerriero* case can be read as implying a defense where the accused acts reasonably, the Maryland Law Encyclopedia does not go beyond the proposition that he is protected if the person aided would have been privileged to act as the accused did. If this is the position of the Maryland Court of Appeals, then, as in the instant case, one who intervenes to protect a stranger would probably do so at his peril.

"This emasculates the privilege of protection of much of its content, introducing a liability without fault which is indefensible in principle." A.L.I., Model Penal Code, Tentative Draft No. 8 (1958) § 3.05, comment 1, p. 32. For further information see, ANDERSON, 1 WHARTON'S CRIMINAL LAW AND PROCEDURE (1957) § 352, p. 705; PERKINS, CRIMINAL LAW (1957) pp. 825 *et. seq.*, 910-911; 4 Am Jur. 155, Assault and Battery, § 54; 6 C.J.S. 950, Assault and Battery, § 93; A.L.I., Model Penal Code § 3.05(1) (Tent. Draft No. 8, 1958).

Criminal Law — "Mental Disease Or Defect" Under Durham Rule Defined. *MacDonald v. United States,* ..... F. 2d ..... (D.C. Cir. 1962). Eight years after it pronounced its product-of-mental-disease-or-defect test in *Durham v. United States,* 214 F. 2d 862 (D.C. Cir. 1954), the U. S. Court of Appeals for the District of Columbia has tried to make clear what it means by mental disease or defect by saying: "[T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." Critics of the *Durham* rule have pointed out the practical difficulty of construing the words "disease" and "defect" and in applying the term "product of" (as the language of the announcing court meant them to be interpreted). It was the latter difficulty, primarily, that prompted the American Law Institute to reject the *Durham* test and recommend instead a test whereby a lack of "substantial capacity . . . to conform his conduct to the requirements of law" would relieve defendant of criminal responsibility. A.L.I., MODEL PENAL CODE § 4.01(1) (Tent. Draft No. 4, 1955). See also Thomsen, *Insanity As A Defense to Crime,* 19 Md. L. Rev. 271, 287-288 (1959).

In Maryland the test used to determine insanity sufficient to relieve the defendant of criminal responsibility is still the *M'Naghten* rule. As adopted in *Spencer v. State,* 69 Md. 28, 37, 13 A. 809 (1888) that rule is that defendant is held responsible if at the time of the offense he had capacity and reason to enable him to distinguish between right and wrong and understood the nature and consequences of his act. The Court of Appeals declined to abandon the *M'Naghten* rule in favor of a more liberal test in *Bryant v. State,* 207 Md. 565, 115 A. 2d 502 (1955). Whether the judicial definition in *MacDonald,* admittedly broad and general, will prove to be an aid to the few courts following the *Durham* rule remains to be seen. (The

language used in the *MacDonald* case, *supra,* should be compared with that of the Model Penal Code, *supra.* Query: Whether the District of Columbia has partially retreated and in fact more nearly follows the test suggested by the American Law Institute.) Thus, the judicial and legislative search for a more satisfactory test than either the *M'Naghten* or *Durham* tests continues. See also *U. S. v. Currens,* 290 F. 2d 751 (3d Cir. 1961). Consult Md. L. Rev., Cumulative Index (Vols. 1-21, 1962), Criminal Law, Insanity, for articles discussing insanity tests. Cases are collected in 45 A.L.R. 2d 1447 (1956).

Domestic Relations — Effect Of A Subsequent Bigamous Marriage On An Illegitimate Child. *In Re Estate of Weeast,* 72 N.J. Super. 325, 178 A. 2d 113 (1962). Decedent deserted his wife and began cohabitation with another woman. As a result of this meritricious relationship the plaintiff was born. Subsequently, the father obtained a Mexican "mail order" divorce and entered a ceremonial marriage with plaintiff's mother. The father died intestate, and plaintiff claimed a right to share in his estate as a legitimate heir under the New Jersey intestacy statutes, basing her claim, *inter alia,* on 9 N.J.S.A. (1960) § 15-2 which reads: "Any child . . . *born of a ceremonial marriage* is the legitimate child of both parents notwithstanding the marriage be thereafter annulled or declared void." (Emphasis added.) The County Court, granting summary judgment for defendant, administrator of the estate, *held* that the attempted "mail order" divorce was void, making the subsequent marriage bigamous, and since the plaintiff's birth occurred *before* the ceremonial marriage, she was not "born of the ceremonial marriage" within the meaning of the statute.

Statutes in most states provide that children born out of wedlock may be legitimated for purposes of inheritance by the subsequent valid intermarriage of the parents. See 4 MD. CODE (1957) Art. 46, § 6; MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) §§ 103-104, p. 346; and see generally 4 VERNIER, AMERICAN FAMILY LAWS (1936) § 243. Moreover, many statutes provide that the subsequent marriage will legitimate the child for all purposes. See, 4 VERNIER, AMERICAN FAMILY LAWS (1936) § 243; Ester, *Illegitimate Children and Conflict of Laws,* 36 Ind. L. Rev. 163 (1961). Maryland has a statute similar to the one construed in the *Weeast* case; however, the Court of Apepals has not had the opportunity to determine whether it would apply in a similar situation. 8 MD. CODE (1957) Art. 93, § 151

("Any children born of parents who have been the subject of a marriage ceremony with each other shall be deemed to be the legitimate issue of such parents, whether or not it is subsequently determined or can be determined, that the marriage is, or might be, legally invalid because of the prior marital status of one of the parents.") See also *Goodman v. Goodman,* 151 Va. 42, 142 S.E. 412 (1928) where the Virginia Supreme Court of Appeals reached an opposite conclusion from the instant case. For general reference see, 4 VERNIER, AMERICAN FAMILY LAWS (1936) § 242 *et. seq.;* 7 AM. JUR. 666, Bastards, § 58; 84 A.L.R. 499 (1933).

Taxation — Purchase Of "Stock" By Subscribers To A Community Television Antenna Service — Income Or Capital? *Community T.V. Association of Havre v. United States,* 203 F. Supp. 270 (D. Mont. 1962). Taxpayer corporation was organized to provide T.V. signals through a community antenna for use by subscribing residents of Havre, Montana. Part of the funds were supplied by the subscribers, each being required, in addition to paying a connection and service charge, to buy one share of Class B stock at par value of $100.00. The shares could be redeemed at any time by the corporation at par value; shareholders had no vote or effective voice in management, had only an illusory share in liquidation proceeds, received no participation in profits and were subject to any restrictions which the Board of Directors might prescribe. Default by a subscriber in the payment of service or connection charges permitted termination of his interest by the corporation without reimbursement. Although the funds received from the sale of Class B stock were segregated and carried on the books as investment capital, the corporation, in its annual reports to the State of Montana, did not list such stock as a part of corporate capital. Taxpayer contended that the funds were "contributions to capital" or, alternatively, payments received "in exchange for stock," and thus non-taxable in either case under the Internal Revenue Code, 26 U.S.C.A. (1955) §§ 118(a) and 1032(a). The District Court *held* that the payments in question were for television services to be rendered and, therefore, constituted taxable income to the corporation.

Similar results were reached in the cases of *Warren Television Corp. v. Commissioner,* 17 TCM 1053 (1958) and *Teleservice Co. of Wyoming Valley v. Commissioner,* 254 F. 2d 105 (3d Cir. 1958); however, the instant case is distinguishable because there was an actual issuance of capital stock to the subscribers. But the Court noted that

no outside investors would have made such investments unless they were, as here, required to do so in order to receive the service. *Supra,* p. 274. For further reference see STANLEY AND KILCULLEN, THE FEDERAL INCOME TAX (4th ed. 1961) p. 48; 1 FEDERAL TAX REGULATIONS (1962) §§ 1.118-1, 1.1032-1(a).

Torts — Pedestrian Has Right Of Way At Intersection Controlled By Stop Sign. *Folck v. Anthony,* 228 Md. 73, 178 A. 2d 413 (1962). Defendant, driving his automobile on a through highway struck plaintiff, a pedestrian crossing the highway at the intersection. Erected on the corner of the side street from which plaintiff approached the major artery was a stop sign. The trial court denied plaintiff's prayer for a right of way instruction, and informed the jury that the stop sign required plaintiff-pedestrian to stop before proceeding to cross the through highway. In reversing, the Maryland Court of Appeals *held* that a stop sign does not require a pedestrian to stop and yield the right of way to vehicular traffic approaching on a through highway.

As a general rule, and absent change by statute, the rights of pedestrians and automobiles at intersections are equal. See 2A BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE (1951) § 1272; 47 A.L.R. 595, 599 (1927). Such statutes commonly provide that an operator must yield the right of way to a pedestrian at an "uncontrolled intersection", one where *traffic* is not regulated by *traffic control signals* or a traffic officer. See 2A BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE (1951) § 1272; 47 A.L.R. 595 (1927). That stop signs are not within the category of traffic control signals see, *Rees v. Spillane,* 341 Ill. App. 647, 94 N.E. 2d 686, 692 (1950). The Maryland statute referring to "uncontrolled intersections", however, reads *traffic control devices* and, "signs" are specifically included within the definition of "traffic control devices". See 6 MD. CODE (1957) Art. 66½, §§ 236, 2(a)(29). Moreover, the term "traffic" embraces the word "pedestrians". See 6 MD. CODE (1957) Art. 66½, § 2(a)(62). In view of the statutory provisions, it would appear that the pedestrian in the instant case would not have had the right of way. However, the Court was of the opinion that it was not the intent of the legislature to require pedestrians to stop in obedience of stop signs, *supra,* p. 79. For a case holding, in the absence of a statutory definition, that "signs" are not within the term *traffic control devices,* see *Buch-*

anan v. Marcusen, 196 Minn. 520, 265 N.W. 319 (1936). For further reference see BABBITT, MOTOR VEHICLE LAW (4th ed. 1933) §§ 1799, 1800; BRUNE, MOTOR VEHICLE LAW OF MARYLAND (1928) §§ 20, 22; 3 M.L.E., Automobiles, §§ 103, 175; 11 Md. L. Rev. 1 (1950).