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Recent Decisions

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Recent Decisions

Conflict Of Laws — Gambling Contract Not Enforceable As Against Public Policy Though Valid Where Entered Into. *Intercontinental Hotels Corp. v. Golden,* 238 N.Y.S. 2d 33 (Sup. Ct. 1963). Plaintiff sought to recover in a New York court the amount of a gambling debt incurred by the defendant in Puerto Rico, a jurisdiction where gambling has been legalized. The Supreme Court, Appellate Division, in a 3-2 decision reversed a judgment for the plaintiff in the lower court, applying the traditional "choice of law" rule, that a contract's legality is ordinarily determined by the law of the place where it is made but that a state need not enforce a contract which is contrary to its public policy. 6 WILLISTON, CONTRACTS (Rev. ed. 1938), § 1792, p. 5095, and RESTATEMENT, CONFLICT OF LAWS (1934), § 612, p. 731. The majority held that the clear and strong public policy of New York would not allow a plaintiff to recover on a debt arising out of a gambling transaction even though gambling was legal where the debt arose. The Court asserted that the New York Constitution and Penal Law evidenced a long-standing policy against gambling and that such a policy could not be disregarded even when an out-of-state transaction was involved. A strong dissenting opinion contended that the public policy of New York was not sufficiently expressive of forum policy against gambling to invalidate gambling agreements entered into *outside* the state's borders. The prohibitions against gambling, in the various state laws, were considered to be guidelines of conduct for the citizens of New York, within the borders of the state, and not intended to limit the citizen's activity outside the state or to be used to invalidate contracts completely valid where made.

In Maryland the Court of Appeals has followed the general "choice of law" rule, holding that contracts valid where made will be enforced in Maryland unless they are contrary to the public policy of this State. *Baltimore and Ohio R.R. Co. v. Glenn,* 28 Md. 287 (1868). Gambling contracts entered into *within* Maryland have been held to be contrary to the public policy of the State and hence invalid. *Spies v. Rosenstock,* 87 Md. 14, 39 A. 268 (1898). Whether the public policy of Maryland against gambling is meant to apply to gambling contracts made *outside* Maryland remains an open issue. The dissent points out that the increased respectability of gambling and the introduction of it into additional forums would indicate that a state's public policy should not so apply.

International Law — Resident Member Of Cuban Delegation To United Nations Not Entitled To Diplomatic Immunity. *United States of America ex rel. Casanova v. Fitzpatrick,* 214 F. Supp. 425 (S.D.N.Y. 1963). Petitioner was a Cuban national serving as an attache and resident member of the Staff of the Permanent Mission of Cuba to the United Nations. He was arrested on a charge of conspiracy to commit sabotage and to violate the Foreign Agent's Registration Act, 18 U.S.C. § 2155(b) (1958). He sought his release by habeas corpus on the grounds that he was entitled to diplomatic immunity and not subject to the jurisdiction of the court.

Petitioner claimed that the U.N. CHARTER, ART. 105, para. 2 was self-executing and required absolute and automatic diplomatic immunity for representatives of member nations and their staffs. The Court (Weinfeld, J.) rejected this contention, basing its decision on various reports from the San Francisco Conference in which the term "diplomatic immunity" was purposely avoided and wherein it was said that only a functional immunity, confined to acts necessary for the independent exercise of functions connected with the UN, was granted. The petitioner next contended that under U.S. Const. Art. III, Sec. 2, and 28 U.S.C. § 1251(a)(2) (1958), which gives the Supreme Court exclusive jurisdiction against public ministers of foreign states, the District Court was without jurisdiction. The Court rejected this claim also, stating that this section of the Constitution and the judicial code applies only to diplomatic representatives accredited to the United States. The essence of the petitioner's claim, however, was that he was entitled to immunity under Art. 5, § 15(2) of the Headquarters Agreement of the United Nations, 61 STAT. 762 (1947). Section 15(1) of this Headquarters Agreement provides for diplomatic immunity for the principal resident representative to the United Nations from each nation, while section 15(2) provides for diplomatic immunity for "such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the member concerned * * *." The Court, interpreting section 15(2), decided (1) that the State Department certificate, stating that there was no agreement to extend to petitioner diplomatic immunity, did not foreclose the Court from considering the question and, (2) that section 15(2) requires an agreement as to each individual on a staff and not, as petitioner contended, to categories of staff personnel. The Court then denied the petition for writ of habeas corpus

and held that the issuance of a visa and a landing card to the petitioner was nothing more than part of the United States' obligation under Art. 4, §§ 11 and 13 of the Headquarters Agreement not to impede petitioner's transit to UN Headquarters, and was not an agreement by the United States under Art. 5, § 15(2) to extend diplomatic immunity to petitioner. For further reference see *United States v. Coplan,* 84 F. Supp. 472 (S.D.N.Y. 1949) and Gross, *Immunities and Privileges of Delegations to the United Nations,* 16 International Organizations 483 (1962).

Joint Tenancy — Felonious Killer Barred From Acquiring Deceased's Share Of Property Held In Joint Tenancy. *In re Cox Estate,* ..... Mont. ....., 380 P. 2d 584 (1963). In a Probate Court action to determine and declare the rights and interests in the estate of deceased, Bess Cox, the court determined that she was feloniously killed by her husband, who then committed suicide. Husband and wife had owned certain real property in joint tenancy. The heirs of the dead husband brought this action to establish their claim to the wife's undivided one half interest in the property. Their claim was that their ancestor, the husband, had become the sole owner of the property at the instant he killed his wife and that it was outside the province of the judiciary to modify in any way the right of survivorship in a joint tenancy, a matter established by statute without any exceptions. The Probate Court ruled that the plaintiffs had no right to the wife's share. The Supreme Court of Montana affirmed and dismissed the plaintiff's argument as being contradictory to the equitable doctrine of preventing one from benefiting from his own wrong. The majority asserted that a substantial benefit would accrue to the tenant who kills his co-tenant and then himself, though the enjoyment of the benefit is postponed to his heirs.

The Court cited the Maryland case of *Price v. Hitaffer,* 164 Md. 505, 165 A. 470 (1933), in which the Court of Appeals applied this doctrine and denied a felonious killer and his heirs their rights, as statutory heirs, to the victim's estate. The Montana Supreme Court could find no reason for treating statutes concerning joint tenancy differently from those concerning intestate succession. In view of the equities of the case a constructive trust was placed on the wife's share of the joint tenancy. The husband, being a trustee holding title to the wife's share for the benefit of her heirs, thus lacked a beneficial interest which the appellants could claim to have inherited. Similar results

have been reached in several recent cases. See *Budwit v. Herr,* 339 Mich. 265, 63 N.W. 2d 841 (1954) and *Cowan v. Pleasant,* 263 S.W. 2d 494 (Ky. 1953). A thorough analysis of this point is found in 17 Md. L. Rev. 45 (1957). For further reference see 4 SCOTT, TRUSTS (2d ed. 1956) Ch. 13, § 493.2; RESTATEMENT, RESTITUTION (1937) § 188; 18 Md. L. Rev. 266 (1959).

Parent And Child — Parental Liability For Malicious Conduct Of A Minor Child. *General Insurance Company of America v. Faulkner,* 259 N.C. 317, 130 S.E. 2d 645 (1963). Freddie Faulkner, an eleven-year-old living with his parents, was admitted to have maliciously and wilfully set fire to the furnishings of Teachers Memorial School proximately causing damage in the amount of $2,916.50. The plaintiff insurer, as subrogee to the school, brought this action for $500.00, the maximum limit, under a North Carolina statute, Gen. Stat. N.C. § 1-538.1 (Cum. Supp. 1961), imposing vicarious liability upon the parents of minors for "damages for malicious or wilfull destruction of property by minors". Defendants demurred to the complaint, claiming that the statute was unconstitutional. The Supreme Court of North Carolina conceded that the statute reversed the established common law rule, whereby parents were not liable for the torts of their children, but held that such statute was not a failure of due process of law under State or Federal Constitutions. North Carolina is the third state to uphold the constitutionality of these statutes; see *Kelly v. Williams,* 346 S.W. 2d 434 (Tex. Civ. App. 1961) and *Palmyra Board of Education, Burlington County v. Hansen,* 56 N.J. Super. 567, 153 A. 2d 393 (1959).

Thirty-two states now have similar anti-vandalism statutes, 40 North Carolina L. Rev. 619 (1962). The primary purpose of these statutes is to fight juvenile delinquency and, under equitable principles, to relieve the innocent parties of part of the financial burden resulting from such activities by juveniles. These statutes vary in form, although they have essentially the same effect. In California the liability is in addition to any existing liability imposed by law, Cal. Civil Code § 1714.1. In Tennessee there is no liability on parents if they can show exercise of due care and diligence, Tenn. Code Anno. § 37-1003 (Cum. Supp. 1963). In Maryland, the legislature has not seen fit to pass a general anti-vandalism statute though several attempts have been made. Montgomery County, however, has partially corrected the situation by giving a judge of the People's Court for Juvenile Causes in that County the power to require a

parent to make restitution for the destructive acts of his child, see 2 MD. CODE (Cum. Supp. 1962) Art. 26, § 76(i).

Religious Societies — Majority Group Enjoined From Using Church Property For Teaching Of Doctrines Contrary To Beliefs For Which Property Was Dedicated. *Holiman v. Dovers,* ..... Ark. ....., 366 S.W. 2d 197 (1963). Plaintiffs, a minority faction in the Landmark Missionary Baptist Church of Traskwood, Arkansas, a self-governing congregational church, sought to enjoin Dovers, the pastor, and the majority group, from using the church property for the preaching of doctrines fundamentally contrary to the original faith and to which the property had been dedicated. The trial court refused to grant the relief, stating that the doctrinal differences were too minor for judicial cognizance. In granting the relief, the Supreme Court of Arkansas held that the controlling faction of a self-governing congregational church may not divert church property for uses for or in support of doctrines contrary to the beliefs and dogma for which the church was dedicated. The Court stated that equitable relief is a proper remedy to be invoked to protect the property kept in trust for the practice of a particular type of religious creed and that courts should not hesitate to assume jurisdiction when a schism affects property rights. They further decided that no judicial determination of religious doctrine was necessary, for, through the use of experts, a factual finding could be made as to whether there had been such a departure from the original beliefs as to justify the relief sought. One judge dissented, asserting that there was no way the Court could decide the question without judicially determining what the fundamental religious tenets of the Landmark Baptist Church originally were, and then comparing them to the tenets of the present majority to see if there had been such a deviation as claimed by the minority. To do this was to "embark on a sea of religious turmoil that may ultimately result in shipwreck."

Brown v. Scott, 138 Md. 237, 113 A. 727 (1921), involved an attempt by a majority of church trustees to change religious affiliation from Methodist to Episcopal. This was successfully thwarted by an injunction. The Court of Appeals held that while any number of members are free to affiliate with whatever group they choose, they cannot by so doing affect the property rights of others nor divert the use of property held in trust for a delineated purpose to a different one. For further reference see: 45 Am. Jur.,

Religious Societies, § 54 (1943); Annot., 70 A.L.R. 75 (1931); for a contrast in scope of application see *Davis v. Scher,* 356 Mich. 291, 97 N.W. 2d 137 (1959) and *Katz v. Goldman,* 33 Ohio App. 150, 168 N.E. 763 (1929).

Severance — Same Counsel Representing CoDefendants With Conflicting Interests. *Case v. North Carolina,* 315 F. 2d 743 (4th Cir. 1963). The defendant was jointly indicted with codefendant for a capital offense, and the same attorney was retained by both. Counsel moved for a severance on the ground that he represented both defendants and expected a conflict of interest to arise; the motion was denied. A conflict did in fact arise on the admission into evidence of codefendant's confession implicating and throwing the burden of guilt on defendant. Codefendant received a life sentence and defendant a death sentence. In habeas corpus proceedings the Court held that failure to grant a severance, where codefendants were represented by same counsel and a conflict of interest was imminent, constituted a denial of defendant's right to effective representation and undivided loyalty of counsel during his trial on a capital offense. The dissent noted that since conflicts of interest are inherent in any joint trial the ruling will permit codefendants in capital cases to force severance by the simple device of retaining the same counsel.

Most conflict of interest cases deal with *appointed* counsel representing both codefendants. The leading case is *Glasser v. U.S.,* 315 U.S. 60 (1942), which held that where a court appointed defendant's counsel to also represent codefendant over the objections of defendant, and with notice of potential conflicting interests, defendant was deprived of effective assistance of counsel. The Supreme Court also stated that the burden of representing codefendants may impair counsel's effectiveness even without any conflict of interest. In later cases the Tenth Circuit Court of Appeals has attempted to limit the scope of the *Glasser* rule by requiring both an actual conflict of interest and a timely protest. *Farris v. Hunter,* 144 F. 2d 63 (10th Cir. 1944); *Roberts v. Hunter,* 140 F. 2d 38 (10th Cir. 1943). Where these essentials are in the record it has been deemed error for a court to deny severance on motion made by counsel for codefendants. *Wright v. Johnston,* 77 F. Supp. 687 (N.D. Cal. 1948).

In Maryland every man has a right to be "allowed" counsel. Maryland Declaration of Rights, Art. XXI. Note, *The Right to Counsel for Indigents in State Criminal Trials,*

23 Md. L. Rev. 332 (1963). To show error in denying a severance there must be a motion based on actual or imminently potential hostility of interest which deprived defendant of impartial and adequate representation. *Jones v. State,* 185 Md. 481, 487, 45 A. 2d 350 (1945); *Pressely v. State,* 220 Md. 558, 155 A. 2d 494 (1959). A case significant in light of the fears of the dissenting opinion in the principal case is *U.S. v. Bernett,* 103 F. Supp. 39 (Md. 1952), in which defendant and codefendant on trial for robbery knowingly retained the same counsel. The Court ruled defendant to be *estopped* from later asserting the inadequacy of his counsel. For further reference see *People v. Lanigan,* 22 Cal. 2d 569, 140 P. 2d 24 (1943); *People v. Rose,* 348 Ill. 214, 180 N.E. 791 (1932); Fellman, *Right to Counsel Under State Law,* 1955 Wis. L. Rev. 281 (1955); and Note, *Right to Benefit of Counsel Under the Federal Constitution,* 42 Col. L. Rev. 271 (1942).

Torts — Illegitimate Child May Maintain Action For Wrongful Death Of Mother. *Sneed v. Henderson,* ..... Tenn. ....., 366 S.W. 2d 758 (1963). The plaintiff, an illegitimate child, commenced this action to collect damages for the wrongful death of his mother under Tenn. Code Ann. § 20-607 (1956), which provides that such right of action ". . . shall pass . . . to his children or to his next of kin. . . ." The jury returned a verdict in favor of the plaintiff. The Supreme Court of Tennessee, on appeal, took the view that the wrongful death statute was in the nature of a law of descent and distribution and was for the benefit of those who would be beneficiaries under intestacy laws. An intestacy statute, Tenn. Code Ann. § 31-205 (1956), provides that an illegitimate child shall share equally with the legitimate children in the distribution of the deceased mother's personal property. Positing its decision on this statute, the Court reasoned that the illegitimate child was included by necessary implication within the terms "children" and "next of kin" as used in the wrongful death statute. Because the recovery in a wrongful death action becomes the personal property of the decedent's estate, in which the illegitimate child would share equally with the legitimate children, the Court reasoned that the illegitimate child should also have an equal right to bring suit, and held that under the laws of Tennessee an illegitimate child may maintain an action for the wrongful death of its mother.

6 MD. CODE (Cum. Supp. 1962) Art. 67, § 4 creates a wrongful death action for the benefit of the child and pro-

vides that " 'child' shall include an illegitimate child whenever the person whose death is so caused is the mother of such child. . . ." The damages recoverable are based upon the pecuniary interest of the equitable plaintiff in the life of the person killed. Maryland has thus by statute solved the problem with which the Tennessee court was faced. For further reference see *State, Use of Holt v. Try, Inc.*, 220 Md. 270, 152 A. 2d 126 (1959); PROSSER, TORTS (2d ed. 1955) § 105, pp. 709-19; and Annot. 72 A.L.R. 2d 1235 (1960).

Torts — United States Not Liable Under Federal Tort Claims Act For Alleged Negligent Hurricane Advisories. *Bartie v. United States*, 216 F. Supp. 10 (W.D.La. 1963). Plaintiff and his family resided on the Gulf Coast near Cameron, Louisiana. Hurricane Audrey, which struck this coastal area in 1957, claimed the lives of his wife and five children. Plaintiff sued the United States Government under the Federal Tort Claims Act on the theory that the Government Weather Bureau was negligent in failing to give adequate warning of the approaching storm as well as the approximate correct time the hurricane would strike the coast. The Court (Hunter, J.), after examining the evidence and noting that no expert had testified to any negligence, determined that the official advisories were technically more than adequate, but that the forecasts received by the coastal people were not sufficient to convey the urgency of the situation. Since the Weather Bureau did not own or operate any of the broadcast facilities by which these forecasts were publicized, the Court held that the plaintiff had not established the defendant's negligence by a preponderance of the evidence.

Continuing, the Court stated that, even if plaintiff could have established some negligence on the part of the Weather Bureau and brought himself within the ambit of the act, the instant case came within the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1958), and thus barred plaintiff from any recovery. The Court pointed out that the content and wording of the bulletins and advisories, which were in fact what the plaintiff had complained of, as well as the means and manner chosen to communicate these to the public, were ". . . determinations made by administrators involving policy, judgment and discretion", and thus came within the above mentioned "discretionary function" exception as interpreted in *Dalehite v. United States*, 346 U.S. 15 (1953). For further reference see *Mid-Central Fish Co. v. United*

States, 112 F. Supp. 792 (W.D. Mo. 1953) and *Western Mercantile Co. v. United States,* 111 F. Supp. 799 (W.D. Mo. 1953).

Trade Regulation — Power Of Federal Trade Commission To Hold Advertising Reference To Manufacturer's List Price An Unfair Practice In Commerce. *Giant Foods, Inc. v. F.T.C.,* ..... F. 2d ..... (D.C. Cir. 1963). Giant Foods, Inc., a Delaware corporation operating retail stores in the Washington, D.C. metropolitan area, including Maryland, petitioned the U.S. Court of Appeals for the District of Columbia to review a Federal Trade Commission cease and desist order against Giant's practice of referring to the "manufacturer's list price" in advertising goods, when that price was not the "usual and customary" retail price in the area. The Commission had held this to be in violation of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(6) (1958), prohibiting "unfair or deceptive acts or practices in commerce". The Commission had determined that the practice was deceptive in that the term "manufacturer's list price" conveyed to the public that that was the price for which the particular article sold for in other area stores, when such was not the case. The petitioner contended it was a legitimate practice for purposes of comparison. The D.C. Court of Appeals (McGowan, J.), in affirming the order, held that, while such use of "manufacturer's list price" was not unlawful in itself, the references to such became so if the list prices were not those adhered to by other area retailers. The Court then decided that the Commission had submitted enough evidence to show that the manufacturer's list price was not the "usual and customary" retail price in the area.

The Court of Appeals thus adhered to the established view that this type of regulatory law is made to protect the general public — *Helbros Watch Co., Inc. v. F.T.C.,* 310 F. 2d 868 (D.C. Cir. 1962) cert. den., 373 U.S. 976 (1963) — and that, given sufficient evidence at a fair hearing, it is for the F.T.C. and not the Court of Appeals to draw reasonable inferences therefrom in order to determine the ultimate impression of a particular practice on the mind of the purchasing public. See *Baltimore Luggage Co. v. F.T.C.,* 296 F. 2d 608 (4th Cir. 1961), cert. den., 369 U.S. 860 (1962), *Vanity Fair Paper Mills, Inc. v. F.T.C.,* 311 F. 2d 480, 488 (2d Cir. 1962) and *Niresk Industries, Inc. v. F.T.C.,* 278 F. 2d 337 (7th Cir. 1960), cert. den., 364 U.S. 883 (1960). For further references see Annot., 65 A.L.R. 2d 220 (1959).