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Recent Decisions

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Building And Loan Association — Right Of Member Of Federal Savings And Loan Association To Membership Lists In Order To Solicit Votes For Election Of Directors. *Dunnin v. Allentown Federal Savings and Loan Association,* 218 F. Supp. 716 (E.D. Penn. 1963). The defendant, a federal savings and loan association incorporated under § 5 of the Home Owners Loan Act of 1933 as amended, 12 U.S.C. § 1464, denied the written request of plaintiff to make available a list of the names and addresses of all members of the association. Plaintiff, a depositor member of the defendant association, sought this list in order to solicit votes for the coming election of directors. Defendant's refusal was based on the contention that a federal savings and loan association was a federal instrumentality governed exclusively by federal statutes, rules and various regulations; and that since there was no provision in any of these for such inspection of membership lists, no right of inspection existed.

The district court denied defendant's motion to dismiss and held that a depositor-member of a federal savings and loan association had a right to obtain a list of the membership in order to solicit votes for the election of directors. The court stated, ". . . more would be required than silence of the regulations to overcome the general 'common law' right of a member of a corporation to inspect and copy the membership lists." The court was influenced in its decision by a similar holding under the Pennsylvania Building and Loan Code of 1933. See *Henzel v. Patterson Building and Loan Association No. 2,* 128 Pa. Super. 531, 194 Atl. 683 (1937). In *Guthrie v. Harkness,* 199 U.S. 148 (1905), the Supreme Court recognized the common law right of inspection in the shareholder of a national bank. As to the rights of members of state savings and loan associations to inspect books and records, see Annot., 134 A.L.R. 699 (1941). Also compare the recent case, *Daunelle v. Traders Federal Savings & Loan Association of Parkersburg,* 143 W.Va. 674, 104 S.E. 2d 320 (1958).

Domestic Relations — Second Spouse Cannot Collaterally Attack Husband's Prior Foreign Divorce Decree. *Leatherbury v. Leatherbury,* Daily Record, July 27, 1963 and ..... Md. ....., 196 A. 2d 883 (1964). Defendant-husband

in October, 1960, went to Alabama and obtained a divorce from his first wife, Zella, who did not herself appear in the Alabama proceedings, but who did file the usual waiver of jurisdiction, power of attorney and answer. Up to the time of the filing of the case at bar, Zella had not contested the validity of the Alabama decree. Plaintiff, second wife, for some time prior to the Alabama divorce, had been a close social friend of the defendant. She had in fact discussed with defendant his plans for an Alabama divorce and had driven him to the airport when he went to Alabama to get the decree. After obtaining the decree, defendant waited the sixty (60) day period as required by Alabama law, then married the plaintiff. Plaintiff in the instant suit sought a divorce on the ground that her husband's prior Alabama divorce was not valid in Maryland, and therefore his subsequent marriage to plaintiff was a nullity. Defendant contended that plaintiff lacked standing to collaterally attack the Alabama decree as she was not a party in interest at the time of the decree, or alternatively, that plaintiff was collaterally estopped by her own knowledge and conduct. The Circuit Court for Montgomery County, in the lower court opinion, held that both reasons presented by the defendant prevented plaintiff from collaterally attacking her husband's prior Alabama divorce.

On appeal, the Maryland Court of Appeals affirmed. The decision points out that each court that has decided the question has applied some variation of the theories of estoppel and/or lack of standing to sue in denying, almost without exception, a subsequent spouse the right to attack a foreign divorce decree he or she has relied on when marrying the party from whom a divorce is now sought. The decision cites affirmatively cases where the second spouse was deemed to be estopped, see *Dietrich v. Dietrich,* 41 Cal. 2d 497, 261 P. 2d 269, *cert. den.* 346 U.S. 938 (1953), and cases where the second spouse was deemed to have no legal standing or interest to attack the previous decree, see *deMarigny v. deMarigny,* 43 S. 2d 442 (Fla. 1949). Which theory is more appropriate would seem to depend on the particular facts of the case. Certainly it is appropriate to use both. The RESTATEMENT, CONFLICT OF LAWS § 112 (Tent. Draft No. 1, 1953), cited in the instant case, states: "A person may be precluded from questioning the validity of a divorce decree if, under the circumstances of the case, it would be inequitable to permit him to do so." For further reference see: Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees — A Comparative*

Study, 65 Harv. L. Rev. 193 (1951) and Note, *The Present Validity of Alabama "Consent" Divorces,* 23 Md. L. Rev. 359 (1963).

Evidence — Confession Obtained While Defendant's Lawyer Denied Access To Him Not Admissible. *People v. Donovan,* 13 N.Y. 2d 148, 193 N.E. 2d 628 (1963). Co-defendants were found guilty of first degree murder. Introduced against them was the written confession of Donovan, one of the co-defendants, taken from him after a period of interrogation and after the police had refused to allow an attorney, retained for him by his family, to see him. At the time the confession was given, Donovan did not know of the attorney or of the police's refusal to allow the attorney to see him. The trial court ruled that the confession was given at a time when defendants were being illegally detained under New York statutory law. In a 4-3 decision, the New York Court of Appeals (Fuld, J.) ordered a new trial, holding that the confession was inadmissible under New York law. New York's statutory and constitutional provisions pertaining to the privilege against self-incrimination and the right to counsel required, in the view of the majority, ". . . the exclusion of a confession taken from a defendant, during a period of detention, after his attorney had requested and been denied access to him." The majority avoided all mention of the question of voluntariness of the confession and in the opinion of the dissent of Judge Burke went against the great weight of authority as stated in *Haynes v. Washington,* 373 U.S. 503, 513 (1963): ". . . the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." Also see the recent case of *Lynumn v. Illinois,* 372 U.S. 528 (1963).

In effect the majority of the court seems to have adopted a version of the federal "McNabb-Mallory" rule enunciated in *McNabb v. U.S.,* 318 U.S. 332 (1943) and *Mallory v. U.S.,* 354 U.S. 449 (1957). This is a rule, adopted by the Supreme Court in its supervisory capacity over the inferior federal courts, which requires the exclusion of all confessions given during a period of illegal detention. See Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue,* 47 Geo. L.J. 1 (1958). While the majority did not explicitly overrule the long line of New York cases rejecting the federal rule and adopting the voluntariness test, see *People v. Elmore,* 277 N.Y. 397, 14 N.E. 2d 451, Annot. 124 A.L.R. 465 (1938), it did, by making a special circum-

stance out of the denial of access to counsel, go far toward that result. Judge Burke's dissent points this out by stating, "If illegal detention does not require exclusion of a confession, how can denial of access, itself but a universally recognized incident of illegal detention, work an automatic exclusion?" While the majority did not base its decision on federal constitutional law it is interesting to note that on the state level, denial of access to counsel for a reasonable period after arrest and before a preliminary hearing does not generally constitute a denial of due process. See *Crooker v. California,* 357 U.S. 433 (1958) and *Cicenia v. Lagay,* 357 U.S. 504 (1958).

In Maryland, the Court of Appeals has consistently held to the test of voluntariness. In *Day v. State,* 196 Md. 384, 397, 76 A. 2d 729 (1950), the court stated, "The failure to have counsel present, or to permit the accused to consult counsel, is not of itself a reason for denying the admission of a confession, provided such confession is shown otherwise to have been given voluntarily." Also see *Presley v. State,* 224 Md. 550, 559, 168 A. 2d 510, *cert. denied* 368 U.S. 957 (1960). While not concerned with denial of access, three recent Maryland cases have reaffirmed the voluntariness test and clarified its extent. See *Prescoe v. State,* 231 Md. 486, 191 A. 2d 226 (1963); *Stewart v. State,* 232 Md. 318, 193 A. 2d 40 (1963) and *Peal v. State,* 232 Md. 329, 193 A. 2d 53 (1963).

Federal Civil Procedure — Travel Expenses Of Witnesses From Places Outside Judicial District And More Than 100 Miles From Place Of Trial Allowed. *Farmer v. Arabian American Oil Company,* 324 F. 2d 359 (2d Cir. 1963). Plaintiff instituted suit against defendant oil company, Aramco, for breach of an employment contract. The first trial terminated in jury disagreement and necessitated a second trial where a verdict for the defendant was returned. In taxing the costs to be allowed defendant for the two trials, the clerk included substantial amounts for air transportation of defendant's witnesses from Saudi Arabia. On plaintiff's motion, District Judge Weinfeld reduced the travel costs of both trials to a uniform allowance of $16 per witness or $.08 per mile for 100 miles each way. This reduction was based on judicial discretion, rather than on the self-imposed 100-mile limitation rule, by which the federal courts have generally limited their power to assess transportation costs of witnesses brought from further than 100 miles away. By this decision, Judge Weinfeld

reversed the determination of Judge Palmieri, who, as judge at the first trial, had allowed these expenses from Saudi Arabia to be taxed as costs.

The Court of Appeals, en banc, reversed and held that Judge Weinfeld had abused his discretion in disturbing Judge Palmieri's ruling. The majority stated that the traditional 100-mile rule was inapplicable as a restraint upon the exercise of a federal court in assessing transportation costs for witnesses brought from long distances away. The majority considered that its position had clear statutory support in 28 U.S.C. § 1821, as amended in 1949, which provides that actual travel expenses, instead of the usual mileage allowance, shall be allowed to *witnesses* who come from long distances away. The majority concluded by stating that the 100-mile rule was "an anachronism in a day when the facility of world-wide travel and the development of international business make the attendance at trial of witnesses from far off places almost a matter of course." Three judges dissented, maintaining that the 100-mile rule should be an inflexible limit on the discretion of the judge in taxing travel costs. From the point of view of the dissent, to change the traditional rule, would be to abandon ". . . the traditional scheme of costs in American courts . . .", and thus reverse ". . . a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means. . . ." For further reference, see Admiralty Rule 47 which explicity adopts the 100-mile limitation rule. Also see 6 MOORE, FEDERAL PRACTICE 1363 (2d ed. 1953) and Peck, *Taxation of Costs in United States District Courts,* 42 Neb. L. Rev. 788, 796 (1963).

Mechanics' Liens — Lessor Of Construction Equipment Not Entitled To Mechanics' Lien For Rental Sums Not Paid By Lessee Of The Equipment. *Lembke Construction Co. v. J. D. Coggins Co.,* ..... N.M. ....., 382 P. 2d 983 (1963). Lembke contracted to do excavation and other work in the construction of a shopping center. The excavation work was then subcontracted to Harris, who leased earth-moving equipment from Coggins for use in the project. Harris did not pay the rent on the equipment and Coggins filed a claim of lien against the owners of the shopping center. Lembke then filed an action for a declaratory judgment to determine whether the rental on the equipment was an item upon which a claim of lien might be based under the New Mexico's Mechanics' and Materialmen's Lien statutes. The Supreme Court of New Mexico

held that the applicable New Mexico statute, N.M.S.A. § 61-2-2 (1953), was not broad enough to include these rental sums.

What debts are lienable items under the mechanics' lien laws of the various states is determined by local statutes. The New Mexico statute gives the lien to "[e]very person performing labor upon, or furnishing materials to be used in the construction. . . ." According to the interpretation by the court, rentals owing for equipment were neither for "labor" nor for "materials". Many courts with similarly worded statutes have reached the same conclusion. See 57 C.J.S. *Mechanics' Liens* § 44 (1948); Annot., 16 L.R.S., N.S., 585 (1908) and *McAuliffe v. Jorgenson,* 107 Wis. 132, 82 N.W. 706 (1900). Other states with more broadly worded statutes have held otherwise. See the California statute, Cal. Civ. Proc. Code § 1181, and the Florida statute, Fla. Stat. Anno. § 84.01 (1941). Also see *Timber Structures v. C. W. S. Grinding & Machine Works,* 191 Or. 231, 229 P. 2d 623, 25 A.L.R. 2d 1358 (1951). The Maryland Mechanics' Lien statute, 5 MD. CODE, Art. 63, § 1 (1957), states that a lien shall exist for "all debts contracted for work done for or about the same, and for materials furnished for or about the same, . . . " Whether a lessor can claim a lien for rentals under this language has not been decided by the Maryland Court of Appeals. For decisions on related issues, see *House v. Fissell,* 188 Md. 160, 51 A. 2d 669 (1946) and *Basshor v. Balto. and Ohio R.R. Co.,* 65 Md. 99, 3 Atl. 285 (1886). By legislative enactment rental sums have been included within the scope of the mechanics' and materialmen's statutes in several states. Aside from the above mentioned California and Florida statutes, see Minn. Stat. Ann. § 514.01 (1945); Tex. Stat. Ann. tit. 90, § 5452 (1957), as amended, Tex. Stat. Ann. tit. 90, § 5452 (2)(b)(2) (1959) and Rev. Code Wash. Ann. § 60.04.010 (1961). The currently extensive use of machines to replace manual labor and the expanding rental of such machines suggests that such statutory changes might well be considered by states with restrictive statutes like New Mexico's.

Sales — Extension Of Implied Warranties To Parties Not In Privity Of Contract. *Jakubowski v. Minnesota Mining and Manufacturing,* 80 N.J. Super. 184, 193 A. 2d 275 (1963). The plaintiff was injured on the job when a grinding disc manufactured by the defendant and supplied by the plaintiff's employer broke. His case rested primarily on a claim for breach of the implied warranty of merchant-

ability. The defense was that, even if the proof did establish such a warranty, it did not extend to this employee. The Superior Court of New Jersey held that the evidence did establish an implied warranty of merchantability and that the plaintiff-employee was within its scope of coverage. In the landmark case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69, 100, 75 A.L.R. 2d 1 (1960), the court stated that the implied warranty of merchantability ". . . extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent." There was no statement that the liability was based in tort and in fact the court stated that it was not necessary ". . . to establish the outside limits of the warranty protection." While it would seem logical to treat the employer here as occupying a position comparable to that of a person using a defective car with the owner's permission, the court in the instant case states, at p. 282 "[W]hat appears to be the sounder approach is that the implied warranty is a matter of strict tort liability, not dependent upon a contract between the parties."

In Maryland, as in most states, privity of contract between plaintiff and defendant has conventionally been required in actions based on breach of implied warranties, *Vaccarino v. Cozzubo*, 181 Md. 614, 31 A. 2d 316 (1943), noted 8 MD. L. REV. 61 (1943). However, the trend in more recent cases throughout the country has been to hold manufacturers of food and beverage products and of dangerous instrumentalities strictly liable to the ultimate consumer, especially where the intermediate purchasers act merely as conduits in the distribution chain, see *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E. 2d 612, Annot. 75 A.L.R. 2d 103 (1958). Maryland does not seem to have followed the trend toward strict liability in food and dangerous instrumentality cases, but rather has required the non-privity plaintiff to allege and prove negligence on the part of the manufacturer, see Note, *Implied Warranty Extending To Persons Not In Privity Of Contract With Seller*, 21 MD. L. REV. 247 (1961).

In *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y. 2d 432, 191 N.E. 2d 81 (1963), cited in the instant case, the court held that a breach of warranty is a violation of the sales contract and is also a tortious wrong. In the *Goldberg* case, the personal representative of a deceased airline passenger was suing both the airplane manufacturer and the manufacturer of the defective altimeter determined to be the cause of the fatal crash. The court held that recovery could be had from the airplane manufacturer based

on strict tort liability for breach of the implied fitness warranty, but that recovery could not be had from the subcontractor who made the defective component. California has also recently held the manufacturer to strict tort liability regardless of privity of contract, *Greeman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P. 2d 897 (1963). The *Goldberg* case was cited in a recent Missouri case, *Morrow v. Caloric Appliance Corp.*, ... Mo. ....., 372 S.W. 2d 41 (1963), in which the court held the manufacturer to be strictly liable to the ultimate user who was injured by a defective gas stove. Also see *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Ia. 1289, 110 N.W. 2d 449 (1961).

The instant case, as well as the other cited cases, all seem to be decided on the basis of strict tort liability. None of the cases have had occasion to consider the applicability and effect of Sec. 2-318 of the UNIFORM COMMERCIAL CODE, now in effect in Maryland, 8 MD. CODE, Art. 95B (1963 Cum. Supp.), which extends the sellers' warranties to any person in the family or household of the buyer, or to a guest in the buyer's home if it is reasonable to expect that person to be affected by the goods. For a construction of this section in Pennsylvania, the first state to adopt the Code, see *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A. 2d 575 (1963). For further reference see: Jaeger, *Privity of Contract: Has the Tocsin Sounded?*, 1 DUQUESNE U.L. REV. 1 (1963) and Prosser, *The Assault on The Citadel*, 69 YALE L.R. 1099 (1960).

Torts — National Park Visitor Injured By Wild Bear Held To Be An Invitee. *Ashley v. U.S.*, 215 F. Supp. 39 (D.C. Nebr. 1963), aff'd per curiam, 326 F. 2d 499 (8th Cir. 1964). The plaintiff and his family were visitors at the Yellowstone National Park. While the plaintiff's wife was driving through the Park the plaintiff fell asleep with his arm protruding from an open window. When his wife stopped the automobile in traffic, a bear bit the plaintiff in the arm. The plaintiff brought suit under the Federal Tort Claims Act. Upon entering the Park the plaintiff had paid a "vehicle admission fee" and had read several leaflets which contained among other items a warning to visitors to stay away from Park bears. The leaflets emphasized this warning by stating the number of prior injuries caused by bears. The plaintiff contended that the United States was absolutely liable under the rule that a person who harbors or owns an inherently dangerous animal is liable for any

injuries caused by it. The District Court rejected this on two grounds: (1) that the language and legislative history of the Federal Tort Claims Act show that "absolute liability" cannot be a basis for suit under the act; and (2) that, unlike private citizens, the United States in maintaining national parks has no choice but to harbor wild animals.

Another contention of the plaintiff was that he was an invitee of the defendant, and the defendant's breach of its duty to an invitee caused his injury. The plaintiff, in an attempt to prove this, introduced evidence showing that soon after his injury park rangers destroyed a bear in the area of the occurrence and that now leaflets warned visitors to close auto windows when bears approach. The court found that under applicable Wyoming law the plaintiff was an invitee. The court determined that under Wyoming law an invitor-invitee relationship can arise even where no business purpose is involved as long as the invitee was either expressly or impliedly invited to the premises by the owner. (The court noted in dicta that the vehicle fee was not decisive in determining plaintiff's status.) As to standard of care, the court found that defendant owed a duty "to use ordinary and reasonable care to keep the premises reasonably safe for his visit and to warn him of any hidden danger." However, the court refused recovery finding that the Park officials did not know that the bear was "dangerous"; the Park officials, in failing to remove a "bold" bear, were merely abusing their discretion and were not negligent; and the warning given to a person of plaintiff's age and maturity was sufficient (and even if not, this was not a proximate cause since the plaintiff was asleep).

The Restatement of Torts, unlike the law applied in the principal case, requires some business relationship between the parties before a person will be classified as an invitee. See, RESTATEMENT, TORTS, §§ 329-387 (1934). Maryland apparently follows the Restatement view. See *Peregov v. Western Md. R.R. Co.*, 202 Md. 203, 95 A. 2d 867 (1953) and note, 18 MD. L. REV. 338 (1958). See also 16 M.L.E., *Negligence* §§ 31-39 (1961).