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Admiralty — Jurisdictional Requirements. *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963). Libellant's decedents were passengers on a scheduled aircraft flight from Boston to Philadelphia. Shortly after take-off, the aircraft crashed into Boston harbor, within one marine league of the shore, thus precluding a cause of action under the Federal Death on the High Seas Act, 46 U.S.C. § 761 (1958). All passengers were killed. Libels in personam were filed in admiralty alleging two causes of action, one being negligence in maintenance, operation and navigation of the aircraft, the second being a contract action for breach of warranty and contract. Although the District Court, 203 F. Supp. 430 (E.D. Pa. 1962), found that the locus of the crash was on navigable waters, it nevertheless, citing *McGuire v. City of New York*, 192 F. Supp. 866 (S.D. N.Y. 1961), held that for admiralty tort jurisdiction to apply, there must be some maritime connection and/or wrong in addition to maritime locality. Maritime connection was defined as conduct which relates to or is involved with shipping, vessels, commerce or the business of the sea. Failing to find such maritime connection between this aircraft flight and the tort, and finding that the contract subject matter in no way related to maritime service or obligation, the District Court held both claims non-justiciable in admiralty.

The Court of Appeals for the Third Circuit affirmed the judgment on the contract action of the District Court, stating that a contract or warranty relating to the physical structure of a land-based aircraft, "and a contract of carriage by air between two cities on the United States mainland are not maritime in substance. . . ." Such contracts do not acquire maritime flavor from a brief flight over navigable waters. The court, however, declined to decide whether similar contracts would be maritime in substance where the flight was primarily trans-oceanic. In reversing the District Court's judgment in regard to libellant's tort claim, this court, following precedent, essentially states that the time and place of impact, where the negligent or intentional force affects the person and/or where the injury is sustained, determines the locus of the tort for admiralty jurisdiction. That the locus of the tort, however occurring and whether or not related to shipping matters or

vessels, is the prima facie test and is sufficient alone for admiralty tort jurisdiction to apply, see: *Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52 (1914); *The Plymouth,* 70 U.S. [3 Wall.] 20 (1865); Comment, 55 COLUM. L. REV. 907, 918 (1955), and 24 MICH. L. REV. 405 (1926).

Automobiles — Virginia's "Implied Consent" Law As Pertains To The Obtaining Of A Chemical Test For Intoxication Or The Forfeit Of Driving License Held Constitutional. *Walton v. City of Roanoke,* 204 Va. 678, 133 S.E. 2d 315 (1963). In 1962 Virginia passed an "implied consent" statute, 4 VA. CODE ANN. § 18.1-155 (Supp. 1962), in an attempt to stem the growing number of fatalities on its roads. The Virginia Advisory Legislative Council, aware of the fact that alcoholic intoxication was a frequent contributor to the present carnage on the highways, had strongly recommended the legislation. It was passed by a large majority in both houses of the Virginia Legislature. See Comment, *Virginia's Implied Consent Statute: A Survey and Appraisal,* 49 VA. L. REV. 386 (1963). The statute, basically, requires a motorist, when arrested for driving under the influence of alcohol, either to submit voluntarily to a chemical test for intoxication (which can be used as evidence against him) or forfeit his driving privilege for a required period of time. In the instant case, Virginia's Supreme Court of Appeals held the statute, in its entirety, to be neither a violation of the Federal Constitution or of the Constitution of Virginia.

Virginia is one of the growing list of states to pass such statutes and the Virginia Supreme Court of Appeals is, likewise, another highest state court to uphold their validity. The constitutional arguments against these statutes, based principally on the 4th and 5th Amendments to the Federal Constitution, have been rejected by the following cases: *Prucha v. Dept. of Motor Vehicles,* 172 Neb. 415, 110 N.W. 2d 75 (1961); *Lee v. State,* 187 Kan. 566, 358 P. 2d 765 (1961) and *State v. Bock,* 80 Idaho 296, 328 P. 2d 1065 (1958). These cases and others are fully explored in, Annot., 88 A.L.R. 2d 1055, 1065 (1961). While the Supreme Court has never held directly on the issue of these statutes, there is substantial reason to believe that the court would uphold their validity. See: *Breithaupt v. Abram,* 352 U.S. 432 (1957); *Holt v. United States,* 218 U.S. 245 (1910), and the analysis in 49 VA. L. REV. 386, 388 (1963).

In the 1964 session of the Maryland Legislature, H.B. 59 was introduced, which, if adopted, would give Maryland a similar "implied consent" statute. It was defeated on the floor of the legislature after an unfavorable committee report. In Maryland in 1963, there were 596 people killed on the highways. It is estimated that alcoholic intoxication was a significant contributing factor in 40% of these fatalities. (Statistics, courtesy of Maryland State Police).

For further reference, especially as to the constitutionality problem see: 8 WIGMORE, EVIDENCE § 2265 (M'Naughten Rev. ed. 1961); Slough and Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing,* 44 MINN. L. REV. 673 (1960); Burgee, *A Study of Chemical Tests for Alcoholic Intoxication,* 17 Md. L. REV. 193, 206 (1959) and Note, 37 N.D.L. REV. 212, 232 (1961).

Constitutional Law — Fluoridation Of Public Water Supply Held To Be A Reasonable Use Of Police Power. *Schurings v. City of Chicago,* 32 U.S.L. WEEK 2478 (March 24, 1964). Appellants brought a taxpayers' action to enjoin the city of Chicago, through its Department of Water and Sewers, from fluoridating the city's water supply. Their contentions were that fluoridation was an unreasonable exercise of the police power and an infringement on their fundamental liberties protected by the constitutional guarantees of due process of law. The Supreme Court of Illinois affirmed the lower court decision against the appellants and concluded that since artificial fluoridation of water had been proven, to its satisfaction, to be reasonably related to the public health, the program adopted by Chicago was a reasonable exercise of the police power.

The Illinois Supreme Court is the most recent state court to uphold the constitutionality of a planned and controlled scheme of adding fluorides to the public water supply. For a collection of cases see, Annot., 43 A.L.R. 2d 453 (1955). Also see for complete discussions, Nichols, *Freedom of Religion and the Water Supply,* 32 So. CAL. L. REV. 158 (1959); Comment, *Legal Aspects of the Fluoridation of Public Drinking Water,* 23 GEO. WASH. L. REV. 343 (1955) and Note, *Constitutional Law-Due Process-Fluoridation of Water Supplies,* 38 NOTRE DAME LAW. 71 (1962).

In Maryland artificial fluoridation of the public water supply has been in effect in many communities since 1952. As of May 1963, approximately 90% of all the water being used by the public from public supplies and systems in Maryland had been treated with controlled amounts of

fluoride. See Md. State Dept. of Health Bull., Vol. 35, No. 5 (May 1963). The power to do this is provided generally in 4 MD. CODE Art. 43, § 388 (1957). This section gives state and local boards of health power to control and to make regulations concerning the waters of the state ". . . in so far as their sanitary and physical condition affect the public health or comfort. . . ." There are no reported court decisions of the constitutionality of fluoridation in Maryland. For further reference, especially as to the contrary view that fluoridation goes beyond the legitimate police power of the state, see: Auchter, *Fluoridation: A Study of Philosophies,* 46 A.B.A.J. 523 (1960).

Creditor's Rights — Quantum Meruit Suit For Professional Services Will Support Garnishee Process Though Amount Of Claim Is Not Ascertained. *Welsh v. Woods,* ..... Haw. ....., 386 P. 2d 886 (1963). Appellant's suit was based on quantum meruit for professional legal services. Garnishee process was served, which defendant moved to quash, on the grounds that the claim was unliquidated and not the type to support garnishment. The defendant argued that the applicable statute, Rev. Laws Haw. 1955, § 237-1 (Supp. 1961), limiting garnishment to actions brought by a "creditor" against his "debtor", restricted the meaning of "debt" to liquidated claims. In overruling the trial court, the Supreme Court of Hawaii held that such a claim was within the meaning of the statute, since the creditor-debtor relationship could exist even where the amount of the claim was not ascertained and reasonable witnesses might differ as to the amount of the claim. One judge dissented, arguing that ". . . the instant claim is still clearly unliquidated in that its ascertainment requires the exercise of judgment, and not mere calculation." In support the dissenting judge cited several Maryland cases (referred to below) and 2 POE, PLEADING AND PRACTICE § 415 (5th ed. 1925). The majority defined debt as a promise, whether express or implied, to pay as much as certain goods or labor were worth. As an action in quantum meruit was an action to enforce an implied promise to pay, it followed that garnishment might be used. In other words, such a claim as appellant's in the instant suit could be within the meaning of the word "debt", though not readily ascertainable or liquidated. See *Hall v. Parry,* 55 Tex. Civ. App. 40, 118 S.W. 561 (1909) and Annot., 12 A.L.R. 2d 787, 810 (1949). On this basis it was unjust, said the majority, to bar a creditor from this remedy, because there was no express

agreement that had ascertained the amount of his claim, when the amount of the debtor's liability could and would be determined by later appropriate judicial procedure.

In Maryland, under a set of similar facts, an amount claimed in quantum meruit for professional services rendered has been declared unliquidated and consequently, not within the contemplation of "debt" as used in the Maryland attachment statute, see MD. RULE G41 and *Steuart v. Chappell,* 98 Md. 527, 57 Atl. 17 (1904). However, attachment or garnishment may be allowed where ex contractu damages are unliquidated, if the strict provisions, including posting of bond by the plaintiff, of MD. RULES G41 and G42 are followed. A well-considered opinion, with a complete discussion of the problem of the meaning of debt as used in the above Maryland statute, may be found in *Blick v. Mercantile Trust Co.,* 113 Md. 487, 77 Atl. 844 (1910). For commentary, including the required liquidation of various types of claims, see Rhynhart, *Attachments In the People's Court of Baltimore City,* 14 MD. L. REV. 235 (1954). Also see, Comment, 34 U. DET. L. J. 428 (1957).

Criminal Law — American Law Institute's Model Penal Code Test For Insanity Adopted In The Tenth Circuit. *Wion v. United States,* 325 F. 2d 420 (10th Cir. 1963). Appellant was charged with causing an explosive to be delivered by mail with intent to injure the addressee. From a conviction in the United States District Court for the District of Colorado, he appealed, challenging the instructions of the court concerning his mental capacity to commit the crime charged. The trial court's charge to the jury, in accord with another Tenth Circuit decision, *Coffman v. United States,* 290 F. 2d 212 (10th Cir. 1961), was basically in the form of the M'Naghten Rule combined with the "irresistable impulse test". The court in *Wion* had been requested to instruct the jury in accord with the test prevailing in the Third Circuit, see *United States v. Currens,* 290 F. 2d 751 (3d Cir. 1961), a test substantially incorporated in the American Law Institute's MODEL PENAL CODE Section 4.01 (Proposed Final Draft, 1962). After finding that the components of *Coffman* were also included in the Model Penal Code Test, the court of appeals selected the wording of the American Law Institute's Test as the construction which would be most easily understood when submitted to a jury: "A person is not responsible for criminal conduct if at the time of such conduct as a result

of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."

Maryland has traditionally followed the M'Naghten Rule, see *State v. Spencer,* 69 Md. 28, 13 Atl. 809 (1888); 7 MLE *Criminal Law,* § 22 (1961). In 1958, a committee was appointed by the Legislative Council of Maryland to study the laws for the commitment of mentally ill persons. The committee adopted a test similar to the Model Penal Code Test, taking careful note to exclude defective delinquents, as provided for in 3 MD. CODE (1957), Art. 31B, § 5, from its coverage. Other minor changes are the substitution of "deficiency of intelligence" for "defect" and "sufficient" for "substantial" in a formulation otherwise identical with the Model Penal Code Test. In January, 1962, the Bar Association formally approved the test, see *Transactions of the Maryland State Bar Association, Mid-Winter Meeting, 1962,* pp. 46-71, 307-311. This test was brought before the Maryland State Legislature in the Fall of 1962 but died in the House Judiciary Committee, having never been brought to the floor for debate. This has been the usual fate of any proposed charge of the M'Naghten Rule in Maryland; however, the bill is again scheduled to be presented to the legislature. For further reference see: *McDonald v. United States,* 312 F. 2d 847 (D.C. Cir. 1962); Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists,* 41 IOWA L. REV. 485 (1956); Sobeloff, *Insanity and the Criminal Law: From M'Naghten to Durham and Beyond,* 15 MD. L. REV. 93 (1955); *Symposium on Insanity,* 45 MARQ. L. REV. 477 (1962); Comment, *M'Naghten Remains Irreplacable: Recent Events in the Law of Incapacity,* 50 GEO. L.J. 105 (1961); 15 MD. L. REV. 44 (1955); 45 A.L.R. 2d 1447 (1956).

Perpetuities — Leasehold Estate To Commence "On Completion Of" Building Not Void Under The Rule Against Perpetuities. *Wong v. Digrazia,* 35 Cal. Rptr. 241, 386 P. 2d 817 (1963). Plaintiff and defendant entered into an agreement, part of which provided that defendant agreed to lease to plaintiff, for a period of 10 years, a building to be constructed by defendant. The lease was to commence "upon completion" of the building. A dispute arose between the parties and plaintiff sought rescission. Plaintiff relied primarily on the case of *Haggerty v. City of Oakland,* 161 Cal. App. 2d 407, 326 P. 2d 957 (1958), which had held

a similarly worded lease void under the rule against perpetuities. The court construed the "upon completion" clause to mean that the lessee's interest vested only upon such completion.

The Supreme Court of California found that the lease was not void under the rule and held, to the extent the *Haggerty* case expressed a contrary position, it was overruled. The court decided that the lease imposed on defendant an obligation to complete construction within a reasonable time and that all rights under the lease agreement would be established within 21 years, for a reasonable time in these circumstances was necessarily less than 21 years. The dissent pointed out that the rule against perpetuities has never depended and should not now depend upon reasonable probabilities as they existed at the time of the lease agreement or as they developed afterwards. To introduce the idea of reasonable probabilities into this area of the law was, said the dissent, to encourage litigation and confuse the law in an area where the law should be well settled.

"On completion" leases are a fairly new idea in commercial development. They are used extensively in shopping center leases. The *Haggerty* case was the first case in which their validity was tested on the appellate level. The case was not particularly well received. See Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives,* 73 HARV. L. REV. 1318 (1960); Note, 47 CAL. L. REV. 197 (1959) and 10 HASTINGS L. J. 439 (1959). It would now seem that the California court, in the instant case, has decided not to [adhere to] such a "rigid mechanistic operation of the rule". See also, *Southern Airway Co. v. DeKalb County,* 101 Ga. App. 689, 115 S.E. 2d 207 (1960); *Isen v. Giant Food, Inc.,* 295 F. 2d 136 (D.C. Cir. 1961) and *City of Santa Cruz v. McGregor,* 2 Cal. Rptr. 727 (Dist. Ct. App. 1960).

Service Of Process — Term "Dwelling House" In Federal Rule Liberally Construed Where Defendant Has Actually Received Notice. *Karlsson v. Rabinowitz,* 318 F. 2d 666 (4th Cir. 1963). Service of process on Rabinowitz was effected by leaving a copy with his wife at their Maryland home, three weeks after Rabinowitz had preceded his family in a move to Arizona, where he had bought a home, intending never to return to Maryland. Defendant's family had remained in the Maryland house to complete moving arrangements and sale of house, during which time process

was received by wife and communicated to defendant. The issue involved was whether the substituted personal service effected constituted sufficient compliance with FED. R. CIV. P. 4(d)(1), which states that service can be had on an individual, "by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion. . . ." The United States District Court for the District of Maryland, 31 F.R.D. 234 (Md. 1962), quashed service, holding the Maryland house was not, at that time, defendant's "dwelling house or usual place of abode", and strongly implying that for it to be such, defendant must have had the intention of returning. The Circuit Court of Appeals, in reversing, saw the salient factor to be Rabinowitz's actual receipt of notice, and held that where actual notice of the action and the duty to defend had been received, FED. R. CIV. P. 4(d)(1) should be liberally construed to effectuate service and uphold the jurisdiction of the court, insuring an opportunity for a trial on the merits. See *Rovinski v. Rowe,* 131 F. 2d 687 (6th Cir. 1942). Cases on the interpretation of this rule are collected in 2 MOORE, FEDERAL PRACTICE para. 4.11, at 929 *et seq.* (2d ed. 1962) and in 1 BARRON and HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 177 (1960). The court observed that defendant's intention to return or not (apparently relied on by the District Court and mentioned in many of the case decisions) serves to indicate the likelihood that notice will actually be received, but should not be used as a test in itself to determine the place of abode. There are many state decisions on point and they are in hopeless conflict. See *State ex rel. Merritt v. Heffernan,* 142 Fla. 496, 195 So. 145, 127 A.L.R. 1263 (1940).

Torts — Criminal Conversation And Alienation Of Affections Found To Be Two Distinct Torts. *DiBlasio v. Kolodner and Rezak,* ..... Md. ....., 197 A. 2d 245 (1964). The defendant, Rezak, through his lawyer, Kolodner, instituted an action for criminal conversation with his wife against DiBlasio. Some of the allegations in Rezak's complaint pertained to an action for alienation of affections, which was abolished by 7 MD. CODE Art. 75c, §§ 1-6, 8, 9 (1957). Because of this error in his pleading, the trial court instructed Rezak to amend his complaint, deleting the references to alienation of affections. Rezak complied with this order, and proceeded on a theory of criminal conversation. Rezak's claim against DiBlasio was still

pending when DiBlasio brought suit against him and his lawyer Kolodner for libel in regard to the statements made about him in the first action. DiBlasio contended that since the tort of alienation of affections had been abolished, a claim for criminal conversation had also been eliminated. Proceeding on the theory that the statute had abolished both torts, DiBlasio argued that the statements made against him concerning alienation of affections were not privileged as they were not part of a judicial proceeding, there being no cause of action on which Rezak could have sued.

The Court of Appeals rejected DiBlasio's contentions. Judge Brune pointed out that the two torts have different elements which distinguish them and do not make them one and the same action. Since the statute abolished only an action for alienation of affections and made no mention of criminal conversation, the court reasoned that as the two torts were distinct from each other, a statute applying to one would not apply to the other (in the observance of) an express provision so stipulating. Judge Brune cited a Pennsylvania case, *Antonelli v. Xenakis,* 363 Pa. 375, 69 A. 2d 102 (1949), which reached an identical conclusion in construing a similar statute. The court then determined that the alleged libelous statements were privileged even though deleted, because they were related to the judicial proceeding. See *Kennedy v. Cannon,* 229 Md. 92, 182 A. 2d 54 (1962).

In reaching this result, Maryland has followed the pattern common throughout the country of strictly construing statutes abolishing actions for interference with domestic relations. See, PROSSER, TORTS § 103, at 698 (2d ed. 1955). Because both torts involve the loss of the right to the consortium of the wife there has been a tendency to consider them as identical, but the physical violation involved in criminal conversation, not required in alienation of affections, distinguishes the former from the latter. 42 C.J.S. *Husband & Wife* § 668, at 320 (1944). For further reference see: *Root v. Root,* 31 F. Supp. 562 (N.D. Cal. 1940); 12 M.L.E. *Husband & Wife* § 9 (1961); 27 Am. Jur. *Husband & Wife* § 523 (1940).

Trade Regulation — Deceptive Claims About Caloric Content Of Bread Held To Be False Advertising. *National Bakers Services Inc. v. Federal Trade Commission,* 5 Trade Reg. Rep. (1964 Trade Case.) ¶ 71,061, at 79,196 (7th Cir. 1964). The case arose as an appeal by National Bakers

Services Inc. from a ruling of the Federal Trade Commission ordering it to cease and desist from making certain claims concerning the bread it produced. National's advertising claims were found by the FTC to be "false advertisements" which constituted unfair and deceptive acts in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1914). The appellant, in its various advertising slogans, played on such words as "dieting", "sweet, slim trim lines" and "stay slender". Included in practically all of its advertisements was the factual claim that there were "only about 46 calories in an 18 gram slice." As a fact without disputs, there was no significance difference in the caloric content of "Hollywood Bread" and other competing white breads. Also without dispute was the fact that standard brands of bread were normally sold sliced in 23 gram slices which contained approximately 63 calories. Putting these figures together, the FTC and the Circuit Court of Appeals found that, "[T]he only reason that 'Hollywood' bread contains approximately 46 calories per slice instead of approximately 63 calories is because Hollywood bread is more thinly sliced." On this basis, the FTC found, and the Court of Appeals affirmed, that, since the public had no conception of the gram weight of a standard slice, this advertising conveyed the impression that "Hollywood Bread" was lower in calories than competing brands, which it was not, and therefore constituted "false advertisements."

Advertisements which are literally true, but which tend to create a false impression, may be prohibited. The truth, properly framed, can be used to deceive and mislead. See, *Rhodes Pharmacal Co. v. FTC*, 208 F. 2d 382 (7th Cir. 1953) and *Koch v. FTC*, 206 F. 2d 311 (6th Cir. 1953). ". . . [R]epresentations made or suggested . . ." can be used in determining whether a statement is misleading or not, see 15 U.S.C. § 55A (1950). For further reference see: *Annot.*, 65 A.L.R. 2d 225 (1959); Barnes, *Law of Trade Practice — False Advertising*, 23 OHIO ST. L. J. 597 (1962) and Gettleman, *Advertising and The Federal Trade Commission*, 7 Antitrust Bull. 259 (1962).