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Recent Cases

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RECENT CASES

CRIMINAL LAW — Degree of Negligence Necessary to Sustain a Conviction of Involuntary Manslaughter. Defendant was convicted of involuntary manslaughter, the indictment alleging that the homicide resulted from the negligent operation of an automobile in violation of certain statutes of this State. There being no statutory definition of the offense in South Carolina, the trial court necessarily charged the Common Law definition that "involuntary manslaughter may consist in the killing of another without malice and unintentionally but while one is negligently engaged in doing a lawful act". The usual definition of negligence was stated but the jury was not instructed as to gross negligence, recklessness, or wantonness. Defendant appealed on the ground that the trial court erred in not charging that the State must show gross negligence or recklessness and that ordinary negligence would not suffice. On appeal, HELD, affirmed. An automobile is a dangerous instrumentality and the want of ordinary care in the handling of such is the equivalent of culpable or gross negligence. *State v. Barnett,* 218 S. C. 415, 63 S. E. 2d 57.

The negligence required for a conviction of involuntary manslaughter is generally greater than that called for in civil issues and must be of a gross or flagrant character. *State v. Davis,* 128 S. C. 265, 122 S. E. 770 (1924); *State v. Satterfield,* 198 N. C. 682, 153 S. E. 155 (1930). It must be of such a nature as to display an indifference to consequences which will be a substitute for actual criminal intent. *State v. Clardy,* 73 S. C. 340, 53 S. E. 493 (1905). Some jurisdictions have interpreted the terms "culpable negligence" or "criminal negligence", in their statutes defining involuntary manslaughter, to mean a grossly careless disregard for the public safety and welfare. *Cannon v. State,* 91 Fla. 214, 107 So. 360 (1926); *Cain v. State,* 55 Ga. App. 376, 190 S. E. 371 (1937). Wisconsin courts define gross negligence as a willingness to inflict injury which the law deems equivalent to an intent to injure. *State v. Whatley,* 210 Wis. 15, 245 N. W. 93 (1932). And in the common law jurisdictions there must be more than simple negligence on the defendant's part in order to sustain a conviction. *State v. Davis, supra.* As a general rule, there need be shown only simple negligence in the handling of a highly dangerous instrumentality in order to sustain a conviction of involuntary manslaughter; whereas a greater degree of negligence must

be evidenced in the case of one handling a harmless instrument. *State v. Gilliam,* 66 S. C. 419, 45 S. E. 6 (1903); *Pamplin v. State,* 21 Okla. Cr. 136, 205 P. 521 (1922). Decisions are almost unanimous in holding that an automobile is not a dangerous instrumentality. *Fielder v. Davison,* 139 Ga. 509, 77 S. E. 618 (1913); *Maloney v. Kaplan,* 233 N. Y. 426, 135 N. E. 838 (1922). However, a vehicle in a bad state of repair is inherently dangerous. *Texas Co. v. Veloz,* .... Tex. ...., 162 S. W. 377 (1913). In spite of majority opinion to the contrary, a few jurisdictions, including South Carolina, have held an automobile a dangerous instrumentality, and consider one causing death through its negligent use as guilty of manslaughter as had the death resulted from the use of fire arms. *State v. Hanahan,* 111 S. C. 58, 96 S. E. 667 (1918); *Southern Cotton Oil Co. v. Anderson,* 80 Fla. 441, 86 So. 629 (1920). In South Carolina the statutory offense of reckless homicide provides a fine of not less than $1,000 nor more than $5,000, or imprisonment for not more than five years, or both, when the death of any person results from injuries received by the driving of any vehicle in reckless disregard of the safety of others. Sec. 56 S. C. Acts and Joint Resolutions 1949, p. 482. It is sometimes argued that statutes such as these are designed as substitutes for the common law manslaughter offense, which provides a maximum penalty of three years when death results from the use of motor vehicles. *Phillips v. State,* 204 Ark. 205, 161 S. W. 2d 747 (1942); *People v. Crow,* 48 Cal. App. Rep. 666, 120 P. 2d 686 (1941). But in South Carolina, the statute discloses a contrary intention; it provides that the offense of reckless homicide "shall not affect, impair, or repeal" the statute fixing the punishment for involuntary manslaughter. Sec. 56 S. C. Acts and Joint Resolutions 1949, p. 482.

The decision supports the rule that an automobile is an inherently dangerous instrument, but it must be conceded that only scant support can be found for it in other jurisdictions. A motor vehicle has many inherent, dangerous propensities. In the hands of an inexperienced, incapable or physically handicapped driver, it becomes dangerous, but certainly it is not *per se* a dangerous instrumentality. It seems South Carolina is confronted with a rather peculiar situation in automobile-homicide cases not involving the elements of murder. The solicitor may prosecute the accused for reckless homicide in which event the State must show recklessness, or he may seek a conviction for involuntary manslaughter, which requires only simple negligence. Therefore, a person guilty of only simple negligence in the handling of an automobile must be given a mandatory jail sen-

tence, while one guilty of recklessness may be subject to a fine as an alternative. In the present case two Justices concurred solely on the basis of the doctrine of stare decisis, illustrating a weakness in the decision and a possible turn toward the contrary.

H. V. HARLESS.

PUBLIC OFFICERS — Effect of Resignation Prior to Election or Appointment. A county sheriff died in office after serving approximately one year of a four year term. Respondent, deceased sheriff's wife, was promised the recommendation of the county delegation for appointment to the unexpired term, provided she execute and deliver to the delegation an undated resignation of the office. Respondent complied with the condition, was duly recommended by the delegation, and was appointed by the Governor to the sheriff's office, which she held at the time of this action. Some fourteen months after respondent was appointed, a member of the county delegation submitted the resignation to the Governor and the Governor accepted. Respondent repudiated the resignation immediately. Subsequently, the Governor, on recommendation of the delegation, appointed the petitioner to fill the alleged vacancy created by the resignation. This action was a proceeding of original jurisdiction in the Supreme Court in the nature of mandamus to determine which party had the right to exercise the office of sheriff. HELD, for respondent. The undated resignation executed by respondent before her appointment and qualification was void; and no vacancy existed to which petitioner could be appointed. *Jackson v. White,* 218 S. C. 311, 62 S. E. 2d 776 (1950).

There has never been any question in this country but that an *incumbent* of a civil office has a right to resign his office. *State ex rel Young v. Ladeen,* 104 Minn. 252, 116 N. W. 486 (1908). *Incumbent* refers to him alone who has possession of the office. *Miller v. Board of Supervisors,* 25 Cal. 94 (1864). To constitute a complete and operative resignation of office, there must be an intention to relinquish a part of the term, accompanied by the act of relinquishment. *State ex rel Young v. Ladeen, supra; Biddle v. Willard,* 10 Ind. 62 (1857). However, a resignation implies that the person resigning has been elected or appointed into the office which he resigns. A man cannot resign that to which he is not entitled and which he has no right to occupy. *The Queen v. Blizard,* L. R. 2 Q. B. 55 (Eng. 1866); *In re Corliss,* 11 R. I. 638, 23 Am. Rep. 538 (1876). There-

fore, one cannot resign an office to which he has been elected or appointed until the time has arrived when he is entitled by law to possess the office, and has taken the oath, given the required bond, and entered upon the discharge of its duties. *Miller v. Board of Supervisors, supra.* An attempt by one to resign an office before he has qualified and entered upon the discharge of its duties is abortive and ineffectual. *Miller v. Board of Supervisors, supra.* The obtaining of a resignation from a person before his appointment to a public office is obviously detrimental to the public interest. *Dolphin v. Mayor and Council of Town of Kearny,* 116 N. J. L. 58, 181 Atl. 644 (1935). It has never been contemplated that when the law conferred the power to appoint, but not to remove, the power to remove might be conferred by requiring a person, as a condition precedent to appointment, to place his resignation in the hands of the appointing power. Such a resignation is held to be void from its inception, necessarily, to prevent designing persons from defeating the public will. *People ex rel Dibelka v. Reinberg,* 263 Ill. 536, 105 N. E. 715 (1914). Further, a public officer's resignation, procured by duress, is voidable and may be repudiated, especially where the duress is imposed by authorities having the duty of accepting or rejecting the resignation. *Board of Education v. Rose,* 285 Ky. 217, 147 S. W. 2d 83 (1940). However, in *Pollock v. City of Philadelphia,* 42 D. & C. 127 (1941), the Pennsylvania Court of Common Pleas held; that while courts do not in general look with favor upon undated resignations from public employees, an undated resignation will be held effective when freely given, prior to employment, without duress or coercion, for a proper purpose, and where accepted by a lawful authority for a proper purpose, under proper circumstances, before repudiation.

The result reached by the court in the principal case is not only the correct result, but the only possible result if the public is to receive the benefit of independent office holders. The slightest relaxation of the rule on which the principal case was based, such as was done in *Pollock v. City of Philadelphia, supra,* would be disasterous. While there was apparently no evidence of improper purposes by the county delegation in the principal case, such conduct, if allowed to be effective by the courts, would be inductive of unethical practices by designing persons to the great detriment of society.

J. F. BUZHARDT.

ATTORNEY AND CLIENT—Attorney's Liens. Complainant represented defendant in divorce proceedings and secured an agreement whereby defendant's former husband conveyed to her his interest in their home for a reasonable sum of money. Title to the house was conveyed to the complainant, as defendant's attorney, and to the former husband's attorney as a temporary measure to assure compliance with the agreement. It was understood that complainant would not join in reconveying the property to the defendant until his fees were fully paid. Because of threatened suit by defendant to compel the complainant to join in reconveying the property, the complainant entered this suit claiming a lien on the real property. The lower court entered a decree for the defendant and complainant appealed. On appeal, HELD, affirmed. Where property was conveyed to complainant-attorney and opposing counsel, not for benefit of counsel but in trust for respective clients, with understanding that the two attorneys would reconvey to complainant's client as soon as agreement could be carried out, complainant attorney had no lien on real property for services rendered. *Ashman v. Shecter,* .... Md. ...., 76 A. 2d 139 (1950).

Attorney's liens are of two kinds; one is called the general, retaining, or possessory lien, and the other the special, particular, or charging lien. *Northrup v. Haywood,* 102 Minn. 307, 113 N. W. 701 (1907); *Hale v. Tyson,* 202 Ala. 107, 79 So. 499 (1918). The general or retaining lien of an attorney is the lien which attaches to the client's papers, money, or documents connected with the litigation and coming into the attorney's hands in the course of his employment, and gives the attorney the right to retain such papers, property, or money until all his cost and charges against his client are paid. *In re Heinsheimer,* 214 N. Y. 361, 108 N. E. 636 (1915). It is a common law lien founded and depending upon possession. *Reynolds v. Warner,* 128 Neb. 304, 258 N. W. 462, 97 A. L. R. 1128 (1935). As distinguished from the retaining lien, the charging lien of an attorney is an equitable right to have the fees and cost due to him for services in a suit secured to him out of the judgment in that particular suit. *Weed v. Bontelle,* 56 Vt. 570, 48 Am. Rep. 821 (1884); *Robertson v. Pettery,* 114 W. Va. 78, 170 S. E. 901 (1933). This lien is not dependent on, nor does it rest upon possession, but is based upon the broad principle of justice that an attorney, as a recognized officer of the court, should be paid his fees and expenses out of any judgment obtained as a result of his labor and skill. *Collins v. Thuringer,* 92 Colo. 433, 21 P. 2d 709 (1933). The minority of courts in the United States follow the English and Canadian view

that the charging lien of an attorney is confined to his taxable cost and disbursements in the suit. *Skinner v. Sweet,* 3 Madd. 244, 56 Eng. Rep. 499 (1818); *Scharlock v. Oland,* 1 Rich. L. 209 (S. C. 1845); however, courts in the majority have extended this lien to include compensation for the service of the attorney. *Coughlin v. New York C. & H. R. R.,* 71 N. Y. 443, 27 Am. Rep. 75 (1877). In absence of statutory provision an attorney has no lien upon the naked cause of action of his client, but such lien attaches only after judgment is rendered. *Stearns v. Wollenberg,* 51 Ore. 88, 92 P. 1079 (1907). By statute a number of states allow a charging lien to attach to the judgment rendered upon real estate, moneys, or other property recovered by means of his exertions and labors; *Stenart v. D'Esterre,* 187 App. Div. 935, 174 N. Y. S. 922 (1919), affirming 170 N. Y. S. 936 (1918); however, in absence of statute or agreement providing therefor, many jurisdictions refuse to allow such attachment. *Hull v. Culver,* 143 Ill. 506, 32 N. E. 265 (1892). At common law it is held, by weight of authority that an attorney has no charging lien against land involved in litigation, which he has recovered for his client, or the title to which he has successfully defended against attack. *W. T. Rawleigh Co. v. Timmerman,* 205 Ala. 233, 87 So. 372 (1920); *Humphrey v. Browning,* 46 Ill. 476, 95 Am. Dec. 446 (1868); *Smalley v. Clark, 22* Vt. 598 (1850); *McCoy v. McCoy,* 36 W. Va. 772, 15 S. E. 973 (1892). Thus, in *McCoy v. McCoy, supra,* it was held that an attorney had no lien on land for his services in obtaining a decree directing a sale thereof for the payment of debts; and it was further held in *Smalley v. Clark, supra,* that a solicitor in chancery who successfully prosecuted to final decree a suit to quiet title to his client's land had no specific lien on the lands for his fee. Courts in the minority have held that even in the absence of statute or contract providing therefor, an attorney has a lien for his services on realty recovered for his client. *Scott v. Kirtley,* 113 Fla. 637, 152 So. 721, 93 A. L. R. 661 (1933).

The result reached in the instant case is in accord with the greater weight of the decided cases in the United States. This case is even clearer than those above setting forth the majority rule because here the complainant did not even acquire the property as a result of the suit to acquire title. The property was conveyed to complainant and opposing counsel, not for the benefit of the counsel but in trust for their respective clients, with the understanding that the two attorneys would reconvey the property to the defendant as soon as the agreement could be carried out. As has been stated attorney's fees are not taxable as cost, and so if an attorney's lien were allowed on real

property, a bona fide purchaser of the property or judgment creditors might suffer grievous loss. The law does not encourage secret liens and if liens were allowed for the professional services of lawyers, no one could foresee the difficulties and confusion that would result, as every tract of land which had been the subject of litigation would lose most of its exchangeable value from an apprehension of some latent lien in favor of some attorney.

B. B. BOZEMAN.

CONFLICT OF LAWS — Extrastate Enforcement of State Tax Laws. Plaintiff, a municipal corporation, levied a tax on personal property of defendant which was situated in plaintiff's jurisdiction in 1943. To collect this claim, which became a debt according to the laws of Michigan, the plaintiff brought suit in the Municipal Court of the City of New York. The defendant prevailed on a motion for dismissal of the complaint on the grounds, *inter alia,* that the court lacked jurisdiction of the subject of the action. The Appellate Term reversed this determination. On appeal, HELD, reversed. New York courts do not lend themselves to the enforcement of revenue laws of another state. *Wayne County v. American Steel Export Co.,* 101 N. Y. S. 2d 522 (1950).

In England, the previously oft-asserted dictum that the courts of one state will not enforce the revenue laws of another was asserted as ratio decidendi in *Municipal Council of Sydney v. Bull,* 1 K. B. 7 (1908). Thereafter in England a strict application of the rule appears to have been established, *e. g., The Queen of Holland v. Drukker,* 1 Ch. D. 877 (1928). In the United States, revenue laws have generally been classed with penal laws as being extraterritorially unenforceable. The leading case, *Colorado v. Harbeck,* 232 N. Y. 71, 133 N. E. 357 (1921), in disallowing a Colorado suit against the estate of a former resident, uttered the now famous dictum that one state will not enforce the revenue laws of another. In New York the doctrine as so stated has now become the established law. *In re Bliss' Estate,* 121 Misc. Rep. 773, 202 N. Y. S. 185 (1923); *Matter of Martin,* 255 N. Y. 359, 174 N. E. 753 (1931); *In re Daltroff's Estate,* 43 N. Y. S. 2d 75 (1943). A federal court first considered the issue in *Moore v. Mitchell,* 30 F. 2d 600 (2d Cir. 1929), aff'd on other grounds, 281 U. S. 18 (1930), where the United States Supreme Court expressly refused to decide the question of extrastate enforcement of tax laws. Dicta in several subsequent opinions of the Court are favorable to the enforcement of tax claims arising in sister states. See *Milwaukee County v. M. E. White Co.,* 296 U. S. 268, 275 (1935); *Massachusetts v. Missouri,* 308 U. S. 1,

20 (1939). In perhaps the earliest contra holding, the Supreme Court of North Carolina allowed a recovery of taxes due under the statutes of another state in *Holshouser Co. v. Gold Hill Copper Co.,* 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 183 (1905), although in so doing it did not expressly consider the doctrine here reviewed. More significantly, the St. Louis Court of Appeals in *State ex rel. Oklahoma Tax Commission v. Rodgers,*[1] 238 Mo. App. 1115, 193 S. W. 2d 919, 165 A. L. R. 785 (1946), squarely challenged, seriatim, the arguments in support of the established rule and in a persuasive opinion upheld the propriety of entertaining a suit to collect a tax levied in another state. In a recent Ohio case, the views expressed in the *Rodgers* case were given weight in overruling a demurrer to a suit for extra-territorial collection of taxes, although the petition was found defective on other grounds. *Minnesota v. Karp,* 84 Ohio App. 51, 84 N. E. 2d 76 (1948). A February, 1951, Kentucky decision was to the effect that its courts were not precluded from furnishing extra-territorial enforcement of Ohio tax laws. *State of Ohio ex rel. Duffy v. Arnett,* 234 S. W. 2d 722 (Ky. 1950). Contra: *Detroit v. Proctor,* 61 A. 2d 412 (Del. 1948).

In South Carolina it appears that the issue of the extraterritorial enforcement of the revenue laws of sister states is a matter *res integra.* It cannot be questioned that the principal case was decided in accordance with the weight of authority both in Great Britain and the United States. However, there are indications of a trend to the contrary, based on the compelling considerations which provided the rationale of the *Rodgers* case. The possibility of evasion of taxes by the simple expedient of crossing a state line presents a serious loophole in existing machinery for the collection of revenue. There is no extradition to reach tax evaders, except as to criminal tax violators. There appears to be an increasing public morality concerning the payment of taxes which might well be the forerunner of a change in the current of judicial authority. Some states are meeting this challenge with legislation providing that the revenue laws of other states will be enforced on a reciprocal basis. A decision by the Supreme Court expressly broadening application of the full faith and credit clause to include enforcement of sister states' tax claims appears to be required.

T. C. FITZGERALD, JR.

1. The *Rodgers* case has been met with striking approbation in the law reviews, 34 CALIF. L. REV. 754 (1946); 46 COL. L. REV. 1013 (1946); 41 ILL. L. REV. 439 (1946); 15 KAN. CITY L. REV. 52 (1946); 31 MINN. L. REV. 93 (1946); 24 N. Y. U. L. Q. REV. (1949); 25 TEX. L. REV. 88 (1946); 33 VA. L. REV. 179 (1947). Its views had been presaged in Leflar, *"Extrastate Enforcement of Penal and Governmental Claims,"* 46 HARV. L. REV. 193 (1932).