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RECENT CASES

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DIVORCE—Right of Wife in Property of Husband. Plaintiff sued his wife for divorce on grounds of desertion and she countered for a limited divorce based on his cruelty. The United States District Court for the District of Columbia granted plaintiff a divorce and gave defendant $60,000.00 total alimony plus $60,000.00 which she had taken from their joint safe deposit boxes. The sum awarded defendant was found by this court to be in excess of 35% of the total value of the plaintiff's property and he appeals from this property award. On appeal, HELD, divorce affirmed, denial of petition for a limited divorce affirmed; reversed and remanded as to the property award. In the absence of some right or element of ownership, legal or equitable, on part of a wife in her husband's property the court in a divorce case is without power to order transfer of that property to her. *Keleher v. Keleher,* 192 F. 2d 601 (1951).

The general rule is that a wife in a divorce proceeding is not entitled to have any specific parcel of real estate assigned as her own. *Wheeler v. Wheeler,* 88 U. S. App. D. C. 193, 188 F. 2d 31 (1951); *Philips v. Philips,* 106 Va. 105, 144 S. E. 875 (1928); *Lovegrove v. Lovegrove,* 128 Va. 449, 104 S. E. 804 (1920). This rule extends to the personal as well as the real property of the parties. *Ring v. Ring,* 185 Va. 269, 38 S. E. 2d 471, 165 A. L. R. 1237 (1946); *Barnes v. American Fertilizer Co.,* 144 Va. 692, 130 S. E. 902 (1925). Although the courts may not award the husband's property to the wife as alimony, they may, in the enforcement of the alimony awarded to the wife, place a lien on the husband's property. *Selvy v. Selvy,* 115 W. Va. 338, 177 S. E. 437 (1934); *Nelson v. Nelson,* 149 Minn. 285, 183 N. W. 354 (1921); *Carnahan v. Carnahan,* 143 Mich. 390, 107 N. W. 73, 8 Ann. 53 (1906). The authority of the courts, in actions for divorce, to transfer the property of either party to the other, or otherwise to dispose of it, is purely statutory. *Anderson v. Anderson,* 380 Ill. 435, 44 N. E. 2d 54 (1942); and inasmuch as the jurisdiction of divorce cause is purely statutory, the court possesses no power not granted to it by the statute. *Mayes v. Mayes,* 342 Mo. 401, 116 S. W. 2d 1 (1938); *Mattison v. Mattison,* 1 Strob. Eq. 387

(S. C. 1847). On the other hand, the Washington court held in *Osetreich v. Osetreich,* 2 Wash. 2d 72, 97 P. 2d 655 (1939), that in divorce actions all property of spouses, both community and separate, is brought within the jurisdiction of the court for disposal, and can be disposed of in any manner that may be equitable and just, even to extent of awarding all the property to the wife. However, the courts will not transfer the property of the husband to the wife in fee simple, unless the wife shows special equities justifying such transfer. *Holm v. Holm,* 27 Wash. 2d 456, 178 P. 2d 725 (1947); *Anderson v. Anderson, supra.* Thus, to warrant the court to direct a conveyance of property from one to the other, the special circumstances and equities must be alleged in the complaint. *Skoronski v. Skoronski,* 395 Ill. 301, 69 N. E. 2d 690 (1946); *Podgornik v. Podgornik,* 302 Ill. 124, 63 N. E. 2d 715 (1945). Also, the relief granted against a defaulting defendant to that demand in the plaintiff's pleadings is confined to only what was asked for in the complaint. *Rinker v. Rinker,* 3 N. J. Super 251, 64 A. 2d 910 (1949); *Burtnett v. King,* 33 Cal. 2d 805, 205 P. 2d 657, 12 A. L. R. 333 (1949); *Johnson v. Swanson,* 209 Ark. 144, 189 S. W. 2d 803 (1945). Where the pleadings put in issue the status of the property and the rights of the parties therein, the court may determine whether the property is separate or community and quiet title in the rightful owner, *Huber v. Huber,* 27 Cal. 2d 784, 167 P. 2d 708 (1946); and the courts may make such division of the community property, in reference to the condition of the parties, as may be equitable and just. *Donovan v. Donovan,* 231 Iowa 14, 300 N. W. 656 (1941); *Trimble v. Trimble,* 15 Tex. 19 (1855). Where a divorce is granted to a wife for the husband's adultery, the court may in its discretion give all the community property to her. *Aston v. Aston,* 14 Cal. App. 323, 111 P. 1035 (1910). Although, in the absence of statute a court on decreeing a divorce from bed and board to the wife cannot deprive her of dower or other marital rights in the husband's estate, at least not without making compensation therefor, *Norman v. Norman,* 88 W. Va. 640, 107 S. E. 407 (1921), where the statutes so provide, the wife on an absolute divorce is entitled to a dower interest in the husband's real property. *Davol v. Howland,* 14 Mass. 219 (1817). However, the wife is not entitled to dower during the life of her husband. *Tierney v. Tierney,* 50 R. I. 105, 145 A. 444 (1929).

137 South Carolina Statutes at Large, Section 12 (1949), as amended by 46 South Carolina Statutes at Large (1950), provides: "on the granting of any final decree of divorce, the wife shall thereafter be barred of dower in land formerly owned, then owned, or thereafter acquired by her former husband.

In the instant case the court followed the majority view of the United States jurisdictions and the only view to be taken under the common law. By the great weight of authority the courts do not have jurisdiction over the property of the parties to a divorce proceeding unless such jurisdiction be given by statute. The South Carolina Divorce Act does not give the courts jurisdiction over the property of the spouses other than to the extent of awarding alimony and attorney's fees. Statutes giving the court power to award property of the husband to the wife in divorce proceedings have enlarged the rights of the wife to the degree that such rights are now greater than if she were to remain married. Historically the wife was entitled only to the right of support from her husband. Upon dissolution of the marriage the alimony award is substituted for the right of support and is sufficient to keep the wife from becoming a burden on society.

CARL W. LITTLEJOHN, JR.

STATE SALES AND USE TAX—Exemptions Under Atomic Energy Act. Actions to test the validity of state sales and use taxes were brought by Roane-Anderson Company and others, and by Carbide and Carbon Chemicals Corporation and others against Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee. Roane-Anderson manages the government-owned town of Oak Ridge, Tennessee; Carbide and Carbon Chemicals Corporation operates the Oak Ridge plants for the production of fissionable materials. Both companies operate under cost-plus-fixed-fee contracts with the Atomic Energy Commission. Judgments of the Chancery Court, in favor of the Commissioner of Finance and Taxation, were reversed by the Supreme Court of Tennessee. The court held that respondents were independent contractors and as such were not exempt from state taxes as there was no implied constitutional immunity attaching to independent contractors by virtue of contracts with a government agency;

however, the taxes are prohibited by Section 9(b) of the Atomic Energy Act of 1946. On certiorari, affirmed by the Supreme Court of the United States. HELD: Purchase and use of materials and supplies by private corporations, in performance of cost-plus-fixed-fee contracts with the Atomic Energy Commission, were activities of Commission exempt from state sales and use taxes under Atomic Energy Act of 1946, exempting "activities" of Commission from taxation by state, county, municipality, or subdivision thereof. *Carson v. Roane-Anderson Co.*, ___ *U. S.* ___, 72 S. Ct. 257 96 L. Ed. 198 (1950).

Possessions, institutions, and activities of the Federal Government are not, in the absence of express congressional consent, subject to any form of state taxation. *U. S. v. County of Allegheny,* 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209 (1944). For instance, a state may not impose a tax upon the privilege of selling gas to the Federal Government for use of its Coast Guard Fleet or Veterans Hospital. *Panhandle Oil Co. v. Mississippi,* 27 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583 (1928). The Atomic Energy Commission is an agency of the Federal Government, and is entitled to all the privileges, immunities and rights of the Federal Government, including that of immunity from state and local taxation. *Graves v. People of State of N. Y. ex rel. O'Keefe,* 306 U. S. 466, 59 S. Ct. 593, 83 L. Ed. 927 (1939). Further, congress has power to provide tax immunities to a Corporation created by it to facilitate the performance of its governmental functions, such as the Home Owner's Loan Corp. *Pittman v. Home Owner's Loan Corp.*, 308 U. S. 21, 60 S. Ct. 15, 84 L. Ed. 11, 124 A. L. R. 1263 (1939). Exemptions of the Federal Land Bank from state taxes extends to sales taxes on purchase made to repair buildings on land acquired by foreclosure of a mortgage. *Federal Land Bank of St. Paul v. Bismark Lumber Co.,* 314 U. S. 95, 62 S. Ct. 1, 86 L. Ed. 65 (1941). But a state can exact occupation tax from independent contractors who are not creatures of the Federal Government since money earned becomes part of gross earnings and the government is no longer concerned with what contractors might be required to pay as tax upon privilege of doing business within the state. *Silas Mason Co. v. State Tax Commission,* 302 U. S. 190, 82 L. Ed. 193 (1936). Nor does a state tax laid upon the gross receipts of an independent contractor, derived from building locks

and dams for the Federal Government within the borders of the state, interfere with the performance of federal functions and is a valid exaction. *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 A. L. R. 318 (1937). *General Constr. Co. v. Fisher*, 295 U. S. 715, 55 S. Ct. 646, 97 A. L. R. 1252 (1934). Neither is a contractor carrying mail immune, as an agency of the Federal Government, from state taxation of property used in performance of the contract, even though the tax is based on the gross receipts of his contract as the burden upon the government is only remote. *Alward v. Johnson*, 282 U. S. 509, 51 S. Ct. 273, 75 L. Ed. 496, 75 A. L. R. 9 (1931). No unconstitutional taxation of means or instrumentalities of the Federal Government is involved in the imposition of a state excise tax on gasoline consumed by a contractor with the government in the performance of a contract for constructing levees. *Trinity Farm Constr. Co. v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469, 78 L. Ed. 918 (1934). The constitutional immunity of the Federal Government is not infringed by a state sales tax upon materials purchased by a contractor for use in carrying out a cost-plus-fixed-fee contract with the government. The Constitution unaided does not prohibit nondiscriminatory state taxation of contractors with the United States, merely because the burden is passed on as a part of the construction cost. *State of Ala. v. King and Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3, 140 A. L. R. 615 (1941). A use tax is valid on materials purchased in another state for use in performing a cost-plus-fixed-fee contract with the United States, even though title to goods passes to government on shipment by seller, and the government reserves the decision whether to buy or not, where the contract clearly contemplates the contractor buying in his own name and on his own credit. *Curry v. U. S.*, 314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9 (1941).

The result of the *Roane-Anderson* case is, as a practical matter, a total reversal of previous Supreme Court decisions pertaining to independent contractors working on cost-plus-fixed-fee contracts with the government. It remains to be seen just how far the court will go in extending this immunity to contractors performing similar government contracts. It is not yet clear whether the court was striving for a particular result in the instant case or whether it intended setting a precedent which will allow a general change of policy in our political and economic system. The tenuous ground upon which

the decision is founded, the broad interpretation of "Activities," leads to the conclusion that the court was only attempting to reduce the tremendous Atomic Energy expenditures; however, it isn't yet clear as to how far the tax immunity will extend even if restricted to the Atomic Energy Program. The court's interpretation of "Activities" could as logically be applied to any contractor working under a government agency, and it is doubtful that Congress has authority to bestow such sweeping tax exemptions upon private enterprise. The decision seems highly questionable since one of the justifications of the tremendous expenditures for Atomic Energy is that private enterprise is to have free access to patents, etc., developed by the program. Under this decision these valuable benefits will be attained free from state taxation which is contrary to our system of non-discriminatory taxation. Further, Congress has in the past specifically refused to allow such exemptions; thus, the Supreme Court has done by implied immunity that which Congress refused to do by legislation.

FRED BLACKWELL

CRIMINAL LAW—Right of Defendant to Withdraw a Plea of Guilty When the Motion is Timely Made. The defendant was indicted in the United States District Court for the Southern District of Florida for attempting to evade income taxes by filing a false return. The defendant in the presence of his counsel and in full understanding of the consequences changed his plea from not guilty to guilty. No elements of coercion, mistake, fear or inadvertence were involved in the defendant's change of plea. Four months thereafter, just before sentence by the District Court, the defendant moved to withdraw his plea of guilty and enter a plea of not guilty. The defendant's motion was denied and he was convicted on his plea of guilty. On appeal HELD, affirmed. While a motion to change a plea of guilty is within the reviewable discretion of the District Court and is usually granted if the defendant made his plea in ignorance of his rights or as a result of fear, coercion, or mistake, it was not an abuse of discretion to deny such a plea where defendant's plea of guilty was made in the presence of competent counsel with full understanding of the consequences and the defendant's only justification for

his motion is that he was surprised by the severity of the sentence imposed. *Williams v. United States,* 192 Fed. 2d 39 (1951).

A defendant has no absolute right at common law to withdraw a plea of guilty, *United States v. Denniston,* 89 Fed. 2d 696 (1937), but some statutes provide that the plea of guilty may be withdrawn at any time before sentence as a matter of right. *Kentucky Criminal Code of Practice,* Section 366. Ordinarily, permission to withdraw the plea of guilty is within the trial court's discretion. *State v. Harvey,* 128 S. C. 477, 123 S. E. 201 (1924); *State v. Branner,* 149 N. C. 559, 63 S. E. 169 (1908). A majority of the courts hold that the exercise of this discretion is subject to review, and will be reversed if there is an abuse of discretion. *State v. Harvey,* 128 S. C. 447, 123 S. E. 201 (1924); *Greene v. State,* 88 Ark. 290, 114 S. W. 447 (1908). Even though the majority holds the discretion of the trial court reviewable the trial courts' ruling is usually affirmed where it is based on conflicting evidence and the court was forced to come to a conclusion. *Dobosky v. State,* 183 Ind. 488, 109 N. E. 742 (1915). A minority holds that the discretion to grant or deny a motion for withdrawal of the plea of guilty is an absolute one, the exercise of which will not be reviewed. *Commonwealth v. Ingersoll,* 145 Mass. 381, 14 N. E. 449 (1888). Under the majority view to successfully attack a refusal by the trial court to allow a withdrawal of the plea of guilty, the accused must show that such plea should not be allowed to stand against him because of some reason existing when it was entered, but for which he would not have entered the plea, and that reason must amount to a fraud or an imposition upon him, or a misapprehension of his legal right. *Rachel v. United States,* 61 Fed. 2d 362 (1932). A motion to withdraw a plea of guilty should not be denied, where a proper showing for its allowance is made, merely because defendant on a trial might or probably would be found guilty; and while the burden is on the accused to show cause for the change of his plea, the court's discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused, especially when the accused is not assisted by counsel and his motion is timely. *Bergen v. United States,* 145 Fed. 2d 181 (1944). Defendant's contention that he did not know that he would be subjected to a severe sentence

when he entered the plea of guilty is not sufficient grounds for reversing the trial court's refusal to permit withdrawal of the plea. *United States v. Colonna,* 142 Fed. 2d 210 (1944). However, the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient ground for the court to allow a withdrawal of the plea of guilty. *State v. Williams,* 45 La. Ann. 1357, 14 So. 32 (1893).

The holding of the principal case appears to be in conformity with the majority and the better view; for the cases show that if the plea of guilty was entered due to coercion, surprise, or fraud the courts do not hesitate to allow a withdrawal of the plea. Despite this general tendency to grant the plea it has been emphasized that the presumption is in favor of the ruling of the trial court and their refusal to grant a motion to change a plea of guilty will be affirmed unless the defendant is able to show some grounds for the application. The courts are correct in not attempting to lay down a general rule as to when the court should or should not allow the defendant to withdraw the plea of guilty; for except where controlled by statute this is within the reviewable discretion of the court, such discretion being exercised according to the facts of each particular case. The tendency of the courts is to allow the plea of guilty to be withdrawn if the accused has any credible grounds on which to base his motion, and it appears from the facts of the case that justice will not be served unless the accused's motion is allowed.

D. L. ERWIN

CRIMINAL LAW—Right of Accused to Have Counsel Appointed in Non-Capital Cases. Defendant instituted habeas corpus proceedings in a state court after being convicted of armed robbery. The conviction was based on a plea of guilty. He alleged that the plea was entered without the assistance of counsel, and as a result of statements made by officer which led him to believe the charge was one of breaking and entering. The petition and answer alleged that defendant had been confined to an institution for the mentally deficient. Petition was dismissed by the state court. On appeal, HELD, reversed. The due process clause of the fourteenth Amendment of the United States Constitution requires States to afford assist-

ance of counsel in non-capital cases when there are special circumstances, such as mental deficiency, indicating that the accused could not have a fair and adequate defense without the aid of counsel. *Dominic Palmer v. Stanley P. Ashe,* ___ U. S. ___, 96 L. Ed. 130 (1951).

The fourteenth Amendment of the United States Constitution provides; "No state shall . . . deprive any person of life, liberty, or property without due process of law." Repeatedly the United States Supreme Court has held that this Amendment requires States to furnish defendant assistance of counsel in non-capital cases when there are special circumstances indicating that the accused could not obtain a fair and adequate defense without counsel. *Uverges v. Pennsylvania,* 335 U. S. 437, 93 L. Ed. 127, 67 S. Ct. 184 (1948). However, by statute and constitutional law, a minority of states, including South Carolina, have limited the power to appoint counsel for defense only in capital cases. *Loggins v. State,* 136 Tex. Cr. 549, 125 S. W. 2d 565 (1939). *State v. Jones,* 172 S. C. 129, 173 S. E. 77 (1933). Generally, a majority of the courts have appointed counsel for mentally deficient defendants, *Grogant v. Commonwealth,* 222 Ky. 484, 1 S. W. 2d 779 (1927); for they hold, that under special circumstances, the court is charged with the responsibility to appoint counsel without request. *Commonwealth v. Jones,* 297 Pa. 326, 146 A. 905 (1929). Recognizing this right to counsel as being a part of the fourteenth Amendment of the United States Constitution, the Alabama court defined the special circumstances as being in consideration of age, ignorance, or mental capacity, but not insolvency. *Johnson v. Mayo,* 25 Ala. 2d 772, 40 So. 2d 134 (1949). However, the California court held the appointment of counsel could be made upon a showing by defendant of insufficient funds to pay an attorney. *Dorris v. Crowder,* 26 Cal. App. 2d 49, 78 P. 2d 1039 (1938). Most jurisdictions follow California in holding that a finding of the indigence of the accused is within the discretion of the court. *State v. Gomez,* 89 Vt. 490, 96 A. 190 (1915). Ignorance as a result of lack of formal education, and not actual mental deficiency, is not considered special circumstances such that warrant the court to appoint counsel for accused of a non-capital crime. *State v. Hedgepath,* 228 N C. 259, 45 S. E. 2d 563 (1947).

In the instant case, Mr. Justice Black did not define or prescribe a test to determine the special circumstances under which a state is required to afford assistance of counsel; however, the Supreme Court did establish mental deficiency as sufficient to warrant the appointment of counsel. Generally, the state courts have agreed as to mental incompacity, yet, there is inconsistency as to other circumstances that are deemed adequate to require appointment of counsel. The inconsistences are indicative of the fact that different jurisdictions have different needs to appoint counsel. Certain circumstances are conclusive in themselves to warrant the appointment of counsel, but the majority of the sufficient circumstances would each be an exception within itself. This decision is made in the interest of the propagation of justice by placing in the discretion of the court the power to determine some of the circumstances whereby the court must appoint counsel for all accused in a non-capital case.

RUTHIE WILLIAMS

TRIAL—Competency of Objectionable Testimony When Brought Out by Objecting Party on Cross-Examination. In May, 1926, appellant issued to respondent a life insurance policy containing a total and permanent disability clause which provided for a $50.00 monthly income should the respondent become totally and permanently disabled. The respondent brings suit in this action to recover the total and permanent disability payments provided for in the policy. The court allowed the respondent, over the objection of the appellant, to testify as to what his future earnings would have been had he remained in his former employment. The appellant subsequently referred to the same testimony on cross-examination by bringing out the salary scale of the respondent. Error is assigned as to the admissibility of this testimony. On appeal, HELD, affirmed. Where the respondent is allowed to testify over the objection of the appellant, and the appellant later brings out the same testimony on cross-examination without eliciting reservation of the objection, the testimony then becomes competent and will afford no basis for an appeal from the judgment. *Goudelock v. Prudential Insurance Company of America*, ___ S. C. ___, 65 S. E. 2d 114 (1951).

Admission of testimony of witnesses, if error, is harmless where witnesses were cross-examined upon that testimony without reservation of the previous objection. *Nock v. Fidelity and Deposit Co.*, 175 S. C. 188, 178 S. E. 839 (1935); *Snipes v. Augusta-Aiken Ry. and Electric Corporation, et al.*, 151 S. C. 391, 149 S. E. 111 (1929). This point is illustrated in *Mathis v. Southern Ry. Co.*, 53 S. C. 246, 31 S. E. 240 (1939), where it was held in a suit for personal injuries, that even though respondent's testimony as to his marriage and the number of his children was not material, when appellant called forth the same testimony from the witness on cross-examination, he was then unable to except to appellant's testimony. In *The South Carolina Terminal Co. v. South Carolina and Georgia Railroad Co.*, 52 S. C. 1, 29 S. E. 565 (1897) the learned judge held that irrelevant testimony, after its introduction by both parties, had no more effect than irrelevant testimony which is withdrawn, by the judge, from the consideration of the jury. In line with the foregoing rules as to incompetent testimony being pursued on cross-examination are the rules as to such testimony where only direct examination is concerned. It was held in *Knight v. Sullivan Power Co.*, 140 S. C. 296, 138 S. E. 818 (1927) that on direct examination, objection to testimony is waived where like testimony is not objected to when given by another witness. The same rule applies to testimony entirely by the same witness. *Young v. McNeill*, 78 S. C. 143, 59 S. E. 986 (1907). However, referring again to cross-examination, *Horres v. Berkeley Chemical Co.*, 57 S. C. 189, 35 S. E. 226 (1926) held that appellant does not waive his right to except on appeal to testimony admitted over his objection, by cross-examining the witnesses on the same point or by offering testimony in his own behalf in reply on the same line. In *Green v. Shaw*, 136 S. C. 56, 134 S. E. 226 (1926), which is in line with the *Horres* case, *supra*, Justice Stabler justifies his decision in saying, "We are unable to see why a litigant who has duly objected to the admission of incompetent testimony should be required to choose between foregoing the opportunity to acomplish such legitimate purposes (as testing the credibility of witnesses or combating the effect of the testimony upon the minds of the jury) through cross-examination of the testifying witness and waiving his right of appeal based on the court's error in admitting the testimony."

In the instant case, the court had ruled, on other grounds, that the testimony in question was admissible from its original introduction by the respondent. The issue under consideration, therefore, was not squarely before the court. Even so, in the light of other cases, it appears that two distinct and contradictory views have prevailed. (1) Even though the rule in the case of *Green v. Shaw, supra,* does seem to be justifed by the learned judge, there are very few cases which are in accord with his decision. (2) The other rule, that objection to testimony is waived by subsequent reference thereto upon cross-examination has two phases. The *Mathis* case, *supra,* makes no mention of an objection being reserved. The *Smith* case, *supra,* and the *Nock* case, *supra,* both say that an objection is cured where the same testimony is brought out without reservation of the objection. This view seems to be the weight of authority in the United States. It can be inferred from these holdings, then, that the converse of the rule is that reservation of the objection, which in fact is the taking exception to the order overruling an objection, would allow the appellant to refer to the objectionable testimony on cross-examination and still retain his right to appeal from the order. Such a rule would meet the qualifications inferred from the latter cases and also afford the appellant the right to cross-examine for the reasons outlined by the *Green* case, *supra.*

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