Recent Cases

RECENT CASES

AGENCY — PRESUMPTION — MASTER — SERVANT — DEALER'S LICENSE PLATES: The rebuttable presumption established by the case of *Haring* v. *Connell*,[1] to wit, that the driver of a motor vehicle bearing dealer's tags is presumed to be the servant of the dealer acting in the course of his employment, was at least partially abolished by the Supreme Court of Pennsylvania in the case of *Lanteigne* v. *Smith*.[2]

The facts were briefly: X defendant negligently drove an automobile owned by Y co-defendant, and bearing dealer's plates into the front of a restaurant owned by the plaintiff, thereby causing injuries to the person of the plaintiff and damage to her property. Y defendant owned an automobile sales agency and X defendant operated an automobile repair shop next door. X from time to time repaired Y's cars and also had an agreement with Y whereby he might receive a commission on any automobile he might sell for Y. The trial court charged the jury that the presence of Y's dealer's tags on the automobile raised a rebuttable presumption that X was acting as Y's servant at the time of the accident. Verdict for plaintiff against both defendants. On appeal, the upper court, holding that no presumption existed in favor of the plaintiff, sent the case back for a new trial because of error in the charge.

The Court, in arriving at its decision, cited the case of *Coates* v. *Commercial Credit Company*[3] which stated the policy behind the presumption:

> "—— —— —— as the legislature has specified the occasions on which dealer tagged automobiles may be legally operated it must be presumed that the rules it prescribes are being complied with."

The only uses permitted under legislation then in force[4] were testing of the vehicle or demonstration by the dealer or his employees. Since under the law, cars bearing dealer's tags could be used only by the dealer or by his servants acting in the course of their employment, there was some justification for the presumption.

The legislature has extended the list of permitted uses since the *Coates* case was decided. It is now permissible for one who is not a dealer or the servant of a dealer to drive a car bearing dealer's tags such as members of the dealer's family for their own pleasure;[5] and it is permissible for one regularly employed

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1 244 Pa. 439, 90 A. 910 (1914).
2 365 Pa. 132.
3 310 Pa. 330, 165 A. 377 (1933).
4 Act of April 21, 1911, P.L. 74.
5 Act of May 1, 1929, P.L. 905.

by the dealer to drive a car bearing dealer's tags when he is not in the course of his employment[6] (e.g., for his own pleasure). Since these changes have been made, the Court concluded in the principal case that the reasoning supporting the presumption loses validity and the presumption falls.

In support of its decision the Court referred to dictum of *Morgan* v. *Heinel Motors Inc.*,[7] which asserted that the presumption was precluded from operating under circumstances where a member of the dealer's family was driving an automobile bearing dealer's plates, this by reason that such use was now authorized by the legislature.

Mr. Justice Jones, in a noteworthy dissenting opinion, concluded that the majority of the court in limiting the application of the presumption to the policy stated in the *Coates* case has overlooked other justifiable reasons for its existence.

He pointed to the presumption established by *William* v. *Ludwig Floral Co.*,[8] to wit, that where a name appears on a commercial vehicle, it is owned by that party and the driver of it is his servant acting within the scope of his employment. The operation of this presumption is not limited to any statutory enactments. In *Seiber* v. *Russ Bros. Ice Cream Co.*,[9] the Court stated that the policy behind this presumption is based on facts: 1. that the evidence regarding identity is peculiarly within the possession of the party whose name appears thereon and 2. the outward evidence of ownership or use to which commercial vehicles are being put. The rationale here mentioned for this presumption could also be considered as an influencing factor behind the presumption that a driver of an automobile bearing dealer's tags is the servant of the dealer acting in the course of his employment, according to Mr. Justice Jones. He fails to see why the presumption should fall because the legislature has extended the authorized use of these vehicles to situations not contemplated at the time the presumption was originally established.

A most important factor also apparently overlooked or discarded by the majority of the Court and considered by Mr. Justice Jones was the interpretation of the Act of 1939.[10] It extended the use of automobiles bearing dealer's tags to all regular employees of the dealer. The facts of the case clearly show that the driver of the automobile was at the most an independent contractor who from time to time did work for the dealer, and by no figment of the imagination could be called a regular employee. If such be the case, the reason for not allowing the presumption here would be inconsistent with the facts of the case.

The decision appears to destroy the presumption entirely. The Court pre-

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6 Act of June 27, 1939, P.L. 1135.
7 329 Pa. 360, 197 A. 920 (1938).
8 252 Pa. 140, 97 A. 206 (1915).
9 276 Pa. 340, 120 A. 272 (1923).
10 *Ibid.*

vented it from applying although the driver was not a regular employee or a member of the dealer's family using the car for pleasure. According to its reasoning this should be the only situation where it could apply. We must therefore conclude that the court didn't intend the presumption to apply in any case. There is a possibility, however, that the Court in the future will give weight to the dissenting opinion and either ignore the decision or limit the rule to facts the reasoning will support.

Theodore Eisenberg

CONFLICTS — CONSTITUTIONAL LAW — RECOGNITION OF DIVORCE DECREE RENDERED AT DOMICILE: In the recent case of *Begay* v. *Miller*[1] a very interesting situation concerning the recognition of a divorce decree rendered at the domicile of the parties was presented. As it is a case of first impression, and as the facts out of which the case arose are very singular, they are set out in detail.

Roland Begay and Alice R. Begay, both non-emancipated members of the Navajo Indian Tribe, were married on the Navajo Reservation in Apache County, Arizona, in a civil ceremony. They obtained their marriage license from the clerk of the Superior Court of Apache County. Marital troubles soon developed, and Roland filed a divorce complaint in the Navajo Court of Indian Offenses, a tribal court. A formal written decree of divorce resulted from the hearing which both Roland and his wife attended. (The decree recited that no children were involved.)

Subsequently, Alice R. Begay filed a suit for divorce in the Superior Court Of Apache County. Summons was issued and served on Roland on the reservation, but he failed to answer. Alice not only secured a judgment in her favor, but also received an alimony decree and support money for the maintenance of a minor child born subsequent to the date of the tribal divorce, together with costs and counsel fees. Roland did not make any payments on this decree. Sixteen months later, Alice filed an affidavit charging contempt of court. An order to show cause was issued, in response to which Roland filed a motion to quash on the grounds that the Superior Court of Apache County lacked jurisdiction to enter the divorce decree. After a hearing, the court denied Roland's motion to quash and found him guilty of contempt of court for failure to abide by the terms of the decree of divorce. He was ordered to pay the sum of $1175, and after a warrant and commitment for contempt was issued against him, he was taken into custody on the reservation by the sheriff of Apache County and incarcerated in the county jail. Roland then petitioned the Supreme Court of Arizona for a writ of habeas corpus, which was granted, naming as the respondent the sheriff of Apache County.

The main issue was thus presented, i.e., did the Apache County Superior Court, under the facts set out above, have jurisdiction to enter the decree of divorce in question.

Roland's contention was that the marriage in question was effectually dissolved by the Navajo Court of Indian Offenses and that the Superior Court of Apache County was bound to accord recognition to such decree, and hence the state court lacked jurisdiction to grant the subsequent divorce to Alice and to issue the order for contempt under which he was incarcerated. Roland's

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[1] 222 P.2d 624 (1950).

counsel advanced alternative claims in support of its contention: first, that the Navajos are treaty Indians inherently possessing a right of self-government, which has not been delegated away either by express grant or by agreement with the federal government, or with an individual state; and secondly, that Congress through powers delegated to the Interior Department has given the tribal court jurisdiction over domestic relations between members of the Navajo tribe.

On the other hand, the respondent (the sheriff) not only challenged both of Roland's claims, but asserted three claims of his own: first, that the Navajo Court of Indian Offenses is nothing more than the product of a mere administrative fiat, set up by and subject to the caprice of the Indian Bureau, and that such a court cannot be recognized under either the rules of comity or the full faith and credit clause of the Federal Constitution; secondly, that since Congress by express enactment has declared all Indians citizens of the United States, it would deprive Alice of her rights under the equal protection clause of the 14th Amendment to hold she could not go into the Superior Court and have her marital rights settled in that judicial tribunal; and third, when Roland and Alice applied to the civil authorities for a state marriage license and were married pursuant thereto in a civil ceremony, that these parties acknowledged state jurisdiction over their marital status and any severance of the marital relationship must necessarily be in accordance with and under the sanctity and authority of the state.

The court begins its opinion by recognizing that specifically the law in regard to the domestic relations of Indians is not very clear, as is not the law generally in regard to tribal Indians and their status in the eyes of the law. However that may be, the fact remains that Indian tribal custom marriage and divorce have long been recognized by both federal and state governments.[2] The basis assigned for the Indians having such control over their domestic relations is that originally as a sovereign nation, they had complete control over their affairs. Conquest renders the tribe subject to the legislative power of the United States and terminates the external powers of sovereignty of the tribe, but does not by itself affect the internal sovereignty of the tribe. The latter may, of course, be regulated and qualified by treaties and express Congressional legislation, but except as expressly qualified, the full powers of internal sovereignty are vested in the Indian tribes and their duly constituted organs of government.[3] A review of the legislation relating to the Navajo tribe revealed that there had been no attempt by Congress to regulate or control their domestic affairs. The only legislation applicable in fact gave the tribe the opportunity (which was accepted by the Navajo tribe) to continue to exercise control over its domestic relations. It was under this procedure that Roland secured his di-

[2] 55 C.J.S., Marriage, § 4c.
[3] Handbook of Federal Indian Law, Ch. 7, p. 122.

vorce. Thus, the contention that the jurisdiction was given by the United States was not well taken. The court was careful to point out that the Court of Indian Offenses, when sitting as a court in divorce matters, is not a federal court within the meaning of Art. 3, Sec. 1 of the United States Constitution but is simply a tribal court exercising jurisdiction retained by the Indians over their own domestic affairs.[4]

Conceding the validity of the first decree of divorce, the court saw no constitutional basis for the Arizona court to refuse to recognize its validity. The court is careful to point out that such a decree would not come within the purview of the full faith and credit clause, as such clause applies only between states of the United States, nor would it fall under the comity doctrine, as the application of such doctrine presupposes two independent sovereign nations, because the Navajo tribe is not so recognized. The court then appears to assign as the reason for recognizing such a decree the rule of conflict of laws "that a divorce valid by the law where it is granted is recognized as valid everywhere."[5]

In answer to the sheriff's contention that Alice would be deprived of the equal protection clause of the 14th Amendment, the court dismissed it with the familiar rule that "Constitutional guaranties of equal rights and privileges are for the benefit of only those persons whose rights are affected and cannot be taken advantage of by any other person."[6] But, the court continued, even assuming the sheriff could properly raise his argument on this collateral attack by habeas corpus, his rights have not been infringed at all.

The court could find no authority to support the contention that by taking out a civil license in a state court, Alice and Roland submitted themselves to the exclusive jurisdiction of the state court over their marriage. The only authority on point takes the exact opposite view that such action does not deprive the tribal court of its jurisdiction.[7]

The Arizona Supreme Court is to be commended for its disposition of this proceeding. Its recognition of the validity of the divorce decree awarded by the tribal court was indeed proper and in accord with the prevailing view. The court's frank recognition that it was not bound to accept the tribal court's decree as binding is at the same time both questionable and commendable. It is questionable in that if it is not bound to accept the decree under either the full faith and credit clause (as this only applies to the states of the United States) or the comity doctrine, under what possible reasoning should it accept

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[4] If it were in fact a federal court, it would not have jurisdiction to grant divorces as the states normally have exclusive jurisdiction in the field of domestic relations.
[5] At p. 628.
[6] 11 Amer. Jur., Constitutional Law, § 113.
[7] Handbook of Federal Indian Law, Sec. 5, p. 138.

it? Suppose, for example, that an Indian wife after her husband secured a tribal divorce, brought an action for support in another state. Could the husband validly object if that court refused to recognize the tribal divorce as controlling? Certainly it would not be a violation of the full faith and credit clause not to recognize such a decree. Why could the court not recognize such a decree under the comity theory? Why should the comity theory be restricted to sovereign states? Why not extend it to Indian tribal courts exercising jurisdiction over their domestic relations? And assuming that the comity theory applies only to sovereign states, could it not be argued that the Indian tribe is still an independent sovereign state in regard to its domestic relations? Certainly some certainty and finality should be attached to the tribal divorce decree. Their recognition should not have to depend upon the whim of the court confronted with the problem of recognizing or failing to recognize such a decree.

On the other hand, the Arizona court should be commended for its frank appraisal of the situation. Comity is an ambiguous and often a harmful as well as a useless term. The court's dismissing the comity basis for recognizing the decree avoids the various ramifications attendant with the employment of that concept. Its statement that "a divorce valid by the law where it is granted is recognized valid everywhere" is simply a statement of the common law rule of conflicts. There being no constitutional reason why the court should not recognize such a divorce, as this court asserted, it follows that it should control. Thus this problem becomes no more than a part of the general confusion behind the entire field of conflicts of law, namely, upon what basis is one jurisdiction bound to make use of the law of another jurisdiction in resolving a dispute before it.

Emanuel A. Cassimatis

CRIMINAL LAW—DOUBLE JEOPARDY—SEC. 51 OF THE ACT OF MARCH 31, 1860: In the recent Pennsylvania case of *Comonwealth* v. *Thatcher*,[1] it was held that, where a criminal defendant had been indicted on counts charging him with murder, voluntary manslaughter, and involuntary manslaughter, respectively, and where the trial court had sustained defendant's demurrers to the evidence on the first two counts and the jury had gone on to acquit the defendant of the involuntary manslaughter charged in the third count, the Commonwealth had no right to appeal from the dismissal of the murder and voluntary manslaughter charges, since, in any event, one who had been acquitted by a jury of the misdemeanor of involuntary manslaughter could not thereafter be tried for more aggravated charges of felony based on the same homicide. If the Commonwealth is to preserve its right of appeals in such cases, the Supreme Court indicated, the District Attorney must promptly *nolle pros* his charge of involuntary manslaughter and appeal at once from the trial court's actions striking the other counts.

In reaching this entirely proper decision, the Supreme Court was wisely guided by the relevant provision of the Act of March 31, 1860, Section 51[2] of which provides:

> "If upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before whom such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

But, in seeking to further justify its conclusions, as well as the provisions of the statute which had dictated them, the Supreme Court, speaking through the late Chief Justice Maxey saw fit to expound a series of hasty rationalizations which invite caution's challenge and provoke these comments.

First of all, the Court pointed out,[3] Section 51 of the Act of 1860 is to be commended in that it forbids the double procedure of acquitting for manslaughter and then reindicting for murder, a procedure which "would lead to results both absurd and unjust." For, as the Court said further by way of illustration, if X, though he had already been indicted and acquitted of involuntary manslaughter (i.e. unlawfully killing Y), could later be reindicted for murder (i.e., unlawfully and maliciously killing Y), the second jury would (but for

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1 364 Pa. 326, 71 A.2d 796 (1950).
2 Act of March 31, 1860, P.L. 426, Section 51, 19 P.S. 831.
3 364 Pa. 326, 331.

the prohibited double procedure) have the power to find that, though one jury had already declared that X had *not unlawfully* killed Y—which is the usual, though (as will be pointed out more clearly *infra*) not necessarily the inescapable, conclusion to be drawn under the common law from an acquittal of involuntary manslaughter, *it* could find that X had killed Y *unlawfully and maliciously,* a finding entirely inconsistent with that of jury number one. The Court's error here, of course, is in attributing the wise prohibition of such a procedure to Section 51 of the Act of 1860. Provisions in both the United States[4] and Pennsylvania[5] Constitutions restate the common law guarantee that, "No person shall be subject, for the same offense, to be twice put in jeopardy of life or limb." And, by one of the leading authorities on the common law of the subject,[6] it has been declared that long *before* 1860 this guarantee against the perils of double jeopardy established an acquittal on charges of involuntary manslaughter as a bar to subsequent prosecution, based on the same homicide, for murder.

The Court's next attempt to justify and explain the innocent statutory provision the learned Chief Justice phrased as follows:[7]

> "The double prosecution would also be unjust because it would force the defendant to reveal on his trial for involuntary manslaughter what his defense was, and then when he was tried for murder, the Commonwealth would know how to meet the defendant's evidence and also how to strengthen any part of its case which had proved to be weak in the first trial. Such a procedure is not in accordance with the American idea of fair play and it would be contrary to established standards of just procedure."

But the difficulty with this apparently worthwhile point is that, were it regarded as in any way valid, similar considerations of the "American idea of fair play" would dictate that one who had earlier been tried and acquitted of murder should be immune from subsequent prosecution, based on the same homicide, for involuntary manslaughter. That a criminal defendant has no such immunity, however, has long been the rule, not only in Pennsylvania,[8] but also in those other jurisdictions[9] where conviction of a misdemeanor could not have been had on the original prosecution for felony.

Finally, and "furthermore," the Court continued:[10]

> "If the defendant should be convicted on the same state of facts, of both involuntary manslaughter or of murder, he would be subject to punishment for *both* offenses. Even if the court should suspend sentence

4 U.S. CONST. AMEND. V.
5 PA. CONST. ART. I, § 310.
6 4 STEPHENS, COMMENTARIES ON THE LAWS OF ENGLAND 213 (19th ed. 1928).
7 364 Pa. 326, 332 (1950).
8 See, for examples; 158 Pa. Super. 484, 45 A.2d 235 (1946); 310 Pa. 380, 165 A. 498 (1933); 271 Pa. 95, 141 A. 511, certiorari denied 257 U.S. 659 (1921); and 114 Pa. 372, 6 A. 267 (1886).
9 22 C.J.S. § 283(c).
10 364 Pa. 326, 332.

> on the conviction of involuntary manslaughter (and the court would be under no obligation to do so), the defendant would still have on his record two convictions for one crime. Section 51 of the Act of 1860 was obviously intended to prevent such an anomalous situation as we have just described and to obviate the unjust results that would follow from allowing prosecution and conviction for *two* crimes, on *one state of facts.*"

Passing over the unquestionable truth that there are many situations in which a just law allows "prosecution and conviction for two crimes, on one state of facts"—as where one who commits murder in the course of robbery is prosecuted and convicted for both murder and robbery, one further ponders the Court's reason for again directing its accolade toward the Act of 1860. The common law defense of *autrefois convict,* guaranteed to criminal defendants by the constitutional provisions noted *supra,* established this equitable and judicious principle as a landmark of our common law jurispurdence,[11] and had the Act of 1860 done aught but restate it, such legislation would long ago have been declared unconstitional. Indeed, the Supreme Court itself recognized the true basis for its decision in declaring later:[12] "It is a principle of the criminal law that the greater crime includes any lesser crime which is one of its constituents, and if the Commonwealth tries a defendant for a crime which is a constituent of a greater crime, it is estopped from prosecuting the defendant for the greater crime."

But even this last principle, as it was applied by the common law and by our own Court to cases such as that now in question, merits closer examination. Though the common law always assumed the principle of constitutent crimes to require the conclusion that a jury's verdict of acquittal of involuntary manslaughter precluded any conviction on their part that the defendant might have been guilty of murder, no such conclusion was in logic warranted. It is true, of course, as the Chief Justice pointed out in his opinion, that in the crimes of voluntary and involuntary manslaughter and murder there is a common element of unlawful homicide. Indeed, for this reason the early common law made no distinction between them.[13] But it is hornbook that involuntary manslaughter consists of an unlawful homicide *without* malice, murder of an unlawful homicide *with* malice, and voluntary manslaughter of an unlawful homicide (with malice) but on legally adequate provocation. Under common law rules, therefore, it was theoretically *possible* (though doubtless unlikely) for a jury to acquit of involuntary manslaughter not because they found no unlawful homicide, but rather because they found such an unlawful homicide to have been in-

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11 331 Pa. 145, 200 A. 632 (1938); 328 Pa. 439, 196 A. 10 (1938); 313 Pa. 537, 169 A. 764 (1934); and 85 Pa. Super. 424 (1925).
12 364 Pa. 326, 332.
13 *Communication to the Legislature* by the Law Revision Committee of the State of New York, Legislative Document (1937) No. 65, pp. 536-540.

spired by malice—to have been, indeed, not involuntary manslaughter but voluntary manslaughter or, perhaps, murder.

And there was yet another crack, this one much wider, in the common law rules of double jeopardy. For it was, and is, a well defined common law principle of this particular subject that, even though the trial court be convinced that the defendant is guilty of murder rather than involuntary manslaughter, and despite the possibility just noted that on making a similiar finding the jury might believe they are obliged to acquit the defendant of the charge of involuntary manslaughter, nevertheless, once the jury has been impanelled, the court is precluded from discharging them and, without the defendant's consent or the demands of absolute necessity, requiring the defendant's reindictment and subsequent prosecution for murder.[14]

The foreclosing of such disturbing possibilities as these, then, must logically be looked to as suggesting the real motives behind Section 51 of the Act of 1860. And though the opinion in *Commonwealth* v. *Thatcher* makes no mention of them in its long paragraphs of avid justification, it would seem that such commendable motives *did* promote that happy piece of legislation. In declaring that, "If upon a trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor," Section 51 precluded the possiblity of a jury acquitting a defendant of involuntary manslaughter because they regarded him as guilty of murder. And then there is the further provision, recommended by the Supreme Court of the District Attorney in the *Thatcher* case as a guide for similar proceedings in the future:

> ". . . and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before whom such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

The purpose of this provision, it can not but be apparent, is to permit the trial court's taking that action of dismissal which, though dictated by the needs of the public safety and not unfair to the rights of the particular defendant, was ever precluded by the dictates of the common law.

It should be noted in conclusion, however, that a Louisiana statute containing similar provisions has been declared unconstitutional as unreasonably conflicting with the common law guarantee against double jeopardy, which

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[14] In general, see 22 C.J.S. § 255 and § 258. Pennsylvania cases on this subject include: 121 Pa. 109, 15 A. 466 (1888); 105 Pa. 1, 15 W.N.C. 145 (1884); 60 Pa. 103 (1869); 23 Pa. 12, 62 Am. Dec. 308 (1854); and 3 Rawle 498 (1831).

the Louisiana court felt that state's constitution had permanently preserved.[15] And even Pennsylvania cases decided subsequent to 1860,[16] though they seem to have been decided without consideration of Section 51 of the Act of that year, have reaffirmed the common law doctrine in this state as being still a matter of right.

Thomas P. Monteverde

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[15] 155 La. 846, 99 So. 621.
[16] 105 Pa. 1, 15 W.N.C. 145 (1884); 121 Pa. 109, 15 A. 466 (1888).