Washington and Lee Law Review

Volume 21 | Issue 1 Article 9

Spring 3-1-1964

Criminal Defendant'S Vested Right In A Void Judgment

wholly choate or wholly inchoate. This preferable view has been expressed by the United States Court of Appeals for the Fourth Circuit in *United States v. Bond* in the following words:

> "The Congress did not prefer the principal of the mortgage debt; it preferred the mortgagee. If the word is to be given its usual meaning the preference cannot be limited to the mortgagee's right to repayment of the principal of the mortgage debt. It extends to all those rights which the Congress must have known the mortgagee commonly and usually possesses."[46]

WELDON J. SMITH

CRIMINAL DEFENDANT'S VESTED RIGHT IN A VOID JUDGMENT

It is almost universally held that courts of record have inherent power to vacate civil judgments at any time during the entire term at which they are rendered.[1] It is usually held that the same rule applies in criminal cases.[2]

A variation on the usual factual situation arose in Florida, in *Michell v. State ex rel. Callahan.*[3] John Thomas Callahan, Jr., a minor, was charged with robbery in the Court of Record in and for Broward County, on April 6, 1962. He was represented by the public defender. A plea of guilty was entered, and he was adjudged guilty. On April 19, 1962, he was sentenced to one year in the county jail. Subsequently, on or about May 12, 1962, the judge learned that Callahan was a minor, and that a Florida statute[4] requiring "notice to parents" had not been complied with. On May 24, 1962, the judge, upon the court's own motion, and during the same term of court, entered an order vacating and setting aside the prior proceeding in its entirety, on the ground it was void. On the same day, following the giving of statutory notice to Callahan's parents, as required by law, the defendant was reprosecuted for the same crime. Again represented by the public defender, he pleaded *nolo contendere.* This

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[46]279 F.2d at 851.

[1]1 Freeman, Judgments § 194 (1925); 30A Am. Jur. Judgments § 629 (1958); 49 C.J.S. Judgments § 228 (1947); Annot. 168 A.L.R. 204 (1947).

[2]United States v. Benz, 282 U.S. 304, 306-07 (1931); Whitman, Federal Criminal Procedure § 35.3 (1950); 15 Am. Jur. Criminal Law § 473 (1938); 24 C.J.S. Criminal Law § 1605(1) (1961).

[3]154 So. 2d 701 (Fla. Dist. Ct. App. 1963).

[4]Fla. Stat. Ann. § 932.38 (1944).

time he was adjudged guilty and sentenced to seven years at hard labor in the state penitentiary. On June 5, 1962, the defendant filed a petition for habeas corpus[5] in the Circuit Court for the 15th Judicial Circuit.[6] This court set aside the May 24 sentence and directed the trial court to impose a sentence not longer than that imposed after the first conviction. This order was appealed to the District Court of Appeal, which reversed, holding that since the seven-year sentence was within the discretion given the trial court by statute,[7] the appellate courts were barred from modifying it. It further held that the trial judge acted properly in vacating the original proceeding, and that the defendant could not complain about being prosecuted a second time.

The holding with respect to the reviewability of the second sentence is consistent with the latest decisions of the Supreme Court of Florida, that is, provided the second judgment was valid. In *Nowling v. State*,[8] the Florida Supreme Court adopted a rule that Florida appellate courts had power to reduce excessive sentences, but in *Brown v. State*,[9] the court receded from the holding in *Nowling*, and held that when the sentence is within the limits prescribed by statute, the only remedy for an excessive sentence is by petition to the Pardon Board.[10] According to the decision in *Brown*, a sentence within the statutory limits cannot be reviewed by an appellate court even if the defendant alleges that his punishment is cruel and unusual,[11] and

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[5]There is some question as to whether habeas corpus is a proper method of attacking a sentence as excessive. Annot., 76 A.L.R. 468 (1932). However, the court heard the petition on the ground that the appeal time had elapsed. But see McGuire v. Cochran, 135 So. 2d 226 (Fla. 1961), which held that where the appeal time had not expired, habeas corpus was improper. There is a further question as to whether habeas corpus is, in this case, a proper method of advancing the plea of double jeopardy, as it does not appear that the defendant objected to retrial or appealed the second conviction. Irvin v. Chapman, 75 So. 2d 591 (Fla. 1954); State ex rel. Johnson v. Mayo, 69 So. 2d 307 (Fla. 1954).

[6]The 15th Judicial Circuit is comprised of Broward and Palm Beach counties. The Circuit Court is not an appellate court as to the Court of Record in felony cases. Fla. Stat. Ann. § 26.53 (1961). But it has authority to grant habeas corpus. Fla. Const. Art. 5, § 6. See Hancock v. Dupree, 100 Fla. 617, 129 So. 822 (1930).

[7]Fla. Stat. Ann. § 813.011 (Supp. 1962). This statute provides that the punishment for robbery shall be "in the state prison for life or for any lesser term of years, at the discretion of the court." It appears that the trial court was permitted to sentence defendant to one year in the county jail by virtue of Fla. Stat. Ann. § 922.05 (1944), and therefore the first sentence, standing alone, was not unlawful for the reason that it imposed imprisonment in a place unauthorized by law.

[8]151 Fla. 584, 10 So. 2d 130 (1942).

[9]152 Fla. 853, 13 So. 2d 458 (1943).

[10]Florida has both a Pardon Board and a Parole Commission. These two bodies have separate and distinct functions. See Fla. Stat. Ann. § 947.01 (1944), and Fla. Const. Art. 4 § 12.

[11]152 Fla. 853, 13 So. 2d 458, 461 (1943).

therefore violative of section 8 of the Florida Declaration of Rights. Therefore, if the second judgment in the present case is valid, it seems that *Brown v. State* is controlling authority that under Florida law the sentence imposed pursuant thereto, being within the statutory limits, is not reviewable.[12]

More difficult problems arise, however, in connection with the procedure followed by the trial judge after he became aware of defendant's age. These procedures, and their possible consequences, merit close examination.

Upon becoming aware that defendant was a minor, the trial judge, upon his own motion, set aside the original proceedings in their entirely. He did this on the theory that the original proceeding was void for lack of compliance with the "notice to parents" statute. The first question that arises is whether the trial court had authority to do this. There appears to be no express statutory authority for the trial court to vacate, upon its own motion, a void criminal judgment, nor are there any cases from Florida so holding, except by way of dicta.[13] It is frequently said, however, that a criminal court has the power to vacate void judgments during the term of court at which they are rendered,[14] and the Supreme Court of Florida has held in several cases that where the "notice to parents" statute is not complied with, the proceedings and judgment pursuant thereto are void.[15] Futhermore, the Supreme Court of Florida has used broad language in describing the power of a court over its judgments.[16] There can be

[12]See Fla. Stat. Ann. § 924.32 (1944); Fla. Appellate Rules, Rule 6.16(a) (Supp. 1962); Fla. Stat. Ann. §§ 924.05, 924.06 (1944), which concern the scope of review of Florida appellate courts. It appears that the power to review criminal sentences as excessive is not expressly withheld from the appellate courts. Brown v. State, supra note 9, appears to be no denial of the power to modify an excessive sentence; rather it is a disclaimer of the right to exercise power on grounds appealing only to clemency, or to substitute it for the executive power of commutation.

[13]Casey v. State, 116 Fla. 3, 156 So. 282 (1934); Preston v. State, 117 Fla. 618, 158 So. 135 (1934); Sawyer v. State, 94 Fla. 60, 113 So. 736 (1927). See also Fla. Stat. Ann. § 921.01 n.5 (1944), concerning the vacation of criminal judgments. The court in the principal case, at p. 703, states that the trial court was under a duty to vacate the first judgment. No citation of authority for this position is given.

[14]Supra note 2, 24 C.J.S. Criminal Law § 1605(3) (1961). People v. Blalock, 170 Cal. App. 2d 307, 338 P.2d 578 (1959).

[15]Vellucci v. Cochran, 138 So. 2d 510 (Fla. 1962); Giles v. Cochran, 129 So. 2d 426 (Fla. 1961); McGuirk v. Cochran, 126 So. 2d 555 (Fla. 1961); Raggen v. Cochran, 126 So. 2d 145 (Fla. 1961); Thompson v. Cochran, 126 So. 2d 564 (Fla. 1961); Williams v. Cochran, 126 So. 2d 887 (Fla. 1961); Willis v. Cochran, 131 So. 2d 728 (Fla. 1961).

[16]In Lake v. State, 100 Fla. 373, 129 So. 827, 829 (1930), the court said: "We have examined the treatment of this question in many jurisdictions, and the rule seems well-nigh universal that, in the absence of statutory or constitutional pro-

little doubt that if defendant had moved for vacation of the first judgment and sentence, the trial court would have been under a duty to vacate them. But whether the court itself may vacate the judgment is a harder question, because when it does so, the possibility immediately arises that upon retrial the defendant may plead double or former jeopardy.

Florida adheres to the view that a void judgment may not be pleaded as a basis of former jeopardy. In *Tilghman v. Mayo*,[17] the court said: "The very fact that the former judgment was void is the reason it cannot be effectively pleaded as a basis of former jeopardy."[18] Since the first judgment in the principal case was held to be void,[19] the *Tilghman* case is cited by the court as compelling authority for rejecting a double jeopardy argument. But there is a basic difference between the facts in *Tilghman* and those of the principal case. In *Tilghman,* it was the defendant himself who attacked the prior judgment; in the present case it was the court. This is a relevant distinction. It is recognized and admitted in the cases, that where the defendant himself attacks the prior judgment, he cannot thereafter plead that judgment as former jeopardy.[20] This position can be supported on the ground that the defendant has waived his right to rely on former jeopardy.[21] If it is not the defendant who attacks the judg-

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visions controlling, prior to the adjournment of the term or other time in which the cause passes beyond the jurisdiction of the court and becomes final, any court of record has full control over its judgments or decrees and can set them aside or reform them as it may deem right and legal. The rule applies to civil and criminal cases alike and may be effected on the court's own motion or on being advised by any party in interest."

[17]82 So. 2d 136 (Fla. 1955).

[18]Id. at 137.

[19]The court in the principal case states that it is not the judgment only which is void, but the entire prior proceeding; trial, judgment, and sentence. The court goes on to say at p. 704 n.2, that it was able to find only one other such case, State v. O'Keith, 136 Kan. 283, 15 P.2d 443 (1932). That case involved a criminal action tried before a court without jurisdiction. The dearth of authority on this point is undoubtedly due to the fact that most courts do not distinguish between a void judgment and a wholly void proceeding.

[20]Bryan v. United States, 338 U.S. 552 (1950); Williams v. United States, 170 F.2d 319 (5th Cir. 1948); Allen v. State, 260 Ala. 324, 10 So. 2d 644 (1954); Cole v. State, 211 Ark. 836, 202 S.W.2d 770 (1947); State v. Phillips, 175 Kan. 50, 259 P.2d 185 (1953); Crum v. State, 216 Miss. 780, 63 So. 2d 242 (1953); State v. Lamoreaux, 20 N.J. Super. 65, 89 A.2d 469 (1952); Village of Avon v. Popa, 96 Ohio App. 147, 121 N.E.2d 254 (1953); Commonwealth v. Balles, 163 Pa. Super. 467, 61 A.2d 91 (1948); Whitehead v. State, 162 Tex. Crim. 507, 286 S.W.2d 947 (1956); State v. Hutchinson, 4 Utah 2d 404, 295 P.2d 345 (1956).

[21]People v. Zendano, 31 Misc. 2d 145, 136 N.Y.S.2d 106 (Erie County Ct. 1954); Cross v. Commonwealth, 195 Va. 62, 77 S.E.2d 447 (1953); Johnson v. Cranor, 43 Wash. 2d 200, 260 P.2d 873 (1953).

ment, however, there can be no waiver. *United States v. Ball*,[22] involved defendants who were originally tried for murder upon a fatally defective indictment, found guilty, and sentenced to death. They appealed this conviction, and it was set aside by the United States Supreme Court, on account of the defective indictment.[23] Upon reprosecution for the same offense upon a proper indictment, they pleaded double jeopardy. In considering their conviction to the second indictment, and the argument of double jeopardy, the Supreme Court said:

> "How far, if they had taken no steps to set aside the proceedings in the former case, the judgment and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant who procures a verdict against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted."[24]

This language, while it leaves the question open, hints that a different result might follow where the defendant does not initiate the attack upon the former judgment. Such a different result was reached in fact, in the case of *Burke v. United States*,[25] which was decided on the basis of the foregoing language from *United States v. Ball*. The *Burke* case is very similar on its facts to the principal case. There, a husband was charged with nonsupport, but the indictment was fatally defective. The defendant was convicted, and sentenced to one year in prison. On motion of government counsel, the first judgment was vacated, and defendant was reprosecuted and again sentenced to one year. In upholding his plea of former jeopardy, the court said:

> "It has been held that a valid information is a prerequisite to the attaching of jeopardy, but the cases so holding involve situations where the information or indictment is dismissed *on motion of accused*, or before judgment on the merits and service of sentence. Here we have an entirely different situation. Judgment was entered in the first case on appellant's plea of guilty, he served a portion of his sentence, and did not initiate the proceeding which lead [sic] to his release from custody and the ensuing resentence."[26]

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[22]163 U.S. 662 (1896). See also 1 Wharton, Criminal Law and Procedure § 139 at 313 (1957).

[23]Ball v. United States, 140 U.S. 118 (1891).

[24]163 U.S. 662, 672 (1896).

[25]103 A.2d 347 (D.C. Munic. Ct. App. 1954).

[26]Id. at 352-53 (emphasis by court). See also Re Bouchard, 38 Cal. App. 441, 176 Pac. 692 (Dist. Ct. App. 1918).

The question resolves itself to this: Is a defendant put in jeopardy by a proceeding, judgment, and sentence which will be, upon attack by the defendant, the state, or the court, set aside as invalid? It seems the answer must be yes, because until attacked, any judgment, even a void one, is sufficient to deprive the defendant of his liberty.[27] And if a defendant is so deprived of his liberty under such a judgment and sentence, it seems unrealistic to say that he was not in jeopardy. The least that can be said is that due to the distinction pointed out above, the Florida cases on double jeopardy are not controlling in the present situation, and that the court would have been at liberty to hold that the defendant in this case was subjected to double jeopardy.

Another possible consequence of retrial under the circumstances in the present case, is a plea by defendant that he was not accorded due process of law. Due process of law is guaranteed by the fourteenth amendment to the United States Constitution, and by section 12 of the Florida Declaration of Rights. It does not appear that any argument was made pursuant to either of these provisions, but such arguments would have been appropriate. There are certain factors present in this case which make the imposition of the second sentence, which is seven times more severe than the first, particularly harsh. First, the statute requiring notice to parents is for the benefit of defendant,[28] not the state; therefore the state was not prejudiced by noncompliance. Indeed it seems anomalous that noncompliance with a statute for defendant's protection should be used as a means to obtain his retrial and subjection to a more severe punishment. The state cannot be prejudiced if defendant is serving a void sentence, because if he challenges the sentence, he waives his right to plead double jeopardy, and may be retried. He cannot escape punishment, unless it be by acquittal at the second trial. Second, the error resulting in noncompliance was made by the state, not by the defendant. Third, the defendant did not attack the judgment; the attack was made by the trial court. Fourth, defendant was a minor.[29] Fifth, no

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[27]Both the Ball case and the Burke case recognize that a trial pursuant to a fatally defective indictment is sufficient to put a defendant in jeopardy. In the present case, there is no evidence that the indictment was defective; the only defect in the procedure was the failure of the state to notify defendant's parents as required by law. This seems, a fortiori, a stronger case than either Ball or Burke for holding that the defendant was put in jeopardy at the first trial.

[28]See Pitts v. State, 88 Fla. 438, 102 So. 554 (1924).

[29]The court in Stanford v. State, 110 So. 2d 1 (Fla. 1959) viewed this factor differently. In upholding harsh sentences imposed on several minors, the court said: "This Court takes judicial knowledge of the fact that all these young men are within the age group that commits a very large percentage of the crimes in this nation." Id. at 2.

new matter was shown to have been brought out at the second trial.[30] These factors, taken together, accentuate the hardship of the second sentence. It is felt, in short, that the procedural treatment accorded defendant violated minimum standards of fairness, and did not constitute due process of law as guaranteed by the fourteenth amendment to the United States Constitution and by section 12 of the Florida Declaration of Rights.

RICHARD V. MATTINGLY, JR.

THE ATTORNEY'S RETAINING LIEN

In his efforts to collect fees charged to clients, the attorney is aided by the common law general or retaining lien.[1] The retaining lien[2] gives the attorney the right to retain possession of a client's documents, money, or other property which the attorney has acquired while performing professional services for the client.[3] The lien continues until the balance due the attorney for his services is paid.[4]

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[30]The court said: "We cannot ascertain from the record why the trial court imposed a seven-year sentence upon the petitioner, after having imposed only a one-year sentence in the void proceedings. But this court is not at liberty to pass upon that matter." 154 So. 2d at 703.

[1]Brown, Personal Property § 115 (2d ed. 1955).

[2]The fundamental characteristics of the retaining lien differ from those of the attorney's charging lien. The charging lien attaches to any fund or judgment which is obtained for a client by means of an attorney's professional services. It is specific in that it covers only services rendered by the attorney in the action in which the judgment was received, while the retaining lien is a general one for the balance of accounts between the attorney and his client. In re Heinsheimer, 159 App. Div. 33, 143 N.Y. Supp. 895 (1913). See generally: Hanna Paint Mfg. Co. v. Rodey, Dickason, Sloan, Akin & Robb, 298 F.2d 371 (10th Cir. 1962); Locke v. Barranco, 267 Ala. 370, 102 So. 2d 2 (1958); Camp v. Park, 226 Ark. 1026, 295 S.W. 2d 613 (1956); Robertson v. Robertson, 106 So. 2d 590 (Fla. Dist. Ct. App. 1958); State ex rel. Shannon v. Hendricks Circuit Court, 183 N.E.2d 331 (Ind. 1962); Neighbors & Danielson v. West Neb. Methodist Hosp., 162 Neb. 816, 77 N.W.2d 667 (1956); Republic Factors, Inc. v. Carteret Work Uniforms, 24 N.J. 525, 133 A.2d 6 (1957); Morgan v. Onassis, 5 N.Y.2d 732, 152 N.E.2d 670, 177 N.Y.S.2d 714 (1958); Butler v. General Motors Acceptance Corp., 203 Tenn. 366, 313 S.W.2d 260 (1958).

[3]McCracken v. City of Joliet, 271 Ill. 270, 111 N.E. 131 (1915); Foss v. Cobler, 105 Iowa 728, 75 N.W. 516 (1898); Board of County Comm'rs of Edwards County v. Simmons, 159 Kan. 41, 151 P.2d 960 (1944); In re Anderson's Estate, 174 Neb. 398, 118 N.W.2d 339 (1962); Reynolds v. Warner, 128 Neb. 304, 258 N.W. 462 (1935); Cones v. Brooks, 60 Neb. 698, 84 N.W. 85 (1900); Morse v. Eighth Judicial Dist. Court, 65 Nev. 275, 195 P.2d 199 (1948); Prichard v. Fulmer, 22 N.M. 134, 159 Pac. 39 (1916); Robinson v. Rogers, 237 N.Y. 467, 143 N.E. 647 (1924); Capehart v. Church, 136 W. Va. 929, 69 S.E.2d 127 (1952).

[4]Capehart v. Church, 136 W. Va. 929, 69 S.E.2d 127 (1952). But the retaining lien is a "passive" lien, that is, one not enforceable by legal proceedings. Sorin v. Shahmoon Indus., Inc., 191 N.Y.S.2d 14 (Sup. Ct. 1959).

The nature and extent of the retaining lien was recently considered by the New Jersey Supreme Court in *Brauer v. Hotel Associates, Inc.*[5] The hotel had become insolvent and its law firm filed a claim for $7,500 with the receiver for professional services rendered prior to its insolvency. In addition, the law firm asserted a retaining lien on all documents, records, and books of the corporation in its possession.[6]

The receiver denied the validity of the lien on the following grounds: (1) the books, records, and documents of the corporation were in possession of the law firm because one of its members was the registered agent of the corporation; (2) the retaining lien was dissolved by the insolvency of the corporation and appointment of a receiver; and (3) the subject of the lien was of no intrinsic value and, therefore, could not be asserted.

The Chancery Division upheld the lien, and on that basis gave the law firm a priority on its claim as an administrative expense. On review,[7] the Supreme Court in a four to three decision affirmed the holding of the Chancery Division.

Although the retaining lien attaches without commencement of a lawsuit in the client's behalf[8] and also without court order,[9] there is a stringent requirement that the attorney have obtained possession[10] of the retained items by reason of his professional employment.[11] Thus, in the principal case the receiver's primary argument was that the law firm had possession of the items because one of the partners in the firm was the corporation's registered agent and *not* by virtue of its professional employment. The court pointed out that the corporation's transfer books were in the possession of the firm for the reason contended by the receiver and that no lien attached to them. However, the divided court decided that the lien did attach to other records

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[5]40 N.J. 415, 192 A.2d 831 (1963).

[6]The receiver was granted an order requiring the law firm to relinquish possession of the books and records; however, the court held in abeyance the question of the firm's alleged retaining lien and its possible right to a priority over the corporation's general creditors.

[7]The receiver appealed to the Appellate Division but the Supreme Court granted certification on its own motion prior to argument before the Appellate Division. R.R. 1:10-1(a).

[8]De La Paz v. Costal Petroleum Transp. Co., 136 F. Supp. 928 (S.D.N.Y. 1955).

[9]Manusse v. Mattia, 10 N.Y.S.2d 495 (Sup. Ct. 1939).

[10]A condition precedent to exertion of the retaining lien is actual possession of the items by the attorney. Cuomo v. Pennsylvania R.R., 157 F. Supp. 358 (W.D. Pa. 1957); Gary v. Cohen, 34 Misc. 2d 971, 231 N.Y.S.2d 394 (Sup. Ct. 1962).

[11]Akers v. Akers, 233 Minn. 133, 46 N.W.2d 87 (1951); Lindsley v. Caldwell, 234 Mo. 498, 137 S.W. 983 (1911); Thomson v. Findlater Hardware Co., 109 Tex. 235, 205 S.W. 831 (1918).

and documents which the firm had in its possession, since as to them, the firm performed services other than services required of it as registered agent.

It appears that the three dissenting judges thought that the corporation's documents and books were held by the firm for a special purpose, that is, as registered agent. Such special purpose would preclude the retaining lien. For example, it was held in *Akers v. Akers*[12] that furs and wedding rings of a client in a divorce action were held by the attorney for the special purpose of keeping them beyond the reach of the defendant in the divorce action and not as security for the payment of the attorney's fees. Similarly, the retaining lien has been held not to attach to a note where it was delivered to an attorney as collateral security for a separate debt owed the attorney.[13]

The preceding are clear examples of what some courts have considered special purposes, but in the principal case the special purpose is not so clear cut. Though more subtle, the situation in the principal case was very close to that found in the Missouri case of *Lindsley v. Caldwell*,[14] where a special confidential relationship and express agreement existed between the firm and its client and thus precluded the lien. In the *Lindsley* case certain shares of stock were placed in the attorney's name as confidential advisor of his client under an express agreement that the attorney would indorse and deliver the stock to the client on demand.[15]

The receiver in the principal case asserted, secondly, that the retaining lien was dissolved by reason of the insolvency of the client and appointment of a receiver, but this contention was summarily dismissed by the court. *Visconti v. M.E.M. Corporation*[16] was cited for the proposition that a receiver takes only such title as the insolvent corporation has and such title is subject to *all* liens arising prior to the insolvency.

The receiver's third argument, in which he asserted that the lien should not be upheld because the subject of the lien was of no intrinsic value, had little foundation. The court found that the actual or intrinsic value of the items retained under the retaining lien was not material. The rule is stated that the value of the lien comes *not* from the intrinsic value or worth of the items as chattels, but from the inconvenience caused the client by his inability to gain access to the

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[12]233 Minn. 133, 46 N.W.2d 87 (1951).
[13]Thomson v. Findlater Hardware Co., 109 Tex. 235, 205 S.W. 831 (1918).
[14]234 Mo. 498, 137 S.W. 983 (1911).
[15]Ibid.
[16]7 N.J. Super. 271, 73 A.2d 74 (App. Div. 1950).

items.[17] It should be noted, however, that the inconvenience caused the client may not be carried to extremes.[18] For example, it was said in *Robinson v. Rogers:*

> "[T]hat where the retention of papers by an attorney serves to embarrass a client the attorney should be required to deliver up the papers upon receiving proper security for his compensation, because insistence upon his lien under such circumstances is not in accordance with that standard of conduct which the court may properly require of its officers."[19]

There is a dearth of authority on the attorney's retaining lien as it applies to criminal proceedings, a case involving Hauptmann, accused of the Lindburgh kidnapping, apparently being the only one reported in which the point was involved. In *Hauptmann v. Fawcett,*[20] Hauptmann made a motion in a New York court for an order directing a first attorney "to turn over all files and papers in his matters to his new attorney."[21] Since the attorney was an officer of the court, the court held that he should be required to turn over to Hauptmann any "papers which would be of value to the defendant in his defense."[22] The court ordered a hearing before a judge, at which both the first and second attorneys could determine which papers were of value and which should be delivered to Hauptmann. This order was later modified so as to provide that the lien was *not* lost and that the documents be returned to the first attorney after the completion of the trial.[23]

With the exception of the unique situation in the Hauptmann case, it appears that in all cases where the attorney has asserted a valid retaining lien and has, nevertheless, been ordered by a court to part with the retained items, the client has been ordered to post bond or other adequate security for the claim of the attorney.[24] In two respects it seems that the substitution works for the attorney's benefit: (1) the new security is by its nature of intrinsic value while the retained items may or may not have been of some intrinsic value; (2)

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[17]The Flush, 277 Fed. 25 (2d Cir. 1921); In re Allied Owners' Corp., 72 F.2d 255 (2d Cir. 1934); In re San Juan Gold, Inc., 96 F.2d 60 (2d Cir. 1938).

[18]Robinson v. Rogers, 237 N.Y. 467, 143 N.E. 647 (1924); Hauptmann v. Fawcett, 243 App. Div. 613, 276 N.Y. Supp. 523 (1935).

[19]237 N.Y. 467, 143 N.E. 647, 649 (1924).

[20]243 App. Div. 613, 276 N.Y. Supp. 523 (1935).

[21]Ibid.

[22]Id. at 524.

[23]In re Hauptmann, 243 App. Div. 619, 277 N.Y. Supp. 631 (1935).

[24]In re Martin's Will, 36 Misc 2d 1020, 234 N.Y.S.2d 573 (Surr. Ct. 1962) (dictum).

the substituted security can be "actively" enforced while the retained items could only have been "kept."

The attorney will lose his retaining lien when he voluntarily parts with possession of the retained items.[25] However, as was demonstrated in the principal case, an involuntary parting with possession by court order does not result in waiver of the lien.[26] In addition to loss of the lien by voluntary parting with possession, the lien may be lost by the client's justifiably discharging the attorney.[27] It is said that where an attorney is guilty of misconduct the court may direct him to give up any papers belonging to his client, even though his fees remain unpaid.[28] Similarly, where an attorney voluntarily withdraws from a case, any retaining lien which he might have had is forfeited. Moreover, in *Leszynsky v. Merritt*[29] it was held that an attorney may lose his lien when he fails to make diligent efforts to have a court determine the status of a claim for fees which he makes against his client but which the client disputes.

When an attorney has property of his client on which he can assert a valid retaining lien, and when such property is of peculiar value to his client, the lien is invaluable.[30] The attorney enjoys a degree of leverage over his client without the cost of litigation and, even more important, without the distasteful publicity which might accompany a lawsuit for collection of fees. The law firm in the principal case was fortunate in that it had corporate property in its possession on which it could assert a valid retaining lien and without which the receiver was unable to administer the adjustment and payment of other claims of the insolvent business.

RICHARD J. TAVSS

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[25]King v. Beale, 198 Va. 802, 96 S.E.2d 765 (1957) (dictum).

[26]Supra note 6. Compare: H. & H. Ranch Homes, Inc. v. Smith, 54 N.J. Super. 347, 148 A.2d 837 (App. Div. 1959).

[27]"If the application for substitution is based on the misconduct of an attorney, it has been held that the court may direct an unconditional substitution, and order that he give up the papers without payment of his fees, and leave him to bring an action for his fees.

"But if the client brings no charges of misconduct against the attorney, but merely elects to have a substitution, the court will grant it imposing such terms as justice requires; and in such cases it is the general rule that a substitution will not be authorized, without providing that the fees and expenses to the displaced attorney shall be paid or secured to him, or his lien in some way preserved." The Flush, supra note 17 at 28.

[28]The Flush, supra note 17.

[29]9 Fed. 688 (C.C.S.D.N.Y. 1881).

[30]It was held in Davis v. Davis, 90 Fed. 791 (C.C. Mass. 1898), that an attorney having a valid retaining lien may disregard, without fear of being in contempt of court, a subponea duces tecum ordering the production of the retained items.