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Inheritance Taxes-Reports of Death by Banks

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be such a deposit has not been decided by the Supreme Court although such a holding seems correct and equitable.[3] May a bank safely ignore this possibility and fail to report death in all cases of joint deposits by husband and wife? The exemption from taxation seems to include all such deposits and the exemption from reporting death should certainly be equally extensive. Prudence would seem to dictate, however, that the depository report death in cases of deposits by husband and wife unless the facts are such that the deposit cannot be other than a tenancy by the entirety. Looking from the other angle, prudence would dictate the making of the report where either the husband or wife had a right to withdraw funds from the deposit by separate checks unsigned by the other spouse for it is this right that makes it questionable that the deposit is a tenancy by the entirety.[4]

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THE EFFECT OF CONSTITUENT CRIMES ON INDICTMENT, VERDICT AND JUDGMENT IN CRIMINAL CASES

The recent case of *Dunn v. The United States* decided on January 11, 1932, and reported in *52 Sup. Ct. Rep. 189, 76 Lawyer's Ed. 249, 284 U. S.*—is of peculiar interest. It is the last case for which Justice Holmes wrote the opinion. For the next day after handing down this decision Justice Holmes resigned from the highest court in the United States to retire to private life. This case is not one of grave economic interest requiring a liberal dissenting opinion for which Justice Holmes was noted but a common everyday liquor case. In this case the defendant, Dunn, was indicted on three counts: first, for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, second for unlawful possession of such liquor, and third for unlawful sale of such

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[3] 34 Dickinson Law Review 156 et seq. (March, 1930).
[4] Idem.

liquor. The jury acquitted him on the second and third counts but convicted him on the first. The defendant appealed on the ground that the verdict on the second and third counts was inconsistent with that upon the first and that he should be discharged. Justice Holmes in his opinion said:

"Consistency in a verdict is not necessary. Each count in an indictment is regarded as if it were a separate indictment. If separate indictments had been presented against the defendant for possession and for maintaining a nuisance, and had been tried separately the same evidence being offered in support of each, an acquittal on one could not be pleaded as res adjudicata of the other. Where offenses are separately charged in counts of a single indictment, the same rule must hold."

The chief point of interest in this case, however, is the problem that arises when an act or series of acts constitute two or more crimes. Peculiar situations result in the indictment, verdict and judgment as the crimes differ in degree. This case presents the situation in which crimes are of the same degree. The decision of the majority of the court represents the general rule as to this question. The indictment may charge in different counts, different offenses covered by the same transaction in all the various ways necessary to meet the possible phases of evidence that may appear at the trial.[1] Each count in the indictment, in Pennsylvania, is regarded as if it were a separate indictment, and therefore consistency in the verdict is not necessary.[2] The fact that the acquittal on one count, as in the *Dunn* case, negatives the commission of the crimes charged in other counts will not prevent judgment on the verdict of guilty on another count. This seems illogical as was contended by the dissenting judge, Justice Butler, but it is in keeping with the rule that each count is regarded as a separate indictment, and the fact that the jury arrives

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[1]Henwood v. Com., 52 Pa. 424 (1866).

[2]Com. v. Donato, 87 Pa. Super. Ct. 285 (1926); Com. v. Strauss, 89 Pa. Super. Ct. 82 (1926); Mills v. Com., 13 Pa. 634 (1850); Com. v. Spink, 137 Pa. 255 (1890).

at such an inconsistent finding cannot be questioned. A verdict which specifically states a finding of guilty on the first count without any findings at all on the other counts is equivalent to a finding of not guilty on the other counts of the indictment.[3] But as will be shown later an acquittal on one count will not operate as an acquittal on the other counts when those others are not specifically mentioned.

It was the general rule at common law and is now the general practice that when an indictment charges an offense which includes within it another lesser offense, or one of lower degree, the defendant, tho acquitted of the higher offense may be convicted of the lesser.[4] The indictment may contain but one count charging the major offense only but the defendant may be convicted on that indictment for the constituent offense. For example, on an indictment for murder, the defendant may be convicted of voluntary manslaughter even tho it was not specifically charged.[5] This statement indicates that the law implies that the lesser crime is included in the higher crime for which the accused is specifically charged, and the indictment must contain allegations essential to constitute a charge of the lesser. To test the question whether an indictment for an offense includes within it a lesser offense, it has been said that when the offenses are of the same general character, the indictment for the one offense must contain all the essential elements of the other or the prosecution for the latter cannot be maintained.[6]

Where one count charges a greater offense, other counts may charge lesser offenses included therein for even without special alleging, the defendant may be convicted of a constituent offense included within the one for which

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[3]Com. v. Curry, 285 Pa. 289, 132 A. 370 (1926); Garton v. Com., 22 Pa. 351 (1853).

[4]Com. v. Anagustov, 82 Pa. Super. Ct. 156, (1923); Hunter v. Com., 79 Pa. 503 (1875); Harman v. Com. 12 S. & R. 69 (1824); Dinkey v. Com., 17 Pa. 126 (1851).

[5]Gable v. Com., 7 S. & R. 423 (1821).

[6]Com. v. Shutte, 130 Pa. 272 (1889); Hunter v. Com., 79 Pa. 503 (1875).

he was indicted.[7] Where the two offenses are charged in separate counts, if the defendant can make it appear that the joinder will subject him to unreasonable difficulty or embarrassment, the court has it in its power either to quash the indictment or to compel the prosecutor to elect on which count he will proceed.[8]

It is a rule that an acquittal or conviction on an indictment for a minor offense is generally a bar to a subsequent indictment for the greater offense where the evidence necessary to convict of the latter would have been sufficient to sustain a conviction for the former.[9] The converse is also true. An acquittal or conviction for a greater offense is a bar to a subsequent indictment for the minor offense included in the former whenever under the indictment for the greater offense, the defendant could have been convicted of the lesser.[10]

In summing up these cases coming within the general rule, where distinct crimes set forth grow out of the same transaction differing only in degree, only one penalty can be imposed after conviction, and separate sentences for each offense charged are void except that sentence permissible upon conviction of the more serious charge.[11]

At the common law an exception was made to the general rule stated above. Where the constituent crime was a misdemeanor and the major offense was a felony, at common law, the rule of merger was said to operate and the lesser crime was absorbed in the greater. In such a case, where the defendant was indicted for a felony he could not be convicted of the constituent misdemeanor;[12]

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[7]Com. v. Shutte, 130 Pa. 272 (1889); Harman v. Com., 12 S. & R. 69 (1824); Com. v. Ashe, 293 Pa. 322 (1928).

[8]Slevick v. Com., 78 Pa. 460 (1875).

[9]Dinkey v. Com., 17 Pa. 126 (1851); Com. v. Morgan, 9 Kulp 573 (1899); Com. v. Lloyd, 141 Pa. 28 (1891).

[10]Com. v. Neely, 2 Chester Co. Rep. 191 (1884); Com. v. McEvans, 92 Pa. Super. Ct. 124 (1927); Com. v. Reed, 4 Lanc. Law Rev. 89.

[11]Com. v. Ashe, 293 Pa. 322 (1928); Johnston v. Com., 185 Pa. 54 (1898); Com. v. Bailey, 92 Pa. Super. Ct. 581 (1927); Com. v. Heston, 292 Pa. 501 (1928).

[12]Com. v. Gable, 7 S. & R. 423 (1821)

or where upon indictment for the misdemeanor, the felony is proved the defendant had to be acquitted of the misdemeanor because it merged in the felony.[13] The reason for this at common law was that on trial for a felony the defendant was denied certain privileges such as the privilege of counsel, right to a copy of the indictment, and restriction of the right to challenge. To preserve the distinction between felonies and misdemeanors, the rule of merger was adopted, for if a man was allowed to be convicted of a misdemeanor on an indictment for a felony, or for a felony on indictment for misdemeanor, the distinction would disappear.[14]

The distinction between felonies and misdemeanors has been abolished and the reasonable ground for the rule of merger has disappeared and so today by statute in Pennsylvanian that rule no longer exists. By Section 51 of the Act of 1860 P.L. 427, 19 Purdon 831, where the defendant is indicted for a misdemeanor and the evidence discloses a felony, the defendant cannot be acquitted of the misdemeanor, as he was entitled under the common law, but cannot be convicted of the felony unless the court discharges the jury and directs an indictment for the felony. The effect of this act is to abolish merger in so far as it existed in an indictment for a misdemeanor where the facts prove a felony.[15] By a liberal construction of this section of the Act and also of Section 50, merger has been abolished also where the defendant is indicted for a felony and the facts prove a constituent misdemeanor.[16] So today in Pennsylvania, a defendant, in an indictment for a felony may be convicted of a constituent misdemeanor included therein. At common law, counts for misdemeanors and felonies could not be joined in the same indictment but this rule has also been abolished and today counts for fel-

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[13]Com. v. Parr, 5 W. & S. 345 (1843).

[14]Wharton's Criminal Law, 9th Edition, Vol. I, Page 41.

[15]Com. v. Robinson, 85 Pa. Super. Ct. 424 (1925).

[16]Com. v. Anagustov, 82 Pa. Super. Ct. 156 (1923); Hunter v. Com., 79 Pa. 503 (1875); Com. v. Sobel, 94 Pa. Super. Ct. 525 (1928).

onies and misdemeanors can be joined in one indictment.[17]

In the opinion of the writer, merger does exist even today in homicide cases where on an indictment for murder the evidence discloses guilt of involuntary manslaughter. It has been consistently held and appears well settled that on an indictment for murder, the defendant cannot be convicted of involuntary manslaughter even where the facts prove a case of involuntary manslaughter.[18] The courts base their decision now on a long line of cases beginning with *Com. v. Gable*[19] and including *Walters v. Com.*[20] In the case of *Com. v. Gable* the court specifically held that since the Act of 1794 expressly made involuntary manslaughter a misdemeanor there could be no conviction of that crime on an indictment of murder because there could be no conviction of a misdemeanor on an indictment for a felony by reason of the common law rule of merger. *Walters v. Com.*, the case most cited for this proposition, decided after the Act of 1860, based its decision on the same grounds and cited the case of *Com. v. Gable.* The court expressly gives as its reason the fact that a misdemeanor cannot be joined with a count for a felony because of the rule of merger. These two cases are the cases relied upon by later decisions on this question which has become so well settled that the courts have forgotten or overlooked the real reason—the rule of merger. So today, there is no reason why, on an indictment for murder, where the evidence discloses the defendant's guilt of involuntary manslaughter, that the defendant should not be convicted of involuntary manslaughter. The general rule, that upon an indictment for a greater offense whether it be a felony or misdemeanor, the defendant may be convicted of the lesser offense included therein, should apply.

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[17]Hunter v. Com., 79 Pa. 503 (1875); Com. v. Shutte, 130 Pa, 272 (1889).

[18]Com. v. Greevy, 271 Pa. 95 (1921).

[19]Com. v. Gable, 7 S. & R. 423 (1821).

[20]Walters v. Com., 44 Pa. 135 (1862).