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Double Jeopardy As Applied to Grades of First Degree Murder

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2. A married woman may enter judgment by confession and issue execution against her husband even while living together.

3. A married woman may bring a bill in equity against her husband even while living together to protect or recover her separate property.

4. Under the Act of 1893, as amended in 1913, a married woman may bring an action at law against her husband to recover or protect her separate property, and this would seem to include actions on contracts between them.

Robert Siegel.

DOUBLE JEOPARDY AS APPLIED TO GRADES OF FIRST DEGREE MURDER

Article I, Sec. 10 of the Pennsylvania Constitution provides:—"No person shall, for the same offense, be twice put in jeopardy of life or limb." In interpreting this clause the Supreme Court of Pennsylvania has held that when a defendant, having been convicted of second degree murder, appeals and is granted a new trial, a conviction of murder in the first degree on this new trial is a violation of such clause. In other words, a conviction of murder in the second degree in Pennsylvania acts as an acquittal of the crime of murder in the first degree.[1] This rule adopted by the court is but an application of the well recognized rule that a conviction of a lesser degree of a crime charged is an acquittal of any higher degree of such crime, to which rule the writer will refer as the doctrine of "implied acquittal."

Prior to 1925 the punishment for first degree murder was death.[2] In that year the Pennsylvania legislature passed the Act of May 14, 1925,[3] which provides:—

> "Every person convicted of the crime of murder of the first degree shall be sentenced to suffer death in the manner prescribed by law, or undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict."

It should be noted here that this is the only case in which the jury is permitted to set the punishment for a crime.[4] In every other case the punishment is determined by the court. The court must in no manner influence this use of discretion by the jury. To do so to the detriment of the defendant is reversible error.[5]

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[1]Comm. v. Deitrick, 221 Pa. 7 (1908); Comm. v. Gabor, 209 Pa. 201 (1904).
[2]Act of 1860, P. L. 382, Sec. 75.
[3]1925, P. L. 759, (18 P. S. 2222).
[4]Comm. v. Alessio, 313 Pa. 537, 169 Atl. 764, at 767 (1934).
[5]Comm. v. Curry, 287 Pa. 553 (1926); Comm. v. Nafus, 303 Pa. 418 (1931).

The question now arises, whether a defendant who has been convicted of first degree murder and sentenced to life imprisonment, may, upon being granted a new trial by the Supreme Court, be tried and convicted of first degree murder and sentenced to death. The point is raised in the following statement of facts: D was indicted, tried and convicted of first degree murder, the jury fixing the punishment at life imprisonment. D appealed for trial errors and the case was returned to the trial court for a new trial. In the retrial D in proper form asked the trial judge to charge that the jury could convict of first degree murder but could not fix the punishment for other than life imprisonment. The judge refused so to charge. D was convicted and the jury set death as the punishment. D appeals. The question here presented has not been adjudicated definitely in Pennsylvania.

The determination of the point raised by the above statement of facts, in the opinion of the writer, must depend upon the judicial interpretation of the Act of 1925. Did the legislature in passing that act intend that first degree murder be divided into two grades of crime? If it did, then the doctrine of "implied acquittal" as recognized by *Commonwealth v. Deitrick*, supra, must be applied, which would prevent the jury from sentencing the defendant to death.

The Act of 1925 does not on its face create two grades of first degree murder. But if the interpretation put upon that act by the Pennsylvania Supreme Court is to the effect that there are really two grades of first degree murder; that is, Grade A—an atrocious, mercenary murder or one committed by an habitual criminal, etc., justifying death as punishment; Grade B—still first degree murder but without elements of personal profit, sordid passion, or atrociousness, etc., justifying merely life imprisonment, the verdict of the jury fixing life imprisonment acts as an acquittal of murder in the first degree, Grade A; the defendant by appeal does not waive the benefit of the doctrine of "implied acquittal" and the rule of *Commonwealth v. Deitrick*, supra, should be applied. Has such a division been made by the Pennsylvania Supreme Court?

The following are expressions taken from the case of *Commonwealth v. Garramone*:[6]—

> "By the act (referring to the Act of 1925) the legislature recognized and established degrees of culpability, provided two possible penalties, and vested the jury with discretion to determine by its verdict which of the two should be inflicted. . . . . whether the record shows a case *in the class* justifying the sentence of death, or *in the class* justifying the lower sentence of life imprisonment. . . . . It is clear that this was not an atrocious murder planned and commit-

[6]307 Pa. 507 at 513 (1932).

> ted in cold blood . . . . . which, we think places him *within the legislative classification requiring* the milder of the two possible sentences."

In this case the Supreme Court went so far as to reverse the lower court for sentencing to death, holding it an abuse of discretion so to do when the elements of atrocity, personal gain, etc., were absent.

We find another expression in *Commonwealth v. Williams*:[7]—

> "Mitigating circumstances do not constitute justification or an excuse for an offense, but they are such matters . . . . . which in fairness and mercy may be considered by the jury in fixing the degree of moral culpability by reducing the punishment inflicted."

There can be but one reasonable conclusion from the foregoing expressions. The court recognizes that the legislature has created two classes of first degree murder, and there is no reason why the rule of "implied acquittal" should not be applied. A conviction of first degree murder with the sentence of life imprisonment is a finding of fact by the jury that the circumstances under which the crime was committed were such that constituted merely the commission of first degree murder Grade B, and amounts also to a finding of fact that the elements necessary to sentence to death were lacking. Hence applying the doctrine of "implied acquittal", the defendant is acquitted of first degree murder Grade A, just as a conviction of second degree murder is a finding of fact that first degree murder was not committed, and amounts to an acquittal of first degree murder. This finding of fact should be as binding on the jury in the retrial as is the finding of fact in the second degree murder case if the defendant there is retried.

It is true the question of punishment is said to be for the jury. But that is said with equal emphasis as to the right of the jury to fix the degree of murder, and yet the discretion is absent when on the former trial the defendant has been convicted of second degree murder merely.

Justice Maxey in the recent case of *Commonwealth v. Alessio*[8] stated, "First degree murder with life is not a bar to conviction of first degree murder with death on a new trial granted." This statement by the learned justice was pure dictum, it not being at all necessary for the determination of that case. As the Justice stated, "The question is here only of academic interest." No reference was made to the Act of 1925 or to the cases cited above interpreting that act, which in the opinion of the writer must be considered before a proper determination of the question may be had. If these cases had been considered, it is the opinion of the writer that the dictum in the *Alessio*

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[7]307 Pa. 134 at 153 (1932).
[8]313 Pa. 537, 169 Atl. 764 at 767 (1934).

case would not have been as it was. The case of *People v. Grill*[9] was cited by the court as its authority. The *Grill* case is one of the two cases in this country that have been decided on the point being discussed. The other case is *Greer v. State.*[10] The facts in both cases were on all fours with the facts presented in the fact situation above. In both cases it was held that a conviction of first degree murder with life imprisonment is not a bar to a conviction of first degree murder with death on a new trial granted. It is submitted that neither of these cases can be used as a persuasive precedent in Pennsylvania.

We will take first the *Grill* case. Article I, Sec. 13, of the California Constitution provides:—"No person shall be twice put in jeopardy for the same offense." The California Penal Code, Article 10, Sec. 2, provides that the punishment upon conviction of first degree murder shall be determined by the jury in its own discretion at life imprisonment or death. Both of these provisions are identical in substance with the provisions in Article I, Sec. 10, of the Pennsylvania Constitution, and the Act of 1925. It would seem to follow that the *Grill* case should be a very weighty precedent in Pennsylvania should the same question arise. But it is submitted that it will not be for the following reasons. In California, although the doctrine of "implied acquittal" is applied where a defendant has been convicted of manslaughter and is granted a new trial,[11] it is not applied where the defendant is convicted of murder in the second degree and is granted a new trial.[12] The reason given by the court for the latter holding is that the defendant by appeal waives the benefit of the doctrine of "implied acquittal," and upon the new trial the defendant may be convicted of first degree murder, which cannot be done in Pennsylvania. If the California courts do not apply the doctrine to degrees of murder charged, then it follows of course that the doctrine will not be applied by them to grades of punishment of one degree of a crime charged. Justice Maxey in citing the *Grill* case no doubt overlooked the fact that in California, the doctrine of "implied acquittal" is not applied as it is in Pennsylvania.

Greer v. State, supra, in the opinion of the writer cannot be used as a precedent in Pennsylvania for the following reasons. The Tennessee Code, Section 5257 provides:—

> "The court may also, when any person is convicted of a capital offense, and the jury who convicted him state in their verdict that they are of opinion that there are mitigating circumstances in the case, commute the

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[9]151 Cal. 592, 91 Pac. 515 (1907).

[10]62 Tenn. (3 Baxt.) 321 (1874).

[11]People v. Superior Court in and for Alameda County et al, 202 Cal. 165, 259 Pac. 943 (1927).

[12]People v. Keefer, 65 Cal. 232, 3 Pac. 818 (1884).

punishment from death to imprisonment for life in the penitentiary."
It is evident from a reading of this statute that the imposition of the penalty is within the discretion of the judge and not the jury as it is in Pennsylvania. In Tennessee the jury may express merely an opinion as to the presence of mitigating circumstances, which opinion the court may disregard. The finding of the jury is not a binding finding of fact on the court as it is in Pennsylvania under the Act of 1925. Quoting the court in the *Greer* case :—

> "We think the idea that the statute[13] creates a new grade of offense is inconsistent with the holding that the court may disregard the finding of the jury. If it be a separate grade of crime, the acquittal by the jury of the higher grade should be conclusive upon the court by the terms of the Constitution[14] itself."

From this statement of the court, it is not unreasonable to say that if the finding of mitigating circumstances were a binding finding of fact upon the court, as it is in Pennsylvania, the court in the *Greer* case would have held that the doctrine of "implied acquittal", which is recognized in Tennessee,[15] should be applied in the case of a defendant convicted of first degree murder with life who is granted a new trial so as to preclude the jury in the subsequent trial from convicting of first degree murder with death.

In the light of the interpretation put upon the Act of 1925 by the Pennsylvania Supreme Court, and the recognition by that court of the doctrine of "implied acquittal", and the reasons given above why the *Grill, Greer,* and *Alessio* cases are of little if any weight as persuasive precedents, it is the opinion of the writer that if the case should ever arise in Pennsylvania it will be held that the legislature in enacting the Act of 1925 intended to divide murder in the first degree into two grades of crime; and that a defendant who has been convicted of first degree murder and sentenced to life imprisonment may not, upon being granted a new trial, be tried and convicted of first degree murder and sentenced to death. To do so should be held to be a violation of the defendant's constitutional rights as guaranteed by Article I, Section 10, of the Pennsylvania Constitution.

Leo Asbell.

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[13]Tenn. Code, Sec. 5257.

[14]No doubt referring to the double jeopardy clause in the Tennessee Constitution, Section 10 of the Bill of Rights.

[15]Slaughter v. State, 25 Tenn. (6 Humph.) 410, (1846).