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Recent Cases

RECENT CASES

MURDER IN THE FIRST DEGREE—KILLING IN THE COMMISSION OF ROBBERY

The defendant, residing in Bucks County, determined to "rob" a store located in Bradford County. He decided that he needed an automobile for use in perpetrating the crime and escaping from the scene. In Sullivan County he solicited and was given a ride in the deceased's automobile. After he had gone a short distance he pulled a revolver from his pocket and commanded the deceased to stop the car and get out. The deceased stopped the car but grabbed the defendant by the wrist and started twisting it. Thereupon the defendant pulled the trigger, discharged the revolver, and wounded the deceased. The deceased opened the door and fell out, pulling the defendant with him. The defendant again fired the gun at the deceased several times. He picked up deceased who was not yet dead and placed him in the car and proceeded to a bridge over a stream. After examining the body of deceased and learning that he was dead he took money and shoes from the deceased's body and threw the body in the stream. The defendant was indicted for murder and entered a plea of guilty. *Held*, the crime was murder in the first degree and the court sentenced the defendant to death. *Comm. v. Frisbee*, 342 Pa. 177, —— A. (2d) —— (1941).

The Supreme Court said that the sentence could be sustained under section 74 of the act of March 31, 1860, which provides that "all murder which shall be committed in the perpetration of or attempting to perpetrate . . . robbery . . . shall be deemed murder in the first degree". The Supreme Court did not clearly indicate the "robbery" to which it referred. Was it

(1) the "robbery" of the store in Bradford County, or
(2) the "robbery" of the automobile from the deceased, or
(3) the "robbery" of the shoes and money from the deceased?

1. If the sentence is to be sustained on the theory that the killing occurred in an attempt to rob the store, it is necessary to consider whether one may be said to be engaged in "an attempt" to rob a store when he is not even in the same county in which the store is located. See *Comm. v. Eagen*, 190 Pa. 10.

2. If the sentence is to be sustained on the theory that the killing occurred in the robbery or attempt to rob deceased of the auto, it is necessary to consider whether the defendant had the "intent to deprive" the deceased "permanently" of the auto, which is an essential element of robbery or an attempt to rob. See *Comm. v. Wilson*, 1 Phila. 80.

3. If the sentence is to be sustained on the theory that the killing occurred in the robbery or attempt to rob deceased of his money and shoes, it is necessary to consider whether *at the time defendant shot* the deceased he had the intent to steal the money and shoes. See 42 DICK. L. REV. 85.

The Supreme Court discussed none of these questions, but simply said "The malice of the initial offense attaches to whatever the criminal may do in connection therewith and by statute the killing is deemed first degree murder."

W. H. H.

BANKING—CONTRACT WITH FIDUCIARY—SUBSEQUENT HIGHER OFFER—BROKER'S FEES

The Secretary of Banking, in his capacity as receiver of the Central Trust & Savings Company, entered into a contract with one Samuel Driban for the purchase of certain realty by the said Driban, the consideration being $6,500 cash. Notice of the proposed sale was given by advertisement in the manner prescribed by the Banking Code, giving the date, time and place when the court would consider the petition by the Secretary for leave to sell such premises. No one appeared at the hearing to present any objection and the court, after considering all the facts set forth in the petition, and deeming $6,500 to be a reasonable price, granted the prayer of the petition, on March 31, 1941. On April 29, 1941, the petitioner, one Sobel, who had previously made an offer for the premises, but who had not appeared at the hearing, made an offer of $7,200 in cash for the premises, and petitioned the court for a rule to show cause why the order approving the first sale should not be vacated, and the sale to the petitioner for $7,200 in cash authorized. *Held,* Rule discharged and petition dismissed, the property being awarded to the prior purchaser. *In Re Central Trust & Savings Company,* 41 D. & C. 304 (1941).

A long line of Pennsylvania cases has held that a fiduciary is bound to accept a higher offer notwithstanding he may have made a prior contract to sell such trust real estate. See, *Orr's Estate,* 283 Pa. 476 (1925); *McCullough's Estate,* 292 Pa. 177 (1928); *Clark v. Provident Trust Co.,* 329 Pa. 421 (1937); *Kargiatly v. Provident Trust Co.,* 12 A. (2nd) 11 (1940). The Orphans' Court and Common Pleas Court have the supervising power, under the act of June 7, 1917, P. L. 363, to set aside any prior agreement of sale entered into by the fiduciary. The cases cited all agree that the main reason for vesting such power in the court is for the benefit and protection of trust and decedent's estates, and hence the court will not set aside any sale unless the welfare of the estate so warrants. In the *Central Trust Co.* case, however, the petition to have the sale set aside was made *after* the court has once confirmed the sale under its supervising power as given by the Department of Banking Code of May 15, 1933, P. L. 565. For this reason, the court refused to entertain the higher offer, justifying its position on the grounds of the absence of any fraud, mistake, accident or other consideration which would ordinarily move a court of equity to set aside a sale of real estate, and also that to hold otherwise would discourage all future buyers from dealing with fiduciaries.

Hence, we may assume that the same conclusion would be reached in the event that the vendor is a trustee, executor, or other fiduciary, namely, that while the court has the supervisory power to set aside agreements of sale where the interests of the estate so warrant, it will refuse to do so when it previously has confirmed the sale, in the absence of fraud, accident or mistake. See, *Brittain's Estate,* 28 Pa. Super. 144 (1905); *Files v. Brown,* 124 Fed. 133 (1903).

It is interesting to note in this connection, that in the event that the court would step in and set aside the first sale, the fiduciary nevertheless remains liable for the real estate broker's fees owing by reason of having found the original buyer. See Act No. 104, approved July 2, 1941, and reported on page 123a of the August 18th issue of the D. & C. advance sheets, which discards the former rule that a real estate broker's right to commission may be defeated by a fiduciary duty to reject the original purchaser if a better offer is received. See, *Clark v. Provident Trust Co., supra; Hoy's Estate,* 286 Pa. 520 (1926); *Brittain's Estate,*

supra. However, the real estate broker may deprive himself of the right given him by the act by contracting to the effect that he is not to be paid his commission until settlement is made. See, *Clark v. Provident Trust Co., supra.*

J. E. M.

INHERITANCE TAX APPRAISEMENT—APPRAISER'S ERROR OF JUDGMENT AS GROUND FOR A SUPPLEMENTAL APPRAISEMENT—ACT OF JUNE 24, 1939, P. L. 721

In May, 1932, the Ramsay's, William, Robert, and Margaret Ramsay Jones, hit upon an "I'll scratch your back, if you'll scratch mine" arrangement whereby they hoped to pass to their heirs certain bonds free of any inheritance tax. Each owned bonds of the Alabama By-Products Corporation with a par value of $50,000. By the terms of their agreement, William became the donor of a trust under which the net income of his bonds was to be paid to Margaret for life, and at her death the principal to her children in certain designated proportions. Margaret did the same with her bonds for the benefit of Robert for his life, and then for his heirs. Robert completed the circle by using his bonds as the res of a trust for William for life, remainder to his heirs. William died in 1933; Robert in 1934. In the administration of their separate estates the appraiser, with knowledge of the trust agreements, did not subject any of the bonds to an inheritance tax. In 1939 the Commonwealth procured a supplemental appraisement for inheritance tax purposes, and this time the bonds were included and taxed. Upon appeal by the executors the Orphans' Court set aside these supplemental appraisements and assessments. From this ruling the Commonwealth appealed. *Held,* the court below ruled properly in denying the Commonwealth the right to a supplemental appraisement. *Ramsay's Est.,* 342 Pa. 103, —— A. (2d) —— (1941).

The court reached the present decision under the general principle that once an appraisement is made it is *res judicata* and the same or a succeeding appraiser cannot go back and revaluate the same assets. When, therefore, the appraiser in 1934 and 1935 exempted the bonds from the tax, the remedy of the Commonwealth was an appeal and it could not substitute the remedy of a subsequent appraisement. Only where there has been fraud, an accidental overlooking, or mistake, or where the assets have not been revealed to the appraiser, resort may be had to another appraisement. *Commonwealth v. Freedley's Executors,* 21 Pa. 33 (1835); *Moneypenny's Est.,* 181 Pa. 309, 37 A. 589 (1897); *Rowell's Est.,* 315 Pa. 181, 173 A. 634 (1934); *Ernst's Est.,* 317 Pa. 367, 177 A. 19 (1935).

However, if a similar case were to arise today it would not be controlled by the decision in this case, but would be governed by the act of June 24, 1939, P. L. 721, 72 PS 82, 384. By this act the legislature changed *mistake of judgment on the part of the appraiser,* from a ground giving rise to an appeal, to a ground upon which a supplemental appraisement might be sought. And the act further provides that this second appraisement may be made within one year of the death of the decedent. Henceforth, apparently, if such a supplemental appraisement is not made within the one year limitation period, the mistaken judgment of the appraiser must be allowed to stand and the tax will be assessed at the erroneous rate.

It should be noted that by the act of 1939 the one year limitation period is operative only when the appraiser with full knowledge of the assets erroneously

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It should be noted that by the act of 1939 the one year limitation period is operative only when the appraiser with full knowledge of the assets erroneously

judges them to be untaxable. There, of course, is no such limitation period when fraud, accidental overlooking, mistake, or nonrevelation of the assets is proven. A very recent lower court case, *Hartman's Est.*, 41 D. & C. 492 (1941), illustrates one such situation where the Commonwealth's right to procure a supplemental appraisement is not affected by the passage of time. Here, when the original appraisement was made there was a contingent claim held by the estate which was not revealed to the appraiser. Nearly nine years after the decedent's death the claim was compromised and a supplemental appraisement for taxing the funds accruing from the belated settlement was held proper.

In the instant case the court had to proceed under the law as it was constituted prior to the act of 1939. This law provided a remedy by appeal for the Commonwealth when there was a mistake in the appraiser's judgment, and they could not substitute a supplemental appraisement as they had attempted to do. As a consequence, the scheme of the Ramsay's proved to be at least two-thirds successful. Whether it will prove a complete success must await, as the court points out, the death of Margaret Ramsay Jones and the appraisement of her estate.

J. M. Q.

CRIMINAL LAW—MURDER—HOMICIDE—ATTEMPTED COMMISSION OF FELONY

The appellant and others bound and gagged one Winifred Flannery, a housekeeper, while attempting to rob the apartment of her employer. She died from strangulation. *Held*, an unintentional homicide in the attempted commission of a felony such as burglary or robbery is murder in the first degree. *Com. v. Guida, Appellant,* 298 Pa. 370, 148 A. 501 (1930).

The appellant argues that a bare attempt to rob was not a felony at common law when this Commonwealth was settled, and that therefore a killing in an attempt to rob was not murder at common law; that the Criminal Code of 1860, on which the court bases its decision, calls an act murder which is not murder. The appellant loses sight of the definition of murder at common law. "Murder is when a person of sound memory and discretion unlawfully killeth any reasonable creature of being and under the King's peace, with malice aforethought, either expressed or implied". (Blackstone, COMMENTARIES 4-194.) "Malice is if two or more come together to do an unlawful act against the King's peace, of which the probable consequences might be bloodshed, as to beat a man, to commit a riot, or to rob a park, and one of them kills a man, it is murder in them all, because of the unlawful act, the *malitia praecogitata,* or evil intended beforehand." (Blackstone, COMMENTARIES 4-199.) There is no doubt that the binding and gagging of the deceased with the intent to rob, the danger of strangulation, and the actual strangulation satisfy these elements of murder at common law. The Criminal Code of March 31, 1860, states: "All murder which shall be committed in the perpetration of, or attempting to perpetrate, any arson, rape, burglary, robbery, or kidnapping shall be deemed to be murder in the first degree." This statute does not define an act as murder which was not murder at common law, but merely prescribes a punishment for the commission of the act. The definition of murder under the several statutes is to be taken in its common law sense. *Commonwealth v. Exler,* 243 Pa. 155. The appellant's argument is certainly an ingenious one to escape the consequences of the crime, but if it were upheld it would be an absurd ruling. It would mean that if a robber should kill his victim in the attempt to rob, he

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would not complete the robbery and therefore not be guilty of murder in the first degree. The court here clearly states, and it has held again and again, that an unintentional homicide in the commission of a felony or in the attempt to commit a felony such as rape, burglary or robbery, was murder at common law. *Commonwealth v. Morrison,* 266 Pa. 223; *Commonwealth v. Lessner,* 274 Pa. 108; *Commonwealth v. Harris,* 314 Pa. 81, 84. C. K. D., Jr.

CRIMINAL LAW—HOMICIDE—INVOLUNTARY MANSLAUGHTER—NEGLIGENCE REQUIRED

Defendant, while operating an automobile at the speed of 60 miles per hour in a southerly direction on Ridge Avenue, struck and killed a young woman at the intersection of Ridge Avenue and Rector Street. Defendant was convicted of involuntary manslaughter and a new trial was granted to him on an appeal from this decision. On his retrial the court again found the defendant guilty of involuntary manslaughter, and defendant appeals because the trial court, in its instructions to the jury, defined involuntary manslaughter as "the commission of a lawful act, not merely carelessness, but so rash and reckless as to *approximate* unlawfulness." *Held,* to state that involuntary manslaughter can be committed by an act that is "almost unlawful" is error in that it lowers the standard of proof required by the Act of April 11, 1929, P. L. 513, sec. 1, 18 P. S. 2226, which demands that death in the consequence of an unlawful act is essential to involuntary manslaughter. *Commonwealth v. Aurick,* —— Pa. ——, 19 A. (2nd) 920 (1941).

The decision arrived at in this case is undoubtedly correct in that it upholds the requirements for conviction of involuntary manslaughter set forth in the Act of April 11, 1929, *supra,* and the Act of June 24, 1939, P. L. 954, sec. 703, 18 P. S. 4703,—the latter being disregarded by the court, despite the fact that it is the most recent legislation on the subject.

Although the decision of the case is correct, dicta in the opinion seem to advocate an entirely new standard of negligence on which to base a conviction for involuntary manslaughter. In this regard Mr. Justice Maxey states:

> "To support a charge of involuntary manslaughter the facts must be such that the fatal consequences of the negligent act or failure to act could reasonably have been foreseen. The true distinction between the negligent act or omission which is non-criminal and the one which is criminal is between an act which is negligent to such a slight degree that the actor cannot reasonably foresee any harmful result to others from it and an act which is so clearly negligent that the actor can reasonably foresee a harmful result from it."

From the standpoint of tort liability alone, it has long been the law in Pennsylvania that civil liability will not be imposed in any case involving negligence unless the harmful result in issue could have been reasonably foreseen. *Ashby v. Philadelphia Electric Co.,* 328 Pa. 474, 195 A. 887 (1938); *Paulscah v. Hoebler,* 330 Pa. 184, 198 A. 641 (1938); *Saar v. Saar,* 143 Pa. Super. 528, 17 A. (2nd) 745 (1941). Comparing this conception with the one stated by Mr. Justice Maxey we find that the minimum negligence required for civil liability is sufficient under his test to support a charge of involuntary manslaughter, and that the lesser degree of negligence which he describes as a foundation for civil liability has never before been considered negligence.

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While the term "negligence" is an indefinite word at best, it would appear that one element of negligence, namely recklessness, heretofore deemed essential to the conviction for involuntary manslaughter in cases where death resulted from a lawful act, is no longer required. Prior to the present case, the courts were in accord with *Commonwealth v. Gill,* 120 Pa. Super. 22, 182 A. 103 (1935), which held that the negligence required for involuntary manslaughter must have an element of rashness and recklessness about it, and that mere negligence of itself was not sufficient to impose criminal liability. *Accord*: *Commonwealth v. Mayberry,* 290 Pa. 195, 138 A. 686 (1927); *Commonwealth v. Carrol,* 131 Pa. Super. 357, 200 A. 139 (1938); *Commonwealth v. Ochs,* 91 Pa. Super. 528 (1927); and *Commonwealth v. Godshalk,* 76 Pa. Super. 500 (1921). In *Commonwealth v. Samson,* 130 Pa. Super. 65, 196 A. 564 (1937), the court plainly stated that simple negligence was not sufficient to support a conviction for involuntary manslaughter unless the added element of recklessness was present.

From the above it is apparent that a conflict exists between the standard of negligence previously adhered to and the one which Mr. Justice Maxey advocates. Should his views be followed, a substantial change in the law would necessarily result, and with it would unquestionably come an increase in the convictions for involuntary manslaughter, for with the element of recklessness removed, most cases of negligence resulting in death would support such a decision.

J. E. K.