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Criminal Law--General Instructions not in Harmony with the Evidence Should not be Given

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called to attend another patient does not excuse him in this case." Upon the actual facts here it would seem that the defendant was negligent in failing to give the patient notice or in procuring another doctor for her as he might have done. The conclusion reached here is no doubt correct and there is apparently no reason to fear that the court in another case would make an unwise extension of the rule.

—HARRIET L. FRENCH.

CRIMINAL LAW—GENERAL INSTRUCTIONS NOT IN HARMONY WITH THE EVIDENCE SHOULD NOT BE GIVEN.—Accused was convicted of first degree murder, and brought error. Defendant was a constable and had been threatened by deceased several days before the tragedy, deceased telling defendant to get his gun and blackjack so he could "take them off of him." There was further evidence that defendant was disliked by deceased. A few days later defendant was walking along the highway toward deceased's residence when deceased and a companion, both intoxicated and the latter displaying a pistol, were going up the steps of deceased's house. As defendant approached both men swore at him, and defendant seeing another constable signaled to him to assist in making an arrest, but it does not appear that the other heeded the signal. Deceased then walked toward the defendant, his companion having retired in the house, saying "what in the hell have you got to do with this?" at the same time having his hand in his hip pocket or behind him. Defendant called twice to halt, and fired a warning shot, and as this was without result, fired the shot which took effect. It does not appear whether deceased was armed or not. The court charged the jury "* * * If the intent to kill is executed the instant it springs into the mind, it is as truly murder as if it had dwelt there for a longer period." *Held*, "* * * Altho similar instructions have been approved by this court in particular cases, in view of the evidence and circumstances surrounding the fatal shot, and the absence of instructions dealing with murder in the first and second degrees or manslaughter, * * * the instruction * * * was misleading * * * and therefore constitutes reversible error", citing *State* v. *Manns*, 48 W. Va. 480, 37 S. E. 613; *Cobb* v. *Simon*, 119 Wis. 597, 97 N. W. 276; *State* v. *Shamblin*, 143 S. E. 230 (W. Va. 1928).

"It is well settled that, if the intent to take life is executed after deliberation and premeditation, though but for a moment or an instant, the crime is murder in the first degree." *State* v. *Porter,* 98 W. Va. 390 at 411, 127 S. E. 386. Therefore it would seem that the charge given in the principal case would have been sustained, had there been no evidence of extenuating circumstances. However, under an instruction covering second degree murder it is possible that the jury might have returned such a verdict. See *State* v. *Garner,* 97 W. Va. 222, 124 S. E. 681, where there was evidence of a previous altercation between the deceased and accused, with a shooting incident almost identical with principal case. The jury found second degree murder. The court expressed regret in setting the verdict aside, on the ground that an improper charge had been given, altho it seems that their honors felt that the jury had nevertheless been guided by the correct charges. But it is difficult to see how an instruction concerning manslaughter would have been appropriate, since the necessary hot blood and heat of passion are lacking. *State* v. *Murphy,* 89 W. Va. 413, 109 S. E. 771. Therefore it would seem that defendant was either guilty of murder, or innocent of any crime, and that the court, in reversing on the ground that the charge was misleading in that no mention of second degree murder or manslaughter was made, overlooked the point that manslaughter would not apply to the case. But any instruction given should not leave in doubt whether or not the accused could be convicted of a lesser offense or acquitted. *State* v. *Graham,* 94 W. Va. 67, 117 S. E. 699, reaffirmed in *State* v. *Brannon,* 103 W. Va. 427, 137 S. E. 694. In the principal case the jury should not be led to believe that they have no alternative other than conviction, for there is some evidence of self defense in that defendant, having previously been threatened, may have feared that the threat was about to be carried out, and it would be proper for them to consider the evidence in this light. *State* v. *Laura,* 93 W. Va. 250, 116 S. E. 251; *State* v. *McMillion,* 104 W. Va. 1 at 11, 138 S. E. 732. It was not necessary for defendant to retire before shooting as he was lawfully on the public highway. *State* v. *Donahue,* 79 W. Va. 260, 90 S. E. 834. Nor was he required to wait until he had actually been covered by a gun before firing. *Miers* v. *State,* 34 Tex. Cr. App. 161, 29 S. W. 1074. (The court there stated that the defendant did not shoot soon enough.)

The opinion does not disclose any evidence to the effect that defendant was attempting to make a lawful arrest or that deceased knew of such a purpose, other than the single instance of defendant's signaling to the other constable. Had such evidence been introduced the case would then be on all fours with *State* v. *Stockton,* 97 W. Va. 46, 124 S. E. 509, which held that there was no evidence of malice when the accused, making a lawful arrest, shot his prisoner in what he honestly believed to be self defense.

In the next issue it will be submitted that second degree murder would not apply to this case.

—JULIAN G. HEARNE, JR.

SURVIVAL OF ACTION — LIABILITY INSURANCE — DIRECT RIGHT AGAINST THE INSURER.—Plaintiff was injured in a collision between a car in which he was riding, and the car of an individual taxi operator, who had complied with Section 62, Chapter 6, Acts of 1923, by filing with the State Road Commission satisfactory liability insurance for the purpose of indemnifying the public for injuries to person and property resulting from such collisions. The defendant insurance company was his insurer. The taxi operator having died before the plaintiff brought her action, the only available party against whom suit could be brought was defendant company. The plaintiff sued about nine months after the cause of action arose. *Held,* the plaintiff could not proceed against the insurer alone until such claim was liquidated. The court followed principles enunciated in *O'Neal* v. *Transportation Company,* 99 W. Va. 456, 129 S. E. 478, without any discussion. *Criss* v. *United States Fidelity & Guaranty Company,* 142 S. E. 849 (W. Va. 1928).

By this holding the court cut the plaintiff off from any satisfaction whatever. The hardship is due in part to the rule that an action for injuries does not survive against the estate of a deceased tort-feasor. This obviously objectionable common law rule has been remedied by statute in a large number of jurisdictions. See 1 C. J. 196. The WEST VIRGINIA CODE, Chapter 127, Section 2, provided that "If the plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for