

SECOND DEGREE

The Highest Crime for Which Dr. Garrison Can be Tried.

A MOST INTERESTING OPINION,

By Judge Paull, a Victory for the Defense.

THE CASE TO BE ARGUED TO-DAY.

Dr. Garrison's Cross-Examination Finished, and All the Testimony in the Defendant Denies All the Threats He was Charged with Having Made Against Dr. Baird—Public Interest in the Trial Increasing as the Decisive Hour Approaches. Six Hours for Argument on Each Side the Limit Set by the Court, and the Case will Go to the Jury To-night.

The important decision of Judge Paull was given yesterday on the plea filed by the defense in the Garrison homicide case, claiming that Dr. Garrison could not be tried a second time for murder in the first degree, the jury having declared him innocent of the crime he was indicted for by finding a verdict of murder in the second degree. His honor announced his decision on the plea just before court adjourned in the evening. As a result of his honor's ruling the jury will consider, in endeavoring to arrive at a verdict, no crime of a higher grade than murder in the second degree. Though of course the attorneys for the defense had all along claimed there could be no other decision than the one arrived at by Judge Paull, their pleasure over the successful result was evident. This is the first time this ruling has been made in this circuit, and the following full report of the learned judge's opinion will be read with interest:

The sole question for decision in this case, Judge Paull said, is, whether the accused, who, at the April, 1891, term of this court, was convicted of murder in the second degree, on an indictment for murder, and who obtained a new trial because of the misconduct of a juror, can again be tried for murder in the first degree.

In 11 Am. & Eng. Ency. of Law, 930, it is said: "Where a greater offense includes a lesser one, being placed in jeopardy under an indictment for the included offense only, constitutes a bar to a prosecution for the greater offense; so, upon a trial for the higher grade of an offense consisting of degrees, if the defendant is convicted of an inferior grade, such conviction operates as an acquittal of, and will bar a subsequent prosecution for any of the higher grades; and where such a conviction is reversed and a new trial ordered, the new trial must be confined to the particular charge upon which the defendant was found guilty on the former trial."

SOME OF THE AUTHORITIES.

His honor then said that the principle above quoted is supported by the following, among other, decisions: State v. Joseph, 3 So. 405 (La.); Jones v. State, 13 Tex. 168; Slaughter v. State, 6 Humph. 410; Johnston v. State, 9 So. (Fla.) 208; People v. Gilmore, 4 Cal. 376; People v. Aggar, 35 Cal. 389; Brennan v. People, 15 Ill. 512; Hurt v. State, 25 Miss. 378; Johnson v. State, 29 Ark. 31; 21 Am. R. 154; State v. Ross, 29 Ark. 31; State v. Brannon, 55 Mo. 63; State v. Tweedy, 11 Iowa 350; State v. Belden, 33 Wis. 120.

In State vs. Belden, after stating the principles as above announced, the court says: "The authorities in opposition to this view, and in support of the doctrine that the effect of granting a new trial on the application of the defendant is the same in a criminal as in a civil case, and opens the whole cause for retrial upon the same issues as on the first, are collected in the case of the State vs. Behimer, 20 Ohio st. 572. It seems to us, however, more in harmony with the

HUMAN MAXIMS OF THE CRIMINAL LAW and the principles of the constitution to hold that the finding of the jury acquitting the defendant of the higher offense was an adjudication upon that charge, and that legal effect should be given to it as such, while the new trial should be limited to the lower degree of homicide of which he has been convicted."

This, it seems to me, Judge Paull said, is the true doctrine upon the subject under consideration, especially as it is believed to be in accord with the express provision of the constitution of this state (Art. 3, sec. 5) that no person "shall be twice put in jeopardy of life or liberty for the same offense"—a provision, which, as was said by Judge Green in Mounts v. Fountain, 27 W. Va. 191, should be liberally construed "in favor of the person whose life or liberty is twice put in jeopardy."

NO VERDICT ABOVE SECOND DEGREE.

Now, in order to give this provision a liberal construction, it must of necessity be held, that George I. Garrison, having been once acquitted of that portion of the charge against him which placed his life in jeopardy, namely: murder in the first degree, cannot be tried for that portion of the charge.

But there is another consideration which leads to the same conclusion: In Starn's case, 28 W. Va. 950, Judge Staples, in delivering the opinion of the court says: "It is well settled law in this state, that where there are several counts in an indictment, and the jury find the accused guilty upon one of the counts, saying nothing as to the others, the verdict operates as an acquittal upon the counts of which the verdict takes no notice, and the court should enter a judgment accordingly. Lithgow v. Com. 2 Va. Cas. 297; Page v. Com. 9 Peigh 683; Canada's case, 22 Gratt. 899; Page's case, 26 Gratt. 943. It may be regarded as equally well settled, that in such a case, if the accused applies for and obtains a new trial, he does not thereby waive the advantage of the acquittal thus obtained. But he must be tried, and can only be tried again on the counts on which he was convicted, and not on the counts of which he had been before acquitted."

Indictments like the one in this case, for the purpose of enabling the state to convict the accused, are construed as containing what is the equivalent of five separate and distinct counts, namely:

MURDER IN THE FIRST DEGREE,

murder in the second degree, voluntary manslaughter, involuntary manslaughter, and assault and battery. And it seems to me that every principle of right and justice demand that the same construction should be placed upon such indictments for the purpose of enabling

the accused to retain the benefits of an acquittal.

It is claimed, however, on behalf of the state that the conclusion here reached is in conflict with the decision of the court in Livingston's case, 14 Gratt. 592. With respect to that decision, Judge Staples in Starn's case, 28 Gratt. page 950, says: "In Livingston's case, 14 Gratt. 592, upon an indictment containing a single count for murder, the accused was convicted of voluntary manslaughter, and the term of his imprisonment in the penitentiary fixed for one year. This court reversed the judgment for errors committed by the lower court in the progress of the trial. The question was presented, whether upon the second trial the accused might be tried and legally convicted of murder, or whether the charge to the jury was to be so modified as to limit the findings to the offense of manslaughter. Judge Daniels took the ground that a party who has been erroneously convicted of manslaughter, and who has appealed to this court for redress, had the right to have his wrong remedied, without being put in jeopardy for a higher offense of which

THE JURY HAS FOUND THE PRISONER NOT GUILTY.

But the other judges sitting with Judge Daniel in that case, "without expressing any opinion upon the question, were in favor of remanding the cause for a new trial to be had on the indictment as it stands, and without any change in the usual charge to the jury."

This is the construction placed upon that decision by the Virginia court, and it must be held to be the true construction. Judge Paull then closed as follows:

It is also claimed on behalf of the state that the decision of the court in Briggs vs. Com. 82 Va. 554, in which it was held, that "so much of section 25, chapter 17, Acts 1877-8, as declares that 'if a verdict be set aside on the motion of the accused, and a new trial awarded, on such new trial the accused shall be tried, and such verdict may be found and sentence pronounced as if a former verdict had not been found,' is not unconstitutional," is a decision in accord with their view of this question. But there is no statute in this state upon that subject; and in other states the decisions are in conflict, so that until the legislature of this state passes such a statute the question cannot be raised or decided.

THE TRIAL PROCEEDINGS.

Dr. Garrison Skillfully Cross-Examined by Captain Dovenor—Other Witnesses Testify.

During the Garrison trial yesterday afternoon there was a larger crowd than has been in the court room since the present trial commenced. The defendant was under cross-examination by Captain Dovenor, and the public interest seemed to center in this fact. After Dr. Garrison left the witness stand the crowd thinned out considerably, and only the usual small number of spectators remained.

One of the incidents of the day was Colonel Arnett's appearance on the witness stand. The colonel interjected while Dr. Garrison was testifying, a remark tending to support the doctor's evidence. He also expressed himself as willing to go on the witness stand. He was examined by the state, under oath, as to the facts of the way in which a statement, purporting to be from the defendant, was printed in the Register the morning after the trial. The colonel testified for the state, and when the state attempted to contradict the colonel's evidence with that of a Register reporter, the colonel's colleague, Mr. Sommersville, objected on the ground that the prosecution could not contradict its own witness, Colonel Arnett being a witness for the state. The court sustained the objection, and Colonel Arnett's evidence remained intact.

There was much sympathy evinced yesterday for Dr. Garrison, whose little boy is very ill. Dr. C. F. Ulrich called to see the prisoner yesterday at the court room, and after a consultation decided to operate upon the child last night. During the last trial the boy was constantly present during the trial, and became a great favorite with the court attaches. His present affliction is of a dropsical nature and exceedingly dangerous.

When court opened Dr. Garrison went on the stand, and was cross-examined by Captain Dovenor. He told about

HIS ACQUAINTANCE WITH DR. BAIRD.

Dr. Garrison said he had first met Dr. Baird in 1881, and they had become intimate friends. Dr. Baird had been instrumental in securing Dr. Garrison's appointment as a member of the state board of health. Asked if Dr. Baird had supported him in his candidacy for the health office, he said he had understood that Dr. Reed Baird was a candidate for the health office the first time defendant was a candidate. On account of his friendship for Dr. Baird the defendant did not want to be a candidate against his friend's son. He spoke to Mrs. Baird and she said she would not allow her son to take the office. Dr. George Baird himself told him not to stand back on account of friendship, that his son Reed would not oppose him. The defendant said he had no particular understanding whether Dr. Baird supported him for health officer or not; he regarded him as any other friend.

The first trouble he had in 1887; Dr. Baird asked him to swear out a warrant for two men, who were manufacturing patent medicine contrary to law, claiming they owed him a bill and if they were prosecuted they would leave the state and he could distress their goods. The defendant says he refused to prosecute his office for the purpose of collecting Dr. Baird's bills, and their relations ever after were strained. Asked if he had ever insisted on swearing out a warrant for Dr. Baird, "No," he replied. The defendant then explained that as health officer he had been instructed by the health committee to report to the chief of police the name of any physician failing to report a case of scarlet fever or diphtheria. Dr. Baird, the defendant claimed, had not reported a case of diphtheria to the chief of police, and according to his instructions he had reported him, but notwithstanding the request of the chief of police

HE WOULD NOT PROSECUTE DR. BAIRD.

The last time he spoke to Dr. Baird was in 1889, when he asked him for his support in his candidacy for the health office. He passed Drs. Wilson and Baird on the street, and when he told them he was a candidate Dr. Baird smiled and said, sarcastically, "Yes, we'll help you." The defendant was elected that time, but at the next election was defeated. He killed Dr. Baird on the seventh of March following, about thirty-five days, as calculated by Captain Dovenor. The captain went on to ask about the fight in the city building. He said he was not injured, except that a hand he had broken when a boy was hurt a little. The defendant repeated his account of the blows he had given Dr. Baird, and said that he had been assaulted by the latter.

Q.—Did he ever lift his hand to you again? A.—No; but his attitude on in-

[Continued on Sixth Page.]

THE COURT HOUSE SITE

At Huntington, the subject of a Warm Discussion there Yesterday. Special Dispatch to the Intelligencer.

HUNTINGTON, W. VA., May 4.—The county court heard arguments on the court house site question this afternoon. The county now owns about two-thirds of a square, and a petition to the county to buy the remainder was negotiated by that body some days ago. Its action has been reconsidered, and the question reopened.

Attorney Eustace Gibson made statements derogatory to J. S. Perry, a real estate man who has been the head of the movement to buy the additional lots. Mr. Perry hotly resented and denied the charge that he was personally interested in the county buying the property, and both gentlemen lost their tempers. Both will bring witnesses before the court to-morrow, and a lively time is expected.

Shot at an Officer.

Special Dispatch to the Intelligencer.

BERKELEY SPRINGS, W. VA., May 4.—Quite an excitement was caused here yesterday evening by Mason C. Pendleton, an ex-mayor of the town, shooting at Deputy Sheriff George W. Cross. Pendleton was given a hearing before a magistrate and was held in two hundred dollars bond for his appearance at the grand jury court.

The Gun was Loaded.

ANDY, W. VA., May 4.—At 9 o'clock this morning Leonard Walker, a young man of this village, met a horrible death. He was blowing in the muzzle of a rifle to see if it was loaded, when it went off. The ball entered the mouth, knocking two of his teeth out, and killing him instantly.

Fell Dead.

These words are very familiar to our readers, as not a day passes without the report of the sudden death of some prominent citizen. The explanation is "Heart Disease." Therefore beware if you have any of the following symptoms: Short Breath, Pain in Side, Smothering Spells, Swollen Ankles, Asthmatic Breathing, Weak and Hungry Spells, Tenderness in Shoulder or Arm, Fluttering of Heart or Irregular Pulse. These symptoms mean heart disease. The most reliable remedy is Dr. Miles' New Heart Cure, which has saved thousands of lives. Book of testimonials free at The Logan Drug Co., who also sells the New Heart Cure. 1

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For Scrofula, Salt Rheum, and all other foul humors in the blood of children or adults, Hood's Sarsaparilla is an unequalled remedy. Read this:

"We are so thankful to Hood's Sarsaparilla for what it did for our little girl that we make this statement for the benefit of other anxious parents and

Suffering Children

Our girl was a beautiful baby, fair and plump and healthy. But when she was two years old, sores broke out behind her ears and spread rapidly over her head and forehead down to her eyes, and into her neck. We consulted one of the best physicians in Brooklyn, but nothing did her any good. The doctors said it was caused by a scrofula humor in the blood. Her head became

One Complete Sore

offensive to the smell and dreadful to look at. Her general health waned and she would lay in a large chair all day without any life or energy. The sores caused great itching and burning, so that at times we had to restrain her hands to prevent scratching. For 3 years

She Suffered Fearfully

with this terrible humor. Being urged to try Hood's Sarsaparilla we did so. We soon noticed that she had more life and appetite. The medicine seemed to drive out more of the humor for a short time, but it soon began to subside, the itching and burning ceased, and in a few months her head became entirely clear of the sore. She is now perfectly well, has no evidence of the humor, and her skin is clear and healthy. She seems like an entirely different child, in health and general appearance, from what she was before taking

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We recommend Priestley's Henrietta Cloths, Dress and Bonnet Veilings as being the best for the consumer. They are the right shade and very serviceable. Grenadines, Organdies, Zephyr Cloths, Llama Cloths in great variety—White Goods and Embroideries in both Dainty and elaborate designs, and in all widths and prices.

In our Cloak Department we are showing and selling freely Cape Wraps and Jackets and Tourist Suits, Silk, Glorie and Silk Serge Raglans, especially well adapted for traveling costumes. In our Market street room we have just opened Ladies' Cambric and Muslin Underwear, also Gauze, Silk, Lisle and Balbriggan Underwear, and in the same room will be found the best assortment of Ladies' Derby Waists and Boys' "Mother's Friend" and Star Shirt Waists we have ever had, and all having been made to order will give entire satisfaction. We invite an inspection of these superior lines. Our Glove Department was never so full. For the sale of the Celebrated P. Centemeri Kid Glove it is well known that we are the sole agent in this city. Also for the Foster, Paul & Co. Hook Glove and the Reynia Mousquetaire Suede Gloves. Centemeri five button, in colors, we sell at the New York agency price, viz: \$1 35. Full lines of Silk and Lisle Gloves and Mitts for ladies and children.

Our stock of Fancy Goods is constantly changing, but to-day it is very full, embracing many novelties just out, in Neckwear, Veilings, Handkerchiefs, Fans, Infants' Hoods, Boys' Belts, Parasols, Infants' Sacques and Wrappers, Carriage Robes, Skirts, in Silk and Satin, etc., and will be kept up during the season by replenishing as new things appear.

We show this spring our Lace Curtains and Fixtures all on the second floor, also Summer Blankets, Summer Comforts and all kinds of Upholstery goods, of which we have a complete assortment.

Our new Table Linens, Linen Sheets, Cotton Sheets, Napkins, Towels, Squares, Scarfs, Drapery Silks, Mull Draperies, Lace Bed Spreads, Table Covers, Eider Down Pillows are all in and ready for inspection. Many of our Table Damasks are 2 1-2 yards wide and Napkins 27 inches square. Our stock of Hosiery and Corsets is new and embraces none but the best.

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