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Criminal Law--The Felony Murder Doctrine as Related to Drunkenness

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CRIMINAL LAW· THE FELONY MURDER DOCTRINE AS RELATED TO DRUNKENNESS

In the early days of English common law no concessions were made because of the intoxication of the accused in criminal cases. A decision reported as early as 1551 indicates that the death penalty would be meted out to the defendant although he was extremely drunk, the court saying:

> " if a person that is drunk kills another, this shall be a felony and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory· but inasmuch as that ignorance was occasioned by his own act and folly and he might have avoided it, he shall not be privileged thereby "[1]

An even more severe attitude toward drunkenness was taken by Hale[2] and Blackstone,[3] who considered drunkenness as an aggravation of the crime committed. Probably the principal ·reason for refusing to give much consideration to the effect of intoxication on crimes of homicide was the belief as expressed by Wharton that "There could rarely be a conviction for homicide if drunkenness avoided responsibility."[4] It might be said then that drunkenness as dealt with in these cases was held to have no mitigating effect on homicide in the early period of our law. It was sufficient for conviction to show that a man had been killed by the defendant without any extenuating circumstances.

The extreme rigor of this rule was relaxed in the nineteenth century in the case of *Regina* v. *Doherty* in which Judge Stephen declared: " although you cannot take drunkenness as any excuse for a crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime."[5] From this statement it is seen that at this stage of the law, intoxication of the accused was neither a defense nor an excuse for a crime, but that it might be considered to prevent the prosecution from making out the crime where specific intent was a *sine qua non* of the offense.

In discussing this problem it is well to state the definition of murder. Stephen in his *Digest of the Criminal Law* defined murder

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[1] Reniger v Fogossa, 1 Plowden 1, 75 Eng. Rep. 1, 31 (1551).
1 HALE, HISTORY OF PLEAS OF THE CROWN (new ed. 1736) 32.
[3] 4 BLACKSTONE, COMMENTARIES (Sharswood ed. 1871) 25.
[4] 1 WHARTON, CRIMINAL LAW (12th ed. 1932) 95.
[5] 16 Cox C. C. 306, 308 (1887).

as an unlawful homicide committed with malice aforethought, and divided the situations constituting malice into four categories:

(A) intentional killing;
(B) knowledge that the act causing death would probably cause death or grievous bodily harm;
(C) an intent to commit any felony;
(D) homicide committed while resisting arrest.[6]

It is the purpose of this paper to consider drunkenness as related to the third category, commonly known as the felony murder rule.

By Foster's time any homicide committed in the perpetration of any felony was held to be murder as a matter of law.[7] This view is understandable, however, when the attitude which the law took toward felonies at that time is known. Felonies were treated as offenses punishable by death.[8] Too, all these common law crimes involved a certain degree of physical violence and danger to life.[9] But with the simultaneous growth of humanistic philosophy and statutory non-dangerous felonies the harshness of the rule soon became evident and resulted in the decision rendered by Stephen in the famous case of *Regina* v. *Serne*.[10] There the celebrated jurist said: "I think that, instead of saying that any act done with intent to commit a felony and which causes death is murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death amounts to murder."[11]

With this decision a radical change took place in the law's attitude toward homicide committed in the course of a felony. No longer could a man be convicted of murder by the mere showing of a homicide-felony combination. It appears that Stephen, in *Regina* v. *Serne*, added a subjective requirement, namely, that the actor must have knowledge of the danger attendant upon the act.[12] In the English courts the emphasis was shifted from the felony itself to the act which accompanied it and which produced death. This seemingly tolled the bell which announced the death of the felony murder rule, since the requirements were substantially the same as set out in "B" of Stephen's analysis of murder.[13]

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[6] STEPHEN, DIGEST OF CRIM. LAW (7th ed. 1926) 161.
[7] FOSTER, CROWN LAW (2nd ed. 1791) 139.
[8] *Op. cit. supra* note 4, at 686.
[9] The common law felonies were arson, robbery, burglary, larceny, rape, sodomy and mayhem.
[10] 16 Cox C. C. 311 (1877).
[11] Id. at 313.
[12] See Turner, *The Mental Element in Crimes at Common Law* (1938) 6 CAMB. L. J. 31, 58; Hall, *Intoxication and Criminal Responsibility* (1944) 57 HARV. L. R. 1045, 1069; *cf.* Tincher, *The Negligent Murder* (1939) 28 KY. L. J. 53, 56 n. 21, Sparks, *Should The Objective Test Be Applied In Negligent Murder Cases?* (1947) 35 KY. L. J.—
[13] This required that knowledge of the dangerousness of the act be present.

Prior to this decision, a drunken person could be convicted under the felony murder rule by proving that he killed in furtherance of a felony. Under the version enunciated in *Regina* v. *Serne* the defendant could not be adjudged guilty of murder even though he intended to commit the felony, unless he had knowledge of the danger.

For example, assume that John Jones becomes intoxicated, and suddenly realizing that he must replenish his empty purse, decides to commit a robbery. He sees a lady walking down a dark street at night and resolves to seize her purse. He certainly has the intent to carry into execution the felony of robbery. Assume also that the lady is easily frightened and afflicted with a serious heart ailment. Jones accosts her with the single purpose of seizing her purse, but because of the extreme fright which enthralls her, and the struggle which ensues, she suffers a heart attack and dies. Under the rule enunciated in the *Serne* case it is probably illogical to hold the defendant for murder. Here the State has the additional burden of proving that the accused knew that the act he committed was one involving a substantial risk to human life. Jones was aware of the fact that he was committing a robbery, but he may not have drawn the conclusion that the acts constituted a great danger.

Some fifty years subsequent to the *Serne* case, appeared a decision which erased Stephen's qualification of the felony murder rule and made it again completely objective. This was the case of *Director of Public Prosecutions* v. *Beard*.[14] The defendant was indicted for the murder of a thirteen year old girl. While intoxicated, and in furtherance of rape, he placed his hand over the victim's mouth and throat in order to subdue her and as a result she died of suffocation. In holding the accused guilty of murder Lord Birkenhead stated: " in Beard's case it was only necessary to prove that the violent act causing death was done in the furtherance of the felony of rape."[15] Further in his decision he said: " drunkenness in this case could be no defense unless it could be established that he was incapable of forming the intent to commit it (rape) which was not in fact, and manifestly, having regard for the evidence, could not be contended."[16]

Completely ignored in the decision was the importance of knowledge of the dangerous character of the act accompanying the felony. An external standard was created, composed of a violent felony and an additional factor, a violent act. Let the factors prescribed by this case be present and the accused would necessarily be guilty of murder. Even the view of Holmes,[17] that a dangerous act causing death of a human being was murder if the actor had knowledge of circumstances that would have led a man of common understanding

[14] (1920) App. Cases 479.
[15] *Id.* at 504.
[16] *Id.* at 504
[17] HOLMES, THE COMMON LAW (1881) 55-56.

to foresee death as a result of the act seems to be rather harsh. Here however, the House of Lords apparently decided that knowledge of such circumstances was superfluous.

That this is the law in England today is evidenced by the case of *Rex.* v. *Betts and Ridley*[18] decided in 1930, wherein the court held that if the defendant caused death by a violent act done in the course of a felony of violence, he was guilty of murder. The court declared that the accused had received the benefit of the doubt when the trial judge had issued an instruction based on a view similar to that of Holmes.[19]

Cases in the United States tend to adhere to a view bearing more resemblance to the doctrine set out in the *Beard* case than to the one held in the *Serne* case.[20] Very little importance is given to the subjective element, while attention is focused on the felony. The only distinction relied on in the American courts is the dangerousness of the felony, some states applying the felony murder rule in cases in which a combination of a homicide and any felony exists,[21] while others restrict it to homicide accompanied by a dangerous *felony.*[22] Typical among the arguments employed in cases within both categories is the statement that the felony dispenses with any proof of an intent to kill.[23] Certainly this intent is not necessary in order to obtain a murder conviction, but it is believed that an application of "B" of Stephen's analysis would bring about a more just result in felony homicides. This procedure would be much more logical than to inflict the death penalty on a man because he has committed a felony—either dangerous or non-dangerous—accompanied by an "accidental and unintended"[24] homicide.

It is submitted that the doctrine enunciated in the *Serne* case reaches the correct result. In order to satisfy the requirements of malice aforethought it should be shown that the accused foresaw the possible consequences of his act and that he was aware of the risk to human life. The felony murder rule should be discarded regardless of whether drunkenness or soberness characterized the defendant. A murder conviction should not be rendered if the accused was so intoxicated at the time of committing the death-dealing act that he did not realize the danger to life it involved and consequently did not foresee the death which occurred. If this foresight cannot be

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[18] 144 Law Times 526 (1930)

[19] *Id.* at 528.

[20] People v Kaye, 43 Cal. App. 802, 111 P 2d 679, 687 (1941) Simpson v. Commonwealth, 293 Ky. 831, 832, 170 S.W 2d 869 (1943)

[21] People v De La Roi, 36 Cal. App. 287, 97 P 2d 836 (1939).

[22] Washington v. State, 181 Ark. 1011, 28 S.W 2d 1055 (1930) State v. Schnelt, 341 Mo. 241, 108 S.W 2d 377 (1937)

[23] People v. Kaye, 43 Cal. App. 802, 111 P 2d 679, 687 (1941)

[24] People v. Valentine, —Cal.— 169 P 2d 1, 10 (1946), citing People v. Lindley 26 Cal. 2d 780, 791, 161 P 2d 227, 233 (1945).

proved, the conviction should be one of manslaughter for an unlawful homicide committed as the result of a reckless act. This is a sufficient deterrent and does not produce the harsh consequence of labeling one a murder who may be a useful member of society.

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