UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 40 | Number 2 Article 13

2-1-1962

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discourage a second attempt by the same person.[29] As stated by a leading authority on criminal law:[30]

> When a man is in the act of taking his own life there seems to be little advantage in having the law say to him: "You will be punished if you fail." . . . What is done to him will not tend to deter others because those bent on self-destruction do not expect to be unsuccessful. It is doubtful whether anything is gained by treating such conduct as a crime.

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Criminal Law—Homicide—Death Resulting More Than a Year and a Day After Assault

In *Commonwealth v. Ladd*,[1] indictments for murder and manslaughter alleged that the defendant struck the victim on September 21, 1958, and that the victim died as a result of this assault on November 1, 1959. The defendant moved to quash the indictments, contending that at common law there could be no criminal responsibility for a killing where the death ensued more than a year and a day after the stroke.[2] The Pennsylvania Supreme Court held that these motions to quash were properly overruled. The majority reasoned that the common law "year and a day" rule was not part of the definition of murder, but only a rule of evidence or procedure. After determining that the rule was evidentiary in nature, the court asserted that it was within the judicial province to abolish the rule in light of the advancement of scientific medicine in determining cause of death.[3] Consequently, the majority held that the indictments were not fatal and did properly charge the crimes of murder and manslaughter. A vehement dissent charged that the abolition of the

[29] See Larremore, *supra* note 23, at 331.
[30] PERKINS, CRIMINAL LAW 68 (1957).

[1] 402 Pa. 164, 166 A.2d 501 (1960).
[2] PA. STAT. ANN. tit. 18, § 4701 (Supp. 1960), does not define murder, but merely divides murder into degrees and provides punishments. The Pennsylvania courts have construed this absence of statutory definition as giving murder its common law meaning. Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); Commonwealth v. Dorazio, 365 Pa. 291, 74 A.2d 125 (1950).
[3] "[W]e may change a common-law rule of evidence without being guilty of judicial legislation, and abolish it when we are aware that modern conditions have moved beyond it and left it sterile." Commonwealth v. Ladd, 402 Pa. 164, 175, 166 A.2d 501, 507 (1960).

rule was unwarranted judicial legislation because the year and a day rule was firmly imbedded in the common law definition of murder.[4]

In order to determine the genesis of and the reasons for the year and a day rule, an examination of its common law development is necessary. At common law there were three methods of dealing with murder and manslaughter,[5] and in each form of action death within a year and a day after the stroke was an important element. One method was the inquisition against deodands whereby an action was brought to forfeit to the king the personal chattels used by the assailant in making the assault.[6] The rule applied in these cases was that if the party assaulted did not die within a year and a day after the assault there could be no forfeiture, for after that time it was conclusively presumed that death resulted from some other cause.[7]

A second form of action was the appeals of death. This was a private process for the punishment of public crimes where a private subject accused another of some heinous crime.[8] During the time that appeals of death were allowed, the Statute of Gloucester[9] was enacted. It provided that an appeal for murder should not be abated if the victim died within a year and a day after the assault. This statute was construed as requiring that the appeal be brought within a year and a day after the completion of the felony by the death of the victim.[10] Thus construed, the statute seems to have been a statute of limitations since it dealt with the time in which

[4] *Id.* at 201, 166 A.2d at 520.

[5] For an excellent and detailed analysis of the three forms of common law action dealing with murder and manslaughter, see Louisville, E. & St. L. R.R. v. Clarke, 152 U.S. 230 (1894). See also Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960); Note, 19 CHI.-KENT L. REV. 181 (1941).

[6] The personal chattels which were used by the assailant were forfeited to the king "to be applied to pious uses, and distributed in alms by his high almoner." 1 BLACKSTONE, COMMENTARIES * 300 [hereinafter cited as BLACKSTONE].

[7] "The law does not look upon such wound as the cause of a man's death after which he lives so long." HAWKINS, PLEAS OF THE CROWN 75 (8th Curwood ed. 1824) [hereinafter cited as HAWKINS].

[8] The appeal of death had its origin in the Germanic custom of allowing a private pecuniary satisfaction called a "weregild" to be paid to the injured party or his relatives. This private process continued in order to insure infliction of punishment upon the offender, although the offenses were no longer redeemable. 4 BLACKSTONE * 313. These appeals could be brought prior to an indictment and if the defendant was acquitted he could not be later tried in a public prosecution for the same offense. 4 BLACKSTONE * 315.

[9] 1278, 6 Edw. 1, c. 9. The appeal of death was abolished as a form of action in England by statute in 1819. Act to Abolish Appeals, 1819, 59 Geo. 3, c. 46.

[10] 4 BLACKSTONE * 315.

the private appeal might be initiated. However, through transition, and perhaps misinterpretation, the year and a day limitation on the right to prosecute an appeal became a substantial element of criminal homicide.[11]

The third form of action was the public prosecution in the name of and on behalf of the king. With the advent of criminal jurisdiction in the King's Court it became well established that no one was criminally responsible for a homicide if the victim lived beyond a year and a day from the infliction of the fatal stroke.[12] The apparent reason for the rule was the uncertainty of medical science in fixing the cause of death due to the long lapse of time between injury and death.[13]

The firm establishment of this rule in the common law probably explains its widespread adoption and application throughout this country. With the exception of New York,[14] and now Pennsylvania, all courts which have considered the question have held that the year and a day rule must prevail.[15] Eleven states have expressly adopted the rule by legislative enactment.[16] In states where there are statutes

[11] For discussions of this statute as one of limitations and its transition into an element of criminal homicide, see Notes, 19 CHI.-KENT L. REV. 181 (1941); 65 DICK. L. REV. 166 (1961).

[12] Louisville, E. & St. L. R.R. v. Clarke, 152 U.S. 230 (1894); Commonwealth v. Ladd, 402 Pa. 164, 175, 166 A.2d 501, 507 (1960) (concurring opinion); 4 BLACKSTONE *197; 3 COKE, INSTITUTES 47 (1817) [hereinafter cited as COKE]; 10 HALSBURY, LAWS OF ENGLAND, *Criminal Law* § 1349 (3d ed. 1955); HAWKINS 93. The reason for the extra day was stated by Lord Coke: "[For] regularly the law makes no fraction of a day: and the day was added, that there might be a whole year at least after the stroke." 3 COKE 53.

[13] Coke gave the reason for the rule: "[F]or if he die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke, or poison . . . or of a natural death; and in the case of life the rule of law ought to be certain." 3 COKE 53. See also The King v. Dyson, [1908] 2 K.B. 454, where the court held that if death did not ensue within a year and a day after the injury was inflicted the death must be attributed to some other cause than the blow.

[14] People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934); People v. Legeri, 239 App. Div. 47, 266 N.Y. Supp. 86 (1933). The New York court reasoned that the common law rule was abrogated by the New York statute defining murder which omitted mention of the year and a day rule. The omission was construed as legislative intent for its non-application. These cases provoked widespread comment. Notes, 4 BROOKLYN L. REV. 86 (1934); 19 MINN. L. REV. 240 (1935); 10 WIS. L. REV. 112 (1934).

[15] *E.g.*, Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943); People v. Corder, 306 Ill. 264, 137 N.E. 845 (1922); State v. Dailey, 191 Ind. 678, 134 N.E. 481 (1922); Elliott v. Mills, 335 P.2d 1104 (Okla. Crim. App. 1959). See generally Annot., 20 A.L.R. 1006 (1922).

[16] ARIZ. REV. STAT. ANN. § 13-458 (1956); ARK. STAT. ANN. § 41-2210

creating, but not defining, the crimes of murder and manslaughter the year and a day rule has been held applicable with the aid of the common law.[17]

Although the great weight of authority supports the application and existence of the rule, there is a sharp conflict as to its nature. The question resulting in this division of opinion is whether the rule is one of evidence or procedure, or whether it is a substantive element within the definition of murder. Those cases holding that the rule is evidentiary in nature reason that no evidence is admissible to show cause of death when a year and a day elapse between injury and death.[18] Those cases holding that the rule is substantive reason that the rule is part of the definition of murder and unless death occurs within a year and a day there is no crime charged.[19] Perhaps the best reasoned solution is found in the recent case of *Elliott v. Mills*[20] where the court termed the rule both substantive and evidentiary, and suggested that in a criminal action death within a year and a day must be both pleaded (by indictment) and proved.[21]

The majority in the *Ladd* case reasoned that merely classifying the rule as evidentiary would serve as a sound basis for its abolition.

(1947); CAL. PENAL CODE § 194; COLO. REV. STAT. ANN. § 40-2-9 (1953); DEL. CODE ANN. tit. 11, § 573 (1953); IDAHO CODE ANN. § 18-4008 (1948); ILL. ANN. STAT. ch. 38, § 365 (Supp. 1960); MONT. REV. CODES ANN. § 94-2509 (1947); NEV. REV. STAT. tit. 16, § 200.100 (1957); N.D. CENT. CODE ANN. § 12-27-27 (1959); UTAH CODE ANN. § 76-30-7 (1953). See also UTAH CODE ANN. § 76-30-7.4 (Supp. 1960).

[17] *E.g.*, State v. Dailey, 191 Ind. 678, 134 N.E. 981 (1922); State v. Moore, 196 La. 617, 199 So. 611 (1940); Elliott v. Mills, 335 P.2d 104 (Okla. Crim. App. 1959).

[18] *E.g.*, Louisville, E. & St. L. R.R. v. Clarke, 152 U.S. 230, 241 (1894) (dictum); People v. Clark, 106 Cal. App. 2d 271, 235 P.2d 56 (1951); Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943); State v. Huff, 11 Nev. 17 (1876). See also PERKINS, CRIMINAL LAW 605 (1957), where the author in discussing the year and a day rule said: "Unless the death occurs within this period after the wound . . . the law conclusively presumes that the loss of life was due entirely to other causes and will not hear evidence to the contrary."

[19] *E.g.*, State v. Moore, 196 La. 617, 199 So. 661 (1940); People v. Brengard, 265 N.Y. 100, 105, 191 N.E. 850, 852 (1934) (dictum); Hardin v. State, 4 Tex. Cr. App. R. 335 (1878); State v. Spadoni, 137 Wash. 684, 243 Pac. 854 (1926). Indictment for murder omitting this essential element of murder does not charge a crime. Alderson v. State, 196 Ind. 22, 145 N.E. 572 (1924).

[20] 335 P.2d 1104 (Okla. Crim. App. 1959).

[21] This reasoning seems to suggest that the rule is substantive because it has the effect of incorporating the year and a day rule into the definition of murder as one of the essential elements of the crime that must be proved as well as alleged.

It should be noted that no other court classifying the rule as evidentiary has abolished it.[22] On the contrary, other courts have reluctantly followed the rule, reasoning that its abolition is a matter for the legislature.[23]

In an early North Carolina case[24] the court recognized and applied the rule in holding that an indictment which did not specify when the victim died after receiving a wound was fatally defective. The court reasoned that "if death did not take place within a year and a day of the time of receiving the wound, the law draws the conclusion that it was not the cause of death; and neither the court nor jury can draw a contrary one."[25] While this language apparently treats the rule as evidentiary, Chief Justice Ruffin's opinion in a later case[26] seems to align North Carolina with those states holding that the rule is part of the substantive definition of murder:

> [I]t must appear on the bill that the day of the death, as laid, is within a year and a day from that of the wounding. For, if it is not so laid, the indictment *does not charge murder,* as the law attributes the death, not happening within a year and a day, to some other cause than the wounding.[27]

The early North Carolina cases recognized the year and a day rule while passing on the sufficiency of indictments containing vague language as to the time of death.[28] The writer could not find that the question of the applicability of the rule has ever been presented in North Carolina when, on the facts, the death occurred more than a year and a day after an assault. In all the North Carolina cases discussing the rule, the question has been raised in connection with the sufficiency of the indictment.

G.S. § 15-144, enacted in 1887, provides that indictments for murder and manslaughter containing the allegations set out in the statute will be sufficient.[29] Conspicuously absent from the prescribed

[22] See cases cited note 18 *supra.*

[23] "[U]nder the present law there is no other alternative. . . . On the question of the year and a day rule, our hands are tied." Elliott v. Mills, 335 P.2d 1104, 1114 (Okla. Crim. App. 1959) (concurring opinion).

[24] State v. Orrell, 12 N.C. 139 (1826).

[25] *Id.* at 141.

[26] State v. Shepherd, 30 N.C. 195 (1847).

[27] *Id.* at 198. (Emphasis added.)

[28] State v. Haney, 67 N.C. 467 (1872); State v. Baker, 46 N.C. 267 (1854); State v. Shepherd, 30 N.C. 195 (1847); State v. Orrell, 12 N.C. 139 (1826).

[29] N.C. GEN. STAT. § 15-144 (1953).

allegations is the the requirement of an allegation that the death occurred within a year and a day. In *State v. Pate*,[30] decided within a few years after the enactment of this statute, an indictment for murder was drawn in the statutory form, alleging only that the date of the murder was December 5, 1896. The evidence at the trial showed that the victim was wounded on this date, but did not die until some seventy hours thereafter. On appeal, the court held that the indictment was drawn within the form prescribed by the statute and was sufficient to charge murder, and that there was satisfactory proof that death occurred within a year and day.

However, even though an indictment drawn in the form prescribed by G.S. § 15-144 is sufficient, this does not have the effect of removing death within a year and a day from among the essential elements of homicide that must be proved to establish criminal responsibility within the common law definition of murder. The legislature has provided that the common law is in full force and effect unless abrogated or repealed.[31] G.S. § 14-17 merely divides murder into degrees and provides the punishments therefor.[32] It does not provide a new definition of murder but permits the definition to remain as it was at common law.[33] Therefore, it seems clear that the ancient year and a day rule remains in effect in North Carolina today, except for the requirement that it be alleged in the indictment.

It is conceded that the majority in the *Ladd* case was motivated by good practical reasoning when considering that the advancement of medical science has rendered the year and a day rule obsolete. However, the abolition of the rule by judicial determination is questionable in view of its firm entrenchment in the common law and widespread acceptance in this country. The better reasoned holding appears in *Elliott v. Mills*[34] where the Oklahoma court was faced with essentially the same question as that presented in *Ladd*. The court in *Elliott* refused to abolish the rule, reasoning that its abolition was a matter for the legislature.

Legal writers have termed the rule "a purely mechanical test"[35]

[30] 121 N.C. 659, 28 S.E. 354 (1897).
[31] N.C. GEN. STAT. § 4-1 (1953).
[32] N.C. GEN. STAT. § 14-17 (1953).
[33] State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949); State v. Dalton, 178 N.C. 779, 101 S.E. 548 (1919).
[34] 335 P.2d 1104 (Okla. Crim. App. 1959).
[35] PERKINS, *op. cit. supra* note 18, at 605.

and an "arbitrary rule"[36] and judicial opinions have joined in assailing the rule as archaic.[37] The cause of death can now be accurately fixed by competent medical testimony, whereas at the time of the rule's inception the cause of death after more than a year and a day was speculative.[38] It is a curious irony that medical science has advanced to the point that it may prolong life for long periods and yet this miraculous advance could very well serve to exonerate a murderer by simply prolonging his victim's life.

It is submitted that the legislature should take notice of this ancient rule in light of current day medical standards and enact legislation abolishing it. Many forms of legislation have been discussed,[39] but a positive repudiation of the rule would best serve the ends of justice. The rights of the accused would still be adequately protected, since the prosecution would still have the burden of proving causation beyond a reasonable doubt. A positive repudiation of the rule would serve to leave the issue of cause of death to the triers of fact, rather than to a legal presumption forged some seven hundred years ago that has long outlived its merit, logic and basis.

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Criminal Law—Split Sentence—Trial Judge in North Carolina Not Permitted To Impose Sentence Active in Part and Suspended in Part

The first probation law was enacted in Massachusetts in 1878;[1] since that time changes in the philosophy of criminal punishment have resulted in widespread use by courts of the suspended sentence. The exact frequency of use of this type sentence is difficult to ascertain because adequate statistical information is not compiled in a large majority of the states. Figures complied by the Federal

[36] CLARK & MARSHALL, LAW OF CRIMES 536 (6th ed. 1958).

[37] Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943) (should be adjusted by the legislature to conform to medical standards); Elliott v. Mills, 335 P.2d 1104 (Okla. Crim. App. 1959) (rule has run the "limit of its logic"); The King v. Dyson, [1908] 2 K.B. 454 (doubts present day merits of the rule).

[38] See Elliott v. Mills, 335 P.2d 1104, 1114 (Okla. Crim. App. 1959) (concurring opinion), where it was pointed out that at the time of the formulation of the rule, life expectancy was not more than thirty-four years, while today, expectancy is about sixty-nine years. Also, at the time of the rule's inception medical science was in its infancy.

[39] *Id.* at 1115.

[1] Mass. Acts 1878, ch. 198. See generally BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 554 (3d ed. 1959).