

June 2014

## Felony Murder and the Jones Law

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### Recommended Citation

Donlon, Edward J. (1929) "Felony Murder and the Jones Law," *St. John's Law Review*: Vol. 4 : No. 1 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol4/iss1/10>

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“It may be that the human agencies engaged in such beneficent work will at times fall short of what would be expected of men and women intrusted with a most serious and delicate task, but that is a matter that concerns the due administration of the laws, and may well be left to the vigilance of the people and the conscience of officials.”

Nevertheless, this is the method adopted by the Legislature, and sanctioned as far as it goes by the leading criminologists of the day.<sup>21</sup> It is the function of courts to interpret and apply the laws of the state. The lower courts have been singularly free from technicalities. They have been quick to grasp the intention of the Legislature, and have striven to apply it. In *People v. Thompson* the Court of Appeals construed the Parole Commission Law, but did it apply it? It found the provisions of the law mandatory in those cities in which it applies, and yet its decision indicates a policy which deviates from that finding. The likely effect of this decision is to influence trial courts in future applications of this statute towards an exercise of a discretion in their pronouncement of sentence, which the Court of Appeals admits was not in the contemplation of the Legislature. Yet this might well be deemed to be authorized, from the fact that the Court of Appeals itself, in this case, held the defendant incapable of reformation in the face of the finding of the Trial Court in its second determination that he was to be considered a proper subject for the reforming agencies with which the Parole Commission Law is concerned. It is difficult to reconcile its policy, as we must interpret it from this case, with its dicta as to the mandatory functions of the law. It is still more difficult to understand why the Court of Appeals, even indirectly, should produce a reactionary effect on the legislative measures passed for the advancement and benefit of society as a whole.

ESTHER L. KOPPELMAN.

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#### FELONY MURDER AND THE JONES LAW.

The recent enactment of Congress, popularly known as the Jones Law,<sup>1</sup> which has assumed much prominence in the press and public

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<sup>21</sup> See Barnes, *The Repression of Crime*; Tannenbaum Frank, *Wall Shadows*.

<sup>1</sup> Public No. 899—70th Congress (S. 2901). An act to amend the National Prohibition Act, as amended and supplemented: “Be it enacted by the Senate and House of Representatives of the United States of America in Congress, assembled, That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of

discussion, presents a question of considerable interest in the field of criminal law. Will it be murder in the first degree, under the felony murder rule where a homicide is committed by one while in the violation of the Jones Law, even though the killing would be either excusable homicide or manslaughter, were the violation of the federal law not itself a felony?

Under the early common law a homicide committed while perpetrating or in the attempt to perpetrate a felony was murder even though there was no premeditation or intent to kill.<sup>2</sup> The maliciousness and the unlawful nature of the felonious act was held to supply the place of malice and intent to kill. Some of the authoritative cases placed the restriction, however, that the felonious act must be an act naturally dangerous to life and likely in itself to cause death.<sup>3</sup> It was also held that if the unlawful act was merely a misdemeanor and not naturally resulting in death the homicide was manslaughter.<sup>4</sup> But before one was held answerable, at common law, for an unintentional homicide, in the very few cases that arose, the unlawful act must have been *malum in se* as distinguished from acts *malum prohibitum*, acts not in and of themselves wrong, merely prohibited by positive law.<sup>5</sup>

This substantially remains the law.<sup>6</sup> Although most states have passed statutes making homicides committed while perpetrating or in the attempt to perpetrate a felony, murder in the first degree, many states have restricted it to certain enumerated felonies which are, generally, arson, rape, burglary, and robbery. In these states it is for the most part held that if the felony is other than those enumerated the homicide is murder in the second degree. As to unlawful acts being *malum prohibitum* or *malum in se* the distinction has rarely been drawn, in this country, in cases of felony, such an act almost always being an act *malum in se* and the occasion to distinguish,

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intoxicating liquor as defined by Section 1, Title II of the National Prohibition Act, the penalty imposed for each such offense shall be a fine not to exceed \$10,000 or imprisonment not to exceed five years or both: Provided, that it is the intent of Congress that the Court, in imposing sentence hereunder, shall discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.

"Sec. 2. This Act shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense now provided by the said National Prohibition Act."

<sup>2</sup> Regina v. Serne, 16 Cox C. C. 311 (1887); Regina v. Greenwood, 7 Cox C. C. 404 (1857); State v. Hopkirk, 84 Mo. 278 (1884); Regina v. Lee, 4 Fost. & F. 63 (1864); Queen v. Franz, 2 Fost. & F. 580 (1861); 1 Hawk. P. C. 127; 2 Hawk. P. C. 442; Barrett's Case, Stephen's Digest of Crim. Law, 164, Art. 224; 1 Wharton, Criminal Law (11th ed. 1912), Sec. 445 *et seq.*; 4 Bl. Comm. 200.

<sup>3</sup> Regina v. Serne, *supra*; 3 Chit. C. L. 725 *et seq.*

<sup>4</sup> Rex v. Wild, 2 Lew. C. C. 214; 3 Chit. C. L. 727, 729.

<sup>5</sup> 1 Hale P. C. 38; *ibid.* 471, 476; Foster C. L. 258 *et seq.* 4 Bl. Comm. 200; 3 Chit. C. L. 729; Commonwealth v. Adams, 114 Mass. 323, 19 Am. Rep. 362 (1873).

<sup>6</sup> 3rd Dec. Dig. 973, *et seq.*

therefore, never having arisen, except in a few cases.

The "felony murder" statutes in New York have undergone a few changes. In 1860<sup>7</sup> the statutes provided that murder committed in the perpetration or in the attempt to perpetrate arson, rape, robbery, burglary or in the attempt to escape from prison, was first degree murder. This was repealed in 1862<sup>8</sup> and arson remained the only subject of felony murder. In 1873<sup>9</sup> the former statute was amended to include all felonies. The present statute, Penal Law, Section 1044<sup>10</sup> provides: "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed \* \* \* 2. \* \* \* or without a design to effect death, by a person engaged in the commission of, or in the attempt to commit a felony, either upon or affecting the person killed or otherwise. \* \* \*" This is all-inclusive, so that the killing of a human being is murder in the first degree, in this state, whenever done by a person engaged in the commission of, or in the attempt to commit *any* felony, and it has been so held.<sup>11</sup>

Prior to the enactment of the Jones Law in March of this year, a first offender of the National Prohibition Act was guilty of a misdemeanor and a second or subsequent offender was guilty of felony.<sup>12</sup> Under the Jones Law a more stringent penalty has been provided for—even a first offender is guilty of a felony because since even he may be punished by imprisonment of more than one year he comes within the federal definition of a felony, which is: "all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors."<sup>13</sup>

By the second section of the 18th Amendment, Congress and the several states are given concurrent<sup>14</sup> power to enforce the Amendment by appropriate legislation. By the terms of the Amendment each state, as well as Congress, may enact such enforcing legislation as they see fit.<sup>15</sup> Breaches of the federal statutes become federal offenses and violations of the state statutes become state offenses.<sup>16</sup>

<sup>7</sup> Laws of 1860, c. 410.

<sup>8</sup> Laws of 1862, c. 197.

<sup>9</sup> Laws of 1873, c. 644.

<sup>10</sup> Laws of 1909, c. 88.

<sup>11</sup> *People v. Collins*, 234 N. Y. 355, 137 N. E. 753 (1922); *People v. Weiner*, 248 N. Y. 118 (1928); *People v. Moran*, 246 N. Y. 100 (1927); *People v. Sobieskoda*, 235 N. Y. 411, 139 N. E. 558 (1923); *Dolan v. People*, 64 N. Y. 485, *aff'd* 6 Hun 493 (1876); *People v. Greenwall*, 115 N. Y. 520, 22 N. E. 180 (1889).

<sup>12</sup> Title II, National Prohibition Act, Sec. 29, 27 U. S. C. A., Sec. 46.

<sup>13</sup> Fed. Crim. Code, Sec. 335, 18 U. S. C. A., Sec. 541.

<sup>14</sup> For House debates on "concurrent power" in the Prohibition Amendment see 58 Cong. Rec. 2512 (1919).

<sup>15</sup> It is interesting to note that the Supreme Court of the United States has held that prosecution by both the state and the federal government for the same act of manufacturing prohibited liquors does not constitute double jeopardy. *Hebert et al. v. Louisiana*, 272 U. S. 312, L. ed. 270, 48 A. L. R. 1102 (1926).

<sup>16</sup> *U. S. v. Lanza*, 260 U. S. 377, 43 Sup. Ct. 141, 67 L. ed. 314 (1922).

By allowing the states to enforce by "appropriate legislation" does not expressly require the passage of enforcing legislation. It merely permits the state legislatures to pass enforcement laws not repugnant to the Amendment.<sup>17</sup> In the year 1921 the Legislature of New York passed an enforcement act known as the Mulligan-Gage Law,<sup>18</sup> which, however, was repealed in 1923 by the Cuvillier Act.<sup>19</sup>

Since we have no prohibition statute on our books at this time the question arises whether a felony against the Federal Government would be construed in this state as a felony under our laws. The idea that the word felony has a fixed and certain meaning is erroneous because it has as many meanings as there are law-making bodies.<sup>20</sup> Each sovereign state may give its own definition as to what shall constitute a felony within its jurisdiction.<sup>21</sup> New York has seen fit to describe a felony as a crime punishable by death or imprisonment in state's prison,<sup>22</sup> and it has been frequently held<sup>23</sup> that the term "felony" as used at common law and in statutes, with reference to the killing of a human being without any design to effect death, by a person engaged in the commission of any felony, means an offense punishable by death or imprisonment in the *state prison*. Consequently, as violations of the prohibition laws are not punishable in the manner provided for in our state definition of a felony, it is submitted that they are not state felonies.<sup>24</sup> Since New York's repeal of its prohibition laws, it may be said that liquor violations are not

<sup>17</sup> *Ex parte* Virginia, 100 U. S. 339, 25 L. ed. 676 (1879); U. S. v. Reese, 92 U. S. 214, 23 L. ed. 563 (1875).

<sup>18</sup> Laws of 1921, c. 155, 156.

<sup>19</sup> Laws of 1923, c. 871.

<sup>20</sup> *Ex parte* Humphrey, 64 Cal. App. 572, 222 Pac. 366 (1923).

<sup>21</sup> *Ex parte* Humphrey, *supra*. In U. S. v. Lanza, *supra* Note 16, at 382, in speaking of Federal and State Prohibition Laws the Court said: "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."

<sup>22</sup> N. Y. Penal Law (1909), Sec. 2.

<sup>23</sup> *Terrill v. State*, 74 Wis. 278, 42 N. W. 243 (1889); *State v. Hammond*, 35 Wisc. 315 (1873); *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578 (1851); *Commonwealth v. Mink*, 123 Mass. 422, 25 Am. Rep. 109 (1877); *Weller v. State*, 19 Ohio C. C. 166 (1899); *Johnson v. State*, 66 Ohio St. 59, 63 N. E. 607, 61 L. R. A. 277, 90 Am. St. Rep. 564 (1902). Cf. *Bannon et al. v. U. S.*, 156 U. S. 464, 39 L. ed. 494 (1895); *ex parte* Wilson, 114 U. S. 417, 5 Sup. Ct. 935 (1885).

<sup>24</sup> In *ex parte* Humphrey, *supra* Note 20, the question arose whether under the state prohibition statutes a second offender was guilty of felony or misdemeanor. The statute by reference adopts the penal provisions of Section 29 of the National Prohibition Act, which, although it provides for imprisonment for more than one year, does not specify whether the offense is a felony or a misdemeanor. The Court held the offense to be a misdemeanor under the state law, even though a felony under the federal law. It was pointed out that the word "felony" under the federal law means something different from the meaning given to it by the state law. Under the federal law the term of imprisonment the Court may impose governs, whereas under the state law the place of imprisonment—*state's prison*—determines the character of the offense. The Court therefore refused to adopt the federal classification of crimes.

criminal<sup>25</sup> against the state sovereignty other than by virtue of the state's duty to uphold constitutional amendments and federal laws.<sup>26</sup> Penal Law, Sec. 22, N. Y. Laws, 1909, Ch. 88, which provides, "No act or omission begun after the beginning of the day of which this chapter takes effect as a law, shall be deemed criminal or punishable, except as prescribed or authorized by this chapter, or by some statute of this state not repealed by it," lends much weight to this view.

It is concluded, therefore, that from a literal and sound construction of the cited statutes felony murder under the Jones Law cannot arise in New York. Assuming that we had a state prohibition law in force which by its provisions made a violation of it a felony, an interesting question arises as to whether our courts would hold a violator of such state law, who committed a homicide while in its perpetration, guilty of felony murder.

A very interesting case<sup>27</sup> which may aid us in our discussion was decided by the Supreme Court of Michigan in 1924. Defendant was convicted of involuntary manslaughter and brought his case to this court for review on exceptions. Defendant was engaged in the business of manufacturing and selling "moonshine" whiskey. After excessively drinking liquor furnished by defendant, deceased and his companions started walking home. This occurrence was in the month of February, and the weather was extremely cold. Doctors testified that the death was caused by acute alcoholism and exposure to the cold, deceased no doubt in a drunken stupor having fallen asleep on his journey home. Defendant argued that selling intoxicating liquor was a felony<sup>28</sup> and since where death results from the commission of a felony the homicide is not manslaughter but murder, he was improperly convicted of manslaughter. Holding him not guilty of homicide in any degree, the Court nevertheless took occasion to point out its complete disagreement with defendant's argument with respect to the degree of his crime, pointing out that violation of liquor laws is not inherently criminal, only criminal because prohibited by statute. In other words, the act was merely *malum prohibitum* and not *malum in se*.<sup>29</sup> The Court said:

"\* \* \* notwithstanding the fact that the statute has declared it to be a felony, it is an act not in itself directly and

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<sup>25</sup> A new aspect to the liquor question has arisen in New York with respect to the prosecution of certain liquor violations under a state penal statute in reference to nuisances, but that question is not germane to the discussion at hand.

<sup>26</sup> U. S. Constitution, Art. VI, Sec. 2; Atwell's Fed. Crim. Law, 2nd ed., Sec. 1, 37.

<sup>27</sup> *People v. Pavlic*, 227 Mich. 562, 199 N. W. 373 (1924).

<sup>28</sup> Mich. Comp. Laws (Cahill, 1915 and Supp. 1922), Sec. 7079, makes practically all violations of the state prohibition statutes felonies.

<sup>29</sup> But see *State v. Keever*, 177 N. C. 114, 97 S. E. 727 (1919).

naturally dangerous to life.<sup>30</sup> So if one in the commission of such an act unintentionally causes the death of another he is not guilty of murder, nor is he guilty of manslaughter unless he commits the act carelessly and in such a manner as manifests a reckless disregard of human life."

It is further stated, in this opinion, that if the liquor furnished by defendant were dangerous for use as a beverage of greater potency than ordinary whiskey, or if it contained poisonous ingredients, the defendant, having distilled it himself, would be charged with a knowledge of its dangerous character and would be guilty of involuntary manslaughter.

It must be noticed, however, that Michigan's definition of first degree murder is not similar to ours.<sup>31</sup> It reads as follows: "\* \* \* all murder which shall be perpetrated by means of poison, or lying-in-wait or any other kind of wilful, deliberate and premeditated killing or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree. \* \* \*" This provision is similar to the provision of the federal criminal code<sup>32</sup> and quite similar to the provision of our state statute of 1860.<sup>33</sup> Although the Michigan statutes make no provision for homicide committed while perpetrating felonies other than those enumerated, it appears from a reading of the cases that the common law in reference to felony murder still obtains in that state. The common law in this particular case, as previously indicated, appears to be that an unintended homicide committed by one who at the time is engaged in the commission of a felony is murder if the homicide is the ordinary and probable effect of the felony in which the criminal was engaged.<sup>34</sup> Therefore we can plainly understand the reason for the decision. Although the act of furnishing the prohibited liquor was a felony still the act is not a probable cause of homicide. The common law as regards involuntary manslaughter still prevails in Michigan. It is, in part, defined as the unintentional killing of another without malice while doing an unlawful act, not amounting to a felony nor naturally tending to cause death or in negligently doing some lawful act.<sup>35</sup> And by the weight of authority where the

<sup>30</sup> In this connection see *People v. Olsen*, 80 Cal. 122, 22 Pac. 125 (1889); *Lamb v. People*, 96 Ill. 73 (1880); *Regina v. Serne*, *supra* Note 2; *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490 (1833); *Cunningham v. People*, 195 Ill. 550, 63 N. E. 517 (1902); *Nutt v. State*, 63 Ala. 180 (1879); 63 L. R. A. 354, note.

<sup>31</sup> Mich. Comp. Laws (Cahill, 1915), Sec. 15192.

<sup>32</sup> Fed. Crim. Code, Sec. 273; R. S. Sec. 5339, 18 U. S. C. A., Sec. 452.

<sup>33</sup> *Supra* Note 7.

<sup>34</sup> *People v. Harris*, 214 Mich. 145, 182 N. W. 673, 16 A. L. R. 910 (1921); *People v. Barnes*, 182 Mich. 179, 148 N. W. 400 (1911); *People v. Ryczek*, 224 Mich. 106, 194 N. W. 609 (1923) and cases therein cited; *supra* Note 2; *State v. Reitze*, 86 N. J. L. 407, 92 Atl. 576 (1914).

<sup>35</sup> Wharton, *Homicide* (3rd ed.) 8; *People v. Harris*, *supra* Note 34.

question has arisen, if the unlawful act is merely *malum prohibitum* and not *malum in se* the act, before one is answerable for the homicide, must be in its nature dangerous to life or it must manifest an evil nature or wrongful disposition to harm or injure another in his person or property.<sup>36</sup> It was under the latter doctrine that the Pavlic case<sup>37</sup> was decided.<sup>38</sup>

The "felony murder" rule as applied to those cases in which the felony is arson, rape, burglary, robbery, or other grievous crimes, where the felonious act displays a wickedness of heart or a general disregard for others, is sound beyond doubt; but where, as under the Jones Law, the offense is *malum prohibitum* only, in the absence of controlling statutes, the rule founded upon reason and justice, and not without authority, should be, if the result of the felony is homicide:

1. The killing will be murder, where the natural and probable consequence of the felony is death; 2. manslaughter, if the unlawful act is done negligently or in a wanton disregard for the life of others and the unlawful act is not a probable consequence of death; 3. neither murder nor manslaughter if the unlawful act is not done wantonly or negligently and if the homicide is not the natural consequence of the unlawful act.

Since as we have already seen,<sup>39</sup> a homicide resulting from the perpetration or attempt to perpetrate *any* felony is statutory murder in New York, it follows that if violations or prohibition laws were made felonious by our penal laws, the resulting death would be held to be murder in the first degree. This would be mandatory and not subject to the judicial refinements found in the common law.

EDWARD J. DONLON.

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<sup>36</sup> People v. Barnes, *supra* Note 34, and cases therein cited; Thiede v. State, *infra* Note 38, and cases therein cited. See also Sparks v. Commonwealth, 3 Bush (Ky.) 111, 96 Am. Dec. 196 (1867); Brittain v. State, 36 Tex. Cr. R. 406, 37 S. W. 758 (1896); Silver v. State, 13 Ga. App. 722, 79 S. E. 919 (1913); State v. De Fonti, 34 R. I. 51, 82 Atl. 722 (1912); State v. Keever, *supra* Note 29; Commonwealth v. Adams, *supra* Note 5; Estelle v. State, 51 N. J. L. 182, 17 Atl. 118 (1888); State v. Reitze, *supra* Note 34.

<sup>37</sup> *Supra* Note 27.

<sup>38</sup> In Thiede v. State, 106 Neb. 48, 182 N. W. 570 (1921) the Court said: " \* \* that since the act of defendant was wrong only because prohibited it is an act *malum prohibitum*, and where in the perpetration of such an act death results, the law will not convert the act, innocently done and done with no intent to injure and with no disregard for the safety of another, into a criminal act and pronounce the act manslaughter. On the other hand, where the act is unlawful is *malum prohibitum* merely, but is accompanied by negligence and, in its performance, the safety of others is recklessly disregarded, it is held sufficient to supply the place of intent."

<sup>39</sup> *Supra* Note 11.