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Ancient Decisions

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2) the assault, with elements common to the homicide, must be merged with it; and 3) there being no underlying separate felony, there was no felony murder. The defense thus read the facts as showing an intent to enter the home solely to assault Sisler, i.e. one continuous criminal transaction from entry to homicide.

The doctrine of merger, where not abrogated by statute, is applicable so that an accused will not face "double punishment" for one act. At common law, the rule was given effect where the same act generated more than one offense. *Klein v. State*, 151 Md. 484, 135 A.591 (1926); MILLER, CRIMINAL LAW, 50 (1934); CLARK AND MARSHALL, CRIMES, § 2.03 (7th Ed. 1968).

The defense theory in *Harris* failed for three basic reasons. First, the burglary was a distinct offense committed for the demonstrated purpose of finding an individual the attackers thought was *other than the murder victim. See Harris v. United States*, 373 A.2d 590, 593 n. 8. This intent to enter to find the "third party" gave the burglary a specificity apart from the homicide—an element of intent separate from the killing. Second, 22 D.C. Code § 2401 proscribes as felony murder a killing in *any housebreaking*. Third, "[T]he societal interest served by the burglary statute [22 D.C. Code § 1801], protection of occupied dwellings, is separate and distinct from that of the murder statute, security and value of the person." 377 A.2d at 38.

As the Court of Appeals stated in a case clearly on point:

> [Defendant] committed burglary by knowingly entering [victim's] home with the intent to assault him. Having committed the burglary and violated the appurtenant societal interests, it was still possible for [defendant] and his companions to withdraw from the premises without attacking [the victim]. But continuation of this criminal conduct resulted in the death . . . and the commission of a second distinct crime.

Blango v. United States, 373 A.2d 885, 888 (D.C. App. 1977).

The court in *Blango* found that a conviction for felony murder was appropriate for policy reasons even where the criminal event was isolated, in terms of both *mens rea* and *actus reus*, to the immediate parties, i.e. no intent was shown to enter for a purpose other than to kill the immediate victim. An even stronger case against merger is thus found in *Harris* where there are indicia of two separate criminal purposes.

In this case, where the homicide is ancillary to the attempted burglary, the following observation is appropriate:

> It is said that if [the accused] arms himself with the intent to shoot anyone who interferes with the commission of the burglary, he is chargeable with such premeditation as to render him guilty of murder in the first degree.

1 WARREN ON HOMICIDE § 74 at 332 (1938).

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There it is, volume one, number one. It is all done in one paragraph and about one-quarter of the page. Still it *is* the first reported case in United States jurisprudence.

In days when Maryland was more freely dispensed than it is today, one William Boreman filed a preliminary claim to four hundred acres at Nanjemoy. Charles County people take note. He had the ground surveyed, occupied it, and considered it his own. He failed, however, to perfect a patent to his land within the time specified in the original warrant.

Meantime, Captain William Stone, apparently realizing the defect in Boreman's claim, filed and perfected a patent to the same land. When Captain Stone undertook to occupy land then his, dispute naturally arose. It came to the attention of the provincial court. *Stone v. Boreman* 1 H & McH 1 (1658).

The court held that Boreman had lost his claim by failing timely to perfect his patent. Stone was the rightful owner of the land in question. Boreman was still entitled to four hundred acres and might have it elsewhere in a "convenient place." *Id.* at 2. Basic equity is affordable where land is plentiful.

The interesting part of this rather short report concerns the treatment of the surveyor who laid out Boreman's original claim. The court seems to hold that he should have known of the fault in Boreman's filing and should have either warned him of it or simply refrained from the commission. At any rate he is held responsible for surveying, without charge, such new claim as Boreman shall take and perfect.

This is a decision hardly possible in today's circumstances. Land is not granted four hundred acres at a time; rather it is bitterly litigated by the foot. It is necessarily the product of an era when royal charters were framed in terms of latitudes north and south to the setting of the sun. Still, it is a decison embodying the virtues of brevity and fairness, criteria we yet strive to meet.

An Afternoon Spent Browsing in the
Dusty Section of a Small Law Library

1 Harris & McHenry (1658)

photo by John Clark Mayden