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Drunkeness, Intent

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COMMENT ON RECENT CASES

CRIMINAL LAW—DRUNKENNESS—INTENT.—[New York] Recently the New York Court of Appeals rendered a decision which deals with the complicated situation which arises when a person offers as a defense to a criminal charge that he was drunk at the time he committed the act.[1] A consideration of this defense frequently involves two other problems in the criminal law, to wit, insanity and more particularly the question of criminal intent. In the particular case, according to the majority opinion written by Pound, J., there was testimony by the defendant that he was intoxicated at the time "so that he did not know what he was doing."[2] The trial court gave instructions on murder in the first degree and acquittal. The jury found defendant guilty of murder in the first degree. The majority of the court ordered a new trial for the reason that the jury was not given an opportunity to find the defendant guilty of a lesser degree of homicide. The court was apparently careful not to commit itself as to the precise instructions which should have been given, but there is a basis for thinking that the trial court should have instructed on a murder in the second degree and on manslaughter in the first and second degrees.[3]

The defendant, according to all the testimony that was deemed important for consideration,[4] killed the deceased while he was in the act of robbing him. At this point a consideration of the New York statutes becomes necessary. In that state there are several sorts of murder in the first degree.[5] Apparently the conviction

1. *People* v. *Koerber* (1926) 244 N. Y. 147, 155 N. E. 79. Cf. *People* v. *Seiber* (1927) 246 N. Y. 262, 158 N. E. 615.

2. If this bit of testimony should be taken to mean that the defendant was so drunk that he did not know that he had a gun in his hand or that he did not know that a cartridge would explode if a trigger was pressed then there would seem to be a case of insanity under *McNaghten's* Case (1843) 10 Clark & F. 200. If the insanity were only temporary, as was the case here, the question arises whether the defense is to be considered on the basis of insanity or drunkenness. See *Beard's* Case (1920) A. C. 479, for a sample of the difficulty resulting in considering drunkenness from the point of view of insanity. Temporary insanity, aside from delirium tremens, does not excuse generally and it is not thought that delirium tremens *should* receive any special treatment. *State* v. *Haab* (1901) 105 La. 230, 29 So. 725; 15 Harv. Law Rev. 755.

3. See the discussion on page 82 of the opinion in 155 N. E. 79.

4. Crane, J., in his dissenting opinion made the following statement: "The attempted defense was that the deceased attacked the defendant leaving the store, and in the mixup, the defendant's pistol went off accidentally. No one takes any stock in this defense, not even the defendant's counsel who admitted on the argument that the defendant was guilty of a crime."

5. Sec. 1044 ch. 41, Cahill's Cons. Laws of N. Y., is as follows: "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

"1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or

"2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to

was obtained in this case on the theory that the act of the defendant was "without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, a felony, either upon or affecting the person killed or otherwise."

This form of murder in the first degree seems to provide for constructive murder and it is not apparent why drunkenness, aside from insanity,[6] should be any defense. In another form of murder in the first degree under the New York statutes, punishing for a homicide "from a deliberate and premeditated design to effect the death of the person killed, or of another," a specific intent to kill a person is apparently required. In this event it would seem that drunkenness should be a defense if the defendant was so drunk that he was incapable of forming the deliberate and premeditated design.[7]

The remarks concerning the first sort of murder in the first degree must be modified, however, if the felony therein specified is a felony requiring specific intent. Since the defendant was alleged to have been in the act of robbing the deceased a specific intent is required before we can say that the defendant was engaged in a robbery. From this it would follow that if the de-

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effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or," etc.

The other provisions are not important here.

6. There may be a closer relation between drunkenness and insanity than courts have realized. See 4 Jour. of Crim. Law and Crimin. 859.

7. This conception to a certain extent has become a part of the statutory law of New York. Sec. 1220 ch. 41: "No act committed by a person while in a state of voluntary intoxication, shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent, with which he committed the act."

People v. *Mills* (1885) 98 N. Y. 176, and *People* v. *Leonardi* (1894) 143 N. Y. 360 (discussed in case under review), deal with this section of the statutes and seem to give it full effect.

"Whenever intent becomes material, its quality or persistence—the deranging influence of fear or sudden impulse of feebleness of mind or will—is matter for the jury if such emotions or disabilities can conceivably have affected the thought or purpose of the actor." Cardozo, C. J., in *People* v. *Moran* (1927) 246 N. Y. 100, 158 N. E. 35.

"Deliberation and premeditation imply the capacity at the time to think and reflect, sufficient volition to make a choice, and by the use of these powers to refrain from doing a wrongful act." *People* v. *Barberi* (1896) 149 N. Y. 256, 43 N. E. 635, 52 Amer. St. Rep. 717. See also *People* v. *Ferraro* (1900) 161 N. Y. 365, 55 N. E. 931, and *People* v. *Caruso* (1927) 159 N. E. 390.

"So also where there are statutory degrees of murder—murder in the first degree requiring deliberate premeditated malice; drunkenness by negativing this premeditation may reduce the killing to second degree murder. *Pirtle* v. *State* 9 Humph. (Tenn.) 663 (1849); *State* v. *Johnson* 40 Conn. 136 (1873); *People* v. *Williams* (1872) 43 Calif. 344"; 34 Harv. Law Rev. 80, note 13.

It seems fair to state that *Flanigan* v. *People* (1881) 86 N. Y. 554, 40 Amer. Rep. 556, has the contrary point of view.

fendant was so drunk as to have been incapable of forming the intent to deprive the deceased of his property then he would not have been guilty of robbery even though he went through the external motions and physically succeeded in taking the property from the deceased.[8]

This seems to make it impossible to convict a person of first degree murder in New York under the above circumstances, unless the conviction is obtained under a provision which specifies "an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual."[9] Nor does it seem to be possible

8. All in this paragraph seems to accord with the opinion by Pound, J. For a different treatment in Missouri, see (1925) 32 Law Series, U. of Mo. Bul., 59.

9. Would an act "evincing a depraved mind" require an actual state of mind on the part of the prisoner? It is possible that one, no matter how drunk, might be convicted under this provision. However the language in *Darry* v. *People* (1854) 2 Parker Crim. Rep. 606, discussing this subject should be consulted. Note particularly that Denio, J., there said that this provision could not "be applied to the case of homicide, resulting from a direct assault by one person upon another." See *Wilson* v. *People* (1859) 4 Parker Crim. Rep. 619, where this provision seems to be ignored.

In *People* v. *Johnson* (1851) 1 Parker Crim. Rep. 291, there are some interesting remarks concerning this sort of murder in the first degree. (The present statute has eliminated the word "particular" before the word "individual.") At the outset Barcuto, J., delivered an encomium:

"It is quite obvious that the revisers in the first chapter relating to 'crimes and their punishment,' intended to present a perfect system in which every grade of homicide should be distinctly and accurately classed. They state in their notes that, 'It has been supposed that there was nothing so much wanted in the criminal law, as a settled line of distinction between murder and manslaughter which are now so nearly connected, and run into each other so much, that courts and juries often mistake, and a lamentable uncertainty prevails, which operates as well to screen the guilty as to expose the innocent'. This evil they have remedied by a careful and judicious classification, so complete and perfect, that upon an ascertained state of facts, every homicide can be reduced to its appropriate degrees, and while it falls clearly within one class can not be brought within any other. The authors of this statute, unlike some modern law givers, understood the precise force and effect of the language used; and as a skillful surveyor makes his work meet so that his map covers the whole ground, neither more nor less, so they have included in their system every species of homicide known to the law, each degree standing by itself and occupying its own peculiar ground."

Such language is enough to make the judicious grieve and it is significant that the remainder of the opinion seems to demonstrate that the praise was excessive.

After getting its feet on earth, the court uttered the following: "We consider the second subdivision wholly inapplicable to a case where there is reason to believe that the killing was in the heat of passion, for such killing never was murder at the common law, and the revisers did not intend to increase the cases of murder. That subdivision is applicable to numerous cases of murder known to the common law, where malice was implied. It would apply to the case of a man shooting into a crowd, or throwing missiles from a house or wall into the public streets of a city without regard to the lives of those who might be exposed. It may also apply to the case where but one person is exposed, and even where the blow is aimed at the person. . . . So if the prisoner had found Kane (deceased) sleeping by the stone wall and had taken the stone in mere wantonness and let it fall upon him

to convict of second degree murder in New York because the statute with reference to that crime provides that the act must be "committed with a design to effect the death of the person killed."[10] Nor is it particularly clear that he was guilty of manslaughter in the first degree[11] because the defendant was apparently not engaged in the commission of a misdemeanor nor was he in the heat of passion.[12]

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without designing to kill, he would properly have been convicted of murder under the second subdivision."

For further difficulty caused by this second subdivision, contrast *Darry* v. *People* (1854) 2 Parker Crim. Rep. 606 (three elaborate opinions), with *Sanchez* v. *People* (1859) 4 Parker Crim. Rep. 535, 555, and *People* v. *Rector* (1838) 19 Wend. 569, 606.

Other decisions demonstrate that the praise bestowed above was premature. See *People* v. *Marendi* (1915) 213 N. Y. 600; *People* v. *Wagner* (1927) 245 N. Y. 143; *People* v. *Van Norman* (1921) 231 N. Y. 454; *People* v. *Spohr* (1912) 206 N. Y. 516; *People* v. *Schleiman* (1910) 197 N. Y. 383.

The other provisions concerning murder in the first degree obviously seem to be inapplicable.

10. Sec. 1046 ch. 41: "Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation."

Sec. 1047 ch. 41, has a special provision for murder in the second degree for a duel fought without the state.

Pound, J., discussing a youth whose mind was "befuddled" by drink and who might "intend" merely to "stage" a holdup, said that he might "conceivably" be guilty of murder in the second degree. It is submitted that this sort of youth is far different from a youth intoxicated "so that he did not know what he was doing." See also note 12, infra.

11. Sec. 1050 ch. 41: "Such homicide is manslaughter in the first degree, when committed without a design to effect death:

"1. By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another; or,

"2. In the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon."

The other provisions are of no importance here.

12. This doubt apparently is not shared by Pound, J.: "It is conceivable, for example, that a youth whose mind was befuddled by drink might intend merely to stage a holdup and yet be guilty of some degree of homicide. He might be so frightened by resistance as to shoot in the heat of passion, the emotion of fright, and thus be guilty of manslaughter in the first degree, or conceivably even of murder in the second degree."

What is meant by "heat of passion"? This is considered in *Wilson* v. *People* (1859) 4 Parker Crim. Rep. 619. No very definite standard is stated. "It is enough that the passions are heated by the acts or conduct of the one upon whom the (deadly) assault is made, and it matters not whether this state is produced by acts or words, if either one or the other are naturally calculated to produce it." The court was addressing itself to manslaughter in the third degree, i. e., without "formed design of effecting death." *State* v. *Berkley* (1891) 109 Mo. 665, has the same point of view with reference to this type of manslaughter and the decision relies upon *Wilson* v. *People*.

Is "heat of passion" to be given an objective consideration? It would seem that such is frequently the attitude of the courts. 2 *Bishop* "Criminal Law" (9th ed.) secs. 710-11; *Johnson* v. *Wisconsin* (1906) 129 Wis. 146, 108 N. W. 55, 5 L. R. A. (N. S.) 809.

In *Commonwealth* v. *Colandro* (1911) 231 Pa. 343, 80 Atl. 571, it is held that fear may be sufficient to reduce the homicide from murder to manslaughter. This fear is contrasted with the fear involved in self defense. The latter clearly seems to be treated objectively. On the whole, the former is treated subjectively though in one place the court writes of the circumstances being

It is possible to say he was guilty of manslaughter in the second degree under the general provision that it was his act which caused the death.[13]

Now it is fairly clear that citizens of New York would not be satisfied in having so serious an affair as this determined to be only manslaughter in the second degree or even in the first degree. It would seem as if those who drafted the New York statutes attempted to be highly scientific but succeeded in effecting too much refinement.[14] In order to bring about a satisfactory result in the particular case it seems necessary to resort to some involved and doubtful reasoning, and that is what Pound, J., indulges in, for he says, "Generally speaking, murder in the first or second degree connotes the specific or particular intent to kill. . . ." In the next sentence this statement is contradicted by this: "But when one engaged in the commission of a felony, his mind being fatally bent on mischief[15] but without a design to effect death, kills a human being, at common law the killing is said to be with malice aforethought and so murder; and the penal law attaches to the act the consequence of murder in the first degree." This is a statement of the theory of constructive murder, and that sort of murder, curiously enough, seems to be approved by the Harvard Law Review.[16]

"adequate" to raise the fear. Other cases purporting to stand for the same rule are cited in 29 Corpus Juris 1127.

"Time to cool" seems to be given an objective consideration in *People* v. *Sullivan* (1852) 7 N. Y. 396, 400.

It is to be noticed that the learned judge in his consideration apparently has shifted from a man so drunk as not to know "what he was doing" to a man "whose mind was befuddled by drink." There is a great difference. The latter sort may well be capable of having specific intents, i. e., may be capable of aiming at a consequence. Such a mind may be sensitive to the emotion of fright. However, is "heat of passion" an important consideration with a man so drunk as not to know what he is doing?

The court might have thought that the defendant testified inaccurately when he said that he was so drunk as not to know what he was doing but it might have concluded that he was at least "befuddled." This raises the point whether such a man may say that he was in the "heat of passion" when a sober man in his place would not have been. See *Marshall's* Case (1830) 1 Lewin C. C. 76, and *Rex* v. *Thomas* (1837) 7 Car. & P. 817, commented upon in (1920) App. Cas. I. c. 496; 1 *Bishop* "Criminal Law" (9th ed.) secs. 414-15. Cf. *Keenan* v. *Commonwealth* (1862) 44 Pa. 55, 84 Amer. Dec. 414; 2 *Bishop* "Criminal Law" (9th ed.) secs. 710-11.

13. See sec. 1052 ch. 41. The conduct might be included under other provisions of this section but no further consideration will be given to this feature.

14. The question is submitted whether it is possible to define satisfactorily in a code the crime of homicide except in very broad terms, which give plenty of room for the exercise of the normal judicial function.

15. Notice the expression, "his mind being fatally bent on mischief." The statute does not contain this. Quaere: how could a person so drunk as not to know what he is doing have a mind fatally bent on mischief?

16. 34 Harv. Law Rev. 79. Cf. Field, J., in *Regina* v. *Franklin* (1883) 15 Cox C. C. 163: "I have a great abhorrence of constructive crime."

Constructive murder is also approved by D. A. Stroud in (1920) 36 Law Quar. Rev. 268, 269: "From a theoretical standpoint it may be thought condemnable as a harsh anomaly, because according to normal principles of inten-

English and American judges for some centuries have been wrestling with the problem of intent. They have insisted that there can be no crime in the common law without an intent. They have distinguished between general criminal intent and specific intent. In general they have seemed to think that specific intent represented an actual state of mind. Their idea of general criminal intent has been most strikingly indefinite when they have not refrained absolutely from defining it. It is conceived that herein lies the difficulty, and that we shall never escape from our confusion until we agree upon some understanding of the meaning of this very important term. So far as the writer has read he has only discovered one judge who, apparently, has disclosed a thoroughly understandable system of criminal intent. Mr. Justice Holmes in *Abrams et. al* v. *United States*[17] in a dissenting opinion

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tionality, willful murder could not be committed in the absence of full homicidal intention, and a culpable intent to commit some other crime, of less gravity, would not satisfy the requirements of mens rea. However, the modern tendency being to favour felons and excuse wrongdoers too much, rather than too little, it may be considered a matter for satisfaction that the House of Lords have confirmed this harsh but salutary doctrine of imputed intent. . . ." It would seem that the same result may be reached through the notion of objective intent and without the sacrifice of logic and without the acceptance of some undesirable consequences.

Attention is called to *People* v. *Moran* (1927) 246 N. Y. 100, 158 N. E. 35, decided since the case under review. This decision appeals to the writer as proof that the present New York Court of Appeals does not particularly fancy one sort of constructive murder and is confining it as closely as possible in view of the New York statutes.

17. (1919) 250 U. S. 616, 626. In quoting from the dissenting opinion the writer does not wish to be understood as agreeing with all contained within it.

The learned Justice while a member of the Supreme Judicial Court of Massachusetts, expressed the following: "So that on the whole the jury were led to suppose that an actual intent to kill unlawfully was necessary to the offense of murder. The defendant cannot complain. If it had been necessary the jury properly might have been instructed that it is possible to commit murder without any actual intent to kill or to do grievous bodily harm, and that, reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled, perhaps with an implied negation of any excuse or justification. 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct': 1 East P. C. 262; *Commonwealth* v. *Pierce* 138 Mass. 165, 178. Of course we do not mean to imply that such a likelihood would be enough to satisfy the statutory requirement of deliberately premeditated malice aforethought, and to constitute murder in the first degree." *Commonwealth* v. *Chance* (1899) 174 Mass. 245, 252.

In *Commonwealth* v. *Pierce* (1884) 138 Mass. 165, he stated: "The very meaning of the fiction of implied malice in such cases at common law was that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them is merely to adopt another fiction, and to disguise the truth. The truth was that his failure or inability to predict them was immaterial, if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious." Cf. *People* v. *Angelo* (1927) 159 N. E. 394 (does not reject an objective standard, though it is not very plain just what is the attitude of the court).

stated as follows: "I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed."[18]

This statement of general criminal intent and specific intent should be contrasted with the ideas put forward by the Harvard Law Review in a note reviewing a much discussed case, *Director of Public Prosecutions* v. *Beard*.[19] It is stated in a footnote as

18. The above expression, it is submitted, was rendered less effective by the addition of the following sentence: "It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind."

In so far as this suggests that an actual (specific) intent is not important legally unless it can also be said to be the proximate cause (motive) of the conduct it may, perhaps, be said to be supported by *Rex* v. *Williams* (1795) 1 Leach 529. Cf. 1 East 400, 424. In any event *Rex* v. *Gillow* (1825) 1 Moody 85, sets forth a more desirable point of view. See also *Rex* v. *Regan* (1850) 4 Cox C. C. 335; *State* v. *Mitchell* (1845) 27 N. C. 288; 33 Harv. Law Rev. 442, 444; 33 Harv. Law Rev. 747, 764 (it seems to advocate a special meaning for specific intent in cases involving "complex social conditions").

19. (1920) A. C. 479.

This decision holds (so far as it is possible to understand it) that in case a man kills a girl by suffocation while in the act of committing rape upon her it would be error to instruct the jury that the crime was only manslaughter, even though the prisoner was so drunk that he did not know that his conduct was dangerous, i. e., likely to inflict serious injury.

For approval of the holding but condemnation of some of the statements in the opinion, see 36 Law Quar. Rev. 268 (acute comment).

Some of the utterances in *Beard's* Case seem to have doomed for the present the prediction by Mr. Kenny in his "Outlines of Criminal Law" p. 137. After referring to the classical cases of shooting at a fowl in order to steal but *accidentally* killing a bystander, and of pushing a man with intent to steal his watch with the unexpected result of the man falling and dying from the fall, he states: "Yet to treat such cases as murder seems an excessive severity indeed. The reluctance of the judges in *Lad's* Case as early as 1773, to treat death caused by a rape as murder, shews that the severity has long been regarded as impolitic. . . . The modern tendency is thus towards a limitation of the rule to such felonies as are likely to cause death." See (1920) 64 Solicitor's Journal 336, for a possible explanation of the failure of the prediction to be fulfilled. See for an observation similar to that of Kenny's (1909) 34 Law Mag. and Rev. 453, 461.

It is simple enough to justify a conviction of murder in *Beard's* Case. His conduct was such as to be directly dangerous to life—even highly dangerous—and common experience would show that death would likely follow from his acts. At least a jury would not be unreasonable in so believing.

But what is meant in *Beard's* Case by this statement: "My Lords, drunkenness in this case could be no defense unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it. . . ."? That sounds as if rape and

follows: "Specific intent must be carefully distinguished from *mens rea*. Specific intent is that qualification of the *act* which makes it criminal. *Mens rea* is that state of *mind* which makes it responsible."[20] This explanation seems utterly futile. Is it any wonder that legal writings concerning the matter of intent in criminal law are so hopelessly confused?

It is submitted that the point of view of Mr. Justice Holmes is the only one that has been put forward that will bring harmony out of the cases. It is not argued that all of the decisions may be reconciled with this theory. After several centuries of dealing with the notion of criminal intent, general and specific, it is too much to expect that all of the results can be reconciled with any given formula. Nor is it to be expected that it will not receive many strains in its application to the innumerable complexities of life. It is thought, however, that, if generally adopted, it would prove to be a workable system.

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CRIMINAL LAW—POWER TO GRANT PROBATION AFTER BEGINNING OF SERVICE OF SENTENCE.—[United States] The case of *United States* v. *Murray*,[1] will prove of interest in these days of criticism of the probation and of the parole. In the prior case of ex parte *United States*[2] the Supreme Court of the United States had held that, though the practice had been generally resorted to throughout the United States, the trial federal judges had no inherent powers to place upon probation or to suspend the execution of a sentence after conviction, but suggested that if such a power were given directly by the statute its exercise would be sustained by the Supreme Court.

Accordingly the probation act of March 4, 1925, was passed. This act (43 Sts. 1259, c. 521) among other things, provided:

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murder require a specific intent. But who believes that? Yet 24 Law Notes 36, quotes the statement with approval. *People* v. *Harris* (1866) 29 Calif. 678, presents a similar confusion. See generally with reference to *Beard's* Case (1920) Scots L. T. 75; (1920) 55 Law Jour. 95.

20. 34 Harv. Law Rev. 80, note 16. Cf. a review of the same decision in (1920) 19 Mich. Law Rev. 97.

Contrast the treatment in *Kenny* "Outlines of Criminal Law" pp. 132ff: "Hence a modern student may fairly regard the phrase 'malice aforethought' as now a mere arbitrary symbol. It still remains a convenient comprehensive term for including all the various forms of mens rea which are so heinous that a homicide produced by any of them will be murder. . . . For there are six several forms of mens rea, which have been held to be sufficiently wicked to constitute murderous malice." See also *Holdsworth* "History of English Law" vol. 8 pp. 433ff; (1920) 64 Solicitor's Jour. 336.

Andrews, J., in his dissenting opinion in the decision under review, stated that it was necessary that the defendant acted with "a general criminal intent," which is defined to be "the intent to take the property . . . against his will by means of force or fear." If this is not specific intent, then what is specific intent?

1. 48 Sup. Ct. Rep. 146.

2. 242 U. S. 27.