

# Crimes--Murder in First Degree--Common Law Rule that Death Must Occur Within a Year and a Day Abrogated by Statute (People v. Brengard, 265 N.Y. 100 (1934))

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binding as the charter<sup>17</sup> are the by-laws of the corporation<sup>18</sup> which vest a right that cannot be taken away without the owner's consent.<sup>19</sup> Cumulative voting provided for therein carries out to a large extent the intent of the legislature and an election by votes cast cumulatively under such a provision should be affirmed.

J. T. B., JR.

CRIMES—MURDER IN FIRST DEGREE—COMMON LAW RULE THAT DEATH MUST OCCUR WITHIN A YEAR AND A DAY ABROGATED BY STATUTE.—The defendant was convicted of murder in the first degree. The deceased was shot on July 22, 1928, and died on July 13, 1932. The defendant claims that the indictment should have been quashed as to murder in the first degree. *Held*, common law rule that the death must occur within a year and a day has been abrogated by statute. *People v. Brengard*, 265 N. Y. 100, 191 N. E. 842 (1934).

At common law to have a conviction for murder in the first degree, the deceased must die within a year and a day of the day on which the assault was committed.<sup>1</sup> If the victim does not so die then the common law conclusively presumes that the death was due to some other cause.<sup>2</sup> This rule remains unchanged in many jurisdictions.<sup>3</sup> Under the first constitution adopted in New York, the

<sup>17</sup> *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 179 (1879); *Hassel v. Pohle*, 214 App. Div. 654, 658, 212 N. Y. Supp. 561, 566 (2d Dept. 1925); *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N. Y. 1826).

<sup>18</sup> *Kavanaugh v. Commonwealth Trust Co.*, 223 N. Y. 103, 107, 119 N. E. 237, 238 (1918); *Matter of Corp. of Yaddo*, 216 App. Div. 1, 3, 214 N. Y. Supp. 523, 525 (3d Dept. 1926).

<sup>19</sup> *Kent v. Quicksilver Mining Co.*, *Hassel v. Pohle*, both *supra* note 17; *Matter of Corp. of Yaddo*, *supra* note 18.

<sup>1</sup> 1 WHARTON, CRIMINAL LAW (10th ed. 1896) 336; 2 COOLEY, BLACKSTONE (4th ed. 1899) 1363; "The time both of the stroke and the death should be stated (in the indictment) that the death may appear to have taken place within a year and a day after the mortal injury"; 1 BARBOUR, CRIMINAL LAW (3d ed. 1883) 71; *Darry v. People*, 10 N. Y. 120 (1854); *People v. Enoch*, 13 Wend. 159 (N. Y. 1834); *Thomas v. State*, 67 Ga. 460 (1881); *Clark v. Commonwealth*, 90 Va. 360, 18 S. E. 440 (1893); 29 C. J. 1083.

<sup>2</sup> 1 WHARTON, CRIMINAL LAW (10th ed. 1896) 336; 1 BARBOUR, CRIMINAL LAW (3d ed. 1883) 71; *Burns & Cary v. People*, 1 Park. Cr. 182 (N. Y. 1848); *People v. Aro*, 6 Cal. 207 (1856); *People v. Kelley*, 6 Cal. 210 (1856); *State v. Mayfield*, 66 Mo. 125 (1877); *State v. Orrell*, 12 N. C. 139 (1828).

<sup>3</sup> *Ball v. United States*, 140 U. S. 118, 11 Sup. Ct. 761 (1891); *Howard v. State*, 7 Div. 787, 137 So. 532 (Ala. 1931); *Roberts v. State*, 17 Ariz. 159, 149 Pac. 380 (1915); *Kee v. State*, 28 Ark. 155 (1872); *People v. Aro*, *supra* note 2; *People v. Kelley*, *supra* note 2; *State v. Bantley*, 44 Conn. 537 (1877); *Jane v. Commonwealth*, 3 Metc. 18 (Ky. 1860); *State v. Kennedy*, 8 Rob. 590 (La. 1845); *State v. Conley*, 39 Me. 78 (1854); *Commonwealth v. Macloom*, 101 Mass. 1 (1869); *Harrel v. State*, 39 Miss. 702 (1861); *State v.*

common law of England and of the colony of New York was recognized as the common law of the state of New York.<sup>4</sup> The present constitution is to the same effect.<sup>5</sup> The penal law in this state defines what acts shall constitute a crime within its jurisdiction.<sup>6</sup> In a subsequent section the crime of murder in the first degree is defined.<sup>7</sup> But that section should not receive a strict construction by the courts but should be construed according to the fair import of its terms.<sup>8</sup> This definition contains no time limitation as to the death of the deceased after the assault.<sup>9</sup>

In cases where the deceased dies after a year and a day elapses after the assault, the common law gives the defendant the benefit of the conclusive presumption that the death was due to some other cause.<sup>10</sup> This rule was adopted because of a lack of scientific and medical knowledge.<sup>11</sup> "The rule in respect of irrebuttable presumptions rests upon the grounds of expediency or policy so compelling in character as to override the general fundamental requirement of our system of law that questions of fact must be resolved according to the proof."<sup>12</sup> Many presumptions formerly held to be irrebuttable are now held, in view of the advancement of knowledge and experience, to be rebuttable.<sup>13</sup> "But all presumptions as to matters of fact capable of ocular or tangible proof such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown."<sup>14</sup> It is possible in most instances for a competent physician to show that a person died as a result of a certain act or fact, even though it took place at a time more remote than a year and a day previous. Therefore, if the prosecution can prove that the defendant was the primary cause of the death beyond a reasonable doubt, then it may do so, even if the deceased lived for a period of time longer than a

Luke, 104 Mo. 563, 16 S. W. 242 (1891); *State v. Huff*, 11 Nev. 17 (1876); *State v. Haney*, 67 N. C. 467 (1872); *Bowen v. State*, 1 Ore. 270 (1859); *Percer v. State*, 118 Tenn. 765, 103 S. W. 780 (1907); *Livingston v. Commonwealth*, 55 Va. 592 (1857); *State v. Spadoni*, 137 Wash. 684, 243 Pac. 854 (1926); *Rex v. Dyson*, 2 K. B. 454 (1908). Montana has incorporated the common law definition of murder in the first degree into the penal statute. *State v. Keerl*, 29 Mont. 508, 75 Pac. 362 (1904).

<sup>4</sup> N. Y. CONST. XXXV (1777).

<sup>5</sup> N. Y. CONST. art. I, §16.

<sup>6</sup> N. Y. PENAL LAW (1909) §22.

<sup>7</sup> *Id.* §1044.

<sup>8</sup> *Id.* §21.

<sup>9</sup> *Supra* note 7; instant case at 107.

<sup>10</sup> *Supra* notes 2 and 3.

<sup>11</sup> *People v. Legeri*, 239 App. Div. 47, 266 N. Y. Supp. 86 (2d Dept. 1934), discussed in (1933) 8 ST. JOHN'S L. REV. 162.

<sup>12</sup> *United States v. Provident Trust Co.*, 291 U. S. 272, 54 Sup. Ct. 389 (1934). The court here overthrew the irrebuttable presumption that a woman was capable of bearing children despite medical knowledge that an operation performed upon her physically prevented such an event.

<sup>13</sup> *United States v. Provident Trust Co.*, *supra* note 12.

<sup>14</sup> *Lincoln v. French*, 105 U. S. 614, 617 (1881).

year and a day.<sup>15</sup> The court here bases its conclusion on the fact that the statute<sup>16</sup> contains no mention of the year and a day rule of common law, and therefore, the defendant is denied the presumption which was his right at common law.<sup>17</sup>

J. A. R., JR.

CRIMINAL LAW—FORGERY—NON VULT—PENAL LAW—2ND OFFENDER.—Defendant pleaded guilty to forgery in second degree. On a prior offense he had pleaded *non vult* to an action brought by the state of New Jersey. He was charged and convicted as a second offender. On motion by defendant, after sentence and beginning of prison term, to withdraw plea of guilty of felony because of alleged promise that court would permit defendant to plead to misdemeanor if certain prior offenses proved to be felonies, *held*, properly denied, where judge before imposing sentence on guilty plea stated that he had made no such promise. *People v. Daiboch*, 265 N. Y. 125, 191 N. E. 859 (1934).

The plea of *non vult* was a common law plea that had the same subsequent consequences in a criminal court as a plea of guilty.<sup>1</sup> When judgment has been entered on it, the record is competent evidence of the conviction.<sup>2</sup> Thus, the plea of *non vult* followed by a judgment is a previous conviction of crime.<sup>3</sup> A prisoner in a criminal case is not entitled as a matter of right to withdraw a plea duly made in order that he may file another plea;<sup>4</sup> the matter is within the sound discretion of the trial court.<sup>5</sup> Where it is plain that substantial justice will not be promoted, or the substantial rights of the defendant prejudiced, the application for leave to withdraw the plea should be denied.<sup>6</sup> In the absence of any controlling fact rendering it unjust to do so the court may refuse to withdraw a plea of guilty.<sup>7</sup> However this discretion should be exercised liberally in favor of life

<sup>15</sup> Instant case at 108; *People v. Legeri*, *supra* note 11.

<sup>16</sup> *Supra* note 7.

<sup>17</sup> Instant case.

<sup>1</sup> *State v. Herlihy*, 102 Me. 310, 66 Atl. 643 (1906); *State v. Sidell*, 103 Me. 144, 68 Atl. 643 (1907). It is pleaded to minimize the duration of the sentence. Instant case.

<sup>2</sup> *Commonwealth v. Jackson*, 248 Pa. 530, 94 Atl. 233 (1915).

<sup>3</sup> Instant case.

<sup>4</sup> *Farley v. State*, 23 Ga. App. 151, 97 S. E. 870 (1919); *State v. Branner*, 149 N. C. 559, 63 S. E. 169 (1908).

<sup>5</sup> *State v. Olsen*, 115 Minn. 153, 131 N. W. 1084 (1911); *State v. Strum*, 115 Minn. 533, 131 N. W. 1086 (1911).

<sup>6</sup> *State v. Gregg*, 123 La. 610, 49 So. 211 (1909); *State v. Stephenson*, 67 W. Va. 553, 68 S. E. 286 (1910).

<sup>7</sup> *Supra* note 6.