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CASE NOTES

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CRIMINAL LAW — HOMICIDE — Felony Murder. — Defendant and another patron of a bar became involved in an argument and were requested to leave by the owner. Outside the bar the argument continued and defendant shot and seriously wounded the bar patron with whom he had been arguing. After defendant had engaged in a gun battle with a policeman seeking to apprehend him for the shooting of the bar patron, he attempted to flee in an automobile driven by a companion. The owner of the bar attempting to aid in the apprehension fired at the fleeing automobile with a rifle and accidentally killed the driver and a bystander. Defendant was indicted for common-law felony murder of the two persons killed by the bar owner. HELD: Indictment dismissed. A fleeing criminal is not guilty of the common-law felony murder of persons accidentally killed by a third party aiding a policeman in the criminal arrest. *People v. Wood,* 186 N. Y. S. 2d 141 (1959).

The common-law rule provides that one is guilty of murder when death results during the commission of any felony by the accused (the necessary intent being supplied by the legal fiction of implied malice). CLARK, CRIMINAL LAW § 72 (3rd ed. 1915). At common law this rule was applied extensively and arbitrarily since all felonies were generally punished by death, so that is was immaterial whether the accused was executed for one felony or another. *Powers v. Commonwealth,* 110 Ky. 390, 61 S. W. 735 (1901). The tendency, however, has been to narrow the rule's scope because of its harshness in those cases where death was not the proximate result of the felony. *State v. Clark,* 21 Wash. 2d 774, 1953 P. 2d 297 (1944). But the rule is still strictly applied where the felon himself does the killing, *Butler v. People,* 125 Ill. 641, 18 N. E. 338 (1888); *Commonwealth v. Moore,* 121 Ky. 97, 88 S. W. 1085 (1905), and where the felon does the killing and his accomplice is indicted therefor. *People v. Giro,* 197 N. Y. 152, 90 N. E. 432 (1910); *Commonwealth v. Lowry,* 374 Pa. 594, 98 A. 2d 733 (1953). Another field in which the common-law rule applies is when one is killed by a person defending himself or by an arresting policeman while a felony is being committed or shortly thereafter. *Commonwealth v. Thomas,*

382 Pa. 639, 117 A. 2d 204 (1955); *Commonwealth v. Moyer,* 357 Pa. 181, 53 A. 2d 736 (1947). Courts have used various rationales in applying the old rule: It is sometimes said that one engaged in the commission of a felony should foresee, and is therefore responsible for, all resulting consequences, *Commonwealth v. Moyer, supra,* or that since the defendant set in motion the acts, he is responsible for all consequences. *Commonwealth v. Thomas, supra.* Other courts reason that a felon who deliberately puts one in danger should be responsible for his death. *Wilson v. State,* 188 Ark. 846, 68 S. W. 2d 100 (1934); *Taylor v. State,* 41 Tex. Crim. 564, 55 S. W. 951 (1900). Also, defendant must be engaged in the commission of the felony. *Commonwealth v. Moore, supra.* Recognizing the harshness of the strict application of the old rule, courts have used various rationale to lessen its effect: Thus, the rule will not apply if the person is killed by someone other than the felon, *Butler v. People, supra; People v. Udwin,* 254 N. Y. 255, 172 N. E. 489 (1930), or if death was the result of a justifiable homicide the felon would be not guilty, *Commonwealth v. Thompson,* 321 Pa. 327, 184 Atl. 97 (1936) (by implication); *Commonwealth v. Mellor,* 294 Pa. 339, 144 Atl. 534 (1928) (by implication), or if there be no casual connection. *Keaton v. State,* 41 Tex. Crim. 621, 57 S.W. 1125 (1900); *Taylor v. State, supra.* State statutes have also been enacted to ameliorate the effect of the rule. 20 CORNELL L. Q. 228 (1935) (a review of State Statutes). The New York statute defines felony murder as "The killing of a human being . . . by a person engaged in the commission of or an attempt to commit a felony, either upon or affecting the person killed or otherwise." MCKINNEY'S CONSOL. LAWS, PENAL LAW § 1044.2 (1944). And, by requiring that the killing be done *by a person* engaged in the commission of the felony, the statute limits the rule's application to felons only, in accord with the general trend in this direction. Thus, the New York Court has held that a felon is not criminally responsible under the felony murder doctrine when a bystander is killed by another bystander seeking to apprehend the felon. *People v. Wood,* 186 N. Y. S. 2d 141 (1959).

The decision in the principal case is sound, since the recent authorities disclose a tendency to lessen the arbitrary effect of the common-law felony murder rule. This is in accord with the modern trend to punish only the person actually responsible for the results. In the case of murder, there

must be intent to support a conviction and the old concept of implied malice is insufficient where the consequence of the crime is death. The modern view is that the felon is responsible for the results which proximately flow from his actions and also that the act of killing must be done by the felon or his accomplice. In accord with this view, and in the light of the New York statute, the accused was not guilty of felony murder as the killing was done by a third party, nor could the bystander's death be properly considered the proximate result of accused's shooting his drinking companion.

O. HARRY BOZARDT, JR.

TORTS—NEGLIGENCE—Effect of a Statute Requiring Motorist Entering a Public Highway to Yield the Right of Way.—The plaintiff's intestate drove his automobile onto a highway from a private road and was struck by an automobile driven by the defendant at an excessive rate of speed. The deceased violated a statute, CODE OF LAWS OF SOUTH CAROLINA, §46-424 (1952), by failing to yield the right of way to a vehicle approaching on a public highway; the defendant violated a statute by exceeding the speed limit and failing to keep his vehicle under control. CODE OF LAWS OF SOUTH CAROLINA, §46-361, §46-362 (1952). As defenses to the plaintiff's claims, the defendant set up the contributory negligence and recklessness of the plaintiff's intestate. Although the verdict of the jury was in favor of the plaintiff, the judge granted a new trial on the ground that the foreman of the petit jury had been a member of the grand jury which returned a "No Bill" on an indictment charging the defendant with murder, and therefore, should have been disqualified. The plaintiff appealed from the order granting the new trial; the defendant appealed from the order refusing a directed verdict and judgment non obstante veredicto. HELD: Affirmed in part. Even though the plaintiff's intestate violated the statute requiring a motorist to yield the right of way to all vehicles approaching on a public highway, it was a jury question as to whether or not the entering motorist had exercised the care and caution that would have been exercised by a reasonable and prudent man under the circumstances. Chief Justice Stukes, in dissent, maintained that the judge in the lower court had erred in failing to direct a verdict in favor of the defendant. In his opinion, the statute was clear in its terms

requiring the entering motorist to yield the right of way, and the failure to do so was the proximate cause of the accident, not the excessive speed of the defendant. *Spence v. Kirby,* 234 S. C. 59, 106 S. E. 2d 883 (1959).

The majority view is that the violation of a statute is negligence in itself if the injury is the type of harm which the statute was intended to prevent and if the injured person is a member of the class of persons that the statute was intended to protect. *Schell v. Du Bois,* 94 Ohio St. 93, 113 N. E. 664, L. R. A. 1917A, 710 (1916); PROSSER, TORTS, §34 (2d Ed. 1955). There is considerable authority to the effect that the violation of an applicable statute is only evidence or permits an inference of negligence which should be submitted to the jury for determination. *Hodgdon v. Barr,* 334 Mich. 60, 53 N. W. 2d 844 (1952). It is well settled in South Carolina that the violation of an applicable statute is negligence per se and whether or not such breach contributed as a proximate cause to the injury is ordinarily a question for the jury. *Green v. Sparks,* 232 S. C. 414, 102 S. E. 2d 435 (1958); *Chapman v. Associated Transport, Inc.,* 218 S. C. 554, 63 S. E. 2d 465 (1951); *Eickhoff v. Beard-Laney, Inc.,* 199 S. C. 500, 20 S. E. 2d 153, 141 A. L. R. 1010 (1941). The statute must, however, be given a reasonable construction and does not give the drivers on the public highway an exclusive privilege to disregard the rights of others. *Temple v. Ellington,* 177 Va. 134, 12 S. E. 2d 826 (1941). A person must operate his vehicle on a highway at a speed that is reasonable and prudent under the circumstances, controlling his vehicle so as to avoid collisions with other vehicles on the highway. CODE OF LAWS OF SOUTH CAROLINA §46-361 (1952). Any speed above fifty-five (55) miles per hour is prima facie evidence that the speed is not reasonable and prudent. CODE OF LAWS OF SOUTH CAROLINA §46-362 (1952). The operator of an automobile on a public highway is entitled to assume, even up to the last minute, that vehicles entering the highway will, as required by statute, yield the right of way, *Garner v. Pittman,* 237 N. C. 328, 75 S. E. 2d 111 (1953); CODE OF LAWS OF SOUTH CAROLINA §46-424 (1952). The accepted rule is that the violation of a statute by the plaintiff should stand on the same footing as a breach by the defendant. PROSSER, TORTS §34 (2d Ed. 1955). Generally, one may not recover in an action for negligence when he has been guilty of negligence himself, *Stevens v. Sou. Rwy. Co.,* 237 N. C. 412 (1953); *Williams v. Haas,* 52

N. M. 59, 189 P. 2d 632 (1948); 38 AM. JUR. *Negligence* §174 (1941); however, contributory negligence ceases to be a valid defense when the injury results from willfulness or gross negligence of the defendant implying wantonness or recklessness. *Field v. Gregory*, 230 S. C. 39, 94 S. E. 2d 15 (1956); *Dawson v. S. C. Power Co.*, 220 S. C. 26, 66 S. E. 2d 322 (1951). If the facts are such as to indicate that both drivers were guilty of negligence or recklessness, then an issue of fact is created as to whether the negligence or recklessness of the defendant, or the contributory negligence or recklessness of the plaintiff, was the proximate cause of the accident and must be submitted to the jury. *Field v. Gregory, supra.* The jury can infer that the accident was proximately caused by the gross negligence or recklessness of the defendant in driving at an excessive rate of speed, even if the plaintiff was negligent. *Green v. Boney*, 233 S. C. 49, 103 S. E. 2d 732 (1958). Thus, the court should refuse to grant a motion for a directed verdict if the evidence warrants an inference of gross negligence or recklessness on the part of the defendant in driving at an excessive speed, as contributory negligence on the part of the plaintiff would not be a defense to the gross negligence of the defendant. *Anderson v. Davis*, 229 S. C. 223, 92 S. E. 2d 469 (1956).

The operator of a vehicle on a public highway normally has the right of way over all vehicles entering from private roads and can presume, even up to the last moment, that entering motorists will obey the law; his right of way, however, is not absolute. He is still required to operate his vehicle in a reasonable manner, keeping it under control and maintaining a proper lookout at all times. Driving an automobile at an excessive rate of speed is a criminal violation of the speed laws, as well as a violation of his civil duty, and is prima facie evidence as not reasonable under the circumstances. In the present case, according to the testimony of the only independent witness, the defendant was traveling at a speed in excess of one hundred (100) miles per hour just prior to the collision. There was no evidence that the deceased failed to stop, as the defendant did not see him until the deceased was halfway across the highway. Considering the fact that the visibility from the entrance of the private road to the crest of the hill was only two hundred (200) feet and that a car traveling at the reported speed of the defendant would cover approximately one hundred forty-six (146) feet per second, only one

and one-third seconds elapsed from the appearance of the approaching vehicle and its arrival at the entrance of the private road, no time being allowed for any reaction time on the part of either driver. The statute requiring one to yield the right of way was passed by the legislature to prevent the particular type of accident that occurred; however, it can hardly be maintained that this should preclude any recovery on the part of persons violating the statute when the conduct of the driver on the through highway is so reckless as to imply a complete disregard for the rights of others. In this area of the law, each case must be decided according to the particular factual situation. Ordinarily the violation of the statute would be the proximate cause of the collision as a matter of law, barring any recovery by the violator, unless the conduct of the defendant is so flagrant as to indicate a complete disregard for the consequences, in which case it would be a question for the jury as to whether or not the defendant's conduct was the proximate cause of the injury.

HERBERT L. MOODY, JR.