# NOTES

MEASURE OF DAMAGE FOR BREACH OF MORTGAGEE COMPLETION BONDS—Trust and Finance Companies have evolved a complicated system of financing the construction of the modern skyscraper, apartment or row of houses. It is believed that only those members of the bar who specialize in real estate law are generally familiar with the method in vogue for financing so-called "building operations." There are almost as many variations in the scheme of financing as there are institutions which engage in the business.

*A Typical Financing Plan.*

A builder owns or buys a piece of land upon which he wishes to erect a building for the purpose of sale at a profit. His architect prepares plans and specifications and the builder negotiates with sub-contractors, obtains completion estimates, and lays his plan before a Trust Company. Assuming the plan is approved as the basis of a construction loan by the latter, the following steps are taken.

The builder organizes two corporations which we shall for convenience call Construction Company and Owning Company. He conveys the unimproved real estate to Owning Company which creates a mortgage to the builder, as mortgagee, in an amount somewhat in excess of the total cash required to finance the building. He, as mortgagee, then applies to the Trust Company for a loan upon his personal note in the amount actually needed to pay commissions, fees, premiums, and construction costs. This amount is usually about 80 per cent. of the mortgage, which is assigned by the builder to the Trust Company as collateral security for the note.

Before the "building operation" account is credited by the Trust Company, that institution usually requires additional protection. The Owning Company enters into a building contract with Construction Company whereunder the latter undertakes to perform all the work and supply all the materials necessary for the erection of the building. In Pennsylvania, this contract invariably contains a waiver of the right to file mechanic's liens and is promptly recorded. Construction Company then enters into its sub-contracts. The sub-contractors are quite customarily promised payment, about 65 per cent. in cash and the balance in Owning Company's notes due ninety days after completion of the building. In Pennsylvania, the sub-contractors are bound by the principal contractor's waiver of the right to file liens, and thus from the outset have a considerable financial interest in the success of the project. If the building is not completed, and sold or refinanced, the chances are they will go begging for their 35 per cent. deferred payments, as Owning Company usually has no assets but the building. All the contracts described above provide

for payment of contractors out of the "operation account" on vouchers approved by either the lending Trust Company or the Surety Company mentioned hereafter. The Trust Company (for a premium) writes a so-called "actual loss" Completion Policy to itself as obligee. To protect itself in the event that any of the sub-contractors default, the Construction Company is required to obtain a surety bond running to the Trust Company as obligee. The condition of this bond is usually that the Principal (Construction Company) shall well and truly complete the building in accordance with the terms of the contract. Similarly, the various sub-contractors are required to obtain completion bonds. Thereafter title to the land is conveyed by Owning Company to the Trust Company's nominee (subject to the aforesaid mortgage) who executes a declaration of trust (which is never recorded) that he will re-convey to Owning Company or its nominee after (1) Trust Company's loan and any further expenses have been repaid in full, (2) the building has been fully completed and (3) all contractors have been paid.

Not until all the above things have been accomplished is Trust Company ready to credit the "operation account" with the amount of the loan. At that time, an "operation agreement" is signed under which the money is advanced only for purposes of completing the building and is thus made safe from the builder's creditors.

Let us assume under the financial plan described above that the principal contractor (Construction Company) defaults under its contract and abandons the work, leaving the building but partly completed. What are the rights of the Trust Company as assignee of the mortgage and holder of the surety completion bond?

In measuring the damage suffered by a mortgagee, or by any other plaintiff in a civil case, it is of course the duty of the jury under proper instruction of the court to determine the actual loss suffered as a result of the breach of the plaintiff's right. In determining this loss in cases such as the one under discussion the courts undoubtedly will be guided by the decided cases which show the proper measure of damage in cases where an *owner,* as distinguished from a *mortgagee,* has suffered a loss as the result of a failure on the part of a contractor to complete a building.

*Owner-obligee.*

In the case where the owner is attempting to recover for a breach of the bond the measure of damages is in effect the same as where the contract itself is breached,[1] and the obligee should recover the sum necessary to put him in as good condition as if the contract had been fulfilled.[2] In theory at least this sum would seem to be the

[1] 2 SEDGWICK, DAMAGES (9th ed. 1912) § 679.

[2] *Ibid.,* § 30. Blackburn, J., in Wall v. City of London R. P. Co., L. R. 9 Q. B. 249 (1874) considered it to be the pecuniary amount representing "the difference between the present state of things, and what it would have been if the contract had been performed."

*difference between the value of the work as done and the value which it would have had if completed in accordance with the contract.*[3] As an alternative method of stating what is theoretically the same measure the courts quite generally use:

> "the difference between the amount to be paid by the owner to the defaulting contractor and the amount it actually and necessarily costs to complete by subsequent contract." [4]

Though the wording of this rule quite naturally varies from case to case,[5] it can invariably be distinguished from the previous stated rule in that the measure of damages is based on the "cost of completion", rather than upon the "difference in value".

It is submitted that the difference between these criteria is merely one of evidentiary technique and that the results will tend to be the same no matter which rule be applied. Furthermore it would seem that any possible deviation which the latter rule might occasion is more than offset by the practical considerations which dictate its use. In the normal situation the injured party will have engaged another contractor to complete, and when he shows his actual expense through this contract the courts are not inclined to look further for the measure of his damages, having already one quite satisfactory and definite guide which the jury can follow. By disregarding the former rule, where the owner has actually completed, the necessity of the generally none too satisfactory expert opinion as to the value of the property at the time of the breach, and if completed, is obviated. As a result we find the courts prefer the latter rule, and measure the damages by the cost of completion.

This problem is considerably complicated by the axiomatic duty of an obligee in a completion bond so to act as to mitigate the loss of his obligor. No case has actually decided whether it is the duty of an owner in this situation himself to take every reasonable means immediately to complete the building, but in such case where the owner is unable or does not choose to complete himself, the cost may readily be ascertained by expert testimony, or the court may apply the "difference in value" measure, either of which, it is submitted, will lead to the same result.

It should be noted at this time that, in addition to direct damage, the owner should recover for such damage as falls within the rule of

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[3] 2 SEDGWICK, *op. cit. supra* note 1, § 30.

[4] Elmohar Co. v. People's Surety Co. of N. Y., 217 N. Y. 289, 111 N. E. 821 (1916).

[5] Kinney v. Mass. B. & Ins. Co., 210 App. Div. 285, 206 N. Y. Supp. 163 (1921) (the difference between the new cost and the sum unpaid the contractor); Gleason v. Smith, 9 Cush. 484 (Mass. 1852) (the sum necessary to complete according to the contract); Watters v. London & Lancashire Ind. Co., 76 Pitts. 605 (Pa. 1927) (the difference between the contract price and the reasonable cost of doing the work).

*Hadley v. Baxendale,*[6] under which recovery may be had for such consequential damage as:

> "may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

This would include the loss of rentals caused by delay or (if it was in the contemplation of the parties at the time the contract was made) the loss of a resale.

*Mortgagee-Obligee.*[7]

In cases such as the hypothetical situation above outlined where a mortgagee is the obligee on the completion bond, the courts seem to have difficulty in applying the rather well settled principle just considered. The fundamental principle is clear: What pecuniary amount will place the mortgagee in as good condition *with respect to his mortgage* as if the contract had been fulfilled?

What is perhaps the leading case on this subject is *Province Security Corporation v. Maryland Casualty Company,*[8] recently decided by the Supreme Judicial Court of Massachusetts. In that case the Court said:[9]

> "The measure of damages is to be based on the difference of the value of the property as security, arising from the failure to comply with the conditions of the bond."

To the same general effect is *Longfellow v. McGregor,*[10] in which the law was stated as follows:

> "The measure of damages is, as against the surety, the difference at the time of the breach of the bond, between the value of the mortgaged premises without the house built on them, and the then amount of the mortgage debt, not exceeding the amount the rebuilding of the house would have increased the value of the premises."

It should be pointed out in passing that in both last cited cases the "completed value" of the buildings would unquestionably have

[6] 9 Ex. 341 (1854).

[7] See also German-American Title & Trust Co. v. Citizen's Trust & Savings Co., 190 Pa. 247, 42 Atl. 682 (1899) (bond to holder of ground rent) and Wheeler v. Equitable Trust Co., 206 Pa. 428, 55 Atl. 1065 (1903) (mortgagee of ground rent) for examples of other limited interests protected by completion bonds.

[8] 168 N. E. 252 (Mass. 1929).

[9] *Ibid.,* at 257.

[10] 61 Minn. 494, 497, 63 N. W. 1032, 1034 (1895).

exceeded the face amount of the mortgage. However, where the surety is able to prove that the buildings, even if completed, would not have been of sufficient value to be complete security for the mortgage, recovery should be limited to the actual loss the mortgagee has suffered from the non-completion, *viz.*: the difference between the security value at the time of the breach and the security value of the completed structure, since what the obligee is protected against is merely *loss caused by non-completion.*[11] For the same reason, in the case of a second or third mortgage, where even the completed building would have afforded no security, there is no loss to such mortgagees as a result of the breach and no action will lie on the bond.

If, on the other hand, at the time of the breach the mortgaged premises have a value then in excess of the face amount of the mortgage held by the obligee of the completion bond, there would clearly seem to be no loss on the mortgage and no cause of action;[12] notwithstanding that the value of the property is less by reason of the breach. Whether this seemingly logical conclusion follows in any particular case depends on the wording of the condition of the bond. There is nothing to prevent a surety who so desires from adding to the usual indemnity bond, a condition in the form of an affirmative covenant to complete. In such a situation the mortgagee himself may complete, and recover the cost thereof from the surety.[13] The mortgagee may elect not to complete and sue for the cost of completion.[14] Such a recovery should be held to be in diminution of the mortgage debt, in which event the practical effect of the covenant would be to render the bond similar to a mortgage-guaranty bond.

When the mortgagee comes to show his loss by reason of depreciation in the value of his security, the question of how this value may be determined arises. In the *Province Security Corporation* case the lower court, following a *dictum* of an earlier case,[15] held the measure of damages to be the difference between the value if completed as contracted for, and the value of the abandoned premises, as shown by the amount realized at the foreclosure sale.

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[11] See cases *supra* notes 9 and 10. Weightman v. Union Trust Co., 208 Pa. 449, 57 Atl. 879 (1904). There is also language pointing to this conclusion in Wheeler v. Equitable Trust Co., *supra* note 7 and Pennsylvania Co. v. Central Trust & Savings Co., 255 Pa. 322, 99 Atl. 910 (1917).

[12] "the plaintiff must show loss to himself as mortgagee, by reason of the failure . . . to complete the building operation. If he shows no loss . . there is no breach of the condition of the bond, and, consequently, no right to recover." Weightman v. Union Trust Co., *supra* note 11, at 451. "If the mortgage, notwithstanding such non-completion was worth its face value, no loss was sustained." Pennsylvania Co. v. Central Trust & Savings Co., *supra* note 11, at 328, 99 Atl. at 913.

[13] Equitable Trust Co. v. National Surety Co., 214 Pa. 159, 63 Atl. 699 (1906).

[14] Pennsylvania Co. v. Central Trust & Savings Co., *supra* note 11.

[15] Norway Plains Savings Bank v. Moors, 134 Mass. 129, 135 (1883).

The Supreme Judicial Court reversed the lower court and pointed out that the proper measure of damages was:

> "the difference *at the time of the breach of the bond,* between the security value of the property as it stood at that time, and the amount then due on the mortgage, or the value of the building if completed." [16]

As thus stated, and as borne out by the other cases, the damage must be assessed as of the time of the breach.[17] For this reason, since the foreclosure sale must occur at some later time, the price there obtained would not be conclusive in the action on the breach of the bond, where only the value at the previous date is in issue. The additional fact that the foreclosure sale is forced should likewise militate against the conclusiveness of the price there obtained. Excepting the possible case where the mortgagee buys in the property on the writ for sheriff's costs. this price will be admissible as *prima facie* evidence tending to show the value of the property at the earlier date.[18]

The present condition of the law seems to be that the mortgagee who has foreclosed may show his *prima facie* loss by proof of the price successfully bid at a *bona fide* sheriff's sale. That this is the acutal value of the property may then be contested by the surety who may attempt to prove greater value. Conversely, if a mortgagee forecloses and at the sheriff's sale himself bids the face amount of the mortgage, it has been quite properly held that he has suffered no loss by the failure of the surety to complete the building.[19]

A collateral inquiry upon which there seems to be little authority, and that little in discord, is whether the mortgagee may recover his foreclosure costs as an element of his damage. In *Province Security Corporation v. Maryland Casualty Co.* the court disallowed the claim [20] pointing out that the bond was not given to secure the payment of the mortgage, but only the completion of the building. In the absence of any direct expression, which would of course govern, the problem is largely conjectural, and the decision of the Massachusetts case would seem to be on a sound basis. The same consid-

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[16] *Supra* note 8, at 257 (italics the writer's).

[17] See Longfellow v. McGregor, *supra* note 10, at 497, 63 N. W. at 1034; Kidd v. McCormick, 83 N. Y. 391, 395 (1881); German American Title & Trust Co. v. Citizen's Trust & Savings Co., *supra* note 7, at 256, 42 Atl. at 683. " . . . the time for determining these values was the time when the defendant left the houses, as finished, or as soon afterward as plaintiff had notice of the defects, or might have had notice by the exercise of reasonable diligence." Norway Plains Savings Bank v. Moors., *supra* note 15, at 135.

[18] Province Security Corp. v. Maryland Casualty Co., *supra* note 9, at 257; 2 SEDGWICK, *op. cit. supra* note 1, § 243.

[19] Wheeler v. Equitable Trust Co., 221 Pa. 276, 70 Atl. 750 (1908).

[20] *Supra* note 8, at 258.

eration would seem to outlaw any claim by the mortgagee for rents and profits as an element of damage.[21]

Perhaps the most interesting situation arises where a surety, following a default by the principal, completes the premises in accordance with the plans and specifications and the terms of the contract, except that the completion is late. In such cases, completion has almost invariably been accomplished with the consent of the mortgagee. To what damage, if any, is the mortgagee entitled as compensation for the delay?

It has been decided that depreciation in the value of the property due to lapse of time is not an element of damage for which the mortgagee can recover.[22]

*A fortiori,* it should follow that the surety would not be responsible for any impairment to the mortgagee's security caused by a depression in the real estate market. Such a fortuitous event could hardly be said to be within the contemplation of the parties at the time of making the contract, nor could it be in any way held to be a consequence of the default. If the bond is merely one for indemnity, and no actual loss can be traced to the delay, it is obvious that there can be no recovery.[23] However, assuming that the bond contains an affirmative covenant to complete, upon the breach the surety has the alternative duty either to complete the building or to pay the cost of completion (or difference in value). If the completion is elected and occurs after the time set in the contract and bond, it would seem that the mortgagee should have some redress. In the usual case, since the property is the sole asset of the mortgagor to which the mortgagee must look for his interest, it might be argued that such loss of interest on the mortgage as the delay occasioned would fall within the *Hadley v. Baxendale* rule. At best this argument seems very tenuous, and it is doubtful whether a court would hold such loss to be within the contemplation of the parties unless specifically set forth. The further consideration that the bond is not a mortgage-guaranty bond would seem to outlaw such a claim. It is only where the amount of the mortgage exceeds the cost of completion that any obligee would attempt such a claim. Granted that the customary damage allowed by the law for delay is interest on the obligation, it would seem that (the pecuniary obligation being the cost of completion) all the recovery, if indeed any, that should be allowed the mortgagee would be interest on the cost of completion from the date on which the building was agreed to be finished until the date on which it actually was finished—the principal amount being discharged by the actual completion of the building. It is pos-

[21] There is a suggestion to the contrary in the Province Security Co. case, *supra* note 8, at 257, but there was no decision since the evidence showed there was no loss of rent.

[22] Norway Plains Savings Bank v. Moors, *supra,* note 15, at 136.

[23] See cases *supra,* note 12.

sible to imagine a case where completion would be postponed several years or indefinitely by the refusal of either party to undertake the work, in which instance the interest would assume great proportions. In this case if the surety refused to offer compensation as well, he would have only himself to thank for his predicament. However, to prevent a situation where the obligee refused to accept tender for the purpose of practically receiving an annuity from the surety (the amount being unliquidated a tender would not stay the running of interest) by waiting until the end of the limitation period to sue, it is submitted that recovery of interest should be completely denied after date of tender where the tender was found to be reasonable in the first instance [24] or that the recovery of interest should be limited to that period during which the building might reasonably have been completed. To do otherwise would in effect make the covenant specifically enforceable, since no surety could afford not to complete. Such a dilemma might be avoided by a limitation clause in the bond.[25]

The law at this time is in a state of early development in this field and consequently much of the above discussion is purely speculative. Many supposititious cases may be put the answer to which will not be found in any of the reports. All that can be done at present is to await the developments from the flood of cases occasioned by the recent depression, and now on the trial lists. It is possible that with the growth of building and frequency of occurrence of such litigation courts or legislatures may treat them as *sui generis* and evolve a special set of rules only applicable to these cases.

MENTAL DEFICIENCY AS REDUCING THE DEGREE OF THE OFFENSE—The doctrine—sometimes referred to as the "doctrine of partial responsibility" [1]—that mental deficiency may be considered to determine whether or not the accused had the requisite specific intent to commit the crime with which he is charged has not found much favor in the courts of this country.[2] At the outset this doctrine

[24] If it is borne in mind that the interest is allowed as damage and not as interest, the court might very properly hold in such a case that there was no damage of this type. It should also be noted that the obligee would be violating his duty to mitigate his loss.

[25] Watters v. Fisher, 291 Pa. 311, 139 Atl. 842 (1927). In the event that action by the obligee is required early the damages will be assessed at that time (although the judgment will be for the penal sum of the bond), and tender by the surety of the sum thus liquidated would effectually stay any further recovery.

[1] Keedy, *Insanity and Criminal Responsibility* (1917) 30 HARV. L. REV. 535, 551.

[2] Weihofen, *Partial Insanity and Criminal Intent* (1930) 24 ILL. L. REV. 505. In this article the author says that the rule "has been adopted in only four or five states, while it has been definitely rejected in twice that number".

must be carefully distinguished from the customary "right and wrong" test of insanity.[3] If the rule of partial responsibility is applied, it is for the purpose of determining whether the accused had sufficient mental capacity so that all the elements of the crime with which he is charged, existed at the time the crime was committed. Thus, if a statute requires wilfulness, deliberation and premeditation for a killing to be murder in the first degree, it is necessary that the killing be wilful, deliberate and premeditated. If the accused at the time of the commission of the crime was incapable, by reason of being mentally deficient, of deliberating and premeditating, then, according to the doctrine of partial responsibility he should not be convicted of murder in the first degree. However, assuming he was able to distinguish between right and wrong he should not be acquitted, and would therefore remain guilty of the crime of murder in the second degree, the elements of which were present when the crime was committed.

A recent decision in a lower court in Pennsylvania,[4] following earlier Pennsylvania cases [5] absolutely rejected the doctrine. In this case the defendant had killed his aunt, with whom he lived, by strangling her with a rope. The testimony of a specialist in mental diseases was to the effect that the defendant was a mental defective; that, medically speaking, he was not insane but was feeble-minded, having the mental capacity of a nine year old child. Others who knew the defendant testified to the same effect. Counsel for the defendant contended that because of his mental deficiency he was incapable of premeditation and deliberation and therefore should not be convicted of murder in the first degree; yet, since he was not insane so as to be irresponsible for crime under the test for insanity in force in Pennsylvania, he was guilty of murder in the second degree. The court, however, held that the testimony introduced on behalf of the defendant could not be considered for the purpose of reducing the grade of the offense from murder in the first degree to murder in the second degree,[6] a holding in accord with the great weight of authority in the United States.[7]

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[3] People v. Coffman, 24 Cal. 230 (1863); Anderson v. State, 42 Ga. 9 (1871); State v. Kotovsky, 74 Mo. 247 (1881).

[4] Com. v. Scott, in the Court of Oyer and Terminer of Fayette County (opinion filed June 17, 1930).

[5] Com. v. State, 190 Pa. 138, 42 Atl. 542 (1899); Com. v. Barnes, 199 Pa. 335, 49 Atl. 60 (1901); Com. v. Cavalier, 284 Pa. 311, 131 Atl. 229 (1925).

[6] The defendant in this case was later declared insane by a commission and the case was not appealed.

[7] Com. v. Cooper, 219 Mass. 1, 106 N. E. 545 (1914); State v. Palmer, 161 Mo. 152, 61 S. W. 651 (1901) holding that although the defense is weak-mindedness, yet the same test, that of the ability to distinguish right from wrong in the doing of the particular act, must be applied. State v. Schlops, 78 Mont. 560, 254 Pac. 858 (1927); Hogue v. State, 65 Tex. 539, 146 S. W. 905 (1912).

It would seem that one reason why courts do not adopt the doctrine before stated is that they recognize only one form of mental affliction, the test for which is the ability to distinguish between right and wrong. They refuse to see that "there are many degrees both of *sanity* and insanity; and that the two states approach each other in imperceptible gradation, melting into each other, . . . as day melts into night".[8] These courts set up two categories, into which all cases must fall, and hold strictly to the view that a man is either wholly responsible or wholly irresponsible. If he is not wholly irresponsible then no matter if he be mentally defective he is held to the same degree of responsibility as a so-called normal person.[9] They proceed on the theory that whenever any question of mentality is introduced as a defense to crime the ordinary test of insanity is to be applied, and if the defendant was able at the time the crime was committed to distinguish between right and wrong, he is fully responsible regardless of his mental deficiency.[10] The attitude of the majority is expressed in the following language of the Supreme Court of Massachusetts:

> "Criminal responsibility does not depend upon the mental age of the defendant, nor upon the question whether the mind of the prisoner is above or below that of the ideal, or of the average, or of the normal man, but upon the question whether he knows the difference between right and wrong".[11]

That one is either wholly responsible or wholly irresponsible does not seem to correspond with fact. It is rather "to fly in the face of perfectly patent facts that are in everybody's individual experience and is only comparable to such beliefs of the Middle Ages that a person is possessed of a devil or is not possessed of a devil, and therefore is or is not a free moral agent".[12]

The doctrine of partial responsibility has been adopted in some jurisdictions. Probably the most recent case adopting it is *People v.*

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[8] 1 WHARTON, CRIMINAL LAW ((11th ed. 1912) 85 (italics the writer's).

[9] State v. Schlops, Hogue v. State, both *supra* note 7, in the former of which the court says at page 578, 254 Pac. 858 at 863:

> "Protection is always afforded in courts of law to persons of unsound mind. Distinction is made between sanity and insanity in people, but not as respects their grade of intelligence. The law does not attempt to measure degrees of intellect nor to make distinction with respect thereto, where the power of thought and reason exists."

[10] Wartena v. State, 105 Ind. 445, 5 N. E. 20 (1885).

[11] Com. v. Trippi, 167 N. E. 354, 356 (Mass. 1929).

[12] WHITE, INSANITY AND THE CRIMINAL LAW (1923) 89.

*Moran*,[13] a New York case. But prior to this it had been announced in other cases.[14] The United States Supreme Court [15] in a case where the defense was intoxication has stated the doctrine broadly enough to cover both mental subnormality and intoxication.[16]

> "When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind by reason of drunkenness *or otherwise*,[17] as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."

These cases show that while the majority of jurisdictions have not adopted the doctrine of partial responsibility it nevertheless has some very eminent judicial support. A pertinent inquiry is whether the doctrine should receive more universal favor and on what legal principles it can be adopted.

It would seem that if the courts but adhered to the fundamental rule of criminal law, that all the elements of the crime with which the accused is charged must be present in order to convict, they would be adopting the doctrine of partial responsibility without question. If certain fixed elements are required to obtain a conviction in the

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[13] 249 N. Y. 179, 180, 163 N. E. 553 (1928), in which the court said:

"Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may properly be considered by the triers of the facts in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense."

[14] In a Utah case the doctrine was announced in the following words:

"While the jury found that his [the defendant's] condition in that respect was not such as to affect his mental capacity to relieve him from responsibility, yet it may have been such as to effect his mental capacity to coolly deliberate and premeditate on his acts. The jury, therefore, . . . should have been instructed to consider all of the foregoing evidence in determining appellant's mental capacity to deliberate and premeditate the homicide. While one's mental condition may not excuse the act, it may nevertheless affect the degree of guilt." State v. Anselmo, 46 Utah 137, 145, 148 Pac. 1071, 1074 (1915).

An early Connecticut case seems to lay down the same rule:

"If it be conceded that one afflicted with it [moral mania] never loses the power to distinguish between right and wrong, and is at all times master of himself and may control his actions, still his mind may be enfeebled and the power of his will weakened, so that he will readily yield to the influence of temptation or provocation without that wilful, deliberate and premeditated malice which is essential to constitute murder in the first degree. The jury therefore ought to consider moral mania, if satisfied of its existence, in determining the degree of crime, and give it such weight as it is fairly entitled to under the circumstances." Anderson v. State, 43 Conn. 514, 526 (1876).

[15] Hoyt v. People, 104 U. S. 631, 634 (1881).

[16] Keedy, *op. cit. supra* note 1, at 552.

[17] Italics the writer's.

case of a defendant charged with a certain crime, and any one of these elements is lacking, as an abstract proposition, most men would agree that no conviction could be had. But, should the crime charged include a lesser offense, all of the elements of which are present without the missing one, the accused should be convicted of this lesser offense.[18]

It will be evident that there are persons who are sane and yet so mentally defective that they are incapable of deliberating upon whether to act or not, weighing one thing against another and making a choice. To return to our original example, it has been said that "to premeditate means to think over, to revolve in the mind, beforehand; that to deliberate means to reflect, to consider, to weigh with a view to a choice or decision".[19] If, then, such person is incapable of doing these things, he is incapable of committing a deliberate, premeditated killing and, therefore, cannot be guilty of murder in the first degree.[20] It is for the jury to decide from the evidence whether or not the defendant had sufficient mental capacity to deliberate and premeditate. On the basis of this fundamental principle of law it would seem that the doctrine could be adopted.

The doctrine of partial responsibility has been applied in the cases of killing where the defense is intoxication.[21] In these cases it is held that if the intoxication is so great as to render the defendant unable to form a wilful, deliberate and premeditated design to kill then he cannot be convicted of murder in the first degree but may be convicted of a lesser offense.[22] But this same principle which is applied in intoxication cases is not carried over to the cases where the defense is defective mentality, a condition for which the defendant is devoid of responsibility. An able and just criticism of such view is found in the words of the dissenting judge in a New Jersey case:[23]

> "It is an abhorrent idea to contemplate that in a case of intoxication resulting, even from the voluntary act of the person,

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[18] People v. Moran, *supra* note 13; Anderson v. State, *supra* note 14; State v. Anselmo, *supra* note 14.

[19] State v. Anselmo, *supra* note 14, at 173, 148 Pac. at 1085.

[20] Note (1922) 13 J. CRIM. L. 300, 301, in which it is said "the inquiry would be, in regard to murder in the first degree, for example, as sometimes defined at least was he capable mentally of forming the intent to kill? Was he capable of doing that wilfully? That is to say, was his mentality sufficient so that he had the power of volition, including in that probably, the ability to choose—the element of choice as a psychological element of the will in that sense? Did he have mentality sufficient to deliberate upon the act?"

[21] State v. Johnson, 40 Conn. 136, 143 (1873); "Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less and not the greater offense was . . . committed." Keenan v. Commonwealth, 44 Pa. 55 (1862); Terrill v. State, 74 Wis. 278, 42 N. W. 243 (1889).

[22] Keenan v. Commonwealth, *ibid.*

[23] State v. Martin, 102 N. J. L. 388, 403, 132 Atl. 93, 99 (1925).

> if by reason of such intoxication his mind is in such a state that he cannot form an intent to take life or to deliberate, or to premeditate, a jury should take that factor into consideration and may convict him of murder in the second degree, whilst if a person is afflicted with a mental disease, the act of God, a jury may not take that factor into consideration on the question of premeditation, deliberation, wilfulness or intent, and must convict the defendant of murder in the first degree if he fails to satisfy the jury that his mental condition was such that at the time of the commission of the act he did not understand the nature of the act which he was doing, and was unable to distinguish right from wrong."

The same doctrine is applied in cases where the killing is done under provocation of certain kinds as in "heat of blood".[24] Here, though the state of mind does not amount to a complete defense, it may reduce the grade of the offense from murder to manslaughter. In such cases the law is indulgent "to the frailty of human nature".[25] But the courts do not seem to be so indulgent, although it would seem that they should be, in the cases where the defense is defective mentality. It is submitted that this doctrine is equally applicable in the cases where the defense is mental subnormality as where the defense is intoxication or "heat of blood".[26]

Another reason which is advanced for the adoption of the doctrine is that juries would not be as prone to acquit defendants who have lacked some of the mental elements necessary for the full crime charged. If the doctrine were adopted juries could then fairly decide whether or not all the elements of the crime were present and bring in their verdict accordingly. Under the present practice they are very likely to acquit in a case where the defendant is not really insane and therefore partly responsible even though deficient mentally.[27]

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[24] Collins v. State, 102 Ark. 180, 143 S. W. 1075 (1912); Maher v. People, 10 Mich. 212 (1862); Com. v. Collandro, 231 Pa. 343, 80 Atl. 571 (1911); Weihofen, *op. cit. supra* note 2, at 506.

[25] Maher v. People, *ibid.* at 219.

[26] Keedy, *op. cit. supra* note 1, at 552.

[27] Weihofen, *op. cit. supra* note 2, at 512: "If reducing the degree of the crime is not within the jury's power, they will often *acquit* a defendant whom the evidence shows to be "not quite bright" even though the evidence shows that he is not so insane as to be legally irresponsible. This is especially likely to happen where the jury's sympathy is with the defendant."

Keedy, *op. cit. supra* note 1, at 554: "the editor suggested that the adoption of the doctrine of partial responsibility would lead to compromise verdicts when the evidence is conflicting. It is submitted that this result is not nearly so likely to happen as is the acquittal, under the present rules, of a defendant who is shown to have lacked some of the mental element necessary for the full crime charged. Illogical verdicts are more likely to result from illogical than from logical rules."

In conclusion it is submitted that courts should apply the fundamental principles of criminal law, that all the elements of the crime charged against the defendant must be present in order to convict him; that they should not refuse to see that there is a distinction between feeble-mindedness and insanity, in that the former is a lack of mind or mentality while the latter is a pathological condition of a developed mind and that, therefore, the rules applicable to the one should not be applied to the other; that if the doctrine of partial responsibility is applied in homicide cases where the defense is intoxication, a condition of mind into which the defendant voluntarily puts himself, and where the defense is "heat of blood," another condition for which the defendant is more or less responsible, it should most certainly be applied in the cases where the defense is feeble-mindedness, a condition of mind for which the defendant is in no way responsible. Then "a result is reached which not only harmonizes with sound principle, but is far more consistent with the public idea of justice than would be a verdict either of not guilty or of murder in the first degree".[28]

*A. W. B.*

[28] 1 WHARTON, *op. cit. supra* note 8, at 86.