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Intoxication as a Defense to a Criminal Charge in Pennsylvania-Sequel

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Note

INTOXICATION AS A DEFENSE TO A CRIMINAL CHARGE IN PENNSYLVANIA—SEQUEL

Commonwealth v. Tarver, 446 Pa. 233, 284 A.2d 759 (1971).

This recent case clearly illustrates the need for a thorough re-examination of the grounds of the intoxication defense by the Supreme Court of Pennsylvania. While the *Tarver* case was being decided, an article in this Review attempted to recapitulate the history of the intoxication defense in Pennsylvania.[1] It was concluded, *inter alia*, that the years of controversy over the defense in Pennsylvania have served neither to sharpen the issues nor to resolve the questions raised by the defense. Quite the contrary, during the 178 years since the defense first surfaced in Pennsylvania,[2] judicial efforts have, by and large, served only to blur the issues, and to "resolve" the questions by smothering them under easy generalities which belie the complex and troublesome nature of the defense. As the *Tarver* decision shows, seeking refuge behind broad pronouncements, themselves the result of imperfectly resolved questions, leads not only to confusion but to questionable law.

The facts. Defendant Tarver entered a general plea of guilty to murder following a killing which occurred while he and two co-defendants were robbing a bank. The victim, a bank customer, was shot six times by defendant and a co-defendant. Defendant was thoroughly questioned by the trial court on the cir-

1. Smith, *Intoxication as a Defense to a Criminal Charge in Pennsylvania*, 76 DICK. L. REV. 15 (1971) [hereinafter cited as *Intoxication as a Defense*].

2. Pennsylvania v. M'Fall, Add. 255 (Pa. 1794).

cumstances of the crime, both upon the entering of the guilty plea and later, at a hearing to determine the degree of guilt. Tarver did not deny either his participation in the robbery or in the killing of the victim. Tarver did, however, contend that he had not *intended* to rob the bank, and that he could not remember either the robbery or the shooting. The defendant claimed that, at the time of the robbery-murder, he was "high" as the result of consuming a quantity of cough syrups, sniffing glue, and smoking marihuana. A physician-psychiatrist testified for the defendant to the effect that, in his opinion (based on certain tests made after the event), Tarver was under the influence of "drugs," his consciousness was "disturbed," and his judgment "impaired" at the time of the robbery-murder. The medical witness testified that the cough syrups, if consumed in sufficient quantity, "would produce an intoxication similar" to alcoholic intoxication, resulting in loss of inhibition, loss of memory, and "an impairment of his intention to do any kind of act."

Under questioning by the court, Tarver admitted remembering stealing "get-away" cars, parking them near the bank, "thinking about robbing the bank," driving to the bank in possession of three guns, and standing on a counter while in the bank.

On these facts the defendant was found guilty of first-degree murder under the felony murder rule.[3] The Supreme Court of Pennsylvania affirmed, two justices concurring in the result. The conviction is hardly surprising, but the reasons advanced by the majority in affirming the conviction are as remarkable as the grounds not advanced (or added in make-weight fashion), and if the *ratio decidendi* of *Tarver* stands, Pennsylvania appears to have taken a unique position on the defense of intoxication to a criminal charge.

The decision. Tarver's conviction was clearly supportable on at least two well-established and to some extent over-lapping grounds, long rooted in Pennsylvania law. First, it is settled that a felonious design conceived *before* an actor becomes intoxicated cannot be defended on the ground of intoxication.[4] The reason be-

3. Murder perpetrated during the commission of a felony is murder in the first degree, and all participants in the felony are guilty of murder in the first degree regardless of personal participation in the killing. Commonwealth v. Batley, 436 Pa. 377, 260 A.2d 793 (1970); Commonwealth v. Shawell, 325 Pa. 497, 191 A. 17 (1937).

4. Commonwealth v. McMurray, 198 Pa. 51, 47 A. 952 (1901); Goersen v. Commonwealth, 106 Pa. 477 (1884); Nevling v. Commonwealth, 98 Pa. 322 (1881). *See also* Commonwealth v. Farrow, 382 Pa. 61, 114 A.2d 170 (1955); State v. Arnold, 264 N.C. 348, 141 S.E.2d 473 (1965).

hind this rule is clear and incontrovertible.[5] Certainly the evidence in *Tarver* clearly pointed to a pre-conceived intention to commit robbery, followed by voluntary intoxication. If there were any reasonable doubt,[6] however, there was another, at least equally compelling ground for affirming Tarver's conviction, *viz.*, that he had not carried his burden of proving by a preponderance of the evidence that, at the time of the robbery, he was incapable of forming the specific intent to rob.[7] Certainly his own admissions concerning the events of the robbery-murder were clearly inconsistent with an asserted incapacity to form a specific intent.[8] The court in *Tarver* did not mention the first possible basis for affirming the conviction, and appended the latter rather as an after-thought.

The majority opinion in *Tarver* rests upon entirely different, and very likely unique grounds, to be examined shortly. It should be mentioned first, however, that there has always been a mist of ambiguity around the intoxication defense to felony murder in Pennsylvania. Other courts have distinguished between the relevant and the irrelevant aspects of the defense in felony murder.[9] If the felony requires a specific intent (*e.g.*, robbery, as opposed, *e.g.*, to rape), then intoxication is relevant to the question whether the defendant was capable of (or had formed) the required specific intent. If the triers of fact find that he was capable, then a killing in the commission of the felony is murder in the first degree, and intoxication is no defense. If, on the other hand,

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5. Dean Laub remarks:

> In view of the penchant of criminals to fortify themselves with liquor and drugs before launching on a criminal enterprise, public policy or necessity requires that intoxication by such means should not constitute a defense. . . .

B. LAUB, 1 PENNSYLVANIA TRIAL GUIDE 372 n.24 (1959) [hereinafter cited as LAUB].

6. Although, once the defendant asserts the affirmative defense of intoxication the burden falls upon him by a preponderance of the evidence, Commonwealth v. Barnosky, 436 Pa. 59, 258 A.2d 512 (1969); Commonwealth v. Chapman, 359 Pa. 164, 58 A.2d 433 (1948), the burden of proof must logically remain upon the state to prove the defense unavailable by reason of an intent formed prior to intoxication.

7. The two concurring justices felt that the defendant had not carried his burden, and even the majority added as an afterthought:

> Further, even if it is accepted that Tarver was "high" from narcotics at the time involved, the record is ample to establish that his claim of lack of felonious intent lacked credibility. . . .

446 Pa. 233, 241, 284 A.2d 759, 763 (1971).

8. Since Pennsylvania is not one of those jurisdictions which subscribe to the doctrine of "diminished responsibility" or "diminished capacity," *q.v.* Annot., 22 A.L.R.3d 1228 (1968), evidence that defendant's consciousness was "disturbed" and his judgment impaired, 446 Pa. 233, 237, 284 A.2d 759, 761 (1971) is insufficient basis for exoneration from criminal guilt, although such evidence is apparently admissible, at the discretion of the court, on the question of proper sentence. Commonwealth v. Thompson, 381 Pa. 299, 113 A.2d 274 (1955); Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216 (1954).

9. People v. Cheary, 48 Cal. 2d 301, 311 P.2d 431 (1957); People v. Walsh, 28 Ill. 2d 405, 192 N.E.2d 843 (1963); People v. Koerber, 244 N.Y. 147, 155 N.E. 79 (1926).

the defendant is found to have been incapable of forming the specific intent required in the felony charge (or is found in fact not to have formed the intent), then the question of intoxication is relevant to the charge of felonious homicide. Under present[10] Pennsylvania law, intoxication is never a defense to felony murder where the felony requires only a "general" intent. The two previous Pennsylvania Supreme Court cases dealing with the felony murder rule[11] are completely ambiguous[12] on the question whether these distinctions were recognized in Pennsylvania.[13]

Certainly it was not improbable that sooner or later a case would arise in Pennsylvania in which it would become necessary to clarify the intoxication defense to a charge of felony murder. Whether *Tarver* was that case is argumentative, especially since the conviction could easily have been affirmed without reaching the complexities of the defense in felony murder cases. In any event, ignoring or touching lightly traditional and well-established principles, the majority in *Tarver* seized the occasion for announcing a rule as logically questionable and inconsistent with past Pennsylvania "law," as it is unique in Anglo-American jurisprudence. The court began by acknowledging that intoxication may be put forward as a defense to murder in the first degree. It then approved

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10. At least until *Tarver*. *See* note 18 and accompanying text *infra*.

11. Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719 (1966); Commonwealth v. Thompson, 381 Pa. 299, 113 A.2d 274 (1955).

12. In Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719 (1966), the Court said:

> Hardy contends that the element of intent was not properly explained in view of the issue of defendant's intoxication at the time of the robbery; that a specific intent is required before one can be convicted of robbery; that where one is incapable of entertaining a specific intent he may not be convicted of robbery, even though the incapacity resulted from voluntary intoxication; and that, if Hardy was incapable of forming the specific intent necessary for robbery, the felony-murder rule has no application. The court charged the jury on the definition of robbery and, in so doing, on the intent necessary therefor. . . . In so doing the charge was in accordance with the law. If the jury found Hardy guilty of robbery he would be guilty of murder under the felony-murder rule and his intent, as related to the murder, would be immaterial. . . .

Id. at 218-19, 223 A.2d at 724.

13. Dean Laub appears to have found the question considerably less ambiguous:

> Felonious intent is a necessary ingredient in a robbery. [Citations omitted]. If the defendant was so drunk as to be incapable of conceiving any intent how could he be capable of forming the intent to commit a burglary or a robbery? Absent the intent, no robbery or burglary could be committed. A killing which takes place during the commission of an act which, even though consummated, would not, in law, amount to a robbery, would not, therefore be a killing during the commission of such crime. . . .

LAUB at 372 n.24.

the finding of the lower court that the felony murder rule applied, so that if the defendants were found guilty of the felony and the killing, the latter would be murder in the first degree. At this point the court, speaking of the rule that intoxication is a defense to first-degree murder, reasoned as follows:

> Although it is clear that this Court has employed the aforementioned rule to *lower the degree of guilt* within a crime, the crime still remains at murder. This Court has never extended the rule to lower murder in the second degree to voluntary manslaughter, nor has it applied this principle to any other crime outside of *felonious* homicide. Thus, exemplifying the fact that the rule has never been applied where its effect would change the nature of the crime, we have always limited its application to changing degrees with a crime. [Citations omitted]. Since there are no analogous degrees of robbery, the principle has no application and defendant's acts are a felony, notwithstanding his alleged intoxication.[14]

This reasoning, it is submitted, completely reverses cause and effect, and states a proposition which, at the risk of generalization, has never been the law in any Anglo-American jurisdiction.

Whether a crime has been divided into degrees by some definitional process has no bearing upon whether intoxication is a defense to that crime (or a degree of the crime), *except to the extent* that one degree of the crime requires a specific intent and the other does not.[15] Thus, as first-degree murder requires premeditation, deliberation, etc., *i.e.*, a specific intent to take life, intoxication is a defense, whereas intoxication is not a defense to second-degree murder, nor to manslaughter, which do not require a specific intent to kill, but only a general intent presumed from the acts themselves.[16] It is not that felonious homicide is divided into de-

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14. 446 Pa. 233, 239, 284 A.2d 759, 762 (emphasis in original).

15. In Maine, for example, intoxication is not a defense to murder because the legislature abolished the degrees of murder, leaving only one degree. The single degree of murder, however, is defined as not requiring a specific intent to kill, but only an "implied" (general) intent found in the act itself. It is because murder so defined does not require a specific intent that intoxication is not a defense to murder in Maine; it is not *merely* that there is only *one degree* of murder that intoxication is no defense. State v. Arsenault, 152 Me. 121, 124 A.2d 741 (1956):

> Where there are statutory degrees of murder (as formerly in Maine) intoxication may sometimes reduce from first to second degree murder. . . .
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> . . . .
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> [But as a result of redefinition], [w]hen the fact of killing is proved and nothing further is shown, the presumption of law is that it is malicious and an act of murder. . . .
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> Voluntary intoxication is not an excuse for crime, *except in those cases where knowledge or specific intent are necessary elements*. . . .

Id. at 124, 124 A.2d at 743 (emphasis in original). Since murder in Maine now requires only "implied malice," *id. loc. cit.*, intoxication is not a defense because the element of specific intent is absent.

16. Commonwealth v. Drum, 58 Pa. 9 (1868).

grees, that intoxication is a defense, but that one degree of homicide requires a specific intent, which can be negated by evidence of intoxication, whereas other degrees of homicide require no specific intent, leaving the intoxication defense with no element to refute.[17] If the relevance of the defense were made to depend upon whether the crime were divided into degrees, then, if the legislature chose to distinguish degrees of, say, assault or rape,[18] it would follow that intoxication would be a defense to these crimes, even though neither requires a specific intent to commit the felonious act. This result has never been the law in Pennsylvania, and the court in *Tarver* certainly did not mean to announce such a revolutionary principle. The real criterion of relevance in the intoxication defense is whether or not the crime is one of specific or general intent. The immediate consequence of the court's reasoning in *Tarver* was that, since robbery is not divided into "degrees," intoxication is not a defense, notwithstanding that robbery is a crime of specific intent.[19]

Abstracting from the position taken in *Tarver*, clearly unique and logically untenable, that the division of a crime into "degrees" determines the relevance of the intoxication defense, perhaps the supreme court simply wished to announce that, regardless of the fact that many non-homicide felonies require a specific intent to commit the act, intoxication can never be a defense in Pennsylvania to any crime other than first-degree murder. If this is really the "rule" that emerges from *Tarver*, what are its consequences?

Consequences of the decision. The most important consequence of the decision in *Tarver*, at least if its reasoning is followed, is that intoxicated defendants will be judged *as if* they had been sober, resulting in a species of strict criminal liability even where the necessary element of (specific) intent may have been absent. Thus, juries in effect will be instructed to disregard the defendant's condition, and to judge his acts by the speculative standards of sobriety. This fictional exercise, if taken seriously, results in punishing defendants for criminal acts even though they may not have been guilty of an essential element of the crime—the element

17. Professor Hall, of course, disputes not only the validity of the distinction between general and specific intent, but feels that intoxication should, at least to some extent, be available even in crimes of "general" intent. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 529-59 (2d ed. 1960).

18. Perhaps on the basis of the degree of injury to the victim or some similar criterion.

19. The court in *Tarver* acknowledged, apparently, that robbery is a crime of specific intent. 446 Pa. 233, 238 n.3, 284 A.2d 759, 761 n.3.

of intent.[20] The result is that defendants are being punished, in large measure, not for the crime itself but for the act of becoming intoxicated. It is questionable whether such an exclusionary rule can be squared with constitutional requirements of fairness and due process. At best, such a rule is illogical and arbitrary, and at worst, harsh and reminiscent of the pre-nineteenth century environment which spawned it.

In addition to arbitarily foreclosing valid defenses, the rule of exclusion announced in *Tarver* turns its back on nearly 75 years of Pennsylvania "law,"[21] and principles of criminal justice[22] which

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20. The extent to which relevant and proper defenses are foreclosed under an exclusionary rule is exacerbated by the fact that, in Pennsylvania at least, the defense of intoxication has come to be thought of as exclusively affirmative. *See Intoxication as a Defense* at 29-33. Consequently, the *Tarver* decision would appear to disallow the defense even where the defendant does not seek to plead it affirmatively. Consider the following hypothetical defendants. A, intoxicated defendant, breaks and enters a building, is apprehended and charged with burglary. He pleads that, because of intoxication, he mistook the building, or that because of intoxication, he mistakenly entered the building, and for a non-felonious purpose. B, intoxicated defendant, begs for money from passers-by in the street. Lack of success renders him more aggressive, until he is arrested for robbery after exacting a contribution from a complainant who claims he was threatened with force and violence. C, intoxicated defendant, is apprehended carrying away the property of another. C claims that because of intoxication he mistook the ownership of the property, or the permission of the owner, or even that he carried off the object without realizing it. If the *Tarver* rule prevails, then, under current Pennsylvania law, all the above defendants will be denied recourse to the intoxication defense, notwithstanding its obvious evidentiary relevance to the crime charged. While cases such as these hypotheticals may be rare compared to the usual case in which intoxication is pleaded, they are not entirely uncommon. *See, e.g.,* Commonwealth v. Ault, 10 Pa. Super. 651 (1899); *see generally,* Annot., 8 A.L.R.3d 1236 (1966); ALCOHOL, SCIENCE AND SOCIETY 148 (Yale Univ. Press 1945).

Of course, where the defendant claims not merely that he had not *in fact* formed the required specific intent, but instead avers that he was so intoxicated that he was *unable* to form any intent, *a fortiori* he cannot be guilty of a crime of specific intent if his defense succeeds. In such cases, the denial of the defense under an exclusionary rule is at least as egregious as the exclusion of such evidence offered only to negate the element of specific intent in the context of an "ordinary defense." *Intoxication as a Defense* at 15 *passim.*

21. Commonwealth *ex rel.* Dunbar v. Keenan, 196 Pa. Super. 592, 176 A.2d 135, *cert. denied,* 371 U.S. 839 (1963) (intoxication a defense to criminal fraud); Commonwealth v. Bell, 189 Pa. Super. 389, 150 A.2d 174 (1959) (intoxication a defense to burglary); Commonwealth v. Heatter, 177 Pa. Super. 374, 111 A.2d 371 (1955) (intoxication a defense to assault with intent to ravish); Commonwealth v. Ault, 10 Pa. Super. 651 (1899) (intoxication a defense to larceny); Commonwealth v. Silverman, 8 Bucks. 238 (Pa. C.P. 1958) (intoxication a defense to burglary); Commonwealth v. Hart, 101 Pitts. L.J. 449 (Pa. C.P. 1953) (intoxication a defense to carrying a concealed weapon and to robbery). Only one jurisdiction within Pennsylvania seems to have held that intoxication is not a defense to a crime of specific intent. Commonwealth v. Spega, 19 Beav. 11 (Pa. C.P. 1957) (intoxication not a defense to obstructing an officer); Commonwealth v. Trowbridge, 13 Beav. 251 (Pa. C.P. 1951) (intoxication not a defense to receiving stolen goods, nor to robbery).

22. Dean Laub remarked of Pennsylvania law in 1959:

> In any case where the specific intent to commit a crime is an

have evolved over nearly two centuries. The decision in *Tarver* apparently puts Pennsylvania in the small and vanishing minority[23] of jurisdictions which still subscribe to the exclusionary rule, at a time when national efforts to codify the now-settled rule of the vast majority[24] of jurisdictions have reached the Pennsylvania legislature.[25] It is true that, strangely enough, the Supreme Court of Pennsylvania had never, until *Tarver*, decided whether the defense of intoxication could extend to non-homicide crimes. But ever since 1899, when the first Pennsylvania appellate court decided the issue,[26] the overwhelming majority of our appellate and trial court cases have recognized the nationally predominant view that intoxication is a defense to a crime of specific intent.[27]

Perhaps the court in *Tarver* was put off by the rather bizarre and incredible defense based on consumption of cough syrup and "sniffing" glue. Or perhaps the court fears that the intoxication defense is too susceptible to fraud to be permitted. Or it may be that the court simply reflects the old view that voluntary intoxication is such a dangerous vice that public order and discipline require that defendants should not be permitted to set it up as a defense (except to first-degree murder). While most courts and commentators would doubtless agree that the defense should be treated skeptically and circumspectly, very few[28] share Pennsylvania's (recently) ex-

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essential ingredient thereof, drunkenness to the point where such specific intent could not be formed constitutes a valid defense. . . . LAUB at 373.

23. The British abandoned the exclusionary rule for all crimes of specific intent many years ago. *See* Director of Public Prosecutions v. Beard, 14 Crim. App. 159 (H.L. 1920); Annot., 12 A.L.R. 846 (1921). Only five jurisdictions still subscribe to the exclusionary rule in crimes of specific intent, in varying degrees. Georgia, Missouri, and Vermont apparently do not recognize the defense to any crime, including murder. Annot., 8 A.L.R.3d 1236, 1241 (1966). Virginia permits the defense only to first-degree murder. Chittum v. Commonwealth, 211 Va. 12, 174 S.E.2d 779 (1970). Intoxication as a defense is foreclosed to all crimes by statute in Texas. Cohron v. State, 413 S.W.2d 112, 115 (Tex. Crim. 1967).

24. According to the most current survey on the topic, over forty of the American jurisdictions are now on record as permitting the defense to specific intent crimes. Annot., 8 A.L.R.3d 1236 (Supp. 1970).

25. The Model Penal Code, by and large, adopts the majority view and permits the intoxication defense wherever evidence of it negatives an element of the offense. MODEL PENAL CODE PROPOSED OFFICIAL DRAFT § 2.08 (1962); MODEL PENAL CODE TENTATIVE DRAFT NO. 9, 1-13 (1959). The Model Penal Code provisions have been introduced as Pennsylvania legislation in Senate Bill No. 455, Session of 1971 (printer's no. 470). Needless to say, the *Tarver* decision and the Model Penal Code stand at opposite poles on the legal globe.

26. Commonwealth v. Ault, 10 Pa. Super. 651 (1899).

27. *See* notes 21 and 24 *supra.*

28. *See* note 23 *supra.*

treme view that the dangers of abuse justify a near-total exclusion of the defense. It is submitted that, if history is any guide, the *Tarver* court's fears are unjustified: the defense rarely succeeds, in Pennsylvania or elsewhere.[29] Further, it is submitted that the proper answer to the possibility of abuse is to set high standards for the defense, especially the affirmative defense,[30] rather than to exclude evidence of intoxication when it is logically and legally relevant. The evil of the exclusionary rule is that it unnecessarily and perhaps seriously prejudices the few defendants who need and deserve it,[31] while contributing nothing to the administration of justice in the great majority of cases where defendants have been and would be properly convicted without it. The undercurrent of unreasonable and atavistic[32] fear of the defense which lurks below the surface in *Tarver*, based perhaps on an example of extreme application, seems to have surfaced in a decision which stands, as much as for anything, for the axiom that "hard cases make bad law."

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29. The only instance of success uncovered by the author in Pennsylvania appellate cases is Jones v. Commonwealth, 75 Pa. 403 (1874) (the court reduced a conviction for first-degree murder to murder in the second degree). The defense has a similar history of rare success in other jurisdictions. Annot., 8 A.L.R.3d 1236, 1246 n.20 (1960).

30. *Intoxication as a Defense* at 35-36, 47-48.

31. *Id.* at 29-32.

32. The only other Anglo-American jurisdiction known to the author which permits the defense to first-degree murder while denying it to all other specific intent crimes justifies its rule on the authority of Lord Hale:

> This vice doth deprive a man of his reason and puts many men into a perfect frenzy; but by the laws of England such a person shall have no privileges by his voluntarily contracted madness but shall have the same judgment as if he were in his right senses.

Gills v. Commonwealth, 141 Va. 445, 450, 126 S.E. 51, 53 (1925). Of course, no one suggests that inebriate offenders should go unpunished. The question is whether the proper punishment is to convict inebriate defendants of crimes of which they may not be guilty. It should be noted that the British have long abandoned Lord Hale's exclusionary rule (*see* note 23 *supra*). Virginia's espousal, and Pennsylvania's apparent recent embrace of Lord Hale's view evoke Mr. Justice Holmes' observation that:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Quoted in J. MARKE, THE HOLMES READER 278 (1955). While the "grounds" for the exclusionary rule, *viz.*, moral aversion to the vice of intoxication, have not vanished in at least a few remaining jurisdictions, the overwhelming weight of modern authority recognizes the harsh unfairness of the rule, at least as applied to crimes of specific intent. If the decision in *Tarver* revives this ancient relic in Pennsylvania it will move the Commonwealth back several centuries into an age whose legal principles are largely antithetical to modern criminal jurisprudence.