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Walter Harrison Hitchler

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## THE KILLER AND HIS VICTIM IN FELONY-MURDER CASES

by

Walter Harrison Hitchler\*

### *The Felony-Murder Doctrine*

"The common law rule was that if a person killed another in doing or attempting to do another act, and if the act done or attempted to be done was a felony, the killing was murder. There was thus supplied the state of mind called malice which was essential to constitute murder. The malice of the initial offense attaches to whatever else the criminal may do in connection therewith."<sup>1</sup>

This doctrine is called the felony-murder doctrine.

### *History of the Doctrine*

The doctrine furnishes an illustration of what is called "constructive crime". A constructive crime exists whenever a person, by reason of his having been engaged in some unlawful conduct, other than the crime with which he is charged, is held criminally responsible for the latter crime.<sup>2</sup>

The doctrine of "constructive murder" was expounded by Coke<sup>3</sup> as one already established in his time. He declared that death resulting from any *unlawful* act was *murder*. Coke's statement was judicially condemned by Holt, C. J., as "too large", and, according to Holt, was subject to the important qualification that "there must be a design of mischief to the person, or to commit a felony, or a great riot"<sup>4</sup> Lord Hale was less explicit. He was unwilling to announce the doctrine in such sweeping terms. He gave illustrations of killings resulting from unlawful acts, some of which he said were murder, and others manslaughter.<sup>5</sup> The limitation that the unlawful act must be a *felony* was probably added by Hawkins.<sup>6</sup> It was given definite form by Foster.<sup>7</sup> Foster's doctrine was adopted by Blackstone who asserted: "If one intends to do another a felony, and undesignedly kills a man, this is murder."<sup>8</sup> The doctrine as thus stated has been asserted by many courts.

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\*B.L., University of Virginia Law School, 1905; D.C.L., Dickinson College, 1932; LL.D., Saint Francis College, 1932; LL.D., Muhlenberg College, 1939; LL.D., Albright College, 1943; Professor, Dickinson School of Law, 1906 --; Dean, Dickinson School of Law, 1930 --; Chairman, Pennsylvania Liquor Control Board, 1939-40; Editor, Statutory Law of Pennsylvania, 1919-22; chairman, Alien Enemy Hearing Board, U. S. Department of Justice, 1941--; Member American and Pennsylvania Bar Associations; Author, HITCHLER ON CRIMES.

<sup>1</sup> *Com. v. Guida*, 341 Pa. 305, 19 A.2d 98 (1941).

<sup>2</sup> Stroud, *Mens Rea*, p. 168. The doctrine has been stated to be a "harsh anomaly" and "an artificial aggravation of actual guilt".

<sup>3</sup> 3 Co. Inst. 56

<sup>4</sup> *R. v. Keate* 406. Hobbes criticized Coke's doctrine saying it "was the common law only of Coke" and that he "believed not a word of it".

<sup>5</sup> 1 P.C. 465

<sup>6</sup> 1 P.C. 29

<sup>7</sup> P.C. 258

<sup>8</sup> 4 Comm. 200

### *An Analogous Doctrine*

An analogous doctrine is incorporated into the law of Pennsylvania by the statute which provides that "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate, any arson, rape, robbery, burglary or kidnapping, shall be murder in the first degree".<sup>9</sup>

This statute does not make all *homicides* by poison, or by lying in wait, or all wilful, deliberate and premeditated *homicides*, murder in the first degree; but it does make any *homicide* resulting from one of the named felonies murder in the first degree because it is murder at common law regardless of the attendant circumstances.

The statute, therefore, could be written with greater clearness and precision as follows: All *murder* which shall be perpetuated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, and all *homicides* which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, burglary or kidnapping, shall be murder in the first degree.<sup>10</sup>

### *Doctrines Compared*

The effect of the common law felony-murder doctrine is to make a homicide resulting from the commission of a felony murder although there was no intent to kill or to inflict great bodily harm or knowledge that death or great bodily harm was likely to result.

The effect of the statutory felony-murder in the first degree doctrine is to make such killings resulting from the commission of the enumerated felonies murder in the first degree and to make intentional killings, which are not deliberate and premeditated, murder in the first degree if they result from the commission of one of the enumerated felonies.<sup>11</sup>

### *Scope and Extent*

The felony-murder doctrine does not make any course of conduct criminal which would otherwise not be criminal; but it does make criminal (murder) some homicides which otherwise would not be criminal; and it makes some homicides murder which otherwise would be involuntary manslaughter.

The doctrine in its original form provides that if one person, while committing a felony, kills another, he is guilty of murder, although he did not intend to kill

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<sup>9</sup> Act of June 24, 1839, P. L. 872, §701

<sup>10</sup> See Mo. Rev. Stats. (1939), §4376

<sup>11</sup> The last proposition is not true in Pennsylvania because the words "wilful, deliberate, and premeditated" have been construed as meaning an intent to kill. *Com. v. Jones* 355 Pa. 522, 50 A.2d 317 (1947). A killing by person or lying in wait is murder in the first degree only if it is intentional. *Com. v. Klase*, 4 Luzerne Leg. Reg. 111 (Pa. 1886).

and although any homicidal risk he created was inadvertently created and so slight as to be inappreciable.

The felony-murder doctrine has been frequently and vigorously criticized and has been limited in various jurisdictions:

- (1) By restricting the doctrine to certain kinds of felonies.<sup>12</sup>
- (2) By requiring the homicide to be the natural and probable result of the felony.<sup>13</sup>
- (3) By limiting the time during which the felony can be said to be in the process of commission.<sup>14</sup>

#### *Causation*

It is frequently stated that homicide committed "while perpetrating a felony" is murder. It is necessary, however, to show that the conduct causing death was done in furtherance of the design to commit the felony. Death must be a consequence of the felony. The requirement is causation and not merely coincidence.<sup>15</sup>

#### *Intentional Act*

The act which immediately causes death need not be intentional.<sup>16</sup> If, e.g., the victim of a robbery attempts to disarm his assailant and is killed by the accidental discharge of the weapon during a struggle for its possession, the robber is guilty of murder.<sup>17</sup>

#### *Reason for the Doctrine*

It has been suggested that the origin of the doctrine can be found in the rule that a man may resist a felony attempted with force even to the point of killing the malefactor but may not so resist a misdemeanor or trespass, and when a person is engaged in a crime in which he may lawfully be killed, the presumption arises that he himself meant to kill if he could not otherwise succeed and such an intention is sufficient to make an ensuing homicide murder.<sup>18</sup>

A more widely accepted explanation of the origin of the doctrine is that at common law practically all felonies were punishable with death and it was considered immaterial whether a man was hanged for one felony or another.<sup>19</sup>

At the time the rule was formulated experience may have been deemed by the law to show that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies and that the law

<sup>12</sup> Perkins, *The Law of Homicide*, 36 *Journal of Cr. L. and Criminology*, 401.

<sup>13</sup> Michael and Wechester, *Cases on Criminal Law*, p. 215.

<sup>14</sup> Cadmus, "The Beginning and End of Attempts and Felonies Under Statutory Felony Murder Doctrine," 51 *Dick. L. Rev.* 12 (1946).

<sup>15</sup> Perkins, "Malice Aforethought," 43 *Yale LJ* 562 (1934).

<sup>16</sup> *Com. v. Lessner*, 274 Pa. 108, 118 A. 24 (1922); *R. v. Jamison* 1 K. B. 74 (1946).

<sup>17</sup> *State v. Best*, 44 Wyo. 382, 12 p.2d 1110 (1932).

<sup>18</sup> *R. v. Horsey*, 3 *Fost & F.* 287, Annotation. The annotator objects to the application of the doctrine to felonies not dangerous to life.

<sup>19</sup> *Powers v. Com.*, 110 Ky. 386, 61 S. W. 735; *P. v. Enck* 13 *Wend.* (N.Y.) 1834.

may therefore have thrown upon the actor the peril not only of the consequences foreseen by him and the consequences predicted by common experience, but also the consequences which the law maker apprehends, although not foreseen by the actor or predicted by common experience. Or on some other grounds of policy the law may have deemed it desirable to make special efforts to prevent such deaths.

### *Criticism of Doctrine*

The felony murder doctrine in its original form has been severely criticized<sup>20</sup> and the fact that the legislatures have created so many new felonies and raised so many crimes which were only felonies at common law to the grade of felonies has intensified the objection to the rule. It would be almost barbaric to apply the doctrine to many of these statutory felonies.<sup>21</sup>

### *Modern Statement of Doctrine*

The courts, both in England and the United States, have experienced some difficulty in determining and in stating the precise terms and limits of the felony-murder doctrine. The trend of the authorities seems to be toward holding that a homicide which results from some other felony, which involves a substantial element of risk to human life, or which does not itself involve such risk but is committed in a manner involving such risk, is murder, even though the danger to life is considerably short of the plain and strong likelihood of death or great bodily harm, which is ordinarily necessary to render a homicide murder.<sup>22</sup>

### **THE KILLER AND HIS VICTIM**

The purpose of this article is to consider whether the application of the common law felony-murder doctrine or the analogous statutory felony-murder in the first degree doctrine depends upon:

- (1) The person who does the act which causes the death.
- (2) The person whose death is caused.

Thus, if D, the defendant, and his confederates, DX and DZ, attempt to commit a felony upon V, the victim, and his companion, VX, it is possible that the act causing death may be done by D, the defendant, or DX, one of his confederates, or by V, the victim, or by O, another person, and in each case the act may have caused the death of D, or DZ, one of his confederates, or VX, the companion of V, or of OX, another person.

The courts have been called to determine the criminal responsibility of D in some, but not in all, of these situations. Two general principles have been an-

<sup>20</sup> Stroud, *Mens Rea*, 168; Stephens, *Criminal Law* §219; Turner, *Modern Approach to Criminal Law*, p. 247; Perkins, "Malice Aforethought," 43 *Yale L. J.* 557 (1934); MacDonal, "The Felony Murder Doctrine in New York," 20 *Corn. L.Q.* 288 (1934); Holmes, *The Common Law* p. 39. The specific purpose of this article precludes a statement or summary of these criticisms.

<sup>21</sup> See *Powers v. C.* 110 Ky. 386, 61 S.W. 735 (1901).

<sup>22</sup> Perkins, "Malice Aforethought" 43 *Yale L.J.* 562 (1934).

<sup>23</sup> 40 C.J.S. 843.

nounced. In order to hold D responsible it is not necessary (1) that his act caused the death<sup>25</sup> or (2) that the person killed be the victim of the felony.<sup>24</sup>

The courts have disagreed as to whether D may be held responsible for the acts of the victim of the felony, V,<sup>25</sup> and of a stranger, O,<sup>26</sup> as well as for his own acts<sup>27</sup> and those of his confederates;<sup>28</sup> and in some cases they have confused the felony murder doctrine with the doctrine that conspirators are guilty of murder if their common design included an intent to kill if necessary to attain their object or if homicide was a natural and probable result of the object of their conspiracy.<sup>29</sup>

The various fact situations will now be considered.

### *D Kills D*

Cases in which a person kills himself while engaged in committing a felony on another are few, and the question whether or not the felony-murder doctrine is applicable thereto can arise only in those jurisdictions in which suicide is regarded as a crime.<sup>30</sup>

There is authority for holding that, if suicide is a crime, a person who accidentally kills himself while committing a felony is guilty of murder. In an English case a person while engaged in committing burglary fell into the cellar of the house broken into by him and killed himself. At the inquest the coroner directed the jury that if a person while committing a felony killed another, he was guilty of murder, and if he killed himself, he was guilty of self-murder. The jury returned a verdict of murder.<sup>31</sup>

But an American court has declared, "it would hardly be seriously contended that one accidentally killing himself while engaged in the commission of a felony was guilty of murder".<sup>32</sup>

### *D Kills DX*

It has been held that if D, in attempting to commit a felony upon V, kills his confederate, DX, he is guilty of murder. In *People v. Cabalero*,<sup>33</sup> D and DX decided to commit robbery in a farm building. D went inside to commit the robbery and DX remained outside as a guard. DX shot at a bystander who drove up. When D came out and saw what had happened, he shot DX in anger without intending to kill him. It was held that D was guilty of murder in the first degree because he killed DX while attempting to commit robbery. The court said that D was guilty "regardless of whether D fired the shot intentionally or accidentally".

<sup>24</sup> 40 C.J.S. 868.

<sup>25</sup> See *infra*.

<sup>26</sup> See *infra*.

<sup>27</sup> See *infra*.

<sup>28</sup> See *infra*.

<sup>29</sup> McDonald, "Felony Murder Doctrine in New York", 20 Corn. L.Q. 306 (1934).

<sup>30</sup> Suicide or an attempt to commit suicide is not a crime in Pennsylvania. *Com. v. Wright* 11 Dist. 144 (Pa. 1902).

<sup>31</sup> 126 L.T.N. 60; Stroud, *Mens Rea*. p. 168.

<sup>32</sup> *P. v. Ferlin* 202 Cal. 587; 265 P. 230 (1928).

<sup>33</sup> 31 Cal. App. 52; 87 P.2d 364 (1939).

*D Kills V*

There are numerous cases which hold that if D, in attempting to commit a felony upon V, kills V, he is guilty of murder of the appropriate degree. In *Com. v. Eagan*,<sup>84</sup> D went to the farm of V, hid until night in the barn, and watched the house with intent to break in after V had gone to bed and take V's money. V came out of the house to go to the barn and D attacked him in the barn, inflicting injuries from which V died. The court held that D could be convicted of murder in the first degree on the theory that the killing resulted from D's attempt to commit robbery or from his attempt to commit burglary.

*D Kills O*

There are cases which hold that if D, in attempting to commit a felony upon V, kills O, another person, he is guilty of murder in the appropriate degree. In *Com. v. Lessner*,<sup>85</sup> D entered a store with intent to rob V, the proprietor. V's screams brought neighbors to the scene before the robbery was completed. D put his revolver away and attempted to escape through the door. He was intercepted and again drew his revolver and forced his way out. In front of the store he was surrounded by neighbors who had heard V's cry of alarm. His revolver was discharged killing O, a bystander. It was held that D was guilty of murder in the first degree. The court said: "He who causes the death of another while in the perpetration of such heinous crime, (robbery) forfeits his own life, although the death may be accidental".

*DX Kills DX*

In *P. v. Ferlin*,<sup>86</sup> D hired DX to burn a building. DX went to the building alone and started the fire with gasoline. In doing so he burned himself so severely that he died shortly afterwards from the effects of the burns. It was held that inasmuch as DX had killed himself, D could not be held criminally responsible for his death.

The court said, "if the defendant herein is guilty of murder because of the accidental killing of his coconspirator then it must follow that DX was also guilty of murder. It would hardly be seriously contended that one accidentally killing himself while engaged in the commission of felony was guilty of murder".

*DX Kills DZ*

There is authority to the effect that if D and DX and DZ agree to rob V and in doing so in pursuance of this agreement DX kills DZ, D is guilty of murder in the first degree.<sup>87</sup>

The court said: "It has long since been declared to be the law of this state that any killing by one engaged in any of the felonies enumerated in section 189 con-

<sup>84</sup> 190 Pa. 10, 42 A. 374 (1894).

<sup>85</sup> 274 Pa. 108, 3 A.2d 398 (1922).

<sup>86</sup> 203 Cal. 587, 265 P. 230 (1928).

<sup>87</sup> *P. v. Cabaltero* 31 Cal. App.2d 52 87 P2d 364 (1939).

stitutes murder in the first degree." The fact that the person killed is a "party to the robbery and is fatally shot while actively participating in the robbery" did not change the rule.

#### *DX Kills V*

It seems to be well settled that if D and his confederate agree to commit a felony against V and in doing so DX kills V, D is guilty of murder.

Thus where D, DX and DZ planned a burglary, went to the designated house, entered it, and DX encountered the occupant, who was aroused from his sleep, killed him, D and DZ as well as DX were guilty of murder.<sup>38</sup>

#### *DX Kills O*

It is also settled that if D and DX attempt to commit a felony upon V and in doing so DX kills a third person, O, in no way connected with the attempted felony, D is guilty of murder.

Thus it has been held that if during a robbery of a house, by D and DX, an officer arrives and is shot by DX, D is guilty of murder.<sup>39</sup>

A remarkable application of this doctrine was made in a recent case. D, DX and DZ agreed to rob V and did so. In escaping with the property they were discovered. They abandoned the property but D was arrested by a police officer. Another officer who was pursuing DX and DZ was shot by one of them. It was held that D was responsible for murder.<sup>40</sup>

#### *V Kills V*

Cases in which, in an attempt by D to commit a felony against V, *V kills himself*, are not likely to arise. In *S. v. Leopold*<sup>41</sup> it appeared that D employed DX to set fire to a building and as a result two boys, sons of a tenant, were burned to death. On the trial of D for murder, he asked the court to charge that if the boys "had a reasonable opportunity to escape and would have escaped but for their own conduct or the act of their father in directing them to return" (to save some money) D could not be convicted. The court refused to so charge. D was convicted of murder and the appellate court affirmed the conviction. The court said, "every person is held to be responsible for the natural consequences of his acts, and if he commits a *felonious act* and death follows, it does not alter its nature or diminish its criminality to prove that other causes contributed to that result". The return of the boys to save property of value was "such a natural and ordinary course of conduct that it could not be said to break the sequence of cause and effect". "Nor did the conduct of the father relieve D of responsibility."

In *P. V. Payne*<sup>42</sup> the court said, "it reasonably might be anticipated that an attempted robbery would meet with resistance during which the victim might be *shot by himself* and those attempting the robbery would be guilty of murder.

<sup>38</sup> *Com. v. Biddle* 200 Pa. 640; 50 A. 262 (1901); *Com. v. Perry* 10 Dist. 279 (Pa. 1901); *Com. v. Ivory*, 10 Dist. 277 (Pa. 1901); *Com. v. Eagen* 190 Pa. 10, 42 A. 374 (1899).

<sup>39</sup> *C. v. Major* 198 Pa. 290, 47 Atl. 741 (1901).

<sup>40</sup> *C. v. Doris* 287 Pa. 547, 135 Atl. 313 (1926).

<sup>41</sup> 110 Conn. 55, 147 Atl. 118 (1929).



*V Kills DX*

It has been held that if D and DX attempt to rob V, and in the attempt V kills DX, D is not guilty of murder because "in order that one may be guilty of homicide, the act must have been done by him actually or constructively and that cannot be unless the crime be committed by his own hands or by the hands of someone acting in consent with him or in furtherance of a common object or purpose".<sup>42</sup>

*V Kills VX*

In a case where D and DX attempted to rob V and VX, and D fired a gun doing the robbery and V fired back and killed VX it was held that D was guilty of murder.<sup>44</sup>

In *C. v. Moyer*<sup>45</sup> D and DX attempted to rob V and VX, and VX was killed. The court said, "if one of the bullets fired by V in self defense killed VX, the responsibility for that killing rests on D and DX, who had armed themselves with deadly weapons for the purpose of carrying out their plan to rob and whose murderous efforts made V's act in firing at them in self defense essential to the protection of himself and his employees and property."

*V Kills O*

It has been held that if D attempts to rob V, and V, properly shooting in self defense, kills O, a third person, D is not guilty of murder because "the act was not done by D actually or constructively by his own hands or the hands of someone acting with him".<sup>46</sup>

*O Kills O*

In *P. v. Krauser*<sup>47</sup> the defendant attempted to commit robbery. During the attempt O, an officer, who happened to be present, attempted to grab the defendant's gun and in the struggle for it the gun was discharged and O was killed. The defendant contended that the shot that killed O was fired by O himself and that therefore the defendant was not guilty of murder. But the court held that the defendant was guilty of murder because the shooting of O was a consequence naturally to be expected from the defendant's act. The court said: "If it be admitted that O shot himself in the struggle for the gun, such a result might reasonably have been anticipated when he started to rob at the point of a revolver."

*O Kills DX*

There seem to be no cases in which the question whether D is criminally responsible if DX, D's confederate, is killed by O, as a result of an attempt by D and DX to commit a felony on O, has been considered.

<sup>42</sup> 359 Ill. 246, 194 N.E. 543 (1935).

<sup>43</sup> *Com. v. Moore* 121 Ky. 97, 88 S.W. 1085 (1905).

<sup>44</sup> *P. v. Payne* 357 Ill. 246, 194 N.E. 543 (1935).

<sup>45</sup> 357 Pa. 181, 53 A.2d 736 (1947).

<sup>46</sup> *C. v. Moore* 121 Ky. 97, 88 S.W. 1085 (1905).

<sup>47</sup> 315 Cal. 485, 146 N.E. 593 (1925).

But if D is held responsible if O kills OX or V, it seems that D should be held responsible if O kills DX.<sup>48</sup>

#### *O Kills V*

A person, D, who attempted to commit a felony on V during which V was killed by O, a person attempting to prevent the robbery, has been held to be guilty of murder because it reasonably might have been anticipated that an attempted robbery would meet with resistance during which the victim, V, might be shot by someone, O, attempting to prevent the robbery.<sup>49</sup>

#### *O Kills OX*

In *Keaton v. S.*,<sup>50</sup> D, DX and others attempted to rob a train. After stopping the train they forced the fireman, OX, to go with them to the door of the express car, after being warned that someone would probably commence shooting at them from the rear of the train. A person, O, resisting the robbery, and intending to shoot the robbers, shot and killed the fireman, OX. D was held guilty of murder because the death of the fireman was "the reasonable, natural and probable result of his act, to wit, placing the fireman in a place of danger where he would probably lose his life".

A somewhat analogous situation was presented in *Butler v. P.*<sup>51</sup> where, however, no felony was involved and the prosecution could therefore not rely on the felony-murder doctrine. D and DX were acting in a disorderly manner and the town marshall attempted to arrest them. D and DX thereupon attacked him and knocked him down. He then fired and killed a bystander. It was held that D was not guilty because the act which caused the death was not committed by him or by anyone acting with him.

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<sup>48</sup> See notes 49, 50, *infra*.

<sup>49</sup> *P. v. Payne*, 359 Ill. 246, 194 N.E. 539, 543 (1935).

<sup>50</sup> 11 Texas Cr. R. 621, 57 S.W. 1125 (1900).

<sup>51</sup> 125 Ill. 641, 18 N.E. 338 (1888).