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ONE Redline and an accomplice Worseck, after perpetrating a robbery and in attempting to escape, engaged in a gun battle with several policemen. As a result of the battle Worseck died from a wound inflicted by a bullet from a policeman's gun. Redline thereupon was indicted, tried and convicted of murder in the first degree for a "murder . . . committed in the perpetration of . . . robbery."[1] In reversing, the Supreme Court of Pennsylvania held in substance that the felony-murder doctrine was not applicable because the act of killing was not the act of Redline.[2]

It is the purpose of this article merely to point up an area of the felony-murder realm where clarification might be in order.

At the outset it might be well to consider a troublesome feature of the Pennsylvania murder statute. The pertinent portion of the statute reads:

> "All *murder* which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, 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." [3] (Emphasis added.)

In aid of analysis the statute might be compressed:

> "All *murder* . . . 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." [4] (Emphasis added.)

In order for the felony-murder portion of the statute to operate so that a given homicide becomes murder in the first degree two elements must exist: (1) a "murder" must be established; and (2) it must be established that *that* "murder" was committed in the perpetration of, or in the attempt to perpetrate, one of the felonies enumerated in the statute. There can be no doubt but that "murder", as employed in the statute, was intended to mean *common law* murder.[5]

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[1] PA. STAT. ANN. tit. 18 § 4701.

[2] Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

[3] Supra note 1.

[4] *Ibid.*

[5] See Commonwealth v. Redline, 391 Pa. 486, 492, 137 A.2d 472, 474 (1958).

In 1794 the Pennsylvania legislature subdivided murder into degrees.[6] This was done so that certain kinds of common law murder could be punished more or less severely than others.[7] To that end the legislature identified the kinds of common law murder which were to be punished more severely and set them forth in the murder-in-the-first-degree portion of the statute. All *other* kinds of common law murder were to be murder in the second degree. Murder at common law was the unlawful killing of another with malice aforethought.[8] Hence, if one killed another with the requisite malice "by means of poison" it would be common law murder, and under the Pennsylvania statute it would be murder in the first degree.[9] If one unintentionally killed another while perpetrating a felony it would be common law murder, and if the felony happened to be a "robbery" it would be murder in the first degree under the Pennsylvania statute.[10]

Now, if the Pennsylvania murder statute were a pure and entire restatement of that which would have been murder at common law, there would be no problem. The fact is, however, that it is not such a restatement. That is to say, certain felony-murders would not have been murder at common law. To illustrate: kidnapping, which was added to the Pennsylvania felony-murder statute as an enumerated felony in 1923,[11] was only a misdemeanor at common law.[12] Thus if an unintended homicide were committed in the perpetration of a kidnapping it would be murder in the first degree in Pennsylvania, but it would not have amounted to murder at common law. Further, the felonies of arson,[13] rape[14] and burglary[15] are, in Pennsylvania, broader in scope than they were at common law. Hence, homicides committed in the perpetration of certain kinds of arson, rape or burglary might be murder in the first degree in Pennsylvania, but they would not have amounted to murder at common law.[16] To the extent that certain kinds of felony-murder in Pennsylvania would not have amounted to murder at common law, "all murder" as used in the Pennsylvania murder statute is not only confusing, but it is inaccurate. That, of course, could be cured by prefacing the felony-murder portion of the

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[6] Act of April 22, 1794.

[7] See CLARK AND MARSHALL, CRIMES (6th Ed.), 1958, p. 608.

[8] See Commonwealth v. Buzard, 365 Pa. 511, 515, 76 A.2d 394, 396 (1950).

[9] See McMeen v. Commonwealth, 114 Pa. 300, 9 Atl. 878 (1887).

[10] See Commonwealth v. Sterling, 314 Pa. 76, 170 Atl. 258 (1934).

[11] Act of May 22, 1923, P.L. 306, § 1.

[12] See CLARK AND MARSHALL, CRIMES (6th Ed.), 1958, p. 662.

[13] PA. STAT. ANN. tit. 18 § 4905.

[14] PA. STAT. ANN. tit. 18 § 4721.

[15] Act of June 24, 1939. P.L. 872, § 901; 18 P.S. § 4901.

[16] See e.g., Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); Commonwealth v. Redline, 391 Pa. 486, 521, 137 A.2d 472, 486 (1958) (dissenting opinion of Justice Bell).

statute by "all homicide" rather than "all murder".[17] In this connection, it might be well if the statute were altered to read similarly to that of the State of Missouri.[18] For example:

> *All murder* which shall be perpetrated by means of poison, or by lying in wait, (etc.), and *all homicide* which shall be committed in the perpetration of, or in the attempt to perpetrate any arson, rape, robbery, (etc.), shall be murder in the first degree.

At common law, the author of an unintentional homicide was guilty of murder if the killing took place in the perpetration of a felony.[19] The malice which played a part in the commission of the felony was transferred to the homicide, thus making the homicide one which was attended by malice—or common law murder.[20] Of course, even though a felon was not the actual killer he would still have been responsible for the homicide if his co-felon or accomplice were the actual killer.[21] In no event, however, was the felony-murder doctrine aimed at foisting upon a felon responsibility for a homicide which neither he nor his co-felon committed.[22] And so the Court in the *Redline* case quite properly observed: "In adjudging a felony-murder, it is to be remembered at all times that the thing which is imputed to a felon for a killing incidental to his felony is *malice* and *not the act of killing.*"[23] In ruling that the felony-murder doctrine was not applicable because Redline could not properly be said to have been the author of the homicide, the Court expressly overruled its earlier pronouncement in *Commonwealth v. Thomas.*[24] It was there held that a felon could be found guilty of felony-murder where the victim of a robbery justifiably killed a co-felon as both felons were attempting to flee from the scene of their crime. The Court in the *Thomas* case, in turn, had followed an earlier decision, *Commonwealth v. Almeida,*[25] wherein it was held that one who had participated in a robbery and was attempting to escape could be guilty of felony-murder where a policeman accidentally killed another policeman while trying to frustrate the felons' escape. At this point it may be noted that had the Court in the *Redline* case said nothing with respect to the status of the *Almeida* decision, the effect of the Court's express overruling of *Thomas* would have been to overrule *Al-*

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[17] This was also suggested in Hitchler, *The Killer and His Victim in Felony-Murder Cases,* 53 DICK. L. REV. 3, 4 (1948).
[18] See MO. REV. STAT., § 559.010 (1949).
[19] Commonwealth v. Guida, 341 Pa. 305, 308, 19 A.2d 98, 100 (1941).
[20] *Ibid.*
[21] Commonwealth v. Brue, 284 Pa. 294, 298, 131 Atl. 367, 368 (1925).
[22] See Commonwealth v. Redline, 391 Pa. 486, 495, 137 A.2d 472, 476 (1958).
[23] *Ibid.*
[24] 382 Pa. 639, 117 A.2d 204 (1955).
[25] 362 Pa. 596, 68 A.2d 595 (1949).

meida by implication. That was not to be, however, for the Court in *Redline* precluded that result by indicating that the *Alemeida* case was being *limited* only, and not disturbed. This was accomplished by seizing upon a factual distinction, namely, that the victim in the *Almeida* case was a policeman while the victim in both the *Thomas* and *Redline* cases was a co-felon. A difference there certainly was, but it cannot fairly be said that it was a difference of *substance.* Indeed the Court itself remarked that the "difference in the character of the victims of the homicide is more incidental than legally significant so far as relevancy to the felony-murder rule is concerned." [26] It is difficult to understand why the Court did not wipe the slate clean rather than await a case factually identical with *Almeida.*[27]

In any event, at least for present purposes, the rulings in the *Almeida* and *Thomas* cases may properly be said to have been harmonious in principle. The combined effect of *Almeida* and *Thomas* is that a felon may be responsible for a homicide so as to support a felony-murder conviction even if his act is not the immediate cause of death. It is enough that his act is the "cause of the cause" of the death.[28] Thus the Court in the *Almeida* case declared:

> ". . . [W]e have a band of robbers engaged in an exchange of shots with city policemen *whose duty it is to subdue the bandits if possible.* In the course of the exchange of deadly bullets Officer Ingling is slain. The policemen cannot be charged with any wrongdoing because their participation in the exchange of bullets with the bandits was both in justifiable self-defense and *in the performance of their duty.* The felonious acts of the robbers in firing shots at the policemen, well knowing that their fire would be returned, as it should have been, was the proximate cause of Officer Ingling's death." [29]

The Court in *Almeida,* later in the opinion, reiterated its position thus:

> "A knave who feloniously and maliciously starts 'a chain reaction' of acts dangerous to human life must be held responsible for the natural fatal results of such acts. . . .
>
> When men engaged in a scheme of robbery arm themselves with loaded revolvers they show that they expect to encounter forcible opposition and that to overcome it they are prepared to kill anyone who stands in their way. If

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[26] Commonwealth v. Redline, 391 Pa. 486, 510, 137 A.2d 472, 483 (1958).

[27] It may be noted that the *Almeida* and *Thomas* decisions referred with approval to Commonwealth v. Moyer and Byron, 357 Pa. 181, 53 A.2d 736 (1947). Since the language so referred to was characterized by the Court, in *Redline,* as dicta, Commonwealth v. Redline, 391 Pa. 486, 504-505, 137 A.2d 472, 480-481 (1958) and since, in any event, the *Almeida* case is factually similar, it will serve no useful purpose to treat of the *Moyer and Byron* case, at this time. Further, Commonwealth v. Bolish, 391 Pa. 550, 138 A.2d 447 (1958) is not considered here for the reason that it involves considerations which require independent treatment entirely beyond the scope and purpose of this article.

[28] Commonwealth v. Almeida, 362 Pa. 596, 604, 68 A.2d 595, 600 (1949).

[29] *Id.* at 607; 68 A.2d at 601.

> in the course of their felonious enterprise they open deadly fire upon policemen or others and if in self-defense and to vindicate the law the fire is returned and someone is killed by a bullet fired in the exchange of shots, who can challenge the conclusion that the *proximate cause* of the killing was the malicious criminal action of the felons? No *other* genesis can justly be assigned to the homicide. The felons should be adjudged guilty of murder in the perpetration of a robbery, that, is murder in the first degree." [30]

In adopting the reasoning of the *Almeida* case and in supplementing it to the extent that the rule was held to apply even where the victim happened to be a co-felon (rather than a policeman as in *Almeida*), the Court in the *Thomas* case declared:

> "That the victim, or any third person such as an officer, would attempt to prevent the robbery or to prevent the escape of the felons, and would shoot and kill one of the felons was 'as readily foreseeable' as the cases where an innocent bystander is killed, even unintentionally, by the defendant's accomplice, or where the victim of the robbery is slain, or where a pursuing officer is killed. The killing of the co-felon is the natural foreseeable result of the initial act. The robbery was the proximate cause of the death. We can see no sound reason for distinction merely because the one killed was a co-felon." [31]

The Court in the *Redline* case refused to go so far. Instead, it ruled that the act of the felon or his accomplice must have constituted the actual and immediate hand of death.

It is beyond the scope of this article to examine or comment upon the merit or lack of merit of either of the above opposing views. There is, however, one facet of the *Redline* rationale which deserves mention.

The Court pointed out that it was unable to see how a felon could be held criminally responsible "for the consequences of the lawful conduct of another person."[32] The lawful conduct here referred to was the policeman's killing of Redline's accomplice—a justifiable homicide. It is clear that the policeman cannot be punished for the killing; it was a lawful homicide. But it simply does not follow that the felon's act (whether the act be his participation in a felony or an act done in furtherance of an attempt to escape) was *for that reason* any the less malicious. The law declares that the felon's malice in committing the felony shall attach to and color any consequence probably and naturally flowing from his evil act. Thus if a killing takes place as a consequence of one's commission of a felony, even if the homicide be purely *accidental,* because of the law's transferral of malice to *that accidental*

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[30] *Id.* at 634; 68 A.2d at 614.
[31] Commonwealth v. Thomas, 382 Pa. 639, 644-645, 117 A.2d 204, 206 (1955).
[32] Commonwealth v. Redline, 391 Pa. 486, 509, 137 A.2d 472, 483 (1958).

killing the felon may be guilty of felony-murder. That *that accidental killing* happened to be excusable as far as some third person is concerned plainly appears to be merely incidental and entirely immaterial. A distinction might be made between a justifiable and an excusable homicide for the reason that the former is authorized and, in some instances, commanded by law, while the latter, because of the absence of malice, is excused though it would otherwise constitute an unlawful killing. Nevertheless, it is felt that a felon's criminality should be measured by his own malicious conduct and not by the presence or absence of malice or justification in some third person.

It would appear that the *Redline* and *Almeida-Thomas* decisions are in harmony as to the principle that it is not the purpose of the felony-murder doctrine to foist upon a felon responsibility for a homicide which neither he nor his accomplice committed. That aside then, the heart of their disagreement lies in their differing conceptions as to the nature of the act which may constitute an "act of killing" by a felon or his accomplice. The *Almeida-Thomas* position is that the felon's act need only constitute the "cause of the cause" of the death. *Redline,* on the other hand, decided that the felon's act must constitute the actual and immediate hand of death.

Lurking in the background, *unchanged* during the *"Almeida-Thomas-Redline"* era, is the Pennsylvania felony-murder statute.[33] In that connection the Court in the *Redline* case declared:

> "The only constitutional power competent to define crimes and prescribe punishments therefor is the legislature, and courts do well to leave the promulgation of police regulations to the people's chosen legislative representatives. . . . If predominant present-day thinking should deem it necessary to the public's safety and security that felons be made chargeable with murder for *all* deaths occurring in and about the perpetration of their felonies—regardless of how or by whom such fatalities came—the legislature should be looked to for competent exercise of the State's sovereign police power to that end which has never yet been legislatively ordained." [34]

Thus did the Court in *Redline* assume that *it* had carried out the legislature's true intent. It is only fair to point out the other side of the coin. Had that truly been the legislative intent, the legislature, presumably, after *Almeida* or at least after *Thomas,* would have amended the felony-murder statute so as to effectuate their intent—which *Almeida* and *Thomas* had apparently abused. No such amendment was made.[35]

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[33] Act of June 24, 1939, P.L. 872, § 701; 18 P.S. § 4701.

[34] Commonwealth v. Redline, 391 Pa. 486, 490, 137 A.2d 472, 473 (1958).

[35] *Id.* at 535 (dissenting opinion), 137 A.2d at 493.

The felony-murder statute in Pennsylvania—at least in respect of what test shall determine responsibility for a homicide—is certainly not crystal-clear. The Courts in Pennsylvania have been struggling to ascertain just what the intent of the legislature is—*Almeida, Thomas* and now *Redline.* Indeed *Almeida,* in the words of Justice Bell (dissenting in the *Redline* case), has been left "suspended between Heaven and earth";[36] it was not overruled by the *Redline* decision. *Thomas,* espousing one interpretation of the statute, was upset by *Redline* which in turn espoused another. It would seem that the time is ripe for the legislature to spell out for the edification of the citizenry of this Commonwealth and the Courts just what its intent is.

It is offered by way of suggestion that if the legislature's intent be as espoused by the Court in *Redline*—that a felon must be the actual author of a homicide in order for the felony-murder rule to be operative—the statute should be altered to read, for example, as it reads in New York.[37] If such a course of action be adopted the statute might read:

> All murder which shall be perpetrated by means of poison, or by lying in wait, (etc.), and all homicide which shall be committed *by a person* in the perpetration of, or in the attempt to perpetrate any arson, rape, robbery, (etc.), shall be murder in the first degree.

The obvious consequence of such a statute would be to finally and unequivocally lay at rest both the *Thomas* and the *Almeida* decisions and to reaffirm the correctness of the *Redline* pronouncement.

If on the other hand the legislative intent was or presently is contrary to that espoused by the Court in *Redline*—namely, that a felon might be responsible for a homicide which he did not actually commit if it can be said that his act (whether the act be his participation in a felony or an act done in furtherance of his attempt to flee from the scene of the felony) was the "cause of the cause" of the death, as that test is explained and qualified in the *Almeida* and *Thomas* cases—it might be well if the felony-murder statute were altered to read somewhat akin to that of New Jersey.[38] The statute might read:

> All murder which shall be perpetrated by means of poison, or by lying in wait, (etc.), and all homicide *which may ensue as a natural and probable consequence* of the perpetration of, or of the attempt to perpetrate any arson, rape, robbery (etc.), shall be murder in the first degree.

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[36] *Id.* at 548 n. 14, 137 A.2d at 499, n. 14.

[37] See N.Y. Pen. Law § 1044 (2).

[38] See N.J. Rev. Stat. 2A-113-1.

The effect of such an enactment would be the nullification of the *Redline* decision and the revival of the *Almeida-Thomas* view.

In conclusion it is submitted that clarification of the Pennsylvania felony-murder statute, *one way or the other,* is in order; it is hoped that such a course of action be considered by the General Assembly.