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CRIMINAL LAW-APPLICATION OF MURDER-FELONY DOCTRINE WHERE HOMICIDE WAS THE ACT OF A NON-PARTICIPANT IN THE FELONY

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CRIMINAL LAW—APPLICATION OF MURDER-FELONY DOCTRINE WHERE HOMICIDE WAS THE ACT OF A NON-PARTICIPANT IN THE FELONY—The appellant and another entered a filling station for the purpose of committing an armed robbery, held up those present, and then separated in search of money after the owner had refused to disclose its location. The unarmed deceased, a friend of the owner, attacked the appellant in an effort to frustrate the robbery. A brief struggle followed during which the deceased obtained possession of the appellant's pistol and struck appellant on the head with it, thereby causing the accidental discharge of the bullet which killed him. The appellant was convicted of murder. On appeal, *held,* affirmed. The alleged fact that the deceased shot himself during a scuffle after wresting the gun from the appellant was no defense. The appellant's act set in motion the cause which occasioned the death of the deceased; therefore his felonious act was the proximate cause of the homicide. *Miers v. State,* (Tex. Crim. App. 1952) 251 S.W. (2d) 404.

It is firmly established that an accidental killing committed by a person in the perpetration or attempted perpetration of a felony, the natural and probable consequence of which is homicide, is murder both at common law and under statutes,[1] without any requirement of a precedent malice or intention to cause death.[2] The asserted rationale for this result is that because such a felony is motivated by malice the essential element of murder is present when an unintended killing is directly caused by the felonious actor. It is less certain, though, whether a person will be held guilty of a murder where a homicide results from the act of one resisting the felony.[3] The available judicial authority illustrates several possible approaches but recent authority indicates a definite trend. The early cases were determined on the narrow, inflexible premise that one could not be guilty of murder unless the act was done by his own hand, or by someone acting in concert with him or in furtherance of a common object. Of course,

[1] For a study of the various types of statutes and their effect on the common law murder-felony rule, see 63 L.R.A. 354 at 357 (1904).

[2] See 40 C.J.S., Homicide §21 (1944); 63 L.R.A. 354 at 358 (1904). For a discussion of whether the homicide was committed in the "perpetration of a felony" when it takes place after the felony itself has been technically completed, see WHARTON, LAW OF HOMICIDE, 3d ed., 186 (1907).

[3] For a recent discussion of the cases in this area, see 12 A.L.R. (2d) 210 (1950).

such a limitation negated liability where the act of killing was done by a person opposing the criminal act.[4] This strict view was given application in a case where a bystander was killed by a shot fired at the accused by one he was attempting to rob.[5] Peculiar statutory language may likewise produce the same result.[6] The historic case of *Taylor v. State*,[7] the first to impose liability in this situation, held that if the defendant, while engaged in the commission of a train robbery, *compelled* the victim of the homicide to occupy a place of danger to aid in consummating the felonious purpose, then such compulsion may be regarded as the proximate cause of the death, even though the fatal shot was fired by a passenger.[8] A final sequence in the development has been the application of the tort theory of proximate cause,[9] the premise being that where the homicide is the result of a force intervening between the death and the act of committing or attempting to commit a felony, then such act itself will be deemed the proximate cause of the death, if the intervening force was a natural and foreseeable result of the initial criminal action. However, the court in *Commonwealth v. Almeida*[10] actually relies on the defendant's act of opening fire on the policeman as the proximate cause, i.e., the reasonably foreseeable consequence of this act was the forcible opposition by officers, rather than the initial felonious act itself.[11] The principal case represents an unqualified application of the prevailing tort theory of proximate cause in a criminal prosecution and completes the cycle by imposing liability where the victim of the homicide was not compelled to occupy a position

[4] Commonwealth v. Campbell, 89 Mass. 541, 83 Am. Dec. 705 (1863); Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888); Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905). This view as expressed in Commonwealth v. Campbell, is explained as dictum in Commonwealth v. Almeida, 362 Pa. 596 at 622, 68 A. (2d) 595 (1949).

[5] Commonwealth v. Moore, note 4 supra. In a discussion of the causal relation between the act and the death, CLARK AND MARSHALL, CRIMES, 5th ed., §236 (1952), in reference to the cases cited in note 4 supra, state: "These decisions seem unsupportable, as the result, as well as the intervening defensive acts, is foreseeable and probable."

[6] A statute providing for the application of the murder-felony rule where the killing was committed *by a person* engaged in the commission or attempt to commit a felony, may be determinative of the issue. See People v. Udwin, 254 N.Y. 255, 172 N.E. 489 (1930).

[7] 41 Tex. Crim. 564, 55 S.W. 961 (1900). See also, Keaton v. State, 41 Tex. Crim. 621, 57 S.W. 1125 (1900). For a more recent case, see Wilson v. State, 188 Ark. 846, 68 S.W. (2d) 100 (1934), where the victim was killed by an officer's bullet while being held as a shield to effectuate an escape. However, the court gave recognition and approval to the principal and result of the cases cited in note 4 supra. Cf. Commonwealth v. Mellor, 294 Pa. 339, 144 A. 534 (1928); Commonwealth v. Thompson, 321 Pa. 327, 184 A. 97 (1936).

[8] However, the court explicitly denied liability in the event the victim went voluntarily to the place where he received the fatal injury.

[9] See Commonwealth v. Moyer, 357 Pa. 181, 53 A. (2d) 736 (1947), where defendant held guilty of murder even though the death bullet was fired by the gasoline station owner during an exchange of shots in the course of an attempt to rob the station. To the same effect, see Commonwealth v. Almeida, note 4 supra, where fatal bullet was fired by an officer during an exchange of shots in an effort to prevent an attempted escape.

[10] 362 Pa. 596, 68 A. (2d) 595 (1949).

[11] Id. at 621, 624, 633, 634, where Maxey, C.J., in an exhaustive opinion, talks in terms of the felon firing the initial shot, or opening fire. However, there is no indication of such a limitation in Commonwealth v. Moyer, note 9 supra. See People v. Podolski, 332 Mich. 508, 52 N.W. (2d) 201 (1952), where liability was imposed on the clear ground that the very act of perpetrating the felony was the proximate cause of the homicide.

of danger, and no shots were fired by the felon to provoke forcible opposition. Of course, the killing as it actually occurred, as distinguished from the intervening resisting force, could not be deemed a reasonably foreseeable consequence of the appellant's act.[12] It seems clear that a homicide unrelated to the felonious act, would fall outside the scope of the rule of the principal case, but in what other situations there will be no liability is merely a matter of professional speculation.[13]

Edgar A. Strause, S.Ed.

[12] See dissenting opinion in Commonwealth v. Almeida, note 4 supra, at 643, 644, where the following charge to the jury was suggested: ". . . that the conduct of the defendant . . . set in motion a chain of events among whose reasonably foreseeable consequences was a killing such as actually occurred."

[13] See Commonwealth v. Almeida, note 4 supra, at 625, where in reference to the famous Lindbergh kidnapping case, State v. Hauptmann, 115 N.J.L. 412, 180 A. 809 (1935), the court hypothesized liability in the event the ladder which Hauptmann was descending broke as a watchman grappled with him, causing the child to fall to the ground and be killed.