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CRIMINAL LAW—FELONY-MURDER RULE—APPLICATION TO THE JUSTIFIABLE KILLING OF AN ACCOMPLICE BY THE INTENDED VICTIM—The defendant and an armed accomplice held up a grocery store, took money at gun point from the proprietor and fled in opposite directions. The proprietor pursued the accomplice and killed him in the gun battle that ensued. Defendant escaped, but later was apprehended and indicted on a charge of first degree murder. On appeal from a judgment sustaining defendant's demurrer to the evidence, *held*, reversed and new trial ordered, three judges dissenting. The defendant may be convicted of first degree murder under the

Pennsylvania statute which provides that "all murder . . . which shall be committed in the perpetration of . . . any . . . robbery . . . shall be murder in the first degree."¹ *Commonwealth v. Thomas*, 382 Pa. 639, 117 A. (2d) 204 (1955).

Because of the varied treatment given the broad principle of felony-murder by courts and legislatures through the years, the form and justification of the rule have remained unsettled to this day. The general pattern up to now has been one of restricting its application.² But the responsibility of felons for homicides resulting from defensive measures of victims or their defenders has been affirmed in a series of recent decisions.³ The earlier case law proceeded on the assumption that participants in crime were liable only for acts actually or constructively performed by them. It was, therefore, impossible to attribute to those participants the activity of adverse parties.⁴ Pennsylvania was once among the jurisdictions accepting this principle.⁵ But at the same time the courts have recognized that the intervening activity of a human agent should not always insulate accused persons from criminal liability for homicide.⁶ When an innocent person is killed while being used as a "shield," the conviction seems to be based upon conduct which is so wanton and reckless that it overrides the finer points of causation.⁷ Neither the acts of insane persons nor the natural impulses of responsible human beings will necessarily break the chain of criminal causation. Theories more familiar to the law of torts are used to distinguish dependent from independent intervening causes, and causation is found to be proximate where the intervening causes are foreseeable.⁸ By applying this test to cases involving felonies in which innocent parties were killed by the resistance of victims or their defenders, Pennsylvania some time ago opened up a new area for the operation of the felony-murder doctrine.⁹ These cases were based on the theory that because resistance may be foreseen and would not have occurred but for the acts of the felons, they are criminally liable for its results. Other states have adopted this view,¹⁰ but there is no indication that those jurisdictions

¹ Pa. Stat. Ann. (Purdon, 1945) tit. 18, §4701.

² See, generally, Arent and MacDonald, "The Felony Murder Doctrine and its Application under the New York Statutes," 20 CORN. L.Q. 288 (1935); Perkins, "A Re-examination of Malice Aforethought," 43 YALE L.J. 537 (1934).

³ See 12 A.L.R. (2d) 210 (1950); 51 MICH. L. REV. 1241 (1953).

⁴ *Commonwealth v. Moore*, 121 Ky. 97, 83 S.W. 1085 (1905); *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924).

⁵ *Commonwealth v. Thompson*, 321 Pa. 327, 184 A. 97 (1936); *Commonwealth v. Mellor*, 294 Pa. 339, 144 A. 534 (1928).

⁶ *State v. Leopold*, 110 Conn. 55, 147 A. 118 (1929); *Lettner v. State*, 156 Tenn. 68, 299 S.W. 1049 (1927).

⁷ *Taylor v. State*, 41 Tex. Crim. App. 564, 55 S.W. 961 (1900); *Wilson v. State*, 188 Ark. 846, 68 S.W. (2d) 100 (1934).

⁸ See CLARK AND MARSHALL, CRIMES, 5th ed., §236 (1952); 31 MICH. L. REV. 659 (1933).

⁹ *Commonwealth v. Almeida*, 362 Pa. 596, 68 A. (2d) 595 (1949); *Commonwealth v. Moyer*, 357 Pa. 181, 53 A. (2d) 736 (1947).

¹⁰ *People v. Podolski*, 332 Mich. 508, 52 N.W. (2d) 201 (1952), cert. den. 344 U.S. 845, 73 S.Ct. 62 (1952); *Meirs v. State*, 157 Tex. Crim. App. 572, 251 S.W. (2d) 404 (1952).

which formerly demanded actual or constructive performance of the act causing death will change their positions.¹¹ In addition to the problem of imposing liability for the acts of innocent parties there is the related question of liability for the deaths of accomplices killed during the felony. Here, too, the authority is conflicting.¹² On the basis of the proximate causation theory, the Pennsylvania court has recently taken the position that the role of the deceased in the crime is immaterial, so that now all participants in a felony are liable for any resulting death.¹³ The principal case marks the first invocation of this principle to convict a felon of the murder of an accomplice when his death was justifiably caused by an intended victim. Justice Holmes contended that the felony-murder rule could be justified only on the ground that the degree of danger attending the commission of every felony is so high that those who engage in this activity will be liable for the homicides that result.¹⁴ If this is so, the fact that the victim of the homicide is a co-felon should not remove the case from the operation of the rule.¹⁵ Because he may be justifiably killed in self defense or in an effort to apprehend him, the felon's death is, in a way, the most likely to occur. By the same token, if the totality of dangers attending the commission of the felony is the starting point, the acts of felons ought not to be distinguished from those of public defenders or victims. All are a foreseeable part of the danger surrounding the crime.¹⁶ The use of the doctrine of proximate causation to link the criminal with homicides committed by others may be viewed as a more articulate attempt to equate liability with the probable state of mind of the accused, and so arrive at the intent that for legal purposes is the foundation of implied malice. The ironical result of all this is that we try for murder the person who, next to the deceased himself, probably wanted least to see this homicide come about. Pennsylvania has chosen to follow this logic to what seems to be the bitter end. That it is the only reasonable conclusion it could reach in view of its past decisions may do no more than point up the weaknesses of the felony-murder rule. Originally evolved as a method of implying malice, the rule now threatens to incorporate a principle of causa-

¹¹ The question of whose act must cause death in a felony-murder case may be answered by statute. A New York statute [39 N.Y. Consol. Laws (McKinney, 1944) §1044] requiring that the killing be committed by a person engaged in or attempting a felony has been interpreted to require at least constructive performance by an accused of the act causing death. *People v. Udwin*, 254 N.Y. 255, 172 N.E. 489 (1930). However, the reasoning used in the principal case could lead to a different result.

¹² Finding felony-murder where one accomplice shot another: *People v. Cabaltero*, 31 Cal. App. (2d) 52, 87 P. (2d) 364 (1939). Acquitting a conspirator not present at the scene of an arson in which an arsonist was burned to death: *People v. Ferlin*, 203 Cal. 587, 265 P. 230 (1928).

¹³ *Commonwealth v. Bolish*, 381 Pa. 500, 113 A. (2d) 464 (1955).

¹⁴ HOLMES, *THE COMMON LAW* 59 (1881).

¹⁵ *People v. Cabaltero*, note 12 supra. But see Justice Musmano's dissenting opinion in the principal case at 221.

¹⁶ But see Justice Jones' dissenting opinion in the principal case at 213.

tion of such universal and questionable application as to suggest that the time is ripe for a basic reappraisal of its scope and worth.

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¹ Section 4 of the act provides that no possibility of reverter or right of entry, whether created before or after passage of the act, shall be good for more than fifty years. Section 5 provides that if the limiting contingency has occurred in any possibilities of reverter created more than fifty years prior to passage of the act, an action for recovery of the land must be brought within one year of the act's passage. Ill. Rev. Stat. (1955) c. 30, §§37e and 37f.

² Clark, "Limiting Land Restrictions," 27 A.B.A.J. 737 (1931); Cook, "Rights of Entry, Possibilities of Reverter, Resulting Trusts and the Rule Against Perpetuities," 15 TEMP. L.Q. 509 (1941).

³ Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 HARV. L. REV. 248 (1940); SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 236 (1953).

⁴ The Massachusetts, Michigan, and Minnesota statutes are representative of the legislation presently in existence. All operate prospectively. Mass. Laws Ann. (1955) c. 184, §22; Mich. Comp. Laws (1948) §554.46; Minn. Stat. (1953) §500.20.

⁵ E.g.: Hurd v. Albert, 214 Cal. 15, 3 P. (2d) 545 (1931); Osius v. Barton, 109 Fla. 556, 147 S. 862 (1933).

⁶ These include provisions that land be used for church purposes, First Universalist Society v. Boland, 155 Mass. 171, 29 N.E. 524 (1892), that liquor not be sold on the property, Cowell v. Springs Co., 100 U.S. 55 (1879), and, of course, the normal building and use restrictions ordinarily provided for by covenants.