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Criminal Law -- Death of a Co-Felon -- Felony-Murder Doctrine

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the father-husband will be free to divorce the girl at any time without being absolutely liable for her support. This is true despite the court's statement that easing the financial burden of support does not facilitate divorce.[21] Neither should the court declare valid a void agreement because the agreement was motivated by a desire to make the child legitimate. With the post-war rise of the divorce rate,[22] the best interests of society are not served by a ruling which validates an agreement requiring the girl's family to indemnify the husband for support of the girl.

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CRIMINAL LAW—DEATH OF A CO-FELON—FELONY-MURDER DOCTRINE

Defendant participated with the deceased in the commission of an armed robbery. The victim of the robbery justifiably killed one of the felons. Defendant was indicted for first degree murder for the death of his co-felon. *Held*, a co-felon is guilty of murder where the victim of an armed robbery justifiably kills the other felon. *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 205 (1955).

An involuntary killing occurring in consequence of an unlawful act constitutes either murder or manslaughter, depending on the nature of such act.[1] Under the common law, a homicide committed in the perpetration or attempted perpetration of a felony is murder, though the killing may have been involuntary or unintentional.[2] Today, all but three states have by statute adopted the common law doctrine of felony-murder.[3] Both at common law and under statute, a necessary element in all murder cases is malice, or intent to kill.[4] Where a homicide is committed in the perpetration of a violent felony, the turpitude of the act supplies the element of deliberate and premeditated malice.[5] In order to apply the felony-murder

21. See note 10 *supra* which indicates that better reasoned opinions consider that easing the financial burden of support *does* facilitate divorce.

22. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1955 (Seventy-sixth edition) 76 (1955).

1. Baker v. Commonwealth, 204 Ky. 420, 264 S.W. 1069 (1924); State v. Werner, 144 La. 380, 80 So. 596 (1919); Commonwealth v. Chance, 174 Mass. 245, 54 N.E. 551 (1899); State v. Schaeffer, 96 Ohio St. 215, 117 N.E. 220 (1917).

2. State v. Serna, 69 Ariz. 181, 211 P.2d 455 (1950); Turnage v. State, 182 Ark. 74, 30 S.W.2d 865 (1930); People v. Gilbert, 22 Cal.2d 522, P.2d 9 (1943); State v. Rossi, 132 Conn. 39, 42 A.2d 354 (1945); Lynch v. State, 207 Ga. 325, 61 S.E.2d 495 (1950); People v. Weber, 401 Ill. 584, 83 N.E.2d 297 (1948); People v. Wright, 315 Mich. 81, 23 N.W.2d 213 (1946); Commonwealth v. Guida, 341 Pa. 305, 19 A.2d 98 (1941); State v. Best, 44 Wyo. 382, 12 P.2d 1110 (1932).

3. Kentucky, South Carolina, and Maine are the only jurisdictions not having Felony-Murder Statutes.

4. Leavine v. State, 109 Fla. 447, 147 So. 897 (1933); State v. Rogers, 141 Neb. 6, 2 N.W.2d 529 (1942); State v. Barton, 5 Wash. 2d 234, 105 P.2d 63 (1940).

5. People v. Watson, 132 Cal. App.2d 70, 281 P.2d 564 (1955); State v. Garcia, 159 Neb. 571, 68 N.W.2d 151 (1955); 4 BLACKSTONE, COMMENTARIES *1599, "If one shoots at A. and misses him, but kills B., this is murder, because of the previous felonious intent, which the law transfers from one to the other."

doctrine the homicide must either be in furtherance of the felony,[6] or the felony must be the proximate cause of the homicide.[7]

It is not necessary, however, that the felon's act cause the death,[8] or that the person killed be the victim of the robbery.[9] In *Commonwealth v. Almeida*,[10] where there was no proof who fired the fatal shot, the court held that the death of a policeman was the proximate result of the defendants' armed robbery. There is some authority in support of the view that one engaged in the commission of a felony can *not* be held criminally liable for the unintentional killing of another by one not a participant in the felony.[11] Several cases have held, contrary to the principal case, that the doctrine of felony-murder is not intended to apply to the death of an accomplice occurring during the commission of a violent felony.[12] In *People v. Ferlin*,[13] where one co-felon was killed during the commission of arson, the court acquitted the other felon by holding the felony-murder doctrine inapplicable on the rationale that the killing was not in the furtherance of the felony, but entirely opposed to it.

The felony-murder doctrine, which Florida has adopted by statute,[14] has been applied in this jurisdiction many times.[15] In *Hornbeck v. State*,[16] the court held that where a third person is killed in the exchange of shots between police officers and felons during the perpetration of robbery or the flight from the scene of the robbery, the felons are guilty of murder, regardless of whether the fatal shot was fired by a felon or an officer and regardless of whether the person killed was the victim of the robbery. It is

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6. State v. Williams, 81 Ala. 1, 1 So 179 (1887); State v. Dallao, 187 La. 392, 175 So. 4 (1937); People v. LaBarbera, 159 Misc. 177, 287 N.Y.S. 257 (1936).

7. State v. Cots, 126 Conn. 48, 9 A.2d 138 (1939); State v. Bessar, 213 La. 299, 34 So.2d 785 (1948); State v. Glover, 330 Mo 709, 50 S.W.2d 1049 (1932); Commonwealth v. Mover, 357 Pa. 181, 53 A.2d 736 (1947); Commonwealth v. Kelloy, 333 Pa. 280, 4 A.2d 805 (1939).

8. People v. Payne, 359 Ill. 246, 194 N.E. 543 (1935). The victim of a robbery was accidently killed by a person trying to prevent the robbery. The robber was held guilty of first degree murder, because it was to be anticipated that the robbery would meet with resistance during which the victim of the robbery might be shot by a third person attempting to prevent the robbery.

9. Wilson v. State, 188 Ark. 846, 68 S.W.2d 100 (1934). A person resisting a robbery shot and killed the robber's hostage. The felons were held guilty of murder because the death of the hostage was the natural result of the felonious act.

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

11. Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888); Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); People v. Udwin, 254 N.Y. 255, 172 N.E. 489 (1930).

12. People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920); State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924).

13. 203 Cal. 587, 265 Pac. 230 (1928).

14. FLA. STAT. § 782.04 (1953).

> The unlawful killing of a human being . . . when committed in the perpetration of . . . robbery shall be murder in the first degree, and shall be punishable by death.

15. Henderson v. State, 70 So.2d 358 (Fla. 1954); Brown v. State, 61 So.2d 640 (Fla. 1852); Smith v. State, 129 Fla. 388, 176 So. 506 (1937); Leavine v. State, 109 Fla. 447, 147 So. 897 (1933); Rivers v. State, 75 Fla. 401, 78 So 343 (1918).

16. 77 So.2d 876 (Fla. 1955).

questionable, even in light of this decision, whether Florida would apply the felony-murder doctrine where the deceased is a co-felon. Prior to the instant case, the only cases holding the doctrine applicable to the death of a co-felon, were those in which a co-felon either accidently caused his own death[17] or was unintentionally killed by another felon.[18]

The principal case presents a far-reaching application of the felony murder doctrine, for it is, as far as can be ascertained, the first time the doctrine has been applied where the victim of a felony justifiably kills a co-felon. The majority based its decision on the concept that the death of the co-felon was the natural consequence of the felonious act. But, how can one be guilty of murder for a killing that was unquestionably a justifiable homicide? Here, the deceased was a perpetrator of the robbery whose death was certainly *not* in furtherance of the crime. The conviction of his co-felon seems to be a wholly unwarranted extension of the doctrine. It is submitted, therefore, that the felony murder doctrine should not be one of limitless application. Where the homicide is justifiable, it should not form the basis of a murder charge against the co-felon.

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CRIMINAL LAW—PARDONS—HABITUAL OFFENDER LAWS

The defendant's sentence was set aside, and a greater sentence imposed under the habitual offender law,[1] predicated upon a prior felony conviction for which a full pardon had been given. *Held,* reversed, the prior conviction may not be considered under the habitual offender law when a full pardon has been granted. *Fields v. State,* 85 So. 2d 609 (Fla. 1956).

There is conflict of authority as to the effect of a pardon.[2] The minority view takes the position that a pardon has the effect of blotting out both the legal consequences and the gilt of the offender.[3] This rationale has its basis in Blackstone's definition that ". . . the effect of such pardon by the king is to make the offender a new man. . . ."[4] *Ex parte Garland*[5] is an illustrative case. There the court held a pardon reached both the punish-

17. Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955).
18. People v. Caballero, 31 Cal. App.2d 52, 87 P.2d 364 (1939).
1. FLA. STAT. § 775.09 (1953).
2. See Weihofen, *The Effect of a Pardon,* 88 U. PA. L. REV. 177 (1939); Williston, *Does a Pardon Blot Out Guilt?,* 28 HARV. L. REV. 647 (1915).
3. State v. Childers, 197 La. 715, 2 So.2d. 189 (1941); State v. Martin, 59 Ohio St. 212, 52 N.E. 188 (1898); *Ex parte* Crump, 10 Okla. Crim. 133, 135 Pac 428 (1913); Scrivnor v. State, 113 Tex. Crim. 194, 20 S.W.2d 416 (1925), *rev'd,* Jones v. State, 141 Tex. Crim. 70, 147 S.W.2d 508 (1941); Edwards v. Commonwealth, 78 Va. 39, 49 Am. Rep. 377 (1883).
4. 4 BLACKSTONE, COMMENTARIES 1773.
5. 71 U.S. (4 Wall.) 333 (1866).