CAUSAL RELATIONS AND THE FELONY-MURDER RULE

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I.

It is probable that one who commences a search through the early books in quest of the origin of the felony-murder rule and the corollary manslaughter-misdemeanor doctrine will come at last to the case of Lord Dacres as one of its first important articulations. Lord Dacres, with a group of companions, went unlawfully to hunt in a forest in the year 1535. One of the party was accosted by a keeper and killed him while the others were a long way off. It was held murder in all the group, and Lord Dacres was hanged.[1]

Other cases of the same period testify to the fact that the felony-murder doctrine was fairly well established in the law of the time. Just a year after the decision in the *Dacres* case, it was held that all the members of a group which gathered to seize some goods in a house were guilty of murder when a stone thrown at an occupant of the house missed its mark and killed a woman emerging from the doorway.[2] One finds the dictum of Coke referred to often in the cases:

> If the act be unlawful it is murder. As if A., meaning to steale a deere in the park of B., shooteth at the deer, and by the glance the arrow killeth a boy that is hidden in a bush, this is murder, for the act was unlawful, although A. had no intent to hurt the boy, nor knew not of him. . . .[3]

But the case of the English lord who was a poor judge of hunting companions will serve as well as any for a point of departure, the more so because there are problems connected with the superficially simple set of facts which are still significant even today.

The rule which the legal profession of the period drew from

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1. The Lord Dacres' Case, Moo. K.B. 216, 72 Eng. Rep. 458 (1535). The case is cited here because it has survived as precedent. Rex. v. Plummer, 12 Mod. 627, 630, 88 Eng. Rep. 1565, 1567 (1699); Sir Charles Stanley's Case, Kel. J. 86, 84 Eng. Rep. 1094 (1663); HALE, PLEAS OF THE CROWN 465 (1st Amer. ed., Small, 1847). Some versions of the case state that the parties had agreed beforehand to kill anyone who resisted. Rex. v. Borthwick, 1 Doug. 207, 212, 99 Eng. Rep. 136, 138 (1779).

2. Mansell & Herbert's Case, 2 Dyer 128b, 73 Eng. Rep. 279 (1536).

3. 3 CO. INST. *56.

such cases may be shortly expressed by saying that it was held that the killing of man by an act done in the commission of a felony was murder in all who participated in the felony,[4] and that if the crime was a misdemeanor—or if it was a mere civil trespass—the death was manslaughter.[5] Coke's specification that the act need be merely unlawful never had much influence in the cases. The rationale of the rule is not difficult to grasp. The common law defined murder as occurring when a man of sound memory and discretion unlawfully killed another with malice aforethought, either expressed by the party or implied by law, the death occurring within a year and a day after the attack on the victim.[6] It is to be observed that malice aforethought is necessary for the commission of crimes other than murder.[7] Assume the case of a man who committed a felonious act, such as going to shoot a deer on land belonging to another. Pretty clearly he had a wrongful intent. If, in the course of his criminal act, he should do some act which resulted in the death of another, the courts took the position that proof of his commission of the one crime supplied all the proof that was necessary to conclusively infer an intention on his part to commit the other, thus making proof of express malice aforethought with respect to the killing unnecessary.[8]

This is all that the felony-murder rule, in the last analysis, does. But when this is perceived, it is possible to see also that when it is said that killing a man by an act done in the commission of a felony is murder, the conventional statement, a result and not a reason is expressed. It may further be pointed out that the explanation given above does not deal with the case where

4. Regina v. Serne, 16 Cox C.C. 311 (1887); Regina v. Horsey, 3 F. & F. 287, 176 Eng. Rep. 129 (1862); Rex v. Plummer, 12 Mod. 627, 88 Eng. Rep. 1565 (1699); Sir Charles Stanley's Case, Kel. J. 86, 84 Eng. Rep. 1094 (1663); HALE, *op. cit. supra* note 1, at 465.

5. "When an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter." 4 BL. COMM. *192-93.

6. 4 BL. COMM. *195-96; 3 CO. INST. *47.

7. A thorough examination of the function of the concept of malice aforethought in criminal law is contained in Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L. J. 537 (1934).

8. HALE, *op. cit. supra* note 1, at 465, *et seq.*; 9 HALSBURY, THE LAWS OF ENGLAND 429 (Hailsham ed. 1933). See also Note, 63 L.R.A. 353, 358 (1903).

several persons are engaged in a felony, and only one of them takes part in the actual slaying. The imposition of liability in such a case appears to have been predicated upon reasons of policy and upon ideas which bore a considerable resemblance to agency principles. Each of the participants, it was said, ought to be held responsible for the acts of the others, and since the killing by the one member of the group would not have occurred but for the underlying agreement to perform the original felony, the killing was murder in all who took part in the original crime.[9]

Little was said in the early decisions to show that much attention was paid to the problem of causation. Coke's description of the rule shows pretty clearly its nature as the early lawyers thought of it. If a death occurred during the course of a felony, even though basically accidental in character as in the case of the boy in the bush, liability for murder followed as a matter of law. The underlying idea appears to have been that surrounding the commission of a felony was a period of time approximately coterminous with the felony during which any death having its root in any act of the parties engaged in the perpetration of the crime was murder, regardless of how it happened.[10] The cases today still bear the imprint of that idea; it is often said that a killing occurring during the *res gestae* of a crime is automatically murder under the felony-murder rule.[11] It will be interesting to return to this idea later.

As felony-murder cases came before the courts, however, a gradual change came over the original character of the rule. Any rule of law which sends a man to his death is bound to be disputed and litigated, and it was very easy for hard cases to arise in cases where constructive murder was alleged. If a large conspiracy to do a felony was present, it was a difficult thing to send eight or nine persons to the gallows for the act of one, par-

9. Powers v. Commonwealth, 110 Ky. 386, 61 S.W. 735 (1901); People v. Nichols, 230 N.Y. 221, 129 N.E. 883 (1921); Sir Charles Stanley's Case, Kel. J. 86, 84 Eng. Rep. 1094 (1663). See also CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES § 188 (3d ed. 1927); Note, 29 KY. L. J. 130 (1940).

10. A good exposition of this point of view is found in People v. Cabaltero, 96 Cal. App. 515, 87 P.2d 364 (1939). See also People v. Luscomb, 292 N.Y. 390, 55 N.E.2d 469 (1944).

11. State v. Adams, 339 Mo. 926, 98 S.W. 632 (1937); MacAvoy v. State, 144 Neb. 827, 15 N.W.2d 45, *cert. denied* 323 U.S. 804 (1944); People v. Smith, 187 N.Y. Supp. 836, *rev'd* 282 N.Y. 329, 133 N.E. 574 (1921); State v. Fouquette, 221 P.2d 404 (Nev. 1950).

ticularly where the evidence showed that the other participants had not desired violence and had been horrified when it occurred. It is very possible that some of the modifications in the rule had their roots in quantitative objections.[12] But more than that, there were other troubles with the rule. It became apparent that it was loosely put in the early cases. There were situations which fell within what one judge referred to as the "mere words,"[13] but did not fall within its spirit if the rule were looked at in the light of other principles. One man shoves another, to cite an old example, intending to steal a watch; the victim has a weak heart and dies from a force which would not have affected one person in ten thousand. Shoving a man may be unlawful and wrong, as is stealing a watch. The trouble is that it is not an act which is very dangerous or likely to produce death, and it is therefore hard to say honestly that death was intended.

The courts tended to express this difficulty in terms of causation. Suppose a man committed a crime and during the course of it did some act, innocent under other circumstances, which unexpectedly resulted in death. It was difficult to say that the illegality underlying the otherwise innocent act had increased the risk of death or had operated to bring it about. The reaction of the courts in some of the later cases was that such a situation was not within the purview of the rule. A man was only responsible for the natural and probable consequences of his own acts, it was pointed out.[14] It was not sufficient merely that death occur during the commission of the felony or closely afterwards in point of time and place.[15] The relationship of cause and effect

12. In Rex v. Borthwick, 1 Doug. 207, 212, 99 Eng. Rep. 136, 138 (1779), the members of a press-gang were all involved. In Rex v. Plummer, 12 Mod. 627, 630, 88 Eng. Rep. 1565, 1567 (1699), the conspiracy involved eight persons. In both the convictions were reversed. In *Rex v. Plummer*, in particular, the opinion shows marked traces of a deliberate attempt on the part of the judges to avoid the necessity of applying the felony-murder rule to a large group of persons. It is interesting to compare *Rex v. Plummer* with People v. Cabaltero, 96 Cal. App. 515, 87 P.2d 364 (1939). In both, a member of a group of conspirators killed another conspirator during the commission of an offense. In *Rex v. Plummer* the collateral nature of the killing was held a defense in the rest of the group. *People v. Cabaltero*, a modern decision, held otherwise in the teeth of the fact that the California statute was basically an embodiment of the common law. See Note, 27 CALIF. L. REV. 612 (1939).

13. Stephen, J., in Regina v. Serne, 16 Cox C.C. 311, 312 (1887).

14. Regina v. Horsey, 3 F. & F. 287, 176 Eng. Rep. 129 (1862).

15. CLARK & MARSHALL, *op. cit. supra* note 9, § 236; WHARTON, HOMICIDE § 358 (2d ed. 1875). See also Arent & McDonald, *The Felony-Murder*

had to exist between the felony and the murder before it was logical to impose liability on the felon for the death.[16] If such a relationship did not exist between the two occurrences, then the person responsible for the one was not responsible for the other.

II.

Under what circumstances, then, is it possible to find a causal connection between felony and death? It is in the answers given by the courts to this question that one finds much of the difficulty surrounding the felony-murder rule. When once the courts had come to the conclusion that the problems of causation were inherent in the application of the felony-murder rule, it is clear that they had transformed what was once a comparatively simple rule into one much less so. Whatever else its defects may have been, the old view was, at least on paper, simple and fairly clear cut. The adoption of an additional requirement that a chain of causation exist between the criminal nature of the act and the "resulting" death, on the other hand, brought at once all of the uncertainties of the law of causation into the picture.[17]

Moreover, it brought them into the cases in a particularly unfortunate context. There are several reasons why this was and is true. In the first place, a crime is generally a violent, emotion-packed transaction. There are elements in almost all felony-murder cases which tend to sway the emotions and opinions of judge and jury against the prisoner. Often his crime is of a nature which shocks the moral sensitivities of ordinary persons, such as rape, abortion, violent robbery and the like. It is difficult in such situations to listen calmly and objectively to the prisoner's argument that the relationship of cause and effect did not exist, that other forces and not his own crime were in the final analysis the effective cause of death.

In addition, the beginning and end of the period of responsibility are inherently difficult to determine. For years the law has

Doctrine and Its Application Under the New York Statutes, 20 CORN. L. Q. 288, 301 *et seq.* (1935) (a lucid and informative discussion).

16. CLARK & MARSHALL, *op. cit. supra* note 9, § 236.

17. "In murder, just as we saw in the case of Attempts, there is a point at which the law refuses to continue to trace out chains of causation; and beyond which, therefore, any act is regarded as too remote to produce guilt. But here, as before in attempts, it is impossible to lay down any general rule for fixing this point; and the utmost that can be done is to suggest it approximately by illustrative instances." KENNY, OUTLINES OF CRIMINAL LAW 127 (12th ed. 1926).

wrestled with the question of when a crime begins, *i.e.*, what constitutes an attempt to commit a crime, and has failed to arrive at satisfactory criteria.[18] The same difficulty arises when one attempts to resolve the question of when a particular criminal transaction has come to its logical and legal conclusion.

The Res Gestae Test

The nature of the causal relationship between crime and death which is necessary under the so-called *res gestae* principle is fairly well stated in a Missouri case:

> It is held in many jurisdictions, including Missouri, that when the homicide is within the *res gestae* of the initial crime and is an emanation thereof, it is committed in the perpetration of that crime in the statutory sense. Thus it has been often ruled that the statute applies where the initial crime and the homicide were parts of one continuous transaction, and were closely related in point of time, place, and causal relation. . . .[19]

On the surface, and at first reading, this would appear to be a fairly clear and explicit statement of an easy rule to follow. But consider for a moment what the court is actually saying: if the death occurred during the course of a criminal transaction, it is murder. The death occurred during the course of criminal transaction if it was closely related in point of time and place *and if there was a causal relation.*

Such a statement, it is submitted, does not solve the problem. It does not aid analysis to say that a connection between a felony and a homicide exists if the homicide fell within the *res gestae* of a crime, and that the homicide fell within the *res gestae* of the crime if a connection between the homicide and the crime existed. The essential nature of the connection is not defined by such logic.

It is true, the statement furnishes some help, but it is remarkably little when one analyzes it. If there was an element of continuity about what happened, if it was part of a "continuous transaction," some indication of a causal relation is present. But consider the various aspects which a continuous transaction may take.

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18. People v. Miller, 2 Cal.2d 527, 42 P.2d 308 (1935); People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927). "No abstract test can be given for determining whether an act is sufficiently proximate to be an attempt." KENNY, *op. cit. supra* note 17, at 81.

19. State v. Adams, 339 Mo. 926, 98 S.W.2d 632, 637 (1936).

In the first place, it is possible for a homicide and a crime to be parts of one continuous transaction although after the commission of the original crime no further act was done by the person committing the crime. In one well-known case, a man raped a small girl who died later of a venereal disease communicated from the defendant in the course of the crime. The judge told the jury they might convict of murder, *i.e.*, that the second transaction, the death, was in the contemplation of the law a continuation of the first. The jury, however, returned a manslaughter verdict.[20] In another, the defendant assaulted a woman with a baby in her arms. The child was frightened and died in convulsions six weeks later. The defendant was convicted of manslaughter.[21] In *Regina v. Holland*[22] one man wounded another's finger. The injured man declined to have the finger amputated, disregarding the advice of his doctor. He died of tetanus. It was held that the death was a proximate result of the defendant's criminal act.

It is difficult to speak of such cases as involving a continuous transaction in the sense of being a continuing series of acts on the part of a criminal. In point of time and place, in each case death occurred long after and far away from the place where the independent felony was committed. The continuity involved was continuity of legal responsibility rather than continuity of motion on the part of the defendants.

There is a second way to look at the theory of the "continuous transaction," and that is to regard it as being a transaction in which both felony and death occur at about the same time and place in a series of continuous factual happenings. In such a situation, at least two acts on the part of the defendant are required, the commission of the original felony and the commission of an act which causes death. But as to what constitutes a continuous factual transaction, the courts are badly split. Consider, for a moment, the case of a man who rapes a woman and then kills her. It may be argued that the commission of the felony is ended as soon as the act of intercourse is complete, and therefore that the killing is not committed in the course of a felony.[23] Con-

20. Regina v. Greenwood, 7 Cox C.C. 404 (1857).
21. Regina v. Towe, 12 Cox C.C. 530 (1874).
22. 2 M. & Rob. 351, 174 Eng. Rep. 313 (1841).
23. "It is not enough that the killing occurred soon or presently after the felony was attempted or committed. There must be such a legal relation-

versely, it may be argued that there was a "continuous" character to the transaction; the defendant proceeded directly from committing one crime to committing another, and hence his killing was within the *res gestae* of the original crime.[24]

Other cases illustrate the same difficulty in defining what constitutes a "continuous" transaction. Suppose a crime such as burglary has been committed, and the criminals are discovered in the act of fleeing from the premises. Is a killing which occurs at that point one which is within the *res gestae* of the felony? On such an issue, there is room for divergence of opinion, and the courts have held both ways.[25]

But the reason behind the conflict of decisions involving deaths during the course of escape has, at bottom, little to do with any question involving the idea of *res gestae.* When analyzed, the decisions revolve about a difference in the substantive law on an entirely different point. The cases holding that a killing is within the *res gestae* of the original felony when committed during the course of an escape do so on the theory that escape is in itself an integral part of the underlying felony.[26] The decisions the other way confine the independent felony, on the other hand, strictly to those acts leading up to and including the actual violation of law, and exclude escape from those acts.[27]

To speak of such cases as turning upon doctrines of *res gestae* is actually pointless. Reference may be made here to the point that the term has apparently crept into the felony-murder cases

ship between the two that it can be said that the killing occurred by reason of and as part of the felony, to wit, rape; or that it occurs before the felony was at an end; so that the felony had a legal relationship to the killing and was concurrent with it in part, at least, and a part of it in an actual and material sense. . . . Tersely put, death must have been the probable consequence of the unlawful act." State v. Opher, 38 Del. 93, 96, 188 Atl. 257, 258 (1936).

24. MacAvoy v. State, 144 Neb. 827, 15 N.W.2d 45, *cert. denied* 323 U.S. 804 (1944). *Accord:* Commonwealth v. Gricus, 317 Mass. 403, 58 N.E.2d 241 (1944); Commonwealth v. Osman, 284 Mass. 421, 188 N.E. 226 (1933).

25. Cases holding the felony-murder rule applicable include State v. Bessar, 213 La. 299, 34 So.2d 785 (1948); State v. Taylor, 173 La. 1010, 139 So. 463 (1931); State v. Adams, 339 Mo. 926, 98 S.W.2d 632 (1936). *Contra:* Huggins v. State, 149 Miss. 280, 115 So. 213 (1928); People v. Marwig, 227 N.Y. 382, 125 N.E. 535 (1919); People v. Huther, 184 N.Y. 237, 77 N.E. 6 (1906).

26. Arent & McDonald, *supra* note 15, at 303-05; Note, 108 A.L.R. 847 (1937).

27. It is to be noted that it is often suggested in these cases that the parties may, by agreement beforehand on a specific plan of committing the felony, extend the scope of the felony to include the escape. People v. Marwig, 227 N.Y. 382, 125 N.E. 535 (1919).

as an import from the law of evidence and has proved no more satisfactory there. Wigmore, speaking of the term, refers to it caustically as "ambiguous,"[28] "unmanageable,"[29] and a "shibboleth."[30] Thayer denounces it in much the same language, remarking that "judges, text-writers and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."[31] In view of the fact that Thayer's comments appeared some seventy years ago, the survival of the term in modern cases is a sad commentary upon the slowness of change in the law.

The Probable Consequences Test

Many of the early cases, considering the problems inherent in the felony-murder rule, laid down a rule that a killing occurring during the course of a felony was not within the meaning of the felony-murder rule unless the death was a natural and probable outgrowth of the felony. Of these cases, certainly the most interesting is *Regina v. Horsey*.[32] The defendant was a transient who set fire to a barn containing a quantity of straw. He was captured at once, and while he and his captors were watching the blaze a figure was seen running about in the barn attempting to get out. It was obvious that the defendant had not known anyone was in the barn. The judge charged the jury that while it was the law that any killing during the commission of a felony was murder, they might acquit if they found that the deceased had entered the barn only after the fire had started, because in that case it was his own act and not that of the defendant which had caused his death. Jerome Frank has long stressed the point that legal decisions are essentially unpredictable because of the vagaries of the fact-finding process, and the case cited is one which goes far to prove his point.[33]

28. 6 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW . . . § 1769 (3d ed. 1940) (discussing the use of the *res gestae* concept in the field of liability for the act of a fellow conspirator).

29. *Id.* at § 1767.

30. *Ibid.*

31. Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gestae*, 15 AM. L. REV. 71, 80-81 (1881).

32. 3 F. & F. 287, 176 Eng. Rep. 129 (1862).

33. The subsequent testimony of the judge before a committee of Parliament studying the necessity for changes in the law of homicide makes it clear that the instruction in question was given simply to afford the jury an intelligible way out of the necessity of applying the felony-murder rule to

The most influential statement of the idea that liability should be imposed under the felony-murder rule only where there is a high degree of probability that the commission of a felony will result in death was made in *Regina v. Serne*,[34] a case which has had a very considerable influence on the development of the law in this area. The defendant had set fire to a store, intending to collect the insurance. His son, sleeping in quarters adjacent to the store, was killed in the fire. Discussing the felony-murder rule in his charge to the jury, the judge said:

> In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed. . . . I think that instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder.[35]

It is clear that the distinction suggested in *Regina v. Serne*, between ordinary criminal acts and those criminal acts "known to be dangerous to life," has found its way into many of the American cases. The classic illustration is the case of the bootlegger who illegally sold whiskey to a man who drank it, went out into a storm, and died of acute alcoholism combined with exposure to cold. Reversing a conviction of the bootlegger on a charge of manslaughter, the Supreme Court of Michigan pointed out that there was nothing inherently dangerous about the act of selling liquor. It was not an act which in the normal experience led to death. Accordingly, there was no reason to apply any doctrine of constructive intent.[36]

Similar reasoning appears to lie behind many of the statutes defining the limits of the felony-murder rule in the various states. Many of them limit the full operation of the felony-murder rule to the case of homicides committed only during the perpetration of certain specified felonies, normally rape, arson, burglary, and

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a case where the judge thought it inappropriate. See the testimony of Baron Bramwell before the Homicide Amendment Committee, reprinted in WHARTON, HOMICIDE 41 (2d ed. 1875). See Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COL. L. REV. 1259, 1274-78 (1947), for comment on situations of this type.

34. 16 Cox C.C. 311 (1887). The case is discussed in HALL, PRINCIPLES OF CRIMINAL LAW 356-58 (1947).

35. 16 Cox C.C. 311, 313 (1887).

36. People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924). *Cf.* State v. Reitze, 86 N.J.L. 407, 92 Atl. 576 (1914).

robbery.[37] These are considered cases of first degree murder. Homicides committed during the commission of other felonies are not regarded as being so intrinsically dangerous to human life, and are therefore treated as second or third degree murder or as manslaughter.

The wisdom of attempting to define, in advance, those crimes which are inherently dangerous to human life for purposes of applying the felony-murder rule may well be open to question. In the case of arson, for instance, the English courts have tended to take a "soft" position, holding that the inherently dangerous quality of the act was for the jury to determine.[38] It might be sounder policy, assuming that it is sound policy to retain the felony-murder doctrine at all, to leave the question of whether the criminal act was one inherently dangerous to human life to determination as the question arises in each case.[39]

The difficulty with the idea that liability ought to be imposed only for deaths which are the natural and probable consequences of a criminal act is basically, however, the same difficulty as that found in the application of the *res gestae* test. The question of what constitutes a natural and probable consequence is shrouded with uncertainty. This is necessarily so since the question only arises in the context of individual fact situations, each of which must be determined on its own merits.

The attempts to lay down criteria for the determination of the question have by and large been as unsuccessful with respect to the natural and probable consequences rule as they have been with respect to the question of when a killing falls within the

37. Perkins, *supra* note 7, at 560.

38. Compare the cases of *Regina v. Serne* and *Regina v. Horsey*, with the decisions rendered by American courts in similar cases. State v. Leopold, 110 Conn. 55, 147 Atl. 118 (1929); Whitfield v. Commonwealth, 278 Ky. 111, 128 S.W.2d 208 (1939); Reddick v. Commonwealth, 17 Ky. L. Rep. 1020, 33 S.W. 416 (1895); State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932). In *State v. Leopold*, the defendant set fire to a building in which a father and two children were sleeping. The father and children attained a place of safety, and the children then returned to their quarters to get some valuables, were caught in the fire, and killed. The court refused the defendant's tendered instruction that he was not guilty if the jury found the facts as stated above or if they found that the father had sent the children back, and instead ruled that even if the facts were true the defendant was not excused. The decision appears squarely in conflict with *Regina v. Horsey*.

39. But see HOLMES, THE COMMON LAW 59 (1881), arguing that it may well be sound policy for a legislature to impose drastic penalties on those types of criminal activity which experience has demonstrated carry a high degree of risk to human life.

res gestae of a crime.[40] That this is so is not surprising when one considers the difficulties which surround the identical question in the law of torts.[41] Such criteria as have been developed, moreover, are generally highly uncertain and variable in their characteristics.

For example, it is often said in the cases that the fact that other causes may have concurred in the homicide does not absolve one from liability for it, if it was committed during the course of a felony.[42] An interesting illustration of this rule is found in the case of Governor Wall,[43] who sentenced a sergeant under his command on the island of Goree to a flogging of eight hundred lashes. The sergeant afterwards drank a considerable quantity of liquor and died. When Wall was tried for the crime some twenty years later, the fact that the victim might not have died save for the fact that he had commenced drinking was held no defense. Blackstone cites the case of the harlot who left her newly born child in an orchard, where it was killed by a bird of prey. Since in the England of that time the intervention of such an outside force was considered something to be expected, the woman was held guilty of murder.[44]

Yet it is not all cases in which the intervention of outside forces is held no defense. The case of the man trapped in the burning straw, already mentioned, establishes that much.[45] It is a famous rule of the common law that killing a man by perjury is not murder.[46] Wharton states that either the interposition of an independent human will or the occurrence of "extraordinary casualties" will excuse a defendant in such a situation.[47]

The basic question involved in the cases of intervening forces, which appears to determine whether or not an intervening force or cause will excuse the defendant, is generally whether the intervention of the outside agency was something which, at the time

40. Kenny, *op. cit. supra* note 17, at 127.
41. Venable, *Proximate Causes and Effects*, 19 MISS. L.J. 183, 184-97 (1948).
42. State v. Leopold, 110 Conn. 55, 147 Atl. 118 (1929); State v. Block, 87 Conn. 573, 89 Atl. 167 (1913); State v. Campbell, 82 Conn. 671, 74 Atl. 927 (1910); State v. Badgett, 87 S.C. 543, 70 S.E. 301 (1911).
43. Trial of Governor Wall, 12 How. St. Tr. 51 (1802).
44. 4 BL. COMM. *197.
45. Regina v. Horsey, 3 F. & F. 287, 176 Eng. Rep. 129 (1862). See *supra* text to note 32.
46. Rex v. McDaniel, 1 Leach 44, 168 Eng. Rep. 124 (1754); Kenny, *op. cit. supra* note 17, at 128.
47. WHARTON, HOMICIDE § 358 (2d ed. 1875).

the criminal act was committed, could have been foreseen as "probable." And the determination of this question, as one writer puts it, is one in which the jury "is called upon to do the impossible."[48] It requires the members of the fact-finding agency, in determining whether the final outcome of the crime was probable at the time it was committed, to do two things: (1) to negate the existence of the injury which has already been presented to their knowledge, something which is really a psychological impossibility;[49] and (2) after the knowledge that a homicide did in fact result from the felony has been put to one side, to attempt, on the basis of the facts concerning the felony alone, to determine whether what actually happened was probable at the time.[50] The courts have not been successful in their endeavors to do this in civil cases where the highly emotional factors inherent in the felony-murder cases are not present; there is nothing to indicate that they have been more so in the vastly more important felony-murder cases themselves.[51]

III.

It would appear desirable, in the light of what has been said, to re-examine the felony-murder rule from something other than the conventional standpoint used in discussing problems of causation in the law of torts. But first the need for a brief analysis of the situations in which the felony-murder rule may become operative is indicated.

Basically, the felony-murder rule applies in two situations: (1) where one person, acting alone, commits a criminal act which

48. Levitt, *Cause, Legal Cause and Proximate Cause,* 21 MICH. L. REV. 34, 50 (1922). See also Beale, *The Proximate Consequences of an Act,* 33 HARV. L. REV. 633 (1920).

49. ". . . when two things have been vividly connected they can seldom, if ever, be separated again in our thinking. This holds true of law courts, I take it, as of ordinary civil life. The jury for days, and sometimes weeks, have had the act and the injury presented to them as inevitably connected. The two are presented in close association. When they retire to consider their verdict these two things are vividly in their minds. They cannot, therefore, negate the injury and treat it as though it had never existed. Nor can they look to the act uninfluenced by the existence of the injury.

"It therefore follows that the method which the jury is supposed to follow in finding whether the reasonably prudent man could have foreseen the incoming of the forces which produced the injury or the occurrence of the type of injury which had been sustained, is an impossible one." Levitt, *supra* note 48, at 51.

50. Levitt, *supra* note 48, at 50.

51. See Wright, *The Law of Torts: 1923-1947,* 26 CAN. BAR REV. 46, 56-60 (1948).

results in death, and (2) where two or more persons, acting in concert, combine to do a criminal act, and one of them does a further act which ends in the death of a third person. In either of these two basic situations, a number of variations are possible. A homicide or death may occur either (a) by reason of an intentional design on the part of one of the criminal actors, as in the case of a deliberate killing of the victim of a crime for the purpose of ending resistance; (b) by an attack committed in the heat of anger or passion under circumstances which might otherwise indicate a second degree murder or a manslaughter charge; (c) by miscalculation of the effect of a force used to accomplish the criminal purpose, as in the case of a man who underestimates the power of a drug he has employed; or (d) by reason of an unintentional or basically accidental act which possesses a deadly character. The categorization thus suggested may not be all inclusive, but it furnishes at least a working analysis on the basis of which some conclusions may be drawn.

The situation referred to in category (a), above, may be simply illustrated: A and B agree to rob C. In the course of the robbery, A stands guard outside of C's home or place of business, while B enters to commit the actual crime. B deliberately shoots C, killing him.

Rather clearly, under any version of the felony-murder rule now followed by the law, both A and B are guilty. B is guilty because the law says that proof of B's participation in the robbery supplies proof of his intention to kill C.[52] A is guilty because the felony-murder rule says that when two or more persons conspire to commit a criminal act, each is responsible for what the other does in the furtherance of the joint design.[53]

But a few questions occur. In the first place, if B intentionally kills C, why should reliance be placed on the felony-murder rule at all? The obvious answer is that the felony-murder rule supplies a means by which the prosecuting attorney may escape the necessity of proving the element of intent; in other words, it lightens the task of the prosecution by allowing proof of intent to com-

52. People v. Hawk, 17 Cal.2d 812, 112 P.2d 225 (1941); Commonwealth v. Green, 302 Mass. 547, 20 N.E.2d 417 (1939); State v. Adams, 339 Mo. 926, 98 S.W.2d 632 (1937).

53. House v. State, 192 Ark. 476, 92 S.W.2d 868 (1936); Simpson v. Commonwealth, 293 Ky. 831, 170 S.W.2d 869 (1943); State v. Adams, 339 Mo. 926, 98 S.W.2d 632 (1936); People v. Nichols, 230 N.Y. 221, 129 N.E. 883 (1921); Sir Charles Stanley's Case, Kel.J. 86, 84 Eng. Rep. 1094 (1663).

mit one crime to act as proof of intent to commit another. If this is so, then a further question may well be asked: Is there any reason to make this imputation of malice aforethought in B conclusive? Why not simply hold that it raises a rebuttable, instead of conclusive, presumption that B acted intentionally?

The force of this last question becomes considerably greater when one considers the situation of A, the other participant. In A's case the felony-murder rule performs a dual task. It first automatically implies malice in B, thus making his crime murder. After this has been accomplished, the rule says that since B acted maliciously and intended to commit murder, A also necessarily intended the result which followed.

Now this, it is extremely possible in the case of A, may well be entirely fictional reasoning.[54] The extent to which the felony-murder rule embodies the use of this type of conceptualistic thinking will become even clearer when one considers the second category suggested in the analysis, the case where the homicide is committed by one of the conspirators in the heat of anger or passion under circumstances which would otherwise indicate a second degree murder or manslaughter charge. A good illustration is the California case of *People v. Cabaltero*.[55] Six conspirators went to rob a man. Three of them remained outside the victim's office as lookouts, while the other three entered to commit the actual crime. One of the lookouts saw a car coming and fired some shots at it, thus warning everyone in hearing distance of the commission of the crime. The men inside the office rushed out to see what had happened, and one of them, in a murderous burst of rage, killed the man who had fired. It was held that all the members of the group were guilty of murder.[56]

It would appear possible, however, to take serious issue with the case. To impute the malice of the man who shot to the other members of the conspiracy manifestly does not square with the facts, since few if any of the conspirators could have had the least idea of what was going to happen. Moreover, few acts could be considered as more likely to impede the successful con-

54. Arent & MacDonald, *supra* note 15, at 309.
55. 31 Cal. App.2d 52, 87 P.2d 364 (1939).
56. See *supra* note 12, for a comparison of this case with the English view. The New York courts have stated that in such a situation the co-conspirators would not be held responsible. *See* People v. Sobieskoda, 235 N.Y. 411, 416, 139 N.E. 558, 560 (1923). *But cf.* People v. Luscomb, 292 N.Y. 390, 55 N.E.2d 469 (1944).

summation of the felony than the act of one conspirator in shooting another. Thus, the act of the one conspirator was not done in the furtherance of the common design, and it seems clear that the other conspirators ought not to have been held chargeable for it.[57] The operation of the rule was as follows. The man who shot did so in the commission of a felony, hence his killing was automatically done with malice aforethought, so far as the law was concerned. Since the man who killed was guilty of intentional murder, all his fellow conspirators were likewise guilty, because they intended what happened—at least in the eyes of the law—as much as the actual killer.

The cases involving the situation where a criminal actor miscalculates the effect of a force he has employed—category (c)—rest on a slightly different basis. In such cases it is possible to argue a good deal more logically than in the cases involving acts by a co-conspirator that a man who employs a criminal device to accomplish a given criminal end ought to be held responsible if the device or force used miscarries. In *State v. Glover*,[58] a good illustrative case, the defendant set fire to a drugstore, intending to collect insurance on it. One of the firemen called to fight the blaze was killed when an explosion took place in the store. It was held that the fact the defendant had not intended the result which followed his crime was no defense, and that the defendant might be held criminally responsible for the death of the fireman.[59] A reference to the English cases—*Regina v. Serne* and the case of the man who set fire to the strawstack and unknowingly killed someone sleeping in the straw[60]—will, as has been pointed out, serve to make it clear that not all the courts are agreed even in such a situation. But whereas the participant in a joint felony often has little or no control over the acts of his co-conspirators once the felony is under way, the man who employs a physical force such as fire or drugs to accomplish his ends does not lack this control. There are, therefore, sound reasons of policy behind a holding to the effect that once one has, by a criminal act, launched such a physical force one is responsible for any consequences which follow. The basic objection to the felony-murder rule in the case of a killing by one of a group

57. Cases cited *supra* note 56.
58. 330 Mo. 709, 50 S.W.2d 1049 (1932).
59. *Cf.* State v. Leopold, 110 Conn. 55, 147 Atl. 118 (1929).
60. See *supra* note 38.

of co-conspirators is that it ignores the idea that guilt in each case ought to be determined on the basis of individual misconduct.[61] Such an objection does not apply in the case where a person employs an unintelligent agency for the commission of a crime. In such a case he may reasonably be expected to foresee that the force he has set in motion may not come to rest in the time planned.[62]

It is, however, the case suggested in category (d), above, which presents the most extreme example of the operation of the felony-murder rule. The courts have often said that an unintentional or accidental killing, occurring during the course of a felony, is murder under the felony-murder doctrine.[63] While it is true, as has been pointed out,[64] that many of these statements are dicta, cases in which the point was squarely decided are not difficult to find.[65]

It is the cases where the killing was unintentional or by accident, moreover, which rest upon the longest line of authority in the felony-murder cases. As Coke's illustration of the boy in the bush killed by the chance glance of an arrow demonstrates, the rule that unintentional killings committed during the course of a homicide are murder is really the keystone of the entire structure of law which has been built about the felony-murder doctrine. It is interesting, accordingly, to watch the felony-murder doctrine in operation in such a case.

Suppose, then, that A and B conspire to rob C, and in the course of the crime B, nervous and frightened, accidentally shoots C and kills him. The felony-murder rule operates as follows:

(1) The rule makes it clear that even though B had no intention of killing C in point of fact, the law will not allow him to

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61. "The outcome of the brief survey above is the basic doctrine that, insofar as legal rules rest on moral culpability, they must be confined to volitional misconduct." Hall, *Interrelations of Criminal Law and Torts: I*, 43 COL. L. REV. 753, 778 (1943).

62. HOLMES, THE COMMON LAW 53-59 (1881).

63. Order of United Commercial Travelers v. Meinsen, 131 F.2d 176 (8th Cir. 1942); Wiley v. State, 19 Ariz. 346, 170 Pac. 869 (1918); People v. Perry, 14 Cal.2d 387, 94 P.2d 559 (1939); Whitfield v. Commonwealth, 278 Ky. 111, 128 S.W.2d 208 (1939); Ford v. State, 71 Neb. 246, 98 N.W. 807 (1904); Commonwealth v. Kelly, 333 Pa. 280, 4 A.2d 805 (1939).

64. Note, 21 MICH. L. REV. 95, 96 (1922).

65. Commonwealth v. Lessner, 274 Pa. 108, 118 Atl. 24 (1922); Ford v. State, 71 Neb. 246, 98 N.W. 807 (1904); Mumford v. United States, 130 F.2d 411 (D.C. Cir.), *cert. denied* 317 U.S. 656 (1942).

say so.[66] The unintentional character of the killing is not a fact which varies B's legal liability at all, though in other areas of the criminal law the fact would have tremendous importance. B is at once put in the same class as the man who is guilty of a deliberate, premeditated killing, although both the judge and the jury know that such a classification is factually incorrect.

(2) The rule says further that even though A had no intention of killing C and may in fact have been unaware of the shooting when it occurred, he likewise had a deliberate intention to cause the death of C.[67] This result follows because it has already been decided that B was guilty of the intentional slaying of C, and therefore that all of his fellow conspirators had the same intention. In point of fact, this is not true, but that is immaterial; the law will not allow this conflict with reality to operate in mitigation of A's crime.

Now, whatever else may be said of the felony-murder rule in this situation, it is clear that it compels the court in a case of this type to reach its results on the basis of reasons which demonstrably do not square with the facts. And if what the courts say in a murder case is not true, it is submitted that the courts ought not to say it.

Actually, would it not be more logical in this situation simply to say that A and B are clearly guilty of robbery, that their case ought to be submitted to the jury on the issue of homicide for consideration of all the facts, including the issues of intent and premeditation, and that the jury should be told only that they may, if they think the evidence sufficient, weigh the fact that a felony was being committed when the homicide occurred in reaching a decision as to whether or not the killing was actually unintentional? It may be objected that this means that no charge of murder can be sustained at all, and so it does. But in point of fact in the situation postulated, B did not act with intention or deliberation at all. And A neither planned nor took part in

66. McCutcheon v. State, 199 Ind. 247, 155 N.E. 544 (1927); Commonwealth v. Guida, 341 Pa. 305, 19 A.2d 98 (1941); Commonwealth v. McManus, 282 Pa. 25, 127 Atl. 316 (1925). *Cf.* Ford v. State, 71 Neb. 246, 98 N.W. 807 (1904).

67. People v. Cabaltero, 31 Cal. App.2d 52, 87 P.2d 364 (1939); State v. Terrell, 175 La. 758, 144 So. 488 (1932), noted, 18 CORN. L. Q. 439 (1933); People v. Nichols, 230 N.Y. 221, 129 N.E. 883 (1921); Commonwealth v. Guida, 341 Pa. 305, 19 A.2d 98 (1941); Commonwealth v. McManus, 282 Pa. 25, 127 Atl. 316 (1925).

the killing of C. If he did join with B in planning to kill C, the fact may be proved and *ought* to be proved instead of inferred.[68]

Such a solution would present at least one way around the problems of the felony-murder rule. It has the following advantages:

(1) It avoids the necessity of reliance on vague tests concerning the *res gestae* of a crime.

(2) It bypasses most of the difficulties which are inherent in deciding the issues of causation present in many of the felony-murder cases.

(3) It is consistent with the ordinary presumption of innocence which surrounds a defendant in criminal cases, whereas the felony-murder rule as presently constituted is not.[69]

(4) It would impose punishment on each person involved only for his own acts and not for the acts of some other person, thus making guilt exclusively individual.

(5) It would be consistent with the general rule of policy that intent is a necessary element of serious crimes, whereas the present rule is not.

Particularly in so far as unintentional or accidental killings are concerned, it has long been recognized, especially by the English courts, that the felony-murder rule operates capriciously and irrationally. In a recent case decided by the United States Supreme Court, the following comment appears:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as familiar as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[70]

It is submitted that the same rationale should be applied to the felony-murder cases. There is undoubtedly a good deal of logic in saying that the commission of a felony, particularly of the

68. WHARTON, HOMICIDE § 59 (2d ed. 1875).
69. *Id.* at § 58.
70. Morissette v. United States, 72 Sup. Ct. 240, 243 (1952).

kind involving violence or the use of armed force, is a circumstance *tending* to show a specific intent to kill. All that is proposed here is that the *conclusive* character of the inference drawn from proof of the commission of an antecedent felony be ended. The rule ought to be changed to provide that proof that a killing occurred during the commission of a felony raises a rebuttable presumption that the necessary specific intent was present. It may be objected that such a rule would do violence to the fundamental principle that every man is presumed innocent until proven guilty beyond a reasonable doubt. But such an objection simply underscores the basic nature of the objection to the felony-murder doctrine as it presently exists, for what is present now in the felony-murder cases is not even a rebuttable but a conclusive presumption, and there are many cases phrasing the effect of the felony-murder rule in precisely that fashion.[71]

There is little to show that the present rule is effective as a deterrent upon criminal enterprises. It appears to have grown out of a medieval legal system which punished small crimes with death as quickly as large ones, and hence was indifferent to whether it put a man to death for shooting another's deer or for shooting his deer-keeper, as the case of Lord Dacres, from which this discussion started, illustrates,[72] Indeed, it is this very factor which has been used as a defense for the rule. Wharton tells us that Chief Justice Fortescue, exhibiting the superiority of the English over the Roman law, used this very illustration. "Crime was repressed so he leaves us to infer, because criminals of all grades were exterminated."[73] The law should not, in modern times, continue a rule with such a sanguinary basis.

71. State v. Meyers, 99 Mo. 107, 12 S.W. 516 (1889); Rhea v. State, 63 Neb. 461, 88 N.W. 789 (1902); Morgan v. State, 51 Neb. 672, 71 N.W. 788 (1897).

72. WHARTON, HOMICIDE § 59 (2d ed. 1875), Arent & McDonald, *supra* note 15, at 290, n. 10.

73. WHARTON, HOMICIDE § 59 (2d ed. 1875).