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Criminal Law--The Felony Murder Doctrine in Kentucky

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reserve notes are tangibles and *Frick v. Pennsylvania* is overruled,² or 3) the transfer of property by gift in contemplation of death is governed by rules which differ from those governing transfer by succession, even though that succession takes place under a will.³ The choice of any of these alternatives might give rise to embarrassing questions.

MARVIN M. TINCHER

CRIMINAL LAW—THE FELONY MURDER DOCTRINE IN KENTUCKY*

The appellant willfully set fire to a dwelling at night, and as a result an occupant was burned to death. Appellant was convicted of murder on the ground that the death was the natural consequence of the arson. He sought a new trial, alleging that the lower court erred in refusing to submit to the jury the question of whether the death of the occupant was a necessary or natural consequence of the burning of the dwelling. In affirming the conviction the court said, "There can be no doubt that the death of this child was the natural consequence of burning the house; therefore, it was not necessary . . . to submit this question for the determination of the jury." *Whitfield v. Commonwealth*, 278 Ky. 111, 128 S. W. (2d) 208 (1939).

In the case at bar the court seems to be in accord with its prior holding in *Reddick v. Commonwealth*,¹ but the case clarifies and explains the Kentucky Court's attitude toward the felony murder doctrine. Prior to the instant case, the Kentucky Court had held that where a death ensues during the commission of a felony dangerous to life, the felon was guilty of murder.² The rule was not qualified in any manner, and the popular conception has been that the felony did not have to be the proximate cause of the death. But in the case under discussion, the court did consider proximate cause and

² Mr. Justice Stone cleverly avoids committing himself on this point when he says (at 214), "there is nothing in the Constitution to compel a state to treat federal reserve notes for tax purposes as chattels were treated in *Frick v. Pennsylvania* . . ." It is unlikely, however, that he would say that there is nothing in the Constitution to compel a state to treat chattels as chattels were treated in *Frick v. Pennsylvania*. He did not dissent in that case.

³ *Frick v. Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603 (1925); *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct. 410 (1928).

* This comment is written in conjunction with the one immediately following. The same case is considered in both. The writers reach different conclusions.

¹ 17 Ky. Law Rep. 1020, 33 S. W. 416 (1895). The defendant set fire to a hotel under cover of night and an occupant was burned to death. The question of proximate cause was not presented on appeal, but the court held that when one commits a dangerous felony and a death ensues the felon is guilty of murder.

² *Reddick v. Commonwealth*, 17 Ky. Law Rep. 1020, 33 S.W. 416 (1895); *Williams v. Commonwealth*, 258 Ky. 830, 81 S.W. (2d) 891 (1935); *Marion v. Commonwealth*, 269 Ky. 729, 108 S.W. (2nd) 721 (1937).

held that the facts warranted a ruling that as a matter of law the burning of the building was the proximate cause of the death of the occupant. The court further said that the death of the child was foreseeable in that the act was dangerous to life, and the appellant knew the house was occupied.³

Let us consider a hypothetical situation in connection with the present case. X lives in a shack at the outskirts of Lexington. A and B are prominent citizens and feel that the ramshackle shack is a disgrace to the community. They go to X's shack under the cover of night with intent to burn it. They search the shack upon arrival and find no one but X, whom they tie to a tree outside before setting fire to the building. Y, an arch criminal, has dug a tunnel from X's shack to the Z bank vault unknown to X, and as he is being chased through the tunnel by the police comes out into the shack soon after the fire is kindled. Y realizes that the shack is on fire but decides to take a chance on burning to death rather than to face sure capture by turning back. Y is burned to death. Would the Kentucky Court of Appeals sustain a conviction of A and B for murder? In no case the writer found has the court been faced with such a problem, as the facts in the cases reviewed have all justified a ruling that as a matter of law the death of the victim was the necessary or natural consequence of the dangerous felony. The writer believes that the conduct of A and B would not warrant a conviction of murder because the utmost precaution was exercised in committing the felony. It is submitted that in the above hypothetical case the court would charge the jury to determine whether the death of Y was the necessary or natural consequence of the commission of the felony.

It is further submitted that the Kentucky Court is in accord with the theory set forth in a recent note on the felony murder doctrine. In this note the writer states that the felony murder doctrine is outmoded and that the courts in reality have done away with its usefulness by inserting into it the element of proximate cause.⁴ The writer of the note comes to the conclusion that the convictions could well be based on the negligent murder doctrine.⁵

In a complementary note an attempt was made to distinguish the two doctrines on the ground that under the felony murder rule the courts always as a matter of law held that the commission of the dangerous felony was the cause of the resulting death.⁶ Apparently the Kentucky Court does not consider this distinction to be valid because the court in the instant case says that the element of proximate cause must be satisfied, but that in the present case reasonable men could not differ as to whether or not the death of the occupant was the necessary or natural consequence of the arson.⁷

³ 278 Ky. 111, 114, 128 S.W. (2d) 208, 210 (1939).

⁴ Note (1940) 28 Ky. L.J. 215.

⁵ Banks v. State, 85 Texas cr. Rep. 165, 211 S.W. 217 (1919).

⁶ Note (1940) 28 Ky. L.J. 218.

⁷ 278 Ky. 111, 114, 128 S.W. (2d) 208, 210 (1939).

In conclusion, it is submitted that the felony murder doctrine in Kentucky is based on the same principles as the negligent murder doctrine, since to convict a defendant of murder for a death occurring during the commission of a felony there must first be a felony dangerous to life and, secondly, the death of the victim must be the necessary or natural consequence of the felony.

J. GRANVILLE CLARK

CRIMINAL LAW—CONSPIRACY AND THE FELONY MURDER DOCTRINE IN KENTUCKY*

Defendant was indicted jointly with two others for the crime of wilful murder by setting fire to a house and burning a child to death. The evidence showed that defendant was not near enough to aid and abet in the crime. Conviction was accordingly obtained under an instruction on conspiracy. Defendant appealed contending, *inter alia*, that the court erred in not submitting to the jury the question of whether the killing of the child was the natural and probable consequence of the burning of the house and therefore within the purpose of the conspiracy. The appellate court affirmed the conviction, holding that there was no doubt that the death of the child was the natural consequence of burning the house; and that therefore it was not necessary for the conspiracy instruction to submit this question for the determination of the jury. *Whitfield v. Commonwealth*, 278 Ky. 111, 128 S.W. (2d) 208 (1939).

According to the modern conception of the felony murder doctrine, a conviction of murder will be sustained when a homicide occurs at the hands of the felon during the perpetration of a felony such as arson, robbery, rape, burglary, or other felony which involves a substantial risk to human life.¹ Whether the homicide was a natural and probable consequence of the commission of the felony is seldom considered by the courts.²

A summary investigation of the instant case might lead one to conclude that Kentucky has modified the felony murder doctrine and now permits a conviction of murder only when the homicide is the natural and probable consequence of the perpetration of the particular felony.³ In order to ascertain the truth or falsity of that conclusion it will be necessary to review briefly the Kentucky decisions relating to felony murder.

* This comment is written in conjunction with the one immediately preceding. The same case is considered in both. The writers reach different conclusions.—Ed.

¹ See Arent & MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes* (1935) 20 Cornell L. Q. 288, 291; Note (1940) 28 Ky. L. J. 218.

² Notes (1940) 28 Ky. L. J. 215, 216; 28 Ky. L. J. 218, 221 n. 11. See also Arent & MacDonald, *supra* n. 1, at 309.

³ See Companion Note (1940) 29 Ky. L. J. 197.