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The Felony Murder Doctrine Distinguished from Criminal Negligence

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as under (B) of Stephen's analysis. Secondly, if there is any difference in the two standards, the requirements for a conviction under the felony murder doctrine are higher; for under this rule the courts require that the act be done for the purpose of committing a felony, while under (B) illegality of the act is not material.

It is submitted that the explanation for the fact that the courts cling to the outmoded felony doctrine is their fondness for "pegs" upon which to base their convictions. It is also submitted that it would be expedient for the courts to entirely abolish the doctrine and obtain their convictions for unintentional homicides resulting from the commission of a felony under (B) of Stephen's analysis. Such would not be a revolutionary step in our criminal law, for (D) of Stephen's analysis has been entirely abolished, and the courts are now basing their convictions on (B) of his analysis.[14] There is also a marked tendency in the late decisions to abolish the rule that one shall be guilty of involuntary manslaughter if he accidentally kills another while in the commission of an act "malum in se."[15]

To summarize, it has been shown that the felony murder doctrine as followed by a majority of the American jurisdictions is entirely too harsh and has been outmoded by the trend toward objectiveness in the law of homicides; and that the courts in England and a few American jurisdictions have in reality done away with the usefulness of the doctrine by setting up in effect the same standard as found in (B) of Stephen's analysis. It is submitted that the courts should formally abolish the felony murder doctrine and accept (B) of Stephen's analysis to base their convictions for homicide resulting from the commission of a felony.

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THE FELONY MURDER DOCTRINE DISTINGUISHED FROM CRIMINAL NEGLIGENCE

The felony murder doctrine of the ancient English common law would sustain a conviction of murder when the perpetrator of any felony caused a homicide to occur during the perpetration of the felony.[1] During these early years the only felonies that existed were

[14] See Perkins, *Rationale of Mens Rea* (1939), 52 Har. L.R. 905, 915–19.

[15] People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921).

[1] At common law, murder was homicide with malice aforethought. Malice aforethought consisted of any of the following states of mind:

1. An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person killed or not.
2. Knowledge that the act or omission which causes death will probably cause the death of, or grievous bodily harm to some person, whether the person killed or another, although, such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.
3. An intent to commit any felony whatever.
4. An intent to oppose by force any officer of justice in arresting

murder, arson, robbery, burglary, larceny, rape, treason, sodomy, and mayhem.[2] These felonies, with the exception of larceny, all involved a degree of physical violence and jeopardy to human life, and each felony was punished by death whether it resulted in homicide or not. Hence, there was little objection to the doctrine that the perpetrator of *any* felony should be held guilty of murder if a homicide occurred during the commission thereof.

However, with the tremendous growth of non-dangerous felonies since the last quarter of the seventeenth century, the necessity for placing a limitation upon the ancient doctrine arose.[3] The courts refused to apply the doctrine to those felonies which involved no element of physical violence, and the common law gradually became transformed so that only those felonies which existed at the inception of the doctrine were included in the application of the new rule.[4]

From this limitation of the common law rule, the statutes of the various states of the United States were cast so that the doctrine could operate upon dangerous felonies only.[5] This limitation to particular felonies was accomplished usually by expressly limiting the doctrine to those felonies that existed in the early common law: arson, robbery, burglary, and rape being most frequently enumerated.[6]

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or keeping in custody a person whom he has a right to arrest or keep in custody, or in keeping the peace.

See 3 Stephen, *History of the Criminal Law of England* (1883) 22.

[2] Of course, the felonies murder and manslaughter cannot constitute a basis for a conviction under the felony murder doctrine because the underlying felony must be separate and distinct from the resulting homicide insofar as a basis for the felony conviction is concerned. See Perkins, *A Re-Examination of Malice Aforethought*, (1934) 43 Yale L.J. 537, 568.

[3] Perkins, *A Re-Examination of Malice Aforethought*, (1934) 43 Yale L.J. 537, 569.

[4] The decisions, except in dicta, failed to support the old rule, and if a rule were to be extracted from the actual holdings of the cases, it would be confined within much narrower boundaries than those set at the inception of the doctrine in the fourteenth century. See Arent and MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes*, (1935) 20 Corn. L.Q. 288.

[5] Blackstone suggested the limitation of the doctrine in his *Commentaries:* "* * * it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in the prosecution of a felonious intent and in its consequences naturally tended to bloodshed, it will be murder." Blackstone's *Commentaries* 192, 193. Blackstone's view has been widely adopted in the United States as a correct statement of the common law.

[6] Usually the felonies of arson, rape, robbery and burglary are enumerated: Ala. Code Ann. (Michie, 1928) §4454; Conn. Gen. Stat. (1930) §6043; Fla. Comp. Gen. Laws Ann. (1927) §7173; Ind. St. Ann. (Burns, 1933) §10-3401; Mich. Comp. Laws (1929) §16708; Miss. Code Ann. (1930) §985; Neb. Comp. St. (1929) §28-401; Nev. Comp. Laws (Hilyer, 1930) §10068; N.H. Pub. Laws (1926) c. 392, §1; Ohio Code Ann. (Throckmorton, 1934) §12400; Oregon Code Ann. (1930) §14-201; R.I. Gen. Laws (1923) sec. 6013; Utah Rev. St. Ann. §103-21-3;

Another murder doctrine having its origin in the English common law has also received application in this country in numerous decisions, foremost among which is *Banks* v. *State*.[7] This doctrine (hereafter referred to as the "negligence murder doctrine") is based upon the commission of an act so abnormally dangerous that it will probably cause the resulting homicide. Judge Stephen expressed the substance of this doctrine in a section of his analysis of murder: "Malice aforethought can consist in the knowledge that the act or omission which causes death will probably cause the death of, or grievous bodily harm to some person, whether the person killed or not, or by a wish that it may not be caused."[8] This doctrine has become quite as firmly imbedded in the law of murder in America as has the felony murder doctrine.

The limitation of the felony murder doctrine to dangerous felonies has brought these two doctrines nearer to inclusion within a single theory. The element of human risk in the commission of the dangerous act is the prime consideration in both doctrines. In both doctrines, the requisite malice aforethought is derived, not from an actual intent to cause death, but from a state of mind deduced, constructively, from an intent to commit the act known to be dangerous to human life. We will attempt to draw a distinction between these two apparently synonymous doctrines as they would be applied under modern American legislation and decisions.

The basis for one distinction between these doctrines lies in the fact that the degree of proximity between the commission of the dangerous act and the resulting homicide must be greater in negligent murder than is required by statute in felony murder.

In order to make this distinction clearer, we shall analyze two hypothetical cases. First: Defendant, while walking near a railroad track, decided for no good reason to shoot his rifle into a passing freight train. The fireman was killed by the shot, and defendant was

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Vt. Pub. Laws (1934) §8374; Va. Code (Michie, 1930) sec. 4393; W. Va. Code (Michie, 1932) §32-204.

Statutes of Kansas, New Mexico, North Carolina, Oklahoma, and New York apply the term "any felony" similar to the ancient common law, but in none of these states has the doctrine been applied to any other than dangerous felonies.

Kentucky, Louisiana, Maine, South Carolina, and Texas make no specific mention of felony murder, but seem to include them within the meaning of "wilful murder" or "homicide with malice aforethought", which are taken to embrace murder as it exists at common law.

[7] 85 Tex. Cr. Rep. 165, 211 S.W. 217 (1919). In this case the court made the following noted statement: "One who deliberately uses a deadly weapon in such reckless manner as to evince a heart regardless of social duty and fatally bent on mischief, as is shown by firing into a moving railroad train upon which human beings necessarily are, cannot shield himself from the consequences of his acts by disclaiming malice." And again: "The intentional doing of any wrongful act in such manner and under such circumstances as that the death of a human being may result therefrom is malice." *Ibid.*

[8] Stephen, *op. cit., supra*, note 1, at 22.

indicted for murder. The act of shooting into a moving freight train was exceedingly dangerous and likely to result in death, and could therefore be negligent murder.[9] However, changing the facts slightly, suppose the shot from the defendant's rifle merely imbedded itself in the wall of a freight car but the slight sound from the distant exploding cartridge so frightened the fireman that he fell from the train and was killed. The act of shooting was equally as dangerous and equally as likely to cause death, but the element of proximate cause was absent. The death was not the natural and probable consequence of the act of shooting into the freight car wall. The act did not cause the death as a consequence of its being dangerous and likely to cause death. A conviction of murder, therefore, would not stand.[10]

Second: Defendant, while attempting a train robbery, shot into the air to frighten the engineer into stopping the train. The slight sound from the distant exploding cartridge so frightened the fireman who was clinging to the side of a freight car that he fell from the car and was killed. The act of committing robbery is equally as dangerous and equally as likely to cause death, but the element of proximate cause is absent again. The death was not the natural and probable consequence of shooting the rifle into the air. The act of committing robbery did not proximately cause the death as a consequence of its being dangerous and likely to cause death. Nevertheless, a conviction of murder will stand in most jurisdictions in America, at least in so far as statutory authority is given strict interpretation.[11] The statute is satisfied if there is a dangerous felony committed (such as robbery) and a homicide occurs in consequence of the commission of

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[9] The facts in this hypothetical case are identical with those in Banks v. State, 85 Tex. Cr. Rep. 165, 211 S.W. 217 (1919). In the *Banks* case, the defendant was convicted of murder and the conviction was affirmed by the appellate court.

[10] "To render a person criminally responsible for the death of another under this rule (referring to the negligent murder doctrine) * * * the result must have been the natural and probable consequence of the improper conduct." Wharton on Homicide (3rd ed., 1907) §22. See also: State v. Presclar, 48 N.C. 421 (1884); Hendrickson v. Commonwealth, 85 Ky. 281, 3 S.W. 166, 7 Am. St. Rep. 596 (1887); Whiteside v. State, 115 Tex. Cr. Rep. 274, 29 S.W. (2d) 399 (1930).

[11] In a few jurisdictions in this country the perpetration of the particular felony must be the natural and probable cause of the death before a murder conviction will be sustained. See Turk v. State, 48 Ohio App. 489, 194 N.W. 425 (1934); Burton v. State, 122 Tex. Crim. App. 363, 55 S.W. 813 (1932); Pleimling v. State, 46 Wis. 516, 1 N.W. 278 (1879). In other jurisdictions the statutory provisions are merely repeated and no reference is made to any necessity for proximate cause. This, however, is due largely to the fact that rarely is the commission of the dangerous felony not the proximate cause of the resulting homicide. The writer is convinced that if such cases should arise in these other jurisdictions, the courts would require a degree of proximity between the commission of the felony and the resulting homicide. See Perkins, *supra*, note 3, at 568. See also statutes cited *supra*, note 6.

the felony (the fireman was killed in consequence, though not the proximate consequence, of the commission of the felony).

Bearing these two illustrations in mind, it will readily be seen that there is at least a theoretical distinction between these two murder doctrines. In negligent murder the degree of causal connection between the dangerous act and the resulting homicide must theoretically be greater than the degree required in the case of felony murder. This is true only theoretically, because cases have arisen only in a limited number of jurisdictions where the felony committed was dangerous to human life but where the resulting homicide did not occur as a proximate consequence of the felony being dangerous.[12]

The basis for another distinction between the two doctrines rests in the probability that in negligent murder the dangerous act must involve a greater degree of substantial risk to human life than felony murder requires.

Foster's view of felony murder was that accidental homicide resulting from an unlawful act is murder if the crime be of the grade of felony, but that otherwise it is manslaughter.[13] Stephen suggested that this rule as propounded by Foster, was exceedingly harsh, and, in *Regina* v. *Serne*,[14] apparently proposed to require the same degree of wanton and willful disregard for human life which would constitute malice aforethought in the absence of the felony murder doctrine.[15] The present law of felony murder seems to fall midway between the views of Foster and Stephen. Not every death resulting from an act done in the commission of a felony is murder, but such a homicide may constitute this crime without the same degree of human risk being involved as would be required in the absence of the doctrine.[16] "It is not necessary to show the willful doing of an act under such circumstances that there is obviously a plain and strong likelihood that death or great bodily injury may result."[17] In negligent murder the decisions

[12] See cases cited *supra*, note 11.

[13] Perkins, *supra*, note 3, at 559.

[14] 16 Cox C.C. 311 (1887).

[15] In this case Stephen suggested that if one commits a felony by such means as is known to be dangerous to life and likely to produce death, and death ensue, it is murder. *Ibid.* This seems to be the same standard set up by Stephen in his analysis as is required for negligent murder. Stephen, *supra*, note 1, at 22.

[16] Perkins, *supra*, note 3, at 559. See also Henry v. State, 51 Nebr. 149, 70 N.W. 924 (1897). In this case, the court said: "To sustain a conviction under Cr. Code §3, for murder in the first degree in killing another while engaged in a robbery, it is not necessary that the killing be such that, in the absence of the statute, it would amount to murder as distinguished from manslaughter." *Ibid.*

[17] Perkins, *supra*, note 3, at 559. "Such a position has much to commend it. It places upon the man who is committing a felony the hazard of guilt of murder if he creates any substantial human risk which actually results in the loss of life; and it does this without including within this offense those homicides which occur so unexpectedly that no reasonable man would have considered that any risk of this nature was involved." *Id.* at 560.

indicate that a conviction cannot be sustained unless there is a great probability that death or great bodily injury may result from the commission of the dangerous act.[18]

In conclusion, the writer submits that a distinction between the two doctrines does exist, and that such a distinction should exist unless the negligent murder doctrine can be extended so that the dangerousness of the undertaking may be derived from a consideration of the circumstance that a dangerous felony is being committed as well as from the circumstances surrounding the commission of the particular dangerous act causing death. The fact that a dangerous felony is being perpetrated should have some tendency to decrease the degree of causation required in ordinary negligent murder, or it should tend to decrease the required element of human risk which must exist before conviction may be had under the negligent murder doctrine.

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JUDGMENT NOTWITHSTANDING THE VERDICT IN KENTUCKY

At common law, the judgment *non obstante veredicto* could be entered only upon the motion of the plaintiff,[1] when the answer of the defendant admitted a cause of action for the plaintiff, and set up matter insufficient as avoidance of the plaintiff's claim.[2] The common law rule, however, has been changed by many states so that such a motion may now be entered by either party, when it is apparent that upon the pleadings the movant should receive a judgment, nothwithstanding a verdict for the adverse party.[3] Such a motion by either party is provided for in Kentucky by Civil Code Section 386, which stipulates, "Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him".

Prior to the enactment of this code section the remedy of a defendant in a civil case when plaintiff's petition failed to state a cause of action and the jury had returned a verdict for the plaintiff was a motion to arrest judgment.[4] A ruling on this motion, however, was not a final judgment in favor of the defendant, but allowed the plaintiff to plead over and cure his defects, while the granting of plaintiff's motion for judgment *non obstante veredicto* was a final judgment determining the rights of the parties. In Kentucky the motion to arrest judgment has now been superseded in civil cases by the motion for judgment *non obstante veredicto*.[5]

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[18] See cases cited *supra*, note 10.

[1] Note (1916) L.R.A. 1916E, 829.

[2] Freeman, Judgments (5th ed. 1925) sec. 10; Notes: (1908) 12 L.R.A. (N.S.) 1021; (1916) L.R.A. 1916E, 829; 23 Cyc. 778; 15 R.C.L. 606.

[3] Hill v. Ragland, 114 Ky. 209, 70 S.W. 634 (1902); Notes: (1908) 12 L.R.A. (N.S.) 1021; (1916) L.R.A. 1916E, 829.

[4] Wheeler v. Preston, 32 Ky. L. Rep. 791, 107 S.W. 274 (1908).

[5] Ibid.