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Homicide - Felony - Murder Rule - Co-Felon Killed by Robbery Victim

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Allowing recovery in circumstances analogous to the instant case would extend potential recovery out of logical proportion. Eventually such a rule would extend to mere bystanders.

LYNN GARRETT

HOMICIDE — FELONY — MURDER RULE — CO-FELON KILLED BY ROBBERY VICTIM—The defendants (Austin and Bell) and the deceased, Rowe, agreed to commit an armed robbery. During the attempted perpetration of the crime, the intended robbery victim shot and killed Rowe. The defendants were charged with first degree murder but were granted a motion to quash the information on the theory that Rowe's death was a justifiable homicide, and therefore no murder was committed. The Michigan Supreme Court affirmed the lower court in a 5-2 decision. *People v. Austin*, 370 Mich. 12, 120 N.W.2d 766 (1963).

At Common Law to be convicted of murder the killing had to fall into one of two categories: (1) an unlawful killing of another with malice aforethought, express or implied;[1] or (2) a killing which falls within the terms of the felony-murder rule.[2] The basis of this rule is that in the commission of a dangerous felony the perpetrator should foresee a possible death since he invites dangerous resistance.[3]

The vast majority of jurisdictions have adopted some statutory form of the common law felony-murder rule.[4] The Michigan statute[5] is similar to other states. Generally

1. Commonwealth v. Buzard, 365 Pa. 511, 76 A.2d 394 (1950); 4 BLACKSTONE'S COMMENTARIES 195 (Lewis' ed. 1897).

2. See PERKINS, CRIMINAL LAW 36 (1957). The felony-murder rule is stated as follows: "Homicide is murder if the death ensues in consequence of the perpetration or attempted perpetration of some other felony unless such other felony was not dangerous of itself and the method of it perpetration or attempt did not appear to involve any appreciable human risk."

3. See Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947) (dictum).

4. See Arent and MacDonald, **The Felony-Murder Doctrine And Its Application Under The New York Statutes,** 20 Cornell L. Q. 288, 294 (1934-35) for a complete survey of state statutes.

5. Mich. Comp. Laws § 750.316 (1948). "All murder . . . which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree; . . ."

they differ only as to which felonies are included within the rule.[6]

The majority of the states hold that in order to convict under the felony-murder doctrine, the killing must have been done by the defendant or by one acting in furtherance of the felonious undertaking.[7] Pennsylvania followed this rule[8] until the *Moyer* decision in 1947 when they extended the doctrine to include any death which could be attributed to the chain of events set in motion by the felon even though he may not have fired the fatal shot.[9] This causation theory was later supported when a robber was convicted of murder in a fatal shooting of a policeman by his fellow officer.[10] In 1955 Pennsylvania, in a fact situation identical to the instant case, held the defense of justifiable homicide did not bar the court from convicting the felon for murder.[11] Three years later the *Thomas* case was considered an unwarranted extension of the felony - murder rule and Pennsylvania declared that the defense of justifiable homicide by the actual killer prevents the robber from being tried for murder.[12]

Prior to the *Redline* decision both Michigan[13] and California[14] had adopted Pennsylvania's causation theory concerning the felony-murder rule. However, Michigan in reaching its decision in the instant case relied on *Redline* as the best interpretation of the felony-murder rule.[15] California has not had further litigation since the *Redline* decision, but the writer submits that they will also discontinue their present trend of over-extending the felony-murder rule.

Apparently North Dakota has not had any litigation in

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6. See Michigan statute **supra** note 5. A sampling of similar statutes differing only in the crimes included are Cal. Pen. Code Ann. § 189 (1955) (adds mayhem); N.D. Cent. Code § 12-27-12 (1960) (adds mayhem and sodomy); Pa. Stat. Ann. tit. 18, § 4701 (Purdon 1963) (adds kidnapping).

7. **E.g.,** Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888); State v. Majors, 237 S.W. 486 (Mo. 1922); State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924).

8. Commonwealth v. Guida, 341 Pa. 305, 19 A.2d 98 (1941); Commonwealth v. Major, 198 Pa. 290, 47 Atl. 741 (1901).

9. Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947). (The gas station proprietor shot and killed his employee while attempting to prevent a robbery).

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

11. Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955).

12. Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958). (The co-felon was killed by the police rather than by the robbery victim).

13. People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952).

14. People v. Wilburn, 314 P.2d 590 (Calif. 1957).

15. People v. Austin, 120 N.W.2d 766 at 775 (1963).

point with the present case, but it is the writer's submission they will follow the present law in Pennsylvania and Michigan.

The end result of the *Austin* case would seem to bring the Michigan application of felony-murder back in line with the majority rule that the killing must be done by the defendant or someone acting in concert with him, and to limit its application to those situations which caused such a doctrine to be developed in the first place.

DAVID J. LANDBERG

SALES — IMPLIED WARRANTY—CIGARETTE-CANCER PROBLEM — The decedent's widow and the administrator of his estate brought an action for death allegedly caused by using defendant's cigarettes. In U. S. District Court there was a judgment for defendant. Their decision was conditionally affirmed by the U. S. Court of Appeals;[1] subject to a statutory certification procedure to determine the applicable state law.[2] The Supreme Court of Florida *held*, two justices dissenting, that there was imposed on the defendant absolute liability for breach of an implied warranty of fitness; even though the plaintiff contracted cancer when it was not foreseeable that cigarettes might be the cause. *Green v. American Tobacco Co.*, 154 So.2d 169 (Fla. 1963).

Early in the 19th century an implied warranty of quality was established on the theory that a purchaser has a right to expect a saleable article when there is no opportunity for inspection.[3] By 1911 strict liability respecting unwholesome food products was established and has since been recognized in most jurisdictions.[4] This strict liability has been given

1. Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1963).

2. Fla. Stat. Ann § 25.031 (1945). Where there are no controlling precedents, the U. S. Supreme Court and federal appellate courts may certify to the state Supreme Court for an interpretation of the law.

3. See Gardiner v. Gray, 4 Camp. 144, 171 Eng. Rep. 46 (1815); Halcombe v. Hewson, 2 Camp. 391, 170 Eng. Rep. 1194 (1810); See generally Prosser, **The Implied Warranty of Merchantable Quality**, 27 Minn. L. Rev. 117, 120 (1943).

4. Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906 (1911); See Prosser, **The Assault Upon the Citadel (Strict Liability to the Consumer)**, 69 Yale L. J. 1099, 1107-1108 (1960). Seventeen states extend strict liability without regard to negligence and privity. Five states have reached the same result by statute. There is no definite North Dakota law on the subject.