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CRIMINAL LAW—THE FELONY-MURDER DOCTRINE REPUDIATED

In Stephen's *History of Criminal Law of England*, it is stated that malice aforethought, one of the necessary elements of the crime of murder, is found in the following circumstances

(A) Where there is an intention to cause the death of, or grievous bodily harm to, any person.

(B) Where there is knowledge that an act or omission which causes death, will probably cause death of, or grievous bodily harm to, some person.

(C) Where there is an intention to commit "any felony whatever," if during the commission of, or attempt to commit, the felony, death results.

(D) Where there is an intention to oppose by force an officer in arresting or keeping in custody one whom he has a right to arrest or keep in custody¹

It is the purpose of this paper to present briefly the history and development of (C) of Stephen's analysis of malice aforethought, and then to discuss the desirability of this doctrine today

The doctrine has been traced back to Coke, who stated that killing in the perpetration of, or attempt to perpetrate, any crime, whether a felony or a lesser offense, was murder.² The rule was somewhat modified by Foster, who said that a homicide committed "in the prosecution of a *felonious* intention" was murder.³

Stephen was highly critical of the rule in his work on criminal law, and attempted to rationalize its introduction into the common law by pointing out that at the time the rule originated, all felonies were capital offenses, and therefore the rule did not work an injustice.⁴ Stephen made excellent use of his opportunity to give the death blow to the felony-murder doctrine in *Regina v Serne*,⁵ in which he said that although

¹ 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 22.

² COKE'S INSTITUTES (6th ed. 1680) 56.

³ FOSTER, CROWN LAW (2d ed. 1791) 258.

⁴ STEPHEN, *op. cit. supra*, note 1, 75.

⁵ 16 Cox C. C. 311 (1877).

a killing may be committed in the perpetration of a felony, the act causing the death must have been one "known to be dangerous to life."⁶ Thus Stephen eliminated (C) in his analysis of malice, and made conviction of murder for homicide in the commission of a felony dependent upon proof that the requirements of (B) of his analysis are met.

Although the felony-murder doctrine was eliminated in England almost sixty years ago,⁷ the rule remains in force in the United States. In this country, it appears that there are two distinct interpretations of the rule. By one of these interpretations, homicide committed in the course of *any* felony is murder.⁸ By the other interpretation, only homicide committed in the course of certain so-called dangerous felonies is murder without proof of actual malice.⁹ The dangerous felonies generally are said to be arson, rape, robbery, and burglary¹⁰ The interpretation of the rule which a court adopts frequently is controlled by the statute of the particular state. Some statutes, in defining murder, say that homicide in the commission of any felony shall be murder,¹¹ while other statutes say that homicide in the commission of certain enumerated felonies shall be murder.¹² Apparently only one state in this country refuses to apply the felony-murder doctrine at all. Ohio, because its statute defining murder requires a homicide to be committed intentionally, does not recognize implied malice, which is the basis of the felony-murder doctrine.¹³

It is the opinion of the writer that Stephen did a great service to the English law when he repudiated the felony-

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *People v De La Rol*, 36 Cal. App. 287, 97 P. 2d 836 (1939), *Simpson v. Commonwealth*, 293 Ky. 831, 170 S.W. 2d 869 (1943)

⁹ *Washington v. State*, 181 Ark. 1011, 28 S.W. 2d 1055 (1930), *State v. Schnelt*, 341 Mo. 241, 108 S.W. 2d 377 (1937), *State v. Mays*, 285 N. C. 480, 35 S. E. 2d 494 (1945).

¹⁰ *State v. Schnelt*, 341 Mo. 241, 108 S.W. 2d 377 (1937).

¹¹ LAWS OF N. Y. (Thompson, 1939) Penal Laws, sec. 1044(2), OKLA. STAT. (1941) Tit. 21, sec. 701(3)

¹² IND. STAT. (Burns, 1933) sec. 10-3401, REV. STAT. OF MO. (1939) sec. 4376.

¹³ *Turk v. State*, 48 Ohio App. 469, 194 N. E. 425, *affd.* 129 Ohio St. 245, 194 N. E. 453 (1934) It would appear that Ohio's interpretation of its murder statute would eliminate the negligent murder as well as the felony murder, since both are dependent upon implied malice.

murder doctrine, and that the American courts would do well to follow his lead. There are at least three reasons for eliminating the felony-murder doctrine. (1) The rule is not logical—in many instances it disregards the causal relation between the felony and the homicide. (2) In some cases the rule works an injustice on the accused. (3) Rule (B) of Stephen's analysis, the negligent-murder doctrine, is adequate to obtain convictions of murder where homicide occurs in the commission of a felony

As to the question of causal relation, it must be pointed out that the rule only requires that the homicide be committed in the course of the felony for it to amount to murder. It is quite conceivable that in the course of committing a felony, one might perform some perfectly innocent act which would cause the death of another, and thus be guilty of murder although he had neither intended to kill nor shown a wanton disregard for life. For example, a man, in the course of stealing a car, might run into and kill a drunk who deliberately walked in front of the automobile, and in such a case the felon would be guilty of murder although he had acted with the utmost caution.

This disregard for causal relation, in certain instances, has resulted in serious injustices. In a case which occurred in California,¹⁴ one of the defendants, in the course of robbing his victim, struck him on the chin. The blow was not so severe that it could have been expected to cause death or serious bodily harm, but in this case it resulted in the death of the recipient and in the conviction of murder for the perpetrator.

Further evidence of the injustice of the rule is found in its application to cases in which there are conspiracies to commit felonies. It is the well established rule that if two or more persons conspire to commit a felony, and in the course of the felony someone is killed, all conspirators are guilty of murder.¹⁵ Thus one might conspire to manufacture illegal whiskey¹⁶ or to commit unarmed robbery,¹⁷ and if a fellow conspirator, acting in the course of the felony, killed

¹⁴ *People v Kaye*, 43 Cal. 802, 111 P 2d 679 (1941).

¹⁵ *People v. Kaye*, 43 Cal. 802, 111 P 2d 679 (1941), *State v. Robnett*, 279 S.W 696 (Mo. 1926).

¹⁶ *State v Robinett*, 279 S.W 696 (Mo. 1926).

¹⁷ *People v Kaye*, 43 Cal. 802, 111 P 2d 679 (1941).

someone, both would be guilty of murder. This seems completely unfair to the conspirator who neither intended to have the felony result in the death of anyone, nor expected it to be dangerous in any way

As a final reason for doing away with the felony-murder doctrine, it is submitted that the negligent-murder doctrine is adequate to obtain convictions of murder where such convictions are justified. The history of the development of the criminal side of the common law shows an unceasing effort to make the punishment fit the crime. Capital punishment is no longer provided for pickpockets, apparently on the theory that such severe treatment for a crime of such a trivial nature did not serve to deter the commission of the crime. But the felony-murder doctrine disregards the nuances of punishment which have developed through the centuries, and it appears as an unsavory anachronism in the present day law. It does not look to the state of mind or relative guilt of the felon, but it punishes the man who steals a few dollars as a cold-blooded murderer if the thief is so unfortunate as to cause someone's death, while he is committing a lesser felony. In such cases, the felon is condemned to death or long imprisonment, not for murder, but for having committed a felony. Of course, if the thief intends to kill in order to carry out his plan to steal, or if he acts without regard for the lives of others, he deserves to be punished as a murderer. But this can be achieved without making use of the felony-murder doctrine, because then the thief will be guilty of intentional murder or negligent murder.

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