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Felony Murder in New York

Cover Page Footnote

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FELONY MURDER IN NEW YORK

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STATUTES, usually the least lively of all legal topics, are sometimes the source of the most spirited and stimulating discussions. The drama latent in almost every sentence of the penal statutes dealing with homicide, appeals to the interest of the layman as well as of the lawyer, and some of the most fascinating and discursive questions in the entire field of criminal law have their source in these statutes. This latter observation is particularly true of Section 1044 of the New York Penal Law which defines felony murder, as it is frequently called. It reads, in pertinent part, as follows:

MURDER IN FIRST DEGREE DEFINED. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed. . .

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; *or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;* or,

3. When perpetrated in committing the crime of arson in the first degree. . .¹

Provisions defining the crime of felony murder are to be found in the statutes of almost every jurisdiction in the United States,¹ but it is principally to the New York doctrine of felony murder that these pages shall be devoted. The common law history of the rule and its ramifications in other jurisdictions will be examined and considered only insofar as they may prove helpful to a proper understanding of the law in this state and of such changes in it as may be herein proposed. But before attempting an analysis of the statute, it might be well to have a brief glimpse at the birth and early development of the doctrine of felony murder at common law.

The common law definition of murder is the unlawful killing of any reasonable creature, in being, with malice aforethought either express or implied.² It was malice aforethought, or premeditation, which, according

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1. Italics supplied.

1a. These statutes vary, of course. Some are worded substantially the same as the New York provision, others provide that homicide during certain named felonies constitutes felony murder, and in still others, a felony murder is not of the first degree. For an exhaustive list of felony murder statutes see Arent and MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes* (1935) 20 CONN. L. Q. 288.

2. See *Commonwealth v. Webster*, 59 MASS. 295, 304 *et seq.* (1850); 3 COKE, INST. 47; 4 BL. COMM. *195; 1 HALE P. C. 451; 1 EAST P. C. 214; STEPHEN, DIGEST OF THE CRIMINAL LAW (1904) 182; 1 WEARTON, CRIMINAL LAW (12th ed. 1932) § 419.

to Blackstone, was the "grand criterion"³ used to distinguish murder from manslaughter. But the ordinary meaning of malice aforethought is not always the same as its legal sense.⁴ Ill will, hatred or revenge is the layman's concept of malice and, while it is true that these conditions of mind also constitute malice in the eyes of the law, they are by no means essential to the legal concept of the word.⁵ The father who killed his infant child to save him from anticipated suffering and unhappiness⁶ or because, in mistaken religious zeal, he desired to send him to a happier abode,⁷ was guilty of murder at common law, although moved to action by love for his boy. Nor were premeditation and deliberation, as those terms are understood today, essential to the concept of malice aforethought. No interval of time was necessary between the formation of the intent to kill and the homicide; the malice was aforethought even though the homicidal design was conceived instantaneously with the killing.⁸ Express or actual malice aforethought therefore, existed at common law when, in the absence of excuse, justification or provocation,⁹ a homicide was intentionally committed

3. 4 BL. COMM. *198.

4. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2nd ed. 1923) 469. For an excellent and comprehensive treatment of malice aforethought, see Perkins, *A Re-Examination of Malice Aforethought* (1934) 43 YALE L. J. 537. See also Brown, *Constructive Murder and Felonious Intent* (1909) 34 LAW MAG. & REV. 453; Maitland, *The Early History of Malice Aforethought* (1883) 8 LAW MAG. & REV. 406; *Constructive Murder* (1929) 67 L. J. 450; Comment (1924) 33 YALE L. J. 528; *Some Points on the Law of Murder* (1903) 67 JUSTICE OF PEACE 530-531; Notes (1912) 38 L. R. A. (N.S.) 1054.

5. State v. Johns, 6 Pen. 174, 65 Atl. 763 (Del. 1906); State v. Ehlers, 98 N. J. L. 236, 119 Atl. 15 (1922); People v. Kirby, 2 Park. Crim. Rep. 28 (N. Y. 1823).

"Though the words, in their ordinary sense, conveyed the idea of deadly animosity against the deceased, and, by a strict interpretation, would, perhaps, only embrace cases of a killing from motives of revenge, they were not so limited by the construction of the courts. All homicides, for which no excuse or palliation was proved, and a large class where there was no actual intention to effect the death of the person killed, were held to be murder. To justify these convictions, an artificial meaning was attached to the words *malice prepense*, by which they were made to qualify the taking of human life, in all cases where sound policy, or the demerits of the offender were supposed to require that he should be capitally convicted." Darry v. People, 10 N. Y. 120, 150 (1854). See Bromage v. Prosser, 4 Barn. & Cres. 247, 255, 107 Eng. Reprints 1051, 1054 (1825).

6. State v. Ehlers, 98 N. J. L. 236, 119 Atl. 15 (1922).

7. People v. Kirby, 2 Park. Crim. Rep. 28 (N. Y. 1823).

8. Allen v. United States, 164 U. S. 492 (1896); State v. Heidelberg, 120 La. 300, 45 So. 256 (1908); State v. Abbott, 64 W. Va. 411, 62 S. E. 693 (1908). See Commonwealth v. Webster, 59 Mass. 295, 306 (1850). Of course, under a statute in which deliberation and premeditation are specifically required, such as N. Y. PENAL LAW (1909) § 1044 (1), the intent to kill must have existed for some period before the slaying and it cannot take place in a fraction of a second or at the moment of striking the fatal blow. People v. Jackson, 196 N. Y. 357, 1909; People v. Guadagnino, 233 N. Y. 344 (1922).

9. Provocation sufficient to arouse a reasonable man to a heat of passion reduced the crime from murder to manslaughter. Regina v. Rothwell, 12 Cox C. C. 145 (1871).

though the slayer had not formed the intention until the moment of striking the fatal blow and even though he was actuated by the kindest feelings towards his victim.¹⁰ But the use of the term "implied malice aforethought" by the common law courts was even more misleading. It was applied not merely to cases in which the existence of an intent to kill, and therefore malice, could be inferred from the nature of the defendant's conduct, (*e.g.*, where he performed an act evincing a depraved mind, heedless of the lives of others¹¹) but the term was also applied to cases where the homicide was unintentional but was committed during the perpetration of some collateral felony.¹²

There were, in all, four cases at common law in which the defendant could be found guilty of murder of malice prepense for a killing which was neither excusable nor justifiable.¹³ These four cases were:

(a) When there existed an intention on his part to cause death or serious bodily injury either to the person killed¹⁴ or to another¹⁵ and there was not sufficient provocation to reduce the crime to manslaughter.

(b) When there was knowledge on his part that his actions would probably cause death or serious bodily injury either to the person killed or to another, even in the absence of a specific intent to kill.¹⁶

(c) When the defendant was, at the time, opposing an officer of the law in the performance of his duties.¹⁷

10. See notes 5, 6, 7 and 8, *supra*.

11. *Mayes v. People*, 106 Ill. 306 (1883); *Brown v. Commonwealth*, 13 Ky. 372, 17 S. W. 220 (1891); *Davis v. State*, 106 Tex. Cr. App. 165, 292 S. W. 220 (1927); *Rex v. Holloway*, Croke Car. 131, 79 Eng. Reprints 715 (1628). For cases construing a statutory enactment similar to the common law rule of responsibility for murder where defendant performs an act evincing a depraved mind, see *People v. Jernatowski*, 238 N. Y. 188, 144 N. E. 497 (1924); *Darry v. People*, 10 N. Y. 120 (1854). Note that whereas the common law rule apparently required merely that the act be inherently dangerous to another, the N. Y. PENAL LAW (1909) § 1044 (2) (p. 43 of the text) says dangerous to "others," and *Darry v. People* held that merely endangering the life of one other person was not murder under such a provision.

12. *Regina v. Lee*, 4 Fost & F. 63, 176 Eng. Reprints 468 (1864); *Queen v. Franz*, 2 Fost & F. 580, 175 Eng. Reprints 1195 (1861); *Regina v. Greenwood*, 7 Cox C. C. 404 (1857); 4 BL. COMM. *200.

13. 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 22; STEPHEN, DIGEST OF CRIMINAL LAW (6th ed. 1904) 182.

14. *Grey's Case*, Kelyng 64, 84 Eng. Reprints 1084 (1666); *Regina v. Welsh*, 11 Cox C. C. 336 (1869).

15. *State v. Smith*, 2 Strobhart's Law 77 (S. C. 1847); *Gore's Case*, 9 Coke 81a, 77 Eng. Reprints 853 (1611).

16. See note 11, *supra*.

17. *Yong's Case*, 4 Coke 40a, 76 Eng. Reprints 984 (1587); *Rex v. Porter*, 12 Cox C. C. 444. But the defendant must have known that the deceased was an officer, or a private individual with lawful warrant. *Rex v. Tomson*, Kelyng 66 (166—). "As if a magistrate or known officer, or any other that hath lawful warrant, and in doing, offering to

(d) When the accused was, at the time, engaged in the commission of a felony.¹⁸

It was from the last subdivision, of course, that our modern law of felony murder came. The rule may be traced back to two early authorities: the first, a statement in Coke that if *A* assaults *B* to rob him, and during the assault *A* kills *B*, “. . . this is murder by malice implied. . .”¹⁹ and the second, an early English case²⁰ in which the majority of the court concluded that murder was committed when an innocent bystander was accidentally shot by a member of a mob attempting to commit robbery. No intent to kill was necessary in common law felony murder,²¹ nor is it today under the New York statute,²² for the general criminal intent evidenced by the accused in committing a felony is transferred, by implication, to the homicide committed so as to make the latter a homicide of malice prepense.²³ This transposition of intent from the felony to the homicide has resulted in the rule that a conviction on the theory of felony murder is consistent with an indictment which charges murder in the common law form, to wit, “of malice aforethought,” and does not specifically mention felony murder.²⁴

Necessity of an Underlying Felony—Merger

The question which naturally presents itself at the outset of a discussion of the New York statute is whether all felonies are included within its scope. The killing of a human being during the commission of the felonies of robbery²⁵ and burglary²⁶ is clearly within the language

do his office, or to execute his warrant, is slain, this is murder by malice implied in law.” 3 COKE, INST. 52.

18. See note 12, *supra*.

19. 3 COKE, INST. 52.

20. Mansell & Herbert's Case, 2 Dyer 128 B, 73 Eng. Reprints 279 (1536).

21. See note 12, *supra*.

22. People v. Giusto, 206 N. Y. 67, 99 N. E. 190 (1912). People v. Udwin, 254 N. Y. 255, 172 N. E. 489 (1930).

23. See People v. Enoch, 13 Wend. 159, 174 (N. Y. 1834).

24. People v. Giblin, 115 N. Y. 196, 21 N. E. 1062 (1889); People v. Sullivan, 173 N. Y. 122, 65 N. E. 989 (1903); People v. Flanigan, 174 N. Y. 356, 66 N. E. 988 (1903); People v. Nichols, 230 N. Y. 221, 129 N. E. 883 (1921); See People v. Osmond, 138 N. Y. 80, 84, 33 N. E. 739, 740 (1893) (to the effect that the common law form of indictment was proper for any kind of statutory murder).

25. People v. Wise, 163 N. Y. 440, 57 N. E. 740 (1900); People v. Monat, 200 N. Y. 308, 93 N. E. 982 (1911); People v. Madas, 201 N. Y. 349, 94 N. E. 857 (1911); People v. Martone, 256 N. Y. 395, 176 N. E. 544 (1931).

26. People v. McGloin, 91 N. Y. 241 (1883); People v. Greenwall, 115 N. Y. 520, 22 N. E. 180 (1889); People v. Meyer, 162 N. Y. 357, 56 N. E. 758 (1900) (burglary in third degree by breaking out of a building); People v. Schleiman, 197 N. Y. 383, 90 N. E. 950 (1910); People v. Chapman, 224 N. Y. 463, 121 N. E. 381 (1918).

and spirit of the statute, but does the statute go so far as to constitute an accidental homicide during the commission of any felony, regardless of its nature, murder in the first degree? While a casual reading of the statute might lead one to believe that the answer is conclusively in the affirmative, a more careful examination of this section and of the associate sections on homicide will reveal that this cannot be its meaning. The most usual case covered by the literal wording of the statute and yet clearly not within its scope is the commission of a felonious assault which culminates in the death of the victim.²⁷ If *A*, for example, assaults *B* with a dangerous weapon intending to kill him, but without deliberation and premeditation, *A* is committing assault in the first degree, which is a felony.²⁸ If *B* were to die as a result of this assault, however, *A* would not be guilty of felony murder for the assault he committed is said to be merged in the homicide and in order to constitute a felony murder there must exist a felony separate and distinct from the homicide itself.²⁹ Although this theory of merger now seems fairly well imbedded in the doctrine of felony murder, such was not always the case.³⁰ There was a good deal of confusion in some of the earlier New York cases³¹ resulting probably from the absence of common law authority on the point, since a felonious assault resulting in death was, in the absence of provocation,³² murder at common law³³ and there was no reason, therefore, for the courts at that time to decide whether such assault would support a felony murder charge. Unless the distinction was recognized by the New York courts, however, other sections of the Penal Law dealing with homicide would be meaning-

27. *Foster v. People*, 50 N. Y. 598 (1872) (Felony murder, except during the commission of arson, was of the second degree at this time); *People v. Hüter*, 184 N. Y. 237, 77 N. E. 6 (1906); *People v. Spohr*, 206 N. Y. 516, 100 N. E. 444 (1912); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927); *People v. Lazar*, 271 N. Y. 27, 2 N. E. (2d) 32 (1936). It has been held, on analogous reasoning, that for a homicide during the commission of a crime less than felony to be manslaughter, there must be a crime independent from the homicide. *People v. Rector*, 19 Wend. 569 (N. Y. 1838); *People v. Butler*, 3 Park. Crim. Rep. 377 (N. Y. 1857); *People v. Grieco*, 266 N. Y. 48, 193 N. E. 634 (1934).

28. N. Y. PENAL LAW (1909) §§ 240 and 241. *People v. Randazzo*, 127 App. Div. 824, 112 N. Y. Supp. 104 (4th Dep't 1908).

29. See note 27, *supra*.

30. *People v. Cole*, 2 N. Y. Cr. Rep. 108 (1883). This case held that a homicide during a felonious assault might be felony murder. See also *Buel v. People*, 78 N. Y. 492 (1879) which had held that a killing of the victim of rape was felony murder and which had, in its opinion, criticized the earlier cases of *People v. Rector*, *People v. Butler* and *Foster v. People* (cited *supra* in note 27). Homicide during rape will be discussed later in this paper.

31. See, for example, *People v. Sweeny*, 41 Hun 332, 340 (N. Y. 1886).

32. See note 9, *supra*.

33. See notes 14 and 15, *supra*.

less.³⁴ Murder in the second degree and some cases of manslaughter in the first and second degrees involve felonious assault on the person killed³⁵ and yet if these assaults were not held to be merged in the homicide they would all be murder in the first degree.

But while an assault is merged in the homicide if it is the victim of the assault who dies, this is not so if the one killed is someone other than the person assaulted. If, in our hypothetical case, *A* were committing a felonious assault on *B*, and *C* intervened and was killed, *A* would be guilty of felony murder.³⁶ Thus we have the seemingly anomalous situation that if a man, without deliberation or premeditation, attempts to kill another, he is not guilty of murder in the first degree if he slays his intended victim, but he is guilty of murder in the first degree if a third person against whom the defendant may bear no ill will at all is killed. The distinction, nevertheless, is sound, for in the first case there is a merger of the assault in the homicide and in the second, the original assault is the independent felony.

A difficulty arising in connection with the cases in which one party is assaulted and another killed, has its source in the rule that the homicide must occur while the assault is still in progress. If the accused has already completed his assault on the first victim before he kills the second, the homicide is not during the commission of a felony,³⁷ and yet the assault on the one and the infliction of the fatal wound on the other must not be so close in point of time as to amount really to one continuous assault on two persons. In *People v. Moran*,³⁸ the defendant pointed his gun at two police officers, ordering them to hold up their hands. He then rapidly fired several shots and killed both officers. In the lower court he was convicted of murder during the commission of a felony, but on appeal this conviction was reversed, the court holding that there was but one assault on two victims and that this assault was merged in the resultant homicide of each.

Another difficult question presented by the assault case is whether a man can be convicted of felony murder where he attempts to kill one

34. *People v. Wagner*, 245 N. Y. 143, 156 N. E. 664 (1927).

35. N. Y. PENAL LAW (1909) §§ 1046, 1050 and 1052. Section 1046, for example, defines murder in the second degree as, "Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation," and is exemplified by the hypothetical case presented in the text.

36. *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1062 (1889); *People v. Patini*, 208 N. Y. 176, 101 N. E. 694 (1913); *People v. Wagner*, 245 N. Y. 143, 156 N. E. 644 (1927).

37. *People v. Spohr*, 206 N. Y. 516, 100 N. E. 444 (1912); *People v. Marendl*, 213 N. Y. 600, 107 N. E. 1058 (1915); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927). The necessity of the continuance of the underlying felony will be treated in more detail *infra*.

38. 246 N. Y. 100, 158 N. E. 35 (1927).

person and by mischance kills another. Is the homicide of the person actually killed in such a case committed during the commission of the felonious assault attempted on the intended victim? If it is, then a felony murder has been committed.³⁹ Or is it rather a case to which the merger theory should be extended, to wit, an assault on one person merging in the homicide of another? It would appear that the second theory represents the better view,⁴⁰ and for the very reason that gave rise to the doctrine of merger, namely, unless such a theory is adopted, some of the language of the homicide statutes is meaningless. According to subdivision 1 of Section 1044 of the New York Penal Law, deliberate and premeditated murder is committed whether the homicidal design was against the person killed or another, and also, under Section 1046, murder in the second degree is committed whether the person killed was the intended victim or not. And so, if *A* aims a shot at *B* intending to kill him, but the bullet enters *C*'s heart instead, *A* should be guilty of murder in the first or second degree depending on the presence or absence of deliberation and premeditation, for such a case falls exactly within the wording of these Sections.

In order, therefore, to constitute a felony murder the elements of the felony must be so distinct from those of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder.⁴¹ But the killing of a woman during the commission of rape is felony murder.⁴² The reason for this is that although violence is an essential ingredient of this felony, there is, in addition to the violence, an element neither essential nor common to homicide, that is, sexual intercourse. If, then, the accused was engaged in the commission of rape, a homicide by him, either of the victim⁴³ of the rape or of a third party intervening as a rescuer,⁴⁴ is felony murder.

But the stated test of the identity of the elements of the homicide and the felony does not seem to have been applied consistently in other cases. Suppose, for example, that the accused, in resisting the attempts of an officer to place him under arrest, kills the officer. At common law, as we have already seen,⁴⁵ the accused was guilty of

39. See note 36, *supra*.

40. See *People v. Spohr*, 206 N. Y. 516, 521, 100 N. E. 444, 456 (1912). See also *People v. Van Norman*, 231 N. Y. 454, 458, 132 N. E. 147, 148 (1921) in which the court intimated that such would be its holding if the question were squarely before it. But see *People v. Miles*, 143 N. Y. 383, 388, 38 N. E. 456, 458 (1894).

41. This was the test enunciated in *People v. Hüter*, 184 N. Y. 237, 77 N. E. 6 (1906) and approved in *People v. Spohr*, 206 N. Y. 516, 100 N. E. 444 (1912).

42. *Buel v. People*, 78 N. Y. 492 (1879); *People v. Wolter*, 203 N. Y. 484, 97 N. E. 30 (1911); *People v. Schermerhorn*, 203 N. Y. 57, 96 N. E. 376 (1911).

43. See note 42, *supra*.

44. See note 36, *supra*.

45. See note 17, *supra*.

murder without regard to the question of the commission of a felony, for this was one of the cases of murder with implied malice prepense. In New York, an assault with the intent to resist lawful arrest is a felony,⁴⁶ but since it is classified as one type of assault, it has been held that this felony is merged in a homicide committed on the arresting party.⁴⁷ But despite its classification in the statute, it seems the courts might have held that this assault, like rape, contains an ingredient in addition to violence, in this case, resistance to lawful arrest. Another case in which the court, it is submitted, failed to apply the test of merger uniformly is *People v. Marenda*⁴⁸ where it apparently agreed that the felony of carrying a weapon was merged in the homicide. The elements of such a felony do not seem identical with the elements of homicide. Of course, if no attempt to arrest is made, then the killing of a police officer by one who has been stopped for questioning is not during the commission of any felony.⁴⁹ On the other hand, if an arrest for a felony already committed is actually effected and the accused reduced to custody, then the death of the arresting officer caused by the accused in attempting his escape is chargeable to him as a felony murder;⁵⁰ an attempt to escape from lawful arrest for a felony is not merely a type of assault but is a separate felony, classified in an altogether different division of the statute.⁵¹ So too, if a homicide is committed during an attempted escape from a state prison, felony murder is committed,⁵² for such an attempt is a felony.⁵³

A striking example of the necessity of an independent underlying felony is to be found in *People v. Roper*.⁵⁴ Roper was a youth under the age of sixteen and had killed a man during a holdup. Section 2186 of the Penal Law provides, in part: "A child of more than seven and less than sixteen years of age, who has committed any act or omission which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency. . . ." The lower court had charged

46. N. Y. PENAL LAW (1909) § 242 (5) defines this as assault in second degree.

47. *People v. Hüter*, 184 N. Y. 237, 77 N. E. 6 (1906).

48. 213 N. Y. 600, 606, 107 N. E. 1058, 1059 (1915). The trial court had charged "that the carrying of a dangerous weapon . . . was merged in the larger crime, that is, the shooting, and cannot be considered as a felony which he was in the act of committing while the shooting was done. . . ." The Court of Appeals seemingly approved of this instruction to the jury.

49. *Ibid.*

50. *People v. Wilson*, 145 N. Y. 628, 40 N. E. 392 (1895).

51. N. Y. PENAL LAW (1909) § 1694.

52. *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684 (1888); *People v. Flanigan*, 174 N. Y. 356, 66 N. E. 988 (1903); *People v. Udwin*, 254 N. Y. 255, 172 N. E. 489 (1930).

53. N. Y. PENAL LAW (1909) § 1694.

54. 259 N. Y. 170, 181 N. E. 88 (1932).

the jury that if they found the defendant was engaged in a robbery in any degree at the time of the homicide they could bring in a verdict of murder in the first degree. The Court of Appeals reversed the conviction and pointed out that while a youth under the age of sixteen could be guilty of murder in the first degree since that crime is punishable by death,⁵⁵ he could not be guilty of the felony of robbery (but of juvenile delinquency only) and therefore there was no independent felony to lay the basis for a conviction on the theory of felony murder.⁵⁶

In one situation, however, the Court of Appeals has not applied the theory of the necessity of an underlying felony so syllogistically. In homicide cases generally, no conviction can be had on the confession of the accused alone, for there must be evidence independent of the defendant's statements that a killing took place.⁵⁷ This rule also applies to felonies other than homicide.⁵⁸ It would seem, then, that if the accused has confessed to a homicide during the commission of a felony, the mere finding of a slain body would not be sufficient corroboration, since there would have to be evidence aside from the confession of the commission of the independent felony. This view was expressed by Judge Crane in a concurring opinion in *People v. Joyce*,⁵⁹ but it has since been repudiated by the Court of Appeals,⁶⁰ on the ground that there need be corroboration only of the fact that a homicide has been committed since the existence of the felony goes only to the degree of the homicide. It is submitted that Judge Crane's argument is more in accord with the policy of rejecting unsubstantiated confessions for, as he pointed out,⁶¹ in an ordinary homicide case a jury may bring in a

55. N. Y. PENAL LAW (1909) § 1045; *People v. Murch*, 263 N. Y. 285, 189 N. E. 220 (1934).

56. Compare *People v. Udwin*, 254 N. Y. 255, 172 N. E. 255 (1930), where one of the defendants claimed that he was legally incapable of committing the independent felony of escaping from a state prison because of the peculiar wording of the statute. This point is discussed later under *Accomplices, infra* at p. 58. Note also in the Roper Case that, had the lower court specifically instructed the jury that they could find Roper guilty of murder if they found that he committed homicide while engaged in *first degree* robbery, there was a possibility of the conviction being affirmed. This possibility existed because robbery in the first degree, at that time, was punishable by indeterminate sentence, and the sentence might be life imprisonment.

57. N. Y. CODE CRIM. PROC. (1881) § 395.

58. N. Y. CODE CRIM. PROC. (1881) § 395; *People v. Kelly*, 37 Hun 160 (N. Y. 1885); *People v. Krauss*, 192 App. Div. 403, 182 N. Y. Supp. 715 (1st Dep't 1920).

59. 233 N. Y. 61, 134 N. E. 836 (1922). The following cases also seem in accord with the reasoning expressed by Judge Crane, although in each there was proof, in addition to the defendant's confession, that both a homicide and the independent felony had been committed, *People v. McGloin*, 91 N. Y. 241 (1883); *People v. Giusto*, 206 N. Y. 67, 99 N. E. 190 (1912).

60. *People v. Lytton*, 257 N. Y. 310, 178 N. E. 290 (1931).

61. *People v. Joyce*, 233 N. Y. 61, 74, 134 N. E. 836, 841 (1922).

verdict of conviction in a lesser degree,⁶² whereas in a true felony murder the jury is limited to first degree murder or acquittal.⁶³ If a confession of homicide may be exacted when none in fact was committed, is it not equally true that a confession of a felony during an admitted homicide may also be exacted though no independent felony was in fact committed? Both cases seem to fall within the spirit and purpose of the statutes requiring corroborating proof of the defendant's confession.

Nature of the Underlying Felony

Passing from the felonies which are merged in the homicide our problem of determining what felonies are included in the doctrine of felony murder becomes more obscured. We must again go to the common law for aid in properly investigating this question. In the Institutes, Coke generalizes on the principle underlying the felony murder rule as follows: "If the act be *unlawful*, it is murder."⁶⁴ This broad statement was never accepted as the law in England. A number of authorities repudiated it and limited the rule to cases where the accused was engaged in conduct which was not merely unlawful but felonious. This was the view of Chief Justice Holt in the case of *Rex v. Plummer*,⁶⁵ and it was thereafter accepted by Foster,⁶⁶ Blackstone⁶⁷ and East.⁶⁸ Later, however, even this modification of the rule was criticized as too harsh and the further limitation was suggested that an unintentional homicide during the commission of a felony should be murder when, and only when, the felony was one in which there was a recognizable risk of death or serious bodily injury to another.⁶⁹ This would have restricted felony murder to the so-called dangerous felonies such as arson, robbery, rape and burglary. In *Regina v. Serné*,⁷⁰ Stephen rejected the rule as laid down by the earlier authorities and

62. N. Y. PENAL LAW (1909) § 610; N. Y. CODE CRIM. PROC. (1900) § 444.

63. "So far as concerns the killing of a human being by one engaged in the commission of a felony, conviction in a lesser degree than murder in the first degree is not justified." *People v. Monat*, 200 N. Y. 308, 312, 93 N. E. 982, 983 (1911). The right of the Trial Court to limit the jury to a verdict of acquittal or of murder in the first degree in felony murder cases is discussed *infra*, pp. 69, 70.

64. 3 COKE, INST. 56. Italics inserted.

65. Kelyng 109, 84 Eng. Reprints 1103 (1701).

66. CROWN LAW, 258.

67. 4 BL. COMM. *200.

68. 1 EAST P. C. 255.

69. *Regina v. Serné*, 16 Cox C. C. 311 (1887); *Regina v. Whitmarsh*, 62 Just. Peace 711, 712 (1898); *Director of Public Prosecutions v. Beard*, A. C. 479, 493 (1920). See 3 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 57, 69, 75 where the author, while conceding that the limitation of the doctrine to felonies was less monstrous than Coke's theory, criticizes Holt and Foster for accepting the doctrine at all.

70. 16 Cox C. C. 311 (1887).

said, "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."⁷¹

Stephen's language may be criticized as abolishing common law felony murders entirely, for, by its test, there is no necessity of resorting to the felony to convict the accused of murder since, at common law, conduct known to be dangerous to life and, in fact, resulting in death was murder even if it did not involve the commission of a felony.⁷² On the other hand, the answer to this criticism might well be that the entire doctrine was smuggled⁷³ into the common law, and that no objection was originally raised because frequently the underlying felony during which the homicide was committed was itself punishable by death and it was immaterial on what theory the felon was hanged just so long as he was hanged.⁷⁴

The more modern English authorities⁷⁵ seem to have adopted the theory that the accused is guilty of felony murder only if he kills another while engaged in the commission of a felony involving foreseeable risk of danger to human life. This is a sound interpretation of the rationale of the doctrine. If one embarks on a criminal venture in which, as a reasonable man, he knows that the lives of others will be endangered, he should be held to answer for such fatal results as do ensue. The mere fact that he may not have had a specific intent to kill should not excuse if he chooses by his conduct to jeopardize the safety of others. On the other hand, a man's guilt or innocence of murder for an unintentional killing should not be dependent upon whether the law has defined his conduct as merely unlawful or as a misdemeanor or as a felony. This is even more evident in cases where the risk of danger to another is not reasonably to be anticipated. But whichever of the common law views is accepted as soundest from the standpoint of policy, there seems little doubt that a further extension of the rule to include all statutory as well as common law felonies would be most unwise. The possibility of such a broadening of the doctrine, however, exists in our statute today.

71. Italics inserted.

72. See note 11, *supra*.

73. "This astonishing doctrine has so far prevailed as to have been recognized as part of the law of England by many subsequent writers. . . . It has been repeated so often that I amongst others have not only accepted it, though with regret, but have acted upon it." 3 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 57.

74. See *Powers v. Commonwealth*, 110 Ky. 386, 413, 61 S. W. 735, 742 (1901); 3 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 75.

75. See note 69 *supra*; 9 HALSBURY'S LAWS OF ENGLAND (2d ed. 1933) 437. See also *Rex v. Elnick*, 53 D. L. R. 298 (1920), and Comment, 5 CANADIAN BAR REVIEW 68.

At common law a felony was an offense for which the punishment might be a total forfeiture of lands or goods, or both, and to which capital or other punishment might be added.⁷⁶ This included the crimes of arson, burglary, robbery, rape and larceny which were *mala in se* and which, with the possible exception of larceny, involved the element of physical danger to others. In New York, while there is no forfeiture of lands or goods, the principle of determining the grade of the offense by the character of the punishment provided is still recognized⁷⁷ and we find that a felony is defined by Section 2 of the Penal Law as follows: "A crime which is or *may* be punishable by death or imprisonment in a state prison."⁷⁸ Within this definition fall many crimes which are not only merely *mala prohibita* but which are also non-dangerous in character. It is to be noted, moreover, that the criterion for determining whether or not an offense is a felony is not the minimum but the maximum penalty provided, for the statute says: "is or *may* be" punishable by imprisonment in a state prison. It has been held, therefore, that an offense is a felony even though imprisonment in a city or county jail or a fine may be imposed as sentence, provided it is also possible under the statute to inflict as punishment imprisonment in a state prison.⁷⁹ Nor is it conclusive that the statute defines an act as a misdemeanor, for if the penalty provided calls for imprisonment in a state prison, it is a felony regardless of what the legislature may term it.⁸⁰ Whether New York will limit the doctrine to felonies which involve a foreseeable risk of danger to others is open to doubt. The argument that the earlier common law authorities did not state the rule accurately when they said without qualification that a homicide during the commission of a felony was murder cannot very well be advanced in the face of a statute which does say without qualification that a homicide during the commission of a felony is murder.⁸¹ The Court of Appeals

76. 4 BL. COMM. *94.

77. *People v. Lyon*, 99 N. Y. 210, 1 N. E. 673 (1885).

78. Italics inserted.

79. *People v. Park*, 41 N. Y. 21 (1869) [this case held that burglary in the third degree was a felony even if committed by a child under the age of 16, because the offense was generally punishable by imprisonment in a state prison, even though the child might have been sent to a Reform School under Chap. 100, Laws of 1840, and Chap. 24, Laws of 1850. See dissenting opinion and compare *People v. Roper*, 259 N. Y. 170, 181 N. E. 88 (1932)]; *People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105 (1893); *People v. Borges*, 6 Abb. Pr. 132 (N. Y. 1858); *People v. Hayman*, 94 Misc. 624, 159 N. Y. Supp. 981 (1916). But see *Fassett v. Smith*, 23 N. Y. 252 (1861) where the court said that in all cases where an offense is not specifically labelled a felony by the statute, the common law governs. This case was later criticized by *People v. Lyon*, 99 N. Y. 210, 1 N. E. 673 (1885).

80. *People v. Bellinger*, 269 N. Y. 265, 191 N. E. 213 (1935).

81. So far as the language of the felony murder statute is concerned, it might be con-

has assumed in some cases, without deciding, that a homicide during the commission of the felony of larceny is murder in the first degree.⁸² And while the weight of authority⁸³ outside of New York supports the view that the creation of new statutory felonies did not effect rules of the common law which on principle applied only to common law felonies, the history of the statute in New York⁸⁴ seems to indicate that it was the legislative intent to include all felonies within the operation of the doctrine. The statute at one time specifically named the felonies which raised a homicide during their commission to murder, and the omission of such an enumeration today supports the inference that felony murder is not limited to any specific felonies.⁸⁵ Although no case has been found in New York which has gone so far as to hold that the doctrine applies to non-dangerous statutory felonies, there are decisions which have extended it to felonies which are of statutory origin only and did not exist at common law, and there is a

tended that the word "otherwise" refers back to "persons" and means "other persons," thus limiting the operation of the felony murder rule to felonies against the person, either of the one killed or of another. Some force is lent to this argument by the existence of a separate subdivision in Section 1044 providing that the homicide during the commission of the felony of arson is murder in the first degree, for if all felonies were intended to be included by the legislature, why the need of the arson subsection? This was the defendant's contention in *People v. Greenwall*, 115 N. Y. 520, 22 N. E. 180 (1899), but the court dismissed it saying, that "otherwise" should be interpreted to mean any felony.

82. See *People v. Joyce*, 233 N. Y. 61, 73, 134 N. E. 836, 841 (1922); *People v. Wagner*, 245 N. Y. 143, 147, 156 N. E. 644, 645 (1927); *People v. Moran*, 246 N. Y. 100, 102, 158 N. E. 35, 36 (1927); *People v. Willett*, 36 Hun 500, 507 (N. Y. 1885).

83. *People v. Pavlic*, 227 Mich. 562, 199 N. W. 373 (1924). See *Thiede v. State*, 106 Neb. 48, 182 N. W. 570 (1921); *State v. Reitze*, 86 N. J. L. 407, 408, 92 Atl. 576, 577 (1914). But *cf.* *State v. Smith*, 32 Me. 369 (1851); *Id.*, 33 Me. 48 (1851) which was explained as follows in *Powers v. Commonwealth*, 110 Ky. 386, 414, 61 S. W. 735, 741 (1901): "With the adoption of the English common law in the various jurisdictions in this country, and its modifications by statute, there came the question whether this doctrine applied to statutory felonies which were not felonies at common law. In some of the jurisdictions it was held without qualification that it did. It may be remarked that, in many of the earlier cases, the attempted offense was abortion; and it may be that the moral turpitude of this offense, not at common law a felony, had effect in determining the question."

84. The first statute (2 N. Y. REV. STAT. [1829] 657, § 5 [3] specifically stated "any felony." In 1860 the statute was amended to enumerate the specific felonies of arson, rape, robbery, burglary and attempted escape from imprisonment as the ones during the commission of which homicide was murder in the first degree (Laws 1860, c. 410, § 2). In 1862, this enumeration was omitted, but homicides during the commission of felonies other than arson were reduced to murder in the second degree (Laws 1862, c. 197, § 5), but later all felony murders were again made of the first degree (Laws 1876, c. 333, § 1). The present statute, except for a few minor changes and except for the substitution of the article "a" for the adjective "any" is substantially the same as this last one.

85. See *Fitzgerold v. People*, 37 N. Y. 413, 427b—427e (1868).

very powerful dictum in one case⁸⁶ to the effect that all felonies are included. In *People v. Van Steenburg*,⁸⁷ the court held that a homicide committed by one, who was at the time armed and masquerading as an Indian, was murder because by statute it was a felony to go armed and disguised. In *People v. Deacons*,⁸⁸ the court held that a tramp who had entered a building under circumstances not amounting to burglary was guilty of murder for a homicide he had committed therein because of a statutory provision⁸⁹ making it a felony for a tramp to enter a building without the owner's consent.

Accomplices

Before taking up the question of the necessity of the continuance of the underlying felony at the time the homicide takes place and to pave the way for such discussion, it may prove helpful at this time to enlarge the scope of our treatment, which thus far has been limited to the liability of the actual killer, and to investigate the guilt of confederates. It is a general rule in criminal law that where a man combines with another to commit a felony, he impliedly consents to the use of whatever means are usual or may prove necessary in accomplishing it, and if such means involve a homicide, he is responsible therefor.⁹⁰ A discussion of the common law distinctions between principals in the first and second degree and accessories before the fact is unnecessary to our inquiry, for, in New York these distinctions have been abolished by the following provision in the Penal Law:

"A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a 'principal'."⁹¹

86. "... as often as the legislature creates new felonies, or raises offenses which were only misdemeanors at the common law to the grade of felony, a new class of murders is created by the application of this principle to the case of a killing of a human being, by a person who is engaged in the perpetration of a newly created felony. So, on the other hand, when the legislature abolishes an offence which at the common law was a felony, or reduces it to the grade of a misdemeanor only, the case of an unlawful killing, by a person engaged in the act which was before a felony, will no longer be considered to be murder, but manslaughter merely." *People v. Enoch*, 13 Wend. 159, 175 (N. Y. 1834). (The statute at that time said "any felony.")

87. 1 Park. Cr. 39 (Del. 1845).

88. 109 N. Y. 374, 16 N. E. 676 (1888).

89. N. Y. PENAL LAW (1909) § 2371.

90. *Anarchists' Case (Spies v. People)* 122 Ill. 1, 12 N. E. 865 (1887); *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408 (1898); *Carrington v. People*, 6 Park. Crim. Rep. 336 (N. Y. 1865); *State v. Cannon*, 49 S. C. 550, 27 S. E. 526 (1897); *Mansell & Herbet's Case*, 2 Dyer 128b (1536).

91. N. Y. PENAL LAW (1909) § 2; *People v. Blivan*, 112 N. Y. 79, 19 N. E. 638 (1889);

It is apparent, therefore, that Section 1044, although it speaks of a homicide "by a person"⁹² engaged in a felony, includes all who are principals in the eyes of the law whether they be the actual killers or not. There is a long line of decisions in New York holding that where one engages in the commission of a felony with others, he is responsible for a homicide committed by one of his confederates during the prosecution of their common design.⁹³ If the accused aided or abetted in the commission of the felony he cannot escape liability by showing that he was in a different part of the premises at the time of the slaying and was wholly unaware of it,⁹⁴ or that he was merely a lookout for the rest of the band,⁹⁵ or that he never was near the premises but was miles away when the felony and homicide were being committed,⁹⁶ or that he counselled against the use of any force,⁹⁷ or that he called out to his confederates to desist when force became necessary,⁹⁸ or even that he attempted to stop them in their use of violence.⁹⁹ In all these cases, as in the case of the actual killer, the accomplice's guilt is not predicated upon the intent to kill, but on the constructive malice imputed to him from his engaging in the commission of a felony.

There is language in some of the cases¹⁰⁰ to the effect that the test

People v. Kief, 126 N. Y. 661, 27 N. E. 556 (1891); People v. Florence, 146 Misc. 735, 262 N. Y. Supp. 775 (Gen. Sess. 1933).

92. Italics inserted.

93. *Ruloff v. People*, 45 N. Y. 213 (1871); *People v. Giro*, 197 N. Y. 153, 90 N. E. 432 (1910); *People v. Friedman*, 205 N. Y. 161, 98 N. E. 471 (1912); *People v. Giusto*, 206 N. Y. 67, 99 N. E. 190 (1912); *People v. Chapman*, 224 N. Y. 381, 121 N. E. 381; *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921); *People v. Martone*, 256 N. Y. 395, 176 N. E. 544 (1931).

94. *People v. Giusto*, 206 N. Y. 67, 99 N. E. 190 (1912).

95. *People v. Usefof*, 227 N. Y. 622, 125 N. E. 923 (1919) (the defendant in that case was a lookout and was convicted of first degree murder in Bronx County Supreme Court. The conviction was affirmed without opinion). See *People v. Michalow*, 229 N. Y. 325, 330, 128 N. E. 228, 230 (1920).

96. *People v. Michalow*, 229 N. Y. 325, 128 N. E. 228 (1920) (reversed on other grounds).

97. See *People v. Friedman*, 205 N. Y. 161, 165, 98 N. E. 471, 475 (1912).

98. *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921).

99. In *People v. Friedman*, 205 N. Y. 161, 98 N. E. 471 (1912) there was some evidence that the accused attempted to wrest the gun from the hand of his accomplice when the shooting began.

100. See *People v. Udwin*, 254 N. Y. 255, 263, 172 N. E. 489, 492 (1930); *People v. Giro*, 197 N. Y. 152, 158, 90 N. E. 432, 435 (1910). "If the *natural and probable consequence* of the common enterprise was the killing of Mr. Schuchart in case of resistance on his part, the defendant was liable for murder in the first degree, although he did not do the actual killing. . . . An express agreement by intending robbers not to kill in carrying out a plan of robbery would not save any of the conspirators from responsibility for a homicide by one of them in committing or attempting to commit the robbery, *if such killing was the natural and probable result of the robbery*. . . ." (Italics inserted). *People v. Friedman*, 205 N. Y. 161, 165, 98 N. E. 471, 473 (1912).

of the liability of an accused for a homicide by one of his associates during the commission of a felony is whether the killing was a natural and probable result of the felony. This would seem to indicate that unless the felony is one of a class ordinarily considered dangerous and one in which there is a recognizable risk of harm to others, a homicide committed by one of a band of felons cannot be imputed to the others. However sound this may be in principle, it certainly is not consistent with the view expressed in other New York cases that the killer himself is guilty regardless of the nature of the underlying felony.¹⁰¹

But if the law seems to favor the confederate by requiring that the killing be a natural and probable result of the felony, it is not so lenient with him in other respects. Consider, for example, that: (a) a confederate may be guilty of murder in the first degree as a principal to a felony murder although he is legally incapable of committing the felony by himself and (b) an accomplice may be guilty of murder in the first degree although the killer himself is not. Only one case has been discovered in which the court followed the first rule set out above. In *People v. Udwin*,¹⁰² the defendant with a number of other prisoners attempted to escape from a state prison. During the "break" one of the conspirators was accidentally shot and killed by another and the survivors were indicted for felony murder. One of the defendants was a life termer and he contended that although the statute provided that an attempted escape from a state prison was a felony, it specifically exempted life termers from its operation.¹⁰³ The court nevertheless held that since he was an accomplice of others, legally capable of committing that felony, he was a principal to their felony under Section 2 of the Act¹⁰⁴ and therefore guilty of first degree murder. The second rule set out above is not so harsh as may appear on the surface, and though no case can be found directly in point, it is submitted that this conclusion is justified. If *A* and *B* conspire to commit robbery, and during the robbery *B* kills the victim, both are guilty of felony murder. But if *B* could prove that at the time of the robbery he was either insane or so intoxicated as to be incapable of entertaining a specific intent, *B* would not be guilty of felony murder, for the gist of the crime of robbery is larceny from the person, and larceny requires the specific intent to steal. Thus, if the jury believes that *B* was incapable of forming any specific intent, the underlying felony would not exist so

101. See pp. 54-56, *supra*.

102. 254 N. Y. 255, 172 N. E. 489 (1930).

103. N. Y. PENAL LAW (1929) § 1695 provides: "A prisoner confined in a state prison for a term *less than life*, who attempts by force or fraud, although unsuccessful, to escape from such prison, is guilty of felony." (Italics inserted.)

104. See note 91, *supra*.

far as he was concerned.¹⁰⁵ There is no reason, however, why this defense which is personal to *B* should be available to *A*. So also in *People v. Roper*,¹⁰⁶ where the court held that a boy under the age of sixteen could not be guilty of felony murder because he was incapable of committing the independent felony, it seems his accomplice in the crime could have been convicted of felony murder if the accomplice was over sixteen years of age regardless of who did the actual killing.¹⁰⁷

Before the accused may be held for a homicide committed by one of his accomplices it must be shown beyond a reasonable doubt that the murder was committed in the execution of the conspired felony.¹⁰⁸ Suppose, for example, that *A* and *B* burglarize a house. *B*, looking out of the window of the house in which they are committing the felony, notices *C*, an old enemy of his, across the street and thereupon he shoots and kills *C*. It is true that at the time *C* was killed both *A* and *B* were engaged in the commission of a felony. But *A* certainly should not be held for that homicide since it was not in pursuance of their common design.¹⁰⁹ If the one slain is the victim of the felony involved, it would obviously be almost impossible for the defendant to prove that the homicide committed by one of his confederates was not in furtherance of the felony, but the Court of Appeals has indicated that this may be shown even in such a case.¹¹⁰ Perhaps the best case to illustrate the requirement that the killing be within the scope of the conspiracy is one in which the question was not felony murder at all but which, nevertheless, emphasizes that there must be a community of purpose for one conspirator to be charged with a homicide committed by another. In *People v. Sobieskoda*,¹¹¹ the defendant conspired with an-

105. *People v. Koerber*, 244 N. Y. 147, 155 N. E. 79 (1926) (though this case did not involve a confederate, it is submitted, that its reasoning is in point).

106. 259 N. Y. 170, 181 N. E. 88 (1932).

107. N. Y. PENAL LAW (1909) § 2186, after providing that in cases of crimes for which the sentence in the case of an adult would be less than death or life imprisonment such acts shall be merely juvenile delinquency if committed by a child over seven and under sixteen years of age, goes on to provide: "but any other person concerned therein, whether as principal or accessory, who otherwise would be punishable as a principal or accessory shall be punishable as a principal or accessory in the same manner as if such child were over sixteen years of age at the time the crime was committed."

108. *People v. Ryan*, 263 N. Y. 298, 189 N. E. 225 (1934); see *People v. Collins*, 234 N. Y. 355, 361, 137 N. E. 753, 756 (1922); *Ruloff v. People*, 45 N. Y. 213, 216 (1871).

109. See note 108, *supra*.

110. "The circumstantial evidence must be sufficient to permit an inference free from reasonable doubt that Cassullo [the victim] was killed in the attempted execution of the design to commit a robbery." *People v. Ryan*, 263 N. Y. 298, 303, 189 N. E. 225, 227 (1934). (Italics in original).

111. 235 N. Y. 411, 139 N. E. 558 (1923).

other to murder the husband of the defendant's paramour. The gunman killed the brother of the intended victim instead. The Court of Appeals held that it was error for the lower court to instruct the jury that it was immaterial, in order to hold the defendant, with what intent the deceased had been killed. The decision is sound. The charge of the trial court which at first blush might seem to follow the exact language of the Penal Law¹¹² would permit the jury to convict the defendant even though the actual killer may have slain the deceased for reasons dehors the conspiracy. Although it would have been in furtherance of the common design if the brother had been killed while coming to the aid of the intended victim, allowance must be made for the possible situation wherein the conspirator for his own personal reasons killed the brother. In the latter case, the homicide would not be within the common purpose and so not chargeable to the other conspirator.

*Necessity of the Continuance of the Underlying Felony—
Escape and Abandonment*

In order to constitute a felony murder, whether the accused be the actual killer or merely an accomplice, it is necessary that the felony be in the course of commission at the time the homicide occurs. If the felony has been completed, or if the accused has effectively severed his connection with the criminal enterprise, he cannot be held on the theory of felony murder for a homicide which subsequently takes place.¹¹³ This rule seems simple and entirely in accord with the statute and there are cases¹¹⁴ in which the factual situation is such that only one conclusion can be drawn as to whether the homicide took place during the commission of the felony, but some cases fall within a twilight zone making difficult any dogmatic inference. Reference has already been made¹¹⁵ to the difficulty in the assault cases of determining whether the attack on the first victim is separate in origin and purpose from the fatal attack on the second so as to constitute a felony independent of the homicide, and yet not so apart in point of time as to make the homicide an occurrence after the completion of the first felonious assault. The attacks in such cases must be concomitant, yet they must be distinct.

112. It has been pointed out, p. 49, *supra*, that an intentional homicide may be committed even though the deceased was not the intended victim.

113. *People v. Hüter*, 184 N. Y. 237, 77 N. E. 6 (1906); *People v. Spohr*, 206 N. Y. 516, 100 N. E. 444 (1912); *People v. Marwig*, 227 N. Y. 382, 125 N. E. 535 (1919); *People v. Smith*, 232 N. Y. 239, 133 N. E. 534 (1921); *People v. Collins*, 234 N. Y. 355, 137 N. E. 753 (1922); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927); *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933).

114. See *People v. Walsh*, 262 N. Y. 140, 147, 186 N. E. 422, 424 (1933).

115. See notes 37 and 38, *supra*.

Where the accused is fleeing from the scene of a completed or attempted crime, a killing during the course of his flight does not occur during the commission of a felony,¹¹⁶ for while escape from lawful custody is a felony,¹¹⁷ flight from the scene of a crime is not. But there are situations in which a qualification of this general rule appears warranted. If there is no pursuit and a homicide occurs several miles from the scene of the original crime or if some interval of time has elapsed since the felony when the killing takes place the general rule applies and the homicide is not a felony murder. But consider the following cases: (a) A robbery is committed in X's store, the robbers then run from the store, and X, who immediately pursues them, is shot and killed by one of the felons; or, (b) Y's house has been burglarized, and as the burglars are leaving his home Y seizes one of them and during the struggle receives a mortal wound. The two cases seem very much alike, and in both it could be argued that the killings are so intimately connected with the robbery and burglary as to be parts of the *res gestae* of those crimes and on this ground alone should be held to constitute felony murders. There are a few cases in which the dicta,¹¹⁸ at least, appear to support this contention, but there are clear holdings¹¹⁹ that while the New York courts recognize "that escape may, under certain unities of time, manner and place, be a matter so immediately connected with the crime as to be part of its commission"¹²⁰ they do not accept the "*res gestae*" rule as a universal test. The two hypothetical cases are distinguishable under the New York decisions. In *People v. Marwig*,¹²¹ which is very similar to our first case, the accused and a companion had entered the store of the deceased to commit either a robbery or a larceny and the deceased fled into an adjoining store. The thieves were then interrupted in their crime and ran from the premises without any loot. One of them was seized by the proprietor in front of the adjoining store, just a few feet from the store in which they had attempted their crime, and in the fracas, the proprietor was killed. It was held that this was not a felony murder on the ground that at the time of the homicide no felony was in the course of commission since the attempted robbery or larceny had already ended. The court, in

116. *People v. Walsh*, *People v. Collins*, *People v. Marwig*, *People v. Hüter*, all cited note 113, *supra*.

117. N. Y. PENAL LAW (1929) § 1694.

118. "All that they did was in furtherance of their original design to rob the house, and what they did to save themselves and escape was as much a part thereof as breaking in with the jimmy or stealing the pocketbook." (Italics this writer's.) *People v. Giro*, 197 N. Y. 152, 157, 90 N. E. 432, 434 (1910); see *Dolan v. People*, 64 N. Y. 485, 497 (1876).

119. See note 113, *supra*.

120. *People v. Walsh*, 262 N. Y. 140, 148, 186 N. E. 422, 424 (1933).

121. 227 N. Y. 382, 125 N. E. 535 (1919).

its opinion, laid great emphasis upon the fact that at the time of the killing the felons were no longer on the premises on which the felony took place. In *People v. Michalow*,¹²² on the other hand, one of the robbers, fearing identification, bound the victim of the robbery in such a way that she suffocated. The court there held that the felony was still in progress when the homicide took place even though the felons had already secured their loot at that time. From these cases it seems clear that the problem of the continuance of the underlying felony cannot always be solved merely by determining whether the accused at the time of the killing, had already accomplished the primary end of his criminal undertaking. And, although an important distinction in the cases last discussed was that in the one case he was no longer on the premises when the homicide was committed, and in the other he was, presence of the accused on the premises is not conclusive. In *People v. Smith*¹²³ the defendant was committing robbery when he was reduced to capture by his victims. While one of his captors telephoned for the police, the accused managed somehow to get possession of a gun, and with it he shot and killed the other. Although the accused was still on the premises at the time of the homicide he certainly was no longer engaged in a robbery when the killing took place, and so the court held, pointing out that while presence on the premises was an important factor, it was by no means conclusive on the question of whether a felony was still in the course of commission.¹²⁴ The following tests have been used by the courts in solving this vexatious problem: If the accused has committed a felony against a person, which in no way involves property, the felony is complete as soon as he starts to flee;¹²⁵ if the accused has been interrupted before actually engaging in the commission of a felony and before he has progressed so far as to be guilty even of an attempted felony, there can be no felony murder;¹²⁶ if the defendant is off the premises and not in possession of any loot, the felony is ended¹²⁷ (unless the accused is still connected with a conspiracy and one of his confederates is still engaged in the

122. 229 N. Y. 325, 128 N. E. 228 (1920) (reversed on other grounds). See also *People v. Giro*, 197 N. Y. 152, 157, 90 N. E. 432, 434 (1910).

123. 232 N. Y. 239, 133 N. E. 574 (1921).

124. It should be noted that the accused may have been guilty of a homicide during the commission of felonious escape from arrest (discussed, *supra* notes 50 and 51), but this theory of guilt was not submitted to the jury.

125. *People v. Marendi*, 213 N. Y. 600, 107 N. E. 1058 (1915); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927).

126. *People v. Young*, 40 Misc. 256, 81 N. Y. Supp. 967 (Sup. Ct. 1903); *People v. Collins*, 234 N. Y. 355, 137 N. E. 753 (1922). But *cf.* *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989 (1903).

127. *People v. Hüter*, 184 N. Y. 237, 77 N. E. 6 (1906); *People v. Marwig*, 227 N. Y. 382, 125 N. E. 535 (1919).

felony¹²⁸); but if the accused is still in possession of his loot or is aiding his accomplice to insure the removal of it this is evidence that the felony is still in progress;¹²⁹ finally, the defendant's presence on the premises, like his possession of the loot, is evidence that the felony is still continuing,¹³⁰ but it is not conclusive.¹³¹

Where the homicide has been committed by conspirators there remain two further questions to be determined: (a) Did the conspirators contemplate a killing during the course of flight, thus making the homicide part of the conspiracy, and, (b) have any of the conspirators abandoned the felony before the commission of the homicide? The first question is usually treated under the felony murder doctrine although strictly it does not fall within its scope at all. Since conspiracy, of itself, is not a felony,¹³² it must be remembered that the mere fact that the conspiracy is still in existence at the time of the homicide does not automatically stamp such homicide as felony murder,¹³³ for it is entirely possible that the conspiracy continue up to the division of the spoils which might not occur until long after the felony has been completed. Suppose that in the *Marwig* case,¹³⁴ Marwig had agreed with Bojanowski (his confederate) that in the event of interruption or threatened arrest they should shoot to kill to effect their escape, and Bojanowski murdered the man who tried to apprehend him, would Marwig be guilty of murder? He might be guilty as a principal to a deliberate and premeditated murder,¹³⁵ but he would not be guilty of felony murder, for, as Judge Crane points out in that case, "Marwig would not be guilty of murder in the first degree if after the robbery had been committed and not while it was being committed his companion shot and killed Weitz while they were aiding each other in trying to escape unless the

128. *People v. Chapman*, 224 N. Y. 463, 121 N. E. 381 (1918); *People v. Michalow*, 229 N. Y. 325, 128 N. E. 228 (1920); *People v. Nichols*, 230 N. Y. 221, 129 N. E. 833 (1921).

129. See *People v. Walsh*, 262 N. Y. 140, 148, 186 N. Y. 422, 424 (1933).

130. *Dolan v. People*, 64 N. Y. 485 (1876); *People v. Meyer*, 162 N. Y. 357, 56 N. E. 758 (1900); *People v. Giro*, 197 N. Y. 152, 90 N. E. 432 (1910); *People v. Schleiman*, 197 N. Y. 383, 90 N. E. 950 (1910); *People v. Michalow*, 229 N. Y. 325, 128 N. E. 228 (1920). The Giro and Schleiman cases arose out of the same murder in which these two men were involved as accomplices. In both cases convictions of felony murder were affirmed, and, although neither case discusses the factor of the defendants' presence on the premises at the time of the homicide, it is submitted that the cases are defensible only on that theory for the burglars were very evidently trying to flee at the time.

131. *People v. Smith*, 232 N. Y. 239, 133 N. E. 534 (1921); *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933); *People v. Ryan*, 263 N. Y. 298, 189 N. E. 225 (1934).

132. Conspiracy is defined as a misdemeanor under N. Y. PENAL LAW (1909) § 580.

133. *People v. Collins*, 234 N. Y. 355, 137 N. E. 753 (1922).

134. See note 121, *supra*.

135. *People v. Emieleta*, 238 N. Y. 158, 144 N. E. 487 (1924).

jury should find premeditation and deliberation upon the part of Bojanowski."¹³⁶ In other words, the question as to whether the homicide was or was not a felony murder depends not so much on any agreement the confederates may have had as it does on the question of whether the felony was still in existence at the time the killing took place.

The second question, abandonment, is a corollary of the rule that the felony must be in existence at the time of the homicide, and at times the two problems overlap. Even when the accused has fled from the premises without any loot, his responsibility for a homicide by one of his confederates who is still on the premises may continue unless the defendant has effectively abandoned the conspiracy before the killing.¹³⁷ This is sound and consistent with the rule that a confederate who does not even appear on the scene is guilty when the homicide is committed by one of his co-conspirators during the commission of a felony.¹³⁸ If, however, a conspirator has desisted to such an extent that he has abandoned the entire criminal enterprise then he is not responsible for a homicide thereafter committed by one of his former associates. What, then, are the essentials of an effective abandonment? The first and foremost is that the accused must have desisted from the crime some time before the danger of death was imminent, and whether there has been a sufficient interval of time is in the last analysis a question of fact for the jury.¹³⁹ It would appear that another requisite for an effective abandonment is that the one seeking to escape responsibility must have given notice of his intention to abandon to his fellow conspirators, and that this notice must have been given in time to permit them to abandon as well.¹⁴⁰ Of course, if his associates have already desisted from the felony themselves, whether voluntarily or involuntarily, notice to them is unnecessary. An interesting case involving the problem of abandonment is *People v. Walsh*.¹⁴¹ In that case four men engaged in a robbery. Three had entered the "speakeasy" which they

136. *People v. Marwig*, 227 N. Y. 382, 388, 125 N. E. 535, 537 (1919).

137. *People v. Chapman*, 224 N. Y. 463, 121 N. E. 381 (1918); *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921).

138. See note 96, *supra*.

139. *People v. Chapman*, 224 N. Y. 463, 121 N. E. 381 (1918); *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921).

140. *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921). "He [defendant] afforded Davis [confederate] no opportunity to abandon the further execution of the felony. . . . Until he abrogated or nullified, *to the knowledge of Davis* and under such circumstances as would permit Davis to take the same action as himself, by words or acts, the conspiracy and confederation between them, there was not an abandonment of the joint or common design." (Italics inserted). *People v. Chapman*, 224 N. Y. 463, 478, 121 N. E. 381, 385 (1918).

141. 262 N. Y. 140, 186 N. E. 422 (1933).

intended to rob, while one remained outside as a lookout. Walsh, one of those who had entered the premises, went into a back room while his two companions remained in the front part of the saloon. The police intervened during the crime and arrested the two men in the front room. Upon discovery of what had occurred, Walsh attempted to flee through an exit, and, in so doing, he shot and killed an officer. This was held not to be a felony murder. The two companions who were under arrest were certainly no longer engaged in the commission of the felony of robbery, nor was it necessary for Walsh to give them notice of his intention to abandon, nor, finally, did Walsh's failure to give notice to the lookout who had not as yet been arrested prolong the existence of the robbery. The Court of Appeals pointed out that the mere presence of the lookout on the outside could not, as a practical matter prolong a robbery which had in fact ended.

The Causal Relation

The problem of causation in felony murder has not been directly involved in many cases. This is due, in part, to the fact that it is interwoven with the question already considered as to what felonies are included in the doctrine, and in part, also, to the fact that there are comparatively few rules relating to the problem which are peculiar to this doctrine and not applicable to homicide cases generally. The test of whether the homicide is a natural and probable result of the felonious act has been used in some jurisdictions to determine whether the particular activity in which the defendant was engaged at the time was included within the scope of the doctrine of felony murder,¹⁴² and in other cases to determine whether the felony committed was a cause of the death.¹⁴³ Frequently the two questions are identical but sometimes they are distinguishable. Arson, for example, falls within the class of dangerous felonies and so is included within the doctrine of felony murder even under the foreseeable consequences rule and yet it was held in an English case¹⁴⁴ that even though arson was committed,

142. See note 69, *supra*.

143. *State v. Glover*, 330 Mo. 709, 50 S. W. (2d) 1049 (1932); *Burton v. State*, 122 Tex. Crim. App. 363, 55 S. W. (2d) 813 (1932); *Pleimling v. State*, 46 Wis. 516, 1 N. W. 278 (1879).

144. "The law, however, is, that a man is not answerable except for the natural and probable result of his own act; and therefore, if you should not be satisfied that the deceased was in the barn or inclosure at the time the prisoner set fire to the stack, but came in afterwards, then, as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act." *Regina v. Horsey*, 3 F. & F. 287, 289, 176 Eng. Reprints 129, 131 (N. P. 1862). Compare *State v. Glover*, 330 Mo. 709, 50 S. W. (2d) 1049 (1932) where it was held that the death of a fireman in a blaze caused by the accused was felony murder, and see Comment, 18 Sr. LOUIS L. REV. 350.

it may nevertheless be shown that the death of another in the fire was caused by his own voluntary act and thus was not a felony murder. Aside from the cases involving the responsibility of a confederate,¹⁴⁵ there is little authority to be found in New York subscribing to the natural and probable consequences rule as a test in determining either the felonies to be included in the doctrine, or the liability of the defendant for the homicide when the felony is clearly a dangerous one.

Where death is a direct result of a felonious act there is, of course, no difficulty in establishing the causal relation. It might be argued in such a case that to constitute felony murder there must be two acts, one, the underlying felony and the other the act of homicide, but this contention is not sound. Although it is necessary that there be a felony independent of the homicide,¹⁴⁶ it is not essential that there be independent acts, since the one act may at the same time constitute a separate felony and cause the death.¹⁴⁷ Violence is a constitutive element of the felony of robbery¹⁴⁸ and if the violence used in such a crime causes death, felony murder is committed.¹⁴⁹ So too, where the very act of rape causes death either because of the force used in effecting the crime¹⁵⁰ or because of a disease communicated to the victim by the accused.¹⁵¹ It seems, moreover, that if the felony being committed causes death by fright, the perpetrator of the felony is guilty of felony murder.¹⁵²

It has already been pointed out that, in order to convict one accomplice of felony murder for a homicide committed by another it is incumbent upon the prosecution to show that the killing was in furtherance of the felony.¹⁵³ Other jurisdictions¹⁵⁴ have held that the rule is the same even though the accused is the actual killer, but no decision has

145. See note 100, *supra*.

146. *Supra*, p. 46, *et seq.*

147. *Buel v. People*, 78 N. Y. 492 (1879). See *People v. Hüter*, 184 N. Y. 237, 244, 77 N. E. 6, 9 (1906).

148. N. Y. PENAL LAW (1909) § 2120; *People v. Hall*, 6 Park. Crim. Rep. 642 (N. Y. 1865).

149. See note 25, *supra*.

150. *Buel v. People*, 78 N. Y. 492 (1879).

151. Although no New York case has been found to support this, the instruction given the jury in *Regina v. Greenwood*, Cox C. C. 404 (1857) authorized the jury to bring in a verdict of guilty of murder in such a case.

152. *Cox v. People*, 80 N. Y. 500 (1880).

153. See note 108, *supra*.

154. In *Burton v. State*, 122 Tex. Crim. App. 363, 55 S. W. (2d) 813 (1932), the defendant was driving a car when a flat tire caused him to lose control, and the car struck and killed another. The defendant was driving while intoxicated at the time of the accident, and this was a felony under the statute. It was held that the homicide was not a felony murder. See also *Pleimling v. State*, 46 Wis. 516, 1 N. W. 278 (1879).

been found in New York either accepting or rejecting the rule in such a case.¹⁵⁵ The better view would seem to be that although the killing need not be perpetrated by the accused intentionally to further his criminal purpose, the act which results in death must have been done in the furtherance of the felony. Mere coincidence of time between the homicide and the felony should not suffice to make it felony murder, if the act resulting in death was wholly disconnected from the commission of the underlying felony.

But no person can be held responsible for felony murder unless the act of homicide was committed either by him or by someone acting in consort with him. It has been held in jurisdictions outside New York that if an officer fires at the defendant who is committing a felony and kills an innocent bystander the homicide, not being the act of the accused, is not chargeable to him as a felony murder.¹⁵⁶ The Court of Appeals has indicated that New York is in accord. In *People v. Udwin*¹⁵⁷ some prisoners were engaged in a prison break and one of their number was killed. The court in holding that a felony murder had been committed emphasized the fact that there was sufficient evidence that the deceased met his death from a wound inflicted by one of the other convicts and not by a prison guard, implying that had no such evidence existed, judgment would have had to be rendered for the defendants on that ground. Three judges dissented because in their opinion there was insufficient evidence on this point. No New York case has gone so far as to hold that if the accused used an innocent person as a shield for his own protection and placed him in the path of a bullet intended for the accused this would not be a felony murder. In other jurisdictions the courts have held that the accused in such a case is the legal cause of the killing, and, if it occurred during the commission of a felony, the homicide is a felony murder.¹⁵⁸

The Charge of the Trial Court

The charge to the jury in cases involving felony murder is the last

155. Although no case directly in point has been found in New York, there is a dictum in *People v. Marendi*, 213 N. Y. 600, 612, 101 N. E. 1058, 1061 (1915) which seems to support this view.

156. *Butler v. People*, 125 Ill. 641, 18 N. E. 338 (1888). Accord: *Commonwealth v. Moore*, 121 Ky. 97, 88 S. W. 1085 (1905); *Commonwealth v. Campbell*, 89 Mass. 541 (1863).

157. 254 N. Y. 255, 172 N. E. 489 (1930). See *People v. Giro*, 197 N. Y. 152, 153, 90 N. E. 432, 434 (1910) where the court goes to great lengths to show that the shots killing the deceased were fired by the accused or his accomplice and not by one of the other victims of the burglary.

158. *Taylor v. State*, 41 Tex. Cr. 564, 55 S. W. 961 (1900); *Keaton v. State*, 41 Tex. Cr. 621, 57 S. W. 1125 (1900); *Wilson v. State*, 188 Ark. 846, 68 S. W. (2d) 100 (1934).

phase of the doctrine to be treated. This problem harasses the mind of the law student perhaps more than any of those heretofore considered, perplexing as they are, and it has become a veritable incubus to the trial judges themselves. Most of the reversals of felony murder convictions in the Court of Appeals in recent years have been predicated on the failure of the trial court to instruct the jury properly.¹⁵⁹ In some instances the error consisted in charging merely felony murder or acquittal,¹⁶⁰ in another it was error not to charge merely felony murder or acquittal,¹⁶¹ and in still others it has been held prejudicial to submit the felony murder theory to the jury at all.¹⁶²

Under an indictment for murder in the first degree, the trial court usually may and does instruct the jury on the various degrees of murder and manslaughter, authorizing it to bring in a verdict of guilty of any one of these crimes or of acquittal. This was the practice at common law¹⁶³ and authority for it today may be found in Section 610 of the New York Penal Law which provides:

"Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime."¹⁶⁴

159. *People v. Hüter*, 184 N. Y. 237, 77 N. E. 6 (1906); *People v. Spohr*, 206 N. Y. 516, 100 N. E. 444 (1912); *People v. Marendi*, 213 N. Y. 600, 107 N. E. 1058 (1915); *People v. Marwig*, 227 N. Y. 382, 125 N. E. 535 (1919); *People v. Smith*, 232 N. Y. 239, 133 N. E. 574 (1921); *People v. Van Norman*, 231 N. Y. 454, 132 N. E. 147 (1921); *People v. Collins*, 234 N. Y. 355, 137 N. E. 753 (1922); *People v. Koerber*, 244 N. Y. 147, 155 N. E. 79 (1926); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927); *People v. Martone*, 256 N. Y. 395, 176 N. E. 544 (1931); *People v. Roper*, 259 N. Y. 170, 181 N. E. 88 (1932); *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933); *People v. Lazar*, 271 N. Y. 27, 2 N. E. (2d) 32 (1936).

160. *People v. Van Norman*, 231 N. Y. 454, 132 N. E. 147 (1921); *People v. Smith*, 232 N. Y. 239, 133 N. E. 574 (1921); *People v. Koerber*, 244 N. Y. 147, 155 N. E. 79 (1926); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927); *People v. Roper*, 259 N. Y. 170, 181 N. E. 88 (1932); *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933).

161. *People v. Martone*, 256 N. Y. 395, 176 N. E. 544 (1931).

162. *People v. Hüter*, *People v. Spohr*, *People v. Marendi*, *People v. Lazar*, (all cited *supra*, note 159). Apparently the Court of Appeals has divided the cases into three groups: (a) Where there is no question but that the homicide was during the commission of a felony and the Trial Judge is justified in limiting the jury to a felony murder conviction or acquittal; (b) Where as a matter of law, no felony is being committed at the time of the homicide; (c) Where there is a question of fact as to whether the homicide is during the commission of a felony. It is questionable, however, whether there is any real distinction between (b) and (c) in the actual decisions, for in every case where the court has held that it was error for the Trial Judge to limit the jury to felony murder or acquittal, it would also have been error to submit the theory of felony murder to the jury at all even if other theories of homicide were charged.

163. See *People v. Schleiman*, 197 N. Y. 383, 385, 90 N. E. 950, 951 (1910).

164. See also N. Y. CODE CRIM. PROC. (1900) § 444.

But where, as in felony murder, intent is no element of the crime of murder in the first degree, the power to convict of a lesser degree of felonious homicide which belongs to the jury in cases where the degree depends upon the intent cannot properly be exercised.¹⁶⁵ And so sometimes it is proper for the court to limit the jury to only one of two verdicts, guilty of murder in the first degree or not guilty.¹⁶⁶ The cases in which this may be done, however, are exceptional and exist only where there are but two alternatives consistent with the evidence, namely, either the accused was in no way connected with the homicide, in which case he should be acquitted, or, if he was so connected, the killing was during the commission of a felony in which case he was guilty of murder in the first degree.¹⁶⁷ Where there exists any question of fact as to the existence or continuance of the underlying felony at the time of the homicide, it is reversible error to submit merely felony murder and acquittal to the jury¹⁶⁸ for "Evidence uncertain in its implications must not be warped or strained to force a jury into the dilemma of choosing between death and freedom."¹⁶⁹ Moreover, if, as a matter of law, an independent felony is not in existence at the time of the homicide, as, for example, where the only felony in the case is the fatal assault, then it is error to submit the theory of felony murder to the jury at all, even if other theories of homicide are also charged.¹⁷⁰ This is on the principle that if two or more theories of guilt are charged and one of them is basically wrong, the appellate court cannot speculate as to the theory upon which the verdict was based, and a reversal is required.¹⁷¹ The failure of the trial judges to recognize this after repeated warnings has caused the Court of Appeals more than once to voice its impatience.¹⁷² But while there are cases in which it is admittedly difficult to understand the basis of the trial

165. *People v. Schleiman*, 197 N. Y. 383, 90 N. E. 950 (1910).

166. *People v. Schleiman*, 197 N. Y. 383, 90 N. E. 950 (1910); *People v. Chapman*, 224 N. Y. 463, 121 N. E. 381 (1918); *People v. Seiler*, 246 N. Y. 262, 158 N. E. 246 (1927); *People v. Martone*, 256 N. Y. 395, 176 N. E. 544 (1931).

167. See note 160, *supra*.

168. *People v. Koerber*, 244 N. Y. 147, 155 N. E. 79 (1926); *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933).

169. *People v. Moran*, 246 N. Y. 100, 105, 158 N. E. 35, 37 (1927).

170. See note 162, *supra*.

171. See *People v. Lazar*, 271 N. Y. 27, 31, 2 N. E. (2d) 32, 35 (1936).

172. See *People v. Moran*, 246 N. Y. 100, 105, 158 N. E. 35, 37 (1927). "It is difficult to understand why trial judges in criminal cases continue to make the serious error disclosed by the record in this case in view of the fact that it has been repeatedly pointed out that such a charge absolutely requires a reversal of a conviction," *People v. Lazar*, 271 N. Y. 27, 29, 2 N. E. (2d) 32, 33 (1936).

court's charge,¹⁷³ in others it would take a legal geomancer to instruct the jury in a way of which the Court of Appeals would approve. Nice distinctions such as were drawn in *People v. Moran*¹⁷⁴ and borderline cases in abandonment such as *People v. Walsh*¹⁷⁵ would shake the confidence of the most learned jurist in drawing his charge to the jury. In fact, the confusion caused by some of the opinions has caused one commentator to observe that the Court of Appeals has apparently decided to reserve to itself the right to send any case back for a new trial if it results in a way not pleasing to that court.¹⁷⁶

Would the difficulty be avoided if the trial judges were to charge the other degrees of homicide in every felony murder case? Where, for instance, the homicide is clearly during the commission of a felony and the issue resolves itself into the question of the defendant's participation in the crime, may the trial court charge both felony murder and deliberate and premeditated murder? In some cases it may, and may thus submit to the jury more than one possible theory of guilt.¹⁷⁷ There is nothing inconsistent with these two theories of guilt, ordinarily, for although the statute says of felony murder "without design to kill" it is obviously no less a felony murder if the felon killed with deliberation and premeditation.¹⁷⁸ But there is one situation in which it would be error for the court to charge anything other than the alternative verdicts of first degree murder and acquittal. Such was the case in *People v. Martone*¹⁷⁹ in which the accused was an alleged accomplice of the

173. For example, in *People v. Lazar*, 271 N. Y. 27, 2 N. E. (2d) 32 (1936), the jury was instructed that it could find the defendant guilty of murder in the first degree even though there was neither intent, deliberation nor premeditation, if it found that he shot the deceased during the commission of a second degree assault on the deceased.

174. 246 N. Y. 100, 158 N. E. 35 (1927). There, it will be remembered, the court held that the killing of the two officers was during the one indivisible assault which merged in the homicides, distinguishing *People v. Wagner*. Discussed *supra*, note 38.

175. See note 141, *supra*.

176. Eisenberg, *The Doctrine of Felony Murder in New York*, N. Y. L. J., Jan. 18, 1935, p. 316.

177. *Buel v. People*, 78 N. Y. 492, (1879); *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989 (1903); *People v. Wagner*, 245 N. Y. 143, 156 N. E. 644 (1927).

178. *Dolan v. People*, 64 N. Y. 485 (1876); *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989 (1903). O'Brien, dissenting in the latter case said at 145: "If the proof tended to show that the deceased was killed without any design to effect death, but while the parties were engaged in an attempt to commit a felony, it necessarily excluded the theory that he was killed from a deliberate and premeditated design. It would seem to follow that the case should have been submitted to the jury on one theory or the other, and not upon both." The force of this reasoning is not convincing for certainly a deliberate and premeditated killing during the commission of a felony is just as much a felony murder as an unintentional homicide.

179. 256 N. Y. 395, 176 N. E. 544 (1931), *rev'g* 232 App. Div. 681, 247 N. Y. Supp. 896 (2d Dep't 1931).

one who had committed homicide during the commission of a felony. The defendant appealed from a conviction of manslaughter contending that he was either guilty of first degree murder or innocent, for if he was an accomplice to the independent felony, he was guilty of murder in the first degree and if he was not such an accomplice, he was guilty of no crime at all. Novel as the defendant's contention may appear, it is absolutely sound and the Court of Appeals reversed the conviction of manslaughter. This decision places a trial judge in a very difficult predicament when the defendant is an accomplice rather than the actual slayer. To charge only felony murder or acquittal, it must be one of the "exceptional" cases mentioned above,¹⁸⁰ and yet to charge anything other than that leaves the door open for the accused to contend that no other theory of guilt is consistent with the evidence.¹⁸¹

Conclusion

It is manifest that the doctrine of felony murder is in need of some reformation in New York. But, while commentators are agreed that the law, in its present state, is far from satisfactory, there is no such unanimity either with respect to the particular phases of the doctrine which require alteration or clarification, or as to the most effective method of accomplishing it. To one author,¹⁸² the principle of holding accomplices responsible for a felony murder committed by another is especially objectionable. He would limit their liability to cases in which the felony was of a dangerous character and in which there was a foreseeable risk of danger to another, and he suggests that even in such cases the rule should not always be applied. That it is a harsh rule which renders a man subject to a charge of murder for an accidental homicide, not reasonably foreseeable, merely because he is engaged in the commission of an act defined by statute as felonious admits of no argument. But it is difficult to see why it is any more inhuman when applied to accomplices than when applied to cases where the accused is the actual slayer. The doctrine should not be applied to non-dangerous felonies in which the risk of death is not reasonably

180. See notes 160 and 167, *supra*.

181. The problem is made the more difficult if the classification stated in note 162, *supra*, is accepted. Suppose the accused was an accomplice of the actual killer and had entered the conspiracy only on the express understanding that no force was to be used. Suppose, further, that there was a question of fact whether the homicide was during the commission of a felony or not. The accused is guilty on only one possible theory, to wit, as an accomplice to a felony murder, and yet, the trial judge may not limit the jury to a felony murder conviction or acquittal if there is any question of fact concerning the existence of the underlying felony.

182. Eisenberg, *The Doctrine of Felony Murder in New York*, N. Y. L. J., Jan. 17, 1935, p. 296.

foreseeable whether the defendant be the actual killer or merely his accomplice. Suppose that the accused attempts to commit felonious larceny of an automobile. As he starts the car, a spark from the machine ignites some gasoline causing an explosion which kills a passerby. Would the accused be guilty of felony murder? Would there be any stronger reason for holding him on such a charge than an accomplice who may have sat beside him? Or, assume that the defendant although ignorant of the fact, has a disease which he communicates to a girl during the commission of second degree rape and she dies from its effects. Should this be considered murder? The objection to the present status of the New York doctrine goes deeper than the question of a confederate's responsibility.

Other authors,¹⁸³ while recognizing that the rule should not be extended beyond the felonies in which the risk of death is reasonably foreseeable, argue against resort to legislative aid and contend that the remedy lies with the courts. It must be admitted that the courts could accomplish far more by a sane application of the rationale of the doctrine than could the Legislature by amending the statute to enumerate the felonies included in the rule. It has been pointed out, for instance, that it is sometimes possible to have felonies which are ordinarily considered non-dangerous committed by violent means, thus rendering foreseeable the risk of death, and that the so-called dangerous felonies may, at times, be committed in such a way that the risk of death is not to be expected.¹⁸⁴ In the face of these arguments, however, stands the fact that the Court of Appeals, except in a few instances where it speaks of the liability of confederates in terms of foreseeability, has given no indication that it intends to follow the lead of the present-day English Courts. It is submitted that the more direct and effective way to avoid the danger of a literal interpretation of the statute is not to sit back and hope, but to change the statute to enumerate, as it once did,¹⁸⁵ those felonies during the commission of which a homicide constitutes murder. This is suggested despite the realization that some felony which should be included in the statute may be omitted, an example of which was presented by the *Hauptmann* case in New Jersey. But this is a criticism not of the method, but of the laxity of the draftsmen, and a well considered and carefully drawn statute would be preferable to the present uncertainty concerning the future decisions of the Court of Appeals on this problem. Moreover, the possibility of one criminal escaping through a negligent omission in the statute would

183. Arent and MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statute* (1935) 20 CORN. L. Q. 288.

184. Perkins, *A Re-Examination of Malice Aforethought* (1934) 43 YALE L. J. 537.

185. N. Y. Laws 1860, c. 410, § 2.

be more than counterbalanced by the elimination of the danger of sending a man to his death for an unintended, non-negligent, non-foreseeable homicide merely because the act in which he was engaged at the time is defined by statute as a felony.

Another phase of the doctrine which calls for attention is the rule governing homicides during the course of escape from the scene of a felony. To change this rule, resort must be had to a legislative enactment, for the Court of Appeals has taken the position that a homicide during the course of flight is not felony murder under the present statute. An amendment was recently introduced in the Legislature¹⁸⁶ to provide that a homicide during an escape or attempted escape from a felony be classified as felony murder, but it was not passed.

Perhaps the strongest objection to such an amendment is the difficulty of defining accurately just what is meant by escape from a felony. A man may be escaping from the commission of a felony for hours, even days after the felony has ended, and under such a provision in the statute a man might be convicted of felony murder for a homicide committed long after the original felony has ended. But this objection loses much of its force if the suggested amendment is revised to read, or construed by the courts to mean homicides committed "in *furtherance* of an escape from or attempted escape from the commission of or attempted felony," and is limited to cases of fresh pursuit where the interval of time between the felony and the homicide is not too great.¹⁸⁷ It is submitted that some such statutory change is warranted. Human experience teaches us that perhaps the time most fraught with danger in the commission of such crimes as robbery and burglary comes at

186. (February 12, 1936) No. 1180. The proposed amendment reads as follows: ". . . or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise, or in the escape from or attempted escape from such commission of or attempted felony."

187. The following cases from other jurisdictions in which a homicide during flight from a felony is felony murder are of interest: *Commonwealth v. Doris*, 287 Pa. 547, 135 Atl. 313 (1926) (holding the accused guilty of a felony murder although the homicide was committed, after the accused had been arrested, by one of his confederates); *State v. Terrell*, 175 La. 758, 144 So. 488 (1932) (where the homicide was committed several blocks from the scene of the felony); *State v. Daniels*, 119 Wash. 557, 205 Pac. 1054 (1922). In the *Daniels* case, the defendants had stolen a car. The following morning they shot and killed a policeman who accosted them six miles from the scene of the larceny. Larceny was specifically included in the felony murder statute in that state, and the Court reached the extreme decision that the defendants could be found guilty of felony murder despite the lapse of time between the theft of the car and the homicide on the grounds (a) that there was a question of fact for the jury whether the felony had been completed, and (b) larceny is a continuing crime.

the moment when the felon is threatened with capture or arrest and is making good his escape. If the doctrine of felony murder is to remain in our law, such homicides should be brought within the scope of the doctrine, for they are clearly within its spirit.