

# Louisiana Law Review

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Volume 16 | Number 4  
*A Symposium on Legislation*  
June 1956

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## Criminal Law - Felony-Murder - Killing of Co-Felon

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### Repository Citation

William L. McLeod Jr., *Criminal Law - Felony-Murder - Killing of Co-Felon*, 16 La. L. Rev. (1956)  
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Orleans is denied constitutional jurisdiction to establish paternity in civil cases as well as in prosecutions under R.S. 14:74 by the present decision, a constitutional amendment will be necessary if it is desired that the juvenile court exercise jurisdiction over such cases.<sup>24</sup> Regardless of whether an adequate civil remedy is provided or the criminal procedure is revised to meet the Supreme Court's objection, it is important that some procedure be made available to impose the burden of supporting the illegitimate offspring of known fathers on those parents rather than on a welfare agency of the state.

*Jack Brittain*

#### CRIMINAL LAW — FELONY-MURDER — KILLING OF CO-FELON

In the retreat from a store at which they had committed armed robbery, two felons were pursued by the proprietor, who fatally shot one of them. The surviving felon was indicted under the felony-murder statute. The lower court sustained the defendant's demurrer to the evidence, and the Commonwealth appealed. *Held*, reversed.<sup>1</sup> "The killing of the co-felon is the natural foreseeable result of the initial act. The robbery was the proximate cause of the death."<sup>2</sup> *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955).

The felony-murder doctrine is a fiction developed in the common law of England to charge with murder those engaged in a dangerous felony from which any death results.<sup>3</sup> The requirement of malice for common law murder is fulfilled under the felony-murder doctrine by ascribing to the felon who only incidentally kills the malice of the lesser felony.<sup>4</sup> Historically the felony-murder doctrine seems to have been limited at first solely to the acts committed by the felon himself.<sup>5</sup> This was the original and long-standing interpretation of the doctrine in the United States.<sup>6</sup> Thus, when the instigators of a riot were on

24. In order to insure all juvenile courts equal jurisdiction over these cases, LA. CONST. art. VII, §§ 52, 53, 96, should also be amended.

1. Three of the seven justices dissented.

2. *Commonwealth v. Thomas*, 382 Pa. 639, 645, 117 A.2d 204, 206 (1955).

3. A discussion of the origin and reason for the doctrine can be found in Hitchler, *The Killer and His Victim in Felony-Murder Cases*, 53 DICK. L. REV. 3 (1948).

4. *Ibid.*

5. 3 COKE, INSTITUTES 56 (1797); 4 BLACKSTONE, COMMENTARIES 192 (1769).

6. *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *Commonwealth v. Campbell*, 89 Mass. 541, 83 Am. Dec. 705 (1863); *Commonwealth v. Thompson*, 321 Pa. 327, 184 Atl. 97 (1936); Annot., 12 A.L.R.2d 210 (1950).

trial for the death of an innocent bystander, they were acquitted because it could not be shown that it was their act, and not that of the suppressing soldiers, which caused the homicide.<sup>7</sup> Early in the twentieth century the doctrine was extended to include the criminal liability of a felon for the death of an innocent party placed in a hazardous position by the felon and killed by a person resisting the crime.<sup>8</sup> Later the courts applied the doctrine to felons who precipitated a situation in which one resisting the felony inadvertently killed an innocent party.<sup>9</sup> The instant decision, involving the death of one of the perpetrators rather than an innocent victim, holds the felon liable for *any* homicide that could be reasonably foreseen to follow from his felonious act.<sup>10</sup> The decision epitomizes the increasing trend toward extending the application of the felony-murder doctrine by incorporating the tort law concept of proximate cause into criminal law.<sup>11</sup>

The Louisiana Criminal Code provides that murder is the killing of a human being when the offender is engaged in the perpetration of certain enumerated felonies.<sup>12</sup> Only one Louisiana case, *State v. Bessar*, has interpreted the limits of the Code's

7. *Commonwealth v. Campbell*, 89 Mass. 541, 83 Am. Dec. 705 (1863).

8. *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934) (bank teller, used as a shield by escaping robbers, killed by an officer); *Keaton v. State*, 41 Tex. Crim. 621, 57 S.W. 1125 (1900) (railroad train fireman, forced to seek entrance to the express car being defended by its occupants killed in the cross fire between robbers and defenders); *Taylor v. State*, 41 Tex. Crim. 564, 55 S.W. 961 (1900) (same incident as *Keaton* case); Annot., 12 A.L.R.2d 210 (1950).

9. *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201 (1952) (officer killed by a fellow officer in resisting the armed robbery of a bank); *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949) (in robbery of market, policeman killed, whether by the felons or the resisting officers was irrelevant); *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947) (gasoline station attendant killed in a robbery, whether by the felons or the owner of the station was immaterial); *Hornbeck v. State*, 77 So.2d 876, 878 (Fla. 1955) (dictum); Annot., 12 A.L.R.2d 210 (1950).

10. *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955). *Contra*, *People v. Garippo*, 292 Ill. 293, 300, 127 N.E. 75, 78 (1920) (dictum); *Commonwealth v. Moore*, 121 Ky. 97, 100, 88 S.W. 1085, 1086 (1905) (dictum). The dicta in the latter two cases anticipated the situation in the instant case and ruled the felony-murder doctrine inapplicable to those facts. The majority in the *Thomas* case refused to follow this restricted interpretation. Though the problem of conspiracy is often present in felony-murder cases, it does not affect the basic development pointed out above.

11. *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955) *passim*; *Commonwealth v. Moyer*, 357 Pa. 181, 198, 53 A.2d 736, 745 (1947).

12. LA. R.S. 14:30 (1950): "Murder is the killing of a human being:

"(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

"(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill."

felony-murder provision, and that case dealt merely with the duration of the vicarious liability. Then Justice Fournet construed the felony-murder statute to include homicide committed in an attempt to escape from the scene of the crime, or at the conclusion of the original offense for the purpose of preventing detection.<sup>13</sup> The court stated by way of dictum that "all [felons] are criminally responsible for the death . . . that ensues as a natural consequence of the common felonious purpose."<sup>14</sup>

In the instant case the majority of the Pennsylvania court indicated that in its view criminal liability under the felony-murder doctrine should encompass any death occurring during the course of the felony. Whether the deceased was an innocent victim or a participant in the felony was of no importance. The court based this extension of the felony-murder doctrine on the deterring effect that such a strict application might have on criminal tendencies.<sup>15</sup> In his dissent Justice Jones suggested that the felony-murder doctrine should only apply to a felon when he or his co-felon had killed a person. He reasoned that it was an anomaly to hold a co-felon guilty of murder for a justifiable homicide committed by one resisting the felony. He indicated that this erroneous result was reached by an imputation to the felon of the *act of killing* rather than of the *malice*, since there could be no malice implied from a justifiable homicide.<sup>16</sup> Justice Musmanno dissented on the ground that since the philosophy of criminal law is to punish wrong, criminal liability could not be based upon a justifiable homicide.<sup>17</sup>

A proper application of the felony-murder rule involves a balancing of the need for protection of society with the humanitarian concept that the punishment should be no more severe than the gravity of the individual's conduct warrants.<sup>18</sup> The Pennsylvania solution in the instant case tends to ignore the latter element. Although the language of the Louisiana court in the *Bessar* case is broad, it should be construed in the light

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13. *State v. Bessar*, 213 La. 299, 34 So.2d 785 (1948). The charge to the jury was to the effect that the defendant would be responsible for his own acts and those of a conspirator, but not for acts of one opposing the felony. This is an example of the original interpretation of the felony-murder doctrine. The Louisiana Supreme Court was not called upon to rule on this point in the charge.

14. *Id.* at 310, 34 So.2d at 789.

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

16. *Id.* at 659, 117 A.2d at 213.

17. *Id.* at 678, 117 A.2d at 221.

18. Arent & MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes*, 20 CORN. L.Q. 288, 312 (1935).

of the actual holding of that case, and does not necessarily imply that the felony-murder doctrine should be carried to the extreme of imposing responsibility where one of the perpetrators is justifiably killed. It is submitted that a judicious balancing of the factors already mentioned should preclude the Louisiana courts from following the regrettable extension of the felony-murder doctrine in Pennsylvania.

*William L. McLeod, Jr.*

#### CRIMINAL LAW — THEFT — MISREPRESENTATIONS AS TO FUTURE FACTS

Defendant agreed to purchase three automobiles from a car dealer and to pay for them by issuing sight drafts payable two days from date. At the time he knew his funds in the drawee bank were insufficient to cover the drafts. Subsequently he sold the automobiles to third persons without having paid any part of the purchase price. To a charge of theft defendant pleaded that the information did not charge a crime, contending that the drafts were mere promises to pay in the future and hence were representations as to future events. Defendant was nevertheless convicted. *Held*, affirmed. Article 67 of the Criminal Code<sup>1</sup> which provides in part that any "fraudulent conduct, practices or representations" constitutes theft, includes fraudulent representations as to future, as well as to past and existing, facts. *State v. Dabbs*, 228 La. 960, 84 So.2d 601 (1955).

At common law the crime of obtaining property by false pretenses is limited to representations of past or existing facts.<sup>2</sup> False representations as to future facts, no matter how misleading or dishonest, will not serve as a basis of criminal liability.<sup>3</sup> At first the crime was limited under the common law to the fraudulent use of false weights and measures.<sup>4</sup> Later it was

1. "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the owner or by means of fraudulent conduct, practices or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential." LA. R.S. 14:67 (1950).

2. *Jones v. State*, 236 Ala. 30, 182 So. 404 (1938); *United States v. Pearce*, 7 Alaska 246 (1924); *Willis v. State*, 34 Ariz. 363, 271 Pac. 725 (1938); *Territory v. Toak*, 33 Hawaii 560 (1935); *People v. Widmayer*, 265 Mich. 547, 251 N.W. 540 (1938).

3. See note 2 *supra*.

4. *Rex v. Wheatly*, 2 Burr. 1124, 97 Eng. Rep. 746 (K.B. 1761); HALL, THEFT, LAW AND SOCIETY 46 (2d ed. 1952).