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# THE FELONY MURDER DOCTRINE AND ITS APPLICATION UNDER THE NEW YORK STATUTES

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Although the felony murder doctrine has existed in the common law for several centuries, it is difficult to state its precise scope. In its broadest form it brings within the definition of murder all homicides committed in the perpetration of any felony, regardless of whether there existed an intention to cause death or great bodily harm. Yet the decisions, whether in New York or elsewhere, except in dicta, have never supported such a statement; if a rule were to be extracted from the actual holdings of the cases, it would be confined within much narrower boundaries. In the United States the felony murder doctrine has found its way into the statutes of nearly all the states—apparently without provoking any serious doubts as to its merits and without leading to any clearer definition of its scope. In the following pages the New York law of felony murder will be examined against its common law background and in comparison with the law of other jurisdictions in an effort to determine what limits should be placed upon its application—first as to the persons committing the homicide and then as to their associates in the underlying felony.

## FELONY MURDER AT COMMON LAW<sup>1</sup>

“Lawyer: A third kind of homicide is when a man kills another either by misfortune, or in the necessary defense of himself,

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<sup>1</sup>At common law murder was homicide with malice aforethought. Malice aforethought consisted of any of the following states of mind:

1. An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not.

2. Knowledge that the act or omission which causes death will probably cause the death of, or grievous bodily harm to, some person, whether the person killed or another, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

3. An intent to oppose by force any officer of justice in arresting or keeping in custody a person whom he has a right to arrest or keep in custody, or in keeping the peace.

4. An intent to commit any felony whatever. 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 21.

Query, under point 2, whether actual knowledge of the dangerous character of the act or omission is necessary. An intention to do an act which will probably

or of the King, or of his laws; for such killing is neither felony nor crime, saving, as Sir Edward Coke says (3 Inst. p. 56), that if the act that the man is doing, when he kills another man, be unlawful, then it is murder. As, if A meaning to steal a deer in the park of B, shooteth at the deer, and by a glance of the arrow killeth a boy that is hidden in a bush, this is murder, for that the act was unlawful; but if the owner of the park had done the like, shooting at his own deer, it had been by misadventure, and no felony.

"Philosopher: This is not distinguished by any statute but is the *common law* only of Sir Edward Coke. I believe not a word of it. If a boy be robbing an appletree, and falleth thence upon a man that stands under it and breaks his neck, but by the same chance saveth his own life, Sir Edward Coke, it seems, will have him hanged for it, as if he had fallen of premeditated malice. All that can be called crime in this business is but a simple trespass, to the damage perhaps of sixpence or a shilling. I confess the trespass was an offense against the law, but the falling was none, nor was it by the trespass but by the falling that a man was slain; and as he ought to be quit of the killing, so he ought to make restitution for the trespass."<sup>2</sup>

As early as 1536 it was held that if a person was killed accidentally by one of the members of a band engaged in a felonious act, all could be found guilty of murder.<sup>3</sup> Coke's statement went further, declaring that death resulting from any unlawful act was murder. Foster narrowed this rule to unlawful acts which were also felonious and *malum in se*.<sup>4</sup> It is from Blackstone's statement of the rule that the felony murder doctrine has become most widely known:

"When an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter."<sup>5</sup>

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kill or do great bodily harm may in itself be sufficient to make the ensuing homicide murder, regardless of whether the actor *knew* that such result would probably follow. CLARK AND MARSHALL, *CRIMES* (3d ed. 1927) § 244.

For an excellent discussion of the whole subject of malice aforethought, see Perkins, *A Re-examination of Malice Aforethought* (1934) 43 *YALE L. J.* 537. On the particular subject of this section, see Brown, *Constructive Murder and Felonious Intent* (1909) 34 *LAW MAG. & REV.* 453; "Constructive Murder" (1929) 67 *L. J.* 450.

<sup>2</sup> HOBBS, *ENGLISH WORKS* (Molesworth ed. 1840), *Dialogue of the Common Laws*, 86, 87.

<sup>3</sup> *Mansell & Herbert's Case*, 2 Dyer 128b (1536).

<sup>4</sup> FOSTER C. C. (1791) 258; 8 *HOLDSWORTH, HISTORY OF THE ENGLISH LAW* (1926) 435, 536.

<sup>5</sup> 4 *BL. COMM.* \*192, 193.

Blackstone's view has been widely adopted in the United States as a correct statement of the common law.<sup>6</sup>

In England, however, the opinion has grown that Blackstone and the other early text writers stated the law too broadly. Although in 1883 Judge Stephen wrote that murder differs from manslaughter in that malice aforethought is present, and that an intent to commit any felony whatever is one kind of malice aforethought,<sup>7</sup> today it is acknowledged that "After much difference of opinion, it may now be taken that homicides resulting from the commission of a felony, not involving danger to life, amount only to manslaughter."<sup>8</sup> In 1862, in an annotation to the famous case of *Rex v. Horsey*,<sup>9</sup> the need for limiting the scope of the felony murder doctrine was forcefully stated, and the suggestion made that the origin of the doctrine can be found in the rule that a man may resist a felony attempted with violence to the person even to the point of killing the malefactor, but may not so resist a mere misdemeanor or trespass.<sup>10</sup> When a person engaged in a crime in which he might lawfully be killed, the presumption arose that he himself meant to kill if he could not otherwise succeed—an intention sufficient to make the ensuing homicide murder. The annotator admits the validity of this presumption where the felonious act was homicidal in its nature and such as might naturally cause death, but strenuously objects to its application to acts not dangerous to human life. He expresses doubt that even deaths caused accidentally in the perpetration of rape, where rape was accomplished without independent and dangerous violence, are to be considered murder. Finally, this admonition: "The extension of the doctrine of constructive murder to statutable felonies would be still more questionable than its application to a common law felony only remotely likely to affect human life." Nearly all of the common law felonies were of such a nature that the perpetration of them involved a substantial risk to human life. They included arson, burglary, larceny, rape, robbery, and those offences which directly

<sup>6</sup>1 MITCHIE, HOMICIDE (1914) 112; note (1904) 63 L. R. A. 353.

<sup>7</sup>STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 21, 22.

<sup>8</sup>4 STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND (16th ed. 1914) 62.

<sup>9</sup>3 Fost. & F. 287.

<sup>10</sup>A more widely accepted explanation of the origin of the doctrine is the following: "If the crime intended was a felony, as at common law practically all felonies were punishable with death, either with or without benefit of clergy, the felonious intent of the intended crime was imputed to the committed act, and, if it were homicide, made it murder; for it was considered immaterial whether a man was hanged for one felony or another." *Powers v. Commonwealth*, 110 Ky. 386, 413, 61 S. W. 735, 742 (1901); *People v. Enoch*, 13 Wend. 159, 174 (N. Y. 1834).

contemplate death or great bodily injury. Larceny is the only one which did not usually involve danger to human life. A recent study of the decisions is said to reveal that cases applying the felony murder doctrine, whether English or American, invariably involve a "dangerous" felony.<sup>11</sup>

The common law doctrine regarding felony murders in England today is stated in Halsbury's *Laws of England*<sup>12</sup> as follows: "Where a person whilst committing or attempting to commit a felony does an act known to be dangerous to life and likely in itself to cause death, and the death of another person results as a consequence of that act, though not intended by the person committing it, the law implies malice aforethought and the person causing the death is guilty of murder." Based upon a widely-quoted dictum by Judge Stephen in *Rex v. Serné*,<sup>13</sup> this is said to be the way the present courts are instructing juries.<sup>14</sup> Such a charge, however, has been considered too favorable for the defense.<sup>15</sup> It overstates the extent to which danger must be apparent in the felonious act. An obvious and strong likelihood that death or great bodily injury would result need not have existed. It is sufficient that there was such chance of causing death as a reasonable man would take into consideration.<sup>16</sup> In England, then, the particular felonious undertaking which caused the death must have involved physical violence or danger to human life<sup>17</sup>; it is not enough, as it is in certain American jurisdictions,<sup>18</sup> that the felony in which the defendant was engaged belongs to a general class of felonies normally considered of a dangerous character.

Two other problems of current importance in connection with felony murder were considered in the early common law, and rules laid down which are still followed:

1. Whoever participates in the underlying felony, whether as principal in the first or second degree or as accessory before the fact,

<sup>11</sup>Perkins, *supra* note 1, at 561.

<sup>12</sup>Vol. 9 (2d ed. 1933) 437.

<sup>13</sup>16 Cox C. C. 311 (1887).

<sup>14</sup>HALSBURY, *loc. cit.* *supra* note 12.

<sup>15</sup>"So here, the jury might have been directed that if Betts, while in the act of committing a felonious act of violence against the person caused death by some act done by him in the course of that felonious act of violence, then he was guilty of murder. . . . The case was left to the jury more favorably than was necessary—they were told that it was only if they were satisfied that the act which he did was calculated in the judgment of ordinary people to cause death, that they should find him guilty of murder." *Rex v. Betts and Ridley*, 22 Cr. App. R. 148 (1930).

<sup>16</sup>*Regina v. Whitmarsh*, 62 Just. P. 711 (1898); *Rex v. Lumley*, 22 Cox C. C. 635 (1911); Perkins, *supra* note 1, at 559, 560.

<sup>17</sup>*Director of Public Prosecutions v. Beard*, [1920] A. C. 479, (1920) 34 HARV. L. REV. 78. <sup>18</sup>*Infra* at p. 294.

is responsible as principal or accessory for all that ensues in the prosecution of the felony, but not for acts distinct from the unlawful undertaking.<sup>19</sup>

2. "But in order to make the killing, by any, murder in all those who are confederated together for an unlawful purpose, merely on account of the unlawful act done or in contemplation, it must happen during the actual strife or endeavor, or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened."<sup>20</sup>

East's illustration is pertinent:

"Several persons were engaged in a smuggling transaction; and upon an attempt to oppose their design by the king's officers, one of the smugglers fired a gun, and killed one of his accomplices. It was agreed by the Court, that if the gun were discharged at the king's officers in prosecution of the original design, which was a fact to be found by the jury, it would be murder in them all, although one of the accomplices happened to be killed. But if done intentionally and with deliberation against the accomplice from anger or some precedent malice in the party firing, it would be murder in him only. In order, therefore, to affect the particular case by the general purpose in view at the time the death happened, the killing must be in pursuance of such unlawful purpose and not collateral to it."<sup>21</sup>

#### STATUTORY ADOPTION OF FELONY MURDER DOCTRINE IN NEW YORK STATE

In the first Revised Statutes passed in 1828 New York adopted the felony murder doctrine as stated by the old common law writers, providing that the killing of a human being was murder "when perpetrated without any design to effect death, by a person engaged in the commission of any felony."<sup>22</sup>

By the Laws of 1860,<sup>23</sup> the crime of murder was divided into the first and second degrees, defined as follows:

"All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or the attempt to perpetrate any arson, rape, robbery, or burglary, or in any attempt to escape from imprisonment, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree."

<sup>19</sup>4 BL. COMM. \*37. Illustrative of the exception is *Rex v. Hawkins*, 3 C. & P. 392 (1828), where after poachers had beaten a gamekeeper senseless and departed, one returned to rob him; the court held that the others were not guilty of the robbery.

<sup>20</sup>1 EAST P. C. 259 (1806).

<sup>21</sup>*Rex v. Plummer*, Kel. 109 (1701).

<sup>22</sup>2 N. Y. REV. STAT. (1829) 657, § 5 (3).

<sup>23</sup>C. 410, § 2.

Two years later this act was repealed, and the provisions of the Revised Statutes were in substance re-enacted, except that homicides perpetrated while committing the crime of arson remained murder in the first degree and all other felony murders became murder of the second degree.<sup>24</sup>

The act of 1862 in turn was amended by the Laws of 1873,<sup>25</sup> restoring all felony murders to the first degree and readopting the wording of the original Revised Statutes. By an amendment in 1876 the words "without any design to effect death" were omitted,<sup>26</sup> but these were restored in 1881 when the Penal Code was passed.<sup>27</sup>

In the Penal Code the section on felony murder reached its present form. With a petty change in 1882<sup>28</sup> and with the addition of the present subdivision 4 by the Laws of 1897,<sup>29</sup> the rest of the definition of first degree murder attained the form in which it now appears.<sup>30</sup> The present Section 1044 of the Penal Law reads as follows:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

"1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or,

"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.

"4. A person who wilfully, by loosening, removing or displacing a rail, or by any other interference, wrecks, destroys or so injures any car, tender, locomotive or railway train, or part thereof, while moving upon any railway in this State, whether operated by steam, electricity or other motive power, as to thereby cause the death of a human being, is guilty of murder in the first degree, and punishable accordingly."<sup>31</sup>

The words "upon or affecting the person killed or otherwise" in subdivision 2 have been held to include a felony on a person other than the decedent,<sup>32</sup> but not to limit the rule to felonies affecting

<sup>24</sup>Laws of 1862, c. 197, § 5; *Fitzgerrold v. People*, 37 N. Y. 413 (1868).

<sup>25</sup>C. 644, § 1.

<sup>26</sup>Laws of 1876, c. 333, § 1.

<sup>27</sup>Laws of 1881, c. 676, § 183.

<sup>28</sup>Laws of 1882, c. 384, § 1.

<sup>29</sup>C. 548, § 1.

<sup>30</sup>N. Y. CONS. LAWS (1909) c. 40, PENAL LAW § 1044.

<sup>31</sup>Italics are the writers'.

<sup>32</sup>*People v. Miles*, 143 N. Y. 383, 38 N. E. 456 (1894); *People v. Patini*, 208 N. Y. 176, 101 N. E. 694 (1913).

persons only.<sup>33</sup> Likewise, the courts have declared that the words "without a design to effect death" do not limit the felony murder rule to unintentional killings, but merely indicate that the element of intent is immaterial.<sup>34</sup> Subdivision 3 adds nothing to the preceding subdivision and is attributable to bad draftsmanship.<sup>35</sup>

#### FELONY MURDER PROVISIONS IN STATUTES OF OTHER JURISDICTIONS

Only five states have statutes similar to that of New York, making the killing of a human being by a person engaged in the commission of, or in an attempt to commit, any felony the crime of murder in the highest degree.<sup>36</sup> The statute of the District of Columbia is the same in effect, but it refers to crimes punishable with imprisonment in the penitentiary instead of to felonies.<sup>37</sup> Two states make such killing in the commission of any felony murder in the third degree.<sup>38</sup>

Most of the other American jurisdictions reserve their severest punishments for killings perpetrated in the commission of certain specified felonies, leaving those perpetrated in the course of lesser felonies to fall under the designation of murder in the second or third degree or manslaughter. Usually the felonies of arson, rape, robbery and burglary are specified.<sup>39</sup> Several states add mayhem to this list.<sup>40</sup> Maryland, New Jersey and North Dakota add sodomy;<sup>41</sup>

<sup>33</sup>People v. Greenwall, 115 N. Y. 520, 22 N. E. 180 (1889).

<sup>34</sup>Cox v. People, 80 N. Y. 500 (1880); People v. Schlieman, 197 N. Y. 383, 90 N. E. 950 (1910); People v. Sobieskoda, 235 N. Y. 411, 139 N. E. 538 (1923).

<sup>35</sup>People v. Greenwall, 115 N. Y. 520, 22 N. E. 180 (1889).

<sup>36</sup>KAN. REV. STAT. ANN. (1923) § 21-401; N. M. STAT. ANN. (Courtright, 1929) § 35-304; N. C. CODE ANN. (Michie, 1931) § 4200; OKLA. STAT. ANN. (Harlow, 1931) § 2216; S. D. COMP. LAWS (1929) § 4012.

<sup>37</sup>D. C. CODE (1929) tit. 6, § 21.

<sup>38</sup>MINN. STAT. (Mason, 1927) § 10070; WIS. STAT. (1933) § 340.09.

<sup>39</sup>ALA. CODE ANN. (Michie, 1928) § 4454; ALASKA COMP. LAWS (1913) § 1883; CONN. GEN. STAT. (1930) § 6043; FLA. COMP. GEN. LAWS ANN. (1927) § 7137; IND. STAT. ANN. (Burns, 1933) § 10-3401; MICH. COMP. LAWS (1929) § 16708; MISS. CODE ANN. (1930) § 985; NEB. COMP. STAT. (1929) § 28-401; NEV. COMP. LAWS (Hillyer, 1930) § 10068; N. H. PUB. LAWS (1926) c. 392, § 1; OHIO CODE ANN. (Throckmorton, 1934) § 12400; ORE. CODE ANN. (1930) § 14-201; R. I. GEN. LAWS (1923) § 6013; UTAH REV. STAT. ANN. (1933) § 103-21-3; VT. PUB. LAWS (1934) § 8374; VA. CODE (Michie, 1930) § 4393; W. VA. CODE (Michie, 1932) § 5916; WYO. REV. STAT. ANN. (Courtright, 1931) § 32-204.

<sup>40</sup>ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4584; CAL. PEN. CODE (Deering, 1931) § 187; COLO. ANN. STAT. (Mills, 1930) § 6665; IDAHO CODE ANN. (1932) § 17-1104; IOWA CODE (1931) § 12910; MD. ANN. CODE (Bagby, 1924) art. 27, § 397; MO. STAT. ANN. (Vernon, 1932) § 3982; MONT. REV. CODE ANN. (Choate, 1921) § 10953; N. D. COMP. LAWS ANN. (1913) § 9462; P. R. COMP. REV. STAT. & CODES (1913) § 199.

<sup>41</sup>MD. ANN. CODE (Bagby, 1924) art. 27, § 397; N. J. COMP. STAT. (1911) tit. 52, § 106; N. D. COMP. LAWS ANN. (1913) § 9462.

Pennsylvania adds kidnapping;<sup>42</sup> and Arkansas, Tennessee, and Washington add larceny.<sup>43</sup>

Kentucky, Louisiana, Maine, South Carolina, and Texas make no specific mention of felony murders, but seem to include them within the meaning of "willful murder" or "homicide with malice aforethought", which are taken to embrace murder as it exists at common law.<sup>44</sup> Georgia and Illinois do the same, except that to their sections on involuntary homicide are appended reservations providing that homicides committed in the course of a felony shall be murder.<sup>45</sup>

In Delaware and Hawaii, murder in the first degree covers only homicides which occur in the commission of, or in the attempt to commit, crimes punishable with death,<sup>46</sup> and in Massachusetts crimes punishable with death or life imprisonment.<sup>47</sup> Other felony murders appear to be of the second degree.

In Minnesota and Wisconsin, where homicide committed in the perpetration of any felony is only third degree murder, felony murder is punishable by a minimum prison sentence of seven years, with a maximum of thirty years in the former state and of fourteen in the latter.<sup>48</sup> In all other American jurisdictions discussed above, except Texas and Illinois, felony murders are punishable by no less than death or life imprisonment. Texas and Illinois have five and fourteen years respectively as their minimum punishment for murder, but the maximum is life imprisonment or death.<sup>49</sup>

In Canada and New Zealand an accidental killing is murder if it occurs in the commission of certain specified felonies, provided that the felon intended to inflict grievous bodily harm for the purpose of facilitating his felonious purpose or his escape.<sup>50</sup> Bermuda has the same provision for all offenses as to which an arrest can be made without a warrant, and also a provision that death caused by an act

<sup>42</sup>PA. STAT. ANN. (Purdon, 1930) tit. 18, § 2221.

<sup>43</sup>ARK. DIG. STAT. (Crawford & Moses, 1921) § 2343; TENN. CODE ANN. (Michie, 1932) § 10767; WASH. REV. STAT. ANN. (Remington, 1932) tit. 14, § 2392.

<sup>44</sup>Kentucky and Louisiana have no statutory definition of murder. ME. REV. STAT. (1930) c. 129, § 1; S. C. CODE (Michie, 1932) § 1101; TEX. ANN. PEN. CODE (Vernon, 1925) art. 1256.

<sup>45</sup>GA. CODE ANN. (Michie, 1926) §§ 60, 67; ILL. REV. STAT. (Cahill, 1933) c. 38, §§ 337, 342.

<sup>46</sup>DEL. REV. CODE (1915) § 4697; HAWAII REV. LAWS (1925) § 4115.

<sup>47</sup>MASS. GEN. LAWS (1932) c. 265, § 1.

<sup>48</sup>MINN. STAT. (Mason, 1927) § 10070; WIS. STAT. (1933) § 340.09.

<sup>49</sup>ILL. REV. STAT. (Cahill, 1933) c. 38, § 339; TEX. ANN. PEN. CODE (Vernon, 1925) art. 1257.

<sup>50</sup>CANADA CRIM. CODE (Tremear, 1929) 260; NEW ZEALAND CONSOL. STAT. (1908) No. 32, § 183.

done in prosecution of an unlawful purpose is murder if the act is of such nature as to be likely to endanger human life.<sup>51</sup> These statutes reflect the development in the English law away from the doctrine that death caused during the commission of any felony is murder. The sentence in each of these countries for the type of murder described is death.

In Germany, unless changes have been made by the Hitler government, homicide committed in the course of a felony is not found among the homicide statutes, but appears in the guise of aggravated degrees of the various crimes.<sup>52</sup> In most cases the punishment for an aggravated felony is imprisonment for from ten years to life.

#### DEFINITION OF FELONY

At common law a felony was an offense which occasioned a total forfeiture of land or goods or both, to which capital or other punishment might be superadded.<sup>53</sup> In New York a felony is defined by Section 2 of the Penal Law as "a crime which is or may be punishable by death or imprisonment in a state prison." This section seems to create a new class of felonies, to which the felony murder doctrine by the terms of Section 1044 of the Penal Law is applicable. Two early cases bear out such an interpretation. In *People v. Enoch*,<sup>54</sup> the court declared that "as often as the legislature creates new felonies, or raises offences 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 killing of a human being, by a person who is engaged in the perpetration of a newly created felony."<sup>54a</sup> In *People v. Van Steenburg*,<sup>55</sup> a homicide committed by a person engaged in a crime punishable by imprisonment in state prison or in county jail or by a fine was held to be a felony murder.

A subsequent case, *Fassett v. Smith*,<sup>56</sup> seemed to intimate, however, that the statute, which then defined felony as "an offense for which the offender on conviction shall be liable to be punished by death,

<sup>51</sup>BERMUDA LAWS (1690-1930) § 238.

<sup>52</sup>DEUTSCHE REICHGESETZE (Schönfelder, 1931), STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH, §§ 178, 251, 307, 315. See also §§ 221, 226, 229, 239, 321-323.

<sup>53</sup>4 BL. COMM. \*94, 95.

<sup>54</sup>13 WEND. 159, 174 (N. Y. 1834).

<sup>54a</sup>"So, on the other hand, when the Legislature abolishes an offense which at the common law was a felony, or reduces it to the grade of misdemeanor only, the case of an unlawful killing, by a person engaged in an act which was before a felony, will no longer be considered to be murder, but manslaughter merely." *Ibid.*

<sup>55</sup>1 Park Cr. 39 (N. Y. 1845). *Accord*: *State v. Smith*, 32 Me. 369 (1851); *State v. Green*, 66 Mo. 631 (1877).

<sup>56</sup>23 N. Y. 252 (1861).

or by imprisonment in a state prison",<sup>57</sup> did not assume to define the term "felony" except when used in a statute, leaving the common law to govern wherever an offense is not specifically labeled "felony". This interpretation of the case was soon discarded, and the statements of the court were taken to mean only that a crime punishable in either state prison or county jail in the alternative was not a felony within the terms of the statute.<sup>58</sup> Accepting this as the law, the court in *Foster v. People*<sup>59</sup> declared that assault with a dangerous weapon, punishable by imprisonment in state prison or county jail, could not be made the basis of a charge of felony murder. The confused statements of the *Fassett* case were later discredited by the Court of Appeals in *People v. Lyon*,<sup>60</sup> which established that if under the terms of a statute the offender is liable to be punished by imprisonment in the state prison, the offense is a felony, regardless of other possible sentences, such as a fine or imprisonment in the county jail. This decision would appear to have deprived the dictum in the *Foster* case of any foundation, leaving the *Van Steenburg* decision unchallenged.

In reference to the immediate question before it, the *Fassett* case held simply that one who purchases in good faith and for value from a person who procured the property by false pretenses obtains a good title. This was the rule at common law, where obtaining goods by false pretenses was not a felony, and is still the rule in New York, where by statute such conduct has been made a felony, despite the principle that the owner of property feloniously taken can follow and reclaim it wherever found.<sup>61</sup> The creation of new statutory felonies, according to *Benedict v. Williams*,<sup>62</sup> does not necessarily affect or extend the operation of rules of the common law applicable in their rationale only to common law felonies. There was a more fundamental reason at common law for enabling a bona fide purchaser to obtain title to property obtained by false pretenses, but not to property obtained by common law larceny, than the mere fact that the latter was a felony and the former was not. "Larceny at common

<sup>57</sup>2 N. Y. REV. STAT. (1829) 702.

<sup>58</sup>*People v. Park*, 41 N. Y. 21 (1869).

<sup>59</sup>50 N. Y. 598, 604 (1872).

<sup>60</sup>99 N. Y. 210, 1 N. E. 673 (1885), *rev'g*, *People v. Lyon*, 33 Hun 623 (1884). *Accord*: *People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105 (1893), *citing*, *People v. Borges*, 6 Abb. Pr. 132 (1858); *People v. Hayman*, 94 Misc. 624, 159 N. Y. Supp. 981 (1916); *People ex rel. Childs v. Knott*, 187 App. Div. 604, 614, 176 N. Y. Supp. 321, 328 (1st Dept. 1919).

<sup>61</sup>But *cf.* *Amols v. Bernstein*, 214 App. Div. 469, 212 N. Y. Supp. 518 (1st Dept. 1925); note (1926) 11 CORNELL LAW QUARTERLY 422.

<sup>62</sup>48 Hun 123 (N. Y. 1888).

law was the feloniously taking property, which was without the consent of the owner, while the obtaining of it by false pretenses was produced by the consent and delivery of it by the owner to the fraudulent vendee, and when so delivered, with the intent at the time being to part with the title and invest it in the latter, the effect of the common law larceny was not given to it so as to defeat the title of a bona fide purchaser for value."<sup>63</sup> The reason for this distinction, the court pointed out, continues to exist despite the fact that obtaining property by false pretenses has been made a statutory felony.

The early decisions holding the felony murder doctrine applicable to statutory felonies have raised no discussion and seem to be accepted as the law. It is not inconceivable, however, that some court, unwilling to extend the harsh theory of felony murder to statutory felonies which were not included in the common law doctrine, may pick up the suggestion of the *Benedict* case and say that the doctrine of felony murder found its justification at common law in the dangerous character of nearly all the common law felonies and hence should not be applied to statutory felonies which do not involve similar risk to human life.<sup>63a</sup>

#### NATURE OF THE UNDERLYING FELONY

Every time a homicide which is not justifiable or excusable is committed, the killer may be said to have been engaged in a felony. To hold him guilty of felony murder, however, would eliminate all existing distinctions between murder and manslaughter and their various degrees. A necessary qualification of the felony murder rule, therefore, is that the felony in which the defendant was engaged must have been independent of the homicide. For a number of years the New York courts struggled with the question whether the felony murder theory could ever be applied where the acts of violence which constituted the felony were the very acts which caused the death. In *Buel v. People*<sup>64</sup> it was finally established, however, that a felony murder conviction may be based upon an attempt at rape, even though death was caused by the acts of violence which constituted the felonious attempt, the court pointing out that "While force and violence constitute an important element of the crime of

<sup>63</sup>*Id.* at 126.

<sup>63a</sup>See *Powers v. Commonwealth*, 110 Ky. 386, 415, 416, 61 S. W. 735, 742 (1901). In *People v. Pavlic*, 227 Mich. 562, 199 N. W. 373 (1924), the court refused to apply the felony murder doctrine to the statutory felony of selling liquor on the ground it was only *malum prohibitum*, not *malum in se*.

<sup>64</sup>78 N. Y. 492 (1879), *aff'g*, *Buel v. People*, 18 Hun 487 (1879) on broader grounds. The early New York cases are reviewed in these decisions.

rape, they do not constitute the entire body of that offense." From this developed the present rule that although there need be no acts collateral to or independent of those which caused death, the elements constituting the underlying felony must be so distinct from those of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder.<sup>65</sup>

The problem of the merger in the homicide of a felonious assault upon the decedent did not arise in connection with the felony murder doctrine at common law, because an intent to cause grievous bodily harm, or knowledge that the acts causing death will probably cause such harm, was in itself sufficient to constitute the killing murder. Under statutes like those in New York, however, with their attempt at precise definition of different degrees of murder and manslaughter,<sup>66</sup> the courts faced something of a dilemma. To apply the felony murder principle would convert many homicides which fall within the definition of second degree murder or manslaughter into first degree murder—as where death results from an assault with intent to kill made in the heat of passion. On the other hand, death resulting from a simple felonious assault falls within the wording of the felony murder sections and does not otherwise come within the statutory definitions of murder or manslaughter; yet it could hardly be intended to let such homicide go unpunished. Seven years after the *Buel* case, one appellate court still regarded it as an open question whether death resulting from a felonious assault would support a charge of felony murder.<sup>67</sup> In recent years, however, the law has been settled as follows:

Where the assault is committed upon the deceased, it becomes merged in the homicide and cannot be made the basis of a conviction for felony murder.<sup>68</sup> But where the killing occurs while the defendant

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<sup>65</sup>People v. Huter, 184 N. Y. 237, 77 N. E. 6 (1906); People v. Spohr, 206 N. Y. 100, 100 N. E. 444 (1912). <sup>66</sup>PENAL LAW §§ 1044-1052.

<sup>67</sup>People v. Sweeney, 41 Hun 332 (N. Y. 1886).

<sup>68</sup>People v. Huter, 184 N. Y. 237, 77 N. E. 6 (1906); People v. Spohr, 206 N. Y. 100, 100 N. E. 444 (1912); People v. Moran, 246 N. Y. 100, 158 N. E. 35 (1927). *Accord*: State v. Fisher, 120 Kan. 226, 243 Pac. 291 (1926), *citing* 29 C. J. 1107. Faced with the same problem as New York regarding deaths resulting from felonious assaults, Missouri held at first that the assault was a proper basis for a charge of felony murder. State v. Jennings, 18 Mo. 435 (1853); State v. Nuesslein, 25 Mo. 111 (1857). These cases were overruled, however, by State v. Shock, 68 Mo. 552 (1878), in which both sides of the problem are ably discussed in majority and dissenting opinions and in which the early New York cases are critically analyzed. The statute was subsequently changed to eliminate the ambiguity by limiting the felony murder rule to "arson, rape, robbery, burglary, and mayhem" instead of the former "arson, rape, robbery, burglary, or other felony".

is engaged in a felonious assault upon a person other than the deceased, the assault may be treated as an independent felony and will sustain a charge of felony murder.<sup>69</sup> The difference between these two situations is well illustrated in the case of *People v. Wagner*,<sup>70</sup> where the defendant, interrupted in an assault upon *A*, assaulted and killed the interfering party, *B*. The court held that the assault upon *A* would sustain a conviction of felony murder for the death of *B*, but that the assault upon *B* was merged in the homicide and could not serve as the independent felony necessary for such a conviction.

In *People v. Marendi*<sup>71</sup> the felony of carrying concealed weapons was held to be merged in the homicide.

The felony murder rule has been applied in New York to homicides committed in the perpetration of the following independent felonies: burglary,<sup>72</sup> robbery,<sup>73</sup> rape,<sup>74</sup> escaping from prison,<sup>75</sup> escaping from arrest for a felony,<sup>76</sup> tramp entering building against the will of the owner or occupant,<sup>77</sup> and assault upon a person other than the decedent.<sup>78</sup> No cases of homicide from arson have been discovered, but arson is obviously within the general doctrine and is also specifically

<sup>69</sup>*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. Van Norman*, 231 N. Y. 454, 132 N. E. 147 (1921).

<sup>70</sup>245 N. Y. 143, 156 N. E. 644 (1927).

<sup>71</sup>213 N. Y. 600, 107 N. E. 1058 (1919). It was formerly understood that to support a charge of manslaughter under Penal Law § 1050, the misdemeanor in which defendant was engaged at the time of the homicide need not have been separate from the act of killing. *People v. Stacy*, 119 App. Div. 743, 104 N. Y. Supp. 615 (3d Dept. 1907); *People v. Darragh*, 141 App. Div. 408, 126 N. Y. Supp. 522 (1st Dept. 1910). In a recent opinion, however, the Court of Appeals follows the analogy of merger of the felony in the homicide and holds that the misdemeanor of reckless driving is merged in the charge of first degree manslaughter. *People v. Grieco*, 266 N. Y. 48, 193 N. E. 292 (1934).

<sup>72</sup>*Dolan v. People*, 64 N. Y. 485 (1876); *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989 (1903); *People v. Giro*, 197 N. Y. 152, 90 N. E. 432 (1910); *People v. Marwig*, 227 N. Y. 382, 125 N. E. 535 (1919).

<sup>73</sup>*People v. Wise*, 163 N. Y. 440, 57 N. E. 740 (1900); *People v. Lingley*, 207 N. Y. 396, 101 N. E. 170 (1913); *People v. Michalow*, 229 N. Y. 325, 128 N. E. 228 (1920); *People v. Slover*, 232 N. Y. 264, 133 N. E. 633 (1921); *People v. Florence*, 146 Misc. 735, 262 N. Y. Supp. 775 (1933).

<sup>74</sup>*Buel v. People*, 78 N. Y. 492 (1879); *People v. Schermerhorn*, 203 N. Y. 57, 96 N. E. 376 (1911); *People v. Walter*, 203 N. Y. 484, 97 N. E. 30 (1911).

<sup>75</sup>*People v. Johnson*, 110 N. Y. 134, 17 N. E. 684 (1888); *People v. Flanigan*, 174 N. Y. 356, 66 N. E. 988 (1903).

<sup>76</sup>*People v. Wilson*, 145 N. Y. 628, 40 N. E. 392 (1895).

<sup>77</sup>*People v. Deacons*, 109 N. Y. 374, 16 N. E. 676 (1888).

<sup>78</sup>*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. Van Norman*, 231 N. Y. 454, 132 N. E. 147 (1921); *People v. Wagner*, 245 N. Y. 143, 156 N. E. 644 (1927).

mentioned in a separate paragraph of the statute covering first degree murder.<sup>79</sup>

With the exception of the peculiar felony affecting tramps, these crimes form the basis of felony murder convictions wherever the doctrine exists.<sup>80</sup> Other jurisdictions also include the felonies of abortion and derailing trains, but in New York these situations are covered by special provisions of the Penal Law.<sup>81</sup>

#### THE CONNECTION BETWEEN THE UNDERLYING FELONY AND THE HOMICIDE

The New York statute stipulates only that the killing be "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."<sup>82</sup> A statute of this type, according to Perkins,<sup>83</sup> "seems to cover every case in which there was a legally recognizable causal connection between the felonious act and the death, however remote the element of human risk may seem to have been." The absence of comment in the New York cases on the character of the felony and its tendency to endanger life appears to justify this observation. One might suppose, therefore, that no matter how peaceful or mild the felony, or how unpredictable or accidental the ensuing homicide, the felon would be guilty of first degree murder.

It is sometimes stated as a general rule that though the felony be not dangerous to life, and the killing be accidental, still the homicide is murder.<sup>84</sup> The statement that the killing may be accidental finds support not only in dicta, but in clear holdings.<sup>85</sup> As indicated pre-

<sup>79</sup>PENAL LAW § 1044 (3).

<sup>80</sup>Extensive citations can be found in 1 MITCHIE, HOMICIDE (1914) 116-119.

<sup>81</sup>PENAL LAW §§ 1050, 1044 (4). Section 1050 specifically makes it manslaughter in the first degree to cause the death of a woman by supplying or administering to her any drug or instrument intended to procure a misarrriage. PENAL LAW § 82 makes the supplying of such materials with the intent to produce a miscarriage a felony, so that, except for § 1050, death produced by such means would be murder in the first degree. Section 1991 makes it a felony to cause certain injuries to railroad property, and § 1044 (4) specifically makes it first-degree murder to cause the death of a human being by such injuries to railroad property. Unless it can be said that the commission of the felony under § 1991 ends when the defendant has finished loosening the rail or otherwise creating a dangerous situation, so that defendant is no longer engaged in a felony when the homicide occurs, the homicide would seem to fall under the felony murder doctrine, and § 1044 (4) duplicates § 1044 (2). <sup>82</sup>PENAL LAW § 1044. <sup>83</sup>*Supra* note 1, at 563.

<sup>84</sup>2 BISHOP, CRIMINAL LAW (9th ed. 1923) 527.

<sup>85</sup>Commonwealth v. Lessner, 274 Pa. 108, 118 Atl. 24 (1922); McCutcheon v. State, 199 Ind. 247, 155 N. E. 544 (1927); Commonwealth v. McManus, 282 Pa. 25, 127 Atl. 316 (1925); People v. Udwin, 254 N. Y. 255, 172 N. E. 489 (1930); State v. Best, 44 Wyo. 383, 12 P. (2d) 1110 (1932).

viously, however, the statement as to non-dangerous felonies appears to be based upon dicta alone. There is some evidence that the courts will not apply the felony murder rule to such non-violent felonies as selling liquor or removing a cornerstone.<sup>86</sup> *Powers v. Commonwealth*<sup>86a</sup> and *State v. Glover*<sup>87</sup> are outstanding among the American cases for their intelligent attempt to define the boundaries of the felony murder doctrine. In the latter the court concludes that the weight of authority requires that "the homicide must be an ordinary and probable effect of the felony", pointing out that if the defendant had no reason to believe any one would be injured, the killing is not the natural and probable result.<sup>88</sup> It is significant that the *Glover* case was decided under a statute which applies the felony murder doctrine only to certain specified felonies of a type usually considered dangerous to human life.<sup>89</sup> It seems, therefore, to go as far as some of the English cases in requiring not merely a felony of the kind usually considered dangerous, but also some foreseeability of risk to human life in the particular acts undertaken. The language of the statute no more suggested such an interpretation than does the language of the New York statute. Since there is no felony murder case in New York which does not involve a dangerous felony and human risk which a reasonable man might anticipate, the courts may yet hesitate, despite the broad language of the statute, to apply the rule to non-violent felonies or to acts from which danger to human life is extremely remote.

Although the New York statute speaks only of a "killing by a person engaged in" committing or attempting a felony, *Buel v. People* says that it is necessary to show that "death ensued in consequence of the felony".<sup>90</sup> Under a statute similarly worded, the Wis-

<sup>86</sup>*People v. Pavlic*, 227 Mich. 562, 199 N. W. 373 (1924). See *Powers v. Commonwealth*, 110 Ky. 386, 416, 61 S. W. 735, 742 (1901).

<sup>86a</sup>*Ibid.*

<sup>87</sup>330 Mo. 709, 50 S. W. (2d) 1049 (1932), 87 A. L. R. 414 (1933). The defendant set fire to a building; held, the death of a fireman in fighting the fire was a natural and probable result of the arson.

<sup>88</sup>*Id.* at 719, 722, 50 S. W. (2d) at 1052, 1054. In 29 C. J. 1073 there is a similar statement to the effect that the homicide must be an ordinary and probable result, but both of the supporting citations go only so far as to say that a co-conspirator in a felony murder can be held only for the natural and probable effects of the common felonious design—a distinct proposition to be discussed later in this report.

<sup>89</sup>4 MO. STAT. ANN. (Vernon, 1932) § 3982.

<sup>90</sup>78 N. Y. 492, 497 (1879). Where the commission of a robbery causes deceased to be killed by the shot of a third person, the robbers may be guilty of first degree murder. *Wilson v. State*, 188 Ark. 846, 68 S. W. (2d) 100 (1934), note (1934) 25 J. CRIM. L. 283; *Taylor v. State*, 41 Tex. Crim. R. 564, 55 S. W. 961 (1900); *Keaton v. State*, 41 Tex. Crim. R. 621, 57 S. W. 1125 (1900).

consin court refused to consider the felony murder rule in connection with the death of a family in a fire alleged to have been caused by defendant while attempting rape, declaring that "the felony committed must have some intimate and close relation with the killing and must not be separate, distinct, and independent from it."<sup>91</sup> In Texas, where driving while intoxicated is made a felony, one who was driving while intoxicated when a flat tire causes his car to swerve into a ditch and kill somebody was not considered subject to a charge of felony murder.<sup>92</sup> These cases suggest the rather extreme decision of *Regina v. Horsey*,<sup>93</sup> where a person committing arson was not held responsible for the death of a tramp who entered the enclosure after the fire had been set, on the ground that the intervening act of the tramp had broken the causal chain.

Since the *Buel* case, the New York courts have not spoken in terms of causation, but have looked to see whether the homicide occurred while the defendant was "engaged in the commission of, or in an attempt to commit a felony" as required by the terms of the statute. The problem of causation seems to be chiefly a question of the duration of the felony or attempt. Only killings committed during the period between the inception of the attempt to commit the felony and the consummation of the felony or the frustration and abandonment of the attempt will be treated as felony murders.<sup>94</sup>

The question of when the perpetration of the felony has ceased—by completion or abandonment of the undertaking—is constantly being litigated before the Court of Appeals.<sup>95</sup> Convictions for felony murder have been reversed when the evidence showed that at the time of the homicide defendant was no longer engaged in the assault upon a third person which was the underlying felony relied on by the prosecution.<sup>96</sup> Likewise, in connection with burglaries and robberies, which create the most vexing problems and are most often appealed, it has been held error to submit the theory of felony murder where it

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<sup>91</sup>*Pliemling v. State*, 46 Wis. 516, 1 N. W. 278 (1879).

<sup>92</sup>*Burton v. State*, 122 Tex. Crim. App. 363, 55 S. W. (2d) 813 (1932).

<sup>93</sup>Fost. & F. 287 (1862).

<sup>94</sup>*People v. Ryan*, 263 N. Y. 298, 189 N. E. 225 (1934), note (1934) 25 J. CRIM. L. 283. See editorial, *Necessity for the Continuance of the Underlying Crime*, N. Y. L. J., Feb. 9, 11, 1935, at 722, 746.

<sup>95</sup>The question of when the felony may be said to have begun—that is, when the plan has progressed far enough to constitute an attempt—is fully discussed in *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989 (1903) and *People v. Sobieskoda*, 235 N. Y. 411, 139 N. E. 558 (1923).

<sup>96</sup>*People v. Marendi*, 213 N. Y. 600, 107 N. E. 1058 (1915); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927); *Hoffman v. State*, 88 Wis. 166, 59 N. W. 588 (1894).

is clear from such facts as departure from the premises and abandonment of the loot that the defendant was no longer engaged in the commission of a felony when the killing occurred.<sup>97</sup>

While it is possible to have situations where only one conclusion can be drawn as to whether or not the homicide took place during the commission of the felony, the instances where a trial judge may charge the point as a matter of law are exceptional.<sup>98</sup> Normally the question is for the jury; and where under any reasonable interpretation the facts might support a belief that the underlying felony had been consummated or abandoned, it is error not to submit this possibility to the jury.<sup>99</sup> The instruction in such a case should point out generally:

"That the killing to be felony murder must occur while the actor or one or more of his confederates is engaged in securing the plunder or in doing something immediately connected with the underlying crime (*Dolan v. People*, 64 N. Y. 485); that escape may, under certain unities of time, manner and place, be a matter so intimately connected with the crime as to be part of its commission (*People v. Giro*, 197 N. Y. 152); but that where there is no reasonable doubt of a complete intervening desistance from the crime, as by the abandonment of the loot, and running away, the subsequent homicide is not murder in the first degree without proof of deliberation and intent. (*People v. Marwig*, 227 N. Y. 382)."<sup>100</sup>

Presence on the premises is important as indicating that the criminal was still engaged in the original crime.<sup>101</sup> But it is not conclusive. Where the defendant had been captured in the attempted robbery and had been handcuffed, his subsequent firing of a gun on the premises was held not to have occurred in the commission of the felony.<sup>102</sup> On the other hand, merely leaving the premises is not sufficient to

<sup>97</sup>*People v. Young*, 40 Misc. 256, 81 N. Y. Supp. 967 (1903); *People v. Huter*, 184 N. Y. 237, 77 N. E. 6 (1906); *People v. Marwig*, 227 N. Y. 382, 125 N. E. 535 (1919). In a lucid dissenting opinion in *Commonwealth v. Dorris*, 8 Pa. D. & C. 210 (Ct. of Oyer and Terminer, 1926), Gordon, Jr., J. reviews the New York cases with approval and suggests that a distinction has been drawn between attempted escapes from the actual scene of the crime and flight after an escape has been effected. Cf. *People v. Giro*, 197 N. Y. 152, 90 N. E. 432 (1910), with *People v. Marwig*, *supra*.

<sup>98</sup>*People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933).

<sup>99</sup>*People v. Smith*, 232 N. Y. 239, 133 N. E. 574 (1921); *People v. Collins*, 234 N. Y. 355, 137 N. E. 753 (1922); *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933); *People v. Ryan*, 263 N. Y. 298, 189 N. E. 225 (1934).

<sup>100</sup>*People v. Walsh*, 262 N. Y. 140, 148, 186 N. E. 422, 424 (1933).

<sup>101</sup>*People v. Dolan*, 64 N. Y. 485 (1876); *People v. Myer*, 162 N. Y. 357, 56 N. E. 758 (1900); *People v. Michalow*, 229 N. Y. 325, 128 N. E. 228 (1920).

<sup>102</sup>*People v. Smith*, 232 N. Y. 239, 133 N. E. 574 (1921).

clear the defendant of the felony. Where his accomplice remains upon the premises and a killing occurs, defendant is held for this natural result of the criminal scheme which he helped to initiate; it may be too late to retire.<sup>103</sup> Or the defendant might have been entirely outside the building when he shot and still have been engaged in the robbery, if he was getting away with the loot or was doing anything to aid his confederates in getting away with it.<sup>104</sup>

By setting narrow limits to the time during which a felony may be considered in progress, New York has substantially reduced the applicability of the stringent felony murder rule. Not all states have been so lenient. In a few jurisdictions if the killing is so closely connected with the robbery as to be part of the *res gestae*, it is considered part of the felony, even though it occurs during flight and after defendant had abandoned the loot and left the building.<sup>105</sup> The Pennsylvania courts have gone so far as to convict of felony murder a robber who was arrested as he attempted to flee and whose companions, having abandoned the property, later shot a policeman while trying to make good their own escape.<sup>106</sup> Where the robbers have not relinquished the property in their flight, the courts generally, including the New York courts, are inclined to consider the felony still in progress.<sup>107</sup>

#### RESPONSIBILITY OF THE ACCOMPLICE IN THE UNDERLYING FELONY FOR THE ENSUING HOMICIDE

A large number of decisions in New York hold that a person who engages in a felony in the commission of which one of his confederates causes the death of a human being shares that confederate's responsibility for the homicide. The courts follow three different lines of reasoning in attaining this result:

1. Some cases proceed on the theory that "the penal responsibility

<sup>103</sup>People v. Nichols, 230 N. Y. 221, 129 N. E. 883 (1921).

<sup>104</sup>People v. Huter, 184 N. Y. 237, 77 N. E. 6 (1906); People v. Udwin, 254 N. Y. 255, 263, 172 N. E. 489, 492 (1930); People v. Butler, 254 N. Y. 624, 173 N. E. 894 (1930); People v. Walsh, 262 N. Y. 140, 148, 186 N. E. 422, 424 (1933).

<sup>105</sup>Conrad v. State, 75 Ohio St. 52, 78 N. E. 957 (1906), *citing*, Bissot v. State, 53 Ind. 408 (1876) and Francis v. State, 104 Neb. 5, 175 N. W. 676 (1919).

<sup>106</sup>Commonwealth v. Doris, 287 Pa. 547, 135 Atl. 313 (1926), *opinion of lower court noted in* (1927) 40 HARV. L. REV. 651. See Commonwealth v. Lawrence, 282 Pa. 128, 132, 127 Atl. 465, 467 (1925). In general the attitude of the New York Courts is said to prevail, and escape and flight after abandonment of the loot are not normally to be considered part of the perpetration of the felony. See notes (1933) 24 J. CRIM. L. 598, (1904) 63 L. R. A. 360-372.

<sup>107</sup>*Supra* note 104. State v. Habig, 106 Ohio St. 151, 140 N. E. 195 (1922); State v. Daniels, 119 Wash. 557, 205 Pac. 1054 (1922).

for the killing of a human being 'by a person engaged in the commission of, or in an attempt to commit a felony' . . . by statute extends to all concerned in the felony or 'attempt to commit a felony' . . ."<sup>108</sup> While Section 1044 of the Penal Law in terms refers only to the person who actually does the killing, Section 2 reads:

"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'."

Hence,

" . . . it is immaterial whether one or all of the conspirators intended to use force, whether they were armed or unarmed, whether one or all were actually present when the murder was committed. The design to effect death is not an element of the crime. If in fact, one did kill 'while engaged in the commission of a felony', all are guilty of murder in the first degree."<sup>109</sup>

2. In another group of decisions the court is not content to rely upon the statute alone, but rests the liability of those who collaborated in the underlying felony upon the principle that all who engage in a conspiracy to commit an unlawful act are responsible for the natural and probable results of their common undertaking.<sup>110</sup>

3. The third group embraces a theory which is really not part of the felony murder doctrine, but which is regularly confused with it because the defendants were at the time of the homicide engaged in a felony and because, in addition, felony murder may have been presented as an alternative theory. In these cases all the conspirators are held equally guilty because their common design included an actual intent to kill if necessary to attain their objects or because the homicide was "a natural result of a conspiracy or plan mutually to resist and overcome any opposition to escape."<sup>111</sup> Here their responsibility rests not upon their participation in any felony, but upon an actual intention in one or all to take a life.<sup>112</sup>

<sup>108</sup>People v. Ryan, 263 N. Y. 298, 302, 189 N. E. 225, 226 (1934).

<sup>109</sup>People v. Michalow, 229 N. Y. 325, 330, 128 N. E. 228, 230 (1920).

<sup>110</sup>People v. Giro, 197 N. Y. 152, 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. Nichols, 230 N. Y. 221, 129 N. E. 883 (1921); People v. Collins, 234 N. Y. 355, 137 N. E. 753 (1922); People v. Udwin, 254 N. Y. 255, 172 N. E. 489 (1930).

<sup>111</sup>People v. Walsh, 262 N. Y. 140, 148, 186 N. E. 422, 424 (1933).

<sup>112</sup>Ruloff v. People, 45 N. Y. 213 (1871); People v. Wilson, 145 N. Y. 628, 40 N. E. 392 (1895); People v. Marwig, 227 N. Y. 382, 125 N. E. 535 (1919); People

It should not be overlooked that, under any of these theories, the accomplice in the felony is responsible, as at common law, for only those acts of his associate which are committed in pursuance to the common design, and not for any independent excursions distinct from the joint undertaking. To illustrate:

"If A and B start out together with the design to kill C and while that design exists, B kills D as a separate and distinct act not as part of the offense designed against C, A is not guilty of the crime of murder in the first degree, or of any crime, merely because he has murder in his heart, directed at C at the time of such killing."<sup>113</sup>

As in New York, the accomplice in the felony everywhere finds great difficulty in escaping the consequences of a killing perpetrated by his associates in the prosecution of a common design. The usual jargon is that of conspiracy—either a conspiracy to commit an unlawful act the natural and probable result of which is homicide (class 2 above) or a conspiracy to aid each other to the extent of killing if necessary (class 3 above).<sup>114</sup> The word "conspiracy" in connection with the felony murder doctrine is used in a rather limited sense.

"Conspiracy itself is not a felony. It is but a misdemeanor. Each conspirator is liable, however, for the acts of every associate done in the effort to carry the conspiracy into effect. If, therefore, the conspiracy be to commit a felony of such a nature as burglary or robbery, if by one conspirator that felony is actually committed or attempted, if in the course of it a person is killed, every conspirator is guilty of murder."<sup>115</sup>

The "conspiracy" reasoning has led to the following rules:

1. If there is a joint undertaking to commit a felony, all of the conspirators are equally responsible for at least those homicides committed by one of their number in carrying out the felonious purpose which are the natural and probable result of the undertaking.

v. Sobieskoda, 235 N. Y. 411, 139 N. E. 558 (1923); *People v. Emieleta*, 238 N. Y. 158, 144 N. E. 487 (1924).

The theory upon which the court is proceeding is not always clear, and a certain amount of overlapping will be found within the divisions listed above. The following cases likewise hold the confederates in the felony guilty of the felony murder, but do not explain their grounds sufficiently to warrant classification: *People v. Flamigan*, 174 N. Y. 356, 66 N. E. 988 (1903); *People v. Madas*, 201 N. Y. 349, 94 N. E. 857 (1911); *People v. Fisher*, 249 N. Y. 419, 164 N. E. 336 (1928); *People v. Martone*, 256 N. Y. 395, 176 N. E. 544 (1931).

<sup>113</sup>*People v. Sobieskoda*, 235 N. Y. 411, 416, 139 N. E. 558, 560 (1923).

<sup>114</sup>For a long note and extensive collection of cases on homicide in carrying out an unlawful conspiracy, see (1905) 68 L. R. A. 193.

<sup>115</sup>*People v. Collins*, 234 N. Y. 355, 360, 137 N. E. 753, 755 (1922).

All are guilty of felony murder.<sup>116</sup> "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 or attempt to rob."<sup>117</sup>

2. If there is a joint undertaking to commit a felony and also to aid each other in escape, all are responsible for those homicides committed in the course of the felony or of the escape which are the natural and probable result of the common venture. If the killing occurred in the course of the felony, it is felony murder in all. If in the escape, all are guilty of the same crime as the actual killer, whether that be first degree murder, second degree murder, or manslaughter.<sup>118</sup> If, however, the conspiracy included an intent to kill if necessary in carrying out its object, all will be guilty of deliberate and premeditated murder.<sup>119</sup> A combination for escape cannot be inferred from the combination to do the original wrong,<sup>120</sup> but the mere fact of combined effort or resistance is sufficient to support a finding by the jury that escape was part of the common enterprise.<sup>121</sup> The conspiracy to kill, with sufficient deliberation and premeditation

<sup>116</sup>*Williams v. State*, 81 Ala. 1, 1 So. 179 (1886); *People v. Olsen*, 80 Cal. 122 (1889); *Lamb v. People*, 96 Ill. 73 (1880); see note (1927) 6 L. R. A. (N. S.) 1154.

<sup>117</sup>*People v. Friedman*, 205 N. Y. 161, 165, 98 N. E. 471, 473 (1912). Sometimes this rule is stated without the qualification that the killing be the natural and probable result. *People v. Vasquez*, 49 Cal. 560, 563 (1875); 1 MITCHELL, HOMICIDE (1914) 53. Occasional cases can be found which hold that all who engaged in the felony are guilty of the homicide committed by one of them and which yet use neither the term "conspiracy" nor the phrase "natural and probable result." *State v. Shelledy*, 8 Iowa 477 (1859); *Brennan v. People*, 15 Ill. 511 (1854); *Hanna v. People*, 86 Ill. 243 (1877).

<sup>118</sup>The conspiracy doctrine was carried to a questionable extreme in *State v. Terrell*, 175 La. 758, 144 So. 488 (1932), where all who joined a conspiracy to rob and to divide the spoils were held guilty of murder, though the killing was done by parties in flight several blocks from the scene of the crime, and though the loot was being carried off in another direction. The court approved a charge that if the conspiracy was not only to rob, but also included and extended to a division of the spoils, then "any act or declaration of one of the conspirators performed or done after the robbery, but before a division or disposition of the proceeds of the robbery had taken place between the conspirators, is binding upon all the conspirators, and the act of one is the act of all." The case is criticized in note (1933) 18 CORNELL LAW QUARTERLY 439.

<sup>119</sup>*People v. Pool*, 27 Cal. 573 (1865); *State v. Klein*, 97 Conn. 321, 116 Atl. 596 (1922); *English v. State*, 34 Tex. Crim. R. 190, 30 S. W. 233 (1895); *State v. Morgan*, 22 Utah 162, 61 Pac. 527 (1900).

<sup>120</sup>*People v. Knapp*, 26 Mich. 112 (1872); *Frank v. State*, 27 Ala. 37 (1855).

<sup>121</sup>*Commonwealth v. Brown*, 90 Va. 671, 19 S. E. 447 (1894).

for first degree murder, may be formed in the course of the escape.<sup>122</sup>

3. In a few jurisdictions all parties to a conspiracy to commit a felony, whether or not the common design included escape, will be held guilty of felony murder even where the homicide occurred during flight, providing it was so closely connected with the felony as to be part of the *res gestae*.<sup>123</sup>

Without casting doubt upon the general rule that conspirators are responsible only for the natural and probable results of their common design, a query may be interposed whether this qualification is appropriate where, as in New York, statutes (1) seem to make killings by a person engaged in a felony first degree murder even when it is not a natural and probable result of engaging in the felony, and (2) make all participants in a crime principals.<sup>124</sup> Suppose, for example, *A* and *B* conspire to commit the felony of concealing stolen goods. *A* negotiates with the thieves, and then *B*, in backing up his truck to unload the goods, accidentally kills a bystander. Certainly the death was not the natural and probable result of the common undertaking. Yet, if *B* could be held for felony murder, is there anything in the statutes to suggest that *A* could not?

Since convictions for felony murder seem confined almost entirely to undertakings which involved substantial risk to human life, limiting the liability of the conspirators to natural and probable results of their common undertaking has, in any event, little practical effect. Normally it adds nothing to the rule that the accomplice is responsible for only those acts of his associate which are committed in pursuance of the common design, and not for any distinct and independent acts.<sup>125</sup> But it may go far beyond this rule in cutting down the responsibility of the accomplice, as when it is interpreted to mean that only if the felony agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, will the participant in the underlying felony be responsible for a felony murder committed by one of his confederates.<sup>126</sup> A court taking this position must

<sup>122</sup>*Francis v. State*, 104 Neb. 5, 175 N. W. 676 (1919); *Territory v. McGinnis*, 10 N. M. 269, 61 Pac. 208 (1900); *Brooks v. Commonwealth*, 61 Pa. 352 (1869). The law of New York seems to be in accord with the propositions stated in this paragraph. *Ruloff v. People*, 45 N. Y. 213 (1871); *People v. Marwig*, 227 N. Y. 382, 125 N. E. 535 (1919).

<sup>123</sup>*Conrad v. State*, 75 Ohio St. 52, 78 N. E. 957 (1906).

<sup>124</sup>PENAL LAW §§ 1044, 2.

<sup>125</sup>*State v. Keleher*, 74 Kan. 631, 87 Pac. 738 (1906).

<sup>126</sup>*Lamb v. People*, 96 Ill. 73 (1880), where defendant was not held responsible for a homicide committed by his fellow conspirator while engaged in carrying out their common undertaking, the felony of concealing stolen goods.

either progress therefrom to the view that the entire felony murder doctrine applies only to felonies involving danger to human life, or create an apparently unwarranted distinction between the killer and his accomplices in the underlying felony.

#### SOME MISCELLANEOUS RULES GOVERNING THE TRIAL

The common law form of indictment for murder may be used in a trial for felony murder.<sup>127</sup> The indictment is sufficient when it simply accuses the defendant of having killed the deceased "willfully, feloniously and with malice aforethought",<sup>128</sup> for this state of mind can be established at the trial by showing that the homicide occurred while the defendant was engaged in the commission of another felony,<sup>129</sup> on the theory that the malicious and premeditated intent to perpetrate one kind of felony is by implication of law transferred from such offense to the homicide which was actually committed.<sup>130</sup> Because of this conception that the function of the independent felony is merely to supply the requisite state of mind for murder, it has been held that only the homicide need be proved by independent evidence. Thus a confession without corroborating evidence is sufficient to prove the underlying felony.<sup>131</sup>

Where cases are tried on the theory of felony murder, the court must submit to the jury the various forms or grades of homicide, unless the inculpatory facts are susceptible of the single interpretation that the accused either was engaged in an independent felony at the time of the killing or did not kill at all.<sup>132</sup> When the persons

<sup>127</sup>The reasons for this rule are fully discussed in *People v. Nichols*, 230 N. Y. 221, 129 N. E. 883 (1921), which cites *State v. Johnson*, 72 Iowa 393, 34 N. W. 177 (1887); *State v. Meyers*, 99 Mo. 107, 12 S. W. 516 (1889); *Ex parte Dela*, 25 Nev. 346, 60 Pac. 217 (1900); and *Titus v. State*, 49 N. J. L. 36, 7 Atl. 621 (1886) in accord.

<sup>128</sup>*People v. Giblin*, 115 N. Y. 196, 21 N. E. 1062 (1889); *People v. Schermerhorn*, 203 N. Y. 57, 96 N. E. 376 (1911).

<sup>129</sup>*People v. Conroy*, 97 N. Y. 62 (1884).

<sup>130</sup>*People v. Enoch*, 13 Wend. 159, 174 (N. Y. 1834).

<sup>131</sup>*People v. Lytton*, 257 N. Y. 310, 178 N. E. 290 (1931), citing memorandum opinions in, *People v. Hirsch*, 254 N. Y. 570, 173 N. E. 870 (1930) and *People v. Metelski*, 256 N. Y. 658, 177 N. E. 181 (1931). But see opinion of Crane, J. in *People v. Joyce*, 233 N. Y. 61, 134 N. E. 836 (1922), and critical note in (1933) 7 ST. JOHN'S L. REV. 328.

<sup>132</sup>*People v. Van Norman*, 231 N. Y. 454, 132 N. E. 147 (1921); *People v. Koerber*, 244 N. Y. 147, 155 N. E. 79 (1926); *People v. Seiler*, 246 N. Y. 262, 158 N. E. 615 (1927); *People v. Martone*, 256 N. Y. 395, 176 N. E. 544 (1931). *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989 (1903), points out that the usual practice is to submit the case to the jury on both the theory of a killing with deliberate and premeditated design to take life and the theory of a killing in the commission of a

who acted in the killing are on trial, exceptional conditions are required to warrant a refusal to instruct the jury as to its power to convict of a lower degree of the crime charged.<sup>133</sup> When, however, their accomplices in the underlying felony who were not otherwise involved in the homicide are on trial, a verdict of second degree murder or manslaughter would be erroneous, and the jury is to be instructed that its verdict must be a conviction of first degree murder or an acquittal.<sup>134</sup> Although the law thus appears to treat the accomplice more harshly than the killer, there may be occasions when the distinction will work to the advantage of the accomplice. A jury, unable to bring in a verdict carrying with it a penalty less than death, may quail before the responsibility of condemning the accomplice to death and bring in a verdict of acquittal. In one case, where the jury was erroneously allowed to find an accomplice guilty of manslaughter, the defendant appealed and secured a new trial on the ground that he could be connected with the homicide only if he were proved an accessory to the robbery and, therefore, had to be found guilty of first degree murder or acquitted.<sup>135</sup>

#### OUTSTANDING PROBLEMS

This study of felony murder suggests the following problems of policy:

1. Should the felony murder rule be limited to certain enumerated felonies which normally involve danger to human life? Or should it be limited even more strictly to felonious acts involving a foreseeable element of human risk? Should anything be done to prevent the application of the New York felony murder doctrine to such extremes as the hypothetical situation in which a person in attempting to perpetrate grand larceny accidentally jabs with his pen somebody whom he is trying to deceive in connection with his scheme, causing blood poisoning to set in and death to result? Or can the courts be considered free under our present statutes, and can they be counted on, to incorporate the mollifying principles being developed in England?
2. Should the degree of the crime and the punishment for it be reduced, as in Wisconsin and Minnesota?

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felony; and that there is no inconsistency between them, since a felony murder can be with or without a design to effect death.

<sup>133</sup>People v. Schleiman, 197 N. Y. 383, 90 N. E. 950 (1910); People v. Moran, 246 N. Y. 100, 102, 158 N. E. 35, 36 (1927).

<sup>134</sup>People v. Seiler, 246 N. Y. 262, 158 N. E. 615 (1927); People v. Martone, 256 N. Y. 395, 176 N. E. 544 (1931).

<sup>135</sup>*Ibid.*

3. Should the parties to the underlying felony other than those who did the killing be freed from responsibility for felony murder and be subject to indictment only for the underlying felony? Or should they be held responsible for the homicide, but the degree of their offense be reduced? Have the courts by their frequent use of the phrase "natural and probable" limited the responsibility of the accomplice to those homicides which were within the foreseeable risks of the common venture? If, as the writers believe, the courts have not committed themselves to such a limitation, should it be written into the statutes?

4. Should a distinction be maintained between homicides by persons engaged in the commission of felonies and homicides by persons engaged in the commission of misdemeanors or civil wrongs? Or should homicides resulting from any kind of unlawful act involving substantial danger to human life be treated alike?

#### LIMITATION OF THE SCOPE OF THE FELONY MURDER DOCTRINE

In England there have been outcries against "the harsh, medieval and repulsive doctrine of constructive murder."<sup>136</sup> In the United States the felony murder doctrine (or "doctrine of constructive murder") has been rather placidly accepted, at least with reference to the person whose act caused the death. One writer who is vehement in his denunciation of the doctrine when it is applied to parties connected with the homicide only by participation in the underlying felony accepts the rule without question in its application to the actual killer.<sup>137</sup> It is true that in the reported cases the person committing the homicide usually arouses little sympathy and seems to deserve severe punishment, while his associates in the underlying felony sometimes appear much less blameworthy. Where a felony is planned by means not dangerous to human life, and especially where there is an express agreement not to use violence, the infliction of the death penalty upon a conspirator whose associate kills somebody hardly satisfies the layman's formula of "making the punishment fit the crime". This situation suggests on its surface the necessity of limiting the application of the felony murder rule to the killer alone, or perhaps of modifying the rule so as to exempt the participants in the underlying felony under certain conditions and to reduce their punishment under others. In view of the statutes abolishing the common law distinctions between principals and accessories,<sup>138</sup> the creation of new differences in their treatment seems unwarranted

<sup>136</sup>"Constructive Murder" (1929) 67 L. J. 450.

<sup>137</sup>Eisenberg, *The Doctrine of Felony Murder in New York*, N. Y. L. J., Jan. 17, 18, 1935, at 296, 316.

<sup>138</sup>E. g., N. Y. PENAL LAW § 2.

and, furthermore, would not reach the fundamental objections to the present law of felony murder. A man who, unarmed, stages a hold-up by pretending to have a gun in his pocket and causes his victim to die of heart failure induced by fright should certainly be treated no worse than a robber who planned a similar hold-up, but whose accomplice, without his knowledge, brought along a gun and used it with fatal results. The remedy lies in another direction—in a redefinition of the felony murder doctrine in terms which would make it applicable only where the culpability of the defendant is such as would warrant the imposition of extreme penalties.

Little would be accomplished by a return to the New York statute of 1860, whereby unintended homicides became murder in the first degree only if committed "in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, or in any attempt to escape from imprisonment." Although these felonies normally involve danger to human life, some of them may be undertaken, as is indicated by the various hypothetical cases already stated, without violence and without any recognizable risk of causing death. On the other hand, felonies normally harmless to life may be undertaken by highly dangerous means. Under such statutes, furthermore, technicalities arise which reflect no credit on the law, as in the recent Hauptmann case, where, in order to establish murder in the first degree, the state had to prove that the baby was killed during the short time that the defendant was engaged in a burglary, kidnapping not being one of the felonies specified in the New Jersey murder statute.

Progress lies in the direction taken by the English courts—in the limitation of the felony murder rule to felonious undertakings which involve physical violence or danger to human life. In 1878 and 1879 the English Criminal Code Commission devoted much attention to the subject of felony murder, and "the prevalent opinion seems to have been that cases of constructive murder should be limited to cases where the felonious act intended was cruel or more or less *eiusdem generis* with murder."<sup>139</sup> In their Draft Criminal Code, which was never adopted, the felony murder doctrine survived only in the proposition that a crime is murder "If the offender for any unlawful object does an act which he knows, or ought to have known, to be likely to cause death and thereby kills any person, though he may have desired that his object should be effected without hurting any one."<sup>140</sup> This definition, according to Judge Stephen, "repro-

<sup>139</sup>*Some Points on the Law of Murder* (1903) 67 JUST. P. 530, 531.

<sup>140</sup>*Ibid.* The "conspiracy" principle apparently would bring those who joined in the underlying unlawful design within the scope of this rule.

duces in plain language that part of the existing law which would be in harmony with the common standard of moral feeling."<sup>141</sup>

Three things are to be noted in this proposal:

1. Dangerous acts intentionally performed for an unlawful purpose, whether they constitute a felony, a misdemeanor, or a civil wrong, are treated alike. The scope of this study being limited to homicides committed in the course of felonies, the writers venture no comment upon the desirability of this innovation.

2. The intimation in *Regina v. Serné*<sup>142</sup> that the defendant must have had knowledge of the risk to human life is not heeded; he can be convicted of murder if the risk would have been apparent to a reasonable man.

3. The act must have been one likely to cause death. If the felony murder doctrine is applicable only when it is likely or probable that death will result, it would not be murder to cause death by the physical violence of rape or by suffocation in gagging a victim in robbery. If such situations are not to be excepted, a weaker link than "likely" must be used.

It is not necessary to go so far as the Draft Code in departing from existing conceptions of the felony murder rule in order to obviate the major objections to it. A satisfactory statement of the rule appeared some twenty years after the Draft Code in the syllabus of *Regina v. Whitmarsh*:<sup>143</sup> "If a man by the perpetration of a felonious act brings about the death of a fellow creature, he is guilty of murder, unless when he committed the felonious act the chance of death resulting therefrom was so remote that no reasonable man would have taken it into consideration." Under this rule the parties to the underlying felony who are not otherwise connected with the homicide would be guilty of murder only if the common enterprise which caused the death were one involving risks to human life of which they should have been aware. In such an enterprise an agreement not to kill should have no force in mitigating their punishment.

The acceptance of risk to human life as the essential element in the definition of felony murder is the least that can be done to justify the survival of the felony murder doctrine. Cogent arguments can be given for limiting the doctrine still further or for reducing the punishment for felony murder. Nevertheless, though the felony murder doctrine confined within the bounds suggested may still be harsh, it will not be "medieval and repulsive".

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<sup>141</sup>*Ibid.*

<sup>142</sup>*Supra* at p. 291.

<sup>143</sup>62 JUST. P. 711 (1898).