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Homicide - Murder - The Felony-Murder Rule

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man's compensation law were a part of the community.[10] In reaching the same result, California[11] and Texas[12] considered the benefits as awarded in lieu of wages.

Louisiana, alone, has held that the benefits are not a part of the community.[13] The court concluded that the purpose of the statute is to provide a means of subsistence to the employee while his earning capacity has been partially or wholly destroyed by injury received in the course of his employment.

Division of property has been defined in a separate property state as an adjustment of property rights and equities between the parties and is clearly distinguishable in purpose from alimony and support money which may also be granted.[14] In the instant case the defendant, 65 years of age, was permanently disabled. The plaintiff was a stenographer and bookkeeper, in good health, and employed at the time of the suit. If these same facts should arise in a separate property state it appears that the wife would have little success in attempting to impound any part of the benefits awarded the husband by the workman's compensation act.

North Dakota has held that the ultimate object to be sought in property division in a divorce action is an equitable distribution[15] depending upon facts and circumstances.[16] Our code substantially reiterates this precept[17] and provides with respect to workman's compensation awards that the payments shall go to the employee and only on his death to his dependents.[18]

Should North Dakota, not being a community property state, have to deal with a property settlement such as that in the instant case, the compensation awards of the husband would merely be taken into consideration along with his other assets when making a property settlement or alimony decree.

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HOMICIDE — MURDER — THE FELONY-MURDER RULE — Defendant and his accomplice fled after robbing a store. The storekeeper pursued the accomplice and killed him. Upon defendant's trial for the murder of his accomplice it was *held* that a co-felon can be found guilty of murder of his accomplice under the felony murder rule[1] where the victim of an armed robbery justifi-

10. Dawson v. McNaney, 71 Ariz. 79, 223 P.2d 907 (1950).
11. Northwestern Redwood Co. v. Industrial Accident Comm'n., 184 Cal. 484, 194 Pac. 31 (1920); Doyle v. Doyle, 44 Cal. App. 259, 186 Pac. 188, 190 (1919) (dictum).
12. Pickens v. Pickens, 125 Tex. 410, 83 S.W.2d 951 (1935).
13. Brownfield v. Southern Amusement Co., 196 La. 74, 198 So. 656 (1940).
14. Brackob v. Brackob, 262 Wis. 202, 54 N.W.2d 900, 903 (1952).
15. Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107 (1952).
16. *Id.* at 784, 52 N.W.2d at 111 (such as the respective ages of the parties, earning ability, conduct of the parties, station in life, health and physical condition, financial circumstances as shown by their property, and all other matters pertaining to the case).
17. N. D. Rev. Code §14-0524 (1943): "When a divorce is granted, the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively. The court from time to time may modify its orders in these respects."
18. N. D. Rev. Code §65-0505 (1943).

1. Pa. Stat. Ann. tit. 18, §4701 (1939): "All murder . . . which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, burglary, or kidnapping, shall be murder in the first degree."

ably kills the other felon as he leaves the scene of the crime. *Commonwealth v. Thomas* 117 Atl.2d 204 (Pa. 1955).

Restating the common law felony murder rule, it has been said: "Malice was implied as a matter of law in every case of homicide while engaged in the commission of some other felony, and such a killing was murder whether death was intended or not. The mere fact that the party was engaged in the commission of a felony was regarded as sufficient to apply the element of malice."[2] Inherent in the application of the rule is the use of the fiction that the malice of the initial offense attaches itself to whatever else the criminal might do.[3] The probability that injustice would result from the fictitious transfer of malice seemed remote because at common law practically all felonies were punishable by death,[4] and it was considered immaterial whether a man was hanged for one felony or another.[5]

Virtually every jurisdiction in the United States has adopted some statutory form of the felony murder rule.[6] Most of these statutes are similar to the Pennsylvania statute applied in the instant case in that only specified felonies are included.[7] Those usually designated are arson, rape, robbery and burglary.[8] Any homicide committed in the perpetration of any of the enumerated felonies is, by statute, declared first degree murder.[9] Premeditation is implied by law (as was malice under common law) and actual intent is immaterial.[10]

Strict enforcement of the felony murder rule has led to some harsh, inequitable results,[11] particularly in cases concerning accomplices who in no way participated in or condoned the homicide.[12] The rule is, in effect, a conclusive presumption of a malicious intent to kill,[13] and it has been criticized as being archaic, unrealistic and completely inflexible.[14]

The instant case represents a unique application of the felony murder rule, to a killing perpetrated by an innocent party in an attempt to thwart a felony. Precedent for finding the felons guilty of murder under these circumstances is found in two recent Pennsylvania cases, *Commonwealth v. Moyer*[15] and *Commonwealth v. Almedia*.[16] In each of those cases defenders mistakenly

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2. Clark and Marshall, Crimes 298 (3rd ed. 1927). See also Wharton, Homicide 38 (1875).
3. People v. Luscomb, 292 N.Y. 390, 55 N.E.2d 469,472 (1944) (dictum).
4. Powers v. Commonwealth, 110 Ky. 386, 413, 61 S.W. 735, 741 (1901) (dictum).
5. *Ibid.*
6. For an exhaustive survey of the various state statutes see 20 Corn. L. Q. 288.
7. N. D. Rev. Code §12-2712 (1943): "Every murder perpetrated . . . in committing or attempting to commit any sodomy, rape, mayhem, arson, robbery or burglary, is murder in the first degree." *Ibid.*
8. See note 6 *supra.*
9. People v. Osborn, 37 Cal.2d 380, 231 P.2d 850 (1951); People v. Lindley, 26 Cal. 2d 780, 161 P.2d 227 (1945); People v. Sutton, 17 Cal. App.2d 561, 62 P.2d 397 (1909); People v. Page, 198 Mich. 524, 165 N.W. 755 (1917); State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951).
10. *Ibid.*
11. See State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932) (Defendant committed arson in burning his building to collect insurance. While fighting the fire, one of the firemen was accidentally killed. Defendant was convicted of first degree murder under the Missouri felony murder statute).
12. See People v. Cabaltero, 31 Cal. App.2d 52, 87 P.2d 364 (1939) (A robber killed one of his conspirators as they were about to carry out their plan to commit a felony. All of the conspirators, though they did not contribute to the death were convicted of first degree murder under the statute).
13. Rhea v. State, 63 Nebr. 461, 88 N.W. 789 (1902).
14. See Crum, *Causal Relations and the Felony-Murder Rule,* 1952 Wash. U. L. Q. 191 (1952).
15. 357 Pa. 181, 53 A.2d 736 (1947).
16. 362 Pa. 596, 68 A.2d 595 (1949).

killed innocent parties and first degree murder convictions were obtained against the felons under the felony murder statute.[17] The Pennsylvania court, in reaching this anomaly, reasons that if one or more felons set in motion a chain of circumstances out of which death ensues, the felons should ipso facto be held guilty of premeditated murder under the statute, regardless of the actual cause of death and the intention of the parties. Such a rationale extends the felony murder rule far beyond the bounds to which it is restricted in other jurisdictions.

Apparently all other jurisdictions that have litigated this question oppose the Pennsylvania interpretation and apply the rule only when the homicide is committed by a felon.[18] Although not expressly so provided, it is implicit in the wording of the typical statute that the killing must be done by a felon or his accomplice.[20] Most jurisdictions have no cases in point, probably because of a generally accepted assumption that felony murder statutes should be so construed. Indeed, a Pennsylvania case prior to those discussed above seems to have proceeded on the basis of such an assumption.[19]

The majority view is represented by the case of *Butler v. People*,[21] where the court said: "No person can be held responsible for a homicide unless the act was either actually or constructively committed by him. In order to be his act it must be committed by his hand, or by someone acting in concert with him, or in furtherance of a common design or purpose."

It is also implicit in the construction of the felony murder rule that the homicide occur in the execution and furtherance of the initial crime.[22] In this case it resulted from an act in direct opposition to the common design of the defendant and the deceased. It is difficult to see how by any stretch of the imagination one could construe this as a malicious act of the defendant.[23]

The unjustified extension of the felony murder rule in this case becomes further apparent when one realizes the homicide was clearly justifiable,[24] and that such killings carry the sanction of society. It would appear then that the defendant has been ordered to pay a non-existing debt to society. Some felony

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17. See note 1 *supra*.

18. See People v. Ferlin, 203 Cal. 587, 265 Pac. 230 (1928); People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920); Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888); Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); Commonwealth v. Campbell, 89 Mass. (7 Allen) 541 (1863).

19. See Commonwealth v. Thompson, 321 Pa. 327, 184 Atl. 97 (1936).

20. N. D. Rev. Code §12-2712 (1943): "Every murder perpetrated . . . *in committing or attempting to commit* any sodomy, rape, mayhem, arson, robbery or burglary, is murder in the first degree." (Emphasis added).

21. 125 Ill. 641, 18 N.E. 338, 339 (1888).

22. See People v. Ryan, 263 N.Y. 298, 189 N.E. 225 (1934).

23. In Commonwealth v. Campbell, 89 Mass. (7 Allen) 541 (1863), the court stated: "Certainly that cannot be said to be an act of a party in any just sense, or on any sound legal principal, which is not only not done by him, or by anyone with whom he is associated or connected in a common enterprise, or in attempting to accomplish the same end, but is committed by a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him and his confederates and abettors in the accomplishment of the unlawful object for which they are united.".

24. See Clark and Marshall, Crimes 338 (3rd ed. 1927): "It is a well settled principle of the common law that any person, whether he be a peace officer or merely a private individual, may and should kill another, if necessary to prevent him from committing a felony attempted by force or surprise, as murder, rape, sodomy, robbery, burglary or arson. The homicide in such a case is not merely excusable, but it is justifiable.".

murder statutes specifically exempt justifiable and excusable homicide.[25] It seems that such an exemption should be implied in the Pennsylvania law.

The extreme position of the Pennsylvania court in the principal case is regrettable. It appears to be an unreasonable extension of an already unreasonable rule, and the anticipated effect would be to stamp as murderers all felons who are remotely associated with a homicide in the course of committing their felonious act. Such a result is obviously unjust and entirely lacking in logic. The desire to discourage the occurence of felonies is unquestionably a highly commendable motive, but in selecting a means to that end, the courts should never cease to temper their decisions with logical reasoning, where the legislative mandate permits.

GEORGE DYNES

INSURANCE — ASSIGNMENT OF POLICY — VALIDITY OF ORAL ASSIGNMENT — The plaintiff's husband obtained an insurance policy on his life, named his wife as beneficiary, and delivered the policy to her. He later took possession of the policy without the plaintiff's knowledge or consent and substituted his sister, the defendant, as beneficiary. Upon her husband's death the plaintiff sought to have herself declared the beneficiary of the policy, alleging an executed oral agreement under which she was to be named beneficiary in return for the payment by her of the premiums. On appeal from a summary judgment dismissing the complaint, the court *held* that a cause of action was stated. An oral agreement to name a beneficiary, plus manual delivery of the policy with intent to make a gift, amounted to a valid and enforceable assignment of the policy; that this assignment was not within the statute of frauds; and that a constructive trust resulted for the benefit of the plaintiff. *Katzman v. Aetna Life Insurance Co.*, 137 N.Y.S.2d 583, 128 N.E.2d 307 (1955).

Generally, full performance will take an oral agreement out of the statute of frauds,[1] provided it is established by clear proof.[2] The statute may not be successfully interposed as a defense in equity where it would aid in the perpetration of a fraud,[3] or in cases involving parol[4] or constructive[5] trusts.

A parol assignment of an insurance policy does not fall within the statute whether made as a gift[6] or for consideration. Delivery, which is essential to

25. N. Y. Penal Law §1044, (1950): "The killing of a human being, *unless it is excusable or justifiable*, is murder in the first degree, when committed . . . 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." (Emphasis added).

1. Jones v. Jones, 333 Mo. 478, 63 S.W.2d 146 (1933); Bayreuther v. Reinisch, 34 N.Y. S.2d 674, 677 (1942), *aff'd.* 47 N.E.2d 959 (1943); Considine v. Considine, 7 N. Y. S.2d. 834 (1938); Burns v. McCormick, 233 N.Y. 230, 135 N.E. 273 (1922) (Part performance is insufficient unless it is unequivocally referable to the agreement).

2. *Accord* Stolar v. Turner, 237 Iowa 593, 21 N.W.2d 544 (1946).

3. Fleming v. Dillon, 370 Ill. 325, 18 N.E.2d. 910 (1938); Keystone Hardware Corp. v. Tague, 245 N.Y. 79, 158 N.E. 27 (1927) (Plaintiff-vendee not permitted to plead statute of frauds in action to recover purchase price under oral contract to convey land where defendant-vendor was willing to convey).

4. Blanco v. Velez, 295 N.Y. 224, 66 N.E.2d. 171 (1946).

5. Latham v. Fr. Divine, 299 N.Y. 22, 85 N.E.2d. 168 (1949); Bogart on Trusts, §56 (2d ed. 1942)(The constructive trust, created in equity, may be based upon oral evidence).

6. Continental Life Ins. Co. v. Sailor, 47 F.2d 911 (S.D. Cal. 1930); See Cooney v. Equitable Life Assur. Soc., 235 Minn. 377, 51 N.W.2d. 285 (1952); John Hancock Mut. Ins. Co. v. Sandrisser, 95 N.Y.S.2d 399 (1950); Young v. Prudential Ins. Co., 131 N.Y.S. 968 (1911).