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## **A Re-Consideration of the Felony Murder Doctrine in New York-- Nature of the Underlying Felony--Merger of the Felony and Homicide--Relation of the Homicide to the Felony**

G. Robert Ellegaard

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# NOTES AND COMMENT

## CRIMINAL LAW

### A RE-CONSIDERATION OF THE FELONY MURDER DOCTRINE IN NEW YORK—NATURE OF THE UNDERLYING FELONY—MERGER OF THE FELONY AND HOMICIDE—RELATION OF THE HOMICIDE TO THE FELONY.

#### *Nature of the Felony.*

The crime of murder at common law was homicide with malice aforethought.<sup>1</sup> Since an intent to commit a felony was one form of "malice aforethought," a homicide consequent upon the commission of a felony was murder, the malice attending the original crime being imputed to the homicide.<sup>2</sup> The doctrine of "constructive murder" was predicated upon the view that the perpetration of a felony was indicative of a "wicked and depraved mind" and that a homicide occurring in the execution of the intent to commit a felony was a natural and probable result to be considered as within the original felonious design.<sup>3</sup> That implication of law was justified, perhaps, in view of the nature of common-law felonies. Nearly all were violent crimes involving danger to life and attended by threats of grievous bodily injury, so that a homicide as a result of their execution was not an unnatural or unforeseeable consequence.<sup>4</sup>

Today, in most jurisdictions, the felony murder doctrine has been adopted by statutory enactments, usually restricted in application to specified felonies of a "dangerous" character such as arson,

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<sup>1</sup> 4 BLACKSTONE'S COMMENTARIES (1897) 198.

<sup>2</sup> For an extensive treatment of this subject see Perkins, *A Re-examination of Malice Aforethought* (1934) 43 YALE L. J. 537.

<sup>3</sup> Where a homicide occurs in the commission of a felony the law presumes "a depraved, wicked, and malignant spirit" which the offender actually had in his heart, or which we impute to him because we suppose him to have intended the necessary or probable consequences of that which he actually did or tried to do. \* \* \* 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, 61 S. W. 735 (1901).

<sup>4</sup> Common-law felonies included arson, rape, robbery, burglary, and larceny. "In other words, with the single [?] exception of larceny, the common-law felonies were either directed toward death or great bodily injury, or involved a substantial risk of this nature." Perkins, *loc. cit. supra* note 2, at 560. Where the unlawful act which preceded the killing did not amount to a felony the crime was merely manslaughter. BLACKSTONE, *op. cit. supra* note 1, at 192, 193.

rape, robbery, burglary, etc., and classifying homicides resulting from other unlawful acts in the lower degrees of murder and manslaughter.<sup>5</sup> Moreover, judicial limitations on the scope of the doctrine have, in many instances, denied its application to crimes which could not be considered dangerous and would not cause a reasonable man to contemplate the possibility of death ensuing.<sup>6</sup> So where the felony consisted of selling liquor, the ensuing death was held not to be murder, the crime being *malum prohibitum*, not *malum in se*, and not one likely to result in death.<sup>7</sup>

But the New York provision which makes the killing of a human being, by one engaged in a felony, murder in the first degree is not, by its phrasing, limited in application to common-law felonies or crimes of a violent and dangerous nature.<sup>8</sup> And since the legislature may raise any crime to the class of felony by providing that the penalty be imprisonment in a state prison,<sup>9</sup> the question whether the felony murder doctrine should be applied to all felonies without regard to their nature becomes important.

There appear to be no cases of felony murder in New York where the felony charged was not violent in character. However, in *People v. Enoch*<sup>10</sup> the court declared that "as often as the legislature creates new felonies, or raises offenses which were only misdemeanors at the common law to the grade of felony, a new class of murders is created by the application of this principle to the case of the killing of a human being by a person who is engaged in the perpetration of

<sup>5</sup> See statutes cited in Arent and MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes* (1935) 20 CORN. L. Q. 288, 313.

<sup>6</sup> "I think that, instead of saying that any act done with intent to commit a felony, and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death would be murder." *Regina v. Serne*, 16 Cox. C. C. 311 (1887). And *Powers v. Commonwealth*, 110 Ky. 386, 61 S. W. 735 (1901), cited *supra* note 3, where the court was of the opinion that if one committing a felony by stealing a cornerstone should, in so doing, drop the stone upon another, killing him, the homicide would not be murder.

"If a man by the perpetration of a felonious act bring 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 his consideration. In that case he is not guilty of murder but only of manslaughter." *Regina v. Whitmarsh*, 62 Just. P. 711 (1898). See also 4 STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* (16th ed. 1914) 62.

<sup>7</sup> *People v. Pavlic*, 227 Mich. 562, 199 N. W. 373 (1924); *Thiede v. State*, 106 Neb. 48, 182 N. W. 570 (1921); *State v. Reitze*, 86 N. J. L. 407, 92 Atl. 576 (1914). In New York such a homicide is manslaughter. *People v. Licenziata*, 199 App. Div. 106, 191 N. Y. Supp. 619 (2d Dept. 1921).

<sup>8</sup> N. Y. PENAL LAW § 1044 (2): "The killing of a human being unless it is justifiable or excusable, is murder in the first degree, when committed \* \* \* 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. \* \* \*"

<sup>9</sup> N. Y. PENAL LAW § 2.

<sup>10</sup> 13 Wend. 159, 174 (N. Y. 1834).

a newly created felony." And the historical background of the present statute on felony murder lends support to the view that the New York rule includes every felony irrespective of its nature or propensities to violence, for whereas, at one time the crime of felony murder was limited to homicides resulting from specified felonies, the statute now places no such restriction on the application of the doctrine.<sup>11</sup>

### *The Merger Principle.*

It cannot be said, however, that every homicide resulting from the perpetration of a felony is murder. Since every section of the statute on murder in the first and second degrees concerns a homicide as a result of a felony, a failure to distinguish between those homicides which are caused by the very acts of violence constituting the felony and those caused by acts other than those of the felony, separate therefrom and independent thereof, would classify every unlawful homicide as felony murder and would deprive the other sections of the statute on murder and manslaughter of any force or effect.<sup>12</sup> The division of criminal homicides into different degrees would fail of purpose if every unlawful death, brought about by conduct which is also a felony, were treated as felony murder. It is because of this situation that the principle of merger has been developed.<sup>13</sup>

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<sup>11</sup> The felony murder doctrine first adopted in the Revised Statutes of 1828 (2 N. Y. REV. STAT. [1829] 657, § 5 [3]) was declaratory of the common law, making the killing by a person engaged in any felony, murder. By the Laws of 1860, c. 410, § 2, only death from arson, rape, robbery, burglary, or escape from imprisonment, was murder in the first degree, all other felony homicides being second degree murder. The Laws of 1862, c. 197, § 5, reduced all felony murders, except death from arson, to the second degree. The Laws of 1873, c. 644, § 1, restored felony murder to the first degree, omitting reference to any particular type of felony. The provision has remained substantially the same ever since. See Perkins, *loc. cit. supra* note 2, at 563, n. 194.

<sup>12</sup> If such a distinction were not made " \* \* \* then every intentional killing, by means of a dangerous weapon, regardless of deliberation and premeditation would constitute the crime of murder in the first degree, since every such killing must be preceded by the direction of such a weapon against the body of the person killed, which in itself would constitute a felonious assault. \* \* \* " People v. Wagner, 245 N. Y. 143, 156 N. E. 644 (1927).

<sup>13</sup> For similar reasons, the principle of merger is also applicable to the homicide, committed by a person engaged in committing, or attempting to commit, a misdemeanor affecting the person or property, either of the person killed or another, which is manslaughter in the first degree. N. Y. PENAL LAW § 1050, subd. 1.

But the courts relying on the opinion of *Buel v. People*, 78 N. Y. 492 (1879) have refused to consider the merger even where the misdemeanor was an assault upon the deceased. So in *People v. McKeon*, 31 Hun 449 (N. Y. 1884), though the defendant contended that under this section of the manslaughter statute, the misdemeanor must be some offense other than that of intentional violence upon the person killed, citing *People v. Butler*, 3 Park.

Where one commits a felonious assault upon another, whereof the latter dies, the crime is not felony murder, for the felony is said to merge with the homicide which is then classed under one of the other sections of the statute.<sup>14</sup>

In *People v. Moran*<sup>15</sup> the evidence indicated that the defendant committed an assault upon *A* and *B*, killing the latter. The Court of Appeals reversed the conviction because the trial court had refused to submit the other degrees of murder and manslaughter, declaring that the facts warranted the jury in finding that the assault upon *A* had terminated before the assault upon *B* had begun, in which case the homicide would not have been committed in the course of the assault upon *A*, and the assault upon *B* would merge in the homicide; moreover, if the assault had been directed toward both at the same time, so that the assault upon *A* was indistinguishable from that upon *B*, the felony merged with the homicide. Nor would an assault directed toward *A* but resulting in the death of *B* be felony murder, for the assault would be an offense against *B* and the crime would come under the other sections of the statute.<sup>16</sup> Likewise, in *People v. Spohr*,<sup>17</sup> the assault upon *A* had terminated before the fatal attack

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Cr. R. 377 (N. Y. 1857), the court, citing *Buel v. People*, *supra*, said: "The question has already received some discussion in the courts, and in the view which we take of the case, the weight of authority must be regarded as adverse to the contention of the accused."

In *People v. Stacey*, 119 App. Div. 743, 104 N. Y. Supp. 615 (3d Dept. 1907), *aff'd memo.*, 192 N. Y. 577, 85 N. E. 1114 (1908), the court, upon similar facts, cited and followed the *McKeon* case.

However, in the more recent case of *People v. Grieco*, 266 N. Y. 48, 193 N. E. 634 (1934), where the misdemeanor charged was reckless driving, the court, disapproving *People v. Darragh*, 141 App. Div. 408, 126 N. Y. Supp. 522 (1st Dept. 1910), *aff'd*, 203 N. Y. 527, 96 N. E. 1124 (1911), held: (1) that the misdemeanor charged did not affect the person or property of the one killed or of another; (2) that the misdemeanor of assault upon the deceased merged in the homicide.

<sup>14</sup> *People v. Hüter*, 184 N. Y. 237, 77 N. E. 6 (1906); *People v. Spohr*, 206 N. Y. 516, 100 N. E. 444 (1912); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927).

<sup>15</sup> 246 N. Y. 100, 158 N. E. 35 (1927).

<sup>16</sup> In *People v. Van Norman*, 231 N. Y. 454, 132 N. E. 147 (1921), the indictment was for the homicide of *A* committed in the course of a felony, to wit: assault upon *B* with intent to kill *B*. The question whether this was a proper application of the statute was not raised, but conviction was reversed because the trial court refused to submit murder in the second degree. In its opinion the court cited *People v. Miles*, 143 N. Y. 383, 38 N. E. 456 (1894) where the evidence admitted of the inference that the defendant accidentally killed *A* in assaulting *B*. There also the merger theory went unnoticed, the issue being whether the word "otherwise" in the statute included the word "another"; the holding being in the affirmative.

In view of the opinion in *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927), neither of the above cases can be considered authority for the view that an assault upon one resulting in the death of another, is felony murder, for the act producing the homicide is a part of the original assault.

<sup>17</sup> 206 N. Y. 516, 100 N. E. 444 (1912).

upon *B* had begun, and the ensuing death of *B* was not felony murder.

Where the felony is an assault upon one other than the deceased and it continues in progress when the second assault is undertaken, the original crime does not merge in the ensuing homicide. Thus in *People v. Wagner*<sup>18</sup> where the defendant in the course of assaulting *A*, killed *B* who attempted to interfere, though the assault upon *B* merged with the homicide, the original assault sustained a felony murder charge.<sup>19</sup>

The principle is not limited to the felonies of assault but is applicable wherever the violence causing death is a constituent part of the underlying felony.<sup>20</sup> So where the felony charged is an assault with intent to prevent the lawful arrest of any person,<sup>21</sup> and the resistance culminates in death, the felony is merged.<sup>22</sup> But where the defendants killed in an attempt to escape from a state prison, the homicide was a felony murder caused by an assault not a part of the original felony.<sup>23</sup> And the crime of escaping from arrest for a felony<sup>24</sup> may be the basis for a felony murder where death is caused by assault which is not an element of the felony charged.<sup>25</sup>

The felony does not merge with the homicide where death is caused by any act not an integral part of the felony, so that where a robber shoots his victim, the homicide is murder, even if the killing

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<sup>18</sup> 245 N. Y. 143, 156 N. E. 644 (1927).

<sup>19</sup> To the same effect, *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1062 (1889); *People v. Patini*, 208 N. Y. 176, 101 N. E. 694 (1913).

<sup>20</sup> *Dicta* in *People v. Marendi*, 213 N. Y. 600, 107 N. E. 1058 (1919), would apply the merger theory to the felony of possessing a dangerous weapon by a second offender (N. Y. PENAL LAW § 1897, par. 4) so that a death caused by the use of such weapon would not be felony murder. This is not an apt use of the merger principle. A homicide under such circumstances would not be felony murder because it would not be a consequence of, or caused by the conduct of, the felony. So in *Potter v. State*, 162 Ind. 213, 70 N. E. 129 (1904) the court said: "It is undoubtedly true, as a general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow or result from such unlawful act. But before this principle of law can have any application under the facts in the case at bar, it must appear that the homicide was the natural or necessary result of the act of appellant in carrying the revolver in violation of the statute." *Contra: Shelburne v. State*, 111 Tex. Cr. R. 182, 11 S. W. (2d) 519 (1928).

<sup>21</sup> N. Y. PENAL LAW § 242, subd. 5.

<sup>22</sup> *People v. Hüter*, 184 N. Y. 237, 77 N. E. 6 (1906), cited *supra* note 14.

<sup>23</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); *People v. Weiner*, 248 N. Y. 118, 161 N. E. 441 (1928); *People v. Udwin*, 254 N. Y. 225, 172 N. E. 489 (1930).

<sup>24</sup> N. Y. PENAL LAW § 1694.

<sup>25</sup> *People v. Wilson*, 145 N. Y. 628, 40 N. E. 392 (1895).

was accidental.<sup>26</sup> In every case, if the homicide and the felony are committed by the same act, they merge.<sup>27</sup>

But the application of the merger principle to the crime of rape where death ensues from the violence constituting the felony, has met with some confusion.<sup>28</sup> In *Buel v. People*,<sup>29</sup> the defendant strangled his victim while perpetrating the crime of rape. The contention was made that since violence was an essential element of the crime, the felony merged in the homicide resulting from that violence. The court, in refusing to apply the merger principle, said "While force and violence constitute an important element of the crime of rape, they do not constitute the entire body of that offense. The unlawful or carnal knowledge is the essence of the crime, and without this no matter what degree of force or violence may be employed, rape is not established" and then added "The decision of the General Term sustaining the charge is placed upon the ground that the death

<sup>26</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. Lytton*, 257 N. Y. 310, 178 N. E. 290 (1931). See also *Cox v. People*, 80 N. Y. 500 (1880); *People v. Schleiman*, 197 N. Y. 383, 90 N. E. 950 (1910) and *People v. Udwin*, 254 N. Y. 255, 172 N. E. 489 (1930). In other jurisdictions: *Commonwealth v. McManus*, 282 Pa. 25, 127 Atl. 316 (1925); *McCutcheon v. State*, 199 Ind. 247, 155 N. E. 544 (1927); *State v. Best*, 44 Wyo. 383, 12 P. (2d) 1110 (1932).

In this connection an interesting case is *Keaton v. State*, 41 Tex. Cr. R. 621, 57 S. W. 1125 (1900), where a trainman, forced by robbers to step into a car defended by passengers, was killed by a bullet fired from within the train. There the homicide was felony murder because a foreseeable consequence of the felony. In New York such a homicide would probably be considered caused by the robbers and thus come within the felony murder statute.

<sup>27</sup> The following analysis was urged in *People v. Hüter*, 184 N. Y. 237, 77 N. E. 6 (1906), cited *supra* notes 14, 22: "In order, therefore, to constitute murder in the first degree by the unintentional killing of another while engaged in the commission of a felony, we think that while violence may constitute a part of the homicide, yet the other elements constituting the felony must be so distinct from that of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder." This test would evidently limit merger to the felonies of assault, ignoring the other felonies like rape, robbery, *etc.*, and would not adequately effectuate the purpose of the principle. The court's attitude was based on the erroneous conception held by the *Buel* case (treated in text). However, the rule was quoted in *People v. Spohr*, 206 N. Y. 516, 100 N. E. 444 (1912), cited *supra* note 17, without comment.

<sup>28</sup> Elsewhere such a crime is generally governed by the express provision of the statute applicable. See *Hoppe v. State*, 29 Ohio App. 467, 163 N. E. 715 (1928), where death was caused by the act of rape on a seven-year-old child. In New York, such a crime might be punishable as "an act evincing a depraved mind." See note 32, *infra*.

Where the statutes do not specify the felony, the acts of the felony which caused the death, merge with the homicide. In *State v. Shock*, 68 Mo. 552 (1878), under a statute which specified "arson, rape, robbery, burglary," the assault merged. Subsequently the felony of mayhem was included in the statute; see *Arent and MacDonald, loc. cit. supra* note 5, at 299. See also *State v. Fischer*, 120 Kan. 226, 243 Pac. 291 (1926).

<sup>29</sup> 78 N. Y. 492 (1879), *aff'g*, 18 Hun 487 (N. Y. 1879).

did not result from rape, but from the strangling of the girl, which was an act distinct from rape. *While there are strong reasons for sustaining this view*, as we have arrived at the conclusion that the charge may be upheld upon the grounds we have stated, it is not necessary to consider that aspect of the question."<sup>30</sup> The court rested its decision upon the conclusion that the statute then in effect was declarative of the common law doctrine of felony murder, which regarded every homicide resulting from a felony as murder. But the court apparently failed to appreciate the purpose of the merger theory, for at common law there were no degrees of murder and hence there was no need to apply the merger principle to distinguish between different types of criminal homicides. Moreover, the statute governing felony murder at the time of the *Buel* case no longer specified the crime of rape as a felony included in its scope, but treated all felonies alike as proper bases for murder charges.

The opinion in *People v. Hüter*<sup>31</sup> enlarged upon the misconception in the *Buel dicta*, for the court said "It does not follow, however, that in the other felonies, in order to bring the case within the statute defining murder, the act which caused the death must be a different one from that done in the commission of a collateral felony. By the same act one may commit two crimes, and to constitute murder in the first degree, as in the commission of a felony, it is not necessary that there should be an act collateral to or independent of that which causes death; but if the act causing death be committed with a collateral and independent design, it is sufficient; thus if the violence used to commit a rape or robbery results in death the case is plainly within the statute, and so this court has held in the cases above referred to [*Buel v. People*]."

Much more was said in the *Hüter* case than was necessary to the decision, and the *Buel* opinion was not restricted to the facts then before the court. These two unfortunate expressions of *dicta* have cast doubt upon the purpose and scope of the felony murder doctrine in New York. But since there appears to be no case in this state where the very acts of a felony caused a death, the courts may yet disregard the reasoning of the above opinions and conform to the general rule. Then a homicide resulting from the acts constituting the felony will be treated, and properly so, under the other sections

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<sup>30</sup> 78 N. Y. 492, 500 (1879) [italics supplied]. See also *People v. Schermerhorn*, 203 N. Y. 57, 96 N. E. 376 (1911); *People v. Wolter*, 203 N. Y. 484, 97 N. E. 30 (1911).

In *Regina v. Greenwood*, 7 Cox C. C. 404 (1857), the victim of rape died of a venereal disease contracted from the defendant in the act. The court declared that the defendant could be convicted of a felony murder. This view is founded upon the common-law doctrine which is applied in England. In New York, the crime probably would not be felony murder under the statute.

<sup>31</sup> 184 N. Y. 237, 244, 77 N. E. 69 (1906). O'Brien and Vann, JJ., concurred except as to that part of the opinion quoted, as to which they expressed no opinion.



of the statute.<sup>32</sup> So where death results from arson in the first degree the crime is murder under that section which specifically provides for such homicide,<sup>33</sup> and is not felony murder. Or where the victim of a robbery dies of fright induced by the act of robbery, where no independent assault was perpetrated, the homicide is not felony murder but one of the other forms of criminal homicides.

### *Relation of the Homicide to the Felony.*

There is one other aspect of the felony murder doctrine which must be taken into consideration in determining whether any given homicide is felony murder. Is every homicide which is not a *consequence* of the underlying felony, nor committed in furtherance thereof, but merely coincidental thereto, felony murder? Manifestly, the characterization of a homicide, which is completely divorced from the felony except in point of time, as a felony murder, is not a just expression of the spirit and intent of the doctrine.

The New York decisions have confined the felony murder doctrine to those homicides committed "during the course of the felony."<sup>34</sup> The felony must be so related to the homicide by time, place,

<sup>32</sup> Homicides caused by felonious acts may be (1) murder in the first degree when committed:

"From a deliberate and premeditated design to effect the death of the person killed, or of another"; (N. Y. PENAL LAW § 1044, subd. 1).

"By an act imminently dangerous to others, and evincing a depraved mind regardless of life. \* \* \*" (N. Y. PENAL LAW § 1044, subd. 2.)

By committing arson in the first degree. (N. Y. PENAL LAW § 1044, subd. 3.)

By injuring railroad property. (N. Y. PENAL LAW § 1044, subd. 4.)

(2) murder in the second degree when committed:

"with a design to effect the death of the person killed, or of another, but without deliberation and premeditation." (N. Y. PENAL LAW § 1046.)

(3) manslaughter in the first degree when committed without a design to effect death:

"In the heat of passion but in a cruel and unusual manner, or by means of a dangerous weapon." (N. Y. PENAL LAW § 1050, subd. 2.)

By injury to a woman for purpose of killing the unborn quick child of which she is pregnant. (N. Y. PENAL LAW § 1050, subd. 2, par. 2.)

To produce a miscarriage. (N. Y. PENAL LAW § 1050, subd. 2, par. 3.)

<sup>33</sup> N. Y. PENAL LAW § 1044 (3). In *People v. Greenwall*, 115 N. Y. 520, 22 N. E. 180 (1889), the court apparently "did not have a clear comprehension of the force and effect" of the felony murder subdivision, when it said that subdivision 3 was evidently the work of one who "clearly did not have a clear comprehension of the force and effect of the prior subdivision."

<sup>34</sup> *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933); *People v. Ryan*, 263 N. Y. 298, 189 N. E. 225 (1934). *Felony Murder—Necessity for the Con-*

and other circumstances as to justify a jury in finding that the homicide was committed in the course of the felony. Where the defendant was apprehended and seized by the proprietor of the store he was burglarizing, his presence on the premises was not conclusive evidence that the felony was still in progress when the homicide occurred.<sup>35</sup> And where a burglar was in flight, and had abandoned the loot when the homicide took place, the felony had terminated and the crime was not felony murder.<sup>36</sup>

But there has been very little indication that the homicide must occur not only during the commission of the felony but must also spring out of it or be caused in furtherance of it, to become felony murder.<sup>37</sup>

Elsewhere, the homicide is not treated as murder unless it is in consequence of the felony. In Texas, a statute made "driving while intoxicated" a felony. But one, who while so driving, was caused by a flat tire to swerve, striking and killing another, was held to be not guilty of felony murder unless it appeared that the commission of the felony was the operative cause of the accident.<sup>38</sup>

In Missouri, under a statute making a death caused by arson, murder, a defendant was convicted for the homicide of a fireman called to extinguish the fire started by the defendant, the court regarding the death as a consequence of the arson.<sup>39</sup>

In Wisconsin a defendant was held not guilty of murder where death resulted from a fire caused by him while engaged in the felony of rape, the court saying there was "no such relationship between the crimes as to make one a consequence of the former or to transfer intent of one to the other" and "the felony committed must have some intimate and close connection with the killing and must not be separate and distinct and independent from it."<sup>40</sup>

*tinuance of the Underlying Crime*, N. Y. L. J., Feb. 9, 1935, at 722, Feb. 11, 1935, at 746, and Eisenberg, *The Doctrine of Felony Murder in New York*, N. Y. L. J., Jan. 17, 1935, at 296, Jan. 18, 1935, at 316.

<sup>35</sup> *People v. Smith*, 232 N. Y. 239, 133 N. E. 574 (1921).

<sup>36</sup> *People v. Marwig*, 227 N. Y. 382, 125 N. E. 535 (1919).

<sup>37</sup> There was some mention of such limitation in *Buel v. People*, 78 N. Y. 892 (1879); *People v. Sobieskoda*, 235 N. Y. 411, 139 N. E. 558 (1923); *People v. Ryan*, 263 N. Y. 298, 189 N. E. 225 (1934).

<sup>38</sup> *Burton v. State*, 177 Tex. Cr. App. 363, 55 S. W. (2d) 813 (1932). The court said: "In the case before us, and in any such case, the trial judge should submit to the jury the issue as to whether the accident or mistake resulted from the fact of the driver being under the influence of intoxicating liquor or from a cause or causes not reasonable growing out of or resulting from such a condition, and the jury should be told to acquit if the latter be true."

<sup>39</sup> *State v. Glover*, 330 Mo. 709, 50 S. W. (2d) 1049 (1932), decided under a statute specifying arson. 4 Mo. STAT. ANN. (Vernon, 1932).

<sup>40</sup> *Pliemling v. State*, 46 Wis. 516, 1 N. W. 278 (1879). The Wisconsin statute, similar to that of New York, includes "any felony."

Obviously the felony murder doctrine in New York under the statute cannot be properly effectuated unless it is limited to the homicide which has a "causal" connection with the underlying felony.<sup>41</sup>

### *Conclusions.*

The application of the felony murder doctrine in New York has been fraught with difficulties. Time after time the Court of Appeals has reversed convictions under the statute because of errors committed by trial courts in their interpretation of it.

In the main, the cause of the confusion surrounding the doctrine in New York may be found in the desire of the courts to limit its application to crimes meriting the harsh penalty exacted by it without violating the expressed intent of the statute embodying the doctrine.

Hence, when provisions for lesser degrees of criminal homicide had been enacted, the courts, to effectuate their purpose, refused to consider homicides, caused by the very acts comprising the felony, as felony murder. But the views of the *Buel* and *Hüter* opinions caused complications. Under them, one who commits second degree rape<sup>42</sup> with the "victim's" consent, would be guilty of felony murder, if death resulted from the act. Such an interpretation is patently unsound, and it is to be hoped that the courts will utilize the first opportunity of expressing their disapproval.

When it was established that the statute on felony murder governed all felonies regardless of their nature, the courts construed the section to cover only homicides committed during the progress of the felony. But to determine whether the felony was in progress at the time of the homicide has not been a simple matter in the midst of complex, factual situations.<sup>43</sup> And some opposition has arisen against this test.<sup>44</sup> This requirement would not prevent a conviction for felony murder where one engaged in grand larceny by removing the stolen property in an automobile, collides with another, killing

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<sup>41</sup> This phase of the doctrine becomes especially important where the defendant participated with others in the felony but did not commit the homicide and the evidence indicates that the death was not part of the common design but was committed by a confederate in the pursuance of a personal motive. *Cf.* *People v. Sobieskoda*, 235 N. Y. 411, 139 N. E. 558 (1923); *People v. Ryan*, 263 N. Y. 298, 189 N. E. 225 (1934).

<sup>42</sup> N. Y. PENAL LAW § 2010, subd. 5, par. 3.

<sup>43</sup> For examples, see *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1923); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927).

<sup>44</sup> See Eisenberg, *loc. cit. supra* note 34, and Perkins, *loc. cit. supra* note 2, at 562.

him; though the defendant be free from any negligence whatever. Such a death should not be treated as murder.

If the requirement were that the acts causing the homicide must be so connected with the felony as to be within the original felonious design or committed because of, or in furtherance of the felony, in order that the death be murder, the felony murder doctrine would be more properly and justly applied.

G. ROBERT ELLEGAARD.

#### ADMISSIBILITY OF PRIOR CRIMES IN A PROSECUTION FOR FORGERY.

At common law, the introduction of any evidence proving a crime, other than that charged in the indictment, was severely censured and the exceptions to this narrow view were fostered with reluctance. Such solicitude for the criminal was undoubtedly motivated by the same judicial philosophy which has created the presumption of innocence and the rule of reasonable doubt.<sup>1</sup>

In the case of *People v. Molineux*,<sup>2</sup> the court, in considering the admissibility of independent crimes, restricted their introduction to cases wherein such unrelated crimes bore directly on the issues presented and tended to prove either intent, motive, absence of mistake, identity or furtherance of a preconceived plan. In considering the application of this rule to forgery,<sup>3</sup> it must be noted that forgery is a crime which can be committed in either of two ways, *viz.*, the crime of forgery<sup>4</sup> and the crime of uttering a forged instrument.<sup>5</sup>

#### *The Rule As Applied to the Crime of Forgery.*<sup>6</sup>

*To Prove the Act.* To establish the crime of forgery, two things must be proven, (a) a specific intent to defraud,<sup>7</sup> and (b) the act

<sup>1</sup> *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319 (1887); *Coleman v. People*, 55 N. Y. 81 (1873); RICHARDSON, EVIDENCE (4th ed. 1931) § 148; *People v. Molineux*, 168 N. Y. 264, 291, 61 N. E. 286 (1901); *People v. Durkin*, 330 Ill. 394, 161 N. E. 739 (1928).

<sup>2</sup> 168 N. Y. 264, 61 N. E. 286 (1901).

<sup>3</sup> N. Y. PENAL LAW art. 84.

<sup>4</sup> N. Y. PENAL LAW §§ 884, 887.

<sup>5</sup> N. Y. PENAL LAW § 881.

<sup>6</sup> Forgery as considered under this heading refers to forging as distinguished from uttering a forged instrument.

<sup>7</sup> N. Y. PENAL LAW § 880; *People v. Molineux*, 160 N. Y. 264, 61 N. E. 286 (1901), "It will be seen that the crimes referred to under this head, constitute distinct classes in which the intent is not to be inferred from the act, \* \* \*." *People v. Katz*, 209 N. Y. 311, 327, 103 N. E. 305 (1913), after stating the general rule against admissibility of prior crimes, continues, "there are various recognized exceptions to this rule, however, and one of them is that