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Criminal Law--Felony-Murder Rule in Missouri--the Underlying Felony Need Not Be Inherently Dangerous

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not rest on this distinction. The court stated that "the proper method of analysis is not to focus on the unfairness of the mutual funds' profit at the expense of their purchasers—who have their own recourse for any wrongdoing—but on the strands of duty running to the corporation from the various individuals involved."[36] But, inconsistently, the court soon after states that "there are ample remedies under the federal securities law to punish this conduct."[37]

The plaintiff in *Schein* sought a departure from the traditional rules governing the fiduciary obligations of individuals dealing in its stock on the basis of inside information. The Florida court refused to extend liability to corporate outsiders who knowingly and intentionally acquired and misused confidential information "in the absence of any viable precedent upon which to base the totally new concept of law . . . ."[38] Unfortunately, it appears that the court has forgotten an earlier attitude it held. In 1927 the Florida Supreme Court stated:

> When new relations between men arise . . . law is called in to adjust them. Legal doctrines are predicated on reason and custom, mark their growth from rude beginnings, and, like the order of the universe, are constantly changing to adjust the new relations of society. We have no better proof of this than the development of our common law and system of equity.[39]

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CRIMINAL LAW – FELONY-MURDER RULE IN MISSOURI – THE UNDERLYING FELONY NEED NOT BE INHERENTLY DANGEROUS

State v. Chambers[1]

Defendant and his accomplice stole a pickup truck from a car lot. The owner of the lot saw the stolen truck being towed down the highway, fired several shots from his pistol in an attempt to stop the thieves, and pursued them. The defendant, driving without lights and at a high rate of speed, proceeded in such a manner as to cause the truck to weave from one side of the highway to the other. As a result, the stolen truck collided with an approaching automobile. All four of the automobile's occupants were killed. Defendant was convicted by a jury of one count of stealing and four counts of second degree murder. On appeal defendant conceded that the jury could reasonably find him guilty of stealing but argued, among other points, that in order to convict him of felony-murder in the second degree it was necessary that the underlying felony

36. 313 So. 2d at 744 (quoting from the Second Circuit's dissent).
37. *Id.* at 745 (quoting from the Second Circuit's dissent).
38. *Id.* at 743-744 (quoting the Second Circuit's dissent).
39. Quinn v. Phipps, 93 Fla. 805, 824, 113 So. 419, 425 (1927).

1. 524 S.W.2d 826 (Mo. En Banc 1975).

or its manner of commission be inherently dangerous to human life. The Missouri Supreme Court affirmed the conviction holding that the underlying felony need not be inherently dangerous.

At common law a person who during the perpetration or attempted perpetration of a felony caused the death of another was guilty of murder.[2] In Missouri this common law felony-murder rule is embodied in two statutes. Section 559.007, RSMo Supp. 1975, provides that the unlawful killing of a human being during the perpetration or attempted perpetration of certain specified felonies is murder in the first degree.[3] Section 559.020, RSMo 1969, provides that all other kinds of murder at common law, not otherwise defined by statute to be manslaughter or justifiable or excusable homicide, are murder in the second degree.[4] This latter section has been construed to include all homicides that occur during the perpetration or attempted perpetration of felonies not specified in section 559.007.[5] Thus the only elements required to be found by the relevant Missouri statutes are a homicide and a felony or the attempted

2. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 545 (1972).

3. § 559.007, RSMo 1975, provides:

> The unlawful killing of a human being when committed without a premeditated intent to cause the death of a particular individual but when committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping is murder in the first degree.

§ 559.007 and § 559.005, RSMo 1975 replaced and repealed § 559.010, RSMo 1969. The effect of these two new sections was to divide what was formerly first degree murder under § 559.010 into the offenses of capital murder and first degree murder. The only significant difference between § 559.007 and the part of repealed § 559.010 dealing with felony-murder is that § 559.007 adds kidnapping to the list of enumerated felonies and eliminates mayhem from the list.

4. § 559.020, RSMo 1969, provides:

> All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.

5. In State v. Williams, 529 S.W.2d 883 (Mo. En Banc 1975), the question was raised whether second degree murder was a lesser included offense of first degree murder. The trial court instructed the jury on both second degree murder and first degree murder over defendant's objection. Defendant conceded that the evidence would have sustained a finding of a homicide committed during a robbery and thus a submission on first degree murder. However his contention was that if no intention to kill could be independently established, he was either guilty of first degree murder or not guilty of murder at all. The court stated that in order to uphold the conviction of second degree murder, it was not necessary to hold that second degree murder was a lesser included offense of first degree felony-murder. Instead the court based its affirmance on Missouri Supreme Court Rule 26.06 and § 556.220, RSMo 1969, which provide that a "defendant cannot complain because the evidence shows him guilty of a higher degree of the offense than that of which he was convicted." This result was especially interesting in light of the long line of Missouri cases holding that when a homicide is committed during the perpetration of one of the enumerated felonies, it is not error to refuse to instruct on second degree murder. State v. Ford, 495 S.W.2d 408 (Mo. En Banc 1973); State v. Sykes, 436 S.W.2d 32 (Mo. 1969); State v. Glenn, 429 S.W.2d 225 (Mo. En Banc 1968); State v. Burnett, 365 Mo. 1060, 293 S.W.2d 335, *cert. denied*, 352 U.S. 976 (1956); State v. Bradley, 361 Mo. 267, 234 S.W.2d 556 (1950); State v. Kauffman, 335 Mo. 611, 73 S.W.2d 217 (1934); State v. Merrell, 263 S.W. 118 (Mo. 1924).

commission of a felony.[6] Proof of the commission or attempted commission of the felony substitutes for and stands in lieu of the elements of malice and intention which are normally required to convict a defendant of murder.[7] Therefore, the only state of mind that need be shown is the intention to commit the underlying felony.[8]

The Missouri courts, however, have not applied the statute literally but have grafted three principal limitations by their construction. The first such restriction limits the scope of the underlying felony. The statute specifies that the homicide occur during the perpetration or attempted perpetration of a felony.[9] This language has been interpreted to require that the homicide occur within the *res gestae* of the felony or attempted felony.[10] If the homicide and felony are connected in one continuous transaction and are closely related in time, place, and causal relation, the homicide is committed during the perpetration of that felony.[11]

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6. State v. Shuler, 486 S.W.2d 505 (Mo. 1972); State v. Jasper, 486 S.W.2d 268 (Mo. En Banc 1972); State v. Conway, 351 Mo. 126, 171 S.W.2d 677 (1943).

7. State v. Williams, 529 S.W.2d 883 (Mo. En Banc 1975); State v. Lindsey, 507 S.W.2d 1 (Mo. En Banc 1974); State v. Ford, 495 S.W.2d 408 (Mo. En Banc 1973); State v. Jewell, 473 S.W.2d 734 (Mo. 1971); State v. Glenn, 429 S.W.2d 225 (Mo. En Banc 1968); State v. Bradley, 361 Mo. 267, 234 S.W.2d 556 (1950); State v. Wright, 337 Mo. 441, 85 S.W.2d 7 (1935); State v. Sharpe, 326 Mo. 1063, 34 S.W.2d 75 (1930). There are several other categories of murder where the actual intent to kill need not be shown. Of these other exceptions the two most common are "intent to do serious bodily injury murder" and "depraved heart murder." W. LAFAVE & A. SCOTT, *supra* note 3, at 528.

8. State v. Owens, 486 S.W.2d 462 (Mo. 1972); State v. Sykes, 436 S.W.2d 32 (Mo. 1969); State v. Burnett, 365 Mo. 1060, 293 S.W.2d 335, *cert. denied,* 352 U.S. 976 (1956); State v. Holloway, 355 Mo. 217, 195 S.W.2d 662 (1946); State v. Robinett; 279 S.W. 696 (Mo. 1926).

9. Note that in order for the state to prove felony-murder it is not necessary that the indictment refer to the fact the homicide occurred during the commission of a felony. State v. Owens, 486 S.W.2d 462 (Mo. 1972); State v. Beal, 470 S.W.2d 509 (Mo. En Banc 1971); State v. Meadows, 330 Mo. 1020, 51 S.W.2d 1033 (1932); State v. Messino, 325 Mo. 743, 30 S.W.2d 750 (1930).

10. State v. Glenn, 429 S.W.2d 225 (Mo. En Banc 1968); State v. Engberg, 376 S.W.2d 150 (Mo. 1964); State v. King, 342 Mo. 1067, 119 S.W.2d 322 (Mo. 1938); State v. Adams, 339 Mo. 926, 98 S.W.2d 632 (1936); State v. Messino, 325 Mo. 743, 30 S.W.2d 750 (1930); State v. McClain, 531 S.W.2d 40 (Mo. App., D.K.C. 1975). In State v. Glover, 330 Mo. 709, 719, 50 S.W.2d 1049, 1053 (1932), the court declared:

> The res gestae may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act, which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. . . . Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary, in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculated policy of the actors.

11. State v. Glenn, 429 S.W.2d 225 (Mo. En Banc 1968); State v. Adams, 339 Mo. 926, 98 S.W.2d 632 (1936); State v. McClain, 531 S.W.2d 40 (Mo. App., D.K.C. 1975). Applying this view, Missouri courts have consistently held that where the homicide occurs during the flight from the scene of the crime, the homicide has occurred during the *res gestae* of the felony. Cases cited *supra* and State v. Beal, 470 S.W.2d 509 (Mo. En Banc 1971); State v. King, 342 Mo. 1067, 119 S.W.2d 322 (Mo. 1938).

The applicability of this first limitation frequently arises in cases where it is arguable that the felony had been completed before the homicide occurred. Thus the courts have established a time when the felony is sufficiently completed so that the felony-murder rule can no longer be applied.[12] However, the courts have recognized that under certain circumstances it is posible for the felons to renew their purpose to do some act in furtherance of the felony and thus for the felony-murder rule to again become applicable.[13] In addition, courts have held that the felony-murder rule applies to any homicide that occurs during the perpetration of the felony. For example, it is not necessary that the homicide victim and felony victim be the same person.[14]

The second limitation placed upon the felony-murder doctrine by Missouri courts is that the homicide be an "ordinary and probable effect of the felony."[15] This restriction is applied where the causal relation between the felony and homicide has been broken. A defendant will be responsible only for accidental homicides that he could reasonably have anticipated and only if the homicide occurred during and was the natural and proximate result of the felony.[16]

The third manner in which the courts have limited the application of this doctrine is by requiring that the underlying felony be one that

12. For example, in State v. Messino, 325 Mo. 743, 30 S.W.2d 750 (1930), the court held that the felony of robbery was completed when the robbers had unmolested dominion over the property which they had taken. *See also* Annot., 58 A.L.R.3d 851 (1974).

13. For example, in State v. Engberg, 376 S.W.2d 150 (Mo. 1964), the defendant and his accomplices were a substantial distance away from the robbery when the homicide occurred. In addition, the robbers were not being pursued for the theft at the time of the killing. The Missouri Supreme Court stated that if the robbery had come to a rest, a jury nevertheless could find that the robbers renewed their purpose to escape and to shoot their way to freedom. The court therefore held that the case was properly submitted to the jury on the theory of felony-murder. *See also* State v. Hershon, 329 Mo. 469, 45 S.W.2d 60 (1932).

14. State v. McClain, 531 S.W.2d 40, 46 (Mo. App., D.K.C. 1975).

15. State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932).

16. The doctrine to be gathered from this last group of cases, as we interpret them, is that, if a defendant perpetrates an arson by setting fire to a building in which he knows, or has reason to believe, there are human beings, and if, in consequence, one of the inmates be burned to death, the defendant will be guilty of first degree murder; but, if the burning be only of a thing and at a place where the defendant has no reason to believe any one will be injured, and the person killed comes in later, the defendant cannot be charged with murder, for there the homicide will not be regarded as a natural and probable result of the arson, and the act of the deceased in getting into the fire will be treated as an intervening cause.

Id. at 715, 50 S.W.2d at 1054. In this case the defendant was found guilty of murder even though the deceased was not in or near the building when the fire was started. However, because the deceased was a fireman the defendant had reason to think the deceased would be present at the fire and would place himself within the range of the flames. Therefore, the court concluded that the homicide was a natural and probable consequence of the arson and that the deceased fireman neither broke the causal relation between the arson and homicide nor constituted an independent intervening cause.

is independent of the homicide (*i.e.*, a collateral felony).[17] For example, the felony-murder rule cannot be applied to the felony of manslaughter and thus raise that offense to second degree murder.[18] If the felony is collateral, the defendant can be prosecuted separately for both the underlying felony and the homicide without violating the doctrine of double jeopardy.[19] The test used to ascertain whether or not the offenses charged are independent of each other is whether each offense requires proof of an essential fact not required to prove the other.[20]

In *State v. Chambers*[21] defendant urged that another limitation be placed on the felony-murder doctrine by requiring that the underlying felony be inherently or foreseeably dangerous to human life. Defendant argued that the offenses enumerated as underlying felonies in the first degree felony-murder statute[22] were inherently or foreseeably dangerous to human life and, in order to avoid incongruous results, it should be required that offenses used as underlying felonies for second degree felony-murder likewise be inherently or foreseeably dangerous.[23] However, the Missouri Supreme Court refused to hold that such a requirement existed.

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17. State v. Shock, 68 Mo. 552 (1878). The court in discussing an earlier version of the first degree felony-murder statute described a collateral felony in this way:

> We are of the opinion that the words "other felony" used in the first section refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an offense distinct from the homicide.

Id. at 561. *See also* Annot., 40 A.L.R.3d 1341 (1971).

18. The felony-murder rule also can probably not be applied to assault crimes. It is applicable in the case of such crimes as burglary, robbery, rape and arson because these are collateral felonies.

19. State v. Chambers, 524 S.W.2d 826 (Mo. En Banc 1975); State v. Moore, 326 Mo. 1199, 33 S.W.2d 905 (1930).

20. State v. Chambers, 524 S.W.2d 826, 829 (Mo. En Banc 1975). Another question raised in this case was whether it was permissible to prosecute the defendant for several murders if more than one death resulted from the same act of the defendant. The court answered affirmatively and therefore held that defendant was correctly prosecuted for four counts of murder when the stolen truck collided with the oncoming automobile killing all four of the car's occupants.

21. 524 S.W.2d 826 (Mo. En Banc 1975).

22. At the time of this case, the applicable first degree murder statute was § 559.010, RSMo 1969. As stated, this statute has been repealed and replaced by § 559.007, RSMo Supp. (1975). *See* note 3 *supra.*

23. Two different tests are employed in jurisdictions limiting the felony-murder rule to inherently dangerous felonies. Under the "inherently dangerous" test, the felony is viewed in the abstract to ascertain whether or not it is an inherently dangerous felony. Under the "manner of commission" test, the actual conduct of the defendant in the particular case at hand is considered. *See, e.g.*, State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972) and Jenkins v. State, 230 A.2d 262 (Del. 1967) applying the "manner of commission" test and People v. Satchell, 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361 (1971) and State v. Moffitt, 199 Kan. 514, 431 P.2d 879 (1967) applying the "inherently dangerous" test. *See also,* Annot., 50 A.L.R.3d 397 (1973).

In *Chambers,* it appears that defendant did not distinguish between these

The court based its decision on two grounds. First, it found that under the facts of this case the underlying felony as committed was dangerous to human life.[24] Second, it noted that no such requirement had ever been recognized in Missouri. As rationale for its decision, the court stated that in second degree felony-murder cases the defendant has formed the intent to commit the underlying felony; thus, defendant should be held accountable for any consequences of his intention.[25]

The dissent in *Chambers* contended that the view that the underlying felony need not be inherently dangerous should be rejected. The dissent based this conclusion on the function of the felony-murder rule at common law,[26] the general trend toward mitigation of the harshness of punishment for many felonies, the addition of many statutory felonies which are not of the same dangerous character as common law felonies, and the abolition of the felony-murder rule in England.[27] In addition, the dissent concluded that the rationale of deterrence cannot justify including nondangerous felonies because the felon will not anticipate that death will occur. The dissent also noted that the law can punish reckless and wanton conduct under conventional manslaughter statutes. It therefore concluded that the majority's approach resulted in an extension of the doctrine "far beyond any rational function it is designed to serve."[28]

The court's decision in *Chambers* was in accord with previous Missouri cases applying the second degree felony-murder rule. However, in almost every case the underlying felony was arguably a dangerous one. In the two cases[29] that have applied this doctrine to felonies which were not inherently or foreseeably dangerous, the issue of the nature of the underlying felony was not raised.[30]

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two tests but instead urged only that the courts find "the underlying felony, stealing a motor vehicle, or its manner of commission 'as being inherently or foreseeably dangerous to human life.'" 524 S.W.2d at 831. Even if the court would have adopted the manner of commission test, it might well have found that the manner in which the felony of stealing a motor vehicle was committed was inherently or foreseeably dangerous to human life. Therefore, the defendant should have urged that the court adopt the "inherently dangerous" test. This is the test the dissent would have applied since "the manner of commission test becomes devoid of meaning by virtue of hindsight; if a death occurs, one can immediately consider that the felony was committed in a dangerous manner—otherwise the death would not have occurred." 524 S.W.2d at 837.

24. 524 S.W.2d at 832 (Mo. En Banc 1975). In this case the underlying felony was stealing. The dissent contended that when viewed in the abstract, stealing is not a felony dangerous to human life. Note that in reaching this conclusion, the dissent applied the "inherently dangerous" test. *See* note 23 *supra.*

25. *Id.* at 833.

26. *See* note 35, *infra.*

27. English Homicide Act of 1957, 5 & 6 Eliz. 2, c. II, § 1.

28. 524 S.W.2d at 837.

29. The two cases are State v. Robinett, 279 S.W. 696 (Mo. 1926), applying the doctrine to a homicide occurring during the transportation of mash for the illegal manufacture of liquor and State v. Wright, 337 Mo. 441, 85 S.W.2d 7 (1935), applying the doctrine to a homicide occurring during an attempt to defraud an insurance company.

30. The dissent in *Chambers* stated that these latter two cases were incor-

A growing number of jurisdictions hold that only inherently dangerous felonies will support a conviction of felony-murder.[31] The *Model Penal Code* creates a rebuttable presumption of recklessness manifesting extreme indifference to human life where the actor is involved in the perpetration or attempted perpetration of robbery, rape, arson, burglary, kidnapping, or felonious escape.[32] Otherwise, the felony-murder rule is abandoned.[33] The *Missouri Proposed Criminal Code* retains the felony-murder doctrine only for homicides occurring during the commission or attempted commission of arson, rape, sodomy, robbery, burglary in the first degree, kidnapping, or escape from custody or confinement.[34] The *Missouri Proposed Criminal Code* thus differs from the *Model Penal Code* by making the presumption conclusive when the homicide occurs during the perpetration of one of the specified felonies.

The better view is that the underlying felony should be inherently or foreseeably dangerous to support a conviction of felony-murder. When the felony-murder rule was developed at common law all felonies were punishable by death. Therefore, under most circumstances the addition of a murder conviction to the underlying felony conviction did not increase the punishment. Conviction of an attempted felony was only a misdemeanor. But if a homicide occurred during the attempted felony, the defendant would be punished by death. This additional punishment

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rectly decided since neither of the underlying felonies were felonies at common law. The dissent also stated that since neither of the felonies involved were felonies at common law, they could not support a conviction of "murder at common law" such as to qualify under § 559.020, RSMo 1969. State v. Mudgett, 531 S.W.2d 275 (Mo. En Banc 1975), decided by the Missouri Supreme Court after *Chambers,* expressly rejected this argument raised by the dissent. *Mudgett* held that it is not necessary that the underlying felony be a felony at common law in order to apply the common law felony-murder doctrine.

31. People v. Stachell, 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361 (1971); Jenkins v. State, 230 A.2d 262 (Del. 1967); State v. Moffitt, 431 P.2d 879 (Kan. 1967); Powers v. Commonwealth, 110 Ky. 386, 61 S.W. 735 (1901); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924); MODEL PENAL CODE § 201.2, Comment 4 (Tentative Draft No. 9, 1959); Annot., 50 A.L.R.3d 397 (1973).

32. MODEL PENAL CODE, *supra* note 31.

33. *Id.* Comment four states that there is no basis for the belief that accidental homicides occur more often in connection with specific felonies. It concludes that there is thus no justification for the continued application of the felony-murder rule.

34. THE PROPOSED CRIMINAL CODE FOR THE STATE OF MISSOURI § 10.020 (1973) provides:

> A person commits the crime of murder if . . . (c) he commits or attempts to commit any of the following felonies: arson, rape, sodomy, robbery, burglary in the first degree, kidnapping or escape from custody or confinement and in the course of and in the furtherance of such felony, or in immediate flight from the commission or attempt, he recklessly causes the death of another person; or (d) he is criminally responsible under Section 7.070 (2) for the conduct of another who is committing or attempting to commit any of the felonies listed in Subsection (c); and such other person commits murder as defined in Subsection (c) and such homicide was reasonably foreseeable as a consequence of committing or attempting to commit the felony.

was justifiable because the defendant, although not intending to commit murder, did intend to commit a crime which if successfully completed was punishable by death.[35] Today this historical rationale cannot justify the continued application of the felony-murder rule. Because non-homicide felonies are no longer punishable as severely as murder, the felony-murder rule increases the punishment to a degree disproportionate to the punishment for the felony defendant intended to commit. Furthermore, at common law almost all felonies were of a dangerous character. Today, however, many non-dangerous crimes are felonies. Thus, the felony-murder rule is being applied to many crimes which are beyond its historical boundaries.

One of the principal uses of the felony-murder doctrine is to relieve the prosecution of the necessity of proving actual malice. Although in many cases there would be sufficient evidence to show actual malice even without the felony-murder rule, in the case of conspirators it would often be difficult to establish the required intent to kill without the application of this rule. Ease of proof, however, is not a sufficient justification for the retention of this doctrine. Neither is the *Chambers* rationale that because the felon is a "bad person" he should be held responsible for all consequences of his act no matter how unintentional or unforeseeable. At common law felonies were generally of such a dangerous character as to arguably allow one to logically infer an intent to kill. However, today with the addition of many non-dangerous statutory felonies[36] it is unsound to apply this doctrine because "there is no logical basis for imputing malice from the intent to commit a felony not dangerous to human life."[37] Furthermore, it is contrary to the general principles of criminal law to hold one criminally liable for bad results which differ substantially from intended results.[38]

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35. In R. PERKINS, THE CRIMINAL LAW 44 (2d ed. 1969), the effect and purpose of the felony-murder rule is described:

> Since the would-be felon was willing to risk his life, it was relatively unimportant that he became guilty of a capital crime in a different manner than he intended. . . . Hence to hold guilty of a capital crime one who made an unsuccessful attempt to commit burglary during which he had caused the loss of human life, however unintentionally and unexpectedly, put the wrongdoer in no worse position, in legal theory, than if he had succeeded in committing burglary without homicide. At the present time, with the removal of most felonies from the category of capital crimes, the reason for the rule has ceased to exist.

36. The illogic of applying the felony-murder rule is illustrated in Powers v. Commonwealth, 110 Ky. 386, 461, 61 S.W. 735, 742 (1901):

> [U]nder our statute, the removal of a corner stone is punishable by a short term in the penitentiary, and is therefore a felony. If, in attempting this offense, death were to result to one conspirator by his fellows accidentally dropping the stone upon him, no Christian court would hesitate to [require the act to have a natural tendency to produce the unintended result before finding it to be a crime.]

Id. at 742.

37. Jenkins v. State, 230 A.2d 262, 269 (Del. 1967).

38. W. LAFAVE & A. SCOTT, *supra* note 2, at 560.