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Circumstances in Which a Criminal Court Must Charge the Jury as to the Lesser Degrees of, and Crimes Included in, the Crime Charged in the Indictment

CIRCUMSTANCES IN WHICH A CRIMINAL COURT MUST CHARGE THE JURY AS TO THE LESSER DEGREES OF, AND CRIMES INCLUDED IN, THE CRIME CHARGED IN THE INDICTMENT

In a recent case, *People v. Mussenden*,[1] the Court of Appeals of New York affirmed, three judges dissenting, a conviction of first degree attempted robbery,[2] rejecting the defendant's contention that the trial judge committed error in refusing to instruct the jury as to the lesser crimes set forth in the indictment. The case therefore presents a problem which arises in varying degrees of complexity in a great number of the cases tried in the criminal courts. Succinctly stated, the question is when must a criminal court in its charge to the jury instruct as to the lesser crimes included in the one charged in the indictment, as to the lesser degrees of the crime charged, and as to lesser crimes charged as additional counts in the indictment?

The principal controlling statutes in New York are sections 444 and 445 of the Code of Criminal Procedure[3] and section 610 of the Penal Law.[4] Summarized, these statutes provide, substantially, that on the trial of an indictment a defendant may be found not guilty of the crime charged in the indictment and guilty of any degreee of the crime inferior to the degree charged, or of any lesser crime necessarily included in the crime charged, or of an attempt to commit the crime charged or a lesser degree thereof.

Broadly speaking, a trial judge has the duty of so charging when, and only when, the jury could correctly convict of the lesser degree or included crime. It can be further generally stated that there are three prerequisites to the imposition of a duty to charge the lesser degrees or included crimes. The first of these is a request to so charge by the defendant's counsel.[5] The second essential element is that the indictment be broad enough in its language to include the lesser crime or lesser degree of the crime charged.[6] Of course, if the lesser crime or degree is set forth as an additional count there is no problem,

1. 308 N.Y. 558, 127 N.E.2d 551 (1955).

2. N.Y. Penal Law § 2124 provides: "An unlawful taking . . . by force or fear . . . is robbery in the first degree, when committed by a person: . . . 2. Being aided by an accomplice actually present. . . ."

3. N.Y. Code Crim. Proc. § 444 provides: "Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime. Upon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence. A conviction upon a charge of assault is not a bar to a subsequent prosecution for manslaughter or murder, if the person assaulted dies after the conviction, in case death results from the injury caused by the assault." § 445 (1881) provides: "In all other cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment."

4. N.Y. Penal Law § 610 provides: "Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime."

5. People v. Jordan, 125 App. Div. 522, 109 N.Y. Supp. 840 (1st Dep't 1903).

6. Dedieu v. People, 22 N.Y. 178 (1860).

except, as will be noted in the latter part of this discussion, in a case like *People v. Mussenden* where there is a question of whether the lesser count is exactly the same crime as the higher count, although called by a different name.

Sections 444 and 445 of the Code of Criminal Procedure are for the most part a codification of the common law. Section 445 is the literal expression of that rule[7] and section 444 was enacted originally in the Revised Statutes[8] as a precautionary measure. The employment of the degree device gave rise to a fear that the separation into degrees of crimes generically alike, thus making them separate crimes, might have been construed as intending, in regard to these, to abrogate the common law rule that on an indictment for one crime a defendant could be convicted of a lesser included crime.[9] Section 610 of the Penal Law is substantially the same as section 444 of the Code of Criminal Procedure.

I. Included Crimes

It is the language of the indictment which is determinative of whether or not conviction may be had for an included crime. The rule at common law was that if it was possible to strike from the indictment all the elements relating to the crime charged but not those relating to the crime of which the defendant is convicted and still have remaining sufficient allegations to set forth the crime of which he was found guilty, then the conviction is good.[10] It is not necessary to the operation of the rule, which is the same today, that the lesser included offense be included in the statutory definition of the offense charged. As pointed out in the case of *People v. Zielinski*,[11] if this were the correct interpretation, then an attempt to commit murder does not necessarily include an assault,[12] and thus, even in an indictment alleging facts showing an assault as well as attempted murder in the same transaction there could be no conviction for the assault alone if the attempted murder was not proved.[13] But if the lesser offense is in fact included in the statutory definition of the crime charged then it is not necessary to further explore the specific allegations of the indictment.

One of the earliest cases illustrating the rule just discussed is *Mackalley's Case*.[14] There the defendant was indicted for murder for killing a sergeant of the mace who was attempting to arrest him under a prescript. It developed

7. People v. Miller, 143 App. Div. 251, 128 N.Y. Supp. 549 (1st Dep't 1911), aff'd, 202 N.Y. 618, 96 N.E. 1125 (1911).

8. 2 N.Y. Rev. Stat. 702, § 27 (1829) provides: "Upon an indictment for any offence consisting of different degrees, as prescribed in this Chapter, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence, inferior to that charged in the indictment, or of an attempt to commit such offence."

9. Dedieu v. People, 22 N.Y. 178 (1860).

10. Ibid.

11. 247 App. Div. 573, 288 N.Y. Supp. 176 (4th Dep't 1936).

12. The example used by People v. Zielinski is that of an attempted murder by means of mailing a package of poison, the transmission of which miscarries.

13. As a matter of fact, N.Y. Code Crim. Proc. § 444 was amended by N.Y. Laws c. 625 (1900) to provide for conviction of an included assault on a murder indictment even where the indictment does not set forth the assault. See note 3 supra.

14. 9 Co. Rep. 61b, 77 Eng. Rep. 824 (K.B. 1611).

during the trial that the sergeant had no prescript but was attempting to make the arrest *ex officio*. The court held that the defendant could be convicted of manslaughter for killing under the latter circumstances under an indictment charging murder of an officer acting under a prescript. The allegation as to the officer's acting under the prescript was held to be mere surplusage and conviction for the crime of manslaughter good, as conviction for an included crime.[15]

A modern case exemplifying the rule is the case of *People v. Friedman*[16] where, in a dictum, the court noted that on an indictment charging burglary[17] and larceny,[18] the defendant could not be convicted of the crime of receiving stolen property.[19] The latter crime is not included in the statutory definition of the former and the language of the indictment was not broad enough in specific allegations to cover the crime of receiving stolen property.[20]

Precise as the rule seems in theory, in its application it produces some unusual results. The question as to whether a defendant indicted for felony murder[21] or misdemeanor manslaughter[22] may be acquitted of the killing charge and convicted of the felony or misdemeanor in which he was involved during the slaying has been clearly settled. The criterion to be employed is, following the general rule, the language of the indictment. If broad enough to describe the underlying felony a conviction of that felony may be had but the felony itself is held not to be a crime included in the statutory definition of felony murder.[23] The same holds true for a misdemeanor in the case of misdemeanor manslaughter.[24]

Some illustrations of the application of the rule to this type of case may be appropriate here. In *People v. Nichols*,[25] a felony murder case, the indictment charged, in the common law form, that the defendant and two others ". . . wilfully, feloniously, and of malice aforethought, shot and killed Samuel Wolchock with a revolver.' "[26] This indictment, which did not mention the crimes of either robbery or burglary (although the former was proved on the trial and

15. See 9 Halsbury's Laws of England 175 (2d ed. 1933): "They [the jury] may, however, at common law, convict of a cognate offence of the same character but of a less aggravated nature, if the words of the indictment are wide enough to cover such an offence."

16. 149 App. Div. 873, 134 N.Y. Supp. 153 (2d Dep't 1912).

17. N.Y. Penal Law § 402.

18. N.Y. Penal Law § 1294.

19. N.Y. Penal Law § 1308.

20. The general rule is that if a greater crime includes all the elements of a lesser crime, as they are both defined by statute, and differs only in the addition of aggravating circumstances, then the lesser offense is one necessarily included in the greater.

21. N.Y. Penal Law § 1044 provides: "The killing of a human being . . . is murder in the first degree, when committed: . . . 2. . . . 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. . . ."

22. N.Y. Penal Law § 1050 provides: "Such homicide is manslaughter in the first degree, when committed without a design to effect death: 1. By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another . . . . "

23. People v. Nichols, 230 N.Y. 221, 129 N.E. 883 (1921).

24. People v. McDonald, 49 Hun. 67 (N.Y. Sup. Ct. 1888).

25. See note 23 supra.

26. 230 N.Y. at 223, 129 N.E. at 883.

provided the basis for the felony murder conviction) was held not to be broad enough in its language to be capable of supporting a conviction for the crime of robbery and hence the trial judge was not required to charge that crime to the jury. This is so even though a conviction of felony murder may be had on an indictment charging murder in a common law count.[27] But it should also be noted that under an indictment specifically charging felony murder alone it is not possible to obtain a conviction of premeditated murder.[28]

The cases of *People v. Colburn*[29] and *People v. McDonald*[30] provide instances where the language of the indictment was broad enough to support a conviction of the felony or misdemeanor on which the crime of murder or manslaughter was based. In the *Colburn* case, explained in *People v. Nichols,* the defendant was convicted of the felony of sodomy[31] under an indictment which the appellate division condensed and commented upon as follows: "[The indictment states that] the defendants did feloniously and willfully assault (a certain person named), continues in the language of the statute against sodomy . . . and charges in sufficient words that the defendants, when in the commission of such felony, committed murder."[32] The second count charged murder alone. In the *McDonald* case the indictment charged the defendant with manslaughter in the first degree[33] committed while engaged in the misdemeanor set forth in what was then section 288 of the Penal Code,[34] viz., failing to care for a child for whose care defendant was legally responsible. It was held the defendant was properly convicted of the misdemeanor, the court saying, "The indictment charges sufficient facts, and more than enough to show the defendant guilty of a misdemeanor. . . ."[35]

Exceptions

There are some specific case law and statutory exceptions to the rule of section 445. For example, a jury need not be charged with a lesser included crime where a defendant has been extradited from a foreign country and the lesser included crime is not one for which he could have been extradited under the particular treaty concerned.[36] Another example of such an exception is where a child under sixteen years of age is being tried for first degree murder. It would be error[37] for the court to charge any included crime except second degree murder because, by statute,[38] such a child cannot be convicted of any crime not punishable by death or life imprisonment.

27. Keefe v. People, 40 N.Y. 348 (1869).

28. People v. Hoffman, 219 App. Div. 334, 220 N.Y. Supp. 249 (2d Dep't 1927), aff'd without opinion, 245 N.Y. 588, 157 N.E. 869 (1927).

29. 162 App. Div. 651, 147 N.Y. Supp. 689 (2d Dep't 1914).

30. See note 24 supra.

31. N.Y. Penal Law § 690.

32. 162 App. Div. at 654, 147 N.Y. Supp. at 690.

33. N.Y. Penal Law § 1050(1). Then, N.Y. Penal Code § 189.

34. N.Y. Penal Law § 482. Then, N.Y. Penal Code § 288.

35. 49 Hun. at 69.

36. People ex rel. Young v. Stout, 81 Hun 336 (N.Y. Sup. Ct. 1894), aff'd, 144 N.Y. 699, 39 N.E. 858 (1895).

37. People v. Murch, 263 N.Y. 285, 189 N.E. 220 (1934).

38. N.Y. Penal Law § 2186.

An interesting contrast can be made between the cases of *Dedieu v. People*[39] and *Freund v. People*.[40] The former is a leading case on the sufficiency of indictments in regard to conviction of lesser degrees and included crimes. The latter case cites the *Dedieu* case and attempts to distinguish it. In the *Dedieu* case the defendant was indicted for first degree arson,[41] viz., setting fire to a dwelling in which there is then present a human being. On the trial the proof showed the defendant guilty only of setting fire to a crate of shoes and boots belonging to him for the purpose of collecting the insurance thereon. The trial court charged the jury that the defendant could be convicted of third degree arson,[42] which provided that it was unlawful to set fire to personal property in order to thereby prejudice the insurer. The defendant was convicted of third degree arson and on appeal Judge Denio said, in reversing the conviction, that under the pertinent section of the Revised Statutes,[43] now section 444 of the Code of Criminal Procedure, the defendant could not be convicted of a lesser degree of a crime for which he was indicted unless the lesser degree was described in sufficient terms in the indictment or included in the definition of the offense charged. Here, third degree arson was in no way embraced by the definition of first degree arson. The only thing they had in common was a burning. And since the indictment did not specifically set forth the elements of third degree arson there could be no conviction for it no matter what the proof showed. In the *Freund* decision, decided the year following the decision in *Dedieu v. People,* the defendant also was convicted of third degree arson under an indictment for first degree arson. On appeal the court said the *Dedieu* case was decided on the ground that the proof showed the defendant merely burned goods with intent to defraud the insurer, while in the case at bar the proof showed that the house was set on fire, not merely the goods, and the only resemblance between the cases is that the object of the perpetrator in each was to defraud the insurer. No mention is made by the case of the wording of the indictment and its bearing on the question.

It is doubtful that the cases can be reconciled. The *Freund* case completely disregards the real basis of the *Dedieu* decision which was that there were no allegations in the indictment sufficient to support proof of third degree arson on the trial, and for that reason, contrary to the interpretation of the decision which the *Freund* case made, the defendant could not be convicted of that crime.

One exception to the rule at common law has not been carried over into New York law under the present statutes. At common law upon an indictment for a felony one could not be convicted of an included misdemeanor. The reasons were peculiar to the common law and consisted of procedural privileges which the defendant lost on a felony indictment. The case of *People v. Jackson*[44]

39. See note 6 supra.

40. 5 Parker Cr. Rep. 198 (1861).

41. N.Y. Penal Law § 221. Then, 2 N.Y. Rev. Stat. 657, § 9 (1829).

42. N.Y. Penal Law § 223. Then, 2 N.Y. Rev. Stat. 667, § 5 (1829). But note, the burning of goods with intent to prejudice the insurer thereof is no longer an offense within the crime of arson, as such, but is an offense under N.Y. Penal Law § 1201.

43. See note 8 supra.

44. 3 Hill 92 (1842).

noted that this was not the law of New York, the reasons for the exception not being present in our law.

A fairly recent exception to the rule was made by the amendment of section 444[45] of the Code of Criminal Procedure to add thereto a second sentence which provides that where the act complained of is not proved to be the cause of death and the defendant has been indicted for murder or manslaughter he may be convicted of any degree of assault warranted by his act. This fairly clear legislative intent to specifically place beyond the rule of sufficiency of allegations in the indictment a case falling within the statute has been subjected to an unusual construction. In the case of *People v. Santoro*[46] the Court of Appeals held, three judges dissenting, that on an indictment for first degree manslaughter[47] a defendant may not be convicted of first degree assault.[48] The court reasoned that the indictment specified no allegations concerning first degree assault and, since it is a primary requisite of manslaughter that there be no intent to kill and since the indictment reiterated that there was no intent to kill and because first degree assault requires an intent to kill the latter crime is not included in the statutory definition of manslaughter and conviction may not be had. This reasoning is excellent and the conclusion that the defendant is deprived of notice of the charges against him if convicted of first degree assault is inevitable. What the court avoids and what the dissent notes is that the addition of the second sentence to section 444 was indisputably intended by the legislature to abrogate the rule of sufficiency of the indictment in this particular case. The dissent holds the defendant is notified of the possible crimes he may be convicted of under such an indictment by the provision of the statute itself. Abrogations of the common law rule have been made at other times.[49]

The third requirement essential to the imposition of a duty to charge the lesser degrees and included crimes is that, provided that there is no question but that the indictment is sufficiently broad to encompass the lesser degrees and included crimes, there must also be some possible view of the facts as presented by the evidence from which the jury could find guilt of the lesser degree or included crime and not necessarily thereby also guilt of the higher. The question has arisen more frequently in felony murder cases than in any other type of criminal case before the courts and for that reason the greater part of the remainder of this article will deal with the problem as presented by that type of crime.

II. Felony Murder and the Lesser Degrees

The classic statement of the third requirement for the imposition of this duty of charging the lesser degrees was made in the case of *People v. Schleiman*.[50]

45. See note 3 supra.

46. 229 N.Y. 277, 128 N.E. 234 (1920).

47. N.Y. Penal Law § 1050.

48. N.Y. Penal Law § 240.

49. 9 Halsbury's Law of England 175 (2d ed. 1933) notes: "In cases provided for by statute a jury may find a defendant guilty of an offence different in nature from that charged in the indictment."

50. 197 N.Y. 383, 90 N.E. 950 (1910).

The trial judge has the duty of so charging "unless . . . there was no possible view of the facts which would justify any other verdict except a conviction of the crime charged or an acquittal."[51] The opinion further amplified this statement in regard to the crime of felony murder with which the case was concerned, to the effect that the court is justified in charging the jury to bring in a verdict of guilty of first degree murder or not guilty only where the intent to kill is not a necessary element of the crime established by the evidence.

In the *Schleiman* case the defendant and another were in the course of committing a burglary at night of an inhabited dwelling[52] when the occupants of the house arose. Schleiman fired and mortally wounded a woman while his accomplice was struggling with the victim's son. It was clear that the felony of attempted burglary was then underway. Although the Court of Appeals pointed out that the situation is unusual where the trial judge will be justified in charging the jury to return a verdict of guilty of first degree murder or not guilty, this case presented such an occasion and the trial judge was justified in charging as he did. Numerous cases since have held that such instructions were properly given or that the lesser degrees of homicide[53] were erroneously charged or, on the other hand, that the lesser degrees should have been charged.[54]

It is possible to place the situations which may arise and involve the problem of when the trial judge should charge the lesser degrees of homicide and when a charge of guilty of first degree murder or not guilty is justified, into four categories,[55] the first two of which are inferable from the language used in the *Schleiman* case. *People v. Schleiman* presents a problem which has since vexed trial courts. It is unclear which one of two possible conclusions the Court of Appeals meant to be drawn when it said that the trial judge must charge the lesser degrees of homicide unless the intent to kill is not a necessary element of the crime shown by the evidence: (1) The first possibility is that the court meant that even if it is clear that a felony was taking place when the homicide occurred, nevertheless, if there is some evidence that an intent to kill was present then the trial judge must charge the lesser degrees of homicide. (2) The second, and, it is submitted, the more probably correct inference possible, is that where it is clear that a felony was occurring when the killing was committed then, even if evidence of an intent to kill is shown, the trial court must charge guilty of first degree murder or not guilty.

51. Id. at 390, 90 N.E. at 953.

52. N.Y. Penal Law § 402 (1909).

53. N.Y. Penal Law § 1044 (1) provides: "The killing of a human being . . . 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 . . . ." N.Y. Penal Law § 1046 provides: "Such killing . . . is 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 § 1050 provides: "Such homicide is manslaughter in the first degree, when committed without a design to effect death . . . ." N.Y. Penal Law § 1052 contains a similar provision in relation to the crime of manslaughter in the second degree.

54. See, e.g., People v. Martone, 256 N.Y. 395, 176 N.E. 544 (1931); People v. Seiler, 246 N.Y. 262, 158 N.E. 615 (1927); People v. Monat, 200 N.Y. 303, 93 N.E. 932 (1911).

55. It is desired to acknowledge the fact that these four categories are, in substance, the same as those presented in Rep., N.Y. Law Revision Commission 683-99 (1937); N.Y. Leg. Doc. No. 65 (P) 169-86 (1937).

In addition to the two possible situations deduced from the language of the *Schleiman* case, there are two other classifications into which cases involving the problem of the trial judge's charging guilty of first degree murder or not guilty may be placed: (3) The first of these is an occasion where it is not clear that the felony required as the basis for the felony murder was taking place when the killing occurred and there *is* some evidence presented indicating the existence of an intent to kill. Here it is certain that the lesser degrees of homicide must be charged. (4) The second of these latter two categories involves a case in which it is unclear that the necessary felony was in progress at the time of the homicide and there is *no* evidence of an intent to kill. In this situation it is clear that the only correct charge can be guilty of first degree murder or not guilty.

(1) Situations in which it is clear that a felony was taking place and there is evidence of intent to kill.

Assuming that the *Schleiman* case intended that the first conclusion above expressed be made, then it is possible to divide the category composing that inference into two subdivisions (in each of which intent to kill enters) as follows: (a) The cases where an accomplice to the felony who is not the actual killer is on trial and evidence is presented of a pre-conceived plan between the felons to kill or at least assault anyone who interferes with the enterprise while the felony is in progress. (b) Those situations where it appears that the killing was not in furtherance of the common scheme to commit the felony but was an independent venture of the slayer. In this situation it is proper to instruct the jury as to the accomplice, that he is either guilty of felony murder or not guilty but, as to the actual killer, the trial court should charge the degrees of murder and manslaughter.

(a) The accomplice and a pre-conceived plan

The first subdivision of this class is the basis of the reasoning of the dissenting opinion in the case of *People v. Lunse*.[56] There, the defendant and two others were in the process of robbing a bar and grill when a police officer entered. All three sprang for the exits and one of them, Kerwin, shot and killed the officer whose returned fire also resulted in Kerwin's death. The trial court charged that the defendant accomplice was either guilty of first degree murder or not guilty and he was convicted. The Court of Appeals affirmed the conviction but the dissenting opinion pointed out that, "the defendants conspired with Kerwin to commit the robbery and they knew he had the gun."[57] From this knowledge could be inferred a pre-conceived plan to shoot under certain circumstances, thus raising a question of a possible intent type of killing. The dissent cites for its position the case of *People v. Cummings*[58] but admits that in that case the defendant, Cummings, told the slayer, Lewis, to shoot, and from that evidence the common plan was inferred. It thus appears that in the absence of evidence other than the mere going armed, a possibility of a pre-conceived plan will not be raised and the trial judge will, in the absence of other evidence of an intent type of killing, be required to charge guilty of first degree murder or not guilty.

56. 278 N.Y. 303, 16 N.E. 2d 345 (1938).
57. Id. at 315, 16 N.E. 2d at 349.
58. 274 N.Y. 336, 8 N.E. 2d 882 (1937).

(b) Independent venture

This class of cases involves a situation where two or more accomplices are engaged in a felony and evidence is presented that the slayer killed, not in furtherance of the common felonious purpose but for a disassociated reason. There, as to the accomplice, the correct charge will be guilty of felony murder or not guilty but, as to the killer, the degrees of homicide must be charged. The jury could find the element of intent to kill. The case of *People v. Elling*[59] supports this view. There it appeared that one of the defendants had, while both were engaged in a robbery, killed the victim out of personal malice and not in furtherance of the felonious purpose and against the wishes of his accomplice. Since there was no evidence contradicting this theory, the Court of Appeals reversed the conviction in the case of the accomplice, Bender, even though the trial court apparently had charged the lower degrees as well as felony murder. The court thus held, in effect, that under the evidence the crime of murder in any form should not have been charged at all against Bender. But had the evidence of a personal purpose in the killing not been so strong, it would seem that the proper charge as to Bender should have been guilty of felony murder or not guilty and, as to Elling, the degrees of murder should have been charged.

(2) Situations in which it is clear that a felony was taking place and there is or is not evidence of intent to kill.

In so far as the first and second categories are concerned, it is not within the scope of this paper to delve deeply into the problems involved in the question of whether or not in a particular case the felony underlying the homicide charge is as a matter of law taking place. It is desired, however, to point out that the following language of the Court of Appeals in *People v. Mussenden*[60] would seem to have a bearing on the problem presented by *People v. Schleiman* as to which of the two conclusions respectively expressed in categories (1) and (2) above was intended: "The principle has, accordingly, evolved that the submission of a lesser degree or an included crime is justified only where there is some basis in the evidence for finding the accused innocent of the higher crime, and yet guilty of the lower one."[61] Although the *Mussenden* case, which will be covered more completely in the latter part of this paper, is not concerned with the crime of murder the court does in using the above quoted language cite the *Schleiman* case. It may thus be inferred that quite possibly the problem has been resolved in favor of imposing on the trial court the duty of charging guilty of felony murder or not guilty in any situation where it is clear that the requisite felony was transpiring when the killing occurred, even if evidence of intent to kill is presented. This conclusion is more forcibly compelled when the fact is considered that the only situation (outside of a case of justifiable[62] or excusable[63] homicide) where it is possible that there be no evidence of intent to kill is one in which the killing is purely accidental, whether negligent or not. In

59. 289 N.Y. 419, 46 N.E. 2d 501 (1943).
60. See note 1 supra.
61. 308 N.Y. at 563, 127 N.E. 2d at 554.
62. N.Y. Penal Law § 1055.
63. N.Y. Penal Law § 1054.

People v. Schleiman itself it is difficult to perceive why, if the proposition contained in category (1) is the correct inference to be drawn, the court did not feel compelled to rule that evidence of intent to kill was presented at the trial therein.

(3) Situations in which it is not clear that a felony was taking place and there is some evidence of an intent to kill.

It is possible to divide the cases indicating that the requisite felony was not taking place into five classes: (a) Situations in which evidence is presented that the actual killer was incapable of forming the requisite intent to commit the underlying felony. (b) Cases where the independent felony which is required for felony murder is lacking because the assault on the person killed is merged in the homicide. (c) Instances where there is evidence that the felony may have been abandoned before the killing took place. (d) Occasions where evidence appears that the enterprise in which the defendant was engaged had not reached the stage of even an attempted felony of an independent type when the homicide occurred. (e) Situations in which it appears that the felony may have been over as to all the participants when the slaying was perpetuated.

(a) Incapacity

The case of *People v. Koerber*[64] presents a situation within subdivision *(a)* above. There the defendant was convicted of first degree murder committed while engaged in perpetrating the crime of robbery. Evidence was presented tending to show a high degree of intoxication in the defendant at the time of the killing. The trial court charged the jury that voluntary intoxication in the defendant at the time of the murder would not excuse his criminal act and that the jury was to find the defendant guilty of first degree murder or not guilty. The Court of Appeals, in reversing the conviction, based its decision on the statute[65] providing that where intent is an essential element of an offense, a degree of intoxication prohibitive of the formation of that intent may be shown and must be considered by the jury in determining whether or not the requisite intent was present. So, if in the case at bar the jury should find that the extent of intoxication of the defendant was such that he was incapable of forming an intent to kill or steal, then the felony on which to predicate felony murder would be lacking. The jury might find that an assault alone without the intent to steal took place, that the defendant became excited and killed without intent to do so, and thus, was guilty of manslaughter. A later case, at first glance appearing to hold to the contrary on this point, is actually in complete agreement with the decision in *People v. Koerber*. The case of *People v. Seiler*[66] held that it was unnecessary for the trial judge to charge the lower degrees even where the defendant claimed intoxication and coercion with resulting inability to form the intent to commit the felony of robbery. But *People v. Seiler* distinguishes the *Koerber* case on the ground that in the latter case the defendant fired the fatal shots but that in the case before the court they were fired by one

64. 244 N.Y. 147, 155 N.E. 79 (1926).
65. N.Y. Penal Law § 1220.
66. 246 N.Y. 262, 158 N.E. 615 (1927).

of the defendant's accomplices. Thus the defendant in the *Seiler* case could be guilty of nothing if he lacked intent to commit a felony since he did not do the actual killing and, if he did have the intent to rob, he would be guilty as an accomplice to a felony murder.

(b) Merger

Illustrative of subdivision *(b)* above is the case of *People v. Moran*.[67] There, the defendant, approached simultaneously by two police officers acting in concert, fired at one of them, Daskiewicz by name, and then at the other, one Byrns. Both officers died as a result of their wounds. In deciding that the charge to the jury of guilty of first degree murder or not guilty was erroneous, the Court of Appeals said that the assault on Daskiewicz could not provide the underlying felony necessary to the crime of felony murder in the killing of Byrns because the assaults on both officers were part of one transaction, were, in actuality one assault, single in origin and purpose, and the firing of shots at Daskiewicz could not provide the independent felony. Accordingly, the assault on both officers merged in the homicide of Byrns and no separate felony was transpiring at the time of the killing.[68]

(c) Abandonment

The case of *People v. Chapman*[69] indicates the situation which is embraced by subdivision *(c)*. There the defendant was engaged in burglarizing an apartment together with two others. Just as one of them was endeavoring to subdue one of the occupants the defendant decided to abandon the enterprise. Without informing his co-conspirators of his intention, he sought but failed to find an avenue of escape and then rejoined his associates. During that interval the struggling inhabitant of the dwelling had been killed. The Court of Appeals held the trial court properly charged guilty of first degree murder or not guilty, indicating that by the defendant's own story there was no evidence of a successful abandonment. He had failed to notify his accomplices of his intention to abandon the crime and his attempt to leave had taken place too soon before the killing.[70]

(d) Attempt stage not reached

The situation under subdivision *(d)* is exemplified by the case of *People v. Sullivan*[71] where the defendant was one of a group which had engaged in an attempt to burglarize a post office and, having in their possession burglary tools, had reached the building and were surveying the premises when they were intercepted by a police officer whom they shot and killed. Since the evidence indicated that possibly the attempt stage had not been reached, the court was

67. 246 N.Y. 100, 158 N.E. 35 (1927).

68. In order for an assault on the decedent not to merge in the homicide the assault must have been made with a collateral felonious design. People v. Luscomb 292 N.Y. 390, 55 N.E. 2d 469 (1944); Buel v. People, 18 Hun 487 (N.Y. Sup. Ct. 1879), aff'd, 78 N.Y. 492 (1879).

69. 224 N.Y. 463, 121 N.E. 381 (1918).

70. See also People v. Lunse, 278 N.Y. 303, 16 N.E. 2d 345 (1938).

71. 173 N.Y. 122, 65 N.E. 989 (1903).

compelled to charge premeditated murder as well as felony murder. This decision, in justifying the charge of premeditated murder, also proceeded on the theory that from the evidence of the conspirators going armed an inference of a pre-conceived plan to kill could have been drawn by the jury.

(e) Felony over as to all

The case of *People v. Ryan*[72] provides an example of the type of case within subdivision *(e)*. There evidence was presented tending to show that Ryan was involved in a conspiracy to commit a felony, i.e., the robbery of a grocery store. The deed was actually accomplished by two of the other conspirators and, although there was no direct evidence showing whether or not the killing occurred during the course of the felony, since the deceased was found lying on the front steps of his store, it could be fairly inferred that the two conspirators had committed the homicide. The court pointed out that in order to convict Ryan, the conspirator who was not present, as a principal in the felony murder, it was necessary to prove that the killing occurred in the ". . . attempted *execution* of the design to commit a robbery."[73] The court then decided that it was entirely possible that the killing had occurred not during the attempt to rob the store but occurred either before the attempt or after the escape from the premises had been made good. The court noted that although these possibilities might be remote they created a question of fact for the jury and the charge of guilty of first degree murder or not guilty was unjustified. If the jury had found the felony had not commenced or was over before the killing occurred, then neither the defendant, an accomplice not present, nor the actual killers could be found guilty of felony murder.

(4) Situations in which it is not clear that a felony was taking place and there is no evidence of an intent to kill.

Category (4), in that it involves a situation in which there is no evidence of intent to kill, can only embrace one possibility, i.e., that the killing was accidental. If the killing was not accidental and was not justifiable or excusable then some evidence of a type of culpable homicide must exist. As noted in the report of the New York Law Revision Commission,[74] there is no New York case presenting the precise facts contemplated by this category, but a case illustrating the situation to a certain extent is that of *People v. Lytton*.[75] There, it was clear a robbery was taking place but the defendant claimed that the gun he was holding was discharged accidentally. If the defendant had been off the premises at the time of the discharge of the gun a question of whether the felony was then in progress would have arisen and a case more truly expressive of this classification would exist. If such a case were presented it would be a clear occasion for an instruction of guilty of first degree murder or not guilty but for the fact that from the defendant being armed the jury could draw an inference of an intent to kill.

72. 263 N.Y. 298, 189 N.E. 225 (1934).

73. Id. at 303, 189 N.E. at 227.

74. Rep., N.Y. Law Revision Commission 691 (1937), N.Y. Leg. Doc. No. 65 (P) 177 (1937).

75. 257 N.Y. 310, 178 N.E. 290 (1931).

III. Crimes Other Than Felony Murder

In so far as crimes other than felony murder are concerned it does not seem that the cases can easily be put in distinct categories. The general provision of the *Schleiman* case that the lesser degrees must be charged "unless . . . there was no possible view of the facts which would justify any other verdict except a conviction of the crime charged or an acquittal,"[76] applies but its precise meaning in crimes other than felony murder is unclear.

It does, however, seem certain that if there is no testimony at all indicating that a lesser crime was committed and the defense does not controvert the evidence of the higher degree of crime then the court need not charge the jury with the lesser degree or included crime. The case of *People v. Meegan*[77] illustrates this rule. There, the defendant and two others broke into a dwelling and the defendant held the victim, or otherwise aided an accomplice in an attempted rape. The trial court charged to the jury the three degrees of burglary[78] and refused a request to charge the included misdemeanor of unlawfully entering a building.[79] The Court of Appeals held that "nothing in the facts proved warranted a conviction for the misdemeanor. The proof, without contradiction, established all of the elements of burglary in the first degree."[80] The defendant denied practically nothing and, since he did not deny the *breaking* which distinguishes burglary from the crime of unlawfully entering a building, to charge the jury that they could convict of this misdemeanor would be ". . . to tell them that they might disregard clear and definite testimony, not only unimpeached but entirely without contradiction."[81] So, it may be said that where the defendant does not deny the elements which cause the crime charged to be of a more serious nature than a lesser degree thereof or an included crime, then the lesser offense need not be charged.

How far the Court of Appeals will go on the general theory of the testimony not showing a reason for charging the lesser offenses is uncertain. This point arises in the case of *People v. Mussenden,* noted earlier in this paper.[82] In that case the defendant had been charged, together with three others, with attempted robbery[83] in the first degree,[84] attempted grand larceny in the first degree,[85] and assault in the second degree with intent to commit robbery and grand larceny.[86] The evidence of the prosecution established, through the testimony of the complaining witness, one James Gilligan, that as the latter was strolling along the sidewalk of a quiet street in the Bronx, one morning in the early hours, an automobile pulled up a short distance in front of him, and defendant's three accomplices emerged and walked back toward him, the defendant remaining at the

76. See note 51 supra.
77. 104 N.Y. 529, 11 N.E. 48 (1887).
78. N.Y. Penal Law §§ 402-04.
79. N.Y. Penal Law § 405.
80. 104 N.Y. at 531, 11 N.E. at 48.
81. Ibid.
82. See note 1 supra.
83. N.Y. Penal Law § 2.
84. N.Y. Penal Law § 2124.
85. See note 19 supra.
86. N.Y. Penal Law § 242(5).

wheel of the car. One of the three asked Gilligan "Is this house 64?"[87] Gilligan, replying that he did not know, began to resume his walk when the other two seized his arms and the third clamped his hands on Gilligan's throat. The victim managed to strike one of them who had succeeded in partially withdrawing Gilligan's wallet from his pocket, and the wallet fell back in. Just then police arrived and seized the defendant and the three attackers.

As a defense the defendants attempted to show, through the testimony of two of their number, neither of whom was the appellant in this case, that they had merely stopped to ask Gilligan the house number and that Gilligan failed to understand them, became excited, and started shouting and waving his arms. They denied touching Gilligan in any way and denied that they intended to rob or assault him. The trial judge, in charging the jury, instructed them that they were to find the defendants guilty of first degree attempted robbery or not guilty, refusing a request to charge the remaining counts in the indictment. The defense excepted.

The Court of Appeals pointed out that since the crimes as to which there was a refusal to charge were presented in the indictment the case does not come strictly within sections 444 and 445 of the Code of Criminal Procedure[88] because those statutes are limited to lesser degrees of the crime charged and lesser crimes necessarily included in the one charged. Section 610 of the Penal Law[89] is limited to lesser degrees of the crime charged and to attempts to commit the degree charged or a lesser degree. But the court decided that the same rules apply here, their application not being influenced by the whim of the prosecution in deciding to charge the two included crimes as additional counts.

The court further decided that, although the aforementioned statutes do apply here in the sense that their application is not foreclosed by the form of the indictment, still the case provides an exception to the rule requiring that the lesser offenses be charged. The trial judge has the duty to charge the jury as to lesser degrees and included crimes unless under no possible view of the facts as established by the evidence, could the jury find the defendant guilty of the lesser degree or included crime and not necessarily, by the same facts, find him guilty of the crime charged.

The court said with regard to the count charging assault with intent to commit robbery and larceny that the crime is made up of exactly the same elements and is the same crime as attempted robbery. The dissenting opinion reasoned that the jury might have found that the crime did not progress to the stage where an attempt had been reached before it was interrupted by the arrival of the police. It is not within the scope of this paper to determine whether or not attempted robbery and assault with intent to commit robbery are one and the same crime; it was in regard to the count charging attempted grand larceny in the first degree that the real problem on the charge to the jury arose here.

The court pointed out that the lesser crime of grand larceny could have been made out here only by evidence showing an absence of force used in the

87. 308 N.Y. at 564, 127 N.E. 2d at 554.

88. See note 3 supra.

89. See note 4 supra.

attempted unlawful taking of Gilligan's property. In order to find that this was the case, the jury would have had to disbelieve that part of Gilligan's testimony indicating an assault took place and also disbelieve the testimony of the defendants that they were guilty of absolutely no misconduct. The court notes, "And we suspect that the defendants would have been quite dismayed, while the verdict was still in doubt, to have had the trial court divert attention from the exculpatory defense actually interposed by giving a series of instructions based upon the possibility of the defendants' perjury."[90] The dissent countered by observing that it was well within the broad powers of the jury in giving credence to testimony. The majority admits, and is supported by the dissenting opinion, that had there been a request by the defense for a charge of assault in the third degree[91] it would probably have been incorrect to refuse it, on the theory that the jury could have found that the defendants intended to assault Gilligan but not to steal from him.

People v. Mussenden would seem to extend the situation in which there will be no possible view of the facts justifying any other verdict except conviction of the crime charged or acquittal from the case where, as in *People v. Meegan,* the defendant denies none of the elements making the crime more serious to the case, as in *People v. Mussenden,* where the defendant denies all wrong doing, at least where the testimony of the witnesses for the prosecution is clear on the facts relating to the elements necessary to the conviction of the higher degree of crime.

At least two other cases seem to be contra to the majority opinion in the *Mussenden* case. *People v. McCallam*[92] seems to follow the reasoning of the dissenting opinion in the *Mussenden* case. In the *McCallam* case the defendant was indicted for first degree grand larceny[93] and the testimony of the complaining witness established the value of a trunk containing some clothing and money, the property taken, to be $540.00, the principal value of which was constituted by the money. This amount was $40.00 over the value of property required to constitute the crime of first degree grand larceny.[94] But only $3.75 in money besides the trunk and clothing were actually found. This property totalled in value more than the $25.00 amount required at that time for the crime of grand larceny in the second degree.[95] The defendant denied all wrongdoing but was convicted of second degree grand larceny and on appeal the Court of Appeals affirmed, holding the charge of second degree grand larceny as well as first degree grand larceny by the trial judge in his instructions to the jury was proper. Here, in order to find that view of the facts justifying conviction of second degree grand larceny the jury had to disbelieve part of the complaining witness's testimony as to the amount of money in the trunk and it also had to disbelieve the testimony of the defendant, for if they believed the former there could have

90. 308 N.Y. at 565, 127 N.E. 2d at 555.

91. N.Y. Penal Law § 244.

92. 103 N.Y. 587, 9 N.E. 502 (1886). And see, to the same effect, People v. Adams, 72 App. Div. 166, 76 N.Y. Supp. 361 (1st Dep't 1902).

93. See note 18 supra.

94. N.Y. Penal Law § 1294(3).

95. N.Y. Penal Law § 1296 provides in part that taking of property of the value of over $100 is necessary to constitute second degree grand larceny.

been no verdict other than guilty of first degree grand larceny and if they believed the latter there could have been no other than not guilty. Perhaps it may be said that this case can be distinguished from the *Mussenden* case on the ground that here the value of the property actually found presented the view of the facts warranting conviction of second degree grand larceny. However, this seems a tenuous distinction, especially as it appeared certain that the trunk had been rifled and the remaining money merely overlooked in haste.

On the other hand, the case of *People v. DeGarmo*[96] tends to support the majority view in the *Mussenden* case. There, the defendant was indicted for first degree manslaughter[97] in killing a small girl in the heat of passion but in a cruel and unusual manner, *i.e.*, by striking her with a poker and stamping upon her. These facts were testified to by a witness who had heard admissions by the defendant to that effect. The defendant, however, denied having anything to do with the killing. It was held by the court that no charge of second degree manslaughter or of any degree of assault was necessary here. The only proper charge was the one given, guilty of first degree manslaughter or not guilty, since the only thing for the jury to decide was whether to believe the testimony of the defendant or that of the witness. If they believed the former, then the defendant was not guilty and, if they believed the latter, then he was guilty of first degree manslaughter and of nothing less, since, if he did stamp on the victim and strike her with the poker that was of necessity, as a matter of law, killing in a cruel and unusual manner. It appears that this is a much stronger case for refusing to charge the lesser degrees and included crimes than the *Mussenden* case, for here the fact of the crime, *i.e.*, the homicide, was established and the only questions to be determined were the manner of the killing and the person who did it. These were answered by the witness for the prosecution and the court itself placed the manner of killing within one crime's definition. In the *Mussenden* case the fact of the crime, the manner of it, and the perpetrators thereof were all established by one witness, the complaining witness. It would seem that greater justification would lie with the court in the *DeGarmo* case in telling the jury, in effect, to either believe the defendant or the prosecution's witness, than with the majority of the court in the *Mussenden* case in upholding an instruction to like effect by the trial court therein.

Whichever view will be held in the future, that of the *McCallam* case or that of the *Mussenden* case, the holding in the former case might be said to be the more preferable, since to hold with the majority opinion in the *Mussenden* case would be, practically, to agree that every time a defendant completely denies wrongdoing he may not be convicted of any crime less than that made out prima facie by the evidence of the prosecution. In other words, if disbelieving part of the prosecution's evidence is required to find the lesser offense, this cannot be done if it also requires disbelieving in part the defendant's claim of complete innocence. This proposition seems a trifle unrealistic, disregarding as it does the fact that a defendant seeking complete exoneration may testify to his absolute innocence in a perjured fashion rather than candidly admit his actual guilt of a lesser offense.

96. 73 App. Div. 46, 76 N.Y. Supp. 477 (4th Dep't 1902).

97. N.Y. Penal Law § 1050(2).