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THE BEGINNING AND END OF ATTEMPTS AND FELONIES UNDER THE STATUTORY FELONY MURDER DOCTRINE

by

Fred T. Cadmus, III

At what point does an act constitute a criminal attempt or a felony under the statutory felony murder in the first degree doctrine? How long after the commission of an attempt or a felony does such crime continue for the purposes of this doctrine? We shall inquire briefly into these interesting questions, recognizing at the outset that no clear lines of cleavage can be drawn.¹ We find some blacks and whites but many more grays.

The prevailing view is that a murder² committed within the *res gestae* of an attempt or a felony is within the statutory felony murder doctrine.³ A more narrow view is followed in New York and a few other states.⁴ Further limitations by the courts are that the killing must have been done in consequence of the wrongful act⁵ and a late Pennsylvania case⁶ stated that it must be in pursuance of, connected with, and not collateral to such attempt or felony.⁷ A Delaware jurist recently noted that a subsequent act detached from the crime is not within the doctrine,⁸ adding that there must be "such a legal relationship that the killing occurred by reason of and as part of the felony . . . in an actual and natural sense."⁹ But no fixed time or place bounds the *res gestae*; each case stands on its own facts.¹⁰

¹"Eminent judges have long been puzzled where to draw the line or to state the principle on which it should be drawn . . ." Holmes, *The Common Law*, (1881) p. 68. "In attempting to define the temporal limits of the underlying felony, the courts are troubled chiefly by the necessity for fixing the time of its termination. The time of its commencement is elastic because an attempt may constitute an underlying crime. Most felonies do not readily lend themselves to the formulation of a rule concerning their cessation and no general principle can be gleaned from the cases." N.Y. State Law Revision Committee, Report, 1937, p. 656. On the same difficulty in another field, Cardozo, J., in *Helvering vs. Davis*, 301 US 619, 640, 57 SC 904, 908 (1936) wrote: "The line must still be drawn . . . Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is large." See also 1 Hitchler, *Criminal Law*, 196.

²1 Wharton, *Criminal Law* (12th Ed. 1932), sec. 511.

³40 CJS 870; *Conrad vs. State*, 75 Ohio 52, 78 NE 957 (1906); 13 RCL 846. That *res gestae* is merely an evidence doctrine, see 8 D & C (Penna.) 210, 215 (1926).

⁴Two good articles stating the New York rules are found in 6 Ford. L.R. 43, (1936) and 20 Corn. L.R. 288 (1935). In the latter article at note 100, the writers state New York rule as prevailing view. Authorities cited are old and at least the second one does not presume to deal with the question.

⁵*Buel vs. People*, 78 NY 492 (1879). But see 20 Cornell L. Q. 288, 303 as to discontinuance of use of causative language in New York after this case.

⁶*Com. vs. Kelly*, 333 Pa. 280, 286, 4 A2d 805, 807 (1939).

⁷*Pliemling vs. State*, 46 Wisc. 516, 1 NW 278 (1879).

⁸*State vs. Opher*, 8 WWHarr. (Del.) 93, 188 A. 257 (1936).

⁹*Hoffman vs. State*, 88 Wisc. 166, 59 NW 588 (1894), using term "legal connection"; 13 RCL 845.

¹⁰*Com. vs. Gardner*, 282 Pa. 458, 466, 128 A. 87, 90 (1925), and cases cited.

THE BEGINNING OF ATTEMPT AND FELONIES

We shall treat as one the beginning of attempts and felonies. Under Sec. 701 of the Pennsylvania Penal Code of 1939¹¹ all murder committed in the perpetration of or attempt to perpetrate specified felonies shall be murder in the first degree. Thus, once the indictable attempt¹² stage is reached, a murder thereafter¹³ will be first degree murder. When is that stage reached?¹⁴

The leading Pennsylvania case is *Com. vs. Eagan*.¹⁵ The facts of this much cited case were these: The defendants went to deceased's farm with intent to rob. They lay in wait for and later attacked and overcame the deceased when he came from his house. One defendant brutally beat him, inflicting mortal injuries. The defendants then crossed the road from the barn where deceased lay and entered the yard, intending to enter the house, but were frightened away. A conviction of murder in the attempt to commit burglary was affirmed. The court said:¹⁶ "An attempt, in general, is an overt act done in pursuance of an intent to do a specific thing, tending to that end but falling short of complete accomplishment of it . . . and sufficiently proximate to constitute one of the natural series of acts which the execution requires." The court suggested that the going to the house and watching were merely acts of preparation, that the hitting of the deceased was the point at which the attempt was first reached.¹⁷ The court also pointed out that even if the felony murder doctrine had not been applicable the circumstances were sufficient to justify the conviction on theory of its being a wilful, deliberate, and premeditated killing.¹⁸

How far must one go to make himself liable for a criminal attempt? The *Eagan* case, it is suggested, does not give much help. Language about proximity and "a natural series of acts" means little. A more helpful statement is that of Justice Holmes quoted approvingly by a learned writer:¹⁹ ". . . The degree of proximity required is perhaps inversely proportional to the gravity of the crime and the apprehension it is calculated to excite . . . Every question of proximity must be de-

¹¹Act of June 24, 1939, P.L. 872, 18 PS 4701.

¹²2 Trickett, Penna. Criminal Law (1908), 775.

¹³This statement does not include certain accidental or independent homicide which might occur chronologically after one had gone so far as to be indictable for attempt or felony which might not constitute felony murder. In *Com. vs. Kelly*, ante, the Pennsylvania Supreme Court reversed a murder conviction, holding erroneous a charge on this point which was apparently in accord with Justice Walling's statement in *Com. vs. Lessner*, 274 Pa. 108, 111, 118 A. 24, 25 (1922): "The theory of the defense is that the gun was accidentally discharged in a struggle for its possession and not fired at deceased or anyone. Such theory, even if true, of which there was but slight evidence, could constitute no defense."

¹⁴For general discussion of the law of criminal attempts, see I Wharton, Criminal Law, secs. 213-238; Hitchler, Criminal Attempts, 16 Dick. L. R. Criminal Law (1912), 188 et seq.

¹⁵190 Pa. 10, 42 A. 374 (1899).

¹⁶190 Pa. 10, 21, 42 A. 374, 377.

¹⁷See 16 Dick. L.R. 243, 257.

¹⁸190 Pa. 10, 21, 42 A. 374, 377.

¹⁹Dean (then Professor) W. H. Hitchler in 16 Dick. L.R. 243, 257.

terminated by its own circumstances, and analogy is imperfect to give much help."²⁰ Professor Holmes had previously²¹ stated a similar view that the attempt stage is reached where public policy, viz. "legislative considerations," so dictate. He included among such "the nearness of the danger, the greatness of the harm, and the degree of apprehension felt." The writer submits that no more can be done without setting down all crimes and the specific acts which will constitute attempts to commit each. But such an impractical alternative cannot be considered, for it would involve the profuse detail of the *Lex Salica*.²²

Let us examine some other Pennsylvania attempt cases to see where the line has been drawn. In an old case²³ it was held that the evidence was insufficient to establish an attempt to commit rape where two drunken defendants broke and entered the deceased's house in which he and his daughter, a prostitute with whom one of defendants previously had been intimate, were sleeping. There was evidence merely that the defendants' purpose was a renewal of illicit relations with her. One of them grabbed her as she passed him but she quickly freed herself and ran to safety, her father being killed in the scuffle that followed. The result seems sound, for the girl was in little danger, the lack of intent to rape her was reasonably clear, and the father's death was not within any *res gestae* of an attempted rape. In a later case²⁴ the defendant solicited A to place poison in B's spring, gave directions therefor, and for that purpose handed over some poison which A handed back. Unknown to A, the defendant put the poison in A's pocket. A never intended to carry out the plan and never took any steps toward doing so. Did the defendant's act come sufficiently near to causing B's death? Our Supreme Court properly held in the negative, stating merely that "the act proved did not approximate sufficiently near to the commission of murder to establish an attempt to commit it."²⁵ If A had mistaken the poison for his chewing tobacco and died as a result, would the defendant have been guilty of felony murder? Logically not, for there was no indictable attempt with which the death was connected. In a later murder case²⁶ the defendant and deceased had an argument after which defendant went home, returning several hours later in the early morning with revolver in hand. He entered by a window, put out an upstairs light, and soon thereafter struggled with deceased and killed him. The defendant claimed that his purpose in returning was pursuant to an arrangement to have immoral relations with deceased's wife and that the killing was accidental. The court affirmed conviction of

²⁰170 Mass. 18, 48 NE 770 (1897).

²¹Holmes, *op. cit.*, p. 68.

²²See extract in Frank, *Law and the Modern Mind* (1930) p. 197, note.

²³*Kelly vs. Com.*, 1 Grant (Penna.) 483 (1858). Referring to this case the court said in *Com. vs. Manfredi*, 162 Pa. 144, 149 (1894): "[It] carried the law to the extreme verge in favor of the prisoner." See also 2 *Trickett, op. cit.*, 775, where the author states that these two cases are not conceived as having been decided on the felony murder theory.

²⁴*Stabler vs. Com.*, 95 Pa. 318 (1880).

²⁵*Ibid.*, p. 322.

²⁶*Com. vs. Manfredi, ante.*

murder in first degree though the Commonwealth's theory was not clear. The prosecution had offered evidence to show that the defendant returned to avenge a fancied slight by the deceased and also evidence supporting a conviction under the statutory felony murder theory. The court said that there was sufficient evidence to presume the presence of defendant with "some criminal intent. What that intent was, was for the jury to determine."²⁷ In this, as in many other cases,²⁸ our Supreme Court noted that even if no conviction on the statutory felony murder theory could be sustained, the evidence was sufficient to meet "all the requirements of the statute as to murder in the first degree." In short, even if the court accepts defendant's contention that the evidence is insufficient as a matter of law to support a statutory felony murder conviction, it will affirm conviction where it thinks the jury might have found the defendant guilty of wilful, premeditated, and deliberate murder.²⁹

In a recent case the defendant, intending to rob a store, and with accomplice standing by running auto, pounded on the door of a store, then fled upon arrival of police. Such was held to constitute an attempt to commit burglary. The court said: "It may be reasonably inferred that the entry with intent to commit a felony failed only by reason of the interruption by the police officer. Apparently there was an overt act which could have resulted, if not interrupted, in crime."³⁰ When had this defendant reached the attempt stage? Is leaving the sidewalk and going up to the intended place for purpose of committing the crime enough? Such was said in an old lower court case, where the court observed: "Steps are private property and one who trespasses on them with felonious intent has committed an actual unlawful deed in pursuance of this purpose . . . When he has left the public street upon which anyone may lawfully walk and gone on private property with intent to commit burglary, it seems to me that he can be convicted of an attempt,"³¹ citing the *Eagan* case. In a later lower court case, however, the evidence was that the defendant with two accomplices drove up in two cars and parked. He then

²⁷But see notes 18 and 23, ante.

²⁸"The case might have been tried and the verdict sustained aside from the attempt to commit robbery, for the unprovoked nature of the assault, the number of shots fired, and the deadly aim, all indicate a deliberate intent to commit murder. Hence, it cannot be affirmed that the evidence was insufficient to establish murder of the first degree." *Com. vs. Cantilla*, 303 Pa. 102, 104, 154 A. 295, 296 (1931). See also *Com. vs. Kelly*, 333 Pa. 280, 289, 4 A. (2d) 431, 434 (1939) and second appeal in 337 Pa. 171, 176, 10 A. (2d) 431, 434 (1940); *Com. vs. Dillard*, 313 Pa. 420, 423, 169 A. 138, 139 (1933); *Conrad vs. State*, 75 Ohio 52, 78 NE 957, 962 (1906); 2 *Trickett*, op. cit., 782.

²⁹In many of these cases the Commonwealth's theory is not clear. Usually is offered evidence tending to support both theories and the court instructs the jury as to both. Incorrect and unjust results follow when a jury finds the evidence insufficient to support a felony murder conviction and convicts solely on the wilful and deliberate theory, and upon appeal the appellate court finds the evidence insufficient on that theory but refuses to reverse because it thinks evidence on the other theory sufficient to support the verdict. Such a situation is not at all unlikely. For our purposes here, note also that the affirming of convictions by giving both theories weakens the authority of many of our cases for their usually cited propositions.

³⁰*Com. vs. Myers*, 131 Pa. Super. 258, 200 A. 143 (1938).

³¹*Com. vs. Clark*, 10 C.C. (Pa.) 444, 447, 28 WNC 540, 542 (1860), where defendant at time of his arrest was carrying a jimmy, candles, matches, wedges, and a dead-latch key.

walked across a gas station property, was captured. His accomplices fled. The defendant confessed a plan to rob the station and had various burglar tools in the car. These facts were held insufficient to sustain the charge of attempted burglary. The court emphasized that there was no evidence that defendant "had actually touched or come in physical contact" with the building on the gas station lot, and that nothing went beyond the preparation stage.³²

In *Com. vs. Dorman*³³ the defendant, before interrupted, got as far as the second story porch of a house and had on his person a lock-opening device. A conviction of an attempt was affirmed. But it does not appear that touching the structure is a *sine qua non*, as the *Forker* case, *supra*, might at first glance appear to indicate. It is merely one of the surrounding circumstances for the jury's consideration on the question of proximity. Three recent cases indicate that our appellate courts will scrutinize carefully the question of proximity in the review of attempt convictions. The first was a conviction of assault and battery with attempt to commit rape which our Superior Court reversed³⁴ because the evidence included merely unwarranted liberties by the defendant against complainant's wishes, his cajolery and offer of money to her, and his being with her for nearly an hour where any outcry might have been heard. The court decided the evidence did not show that any intent to commit rape had yet formed in his mind. It seems to have decided actually that matters had not passed the preparation stage³⁵ and there was no evidence to indicate that they would have done so if uninterrupted. In the second case³⁶ the defendant, a drinking acquaintance of complainant was indicted for burglary. He had broken a pane of her bedroom window and solicited her to have immoral relations with him. He refused to leave when she asked him to do so, and she threatened him with arrest, later going to a neighbor's house. The defendant saw her there, walked in her open front door, soon came out and left. The jury's verdict was guilty of an attempt to break and enter a building with intent to commit rape. The Superior Court's affirmation of this conviction was reversed by the Supreme Court. The reasons given, among others, were that there was no evidence of threats against the complainant or of an attempt to attack her or anything suggesting an intention to commit rape or any other felony. It has been suggested that defendant's breaking the window pane was sufficiently proximate to constitute an attempt to enter.³⁷ In the third case³⁸ a conviction of assault and battery with intent to commit rape was reversed where the evidence was as follows: The defendant was a friend of complainant and her husband and had visited her

³²*Com. vs. Forker*, 11 D&C (Pa.) 543, 544 (1927).

³³86 Pa. Super. 205, (1926).

³⁴*Com. vs. Jaynes*, 137 Pa. Super. 511, 10 A2d 90 (1939).

³⁵That this term is a mere convenient catchword and label, see 16 Dick. L.R. 243, 256.

³⁶*Com. vs. Ellis*, 349 Pa. 402, 37 A2d 504, (1944) reversing 154 Pa. Super. 227, 35 A2d 553 (1943).

³⁷Noted in 49 Dick. L.R. 62 (1945).

³⁸*Com. vs. Shrodes*, 354 Pa. 70, 46 A2d 70 (1946), reversing 158 Pa. Super. 135, 44 A2d 319 (1945).

several times before when her husband was at work. He went to her apartment, was greeted cordially and sat for a time talking to her. Later he closed and locked the apartment door and took her by the arm into the bedroom suggesting immoral relations. She "tried to talk him out of it" but made no outcry and there was no struggle. The court said that defendant's acts went no further than solicitation to have intercourse, and further remarked: "Solicitation and an attempt to commit adultery do not warrant a conviction on a charge of assault and battery with intent to ravish."³⁹ The court noted that there was no evidence that there were any touching by defendant not consented to, an unlawful touching here being an element of the crime charged.

In the cases where the convictions were reversed the best explanation would appear to be that the court weighed Holmes' considerations at least unconsciously and looked at the gravity of the crime intended, the steps which defendant took toward its commission, and the intended victim's mental state, and then decided that the acts done did not constitute the attempts for which the defendants were indicted.

Another interesting case is *Com. vs. Stelma*⁴⁰ where the following question relative to our subject arose: Where the defendant mortally injures deceased believing such force necessary for self-defense and later decides to rob the deceased's person and does, has defendant killed in the commission of a felony? Our Supreme Court had no trouble with this question and easily though perhaps not correctly disposed of it by stating that it is immaterial *when* the defendant conceived the intent to rob if the homicide occurred *while* he was perpetrating a robbery. It appears that the court here spread the *res gestae* blanket too far. Although the statement of the court was a dictum, it must lead to this incorrect corollary: A robbery may commence although the intent to rob is not present for the purpose of the felony murder doctrine. But heavier fire has already demolished this case.⁴¹

THE FAILURE OF ATTEMPTS AND THE CONSUMMATION OF FELONIES

Attempted felonies and completed ones may come to different kinds of conclusions. One of the elements of an attempt is *failure to complete* the crime. Three causes of such failure are, first, interruption of defendant by natural causes or third persons, or his voluntary withdrawal before he had done all of the intended acts; second, the operation of extraneous forces after the defendant had completed all his intended acts; third, a mistake of fact on the part of the defendant.⁴² It would appear that the failure stage of an attempt would ordinarily mark its end.

The technical completion of an attempt or a felony, however, does not mark its end for purposes of the statutory felony murder doctrine. All courts seem

³⁹354 Pa. 70, 74, 46 A2d, 483, 485. (1946).

⁴⁰327 Pa. 317, 192 A. 906 (1937).

⁴¹Note in 42 Dick. L.R. 85.

⁴²1 Hitchler, op. cit., 189 et seq.

to agree on this point but they do not agree on *when* that end is reached. Further, they differ in their reasoning. In an old Oregon case, the court said: "When a person takes with force and violence the goods of another from his person or presence and against his will, he has committed robbery . . . but it does not necessarily complete the crime. The act of robbery may be prolonged beyond the time when that liability is fixed. . . . The robbery in the contemplation of the law was not completed until the taking and carrying away was ended."⁴³ The more accurate explanation of the result would be simply that the crime is completed for the purpose of a conviction of *it* but not for the purposes of the statutory felony murder doctrine.⁴⁴ Two reasons given for the rule are (1) a narrow construction of "completion" would make it impracticable in many cases to convict for a murder committed in the perpetration of an attempt or felony, contrary to the legislature's intention,⁴⁵ and (2), the fundamental theory behind felony murder, that the turpitude of the felonious act or its attempt supply the element of deliberation or design to effect death.⁴⁶ The majority of courts, following this basic principle, really extend the time during which the crime is in commission by the convenient term *res gestae*—a mere label for the period within which a killing may be statutory felony murder.

Our purpose thus narrows down to defining the limits of that doctrine. The question appears to be mainly one of causation. Such is the terminology used by many courts. In a recent Pennsylvania case our present Chief Justice said that where a murder following an attempt to commit a robbery was "so identifiable with that initial crime as to make the homicide one committed in the attempted perpetration of the felony," the statutory felony murder doctrine is applicable.⁴⁷ He set down this general test: "Was there a break in the chain of events between the initial

⁴³State vs. Brown, 7 Ore. 186 (1879). In State vs. McCarty, 160 Ore. 196, 202, 83 P(2d) 801, 803 (1939), the court said: "So long as defendant was in flight and seeking to find a place in which the stolen property could be secreted, his dominion over the property was not molested and the robbery was ended."

⁴⁴State vs. Hauptman, 115 NJL 412, 180 A. 809, 820 (1935), cert. den., 296 US 649. In that case the theory was felony murder in the perpetration of burglary with intent to commit larceny, i.e. to steal baby and clothing, which intent was evidenced by the stealing of the baby's sleeping jacket. See also State vs. Habig, 106 Ohio 151, 140 NE 195, 198 (1922), where the two uses of "completion" are distinguished.

⁴⁵Bissot vs. State, 53 Ind. 408, 412 (1876). If one might enter a house with intent to steal and after entry kill a guard or occupant, and then be permitted to defend on the theory that his act was complete upon the entry, our common sense would be jolted. Under such an argument the same court pointed out that arson would be completed when the fire has been started and rape when penetration has been effected. Thus, murder thereafter would be first degree only if deliberate, wilful, and premeditated, and in addition under our code by poison or lying in wait. As to the doctrine of strict construction of criminal statutes, see Crawford, Statutory construction (1940) se. 240 et seq.

⁴⁶Com. vs. Flannagan, 7 W. & S. (Penna.) 415,418 (1844); Com. vs. Kelly, ante; People vs. Enoch, 13 Wend (NY) 159, 174, 27 Am. Dec. 197, 200 (1834).

⁴⁷Com. vs. Kelly, 337 Pa. 171, 174, 10 A. 21, 431, 433 (1940), where the defendant attempted to rob a store but left when the proprietor gave the alarm. The defendant walked down the street followed by a little girl who identified him to an officer as the would-be robber. The officer arrested defendant and was putting him into a truck when defendant drew a gun and shot him, inflicting mortal wounds. Cf. People vs. Smith, 232 NY 239, 133 NE 574 (1921), where under similar facts held not felony murder although the killing occurred on the premises.

crime and the homicide?" Such causation terms require that the killing be a link or part of the series of incidents to bring it within the statutory felony murder theory. Murder independent of and unconnected with the attempt or felony is outside the *res gestae*.⁴⁸

What acts may the *res gestae* include? A convenient classification for our purposes is as follows:

- A. Acts near in time and space to the criminal act.
- B. Flight and escape.
- C. Concealment of the criminal act.

A. *Acts Near in Time and Space*

Murder may follow an attempt or a felony so closely in time or be so near in distance thereto as to constitute part of the *res gestae*.⁴⁹ Such proximity strongly indicates a statutory felony murder. In *Com. vs. Dillard*, supra, defendants got into argument with the deceased who cried out that they were robbing him. They desisted and the deceased started home. One of the defendants followed him across the street and struck him with a piece of pipe, causing a mortal wound. The facts do not indicate the time elapsed between or the distance of scene of the alleged attempted robbery and the murder, but the court said:

"The fatal blow was sufficiently close in point of time to warrant the trial judge's characterization of the entire happening as a continuous robbery."⁵⁰

B. *Flight and Escape*

In *Com. vs. Kelly*,⁵¹ the court observed that the same malice that motivates the commission of a crime or its attempt attends the criminal in flight. Such is the weight of authority⁵² and the law of Pennsylvania. Two decades ago the famous

⁴⁸See note 7, ante.

⁴⁹All courts including New York agree.

In the following recent Pennsylvania cases the killings occurred at the scene and were contemporaneous with the crime or its attempt. No questions of break in events were raised:

Com. vs. Curry 298 Pa. 363, 148 A. 500 (1930); *Com. vs. Flood*, 302 Pa. 190, 153 A. 152 (1931); *Com. vs. Sterling*, 314 Pa. 76, 170 A. 258 (1934); *Com. vs. Shawell*, 325 Pa. 497, 191 A. 17 (1937); *Com. vs. Frisbie*, 342 Pa. 177, 20 A. (2d) 285 (1941); *Com. vs. Childers*, 346 Pa. 258, 29 A2d 471 (1943).

⁵⁰313 Pa. 420, 423, 169 A. 138, 139.

The courts use the word "continuous" in a further effort to explain their results. Once it has labeled a series of events "continuous," a murder occurring during that period can more easily be tagged within the *res gestae*. In *State vs. Daniels*, 119 Wash. 557, 205 P. 1054, 1055 (1922) the court held that the time when larceny was complete was a question of fact for the jury and gave as "another reason" for affirming felony murder conviction larceny's being a "continuous crime." Did the court feel that the connection between the larceny and the killing, which took place six miles away and eight hours later, with only brief pursuit, was weak and so used this language to bolster its argument? In *Com. vs. Doris*, 287 Pa. 547, 135 A 313 (1926) the court discusses the results where the crime is part of one continuous act.

⁵¹337 Pa. 171, 10 A2d 431 (1940).

⁵²*People vs. Boss*, 210 Cal. 245, 290 Pac. 881 (1930), 108 ALR 847, stating New York cases as exception to the rule.

case of *Com. vs. Doris*⁵³ raised this question. The defendant and his confederates had held up a bank depository truck and tried to escape with the loot. Their waiting auto was disabled and they scattered, abandoning the loot. The defendant, revolver in hand, was captured by pursuers. The others kept up their flight and commandeered a milk wagon. Ten minutes after defendant's capture at a point a half-mile away from where he was being held one of them shot and killed a pursuing officer. The defendant was convicted of statutory felony murder and a court en banc refused motion for a new trial. Judge Gordon dissented on the grounds that (1) the defendant's arrest and custody had relieved him of responsibility for the killing on the theory that he had abandoned or withdrawn from the proceedings, and (2) escape of defendants was not a part of the crime. He examined the law on the question of flight's being a part of the crime it follows, noting that the authorities were not in agreement and that in the few cases in which the question had arisen much ingenuity of reasoning had been employed by the courts. He discussed the New York rule and found it to be better reasoned. Judge Gordon distinguished the *Lessner* case, *supra*, on the ground that the murder occurred at the scene of the attempted crime and the felony murder question did not seem to have been raised, although an examination of that case does not appear to bear him out on that point.⁵⁴ He distinguished the *Morrison* case⁵⁵ on the latter ground and pointed out that evidence of robbery was there admitted as part of the *res gestae* of the murder, not the murder as part of the *res gestae* of the robbery. Our Supreme Court, however, affirmed the conviction,⁵⁶ the late Justice Sadler laying down the *Lawrence* case⁵⁷ as stating the Pennsylvania rule: "Though the

⁵³8 D. & C. (Pa.) 210 (1926).

⁵⁴*Com. vs. Lessner*, 274 Pa. 108, 111, 118 A. 24, (1922). The defendant had entered a store intending to rob the proprietor. A crowd gathered in front of the store and the defendant pocketed, his pistol and left the store, attempting to escape through the crowd. In a scuffle in front of the store the defendant shot a bystander. The court said: "In the instant case, the shooting, although done in front of the store, was so connected with the attempted robbery as to form a part of it. The mere putting away of the weapons upon the approach of neighbors, and the immediate withdrawing of them did not constitute a break in the chain of events; therefore, we must treat this case as a homicide committed in an attempt to perpetrate robbery." A similar factual situation appears in *People vs. Marwig*, 227 NY 382, 125 NE 535, (1919), where the felony, burglary of a store, was held to have terminated before the deceased was shot on sidewalk in front of an adjoining store.

⁵⁵*Com. vs. Morrison*, 266 Pa. 223, 109 A 878 (1920), where the defendant entered to rob, shot the storeowner, slugged his wife, and tried to escape by the rear door. He fled into a blind alley near the entrance of which he shot and killed a pursuer. The court found that no intervening act broke the "chain of events" and that the killing might be considered a part of the *res gestae*.

⁵⁶*Com. vs. Doris*, 287 Pa. 547, 135 A. 313 (1926).

⁵⁷*Com. vs. Lawrence*, 282 Pa. 128, 132, 127 A 465, 467 (1925), a payroll holdup where the crime and killing were almost contemporaneous. That case, in turn, cited *Com. vs. Major*, 198 Pa. 290, 47 A 741 (1901), where three defendants committed burglary and blew a safe. Shortly afterwards they entered a house intending to rob the occupants, one acting as lookout. While two were inside arguing with the occupants for more loot, peace officers in close pursuit entered, the lookout giving the alarm. In the shooting that followed one of the officers was killed. The Commonwealth apparently submitted the case on both felony murder and wilful murder theories. A conviction of first degree murder was sustained, the court holding admissible testimony as to the first burglary to show the wilful intentional nature of the killing, but the court went on to point out that here the trial court could not say as a matter of law that the robbery had been completed, indicating that in clear cases the court may so decide.

forcible stealing may be technically completed, if the homicide is committed while the actor is engaged in one of the elements incident to the crime, as, for illustration, an *escape or flight*, the killing is referable to the robbery."

Let us examine briefly the argument that Doris had abandoned or withdrawn from the crime when he was arrested. Judge Gordon in his dissent noted that Doris' connection with the proceedings had terminated "technically, actually, finally, and irrevocably." Was that correct?⁶⁸

Where the defendant voluntarily⁶⁹ withdraws within a *locus penitentiae* and so notifies any accomplices⁶⁰ he may have "before killing became the natural and probable consequence of the joint action," and an opportunity is given for such accomplices to abandon further execution of the felonious intent,⁶¹ such defendant should not be held for a felony murder in connection therewith.⁶² A stronger case for the defendant is made out where he attempts to dissuade his fellow conspirators.⁶³ A mere physical withdrawal from the scene is not enough⁶⁴ because his guilt consists in the encouragement and support to those who commit the crime; "He cannot escape responsibility merely by the expedient of running away."⁶⁵ He cannot put the evil purpose or plan in motion, leave, and then escape liability.

An interesting case raising this problem was *Com. vs. Elliott*,⁶⁶ where the defendant attempted robbery, found no loot, and was, on his testimony, about to leave when the occupant returned. He claimed that the occupant would not let him leave, and that he warned the defendant: "You'll never rob anyone else," then attacked him. The defendant claimed that he killed in self defense. The court found that the chain of events was unbroken and that the defendant had left behind

⁶⁸The notewriter in 40 Harv. L.R. 651 (1927) asked this question and answered in the negative.

⁶⁹1 Wharton, *op. cit.*, 226: ". . . If an attempt be voluntarily and freely abandoned before the act is put in process of final execution, there being no outside cause prompting such abandonment, then this is a defense." *Com. vs. Tauza*, 300 Pa. 375, 379, 150 A 649, 650 (1930). Compare *People vs. Nicholls*, 230 NY 221, 129 NE 883 (1921), where the court pointed out that in New York the motive for abandonment may be fear or repentance. The question of when murder is within the common purpose in conspiracy cases is not within the scope of this article.

⁶⁰*Com. vs. Green*, 302 Mass. 547, 20 NE (2d) 417 (1939); *State vs. Allen*, 47 Conn. 121 (1879). Such notice must be received. *People vs. Walsh*, 262 NY 140, 186 NE 422 (1933).

⁶¹*State vs. Mule*, 114 NJL 384, 177 A. 125 (1935). In *People vs. Nicholls*, *ante*, the court said: "There must be some appreciable interval between the alleged abandonment and the act from responsibility for which escape is sought. It must be possible for the jury to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed." *Com. vs. Green*, *ante*.

⁶²5 RCL 1067, 13 RCL 728 and cases cited.

⁶³5 RCL 1067, 68 LRA 210.

⁶⁴*State vs. Forsha*, 190 Mo. 296, 88 SW 746 (1905); 13 RCL 728.

⁶⁵26 Am. Jur. 206.

⁶⁶349 Pa. 488, 37 A2d 582, (1944).

his privilege of self-defense.⁶⁷ One might well wonder whether assuming the truth of his testimony, the defendant had not actually abandoned his attempt even though he was still on the premises. Such is logically possible. The lack of corroborating evidence for defendant's testimony on this point may be an explanation of the decision although the court assumed the truth of defendant's testimony in deciding.

In the discussion of the *Doris* case, Judge Gordon and others to support their arguments suggested extreme hypothetical cases. Some such cases have since come before the courts. One was *State vs. Metalski*.⁶⁸ The defendants robbed a Philadelphia tavern at 2 a.m., stole a car, and sped northward unpursued. They crossed into New Jersey at 4 a.m., stopped along the way a half hour for food and later, at a point sixty miles from the scene of the crime while being pursued for speeding by state police, they shot and killed an officer. In a 9-4 opinion the conviction for murder in first degree was affirmed, the majority noting incidentally that the elements of a wilful and premeditated murder under a statute similar to the Penna. Act of 1939 were present. The dissenters would have held that the shooting was not a part of the *res gestae*, emphasizing the distance from the scene, the time elapsed since the robbery, the ignorance of the officers of the robbery's commission, the lack of any pursuit for the robbery, and the case's having been presented on felony murder theory. The note writer approving the *Doris* case had suggested that on facts such as these where a felony occurred in one jurisdiction and the killing in another the felony murder theory would be inapplicable.^{68a} But the case at hand appears to be even farther removed from the "chain of events" than that writer's hypothetical case.

Another case presents a somewhat parallel situation. The defendants committed robbery and escaped undetected. An alarm later went out as they fled forty miles from the scene into another county. Several hours after the robbery pursuing officers contacted them and closely followed them for two miles. In a gunfight at that point an officer was killed. The court affirmed murder conviction under a Washington statute which specifically included "withdrawal" from the scene as a part of the *res gestae*. The court said: "There is no exact measure of the lapse of time or distance which an accomplice must travel from the scene of the crime before it will be said that he is not withdrawing therefrom. Each case must depend on its own facts. Time and distance must be considered in the light of present day conditions such as paved highways, high-powered automobiles, telephone communications, and radio."⁶⁹

⁶⁷But on this conclusion, compare *State vs. Sorrentino*, 31 Wyo. 129, 224 Pac. 420 (1921), 34 ALR 1177, where the court held that one may not kill a burglar for an entry already committed, and 13 RCL 840, noting that "A man has a right to prevent in his home the commission of a felony . . . but cannot inflict punishment for acts already done." See also 2 LRA (NS) 62, 13 LRA (NS) 448, 26 LRA (NS) 621.

⁶⁸116 NJL 543, 185 A. 351, (1936).

^{68a}40 Hav. L. R. 651 (1927).

⁶⁹*People vs. Ryan*, 192 Wash. 160, 73 Pac. (2d) 735, 737, (1937). See also *State vs. Barton* 5 Wash. 2d 234, 105 Pac. (2d) 63 (1940).

An unusual case of withdrawal under the same statute was *State vs. Diebold*,⁷⁰ where the defendant stole a car, drove five miles, stopped for food, and soon thereafter, although realizing his intoxicated condition, started to drive the car back to the scene to return it. He lost control of the car, striking and killing a bystander. Conviction of felony murder was reversed, the court holding that the defendant was not withdrawing from the scene within the meaning of the statute. "Just where the act of withdrawal would be completed . . . it is not necessary at this time to determine," said the court, noting that withdrawal might continue up to any conceivable distance and in any direction but that such was not contemplated by the statute. It is submitted that a similar result would follow in absence of such "withdrawal" provision in the statute, e. g. Pennsylvania Penal Code, under the *Doris* case.

We have had a candid answer to our question as to where and when escape stops; there is no line we can draw as a measuring aid; each case stands on its own facts. In these cases the "chain of events" was broken where the court considered distance between the scene of the crime and killing of five or six feet,⁷¹ in front of the store where attempt was made,⁷² twenty-five to thirty feet away on another lot,⁷³ eight hundred feet,⁷⁴ four blocks,⁷⁵ one-half mile,⁷⁶ nearly a mile,⁷⁷ seven miles,⁷⁸ forty miles,⁷⁹ and sixty miles.⁸⁰ In most of these cases, however, convictions could probably have been sustained on the wilful and deliberate murder theory. As to time, felony murder convictions have been sustained where the lapse of time between the crime and the killing were two minutes,⁸¹ "a very short period,"⁸² and even early morning of the day after the crime was committed.⁸³

But in all these cases the close causal relations between the underlying crime and the killing were the important things. The lack of intervening events, the carrying away of loot, the fresh pursuit, and such similar events outweigh mere

⁷⁰People vs. Diebold, 152 Wash. 68, 277 Pac. 394, (1929).

⁷¹Com. vs. Bodner, 34 C.C. (O.&T., Phila.) 401, (1906), cited in 40 CJS 870.

⁷²Com. vs. Lessner, ante.

⁷³Com. vs. Dillard, ante.

⁷⁴State vs. Conrad, 75 Ohio 52, 78 NE 957, 6 LRA (NS) 1154 (1906), 3-2 decision.

⁷⁵State vs. Brown, 7 Ore. 186 (1879).

⁷⁶Com. vs. Doris, ante.

⁷⁷Francis vs. State, 104 Neb. 5, 175 NW 675 (1919).

⁷⁸State vs. Daniels, ante.

⁷⁹State vs. Ryan, ante.

⁸⁰State vs. Metalski, ante.

⁸¹State vs. Williams, 28 Nev. 395, 82 Pac. 353 (1905).

⁸²Com. vs. Morrison, ante.

⁸³Com. vs. Grether, 204 Pa. 203, 53 A. 753, (1902), *State vs. Daniels*, ante. See also *Com. vs. Wendt*, 258 Pa. 325, 102 A. 27, (1917), where defendant committed robbery at night and the next day at noon killed a constable looking for him. The court admitted evidence of the robbery for the purpose of proving motive for the murder. The prosecution apparently tried the case as wilful, deliberate, and premeditated murder with escape as motive, rather than as a felony murder with escape as a part of the crime of robbery. A similar case was *Com. vs. Chienulewski*, 243 Pa. 171, 89 A. 964, (1914), where the officers two days after a series of robberies came for defendant, who had told his confederates that if police came he would run if he could and otherwise would shoot it out with them. In a gun duel an officer was killed. Evidence of robbery was held admissible to show: (1) that defendant had a revolver, (2) motive, and (3) "wilful and intentional and not accidental" killing.

time and space measurements. And we re-emphasize that many of these cases could be affirmed on the other theory of first degree murder, thus weakening their authority for our purposes.⁸⁴

On the basis of the *Doris* case, *supra*, which went solely on felony murder, the Pennsylvania rule has been clear. It was, therefore, significant to note the approving citations of and quotations from the several New York cases in the first *Kelly* case⁸⁵ and the late repetition of their language in the *Elliott* case, *supra*, only two years ago, both opinions being written by our present Chief Justice. Apparently harmless language of Chief Judge Cardozo's opinion in *People vs. Moran*⁸⁶ was quoted: "The very meaning of flight is desidence or abandonment, unless, indeed, in special circumstances as in cases where a thief is fleeing with his loot." Was not the learned New York scholar saying here that in New York one type of abandonment is flight and that, since abandonment means the end of the underlying crime for the purposes of the felony murder doctrine, flight ends the crime? Such would be distinguishing escape from scene from flight after escape, the view expressed by Judge Gordon in the *Doris* case. Such is the general New York rule. Did Chief Justice Maxey and his learned colleagues begin to question our established view that flight is part of the *res gestae*? Are they beginning to reconsider Judge Gordon's dissent? The famous case of *People vs. Marwig*,⁸⁷ which Judge Gordon approved as a well reasoned case, was also approvingly cited in a quotation from *People vs. Walsh*,⁸⁸ such being stated in 20 Cornell LQ 288, 304 as a model New York charge. Although the *Kelly* case was on its facts easy to affirm on the wilful and deliberate theory, Pennsylvania lawyers and lower court jurists may well wonder if our law is as certain as it was before the *Kelly* case. We have some indication of a future tendency of our courts toward the New York view.

One reason suggested for the narrower New York view is that the courts, because the New York statute includes all felonies, try to construe *res gestae* more limitedly.⁸⁹ Pennsylvania has not this reason, for our act specifies five serious felonies. This writer submits, however, that Judge Gordon's dissent should be re-examined, not only because it presents an excellent discussion of the problem, but also because its view is convincingly sound and may, as indicated, in the near future come to be accepted by the Pennsylvania Supreme Court.

C. Concealment of Crimes

There appears to be a split of authority as to whether a murder following an attempt or felony for the purpose of concealing the crime is within the *res gestae*.

⁸⁴See notes 28 and 29, *ante*.

⁸⁵333 Pa. 280, 287, 4 A. (2d) 805, 808, (1939). Some of the language was repeated in *Elliott* case, 349 Pa. 488, 491, 37 A. (2d) 582, 583 (1944).

⁸⁶246 NY 100, 158 NE 35, 36, (1927).

⁸⁷227 NY 382, 125 NE 535, 22ALR 845 (1919).

⁸⁸262 NY 140, 186 NE 422, 424 (1933).

⁸⁹20 Cornell LQ 288, 305.

A recent Delaware case, by way of charge to jury, held negative on this question where the defendant had raped a young girl, then shot and mortally wounded her. The charge noted that ". . . the shooting formed no part of the offense of rape or attempt to rape, but was a subsequent act and detached from those crimes . . . and that the shot was fired not in the perpetration or attempt to perpetrate either of them, but for another and distinct purpose, to wit: to close the mouth of the victim and thereby escape detection and punishment."⁹⁰ The court implied clearly that the felony had ended, although the time lapse appeared to have been small and the felony and killing were continuous and closely connected.

In an old Massachusetts case the defendant ravished a girl and inflicted severe wounds "and as a part of the same transaction and for the purpose of concealing that crime and escaping pursuant therefor," struck her further on the head and threw her body into a river. Conviction of murder was affirmed,⁹¹ the case apparently having been tried on the wilful and deliberate murder theory. But more recently a similar case arose where the rape, injury, death, and disposing of the body took three quarters of an hour at most. The court said:⁹² "The natural inference that killing was for the purpose of concealing the rape and was done during the rape or soon afterwards . . . If the killing followed the rape in point of time, that did not make the crimes independent of each other." Significantly, the court also observed that the case might have gone on the same theory as the *Desmarteau* case. An early lower court case in this state was *Com. vs. Hanlon*,⁹³ where on similar facts the court gave the jury the question of whether the strangulation causing the girl's death was "incident to, and a part of, the act of some person engaged in the perpetration of a rape . . . If you come to the conclusion that although a rape did take place, the child afterwards died by an act of violence independent of the rape, the offense would be murder in the first degree, if the guilty agent acted maliciously with intent to take life, and wilfully, deliberately, and with premeditation."

In *State vs. Turco*⁹⁴ the defendants killed another after a robbery in an attempt to conceal their crime, protect their possession, and secure their escape. A felony murder conviction was sustained, the appellate court noting that the killing was "so closely connected as to be a part of the *res gestae* of the act of robbery . . ." A dictum in *Com. vs. Lawrence*, *supra*, supports this view. Our court there said: "Murder is usually committed in the course of a robbery, to suppress evidence as well as to avoid danger . . ."⁹⁵

⁹⁰*State vs. Opher*, 8 W.W.Harr. (Del.) 93, 188 A. 257, 258 (1936).

⁹¹*Com. vs. Desmarteau*, 16 Gray (Mass.) 1 (1860).

⁹²*Com. vs. Osman*, 284 Mass. 421, 188 NE 226, 228 (1933).

⁹³*Brewster* (Pa.) 471 (1870).

⁹⁴99 NJL 96, 122 A. 844 (1923).

⁹⁵282 Pa. 128, 132, 127 A. 465, 467 (1925).

CONCLUSIONS

1. Any murder a part of and within the *res gestae* of the attempt to perpetrate or the perpetration of the felonies of arson, rape, robbery, burglary, or kidnapping is murder in the first degree in this state.
2. Under the general view, the *res gestae*
 - A. Begins at the point where an indictable attempt is reached, and
 - B. Ends where the "chain of events" between the attempt or felony is broken, such question usually being a question of fact for the jury.
3. Recent Pennsylvania cases indicate a trend toward limitation of these rules in line with the more narrow New York view.