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When Does Preparation for Crime Become a Criminal Attempt?

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that the debtor in accepting the money has not lost his right to sue and recover.28 Under this view the employee in Tanner v. Merrill should have been allowed to have the counter-claim decided upon the evidence.

Another method frequently employed in avoiding the Tanner v. Merrill rule is to find that the creditor did not clearly understand that the payment was made in full satisfaction of all claims. This view is scarcely convincing since most of the cases involve checks marked payment in full, often adding, of all claims. The least that can be said is that the courts are very liberal in finding that the creditor was reasonable in failing to understand the terms of the payment.

Even a casual reading of such cases leads to the belief that many courts, including Kentucky, while supposedly following Tanner v. Merrill, are quite willing, perhaps even eager, to be convinced that a given set of facts can be differentiated from that case and a contra result obtained. It is suggested that this is due to a conviction that the principal case rests on a doubtful legal basis and is equally questionable from the point of view of attaining justice.

Rosanna A. Blake

WHEN DOES PREPARATION FOR CRIME BECOME A CRIMINAL ATTEMPT?

The law of criminal attempts presents two principal problems. One of these is the effect of impossibility, and the other involves determining when preparation for a crime becomes a criminal attempt. It has been suggested that impossibility is no bar to making out the crime if the defendant reasonably expected to succeed with the means he was using.1 If the defendant could not have reasonably expected to succeed, then the necessary specific intent cannot be shown, and thus the crime cannot be made out. Impossibility, in this view, is important only for its bearing upon specific intent. In this paper the theory will be advanced that preparation becomes a crime when the preparatory acts are of such an unequivocal nature that a criminal design is manifest. In the cases to be cited subsequently, the language is to the effect that while the act need not be the last proximate step before consummation, yet it must be beyond mere preparation; it must be an act directly tending toward commission of the crime. The effect of holding that an act of preparation is too remote from

29 109 Ky. 388, 59 S.W 323 (1900).
1 Note (1943) 31 Ky. L. J. 270.
the completed crime to constitute an attempt is that the unequivocal nature of the intent cannot be shown.

An examination of the literature of criminal attempts and the cases dealing with the subject reveals that no general rule can be laid down which will be of very great help in determining at just what point preparation for a crime shades off into a punishable attempt. It will depend in part upon the nature of the crime and how great is the danger of societal harm inherent therein, upon the theory of punishment to which the court involved adheres, and also upon the criminal record of the individual involved.

In attempts the *mens rea* required is an intent to commit the complete crime which the accused is charged with attempting. In this respect the ground of punishment for attempts differs materially from that in other crimes. For example, in the crime of murder, the condition for the infliction of punishment is the *corpus delicti*, and the *mens rea* is a necessary condition, but in attempts the law makes *mens rea* the more important ground and the *corpus delicti* is the necessary condition. In attempts the law has come very close to making an exception to the rule that intent alone is never a punishable offense. It is true that intent alone is never sufficient to constitute the crime, but must always have coupled with it a certain number of the elements that comprise the completed crime. On the other hand, an act alone can never amount to an attempt, no matter how well adapted it may be to effect a criminal result, unless coupled with intent. The man who points a gun at his friend in jest, though it is loaded, is guilty of no attempt; the same act when done with intent to harm may at once become a punishable attempt. A boy and girl are on an outing together; in a spirit of play he seeks to hold her, and she breaks free and runs, he in pursuit. No one would pretend that such conduct is criminal on the part of the boy. The very same facts, with an evil intent infused, might well constitute an attempt to rape. Clearly, then, when a person is held guilty of an attempt, the court is saying, in effect, a person whose acts manifest such a dangerous intendment is a menace to society and ought to be subjected to penalty to protect society against his depredations.

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3 The difficulty of formulating a helpful general rule is recognized by Arnold, who says: "An effort to state a single general rule for attempts to commit all crimes flies in the face of the fact that the people through their judges and juries intend to and do find criminal liability at points of greater or less remoteness to the contemplated crime according to the nature of the particular crime and the personality of the actors in it." Arnold, *Criminal Attempts—The Rise and Fall of An Abstraction* (1930) 40 Yale L. J. 53.


When is an attempt to commit a specific crime complete? Turner advances the following rule in answer to this question: "The actus reus of an attempt to commit a specific crime is constituted when the accused person does an act which is a step towards the commission of that specific crime, and the doing of such act can have no other purpose than the commission of that specific crime." An act which does not contribute to the commission of the crime, though it may indicate mens rea, cannot count as part of the actus reus. For example, A writes to his good friend B and states his intent to murder X. This may indicate intent to commit a crime on the part of A, but it would not be sufficient to constitute a punishable attempt. The language of the cases usually is a paraphrase of the following statement:

"The accused must take at least one step beyond preparation, by doing something directly moving toward and bringing him nearer the crime he intends to commit. In other words, while the act need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself."

A keeps a jewelry shop, and before leaving for the night, he takes a number of valuable diamonds from the safe and caches them beneath the safe with the intention of reporting them stolen and collecting the insurance. Before he has had an opportunity to report them stolen and file a claim, his plan is frustrated. Though his actions may have shown an intent to commit the crime, yet until he has made some move toward obtaining the insurance money, his acts would not constitute an attempt. While his act in concealing the jewels might indicate a criminal purpose, nevertheless it was not unequivocally indicated. To state the matter differently, intent was indicated, but not unequivocally indicated. He might have been merely turning the criminal design over in his mind and debating it, and might voluntarily have desisted short of that point where intent has crystallized into a dynamic effecting of purpose. Society is endangered sufficiently for the law to notice only when intent has crystallized into dynamic form.

At what point in the process of preparation does a criminal attempt become complete? The language in the following cases, selected at random, indicates that the rule used to determine when preparation for crime has ripened into a criminal attempt stands either upon the vague concept of proximity to or remoteness from the crime attempted, or whether the acts directly tended toward commission of the offense. The rule as thus defined is

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*Turner, supra at 236. (Italics omitted)
*16 C. J. 114.
so indefinite that it has almost no value, and the task of reconciling the cases under the rule is a hopeless undertaking. In the cases cited, if one looks behind the language, it will be seen that the courts found the crime to be complete when the defendant's preparatory acts were so unequivocal that the specific intent to commit the crime could be inferred beyond reasonable doubt. A consideration of a few cases reveals that the answer to the above question depends upon the crime attempted and the circumstances in the particular case. The line of demarcation between mere preparation and the attempt, the courts customarily say, in effect, is marked by that overt act which is of such nature as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself.

In *People v. Miller*, a conviction for attempted murder was reversed where the defendant approached his alleged victim carrying a rifle but did not point or aim the gun, and the victim fled, keeping a distance between himself and the defendant until the latter was disarmed. From this and other cases involving attempted homicide it would seem that the requirements of this type of attempts are satisfied, at the earliest, when the defendant starts to aim the gun at the victim. Acts short of that stage are so equivocal that the necessary intent cannot be inferred.

In *People v. Lanzit*, a conviction was sustained where the defendant arranged to have a bomb made to kill his estranged wife. In this instance, the defendant procured another to construct the lethal weapon and accompanied him the the place where his wife was to be at a later hour. The defendant struck several matches to assist the confederate in placing the detonator, and the court relied upon these acts as being near enough to the crime itself to render the accused guilty. Police made the arrest before there was opportunity for the bomb to explode. Perhaps it may be said that here the preparation merges into the attempt.

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70 Cal. App. 498, 233 Pac. 816 (1925). But cf. State v. Davis, 319 Mo. 1222, 6 S. W. (2d) 609 (1928) where the defendant had an affair with a woman, and they planned to kill her husband. Defendant contacted L who was to procure a killer, but instead divulged the plan to a policeman, who posed as the killer. Defendant, unaware that his plan had been disclosed to an officer instead of the one intended, planned the manner and place of the slaying, providing the defendant with a picture of the proposed victim, and a plan of the place where the victim was to be slain. Money was paid to the officer, and the latter went to the scene of the proposed crime in strict accordance with the plans made by the defendant. Held, no attempt. This illustrates the absurd result obtained by adherence to the rule that the act of the accused must be, in the words often used, one step beyond mere preparation.
when the bomb is placed on the intended premises, or, the defendant, bearing the bomb, arrives at the place where he is to place it.

In *Lewis v. State,* a negro accosted a white woman with intent to commit rape. The woman fled, and the negro pursued her for a distance of a mile or more, before she eluded him. At no time did he get closer than ten steps. The court held that if he went so far as to put her in terror and make flight necessary it was sufficient. Thus, in the case of rape, an attempt may be complete where the victim's person has not been touched.

For a less serious crime, adultery may be considered. In *State v. Schwarzbach,* the woman's husband was presumed to be away for the night, but returned unexpectedly to find the defendant in his wife's bedroom. She was sitting upon the bed clad in a nightgown, and the defendant was standing nearby, his hat, coat, and shoes removed, and one suspender strap hanging down, as though preparatory to removing his other garments. The defendant was held guilty of attempted adultery.

In a sense, intent is the essence of the crime of attempts, but the act which would clearly point toward intent where the crime has been consummated, may be equivocal and insufficient to prove the species of intent requisite to an attempt. For example, in *People v. Miller,* the defendant, to consummate an attempt, had but to point the gun at the alleged victim, and yet the court held that there was no attempt. In *People v. Lanzit,* consumption was made impossible; the intended victim was not present and the defendant's confederate had no intention of allowing the crime to be perpetrated, yet the attempt was held to be complete. The usual rule of proximity to or remoteness from the crime cannot reconcile these cases. They can be reconciled, however, under a rule that holds the attempt to be complete when the defendant's acts are so unequivocal as to show the intent to commit the whole crime. In the former case the defendant's acts were not inconsistent with a purpose no more blameworthy than to frighten or intimidate. In the latter case the defendant's acts were consistent only with an intent to execute the crime of murder.

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34 N. J. L. 266, 86 Atl. 423 (1913).
2 The court said in part, "Preparation for adultery necessarily consists of such preliminary arrangements as appointing the time and place of meeting, and repairing to the rendezvous; but, after the parties are met and are disrobed or disrobing, and nothing but an extraneous cause, namely, one not moving from themselves, prevents the accomplishment of the intended criminal purpose, then surely the offenders have progressed beyond the stage of preparation and are actually engaged in the attempted commission of crime."
3 2 Cal. (2d) 527, 42 P (2d) 308 (1935) supra note 9.
A hypothetical case with the constituent elements of a typical crime set forth might be helpful in indicating where the line is to be drawn. A and B are next-door neighbors and bitter enemies. A is sitting in his living room reading the evening paper and brooding over the grudge he bears his neighbor. He decides to kill B, but he has no gun in the house, and no place is open where he can buy a gun at that hour. Next morning A goes downtown and purchases a gun and cartridges, putting both in his pocket. Both intent and the means of executing that intent are now present, but his acts do not yet constitute an attempt. When evening has come, and B is out upon his lawn, A goes out upon his own lawn, his hand grasping the gun concealed in his pocket. Probably no attempt could yet be made out. A takes the gun from the pocket of his coat and points it at B—at this point the attempt is complete. In this case A's intent was fully formed while he sat brooding over his grudge, and even at this point he was a menace to society. The law, however, will take no action until his intent has crystallized into dynamic manifestation.

It is submitted that the better rule—the rule which is latent in the cases cited—is that preparation for a crime becomes a crime when the acts of the defendant are so unequivocal in nature that the defendant's intent to commit the crime is shown beyond reasonable doubt. Under this rule, proximity to the crime itself would not be the decisive factor except to the extent that proximity would bear upon the question of intent. This rule would permit a greater flexibility of administration, and thus, in turn, would enable courts and juries more effectively to guard against socially dangerous individuals.

LEO OXLEY

IS KNOWLEDGE OF THE FACT OF IMPRISONMENT BY THE PLAINTIFF A NECESSARY ELEMENT IN FALSE IMPRISONMENT?

"False imprisonment has been said to be the unlawful restraint by one person of the physical liberty of another." Prosser says that it is an invasion of an interest, which is in a sense mental, resembling the apprehension of contact in the assault cases. Therefore, if one incloses another within definitive bounds without just cause and without the consent of the other, he is liable for false imprisonment.

It is contended by the text-writers that the better view is that the plaintiff must have actual knowledge, at the time, of the fact that he is imprisoned before he can maintain an action.²

² Prosser, Torts (1941) 68.
³ Ibid.