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in the light of all the circumstances surrounding the crime in order to determine whether or not it is an overt act.

JOHN J. YEAGER

THE OVERT ACT IN CRIMINAL ATTEMPTS

Webster defines an attempt as an undertaking or an unsuccessful effort. This definition implies first, an intention to do some particular act; second, an act or acts which are calculated to effect a realization of this intention; and third, a failure to accomplish the intended act. The word attempt, as used to designate a branch of criminal law, has the same meaning as when used in ordinary speech. Thus, a criminal attempt requires specific intent to commit a crime, an overt act moving directly toward the commission of the crime, and a failure to consummate the crime. The problem to be considered here is the nature of the required overt act.

That there must be some overt act leading directly toward the commission of the intended crime is not questioned. While specific intent is a necessary, and perhaps the most important, element to be proved in a prosecution for criminal attempts, proof of intent alone does not make out a crime. But specific intent must of necessity often be proved from the acts of the accused, and in many cases it cannot be inferred from any acts except those moving directly toward consummation of the crime. This seems to have given rise to an erroneous assumption that wherever intent can be shown from the acts of the accused, an attempt has been committed, and courts have at times sustained a conviction where intent was shown from mere preparation. In the case of People v. Lombard it was shown that the defendants intended to kidnap someone. They prepared a place to hide the victim, procured ropes and gags, and drove out to the victim's home. One of the defendants scouted around and found that the police were watching the house. The defendants made no move toward actually kidnapping anyone; however, the court held that these preparations were enough to constitute an attempt. A similar holding is found in Cunningham v. State, in which the court held that possession of blank warrants of the state, seals, and a stamp of the state

1 Webster's New International Dictionary (2d ed. 1935).
4 131 Cal. App. 525, 21 P (2d) 94 (1933)
5 49 Miss. 685 (1874).
auditor’s signature, with the intent to forge warrants of the state was sufficient to constitute an attempt to forge. Compare these two cases with *Dill v. State*, which held that the possession of a still and several barrels of mash was not enough to constitute an attempt to manufacture liquor, even though intent was admitted, and with *People v. Miller*, which held that proof that the defendant came into the presence of one whom he had threatened to kill and proceeded to load a rifle which he was carrying under his arm was not enough to sustain a conviction for attempted murder. The latter two cases represent the accepted rule, that there must be more than mere preparation to constitute an attempt, even where intent is shown.

In the case of *People v. Gilbert*, the court said that although mere intent is no offense, if the defendant has acted in such a manner that intent could be inferred from his acts, an attempt has been committed. This language is likely to be misleading, as it leaves the impression that once intent has been conclusively proved, a conviction for attempt would be proper. However the rule of the Gilbert case as applied in *People v. Miller* does not result in a conviction for intent alone. In this case acts from which intent can be inferred are defined as acts directly and unequivocally done in the commission of the crime. While the court seems to make intent the all important element to be proved in making out an attempt, it will not sustain a conviction unless in addition to intent there is an overt act moving directly toward consummation. There are also cases which hold that once intent is established, slight acts on the part of the defendant will constitute an attempt. An examination of these cases shows that the slight acts required are acts which move directly toward the commission of the crime, in other words, overt acts. What is probably meant by such language is that if intent is shown, any overt act will constitute an attempt, whereas if intent must be proved from the defendant’s acts, there must be acts moving directly toward consummation which unequivocally show the intention to commit a crime.

In those cases where the defendant is apprehended while he himself is engaged in direct, unequivocal acts which would, if he had been allowed to complete them, have resulted in the consummated crime, there is no doubt that he is guilty of an attempt. In such a case an overt act can easily be shown. Cases presenting the most

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9 *149 Miss. 167, 115 So. 203 (1928)*
10 *2 Cal. (2d) 527, 42 P. (2d) 308, 98 A.L.R. 913 (1935)*
11 *2 Cal. (2d) 527, 42 P. (2d) 308, 98 A.L.R. 913 (1935)*
12 *People v Anderson, 1 Cal. App. (2d) 687, 37 P. (2d) 67 (1934)*,
13 *Dill v State, 149 Miss. 167, 115 So. 203 (1928)*
14 *People v Mayen, 188 Cal. 237, 205 Pac. 435 (1922)*, *State v Roby, 94 Iowa 1032, 188 N.W. 709 (1922)*, *Alford v Commonwealth, 240 Ky 513, 42 S.W. (2d) 711 (1931)*, *State v Verganadis, 50 Nev 1, 248 Pac. 900 (1926)*, *People v Lawton, 56 Barb. 126 (N. Y. 1867)*, *State v Cass, 146 Wash. 585, 264 Pac. 7 (1928)*
difficulty are those where consummation of the crime depends not on
the defendant's acts alone, but on some factor outside the defendant's
control, such as the acts of an accomplice or the passage of time.
Usually it is not hard to show intent in such a case, but because the
defendant plays a more or less passive role in bringing about certain
conditions necessary to the commission of the crime it is often im-
possible to show any physical effort on the part of the defendant
toward the commission of the crime itself.

The case of State v. Davis\(^{32}\) presents an illustration of the difficul-
ties which may arise when the consummation of the crime depends
solely on the acts of another. In this case the defendant approached
one whom he believed to be a criminal and hired him to kill another.
The defendant provided him with a picture of the intended victim,
outlined to him the plan of the murder, and arranged to have the
victim's wife lure him to the spot where he was to be killed. The one
whom the defendant had hired to do the killing turned out to be a
police officer, and the defendant was arrested after being allowed to
carry his plot almost to completion. The court held that here there
was no overt act and the defendant was not guilty of an attempt. A
similar case is Hicks v. Commonwealth,\(^{33}\) in which the defendant pro-
cured some poison and gave it to a servant who was to put it in her
master's coffee. The servant disclosed the plot to the police, and the
defendant was charged with attempted murder. The court held that
here there was no overt act, and the defendant was released. Both
of these cases should have been decided differently. In the Davis
case, the acts of the defendant in furnishing the one hired to do the
killing with a picture of the intended victim and in having the victim
lured to the place where he was to be killed seem clearly to be overt
acts moving directly toward the consummation of the crime. If the
defendant had done that which his agents had done there would be no
question as to his guilt. In the Hicks case the giving of poison to one
whom the defendant had induced to administer it to the intended
victim could be considered as the required overt act. In each case
the defendant had done everything possible to bring about the com-
pletion of the crime, and was stopped only by the disinclination of
his agents to carry out the plot. In such a case the defendant should be
held guilty of an attempt, as was held in Stokes v. State,\(^{34}\) a case
directly contra to the Davis and Hicks cases.

It is impossible to set up any absolute rule to determine the divid-
ing line between preparation and the attempt itself. Such a rule must
be definite enough to establish a guide for determining when an
attempt has been committed, yet flexible enough to enable it to be
adapted to any set of facts which may arise. If it appears that the
defendant is merely arranging the means necessary to enable him to
commit the crime he is still in the preparatory stage. But once these

\(^{32}\) 319 Mo. 1222, 6 S.W. (2d) 609 (1928)
\(^{33}\) 86 Va. 226, 9 S.E. 1024, 19 Am. St. Rep. 891 (1889)
\(^{34}\) 92 Miss. 415, 46 So. 627, 21 L.R.A. (n.s.) 888 (1908)
arrangements are made and the defendant is in a position to commit
the crime, then any act which moves directly toward consummation of
the crime, no matter how slight, will be an overt act sufficient to
constitute an attempt.

From what has been said, it may be concluded that those cases
and writers which seem to suggest that all that is necessary to make
out a criminal attempt is an act or acts from which intent can be
inferred, are overlooking the fact that in this crime, as in others, it
is the act, fundamentally which is contrary to the public interest, not
the intent. They would leave the impression that the act is valuable
only as evidence showing intent, whereas the more logical view and
the correct one, is that the act is necessary in itself, not as a means of
showing intent, but as one of the basic elements of the crime of
attempts.15

With this principle in mind, the problem is to discover what is
the nature of the required act in attempts. This will naturally depend
to a great extent on the nature of the attempted crime. It is sug-
gested that if a number of crimes were broken down into their
components, it would be found that in any crime there are certain acts
which are essential to every crime of that particular classification,
and there are other acts which are merely incidental to this particular
crime. The latter may be classed as acts of preparation, whereas the
former are acts which, if not successful, will constitute an attempt.
For example, in the crime of murder, the essential act is a killing.
This is a composite act, made up of other acts, pointing a gun at the
victim, pulling the trigger, the explosion of the powder, the flight of
the bullet, the bullet striking the deceased in a vital spot. Any other
act is merely incidental, the necessity of it arising out of the peculiar
circumstances surrounding any particular murder. The performance
of any of these incidental acts is classed as preparation, since the
purpose of these acts is to prepare the way for the essential act,
killing the deceased, and the performance of any of these acts would
not constitute an attempt. It would take one of those acts which
go to make up the essential act to make an attempt, but once the first
of these acts has been performed the attempt has been committed.
Thus if A walks into B's office, armed with a shotgun, and announces
his intention to kill B, no attempt has been made, since none of those
acts which go to make up the essential act have been performed. A
now loads the gun. Still no attempt has been committed. A now
raises the gun so that it is aimed at B. This is the first of those acts
which go to make up the act of killing B. This is, therefore, the
required overt act and an attempt has been committed.

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15 This does not mean that the act has no value in showing specific
intent. Intent must often be inferred from acts. However, proof
of intent is not the only reason an act must be shown.