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Effect of Impossibility on Criminal Attempt

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NOTES

EFFECT OF IMPOSSIBILITY ON CRIMINAL ATLTEMPT

The modern conception of the effect of impossibility of consummation of an attempted crime is well illustrated by two recent cases. In State v. Block,¹ the defendant was accused of attempting to obtain property under false pretenses from an insurance company, under a claim for an injury which had never occurred. The court held the defendant not guilty on the ground that it was not shown that a policy existed, and that without a policy, recovery for the alleged injury was impossible. There was no apparent possibility of success, and the defendant must have known this, since he knew there was no policy. The court ruled that the defendant's actions did not constitute a criminal attempt, since there was, from his point of view, no possibility of consummating the crime.

State v. Wright² is in many particulars similar to State v. Block in that this case also concerns an attempt to defraud an insurance company where no policy was in existence. Wright was indicted for murder committed in the course of a felony, and the question arose as to whether his actions constituted the felony of attempting to obtain property under false pretenses. Although it was proved that consummation of the felony was impossible, the court held Wright guilty. The theory employed by the court was that Wright was ignorant of the non-existence of the insurance policy, and from his viewpoint there was an apparent possibility of his succeeding in committing the fraud. The court held Wright guilty because success was apparently possible from his point of view, even though it was actually impossible.

In these two cases the effect of impossibility of consummation was made to depend on whether or not the defendant in each case knew of the impossibility.³ This is in accord with the

¹ 333 Mo. 127, 62 S. W. (2d) 428 (1933).
² 342 Mo. 58, 112 S. W. (2d) 571 (1937).
³ Since this note deals only with the effect of impossibility, the existence of all other necessary elements of a criminal attempt, such as specific intent and an overt act going beyond mere preparation, is assumed.
majority of recent cases dealing with this point, which hold that reasonable anticipation of success on the part of the defendant is the deciding factor. If the defendant knows or should as a reasonable man know that success is impossible with the means he is using, he cannot be guilty of a criminal attempt, while if he reasonably believes he can consummate the crime by such means, he is guilty.

The idea of holding a person guilty of an attempt when consummation was impossible seems to have first arisen in cases involving pickpockets. In Rogers v. Commonwealth the court held it to be a well settled principal of law that a person can be held guilty of an attempt to pick a pocket when in fact there is nothing in the pocket of the person he is trying to rob. The court justified this holding by saying that the defendant had the intention to steal something, and the fact that there was nothing to steal does not excuse the intent to steal. If this line of reasoning is followed, it would seem that one could be held guilty of an attempt to commit any crime, regardless of possibility, if intent can be shown. But the courts seem to have regarded attempts to pick pockets as being in a separate class in regard to this point. In Commonwealth v. McDonald, another attempted pick-pocket case, the court said that here there was no need to show that there was anything in the pocket of the intended victim, but if the defendant had been accused of an attempt to commit some other form of larceny, it may have been necessary to show goods which the defendant was attempting to steal. In State v. Wilson the court distinguished an attempt to pick a pocket which was empty from an attempt to defraud by means which could not possibly defraud anyone and attempts to poison by using a non-poisonous substance, by saying that in the last two situations consummation was "legally impossible", while in the case of an attempt to pick a pocket which was

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5 Sargeant & Rawles 462 (Pa. 1820).

6 30 Cush. 365, 368 (Mass. 1850). "This decision is confined to the particular case under consideration, of an attempt to steal from the person; as there may perhaps be cases of attempts to steal, when it would be necessary to set out the particular property attempted to be stolen, and the value."

7 30 Conn. 500 (1862).
empty, consummation was "legally possible"; though actually impossible. However, the court failed to state the formula by which it distinguished "legal possibility" from "legal impossibility".

Originally an attempt to poison by using a non-poisonous substance was not punishable as attempted murder, and the Alabama court so held in *State v. Clarissa*, where the indictment failed to charge that the substance used was poisonous. The court held that the attempt must be made by means calculated to accomplish the purpose, and that it was necessary that the person against whom the attempt was made be placed in jeopardy. But just three years later an English court held in *Regina v. Cluderay* that the fact that a non-poisonous substance was used would not prevent the defendant's conviction, since he administered the substance which he thought was poisonous with intent to kill in a manner which he thought would produce death. In *State v. Glover*, the South Carolina court ruled likewise in a similar situation. This view has been generally followed in recent cases involving this point.

What has been said would indicate that courts began about a century ago to get away from the old view that impossibility of consummation would prevent conviction for a criminal attempt, and that in the past forty years there has been a general trend in this direction. The test now is whether the defendant reasonably expected to succeed with the means he was using, rather than whether he could have succeeded. If the expectation of success can be clearly shown, the courts will disregard the fact that consummation is actually impossible in determining whether an attempt has been committed.

The only cases in which impossibility will be a defense are those in which it is shown that the defendant, as a reasonable man, must know that his act cannot possibly bring about the consummation of the intended act. Impossibility now plays only a minor role in the law of attempts, and perhaps the only reason for its having any role at all is that if the defendant knows that he cannot succeed with the means he is using, it cannot be shown

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8 11 Ala. 57 (1847).
9 2 Car. & K. 907, 4 Cox C. C. 84 (1850).
10 27 S. C. 602, 4 S. E. 564 (1888).
that he has the necessary specific intent to commit the crime, for it cannot be said that a man intends as the result of his act that which he knows to be physically impossible. It would be ridiculous to say that the defendant intended to kill another by putting sugar into his coffee, when he knew that the substance he used was sugar, and not arsenic. The effect of proving that consummation was impossible, and that the defendant knew that consummation was impossible, is to prove the defendant did not have the necessary intent.

The better view would seem to be that impossibility of consummation will not prevent a conviction, unless it can be inferred from the defendant’s knowledge of this impossibility that he did not intend that a crime result from his act. There is very little difference between one who shoots at another with a gun which, unknown to him, is loaded with blanks rather than bullets, and one who fires a loaded gun at another, but misses because a bystander knocks the gun aside. In each case the intent to kill and an overt act which would produce the desired result if it were not for unforeseen circumstances are present. Impossibility of consummation should have no greater effect in one case than in the other. The defendants in both cases should be held guilty. The defendant’s attitude toward his act is the important element. If the intent is established, and the defendant’s act has gone far enough toward accomplishing his purpose so that it can be said that they constitute more than mere preparation, it can certainly be said that a criminal attempt has been committed, regardless of the impossibility of consummation.

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