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The Effect of Impossibility on Criminal Attempts

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People v. Youngs, supra, the defendant procured burglar's tools and met a confederate at a distance from the house they expected to rob. Held not guilty. Yet in *People v. Stites*, 75 Cal. 570, 17 Pac. 693 (1888), defendant was convicted of an attempt to place a bomb on a railroad track when he was caught before he had reached the rendezvous with his confederate. Many other examples of courts arriving at opposite conclusions on similar states of fact could be given. This can be attributed not to a difference in the law but to difference in judgment as to the importance of the act done and the notice it deserves from the law. It is submitted that this is as it should be because under a flexible rule of this sort justice is more certain in a field of criminal law where the number of possible situations is infinite, than it would be under a strictly technical rule which could not possibly cover all the factors which should be considered.

BRUCE MORFORD.

THE EFFECT OF IMPOSSIBILITY ON CRIMINAL ATTEMPTS.* A—MEANS USED MUST BE APPARENTLY SUITABLE.—It is difficult to say that any particular means will certainly effect any particular end. The best laid plans of which we may conceive are frustrated. The best rifles loaded, capped, primed and well aimed, may miss fire; or the party shot at may wear a coat of impenetrable armor. How then may we under any circumstances do more than to say of any particular agency, that it is "apparently" adapted to produce the end? The means used must be apparently adequate, though the actor, by using such means, is totally incapable of accomplishing the intended consummation.

In apparent conflict with the above view is a group of English cases on statutes. In *Rex v. Lovel*, 2 Moody & R. 39 (1837), it was held "shooting of another person does not take place when the other person is not in the place shot at, and that there can be no shooting with 'loaded arms' when a gun is so stuffed that it cannot be fired." In 1835 an English Court, *Rex v. Whitley*, 1 Lewin, C. C. 123, held that if the gun does not contain a sufficient amount of powder to be discharged no attempt has been committed. But the ground on which these cases were decided was that the statute used the words "loaded arms," etc.' which were incorporated in the indictment, and averment of which had to be substantially proved. On the other hand, the offense is not an attempt if the party threatened knew the gun was not loaded and was therefore not adaptable to doing harm. The same is true for attempts at poisoning, *State v. Clarissa*, 11 Ala. 57 (1847), and attempts to produce abortion by means of drugs, *Bates v. U. S.* 10 Fed. 92 (1881). But if the means used are both absolutely and apparently inadequate, as where a man threatens another with witchery or points

* The following authorities will be found helpful: Wharton Criminal Law, 11th Ed., Vol. 1, p. 238. May, 3rd, Ed., p. 167, 78 Univ. Penn. L. R. 962, (1930) 41 H. L. R. 491, 840, 891, (Sayre), 19 Georgetown L. J. 316, (1930-1931).

a toy popgun at him then it is plain that an attempt, in so far as to invade another's rights, does not exist.

Whether the attemptor must be physically capable of consummating the offense has been discussed slightly in its general relation above. It will be sufficient to view it in relation to rape. Suppose a boy of thirteen years of age is indicted for attempt of rape, the statute declaring a boy of that age incapable of committing rape. If the youth is legally incapable of committing the crime of rape, it would seem most illogical to convict him for the attempt to commit the offense. A Massachusetts court, however, upheld such an indictment, *Comm. v. Green*, 2 Pick. 380 (1824). In that case the court said, "a minor of fourteen years of age or just under, is capable of that kind of force which constitutes an essential ingredient in the crime of rape, and he may make an assault with an intent to commit that crime, although by an artificial rule he is not punishable for the crime itself." It is to be noticed that the court was somewhat influenced by the doctrine of "societal harm" which has crept into the law of attempts from time to time. The words used by this court that "females might be in as much danger from precocious boys as from men, if such boys are to escape with impunity from felonious assaults, as well as from the felony itself," evidence such a tendency. These precocious boys may under such circumstances be convicted and punished for a criminal assault. There is no reason for invoking the doctrine of societal harm by contending that the minors escape punishment.

The common law rule that an infant under fourteen years is incapable of committing rape or attempting to commit the crime of rape, is well established. And if he be under that age, no evidence is admissible to show that, in point of fact, he could commit the crime. This has been the established law of England for many hundred years, nor has it been departed from in the United States except perhaps in a very few instances.

To adhere too closely to the common law rule as to the inadmissibility of evidence tending to show capacity for an infant under fourteen years, would seem to the writer to be a departure from reason and good sense. It would also be a violation of the statute itself, by withdrawing persons who had actually violated it, from punishment.

To substantiate my view here taken I propose to look briefly into the origin of the common law rule. Rape is defined to be the having of unlawful and carnal knowledge of a woman, by force and against her will. To constitute this carnal knowledge there must be both penetration and emission. Before a boy has arrived at age of puberty he cannot emit seeds and hence is incapable of the crime of rape.

If it were an invariable law of human nature that an infant under the age of fourteen years could not emit seed, it would be a reasonable rule that evidence should not be permitted to contradict it. But this law of human nature is not invariable. It is not uncommon to find boys under this age who are capable of emission. Therefore it would

seem worse than idle to have a presumption of law that contradicts what is necessarily true.

In the moist and cold climate of England and most countries of Northern Europe, it is so seldom that an infant under fourteen years is capable of emission that it is perhaps reasonably assumed that a boy of that age is never capable of committing rape. But in tropical climate where the male usually arrives at puberty before the age of fourteen, the rule instead of being founded in good reason, would contradict both reason and fact. In our southern states the age of puberty is frequently earlier than in the climate of England, or of our northern states. We have among us almost every variety of the races of men. To adopt the rule which exists in England and more northern countries, where the climate conditions and habits of the people are different, would be a departure from sound reasoning.

The American States have never adopted the common law in its entirety. We have adopted only that part which is suitable to our conditions and habits of living. We ought to modify the common law rule under discussion to our circumstance and conditions, as set out by the court in *Williams v. State*, 14 Ohio Rep. 22 (1846), saying "an infant under age of fourteen years is presumed incapable of committing the crime of rape or an attempt to commit it, but that presumption may be rebutted by evidence that he has arrived at the age of puberty and is capable of emission and consummation of the crime."

Let us suppose the incapacity is merely nervous or physical. "A man may fail in consummating a rape from some physical or nervous incapacity intervening between the attempt and execution. But this failure would be no defense to the indictment for the attempt. At the same time there must be apparent capacity." Wharton Criminal Law, Vol. 1, 288. That capacity of success is an essential element of an attempt was proclaimed by a high English Jurist, Lord Chief Justice Cockburn, saying that "an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged," *Rex v. Collins*, Leigh & C. C. C. 471. We may assume that this is not the law, for apparent adaptation is sufficient, even though the consummation was, in reality, impossible from the first step taken toward the intended consummation.

In *State v. Fitzgerald*, 49 Iowa 260 (1878), defendant being indicted for attempting to commit abortion, it was held, "the fact that the accused used a substance which would not produce a miscarriage, would constitute no defense, if he employed it with a criminal intent." In Massachusetts, *Comm. v. Taylor*, 232 Mass. 261 (1882), a person was convicted of an attempt to produce miscarriage of a woman, though the woman was not pregnant.

B—IT IS NOT ESSENTIAL THAT THE OBJECT REALLY EXISTS.—In 1864 an English Court, *Reg. v. Collins*, 9 Cox C. C. 497, held that it was

error to convict a pickpocket of an attempt to commit larceny from a pocket which, in fact contained no money or other valuables. It was said that since consummation was impossible, there being no money in the pocket, there could be no attempt. But this case has since been overruled in England, *Reg v. Brown*, 24 Q. B. Div. 357 (1889), *Reg. v. Ring*, 66 Law Times (N. S.) 300 (1850), it was said, "to constitute the attempt it is not necessary to allege or prove that the victim, at the time of the attempt, had anything in his pocket, which could be the subject of larceny." This represents the overwhelming weight of authority in this country. In *Clark v. State*, 66 Tenn. 511 (1888), it was held that defendant who attempted to open a cash drawer with intent to steal money therefrom was rightly convicted of attempt to commit larceny, when in fact there was no money or other valuables in the drawer. In *State v. Beal*, 37 Ohio St. 108 (1881), it was said that an indictment for burglary with intent to steal from a safe would not be defeated by proof that the safe was not used as a place of deposits for valuables. All modern authority seems to be in accord with the proposition that it is not essential to the crime of attempt that the object really exists. The fact that conditions exist which render the actual consummation of the crime impossible does not prevent the party from being guilty of the attempt, if such conditions are known to him," Clark & Marshall, 3rd Edition, p. 158, clearly states the law on this phase of attempts. The court in *People v. Lee Kong*, 95 Cal. 666 (1892), went further than most courts. There the defendant, believing that a policeman was on the roof watching him through a knot hole fired at the hole, with the intent to kill the policeman. The policeman, in fact, was on a different part of the roof. The defendant was convicted of attempt to murder. Professor Sayre has said that one who shoots at a post with intent to kill a human being is guilty of an attempt to murder. I have been unable to find cases that go as far as this. It was early held by Lord Bramwell that if A mistakes a log of wood for B, and intending to murder B, strikes the log with an ax, this is no attempt to murder B.

The means used must be reasonably suitable to accomplishment of the intended crime. It may nevertheless amount to an attempt, though, it later appears that the consummation was impossible. Where the consummation of the crime intended is legally impossible, there can be no crime of attempt committed, *People v. Gardiner*, 25 N. Y. Supp. 1072 (1893).

It has been observed that a pickpocket may be guilty of an attempt of larceny, when there was no money in the pocket. Yet would anyone try to suppose that if an assault should be made upon a dummy dressed as a woman, with intent to ravish, the assailant believing the object to be a woman, he could be convicted of an attempt to rape? The means must not be so obviously unsuitable. The law will not take cognizance of such an act, and the bare intent is not punishable. *People v. Gardiner*, *Supra*.

There has been much discussion in the cases as to the extent to which the means employed must be adapted to the accomplishment of the intended crime, in order to render one guilty of an attempt. And at this stage of the law, we may consider it well established both in England and this country, that an apparent possibility to commit the crime is sufficient, but means used must not be so preposterous that there is not even an apparent intent.

D. T. MARTIN.

AGENCY—FAMILY PURPOSE DOCTRINE IN CASE OF ADULT CHILD.—A mother who was living with her son, aged 30 and self supporting, was given by him an automobile upon which a liability insurance policy was issued in her name with an omnibus coverage clause. The son who did all the driving was using the car for business purposes with his mother's permission and later took some friends to a road house near the city. On the return trip he collided with a street car injuring the automobile and some of the guests. One of the injured parties brought suit for personal injuries against the driver, the owner and the street car company, and was given a judgment against the driver only who was found to be execution proof. A second action was then brought against the insurance company and recovery allowed on the grounds that the omnibus coverage clause in the owners insurance policy was broad enough to include her son who was driving. *U. S. Fidelity and Guaranty Company v. Hall*, 237 Ky. 393, 35 S. W. (2nd) 550 (1931).

While the statement in the case that the family purpose doctrine does not apply where an adult son inflicts injury while driving his mother's car with her permission, is perhaps no more than dictum, as the case apparently turns upon another point, still, it presents an interesting problem.

It seems well settled in those states which have adopted the family purpose doctrine that the liability of the parent must rest upon the doctrine of agency, or the master and servant relationship of which agency is an outgrowth and expansion. (31 Cyc. 1191). *Sale v. Atkins*, 206 Ky. 224, 267 S. W. 223 (1924), *Grier v. Woodside*, 200 N. C. 759, 158 S. E. 491 (1931). It cannot rest upon the theory that an automobile is a dangerous instrumentality, for it is not so considered. *Tyler v. Stephan's Administratrix*, 163 Ky. 770, 174 S. W. 790 (1915). Neither can it rest upon the relation of parent and child, for a parent is not generally liable for his children's torts. *Arkin v. Page*, 287 Ill. 420, 123 N. E. 30, 5 A. L. R. 216 (1919). It follows that, regardless of whether the child is an adult or a minor, the parent is not liable unless it is found from the facts that there is the relationship of principal and agent.

It does not, however, follow that when a child becomes of age, he can no longer be his parent's agent under the family purpose doctrine. In *Malcolm v. Nunn*, 226 Ky. 275, 10 S. W. (2nd) 817 (1928), the court