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Comments

THE ATTEMPT AS A RESPONSIVE VERDICT

The recent Louisiana Supreme Court decision in *State v. Love*¹ has focused particular attention upon the question of whether a verdict finding a defendant guilty of an attempt to commit a crime is responsive to a charge of the completed offense. In holding that a verdict of attempted manslaughter was not responsive to a charge of murder, the Court also declared that the crimes of murder and attempt to commit murder were not generic offenses.² Justice Rogers avoided the provision in Article 27 of the Criminal Code that an attempt is a separate but lesser grade of the intended crime by reasoning that "any interpretation of the code articles that would permit a person charged with murder to be convicted of an attempt to commit the murder or an attempt to commit manslaughter is wholly out of keeping with the accepted notions of criminal law and procedure."³ Reliance was also placed upon Article 386 of the Code of Criminal Procedure⁴ which expressly provides that "in all trials for murder the jury shall be instructed that they may find the accused guilty of manslaughter or negligent homicide." This was treated as an exclusive enumeration of the verdicts responsive to a charge of murder. The decision in the *Love* case was reaffirmed shortly thereafter in *State v. Bray*,⁵ wherein the court held that a verdict of attempted murder was not responsive to a charge of murder.

A third case, *State v. Ferrand*,⁶ also decided shortly after the *Love* case, indicates that the principle enumerated in the later opinion may be limited to homicide cases. In *State v. Ferrand*⁷ the supreme court affirmed a verdict of attempted aggravated rape which had been returned in response to a charge of aggra-

1. 26 So. (2d) 156 (La. 1946).

2. The court, through Justice Rogers, stated: "It is certain that murder and attempt to commit murder are not generic offenses and the lesser is not included in the greater. The two offenses are separate and distinct and could not be included in the same count in one indictment." 26 So. (2d) 156, 158 (La. 1946).

3. *Id.* at 157.

4. La. Code of Crim. Proc. of 1928.

5. 27 So. (2d) 337 (La. 1946).

6. 27 So. (2d) 174 (La. 1946)

7. *Ibid.*

vated rape. No issue was made of the responsive nature of the verdict and the court said: "A separate but lesser grade of the offense of aggravated rape, and responsive to a charge for that crime, is an attempt to commit aggravated rape."⁸ In so declaring, the court recognized and applied the general principle that an attempt verdict is responsive to a charge of the basic crime.

While the supreme court's actual holding in the *Love* case is probably limited in scope, some of the principles announced therein might become far reaching in their effect; a careful reappraisal of the issues involved is in order.⁹ Article 27 of the Louisiana Criminal Code is a general provision embracing all attempts to commit crimes. Being a part of the substantive criminal law, it does not deal with the related procedural problem of whether a verdict of attempt is responsive to a charge of the basic crime. It does, however, expressly provide that "an attempt is a separate but lesser grade of the intended crime;" and further provides that proof of the actual commission of the offense shall not bar a prosecution for the lesser and included inchoate offense of "attempt." These provisions indicate a legislative intent, in drafting the substantive law of crimes, that an attempt should be generic with, but a lesser grade of, the various basic crimes defined in the other articles of the Criminal Code.

An application of Section 1053 of the Revised Statutes of 1870, which was apparently overlooked by both the court and counsel,¹⁰ might well have sustained an attempt verdict in these cases. That section provides,

"If, on the trial of any person charged with any crime or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an *attempt* to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the crime or misdemeanor charged, but is guilty of an attempt to commit the same. . . ."¹¹

8. *Id.* at 178.

9. It is well to note that the *Love* case was decided in April, 1946; the decision in the *Ferrand* case, holding an attempt responsive, was handed down in May, 1946; and the *Bray* case, which held a verdict of attempted murder not responsive to a charge of murder decided in June, 1946. Also in the *Ferrand* case no issue was made of the responsiveness of the verdict by counsel for the defense.

10. This is probably explained by the fact that Dart's Statutes list Section 1053 of the Revised Statutes of 1870 as having been superseded.

11. La. Rev. Stats. of 1870, § 1053.

This statute has not been repealed by the legislature nor has it been specifically overruled by the jurisprudence of this state. On previous occasions the courts have recognized and applied Section 1053. In *State v. May*¹² the court flatly applied Section 1053 of the Revised Statutes holding that this section justified a verdict of assault with intent to rape where the defendant was charged with rape. The verdict was treated as an attempt to commit the crime and was held responsive. Again in *State v. Madison*¹³ the defendant was charged with robbery and found guilty of assault with intent to rob. The court cited 1053 and found the verdict responsive. In *State v. Hearsey*¹⁴ and *State v. Porter*¹⁵ the court found that this particular section of the Revised Statutes was inapplicable; but in each case its existence and validity were noted. In one instance it was found that no crime had been charged and in the other that no penalty was prescribed for that particular offense.

While the above cases were decided before the adoption of either the Code of Criminal Procedure or the Criminal Code, there is no reason to believe that the effect or validity of Section 1053 has been altered by the adoption of these two codes. It does not conflict with the general responsive verdict provisions of the Code of Criminal Procedure, and is entirely consistent with the substantive law concept of the "attempt" which is enunciated in Article 27 of the Criminal Code. Resort to the Revised Statutes to supplement and aid in the construction of the Code of Criminal Procedure is expressly sanctioned by Louisiana jurisprudence. The court in *State v. McKinney*¹⁶ applied Section 992 of the Revised Statutes in holding that the defendant must be served with a copy of the indictment and the jury list; and this despite the fact that no such requirement is found in those articles of the Code of Criminal Procedure which safeguard the rights of the accused.¹⁷ This interpretation, that the adoption of the 1928 Code of Criminal Procedure did not preclude resort to provisions of the Revised Statutes of 1870 except in case of direct conflict, was reaffirmed a year later in *State v. Brown*.¹⁸ In line with this rule of construction, the court might well rely upon Section 1053 of

12. 42 La. Ann. 82, 7 So. 60 (1890).

13. 50 La. Ann. 679, 23 So. 622 (1898).

14. 50 La. Ann. 373, 23 So. 372 (1898).

15. 48 La. Ann. 1539, 21 So. 125 (1896).

16. 171 La. 549, 131 So. 667 (1930).

17. For a criticism of this decision see Comment (1932) 6 Tulane L. Rev. 135.

18. 172 La. 49, 133 So. 358 (1931).

the Revised Statutes in holding that an attempt verdict is responsive to a charge of the basic crime.

Prior to the adoption of the 1942 Criminal Code, very few attempts were recognized as criminal with penalties provided; and, consequently, there was little occasion for the application of Section 1053. The shortcomings and inadequacies of Louisiana's substantive law of attempts was noted in *State v. Hearsey*.¹⁹ Judge Marr aptly described the situation saying:

"The meaning of R.S. 1053 is that, if there is a statute punishing an attempt to commit a certain crime, the jury could, on an indictment for the crime, bring in a verdict for an attempt to commit it; but where no such statute exists, no such verdict can be the basis of sentence."²⁰

This difficulty is overcome today by the general attempt article of the Criminal Code, which prescribes the penalty for attempts to commit all crimes. Thus Section 1053 assumes a new and added importance.

Justice Rogers' general statement in *State v. Love*,²¹ that an attempt is not generic with a charge of the completed crime, is out of line with the jurisprudence of our sister states. It is practically the unanimous holding of the courts of other states that a verdict of an attempt is responsive to a charge of the basic crime. The courts in Alabama,²² California,²³ Georgia,²⁴ Indiana,²⁵ Kansas,²⁶ Kentucky,²⁷ Maine,²⁸ Mississippi,²⁹ Nebraska,³⁰ New York,³¹ North Carolina,³² Tennessee,³³ Utah,³⁴ and West Vir-

19. Upon a charge of rape, the jury returned a verdict of assault with attempt to commit rape. This was not found to be responsive for it found the defendant guilty of no crime for which a penalty was prescribed. Section 1053 of the Revised Statutes was not found to be applicable, for the verdict was assault with *intent* to commit rape, not with *attempt* to commit rape. However a clear verdict of attempt would not have been valid for no penalty was prescribed for the crime of attempt; thus Section 1053 would still be inapplicable.

20. 2 Marr, *Criminal Jurisprudence of Louisiana* (2 ed. 1923) 1080.

21. 26 So. (2d) 156 (La. 1946).

22. *Benbow v. State*, 128 Ala. 1, 29 So. 553 (1901).

23. *People v. Hart*, 28 Cal. App. 335, 152 Pac. 947 (1915).

24. *Lowe v. State*, 112 Ga. 189, 37 S. E. 401 (1900).

25. *Gillespie v. State*, 9 Ind. 380 (1857).

26. *State v. Franklin*, 69 Kan. 798, 77 Pac. 588 (1904). The special statute here covered all lesser-included offenses and attempts.

27. *Young v. Commonwealth*, 75 Ky. 243 (1876).

28. *Petition of Carson*, 39 A. (2d) 756 Me. (1944).

29. *Horton v. State*, 84 Miss. 473, 36 So. 1033 (1904).

30. *Evers v. State*, 84 Neb. 708, 121 N.W. 1005 (1909).

31. *People v. Samuels*, 284 N. Y. 410, 31 N. E. (2d) 753 (1940).

32. *State v. Parker & Taft*, 224 N. C. 524, 31 S. E. (2d) 531 (1944).

33. *DeLacy v. State*, 67 Tenn. 401 (1875).

34. *State v. Winslow*, 30 Utah 403, 85 Pac. 433 (1906).

ginia³⁵ all hold an attempt responsive by virtue of special statutes similar in effect to Section 1053 of the Louisiana Revised Statutes. In Arkansas an attempt is found to be responsive under a statute making all lesser and included offenses responsive to a charge of the crime. The attempt is treated as such an offense.³⁶ Missouri has also held the attempt responsive as a lesser-included offense.³⁷

Relying solely on the logic and reason of the situation it also appears that an attempt is of the same genus as the crime charged. All the elements of the basic crime, with the exception of completion, are found in the attempt.³⁸ Thus the attempt verdict should clearly meet the requirements of the generic and lesser-included offense theory.

Mention is made of the fact that the victim was dead and that it is impossible to find an attempt to kill in such a situation.³⁹ This is undoubtedly true as far as the common law view is concerned, for one could not be guilty of an attempt if there was evidence that the crime had been completed.⁴⁰ Article 27 of the Criminal Code, however, specifically states that actual commission of the basic crime does not prevent liability for the attempt.⁴¹

It is entirely probable, in view of the *Ferrand* case, where a verdict of attempted aggravated rape was upheld in response to a charge of aggravated rape, that the Louisiana Supreme Court will limit the rule of the *Love* decision to homicide cases, despite the apparent generality of some of the language employed. This possibility is strengthened by the fact that much reliance was placed on Article 386 of the Code of Criminal Procedure which enumerates verdicts responsive to a murder indictment. This article provides that in trials for murder the jury shall be in-

35. *State v. Meadows*, 18 W. Va. 658 (1881).

36. *Pratt v. State*, 51 Ark. 167 (1888).

37. *State v. Frank*, 103 Mo. 120 (1890).

38. For an exhaustive treatment of the generic and lesser-included offense theories, see Comment (1944) 5 LOUISIANA LAW REVIEW 603.

39. In the *Love* case the court said: "as a practical matter, a verdict of attempted murder or of attempted manslaughter could only mean that from the evidence the jury found that the alleged victim was still alive On the other hand if the evidence disclosed that the victim was dead as a result of the attempt to take his life, then a verdict of attempted murder or attempted manslaughter would be justified neither in law or in logic." *State v. Love*, 26 So. (2d) 156, 158 (La. 1946).

40. See 16 C. J. 113, § 92, and authorities there cited.

41. ". . . and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated. . . ." Art. 27, La. Crim. Code of 1942.

structed that the accused can also be found guilty of manslaughter and of negligent homicide. In so doing the court apparently, but without express recognition, applied the doctrine of *expressio unius est exclusio alterius*. The decision reasons that this enumeration is exclusive and that other possible verdicts such as attempts are not responsive. This maxim, while not conclusive, is a syllogistic restatement that the courts will first look strictly to the literal language of the statute to determine legislative intent and has been frequently used in the construction of statutes penal in nature.⁴² Upon this basis the decision in the *Love* and *Bray* cases can be justified as concerns homicide verdicts; but no similar provision is controlling as to other crimes.

As a practical matter, the possibility of an attempt verdict is of great help to the prosecution. Frequently the state does not secure a conviction because of its failure to prove all the elements of the completed crime. For example, in a rape case the rape may not be proved because of a failure to show penetration, or in a theft case the actual taking of the goods may not be fully established. Where it is clear that the defendant at least "attempted" to commit the crime, should not the lesser crime be a responsive verdict just as the lesser crime of simple battery or assault is responsive where all the elements of aggravated battery are not established? If the same jury cannot consider the possibility of an attempt, the result is an additional trial with the incumbent difficulties of a conviction upon retrial.

From the *Love*, *Bray*, and *Ferrand* decisions several assumptions are possible. Looking to the actual holdings in those cases, the conclusion may be reached that an attempt verdict is not responsive in homicide cases, relying largely on the special provisions in Article 386 of the Code of Criminal Procedure to substantiate this view; but that an attempt will be upheld in other cases. The *Ferrand* case strengthens this assumption. On the other hand, there is much language in Justice Rogers' opinion in the *Love* case which indicates that attempts are never to be considered responsive, and the *Ferrand* case is weakened by the fact that the question of attempt was not put at issue by argument of counsel.

It is hoped, in the interests of trial expediency, that the first interpretation as to the scope and meaning of these decisions proves to be the more accurate prediction of the future course

42. 2 Sutherland, *Statutes and Statutory Construction* (1943) 412 et seq., § 4915.

of judicial decisions. Such a result would seem to be dictated by the clear language of Section 1053 of the Revised Statutes of 1870, and by the jurisprudence in other jurisdictions to the effect that an attempt is generic and a lesser-included degree of the basic crime.

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RETROSPECTIVE EFFECT OF AN OVERRULING DECISION

In *Succession of Lambert*,¹ the most recent Louisiana case on the vexing problem of conjoint legacy, the Supreme Court of Louisiana overruled certain of its prior cases on the subject.² The argument that a changed interpretation of the pertinent code provisions would prejudice the property rights of those who had relied on the overruled decisions was answered by the court with a reiteration of the doctrine of *Norton v. Crescent City Ice Manufacturing Company*.³ The latter, while recognizing that the rule of a case generally would be applied both retrospectively and prospectively, announced that where vested rights had been acquired in reliance upon prior decisions any case overruling the latter would be given prospective effect only.

All systems of law recognize the necessity for some adherence to judicial precedent. A clash occurs only with respect to the weight to be accorded the authority of the decided case. The force of judicial precedent depends upon the extent to which each judicial system is willing to subordinate the necessity of modification of legal rules in accordance with social and economic changes to the desiderata of certainty and predictability in the law.⁴

In the main, three distinct theories obtain as to the force of judicial precedent.⁵ Under the English rule of *stare decisis*, a prior case directly in point has the same force and effect upon the court which decided it and on all inferior tribunals as a statute, unless and until overruled by a higher court. If the prior case was decided by the House of Lords, the point decided becomes the law of England, which can only be overturned legislatively by an act of Parliament. Judicial precedent, even of the single case, is law de jure which all inferior courts are obliged

1. La. Sup. Ct. Docket No. 37,997 (June 14, 1946).

2. For a treatment of the substantive law presented in the *Lambert* case, see Case Note, *infra* p. 138.

3. 178 La. 135, 150 So. 855 (1933).

4. For an excellent discussion of the various aspects of this problem, see Goodhart, *Case Law in England and America* (1930) 15 *Corn. L. Q.* 173.

5. Goodhart, *Precedent in English and Continental Law* (1934).