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Criminal Law - Impossible Attempts

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the standard enunciated in *Norton* to the factual situations in this case.

Mr. Justice Goldberg in his dissenting opinion states that the Court went beyond its holding in the *Norton* decision. He indicated that *Norton* would require immunity for all the Pontiac and Oldsmobile sales and also for those sales of parts and Chevrolets which were not connected with a Seattle warehouse or office. But this argument ignores the fact that GM, through its activities in Washington, has just as permanently established itself in the state, as it would have through establishing a local office as in the *Norton* case. It is also Justice Goldberg's belief that the activities of GM's representatives were comparable to the activities of itinerant drummers or traveling salesmen which have been held immune from state taxation.⁴⁰ It is submitted that this argument ignores the distinguishing facts that the "district managers" were permanently established in the state and were engaged in a broad range of activities to aid in the stimulation of GM sales.

The Court in deciding this case properly directed its inquiry toward determining whether the bundle of in-state activity of the taxpayer which produced the sales was a sufficient connection with Washington to support the tax. The Court should have gone further, however, and related the tax to the protection, opportunities, and benefits given by the state levying the tax. But until a final determination by Congress concerning what state taxation of interstate commerce will be permissible, the Supreme Court must decide the constitutionality of state taxation of interstate commerce on a case-by-case basis. In this case the Court was justified in upholding the tax.

Lawrence L. Jones

CRIMINAL LAW — IMPOSSIBLE ATTEMPTS

A thief, captured with a stolen overcoat, cooperated with Oklahoma police in entrapping the defendant by delivering the coat to him. There was no question as to the defendant's intent

40. For cases relied on by Justice Goldberg, see *McLeod v. J. E. Dilworth*, 322 U.S. 327 (1944); *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887).

in receiving the coat, as he clearly believed it to be stolen. Defendant was convicted for "attempt to receive stolen goods," but on appeal, the Oklahoma Court of Criminal Appeal reversed. *Held*, a person could not be guilty of an "attempt to receive stolen goods"¹ where the goods he received were no longer stolen property. *Booth v. State*, 398 P.2d 863 (Okla. Crim. App. 1965).

A person may fail to commit a crime but still be liable for a criminal attempt. If he fails because he is physically interrupted in his planned course of action, it is generally held that he is liable for a criminal attempt. Problems have arisen, however, when the actor completes his planned course of action, but the act does not constitute the intended crime. Simple illustrations of such a case are the attempt to pick an empty pocket and the attempt to kill someone already dead. It is this type of attempt, termed "impossible attempt," which is the subject of this paper.

The courts have struggled with the problem for nearly a century, with the result that most jurisdictions today draw a distinction between *factual impossibility* and *legal impossibility*. A factually impossible attempt has been defined as one that fails because some factual or physical condition unknown to the defendant makes it impossible to complete the intended crime, for example, trying to pick an empty pocket. A legally impossible attempt is one in which the act when fully consummated does not meet the legal requirements of the intended crime, for example, "stealing" one's own umbrella.² Under the majority Anglo-American view conviction will depend upon whether the defendant's attempt can be classified as a factual impossibility; no conviction will lie if the attempt is classified as a legal impossibility.

1. OKLA. STAT. ANN. tit. 21, § 42 (1951): "Every person who attempts to commit a crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or interrupted in the perpetration thereof" *Id.* § 1713: "Every person who buys or receives, in any manner, upon any consideration, any personal property of any value whatever that has been stolen, embezzled, obtained by false pretense or robbery, knowing or having reasonable cause to believe the same to have been stolen, embezzled, obtained by false pretense or robbery, or who conceals, withholds, or aids in concealing or withholding such property from the owner"

2. See *Booth v. State*, 398 P.2d 863, 870 (Okla. Crim. App. 1965). See also CLARK, CRIMINAL LAW 146 (3d ed. 1915): "If a person attempts to do something which, even if his purpose is accomplished, will not be crime in law, he is not guilty of a criminal attempt, though he may think he will commit a crime." See also PERKINS, CRIMINAL LAW 494 (1957), wherein the author states that the legal impossibility doctrine boils down to this: "Attempting to do what is not a crime is not attempting to commit a crime."

Originally the English courts refused to convict in any case of impossible attempt. In *Regina v. Collins*,³ the court took the view that a man who placed his hand into an empty pocket could not be convicted of attempting to steal. Speaking for the court, Baron Bramwell concluded: "We think 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."⁴ In order to emphasize his position, Bramwell supposed situations where a man might attempt to steal his umbrella, or strike a deadly blow at a block of wood believing it to be man, or enter an empty room with intent to steal.⁵ The absurdity of conviction in these situations apparently convinced him of the soundness of his decision. This extreme view was later rejected by the English courts in *Regina v. Ring*,⁶ and, after various developments, the present distinction between legal and factual impossibility⁷ was established.

The leading American case is *People v. Jaffe*,⁸ which held that it was not a criminal attempt to receive goods believed to be stolen when in fact they were not, classifying the attempt as legally impossible. Other cases which have been held legally impossible attempts are: attempt to shoot a deer out of season, when in fact the "deer" was a stuffed skin;⁹ attempt to bribe a juror who was not a juror;¹⁰ attempt to commit subornation of perjury where the testimony would have been immaterial to the case;¹¹ attempt by a public official to contract illegally for a valid debt when the debt was unauthorized and a nullity.¹²

3. Le. & Ca. 471, 169 Eng. Rep. 1477 (Ex. 1864).

4. As reported in 9 Cox C.C. 497, 499 (Ex. 1864).

5. *Id.* at 498.

6. 17 Cox C.C. 491, 61 L.J.M.C. 116, 66 L.T.(N.S.) 306 (1892).

7. The French during this period of development tried unsuccessfully to classify impossible attempts as "absolute" or "relative," a dichotomy basically similar to the majority position in America today. For examples of each classification see HALL, PRINCIPLES OF CRIMINAL LAW 121 (1937). Hall describes this system of classification as an "intermediate view" between the extremes of punishing all the attempts and the earlier view of refusing to punish any impossible attempts.

8. 185 N.Y. 497, 78 N.E. 169 (1906).

9. *State v. Guffey*, 362 S.W.2d 152 (Mo. App. 1953).

10. *State v. Taylor*, 345 Mo. 325, 133 S.W.2d 336 (1939).

11. *People v. Teal*, 196 N.Y. 372, 89 N.E. 1086 (1909).

12. *Marley v. State*, 58 N.J.L. 207, 33 Atl. 208 (1895). For other cases following the *Jaffe* decision see *People v. Werner*, 16 Cal. 2d 216, 105 P.2d 927 (1940); *People v. Schroeder*, 132 Cal. App. 2d 1, 281 P.2d 297 (1955); *People v. Zimmerman*, 11 Cal. App. 115, 104 Pac. 590 (1909); *People v. Jelke*, 1 N.Y.S.2d 321, 152 N.Y.S.2d 479, 135 N.E.2d 213 (1956); *People v. Rollino*, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (1962); *People v. Finkelstein*, 21 Misc. 2d 723, 197 N.Y.S.2d 31 (1960).

Typical of decisions based on factual impossibility are those holding that the picking of an empty pocket is a criminally punishable attempt.¹³ Likewise, a defendant who shot into his intended victim's bed, believing him there when in fact he was elsewhere, was guilty of attempted murder.¹⁴ It has been held no defense to "attempted abortion" that the woman was not pregnant.¹⁵ Other examples of factually impossible attempts are: attempted shooting of someone with an empty gun,¹⁶ attempted stealing from an empty receptacle;¹⁷ attempted rape by an impotent defendant.¹⁸

The legal impossibility doctrine is not accepted in all American jurisdictions. In 1959, for example, California abandoned the *Jaffe* rationale and the defense of legal impossibility in *People v. Camodeca*¹⁹ and in *People v. Rojas*.²⁰ The American Law Institute has also decided against the legal impossibility doctrine. The Model Penal Code article 5.01 provides in part: "A person is guilty of an attempt to commit a crime if acting with the kind of culpability otherwise required for commission of the crime he: (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be."²¹

In Louisiana, as in Oklahoma, attempts are made criminal under a general attempt article²² which must be read with the

13. See *Commonwealth v. McDonald*, 5 Cush. 365 (Mass. 1850); *People v. Jones*, 46 Mich. 441, 9 N.W. 486 (1881).

14. *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902).

15. *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N.E. 910 (1893); *People v. Huff*, 339 Ill. 328, 171 N.E. 261 (1930).

16. *State v. Damms*, 9 Wis. 2d 183, 100 N.W.2d 592 (1960).

17. *Clark v. State*, 86 Tenn. 511, 8 S.W. 145 (1888).

18. *Hunt v. State*, 114 Ark. 239, 169 S.W. 773 (1914); *State v. Ballamak*, 28 N.M. 212, 210 Pac. 391 (1922).

19. 52 Cal. 2d 142, 338 P.2d 903 (1959), involving attempted theft by false pretenses where the intended victim was not deceived.

20. 55 Cal. 2d 252, 358 P.2d 921 (1961).

21. MODEL PENAL CODE § 5.01 (Proposed Official Draft 1962).

"(1) Definition of Attempt

"A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime he:

"(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

"(b) when causing a particular result in an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

"(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime."

22. LA. R.S. 14:27 (1950): "Any person who, having a specific intent to

article proscribing the crime in question. In none of its terms does the attempt article refer to a distinction between legal or factual impossibility. It does provide, however, that "it shall be immaterial whether, under the circumstances, he would have accomplished his purpose."²³ In the Comments under the article the Reporters added: "It is immaterial whether there is an *actual* possibility of committing the intended offense."²⁴ (Emphasis added.) There follows an apparent reference to legal impossibility: "The test appears to be . . . would the defendant have been guilty of a crime if his intention had been fully consummated."²⁵ Under article 69, "Receiving Stolen Things,"²⁶ however, the Reporters commented: "[I]f a trap were set for a suspected receiver of stolen things, and he actually took some 'planted' goods into his possession, the circumstance that the goods were not in fact stolen goods would be a defense. However, the individual in question would possibly be guilty of an attempt to receive stolen things."²⁷ No Louisiana case has decided the question of legal impossibility, and the comment by the Reporters does not squarely meet the issue.

The instant case was one of first impression in Oklahoma. The facts were directly in line with *Jaffe*, which had approved the legal impossibility doctrine, and with *Rojas*, which had rejected the doctrine. The decision to apply the doctrine was influenced by the decision of another Oklahoma court giving recognition to the doctrine.²⁸ Although forced to admit the many inconsistencies in the application of the legal impossibility distinction, the court blamed them on mistakes in applying the doctrine, rather than on the doctrine itself. The court pointed out that the *Camodeca* case, which departed from the line of California cases supporting the *Jaffe* decision, actually represented a case of factual rather than legal impossibility. The court could not deny, however, that the *Rojas* case, following *Camodeca*, was

commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishment of his object"

23. *Ibid.*

24. *Id.* Reporter's Comment.

25. *Ibid.*

26. *Id.* 14:69: "Receiving stolen things is the intentional procuring, receiving, or concealing of anything of value which has been the subject of any robbery or theft, under circumstances which indicate that the offender knew or had good reason to believe that the thing was the subject of one of these offenses."

27. *Id.* Reporter's Comment.

28. *Nemecek v. State*, 72 Okla. Crim. 195, 114 P.2d 492 (1941).

directly in point with the instant case, and was thus a case of legal impossibility.

The court also faced a serious problem in the language of the Oklahoma statute which required knowledge on the part of the defendant that the goods were stolen. The court was uncertain how one could know property was stolen when in fact it was not and concluded that it was dealing with a case of legal impossibility because the act of receiving the coat was not criminal.

Much has been written explaining impossible attempts, both in favor of and in opposition to the majority view.²⁹ It has been stated that the present jurisprudence supporting the legal impossibility doctrine relies on the "crucial fallacy" that "because the intended harm could not be accomplished, none occurred."³⁰ It also is argued that the underlying reason why courts have avoided the extremes of holding *no* impossible attempt to be criminal and of holding *all* such attempts to be criminal is that some attempts carry with them a great probability of harm because they carry a great probability of accomplishment; yet as to other attempts, the chances of accomplishment and therefore of harm are so remote that it would seem unreasonable to condemn them as criminal.³¹

The court in the *Camodeca* case avoided the "crucial fallacy" when it stated: "One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out his intention he committed an act that caused harm or *sufficient danger of harm*, it is immaterial that for some collateral reason he could not complete the intended crime."³² (Emphasis added.)

29. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930); Curran, *Criminal and Non-Criminal Attempts*, 19 GEO. L.J. 185, 316 (1931); Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464 (1954); Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U.L. REV. 1170 (1957); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821 (1928); Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422 (1957); Strahorn, Jr., *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962 (1930).

30. See HALL, PRINCIPLES OF CRIMINAL LAW 128 (1957).

31. *Id.* at 124.

32. *People v. Camodeca*, 52 Cal. 2d 142, 147, 338 P.2d 903, 906 (1959). The court continued: "Although the law does not impose punishment for guilty intent alone, it does impose punishment when guilty intent is coupled with action that would result in a crime but for the intervention of some fact or circumstance unknown to the defendant."

The court in the instant case was forced to admit that "what is a 'legal impossibility' as distinguished from a 'physical or factual impossibility' has over a long period of time perplexed our courts and has resulted in many irreconcilable decisions."³³ And the court strongly recommended that article 5.01 of the Model Penal Code be adopted, so as to abrogate the doctrine of a legal impossibility. The force of this reasoning is easily illustrated. Assuming that the purpose of the legal impossibility doctrine is to draw a line between the absurd attempt and the more realistic attempt, it is submitted that the doctrine fails both theoretically and practically. Factual impossibility cases can be supposed, and have actually arisen, which are as absurd as any imaginable legal impossibility case, though, like legal impossibility cases, never completely devoid of the prospect of harm; for example, attempted murder with a voodoo charm;³⁴ attempted poisoning with a ridiculously insufficient dose,³⁵ or even a non-poisonous substance; attempted rape by an impotent man,³⁶ attempted theft from an empty house.³⁷ Stating that the legal impossibility doctrine is designed to avoid an absurd result is equivalent to asserting that the legal impossibility doctrine is designed to avoid those attempts which do not carry with them a reasonable probability of harm, and such a purpose is indeed a valid and proper one. But since the doctrine fails in this purpose, it is questionable why the doctrine should be inserted into this already complex area, especially when the basic reason for condemning some attempts and exculpating others can easily serve as an effective test. It should suffice to look to the presence of the criminal intent and to the probability of harm.³⁸

Theoretically, the test approved by the court in the instant

33. 398 P.2d at 870, where the court also said: "Detailed discussion of the subject is unnecessary to make it clear that it is frequently most difficult to compartmentalize a particular set of facts as coming within one of the categories rather than the other."

34. See *The Attorney General v. Willem*, 2 H. & C. 431, 159 Eng. Rep. 178 (Ex. 1863); and *State v. Clarissa*, 11 Ala. 57 (1847).

35. *Rex v. White*, 2 K.B. 124 (1910).

36. *State v. Damms*, 9 Wis. 2d 183, 100 N.W.2d 592 (1960).

37. *State v. Utley*, 82 N.C. 556 (1880). See also *People v. Jones*, 46 Mich. 441, 9 N.W.486 (1881), where an attempt to pick an empty pocket was held factually impossible. But if the defendant had picked a pocket and recovered his own wallet, the cases seem to indicate that such an attempt would be held legally impossible. There seems to be little justification for this distinction.

38. See Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422 (1957), wherein the author expresses much the same idea when he speaks of the need to punish extreme recklessness, such as attempt to poison with an insufficient dose.

case is extremely weak. According to the court's test one must assume that the defendant's act is completed as he intended it, and then if this completed act does not constitute a crime, his attempt cannot be criminal. The fallacy lies in the assumption. If, indeed, one assumes that the defendant's intended act is completed, it is necessary to assume not only that the physical act is completed but also that the circumstances are as the defendant believed them to be and the consequences of his action are as he intended. The defendant's physical act was not the act he intended, yet the court was willing to equate the two in applying the test. To apply the test properly one should assume that the defendant in the instant case received, not simply *goods*, but *stolen goods*. And, further, if he had done what he intended, received a stolen coat, he would indeed be guilty of a crime. Thus the test adopted by the court in *Booth* to find a legal impossibility, if applied correctly, is a mere effort in futility, for proper application eliminates completely the distinction for which the test was formulated. It is therefore submitted that the similar test suggested by the Reporters under the Louisiana general attempt article should not be used, as it too is worthless if correctly applied. It is further submitted that the legal impossibility distinction contradicts the clear language of the Louisiana attempt article.

The Louisiana attempt article is similar to the Oklahoma attempt article except for the important added statement: "It shall be immaterial whether, under the circumstances, he completed an act different from the act he intended."³⁹ This is a clear and emphatic declaration that *all* impossible attempts are to be treated as indictable attempts in Louisiana, whether they be classified as legally impossible or factually impossible. Thus, by the certain language of article 27, it is submitted that the legal impossibility doctrine, with all of its difficulties and irrationalities, should find no place in Louisiana jurisprudence.

With the possible limited exception of those cases (more theoretical than practical) where the probability of harm is so slight that the criminal intent itself amounts to an absurdity, the broad, clear language of article 27 should be accorded its full scope. The unduly guarded language of the Reporter's Comment under article 69 suggests that such an application

39. LA. R.S. 14:27 (1950).

of article 27 is "possible," and the experience of other jurisdictions indicates that such an application is highly desirable.

Billy J. Tauzin

OBLIGATIONS — OFFER MADE IN NEWSPAPER ADVERTISEMENT

Defendant advertised in a local newspaper :

"OPPORTUNITY KNOCKS

"WE WANT enthusiastic, ambitious men to represent us locally, Professional training program w/\$450.00 monthly guarantee if qualified. Enthusiasm and ambition quickly rewarded with advancement. Be in the four figure bracket. For appointment call Mr. Johnson, 357-9756 before 1 p.m. daily."¹

In response to the advertisement, plaintiff applied for employment and was hired as a salesman. After receiving commissions of \$171.84 for the first month and \$417.61 for the second, plaintiff resigned, and brought suit for \$300.00, which he considered the balance due under his contract at \$450.00 per month, less commissions paid. Defendant urged that the newspaper advertisement was merely an invitation to the prospective employee to make an offer and enter into a contract of employment. The lower court sustained the plaintiff's claim, and on appeal the First Circuit Court of Appeal affirmed. *Held*, the newspaper advertisement constituted an offer, which, upon acceptance, formed a binding contract containing the terms of the advertisement. *Willis v. Allied Insulation Co.*, 174 So. 2d 858 (La. App. 1st Cir. 1965).

The Louisiana Civil Code provides four requirements for a valid contract: (1) legal capacity to contract, (2) a certain object, (3) a lawful purpose, and (4) consent legally given.² Consent, defined as "the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and de-

1. *Willis v. Allied Insulation Co.*, 174 So. 2d 858, 860 (La. App. 1st Cir. 1965).

2. LA. CIVIL CODE art. 1779 (1870).