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CRIMINAL LAW—THE DOCTRINE OF TRANSFERRED INTENT IN HOMICIDE

Sir Matthew Hale well states the problem involved in transferred intent in writing that "if A. by malice forethought strikes at B. and missing him strikes C. whereof he dies, tho he never bore any malice to C. yet it is murder, and the law transfers the malice to the party slain . . ." ¹ The courts have asserted this doctrine in cases of homicide resulting from a blow or the use of a gun ² or poison. ³ It has also been applied in cases of arson ⁴ and burglary ⁵ and in tort actions. ⁶ The problem to be considered in this note is in what manner the law explains the transfer of malice from one person to another person toward whom no actual malice exists.

The answer has come from a gradual building up of the rationalization of the rule over a period of several hundred years, and a number of the reasons will be enumerated. Blackstone, calling it implied malice, writes that the "previous felonious intent" to kill makes the rule applicable, ⁷ and *Agnes Gore's Case* states that "the law joins the intention with the event." ⁸ The fiction that "the intention follows the bullet" has been used as a partial basis in a number of cases. ⁹ In introducing the ground of public policy, Wharton states that it is the policy of society to protect life and to enforce justice against persons having a state of mind which intends the killing of one of its members. ¹⁰

When we turn to the field of torts, closely related to the criminal law in this doctrine because of the original close association of intentional torts with crimes, ¹¹ we find that the

¹ HALE, HISTORY OF THE PLEAS OF THE CROWN (1778) 466.

² *United States v. Hart*, 162 Fed. 192 (1908); *Commonwealth v. Caldwell*, 223 Ky. 65, 2 S. W. 2d 1055 (1928); *Shelton v. Commonwealth*, 145 Ky. 543, 140 S. W. 670 (1911).

³ *State v. Fulkerson and Butner*, 61 N. C. (Phil. 233) 152 (1867); *Agnes Gore's Case*, 9 Coke 81 a, 77 Eng. Rep. 853 (1611).

⁴ *Reg. v. Regan*, 4 Cox. C. C. 335 (1850).

⁵ I WHARTON, CRIMINAL LAW (12th ed. 1932) 212.

⁶ *Talmage v. Smith*, 101 Mich. 370, 59 N. W. 656 (1894).

⁷ IV BL. COMM. (11th ed. 1790) 201.

⁸ 9 Coke 81 a, 77 Eng. Rep. 853 (1611).

⁹ *State v. Batson*, 339 Mo. 298, 96 S. W. 2d 384, 389 (1936); *Carpio v. State*, 27 N. M. 265, 199 Pac. 1012, 1013 (1921).

¹⁰ I WHARTON, CRIMINAL LAW (12th ed. 1932) 746.

¹¹ On this point, see PROSSER, TORTS (1941) 47.

early law provided that a defendant whose act had caused harm to another was *prima facie* liable as a trespasser unless he could show himself free from fault, a thing which he was unable to do if he had an intention to harm anyone in a like manner.¹²

The real basis of the rule in homicide cases¹³ seems to be that the actor has the kind of *mens rea* necessary for an intentional murder;¹⁴ that is, he intends serious bodily harm or death to a human being¹⁵ and commits on C the same character of act that he intended to commit on B. The intention of the defendant is the clue; for if A, acting upon a justification such as self-defense, fires at B and kills C instead, he will not be held responsible. When, from a subjective standpoint, one has a wrongful intent to kill, there exists a dangerous state of mind which, when executed by the act,¹⁶ is conduct contrary to the policy of society to protect life; and the actor should be punished as if he had carried out the crime as originally intended.

The courts have overwhelmingly decided that the degree of guilt is the same as it would be if the person intended had been killed;¹⁷ and in some jurisdictions this means that the defendant may even be guilty of murder in the first degree, if

¹² RESTATEMENT, TORTS (Tent. Draft, 1935) Commentary to section 10 (1).

¹³ Although this paper is concerned only with transferred intent in homicide cases, it is believed that this statement, and the rationalization which follows, are also true in other cases of transferred intent in torts and crimes.

¹⁴ "An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not." STEPHEN, A DIGEST OF THE CRIMINAL LAW (1877) 161.

¹⁵ The intention to shoot a dog is held insufficient to meet the requirement of intent: *People v. Keefer*, 18 Cal. 636 (1861); as is the intention to poison rats, where a person took the poison: See *Agnes Gore's Case*, 9 Coke 81 a, 77 Eng. Rep. 853 (1611). 'But see hypothetical cases in 20 IRISH LAW TIMES 276 (1886).

¹⁶ For a discussion of the intent and the act being joined, see Perkins, *A Rationale of Mens Rea* (1939) 52 HARV. L. REV. 905, 927-928.

¹⁷ *Winton v. State*, 229 Ala. 642, 159 So. 62 (1935); *Mayweather v. State*, 29 Ariz. 460, 242 Pac. 864 (1926); *Brown v. State*, 175 Ga. 329, 165 S. E. 252 (1932); *Bolen v. Commonwealth*, 265 Ky. 456, 97 S. W. 2d 1 (1936); *State v. Treficanto*, 106 N. J. L. 344, 146 Atl. 313 (1929).

the statutes so allow.¹⁸ It necessarily follows that the same defenses are available to the accused as he would have had if he had killed the person whom he intended as the victim.¹⁹

Thus far, we have considered only the way in which the law has *applied* the rule by *transferring* malice; but there is support for other views. Wharton, for instance, suggests that if the field were still fully open for development, the logical result might be quite different, with an indictment for (1) an attempt to kill B and (2) the negligent manslaughter of C.²⁰

It is the opinion of the writer, however, that the established doctrine is desirable, since, subjectively, the actor has a state of mind which intends a homicide; and, objectively, that state of mind has manifested itself in the external world in the death of a human being.

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¹⁸ *People v. Weeks*, 104 Cal. App. 708, 286 Pac. 514 (1930); *State v. Taylor*, 65 Ore. 505, 132 Pac. 713 (1913). Some cases, however, have held the crime to be second degree murder only, under a statute requiring express malice toward the person actually killed: *Musick v. State*, 21 Tex. App. 69, 18 S. W. 95 (1886); *McConnell v. State*, 13 Tex. App. 390 (1883).

¹⁹ *Noe v. Commonwealth*, 290 Ky. 194, 160 S. W. 2d 600 (1942).

²⁰ I WHARTON, CRIMINAL LAW (12th ed. 1932) 746.