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Attempts, Preparation a Matter of Degree

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STUDENT NOTES

ATTEMPTS, PREPARATION A MATTER OF DEGREE.*—In a recent case the prisoners were convicted under Ky. Statute 1159-a which provides punishment for “ any person who shall by means of explosives attempt to open any safe. ” The evidence disclosed that the prisoners, intending to open the safe, took tools and explosives and having entered the building, forced the night-watchman to lead them to the third floor and point out the room in which the safe was located, and had bound the watchman before they were arrested. The court cited with approval from Bishop’s Criminal Law, Vol. II, Sec. 728, “An attempt is an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing, sufficient both in magnitude and proximity to the act intended to be taken cognizance of by the law that does not concern itself with things trivial and small.” *Atford et al. v. Commonwealth*, 240 Ky. 513, 42 S. W (2nd) 711 (1931).

Unquestionably the possession of burglar’s tools and firearms, the forcible entry and the assault on the watchman were sufficient to supply the overt act necessary to the conviction for the offence. Dicta in *Reagan v. Commonwealth*, 217 Ky. 83, 288 S. W 1026 (1927), indicated that the trespass to property alone was a sufficient act. That was a case in which the prisoner, armed with burglar tools, climbed to the roof of a neighboring building and opened a window into a jewelry storeroom. He was caught by a nightwatchman before he entered. There have been convictions in much weaker cases. In *Griffin v. State*, 26 Ga. 493 (1858), the prisoner took an impression of the lock on a warehouse and had a key made to fit. This was held indictable although it was not shown that he intended to use the key himself. In another instance the defendant carried his tools to a house, laid them down and went back to get a tool he had forgotten. Held guilty. *People v. Lawton*, 56 Barb. (N. Y.) 126 (1867). Defendant was caught while examining a house to pick out a fit place to break when he was caught and found guilty *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989 (1903).

While the principal case is too clear to be interesting in its facts the discussion in the opinion and the quotation from Bishop raise the troublesome question of the distinction between mere preparation and an overt act of the kind that will support a conviction.

The courts treated the first attempt cases as if the intent were the thing punished. *Reg. v. Roberts*, 25 L. J. M. C. 17, 7 Cox, C. C. 39 (1855). But they demanded that the intent be evidenced by some act.

*The following material will be found helpful on this subject. 16 Har. L. Rev. 491, 501, 41 Har. L. Rev. 821, 843.

State v. Marshall, 14 Ala. 410 (1848), *People v. Murray*, 14 Cal. 159 (1859). So the requirements for an attempt are the same as for any other criminal offence. However a distinction is made so that any act is not sufficient. *Nider v. Commonwealth*, 140 Ky. 684, 131 S. W 1024, Ann. Cas. 1913E, 1246 (1910), *Ex Parte Floyd*, 7 Cal. App. 588, 95 Pac. 175 (1908).

The following cases in which there were both acts and intent were found to be merely preparation and not indictable attempts. *Groves v. State*, 116 Ga. 516, 42 S. E. 755 (1902), in which the defendants hired a hack, procured masks and ascertained that their intended victim was not armed. *People v. Youngs*, 122 Mich. 292, 81 N. W 114 (1899), defendant procured burglar's tools and met a confederate at a distance from the house they intended to rob. Putting the finger on the trigger of a pistol at half-cock, or otherwise not in condition to be discharged, is not an attempt to shoot. *Rex v. Harris*, 5 C. & P. 159 (1831). Defendant eloped with his niece and sent a friend to get a magistrate to perform a ceremony; not an attempt to commit an incestuous marriage. *People v. Murray*, supra. Sending an order to a firm in San Francisco to ship whiskey to a point in Alaska was no attempt to introduce whiskey into Alaska. *U. S. v. Stephens*, 8 Sawy 116, 12 Fed. 52 (1882).

The expressions by which courts endeavor to distinguish between the kind of acts which are sufficient and those which are not are many and varied but they are all extremely vague and general. Kenny, *Outlines of Criminal Law*, p. 81, May's *Criminal Law*, Sec. 83. "There must be an 'overt act.'" *State v. Thompson*, 212 Pac. (Okla.) 1026 (1923). "The overt act must be sufficiently proximate to the intended crime to form one of the natural series of acts which the intent requires for its full execution." *Commonwealth v. Egan*, 190 Pa. 10, 42 Atl. 374 (1899). "There must be an act done which more or less directly tends to the commission of the crime." *Leverett v. State*, 20 Ga. App. 748, 93 S. E. 232 (1917), *Groves v. State*, 116 Ga. 516, 42 S. E. 755, 59 L. R. A. 598 (1902). "There must be an act in part execution of the crime." *Nider v. Commonwealth*, supra; *Flowers v. Continental Casualty Co.*, 140 Iowa 510, 118 N. W 761 (1908), *State v. Donovan*, 90 Atl. (Del.) 220 (1914). "The actual transaction must have commenced." *Reg. v. Cheeseman*, 1 Leigh & C., C. C. 140, 9 Cox, C. C. 100 (1862). "A step must be taken which can be regarded as the beginning of the actual commission of the crime intended." *People v. Murray*, 14 Cal. 159 (1859).

None of the tests listed above mark definitely the distinction between preparation and an attempt. Other more practical tests have been offered: "The last human act necessary." *Lovett v. State*, 19 Tex. 174 (1857), *Reg. v. Eagleton*, 24 L. J. M. C. 158, 166, 6 Cox. C. C. 559 (1855), *U. S. v. Stephens*, 8 Sawy. 116 (1882), *Sipple v. State*, 46 N. J. L. 197 (1884). This test will settle clear cases satisfactorily. For instance in *People v. Lee Kong*, 95 Cal. 666, 30 Pac. 800 (1892),

the prisoner shot through a knot-hole in the roof with intent to hit a policeman who he thought was watching him. The policeman was in fact on another part of the building but the prisoner was properly convicted.

Nevertheless this test is found to be imperfect when applied to border-line cases and especially in "impossibility" cases, as witness the case suggested by Justice Holmes of the man who shot at a post thinking it was his enemy. Nor is the converse of the rule true. In *Weaver v. State*, 116 Ga. 550, 42 S. E. 745 (1902), the defendant threw kerosene on a house but left without making an effort to light it and he was convicted of an attempt to commit arson although he had not done the last human act necessary. See criticism of this test in *Uhl v. Commonwealth*, 6 Gratt. State 706 (1849).

Many courts have recognized the impossibility of laying down a hard and fast formula for determining the boundary line. Holmes, J. in *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770 (1897), decides "Every question of proximity must be determined by its own circumstances and analogy is too imperfect to give much help. Any unlawful application of poison is an evil which threatens death, according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from the poison even if not enough to kill, would warrant holding liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes."

The same authority states in his lectures on the Common Law at page 68 "Eminent judges have puzzled where to draw the line, or to state the principle on which it should be drawn, between these two sets of cases. But the principle is believed to be similar to that on which all other lines are drawn by the law. Public policy, that is to say, legislative considerations are at the bottom of the matter; the considerations being, in this case the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."

"It is a question of degree." *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N. E. 55 (1901), 15 Har. L. Rev. 491, 503; Clarke's Criminal Law, p. 127.

However helpful some of the other formulas may be in particular cases the authorities are substantially in agreement that each case must be decided on its own facts, after giving due consideration to such factors as the seriousness of the crime intended, the apprehension caused to society, the likelihood of consummation, proximity in time and place to the crime intended and infringement on personal and property rights. See Bishop's Criminal Law Vol. I, Sec. 729 (2), May's Criminal Law Sec. 183.

The facts in *Reg. v. McCann*, 28 U. C. Q. B. 514 (1869), were almost the same as in *People v. Sullivan*, supra, yet the prisoner in one was held guilty of an attempt and in the other was acquitted. In

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.

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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).