CRIMINAL ATTEMPTS AT COMMON LAW

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GENERAL PRINCIPLES

Much has been written on the law of attempts to commit crimes¹ and much more will be written for this is one of the most interesting and difficult problems of the criminal law.² In many discussions of criminal attempts decisions dealing with common law attempts, statutory attempts and aggravated assaults, such as assaults with intent to murder or to rob, are grouped indiscriminately. Since the definitions of statutory attempts frequently differ from the common law concepts,³ and since the meanings of assault differ widely,⁴ it is be-

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1. See Beale, *Criminal Attempts*, 16 HARV. L. REV. 491 (1903); Hoyles, *The Essentials of Crime*, 46 CAN. L.J. 393, 404 (1910); Cook, *Act, Intention and Motive in the Criminal Law*, 26 YALE L.J. 645 (1917); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821 (1928); Tulin, *The Role of Penalties in the Criminal Law*, 37 YALE L.J. 1048 (1928); 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); Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. OF PA. L. REV. 962 (1930); Derby, *Criminal Attempt—A Discussion of Some New York Cases*, 9 N.Y.U.L.Q. REV. 464 (1932); Turner, *Attempts to Commit Crimes*, 5 CUMB. L.J. 230 (1934); Skilton, *The Mental Element in a Criminal Attempt*, 3 U. OF PITT. L. REV. 181 (1937); Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. OF PITT. L. REV. 308 (1937); Hitchler, *Criminal Attempts*, 43 DICK. L. REV. 211 (1939); Strahorn, *Preparation for Crime as a Criminal Attempt*, 1 WASH. & LEE L. REV. 1 (1939); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, cc. 3 and 4 (1947); Edwards, *Criminal Attempts*, 15 MOD. L. REV. 345 (1952).

For a history of the English law of criminal attempts see, Sayre, *supra* at 821-837; Curran, *supra* at 191-202; HALL, *op. cit. supra* at 61-88.

2. "This doctrine of attempt to commit a substantive crime is one of the most important, and at the same time most intricate, titles of the criminal law." Peyton, C. J., in *Cunningham v. State*, 49 Miss. 685, 701 (1874).

"The subject of this chapter [Attempt] is alike intricate and important. The reports are full of cases upon it, yet it is but imperfectly understood by the courts." 1 BISHOP, *CRIMINAL LAW* § 725.1 (8th ed. 1892).

3. For example, a Georgia statute provides that "If any person shall attempt to commit a crime and in such attempt shall do any act toward the commission of such crime, but shall fail in the perpetration thereof, or shall be prevented or intercepted from executing the same, he shall . . . be punished. . . ." GA. CODE ANN. tit. 27, § 2507 (1953). The Georgia Supreme Court in applying this statute, which was enacted in 1833, stated that "The word 'attempt' ordinarily implies an act, an effort, but the General Assembly, in this statute, uses it as synonymous with 'intend'." McDonald, J., in *Griffin v. State*, 26 Ga. 493, 497 (1858). The Supreme Judicial Court of Massachusetts, referring to a similar statute, stated that it created "a peculiar statutory offense." Fletcher, J., in *Commonwealth v. McDonald*, 5 Cush. 365, 366 (Mass. 1850). Under a similar statute in New York a solicitation was held to constitute an attempt. *People v. Bush*, 4 Hill 133 (N.Y. 1843). The present statutory definition of attempt in that state is "An act, done with intent to commit a crime, and tending but failing to effect its commission. . . ." N.Y. PENAL LAW § 2. This provision was held to include a solicitation. *People v. Bloom*, 149 App. Div. 295, 133 N.Y. Supp. 708 (2d Dep't 1912).

4. Assault is sometimes defined as an attempted battery. *Lane v. State*, 85 Ala. 11, 4 So. 730 (1887); *Commonwealth v. Remley*, 257 Ky. 209, 77 S.W.2d 784

lieved that it will tend to a clarification of the problem to confine the present discussion to attempts at common law.

Most common law crimes involve actual damage⁵ to person or property. Thus murder, manslaughter, rape, mayhem and robbery require damage to the person, while arson requires damage to real property and larceny, damage to personal property. On the other hand some common law crimes may be committed although there is no damage but only the danger of damage. Solicitation to commit a felony is a crime although the person solicited refuses or simply fails to commit it.⁶ The crime of conspiracy is complete although no overt act is done to carry out the purpose of the conspiracy.⁷ The characteristic of both these crimes is the danger of damage. Libel is a crime because it tends to a breach of the peace and it is immaterial that the person libelled takes no action of any kind.⁸ In the case of certain common law misdemeanors the gist of the offense is the tendency to damage the public or some function of government, although no damage in fact occurs. Thus it has been held that it is an indictable offense to carry a child suffering from smallpox along a public highway although no person is thereby infected.⁹ An offer to bribe a public official is punishable although the bribe is refused.¹⁰ To speak insulting words of a magistrate is a misdemeanor although it does not appear that the administration of the criminal law was thereby affected.¹¹

(1934); *Merritt v. Commonwealth*, 164 Va. 653, 180 S.E. 395 (1935). It is also defined as putting another in apprehension of unpermitted contact. See *State v. Gorham*, 55 N.H. 152 (1875); *State v. Baker*, 20 R.I. 275, 38 Atl. 653 (1897); *State v. Williams*, 186 N.C. 627, 120 S.E. 224 (1923); 2 BRISOP, *op. cit. supra* note 2, at § 23. Assault is also held to mean a battery. *State v. Brewer*, 31 Del. 363, 114 Atl. 604 (1921); *People v. Benson*, 321 Ill. 605, 152 N.E. 514 (1926); *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927). See Note, *Attempt, Assault and Assault with Intent*, 14 MICH. L. REV. 399 (1916).

5. The word "damage," as used in this connection, means factual detriment (*damnum*), as distinguished from legal wrong (*injuria*). This distinction occurs in the phrases, *damnum absque injuria* and *injuria sine damno*.

The word "harm" is sometimes used to include both damage and the danger of damage. HALL, *op. cit. supra* note 1, at 110-116; Curran, *supra* note 1, at 333. See also Hall, *Science and Reform in Criminal Law*, 100 U. OF PA. L. REV. 787, 801 (1952).

6. *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269 (1801); *Walsh v. People*, 65 Ill. 58 (1872); *Commonwealth v. Randolph*, 146 Pa. 83, 23 Atl. 388 (1892).

7. *The Poulterers' Case*, 9 Co. Rep. 55b, 77 Eng. Rep. 813 (1611); *Rex v. Eccles*, 1 Leach 274, 168 Eng. Rep. 240 (1783); *State v. Buchanan*, 5 Harris & J. 317 (Md. 1821); *Commonwealth v. Mezick*, 147 Pa. Super. 410, 24 A.2d 762 (1942).

8. *Rex v. Summers*, 3 Salk. 194, 91 Eng. Rep. 772 (1701); *State v. Avery*, 7 Conn. 266 (1828); ODGERS, LIBEL AND SLANDER, 443 (3d ed. 1896).

9. *Rex v. Vantandillo*, 4 M. & S. 73, 105 Eng. Rep. 762 (1815); *Rex v. Burnett*, 4 M. & S. 272, 105 Eng. Rep. 835 (1815).

10. *State v. Ellis*, 33 N.J.L. 102 (1868).

11. *Rex v. Darby*, 3 Mod. 139, 87 Eng. Rep. 89 (1687); *Rex v. Revel*, 1 Str. 420, 93 Eng. Rep. 609 (1721).

Like the offenses enumerated above, attempt is a crime because it causes either (1) damage or (2) the danger of damage. If one man with the intent to kill another man shoots him but fails to kill him this is an attempt to murder. Also if with the same intent he shoots at, but just misses, the other man, who is unaware of the shooting, this is likewise an attempt to murder. In the first case there is damage, while in the second there is the danger of damage. Where the door of a building was broken, but there was no evidence of an entry, it was held that the defendant was guilty of an attempt to commit burglary.¹² Here there was damage. It has likewise been held to be an attempt to commit burglary where the defendants with the intent to break into a building went up the outer steps.¹³ Here there was no damage but sufficient danger of damage. The offer to bribe a public official is sufficient to constitute an attempt although the official refuses to accept the bribe,¹⁴ because there is the danger of damage.

The first requisite of a criminal attempt is the intent to commit a specific crime.¹⁵ Thus for an attempt to murder *A* there must be the intent to murder *A* and for an attempt to steal the coat of *A* it is necessary that there be the intent to steal the coat of *A*. While the completed crime of the murder of *A* may be committed without the intent to murder *A*,¹⁶ and even without the intent to murder any person,¹⁷ there can be no attempt to murder *A* unless there exists the intent to murder *A*.

Intent as used in this connection must be distinguished from motive, desire and expectation.¹⁸ If *C* by reason of his hatred of *A*

12. *State v. Carr*, 146 Mo. 1, 47 S.W. 790 (1898).

13. *Commonwealth v. Clark*, 10 Pa. Co. 444 (1891).

14. *Rex v. Vaughan*, 4 Burr. 2494, 98 Eng. Rep. 308 (1769). "And in many cases, especially in bribery at elections to parliament, the *attempt* is a crime: it is complete on *his* side who *offers* it." Lord Mansfield, 4 Burr. at 2500, 98 Eng. Rep. at 311. Also *Walsh v. People*, 65 Ill. 58 (1872).

15. *Regina v. Doody*, 6 Cox C.C. 463 (1854); *Cockburn, C.J.*, in *Regina v. Gray*, 1 Dears. & Bell. 303, 306, 169 Eng. Rep. 1017, 1018 (1857); *Regina v. Taylor*, 1 F. & F. 511, 175 Eng. Rep. 831 (1859); *Regina v. Duckworth* [1892] 2 Q.B. 83 (1892); *State v. Meadows*, 18 W. Va. 658 (1881); *Heard v. State*, 38 Ind. App. 511, 78 N.E. 358 (1906); *State v. Thompson*, 31 Nev. 209, 101 Pac. 557 (1909); *Thacker v. Commonwealth*, 134 Va. 767, 114 S.E. 504 (1922); *State v. Sullivan*, 146 Me. 381, 82 A.2d 629 (1951).

16. Shooting at one person and killing another. *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891).

17. Killing a person while engaged in the commission of a felony. *Regina v. Greenwood*, 7 Cox C.C. 404 (1857).

18. Writers on jurisprudence emphasize the distinction between intent and motive. 1 BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 137, 161 (1823); 1 AUSTIN, JURISPRUDENCE 355 (4th ed. 1879); AMOS, THE

plans to kill him, but mistaking *B* for *A* shoots *B*, his motive, desire and expectation are to kill *A* but his intent is to kill *B*.¹⁹ If a married man forcibly has intercourse with a woman whom he believes to be his wife's twin sister, but who in fact is his wife, he is not guilty of rape because his intent was to have intercourse with the woman he attacked, who was in fact his wife. If *A* takes an umbrella which he believes to belong to *B*, but which in fact is his own, he does not have the intent to steal, his intent being to take the umbrella he grasps in his hand, which is his own umbrella.²⁰ If a man, mistaking a dummy in female dress for a woman, tries to ravish it he does not have the intent to commit rape since the ravishment of an inanimate object cannot be rape.²¹ If a man mistakes a stump for his enemy and shoots at it, notwithstanding his desire and expectation to shoot his enemy, his intent is to shoot the object aimed at, which is the stump.²²

SCIENCE OF LAW 102-105 (8th ed. 1896); POLLOCK, A FIRST BOOK OF JURISPRUDENCE 138, 139 (1896); MARKBY, ELEMENTS OF LAW 116, 117 (4th ed. 1889); SALMOND, JURISPRUDENCE 523 (9th ed. 1937); KEETON, ELEMENTARY PRINCIPLES OF JURISPRUDENCE 211 (2d ed. 1949).

"Suppose *X* wishes to kill *A* with a rifle bullet. *B* is standing between *X* and *A*, so that the bullet from *X*'s rifle, if it is to reach *A*, must necessarily pass through *B*'s body. In spite of this, *X* aims and fires, and the bullet, pursuing the course *X* wishes, passes through *B*'s body before it strikes *A*. Here clearly all would agree that *X* intended the bullet to go through *B*'s body, for only by having it do so could the purpose for which he fired be accomplished." Cook, *supra* note 1, at 656.

"Intent, in its legal sense, is quite distinct from motive. It is defined as the purpose to use a particular means to effect a certain result. Motive is the reason which leads the mind to desire that result." Dodge, J., in *Baker v. State*, 120 Wis. 135, 145, 97 N.W. 566, 570 (1903).

For other cases involving the distinction between intent and motive see *Regina v. Sharpe*, 7 Cox C.C. 214 (1857); *Reynolds v. United States*, 98 U.S. 145 (1878); *United States v. Harmon*, 45 Fed. 414 (D. Kan. 1891).

19. *Regina v. Smith*, Dears. 559, 169 Eng. Rep. 845 (1855); *McGehee v. State*, 62 Miss. 772 (1885).

20. *Turner*, *supra* note 1, at 238.

21. 1 BISHOP, *op. cit.* *supra* note 2, § 742.

22. In discussing the "stump case" Professor Beale stated that "the thing which the actor aims to do is to bring his bullet into violent contact with the object seen." Beale, *supra* note 1, at 494.

Professor Sayre expressed the opinion that the defendant in the "stump case" should be guilty of an attempt to kill his enemy if he acted like a reasonable man in mistaking the stump for his enemy. Sayre, *supra* note 1, at 853.

In Conan Doyle's story, *The Adventure of the Empty House*, Sherlock Holmes learned that his enemy, Colonel Moran, planned to shoot him while he was in the front room of his house on Baker Street. Accordingly Holmes had a wax bust of himself made, which he placed in such a position between a reading lamp and the window that it cast a shadow on the shade. Colonel Moran from an empty house across the street from Holmes' chambers, using the shadow as a guide, shot and hit the bust which he believed to be Holmes. At the time of the shooting Holmes and an inspector of police were hiding in a room of the house from which Moran shot. When Moran was arrested by the inspector, immediately after the shooting, Holmes asked what charge he planned to make against Moran. The inspector replied "The attempted murder of Mr. Sherlock Holmes." While Moran's motive, desire and expectation were to shoot Holmes, his intent was to hit the object

It has been suggested that if *B* stabs the dead body of *A*, without being aware that *A* is dead, *B* may be guilty of an attempt to murder *A*.²³ This seems clearly incorrect. Although *B* wished to kill *A*, he intended to stab the body he saw, which was a corpse. Further than this, it is difficult to see how one can attempt to murder a man who no longer exists.

It is sometimes stated that an attempt requires a "specific intent."²⁴ This is not accurate terminology. What must be specific is the crime which is intended. The Supreme Court of Pennsylvania has correctly stated that an attempt requires "an intent to do a specific thing."²⁵

After it has been established that there exists an intent to commit a specific crime, such as intent to murder *A*, the question then arises as to what is further required in order to constitute an attempt. Since, as previously stated, an attempt is a crime because it results in damage or sufficient danger of damage, it necessarily results that one of these elements must follow the intent. It is a difficult matter to state exactly what constitutes sufficient danger of damage and courts frequently disagree in their answers to this problem. At the outset, however, it may be stated that some act must be done towards carrying out the intent. There must be a start towards the accomplishment of the result intended. Courts agree that if there is nothing more than preparation for the commission of the crime intended an attempt has not been committed.²⁶ Thus it has been held that purchasing a gun,²⁷

casting the shadow which was the wax bust, consequently he was not guilty of an attempt to murder Holmes.

"Let us suppose the old moot case of *A* shooting at a bust, believing the bust to be his old enemy, *B*. Whatever *A*'s intention may have been before he saw the bust and aimed at it, the fact is that at the particular moment of concentration in aiming at the bust he merely intended to kill the object which was before him, namely, a bust. Had he done all he intended to do at this particular moment, he could only have killed a bust, and this is no crime." Skilton, *The Mental Element in a Criminal Attempt*, 3 U. OF PITT. L. REV. 181, 187 (1937).

23. "There is nothing in principle to prevent a person from being found guilty of attempting to murder by stabbing a person already dead. . . ." Turner, *supra* note 1, at 246. Professor Sayre expressed the opinion that "although the defendant could not of course be convicted for murder, he should be held liable for an attempt to kill if his belief that the victim was still living was under all the circumstances a natural and reasonable one." Sayre, *supra* note 1, at 853 n.103.

24. CLARK AND MARSHALL, *CRIMINAL LAW* 180 (2d ed. 1912); Sayre, *supra* note 1, at 841; Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. OF PA. L. REV. 962, 969 (1930); Arnold, *supra* note 1, at 68.

25. Mitchell, J., in *Commonwealth v. Eagan*, 190 Pa. 10, 21, 42 Atl. 374, 377 (1899). An attempt requires "an intent to do a particular thing." 1 BISHOP, *op. cit. supra* note 2, § 728.

26. "It is clear that mere preparations for the intended crime, antecedent to the actual commencement of the crime itself, do not amount to an indictable attempt." KENNY, *OUTLINES OF CRIMINAL LAW* 80 (1902).

27. Blackburn, J., in *Regina v. Cheeseman*, 9 Cox C.C. 100, 103, 169 Eng. Rep. 1337 (1862); Deady, J., in *United States v. Stephens*, 8 Sawy. 116, 119, 12 Fed. 52, 55 (D. Ore. 1882).

purchasing poison,²⁸ purchasing and loading a gun²⁹ constitute preparation for murder. Likewise the following acts amount only to preparation: buying matches to commit arson,³⁰ giving a woman cantharides in order to commit rape,³¹ going to an illicit still to buy whiskey for a sale,³² buying poison and soliciting another to put it in intended victim's coffee for the offense of administering poison,³³ watching a person's house and procuring a rope to tie him in a robbery,³⁴ procuring "hack saws" to use in jail breaking,³⁵ arranging a pretended theft of jewelry in order to obtain money by false pretenses.³⁶

It is likewise well settled at common law that there can be no conviction for an attempt if the intended crime has been consummated.³⁷ This logically follows from the ordinary meaning of attempt, which is "to try" or "to endeavor."³⁸ However, statutes in some states have changed the rule of the common law.³⁹

The requirements that preparation is not sufficient for an attempt and that there is not an attempt if the intended crime was completed, may be expressed in terms applicable to a race by saying that the starting line must be crossed and the finish line must not be reached. The difficult problem is to determine how far past the starting line the actor must proceed in order to constitute an attempt. He cannot proceed far enough if the means employed are not reasonably adapted to carry out his intent, for in such case there can be no damage or danger of damage, one of which is necessary for an attempt. Thus there cannot be an attempt to discharge a pistol if there was no

28. *Ibid.*

29. Field, C. J., in *People v. Murray*, 14 Cal. 159 (1859). Buying a pistol and taking a ticket to the place where the intended victim is expected to be is only preparation for murder. KENNY, *op. cit. supra* note 26, at 80.

30. Pollock, C.B., in *Regina v. Taylor*, 1 F. & F. 511, 512, 175 Eng. Rep. 831 (1859).

31. *State v. Lung*, 21 Nev. 209, 28 Pac. 235 (1891).

32. *Andrews v. Commonwealth*, 135 Va. 451, 115 S.E. 558 (1923).

33. *Hicks v. Commonwealth*, 86 Va. 223, 9 S.E. 1024 (1889).

34. Mitchell, J., in *Commonwealth v. Eagan*, 190 Pa. 10, 22, 42 Atl. 374, 377 (1899).

35. *State v. Hurley*, 79 Vt. 28, 64 Atl. 78 (1906).

36. *Rex v. Robinson*, [1915] 2 K.B. 342 (1915). Inviting a young boy into an automobile is only preparation for the offense of gross indecency. *People v. Pippin*, 316 Mich. 191, 25 N.W.2d 164 (1946).

37. *Regina v. Nicholls*, 2 Cox C.C. 182 (1847); *Commonwealth v. Eagan*, 190 Pa. 10, 42 Atl. 374 (1899); *Graham v. People*, 181 Ill. 477, 55 N.E. 179 (1899).

38. WEBSTER, *NEW INTERNATIONAL DICTIONARY* (2d ed. 1949). It has been stated that if the intended offense was completed "... the attempt became merged in the greater offence. . . ." KENNY, *op. cit. supra* note 26, at 82.

39. "A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury and directs the defendant to be tried for the crime itself." N.Y. PENAL CODE § 260. For a similar provision see CAL. PENAL CODE § 663 (1949); WASH. REV. CODE § 9.01.070 (1951).

priming⁴⁰ nor can the firing of a pistol loaded only with powder and wadding be sufficient for an attempt to assassinate.⁴¹ An attempt to distill alcohol cannot be committed unless an appliance called a "worm" is used.⁴² If a person with the intent to kill another invokes witchcraft, charms, incantations,⁴³ maledictions, hexing⁴⁴ or voodoo⁴⁵ this cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result. Striking a man with a small switch cannot constitute an attempt to murder him. However, a small switch may be adequate to kill an infant and an attempt to murder the infant can be committed by such means.

In the much discussed case of *State v. Clarissa*⁴⁶ it was held that administering a harmless substance thought to be poisonous cannot constitute an attempt to murder. Some writers have had difficulty in distinguishing *State v. Clarissa* from the case of *State v. Glover*⁴⁷ decided by the Supreme Court of South Carolina.⁴⁸ In this case the defendant was indicted for the statutory offense of assault with intent to kill by the administering of a poison. The defendant forced an infant to drink a poisonous drug but the amount was not enough to cause serious bodily injury. The court in affirming the conviction stated, ". . . the gist of the offense is in the intent, though there must be also some act in the direction of such intent."⁴⁹ The opinion of the court was devoted entirely to the requirements of the statutory offense, and there was no reference to an attempt. The two cases may also be distinguished on another ground, *viz.*, that there was actual damage to the person of the infant in the *Glover* case. In this

40. *Regina v. Gamble*, 10 Cox C.C. 545 (1867).

41. *Regina v. Oxford*, 9 C. & P. 525, 175 Eng. Rep. 941 (1840).

42. *Trent v. Commonwealth*, 155 Va. 1128, 156 S.E. 567 (1931).

43. "If a statute simply made it a felony to attempt to kill any human being or to conspire to do so, an attempt by means of witchcraft, or a conspiracy to kill by means of charms and incantations, would not be an offense within such a statute. The poverty of language compels one to say 'an attempt to kill by means of witchcraft,' but such an attempt is really no attempt at all to kill." Pollock, C.B., in *Attorney Gen. v. Sillem*, 2 H. & C. 431, 525, 159 Eng. Rep. 178, 221 (1863).

44. Maxey, J., dissenting in *Commonwealth v. Johnson*, 312 Pa. 140, 152, 167 Atl. 344, 348 (1933). "Hexing" is a local term in sections of the United States for the practice of witchcraft. See WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1949).

45. "Even though a 'voodoo doctor' just arrived here from Haiti actually believed that his malediction would surely bring death to the person on whom he was invoking it, I can not conceive of an American court upholding a conviction of such a maledicting 'doctor' for attempted murder or even attempted assault and battery." Maxey, J., dissenting in *Commonwealth v. Johnson*, 312 Pa. 140, 153, 167 Atl. 344, 348 (1933).

46. 11 Ala. 57 (1847).

47. Arnold, *supra* note 1, at 71 n.35; Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. OF PA. L. REV. 962, 976-8 (1930).

48. 27 S.C. 602, 4 S.E. 564 (1888).

49. *Id.* at 605, 4 S.E. at 565.

connection the court stated that ". . . some physical force must have been exerted to compel so small a child to drink such a nauseous drug."⁵⁰

It is sometimes stated that it is sufficient for an attempt if the means are *apparently* adapted to accomplishing the result intended. Thus Bishop says, "The adaptation need only be apparent; because the evil to be corrected relates to apparent danger rather than to actual injury sustained."⁵¹ While it is true that actual damage is not necessary, the *danger* must be actual and not merely apparent. To "snap a toy gun" at a man cannot constitute an attempt to kill⁵² and there would be no more danger of damage if the toy gun resembled a real gun and the person snapping it believed it to be such. A pistol, which cannot be discharged because of defective mechanism, is not adapted to shooting a man and, even though the defect was unknown to the person trying to fire the pistol, there could not be an attempt to murder.

According to the decisions of courts, not every act done beyond preparation will be sufficient for an attempt.⁵³ Thus taking a blunderbuss by defendant from a folded coat on his arm with intent to kill the prosecutor, but being seized before he could aim and fire, is not an attempt to discharge a loaded firearm at prosecutor.⁵⁴ Soliciting

50. *Id.* at 608, 4 S.E. at 567.

51. 1 BISHOP, *op. cit. supra* note 2, § 754. No authorities were cited for this statement.

Bishop also stated that: ". . . in reason and by the better authorities a mere apparent adaptation suffices, though there are cases which seem to require it to be complete." 1 BISHOP, *op. cit. supra* note 2, § 749. To this statement there is the following footnote: "See and compare *Kunkle v. State*, 32 Ind. 220; *Mullen v. State*, 45 Ala. 43; *State v. Napper*, 6 Nev. 113; *Regina v. Gamble*, 11 Cox C.C. 545; *State v. Epperson*, 27 Mo. 255; *Regina v. Dale*, 6 Cox C.C. 14; *Sumpter v. State*, 11 Fla. 247; *People v. Blake*, 1 Wheeler Crim. Cas. 490; *Regina v. Goodman*, 22 U.C.C.P. 338." In the *Kunkle*, *Mullen*, *Napper* and *Epperson* cases the charge was the statutory offense of assault with intent to murder. In *Sumpter v. State* the offense charged was "administering poison." In *People v. Blake* the indictment charged ". . . procuring a . . . vegetable powder, called cow-itch, and putting the same . . . in a tub of water used by prosecutor. . . ." The defendant in *Regina v. Dale* was indicted for attempt to administer poison but the problem under discussion was not raised. In *Regina v. Gamble* the judge stated that "a person can not attempt to discharge a pistol if it had no priming in it." In *Regina v. Goodman* the charge was attempt to commit arson. The Court in affirming the conviction quoted with approval the statement of Pollock, C.B., in *Regina v. Taylor* (1 F. & F. 512, 175 Eng. Rep. 831) that "The act must be one . . . committed under such circumstances that he has the power of carrying his intention into execution." The statements in the *Gamble* and *Goodman* cases support the view that the adaptation of the means employed must be actual and not merely apparent.

52. CLARK, CRIMINAL LAW 145 (3d ed., Mikell, 1915).

53. Some statutes provide that there may be an attempt if any act has been done towards the consummation of the intended crime. See, *e.g.*, GA. CODE ANN. tit. 27, § 2507 (1953); WASH. REV. CODE § 9.01.070 (1951).

54. *Regina v. Lewis*, 9 C. & P. 523, 173 Eng. Rep. 940 (1840). Putting finger on trigger of loaded pistol and then being prevented from firing is not sufficient act for an attempt. *Regina v. St. George*, 9 C. & P. 483, 173 Eng. Rep. 921 (1840), overruled by *Regina v. Duckworth*, [1892] 2 Q.B. 83 (1892).

B to poison *A* with directions how to proceed and putting a package of poison in *B*'s pocket without his knowledge are not sufficient for an attempt to administer poison to *A*.⁵⁵ Soliciting and paying *B* to murder *A* and giving information how to identify *A* do not go far enough for an attempt to murder *A*.⁵⁶ Arming oneself for the purpose of killing another and then seeking and finding him, with no further act, do not constitute an attempt.⁵⁷ Urging a married woman to have intercourse with defendant is not an attempt to commit adultery.⁵⁸ Inducing a little girl to go into a woods and snatching a button from her snow suit are not sufficient for an attempt to commit rape.⁵⁹ In contrast with these examples it was decided in the following cases that the act went sufficiently far towards carrying out the requisite intent to constitute an attempt: preparing combustibles and lighting a match which failed to ignite combustibles—attempted arson;⁶⁰ partially disrobing—attempted adultery;⁶¹ breaking window of building—attempted burglary;⁶² dislodging a diamond shirt stud which fell to the floor—attempted larceny;⁶³ putting poison in the victim's wine glass—attempted murder;⁶⁴ striking a woman with fists and removing her clothing—attempted rape;⁶⁵ striking a person—attempt to rob.⁶⁶

55. *Stabler v. Commonwealth*, 95 Pa. 318 (1880).

56. *State v. Davis*, 319 Mo. 1222, 6 S.W.2d 609 (1928). The majority of the court described the defendant's acts as preparation. A dissenting judge was of the opinion that there was an attempt.

57. *Henry, C.J.*, in *State v. Rider*, 90 Mo. 54, 60, 1 S.W. 825, 826 (1886).

"The law does not punish every act which is done with the intent to bring about a crime. If a man starts from Boston to Cambridge for the purpose of committing a murder when he gets there, but is stopped by the draw and goes home, he is no more punishable than if he had sat in his chair and resolved to shoot somebody, but on second thoughts had given up the notion." *HOLMES, COMMON LAW* 68 (1881).

58. *State v. Butler*, 8 Wash. 194, 35 Pac. 1093 (1894).

59. *Mullins v. Commonwealth*, 174 Va. 477, 5 S.E.2d 491 (1939).

60. *Regina v. Taylor*, 1 F. & F. 511, 175 Eng. Rep. 831 (1859).

61. *State v. Schwarzbach*, 84 N.J.L. 268, 86 Atl. 423 (1913).

62. *Regina v. Spanner*, 12 Cox C.C. 155 (1872). *Accord*, *Commonwealth v. Shedd*, 140 Mass. 451, 5 N.E. 254 (1886); *Commonwealth v. Flaherty*, 25 Pa. Super. 490 (1904).

63. *State v. Johnson*, 78 Kan. 866, 98 Pac. 216 (1908). Shooting a hog with intent to steal it but being frightened away before removing carcass constitutes attempt to commit larceny. *Tinker v. State*, 125 Ga. 743, 54 S.E. 662 (1906). Arranging for the purchase of a barrel of molasses, knowing it to be stolen, and having it rolled out to a truck constitutes an attempt to receive stolen goods feloniously. *State v. Parker*, 224 N.C. 524, 31 S.E.2d 531 (1944).

64. *Rex v. White*, [1910] 2 K.B. 124 (1910). Putting poison in food which was not swallowed because of its bitter taste was held sufficient for attempted murder. *Johnson v. State*, 1 Ala. App. 102, 55 So. 321 (1911).

65. *State v. Swan*, 131 N.J.L. 67, 34 A.2d 734 (1943). Throwing a woman down and choking her was held sufficient for an attempt to rape. *Ingram v. Commonwealth*, 192 Va. 794, 66 S.E.2d 846 (1951).

66. *Commonwealth v. Eagan*, 190 Pa. 10, 42 Atl. 374 (1899). Threatening the owner of liquor with a gun in order to make him disclose the location of the liquor was held sufficient to constitute attempt to rob. *Commonwealth v. Crow*, 303 Pa. 91, 154 Atl. 283 (1931). Likewise striking a person with a blackjack and "frisking" his clothing. *State v. Jones*, 227 N.C. 402, 42 S.E.2d 465 (1947).

It is important to note, in determining how far the act or acts have advanced towards the completion of the crime, that three distinct stages must be considered. They are (1) preparation, (2) an act towards carrying out the intent which has not progressed sufficiently far to be an attempt and (3) an act or acts which are sufficient for an attempt.⁶⁷ These three situations may be illustrated as follows:

<i>Preparation</i>	<i>Insufficient act</i>	<i>Sufficient act</i>
Procuring gun	Starting with gun toward intended victim	Shooting at victim and just missing him
Procuring matches	Going towards house and meeting confederate	Lighting combustibles which are extinguished
Making impression of lock	Going to look at building	Breaking window of building

If the act or acts committed in furtherance of the required intent have proceeded far enough to constitute an attempt, the fact that the actor then voluntarily abandons his undertaking does not relieve him from responsibility for the attempt.⁶⁸ The damage or danger of damage in such a case is just as great as where an extraneous force prevents him from proceeding further. A man who is choking a woman with murderous intent is just as guilty of an attempt to murder where he voluntarily discontinues his attack as where he is forcibly

67. Some writers contrast only preparation and attempt. See Sayre, *supra* note 1, at 845 and HALL, *op. cit. supra* note 1, at 103.

68. State v. Hayes, 78 Mo. 307 (1883); Commonwealth v. Eagan, 190 Pa. 10, 42 Atl. 374 (1899); Glover v. Commonwealth, 86 Va. 382, 10 S.E. 420 (1889); State v. McGilvery, 20 Wash. 240, 55 Pac. 115 (1898). In the *Glover* case Lewis, J., stated the following: "It is a rule, founded in reason and supported by authority, that if a man resolves on a criminal enterprise, and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such, although he voluntarily abandoned the evil purpose." 86 Va. at 386, 10 S.E. at 421.

A case frequently cited in support of the above proposition is Lewis v. State, 35 Ala. 380 (1860). In this case the defendant, a slave, was convicted of an attempt to rape on evidence that with the intent to ravish he pursued the prosecutrix for over a mile, but failed to overtake her. On the question of abandonment Stone, J., stated the following: "If the proof shows that Lewis voluntarily desisted from the pursuit, when the accomplishment of his imputed purpose was probably, or even possibly attainable, this is a circumstance which should weigh much against the truth of the charge contained in the indictment. On the contrary, if he abandoned the pursuit, because he was unable to overtake Miss Ozley, or because he feared to proceed further, lest he should encounter other opposition, then the fact that he desisted should weigh nothing in his favor." *Id.* at 389.

Wharton expressed the opinion that "If an attempt be voluntarily and freely abandoned before the act is put in process of final execution, there being no outside cause prompting such abandonment, then this is a defense." 1 WHARTON, CRIMINAL LAW 306 (12th ed. 1932). He gives as a reason for this view that in such a case there is no damage. *Id.* at 307. There may, however, be sufficient *danger* of damage to constitute an attempt.

prevented from further action by another person. If a match is lighted to set fire to a house the result is the same whether the match is blown out by the wind or by the person who lighted it.

Some judges and writers have announced arbitrary tests for determining when the act or acts, committed in furtherance of the required intent, have proceeded sufficiently far towards its accomplishment to constitute an attempt. The extent to which these tests differ can be readily noted from the following enumeration:

"The *actus reus* of an attempt to commit a specific crime is constituted when the accused does an act which is a step towards the commission of that specific crime, and the doing of such act can have no other purpose than the commission of that specific crime;"⁶⁹ "The act must be one immediately and directly tending to the execution of the principal crime;"⁷⁰ "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;"⁷¹ "act of which the natural and probable effect under the circumstances is the accomplishment of a substantive crime;"⁷² "act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation;"⁷³ "an act . . . forming part of a series of acts, which would constitute its actual commission if it were not interrupted;"⁷⁴ "act [or acts] must be such as will *apparently*⁷⁵ result, in the usual and natural course of events, if not hindered by *extraneous*⁷⁶ causes, in the commission of the crime itself."⁷⁷

69. Turner, *supra* note 1, at 236. "It is sufficient that one step be taken towards the commission of the contemplated crime." HOCHHEIMER, CRIMINAL LAW AND PROCEDURE 297 (2d ed. 1904).

70. Pollock, C.B., in *Regina v. Taylor*, 1 F. & F. 511, 512, 175 Eng. Rep. 831 (1859). See similar statement by Brown, C.J., in *State v. Lampe*, 131 Minn. 65, 69, 154 N.W. 737, 738 (1915).

71. Mitchell, J., in *Commonwealth v. Eagan*, 190 Pa. 10, 21, 42 Atl. 374, 377 (1899).

72. HOLMES, *op. cit. supra* note 57, at 65. A similar statement was made by Ashe, J., in *State v. Colvin*, 90 N.C. 717, 718 (1884).

73. Lewis, P., in *Commonwealth v. Hicks*, 86 Va. 223, 226, 9 S.E. 1024, 1025 (1889). *Accord*, Sherwood, J., in *State v. Fraker*, 148 Mo. 143, 162, 49 S.W. 1017, 1021 (1899).

74. STEPHEN, DIGEST OF THE CRIMINAL LAW 37 (1883). *Accord*, 1 WHARTON, *op. cit. supra* note 68, at 294. Baldrige, J., in *Commonwealth v. Neubauer*, 142 Pa. Super. 528, 533, 16 A.2d 450, 452 (1940).

75. Emphasis added.

76. Emphasis added.

77. The Chancellor in *Sipple v. State*, 46 N.J.L. 197, 198 (1884). "To make an intentional act an indictable attempt it must go so far that it would result, or apparently result in an the actual commission of the crime it was designed to effect, if not extrinsically hindered or frustrated by extraneous circumstances." Fine, J., in *Commonwealth v. Kelley*, 162 Pa. Super. 526, 529, 58 A.2d 375, 376 (1948). The act "need not be the next preceding or proximate act necessary to consummation of the crime intended." Boyce, J., in *State v. Donovan*, 28 Del. 40, 46, 90 Atl. 220, 223 (1914). *Accord*, Chichester, J., in *Lee v. Commonwealth*, 144 Va. 594, 599, 131 S.E. 212, 214 (1926).

Most writers recognize that the extent to which an act or acts must proceed towards the accomplishment of the intended crime cannot be determined by any arbitrary rule. For example, Stephen stated the following:

"The law as to what amounts to an attempt is of necessity vague. It has been said in various forms that the act must be closely connected with the actual commission of the offence, but no distinct line upon the subject has been or as I should suppose can be drawn."⁷⁸

According to Professor Kenny there must be "some physical act which helps, and helps in a sufficiently 'proximate' degree, towards carrying out the crime contemplated."⁷⁹ Professor Beale has said that "The attempt must come sufficiently near completion to be of public concern."⁸⁰ Consistent with what was said at the beginning of this article regarding the nature of a criminal attempt, the act or acts must proceed so far towards the accomplishment of the intended crime as to constitute, in the opinion of the court in the particular case, sufficient damage or danger of damage.

Although no exact rule can be laid down for determining how near accomplishment it is necessary to proceed in order to constitute an attempt several writers and judges have suggested, as a practical working guide, that the more serious the crime intended the less far need the actor proceed in order that an attempt may result. Thus Bishop has stated, "Though in attempt some act must accompany the special intent, still, as the thing noticed by the law is the sum of both, the act may be less and proceed less far in proportion as the intent is in enormity greater."⁸¹ It seems reasonable that the law should be more concerned when a person goes half way towards committing a murder than when he proceeds equally far in his effort to commit a battery.

78. 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 224 (1883).

79. KENNEY, *op. cit. supra* note 26, at 82.

80. Beale, *supra* note 1, at 501. The act must be "sufficient both in magnitude and in proximity to the fact intended, to be taken cognizance of by the law that does not concern itself with things trivial and small." 1 BISHOP, *op. cit. supra* note 2, § 728.

81. 1 BISHOP, *op. cit. supra* note 2, § 760. The following statement by Holmes, J., has been frequently cited: "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 poison even if not enough to kill, would warrant holding the 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." *Commonwealth v. Kennedy*, 170 Mass. 18, 22, 48 N.E. 770, 771 (1897). Although the prosecution in this case was for a statutory attempt, the statement by Holmes is equally applicable to a common law attempt.

To the same effect, *Lewis v. State*, 35 Ala. 380, 388 (1860); Beale, *supra* note 1, at 502; Sayre, *supra* note 1, at 845; Skilton, *The Requisite Act in a Criminal*

IMPOSSIBILITY OF ACCOMPLISHMENT

"*Legal Impossibility.*" The most elusive problem in the law of criminal attempts is to determine whether there can be an attempt if, under the circumstances of the particular case, it is impossible to commit the intended crime. At the outset it seems advisable to discuss what is sometimes termed "legal impossibility."⁸² In this connection the cases of *People v. Jaffe*⁸³ and *Marley v. State*⁸⁴ must be considered. In *People v. Jaffe* the defendant was convicted of an attempt to receive stolen goods. He purchased certain goods which he mistakenly believed were stolen. The Court of Appeals of New York reversed the conviction on the ground that the defendant did not have the necessary intent to receive stolen goods as he intended to take these particular goods which were not stolen.⁸⁵ In *Marley*

Attempt, 3 U. OF PITT. L. REV. 308, 313 (1937). Referring to the proposition that "the greater the intended offense, the less 'immediate' need conduct be to constitute the relevant criminal attempt," Professor Hall states the following: "That it will not bear critical scrutiny is apparent on reference to many of the cases where serious criminal attempts were charged and the prosecution failed because the situations amounted merely to states of preparation." HALL, *op. cit. supra* note 1, at 105.

82. See 1 BISHOP, *op. cit. supra* note 2, § 753; Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. OF PA. L. REV. 962, 986 (1930); MAY, *LAW OF CRIMES* 194 (4th ed., Sears and Weihofen, 1938).

83. 185 N.Y. 497, 78 N.E. 169 (1906). Although New York has a statute defining attempt, the reasoning of the Court of Appeals was based on common law principles.

84. 58 N.J.L. 207, 33 Atl. 208 (1895), approved in *State v. Weleck*, 10 N.J. 355, 91 A.2d 751 (1952).

85. The court based its conclusion on the following statement by Bishop: "If what a man contemplates doing would not be in law a crime, he could not be said in point of law to intend to commit the crime. If he thinks his act will be a crime this is a mere mistake of his understanding where the law holds it not to be such, his real intent being to do a particular thing. If the thing is not a crime he does not intend to commit one whatever he may erroneously suppose." (1 Bishop's *Crim. Law* [7th ed.] sec. 742.) *People v. Jaffe*, 185 N.Y. 497, 502, 78 N.E. 169, 170 (1906).

Chase, J., dissented saying, "That the defendant intended to commit a crime is undisputed." *Id.* at 503, 78 N.E. at 171.

The majority opinion distinguished the decision in the earlier case of *People v. Gardner*, 144 N.Y. 119, 38 N.E. 1003 (1894). In that case a conviction of an attempt to commit the crime of extortion was upheld, although the woman from whom the defendant sought to obtain money by a threat to accuse her of a crime was not induced by fear, since she was acting as a decoy of the police. The problem in the *Gardner* case was not one of intent, as in the *Jaffe* case, but whether the act was sufficient to constitute an attempt, the court saying that there was the "intent to commit the crime of extortion." *People v. Gardner*, *supra* at 124, 38 N.E. at 1003 (1894). Professor Sayre expressed the opinion that the decision in the *Jaffe* case was "apparently irreconcilable" with the decision in the *Gardner* case, Sayre, *supra* note 1, at 854.

Wharton puts the following case: "Lady Eldon, when traveling with her husband on the Continent, bought what she supposed to be a quantity of French lace, which she hid, concealing it from Lord Eldon in one of the pockets of the coach. The package was brought to light by a custom officer at Dover. The lace turned out to be an English manufactured article, of little value, and of course, not subject to duty. Lady Eldon had bought it at a price vastly above its value, believing it to be genuine. . . ." Wharton expressed the opinion that Lady Eldon had the intent to smuggle this lace into England and was guilty of an attempt to smuggle. 1

v. State the defendants, who were members of the board of freeholders of Passaic County, New Jersey, were convicted of an attempt to incur obligations in behalf of the county in excess of amount provided by law. On appeal the Supreme Court of New Jersey decided that all the acts done by the defendants were nugatory and reversed the conviction stating that (a) "the defendants have been convicted of an attempt to commit a misdemeanor which was a legal impossibility" and (b) "these defendants, even if the intent to commit the offense can be imputed to them, did, in legal contemplation, no act towards the accomplishment of such purpose, for every act they did was, in the eye of the law, an absolute nullity."⁸⁶ The decisions in *People v. Jaffe* and *Marley v. State* are easily explainable, without reference to any conception of "legal impossibility." In the *Jaffe* case the necessary intent, and in the *Marley* case a necessary act, was lacking. In a Missouri case the defendant, who was convicted of attempting to corrupt a juror, had tried to influence a man who was not a juror, although defendant thought he was. The Missouri Supreme Court, basing its decision on *People v. Jaffe*, reversed the conviction.⁸⁷

Another question of so-called "legal impossibility" is whether a boy under the age of fourteen can commit an attempt to rape. According to a fixed rule of the common law the completed crime of rape can not be committed by a boy under fourteen.⁸⁸ Two reasons have been stated for this rule, *viz.*, (1) absence of the necessary mental element and (2) lack of physical capacity.⁸⁹ No English cases were

WHARTON, CRIMINAL LAW 304 n.9 (12th ed. 1932). The fallacy of this argument is found in the fact that the particular lace which Lady Eldon intended to bring into England was not subject to duty and therefore, although there was the wish to smuggle, there was not the intent to do so. Professor Sayre expressed the opinion that Lady Eldon "intended to smuggle genuine French lace." Sayre, *supra* note 1, at 852. Professor Arnold put the question—"Shall we say that this is an attempt to smuggle French lace or that what she has attempted to do was to smuggle that particular lace, which was not a crime?" Arnold, *supra* note 1, at 69. The question was not answered.

A husband by having forcible intercourse with his wife is not guilty of rape. 1 HALE, P.C. *629; *Commonwealth v. Fogerty*, 8 Gray 489 (Mass. 1857). Nor does he commit an attempt to ravish if he uses force but does not accomplish his purpose. His intent is to have intercourse with the particular woman, who is his wife, and hence he does not have the intent to commit rape. "One without legal capacity to commit a crime cannot, in law, intend its commission." 1 BISHOP, *op. cit. supra* note 2, § 746. Likewise a husband cannot personally commit an assault with intent to ravish his wife. *Frazier v. State*, 48 Tex. Cr. 142, 86 S.W. 754 (1905).

86. 58 N.J.L. at 211, 33 Atl. at 210.

87. *State v. Taylor*, 345 Mo. 325, 133 S.W.2d 336 (1939). *Accord*, *State v. Porter*, 125 Mont. 503, 242 P.2d 984 (1952).

88. "A male infant under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it." 4 BL. COMM. *212.

89. As regards a boy under fourteen "the law presumes him impotent, as well as lacking discretion." 1 HALE, P.C. *630. ". . . as to this particular species of felony [rape by boy under fourteen] the law supposes an imbecility of body as well as mind." 4 BL. COMM. *212.

found in which an attempt to commit rape was charged against a boy under fourteen. There are, however, cases where the indictment was for assault with intent to rape. In *Rex v. Eldershaw*, a case frequently cited, the trial judge told the jury that "From his age, the law concludes that it is impossible for him to complete the offence, and that, in my judgment, must be held to negative the intent [to commit rape]." ⁹⁰ A New York court in 1855 followed this ruling.⁹¹ Bishop expressed a similar opinion, stating that ". . . no one can legally intend what is legally impossible; for example, a boy too young for rape can not in legal contemplation intend to commit it, or be guilty of an attempt." ⁹² If the boy under fourteen is unable to form the intent to ravish, it conclusively follows that he cannot be guilty of an attempt to commit rape and "legal impossibility" in this connection means simply lack of the requisite intent.

There are two cases in this country where the question whether an attempt to commit rape can be committed by a boy under fourteen was squarely raised. In a Kentucky case in 1898 the Court of Appeals of Kentucky sustained a conviction since the evidence showed that, although the defendant was under fourteen he was physically capable of committing rape and that he was "mentally capable of understanding that it was wrong to do so." ⁹³ In a Virginia case, decided the same year, the Supreme Court of that state reversed a conviction for the reason that "The accused being under fourteen years of age, and conclusively presumed to be incapable of committing the crime of rape, it logically follows, as a plain, legal deduction, that he was also incapable in law of an attempt to commit . . . an offense which he was physically impotent to perpetrate." ⁹⁴ The problem of physical impossibility will be discussed later.

90. Vaughan, B., in *Rex v. Eldershaw*, 3 C. & P. 396, 172 Eng. Rep. 472 (1828). *Accord*, Patteson, J., in *Regina v. Philips*, 8 C. & P. 736, 173 Eng. Rep. 695 (1839).

91. *People v. Randolph*, 2 Parker Cr. 213 (N.Y. 1855). In *Commonwealth v. Green*, 2 Pick. 380 (Mass. 1824) the Supreme Judicial Court of Massachusetts upheld the conviction of a boy under fourteen years for an assault with intent to commit a rape. The court (Parker, C. J., dissenting) stated the following: "The law which regards infants under fourteen as incapable of committing rape, was established *in favorem vitae*, and ought not to be applied by analogy to an inferior offence, the commission of which is not punished with death. . . . An intention to do an act does not necessarily imply an ability to do it. . . ." *Id.* at 381.

92. 1 BISHOP, *op. cit. supra* note 2, § 753.

93. *Davidson v. Commonwealth*, 20 Ky. L.R. 540, 47 S.W. 213 (1898). In addition to this case the following cases hold that the presumption a boy under fourteen cannot commit rape may be rebutted: *Williams v. State*, 14 Ohio 222 (1846); *Gordon v. State*, 93 Ga. 531, 21 S.E. 54 (1893); *Heilman v. Commonwealth*, 84 Ky. 457, 1 S.W. 731 (1886); *State v. Fisk*, 15 N.D. 589, 108 N.W. 485 (1906).

94. *Riely, J.*, in *Foster v. Commonwealth*, 96 Va. 306, 311, 31 S.E. 503, 505 (1898).

Factual Impossibility. When there is the intent to commit a specific crime and a start made to carry out this intent, the accomplishment of the crime may be rendered impossible by reason of (1) the physical inability of the actor, (2) some inactive prevention or (3) the active prevention of the intended victim or some other person, or the intervention of some natural force. Examples of the actor's physical inability to complete the crime are the following: *A* with the intent to steal a safe tries to lift it but is not strong enough to do so; *A* with the intent to murder fails in his effort to pull the trigger of a pointed gun due to the heavy spring of the trigger or is stricken with paralysis as he starts to pull the trigger; *A* with the intent to commit a felony in a dwelling house fails to break open a door or to climb a wall to reach a window by reason of physical weakness. In all these cases the actor having the intent to commit a specific crime has proceeded far enough to cause danger of damage.

Two situations involving physical incapacity have proved more difficult of solution. The first of these is where a man attacks a woman with intent to rape but is unable to complete the crime because he is impotent. Although there are dicta to the contrary⁹⁵ it has been squarely decided by the Supreme Court of Virginia that impotence of itself is no defense to a charge of attempted rape.⁹⁶ The court based its decision on the following statement by Professor Strahorn:⁹⁷

"When a defendant, with rape in mind and with the expectation of accomplishing penetration seizes his female victim in the customary manner in order to achieve his purpose and finds penetration impossible because of impotency, the authorities agree that he is guilty of a real⁹⁸ [*sic*] criminal attempt at rape, and that his impotency has no bearing on the case except as possibly negating the specific intention to accomplish penetration." "⁹⁹ Inability to complete the crime of rape due to impotence is properly held to be no defense to an indictment for the attempt since the defendant has proceeded far enough to cause actual damage to the person of the woman.

A similar question is whether the physical incapacity of a boy under fourteen years constitutes a defense to a charge of attempted rape.

95. *Nugent v. State*, 18 Ala. 521, 527 (1850); *Jeffers v. State*, 20 Ohio Cir. Ct. 294, 296 (1900); *State v. Fisk*, 15 N.D. 589, 593, 108 N.W. 485, 487 (1906).

96. *Predry v. Commonwealth*, 184 Va. 765, 36 S.E.2d 549 (1946).

97. Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. OF PA. L. REV. 962, 971-2 (1930).

98. The word "real" should be "relative."

99. *Predry v. Commonwealth*, 184 Va. 765, 774, 36 S.E.2d 549, 552 (1946).

It has been decided that impotence is no defense to a charge of assault with intent to rape. *Territory v. Keyes*, 5 Dak. 244, 38 N.W. 440 (1888); *Hunt v. State*, 114 Ark. 239, 169 S.W. 773 (1914).

Impotence may negative the intent to ravish. *State v. Ballamah*, 28 N.M. 212, 210 Pac. 391 (1922).

The little judicial opinion on the question is to the effect that in such a case physical impossibility is a defense. In an English case in 1892 Lord Coleridge, C. J., stated, by way of dictum, that ". . . it certainly seems to me that a person cannot be guilty of an attempt to commit an offence which he is physically incapable of committing. . . ." ¹⁰⁰ The Supreme Court of Virginia in 1898 stated the following:

"The accused being under fourteen years of age, and conclusively presumed to be incapable of committing the crime of rape, it logically follows, as a plain, legal deduction, that he was also incapable in law of an attempt to commit it. He could not be held to be guilty of an attempt to commit an offense which he was physically impotent to perpetrate." ¹⁰¹ The view expressed in these cases that there cannot be an attempt by a person who is physically unable to commit the completed crime is contrary to the decision that an impotent man may commit an attempt to rape and seems unsound in principle, since all the requisite elements of an attempt are present. By way of analogy there would be an attempt to rape where a man with the necessary intent attacks a woman but is temperamentally incapable of completing the offense.¹⁰²

100. *Regina v. Waite*, [1892] 2 Q.B. 600, 601 (1892).

101. *Foster v. Commonwealth*, 96 Va. 306, 311, 31 S.E. 503, 505 (1898). Commenting on this statement of the Virginia Supreme Court Professor Beale stated the following: "Why not, one might ask, is the weaker and less skilled of two contending football teams incapable of trying to win the game?" Beale, *supra* note 1, at 499.

The question arose in a series of cases whether a boy under fourteen years of age could be guilty of assault with intent to rape. In Massachusetts in 1823 the defendant in such a case was convicted and a motion in arrest of judgment was overruled, the court saying, "An intention to do an act does not necessarily imply an ability to do it. . . ." *Commonwealth v. Green*, 2 Pick. 380, 382 (Mass. 1824). In 1828 the trial judge in an English case instructed the jury not to convict saying "From his age, the law concludes that it is impossible for him to complete the offence, and that, in my judgment, must be held to negative the intent [to rape]. . . ." Vaughan, B., in *Rex v. Eldershaw*, 3 C. & P. 396, 172 Eng. Rep. 472 (1828). Eleven years later another English judge directed an acquittal in a similar case but stated no reason. Patteson, J., in *Regina v. Philips*, 8 C. & P. 736, 173 Eng. Rep. 695 (1839). In 1855 the trial court in a New York case, following the statement of Vaughan, B., in *Rex v. Eldershaw*, *supra*, instructed the jury not to convict. *People v. Randolph*, 2 Parker Cr. 213 (N.Y. 1855). In 1864 the Supreme Court of North Carolina followed the instructions given the jury in *Rex v. Eldershaw*, *supra* and *Regina v. Philips*, *supra*, and stated that "It is a logical solecism to say, that a person can intend to do what he is physically impotent to do." Manly, J., in *State v. Sam*, 60 N.C. (1 Winst.) 300, 301 (1864).

It is interesting to note that the New York and North Carolina courts followed the unsupported statement of a trial judge in an English case rather than the reasoned opinion of the Supreme Judicial Court of Massachusetts.

102. "A man may fail in consummating a rape from some nervous or physical incapacity intervening between attempt and execution. But this failure would be no defense to the indictment for the attempt." 1 WHARTON, *op. cit. supra* note 68, at 300.

"The physical impossibility of accomplishing the crime will not be a bar to conviction." Sayre, *supra* note 1, at 859.

The problem of impossibility due to inactive prevention, which has caused the most discussion, is that of the so-called "pickpocket cases," the background for which was laid in *Regina v. M'Pherson*,¹⁰³ decided in 1857. The defendant in this case was indicted for breaking and entering a dwelling house and stealing certain specified articles. The evidence showed that these articles were not in the house at the time of defendant's entry. The jury convicted him of an attempt to steal the articles. The Court for Crown Cases Reserved, by a unanimous vote, quashed the conviction on the ground that the defendant could not be guilty of an attempt since it was impossible for the defendant to steal articles which were not in the house. One member of the court was Coleridge, J., who later became Lord Coleridge, C. J. During the argument by Crown Counsel in favor of the conviction Bramwell, B., stated: "It seems to me to be a legitimate conclusion from this argument, that if I strike a vigorous blow at a log of wood, supposing it to be a man's head, I should be liable to be convicted of an attempt to commit murder."¹⁰⁴

The first "pickpocket" case, *Regina v. Collins and others*,¹⁰⁵ was decided in 1864. The indictment charged that the defendants "unlawfully did attempt to commit a certain felony; that is to say, that they did then put and place one of the hands of each of them into the gown pocket of a certain woman, whose name is to the jurors unknown, with intent the property of the said woman, in the said gown pocket then being, from the person of the said woman to steal." The evidence showed that one of the defendants put his hand in a woman's pocket, but there was no evidence that there was or ever had been any property in the pocket. The defendant was convicted but the Court for Crown Cases Reserved quashed the conviction on the ground that the case "is governed by *Regina v. M'Pherson*." During the argument Bramwell, B., put the following questions:

"The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal, appeared to me at first plausible; but supposing a man believing a block of wood to be a man who was his deadly enemy, struck it a blow *intending to murder*,¹⁰⁶ could he be convicted of attempting to murder the man he took it to be?"

"Suppose a man takes away an umbrella from a stand *with intent to steal it*,¹⁰⁷ believing it not to be his own, but it turns out to be his own, could he be convicted of attempting to steal?"¹⁰⁸

103. 7 Cox C.C. 281 (1857).

104. *Id.* at 284.

105. 9 Cox C.C. 497 (1864).

106. Emphasis added.

107. Emphasis added.

108. 9 Cox C.C. 497, 498 (1864).

It will be noted that Bramwell is confusing intent and motive, a distinction which is well recognized by English writers on jurisprudence.¹⁰⁹ In the "block of wood case" the intent was to strike the particular object, which was the block of wood. Thus there was no intent to murder, and therefore no attempt. In the "umbrella case" the intent was to take the particular umbrella which was in fact the umbrella of the taker. Thus there was no intent to steal, and consequently no attempt. By similar reasoning it can be said that, while the defendants in the *Collins* case *expected* to steal, there was no *intent* to steal any property since it was not shown there was any property to steal. Accordingly it was properly decided that there was no attempt. Cockburn, C. J., after correctly stating that *Regina v. Collins* was governed by *Regina v. M'Pherson*, announced the following broad proposition, which was not necessary for the decision of *Regina v. Collins*: "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, and the felony completed of the attempt to commit which the party is charged."¹¹⁰

Regina v. Brown, decided in 1889, is a remarkable case. The defendant was brought to trial before Lord Coleridge, C. J., and pleaded guilty to a charge of attempting to commit unnatural offenses with domestic fowls under a statute punishing such offenses with "an animal." Subsequently Lord Coleridge was informed that it had been previously decided in an unreported case, *Regina v. Dodd*, that a "duck was not an animal" within the statute in question. He accordingly referred the case of *Regina v. Brown* to the Court for Crown Cases Reserved over which he presided. No counsel appeared in support of or against the conviction. The court affirmed the conviction on the ground that it was physically possible for the defendant to commit the completed offense. Lord Coleridge, however, stated that he was informed by several of his colleagues on the court, who had participated in the decision of *Regina v. Dodd*, that this decision was not based upon the ground that a duck was not an animal, but followed the holding in *Regina v. Collins*.

There are six reports of *Regina v. Brown*. In one of these Lord Coleridge specifically stated, "We do not think that upon the facts, this case comes within *The Queen v. Collins*, for there seems no doubt that this boy could have completed the offence."¹¹¹ He also stated that "this is a decision with which we are not satisfied."¹¹² In two

109. See note 18 *supra*, where authorities are listed.

110. 9 Cox C.C. 497, 499 (1864).

111. 59 L.J.M.C. 47, 48 (1889).

112. *Ibid.*

reports it is stated that Lord Coleridge said, *Regina v. Collins* is "a decision with which we all agree"¹¹³ and also that *Regina v. Dodd* "can not be considered any longer as law"¹¹⁴ since it proceeded on the authority of *Regina v. Collins*. According to another report Lord Coleridge said that *Regina v. Collins* is "a decision with which we are not satisfied" and it is "no longer law."¹¹⁵ In the fifth report Lord Coleridge said, "we do not think the decision in *R. v. Collins* should any longer be considered binding."¹¹⁶ The sixth report, which is brief, contains no reference to the *Collins* case.¹¹⁷

It should be noted that Lord Coleridge, while expressly recognizing that the problem of *Regina v. Collins* was not involved in the decision of *Regina v. Brown*, gave no reason for his conclusion that *Regina v. Collins* was no longer law. Although the decision in that case was based on the holding of *Regina v. M'Pherson*, in which he participated as Coleridge, J., no reference to that case is made in his opinion, as Lord Coleridge, C. J., in *Regina v. Brown*.¹¹⁸

In the trial of *Ring and Others*¹¹⁹ in 1892 the defendants were charged with "an attempt to steal from the person of a person unknown." The evidence showed that the defendants "hustled" a woman in a railway station and that one of them was seen endeavoring to find her pocket. There was no evidence that there was anything in the pocket. The defendants were convicted and a case was stated by the trial judge for the Court for Crown Cases Reserved. In his argument on behalf of the prosecution Forrest Fulton said that "The case was stated with the object of ascertaining whether *Reg. v. Collins* is good law."¹²⁰ The conviction was affirmed and Lord Coleridge in his opinion stated the following regarding *Regina v. Collins*:

"That case was overruled by the decision in *Reg. v. Brown*, a case decided by five judges, and since this case will also be decided by five judges, one of whom was one of the judges who decided *Reg. v. Brown*, the learned judge who stated the case will have the satisfaction of knowing that now nine judges hold that *Reg. v. Collins* is bad law."¹²¹

113. 61 L.T. 594, 595 (1889) and 16 Cox C.C. 715, 717 (1889).

114. *Ibid.*

115. 24 Q.B. 357, 359 (1889).

116. 38 W.R. 95, 96 (1889).

117. 54 J.P. 408 (1890).

118. Since no counsel appeared before the court in *Regina v. Brown* it is possible that Lord Coleridge had forgotten the decision in *Regina v. M'Pherson*, which was made thirty-two years earlier. His biographer states that "his memory, remarkably tenacious of matter germane to his tastes and predilections, was not very retentive of 'cases,' 'decisions,' 'reports.'" COLERIDGE, LIFE AND CORRESPONDENCE OF LORD COLERIDGE 286 (1904).

119. 17 Cox C.C. 491 (1892).

120. *Id.* at 492.

121. *Ibid.*

Thus *Regina v. Collins* was overruled by weight of numbers, not by force of reasoning, for no reason was stated to indicate why the decision in this case not sound law.¹²²

In this country there are only two cases in which it was decided, apart from a statute, that a pickpocket, who puts his hand in another person's pocket, can be convicted of an attempt to steal even though it is not shown that there was any property in the pocket.¹²³ The holding

122. See page 482 *supra*.

English judges, in considering whether a common law crime was committed, in most instances applied strictly the rules of law to the evidence of the particular case and did not hesitate to decide that conduct, however atrocious, did not constitute a particular crime unless all the elements of that crime were established by proof. Whenever it was considered desirable to accomplish a change in the law, this was done by a legislative enactment.

Fraudulent obtaining of property, while regarded by the courts as wrongful, was held not to be larceny since the title as well as the possession passed. 1 BISHOP, *op. cit. supra* note 2, § 583. To meet this situation a statute was passed making the obtaining of property by false pretences a felony. 30 GEO. II, c. 24 (1757). The preamble of this statute was as follows: "Whereas divers evil-disposed persons, to support their profligate way of life, have, by various subtle stratagems, threats, and devices, fraudulently obtained divers sums of money, goods, wares, and merchandizes, to the great injury of industrious families, and to the manifest prejudice of trade and credit. . . ." Where the employee of a bank received money from a customer and, instead of putting it in the till, appropriated it to his own use this was held not to be larceny since the money had never been in the possession of the bank. *Rex v. Bazeley*, 2 Leach 835 (4th ed. 1799). The same year a statute was enacted making it a felony for an employee to embezzle funds entrusted to his possession. 39 GEO. III, c. 85 (1799). In a case where a defendant had intercourse with a married woman by impersonating her husband it was decided that the crime of rape was not committed since the woman consented to the intercourse. *Rex v. Jackson*, Russ. v. Ry. 487 (1822); *Regina v. Saunders*, 8 C. & P. 265, 173 Eng. Rep. 488 (1838). This conduct was later made criminal by statute. 48 & 49 VICT., c. 69, § 4 (1885).

In 1879 a Royal Commission recommended that the rule of *Regina v. Collins* be changed by the following provision: "Every one who believing that a certain state of facts exists, does or omits an act the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible." Report of Royal Commission, 224 PARL. PAP. App. § 74. Regarding this proposed section the Commissioners stated the following:

"Section 74 deals with attempts to commit offences, and treats the act of a person who with the intention to carry off the money he believes to be there puts his hand into a pocket or breaks open a box, as an attempt to steal, though there was no money in the pocket or in the box. This alters the law from what it has been held to be." *Id.* at 19.

In contrast with the law of England, Scottish courts have an inherent power to punish an act which they regard as criminal although it had never been the subject of prosecution previously. The leading writer on Scottish criminal law has stated that the Supreme Criminal Court (Court of Justiciary) has "an inherent power as such competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature; though it be such which in time past has never been the subject of prosecution." 1 HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES 12 (1844). Embezzlement and obtaining property by false pretenses, although not coming within the definition of larceny, are treated as common law crimes. MACDONALD, CRIMINAL LAW OF SCOTLAND 64, 89 (2d ed. 1877). When the case of a defendant who obtained sexual intercourse with a married woman by impersonating her husband came before a court in Scotland it was held this was punishable, although it did not constitute rape. *H.M. Adv. v. Fraser*, Ark. 280 (1817).

123. *State v. Wilson*, 30 Conn. 500 (1862); *People v. Jones*, 46 Mich. 441 (1881).

in these cases, both of which were decided before *Regina v. Collins*, followed a Massachusetts case in 1850,¹²⁴ where the indictment charged what the court described as "a peculiar statutory offense."¹²⁵

It should be noted that in all of the cases, in this country and England, of prosecutions for an attempt to steal from an empty pocket there was no evidence that the pocket had ever contained any property.¹²⁶ Nor was it shown the "victim" was aware that the defendant had inserted his hand in the pocket.¹²⁷

The opinion has been expressed in this country that the decision in the "pickpocket cases" accomplishes a desirable result. This may be so, but this result should be accomplished by legislation and not by a stretching of the common law.¹²⁸

124. *Commonwealth v. McDonald*, 5 Cush. 365 (Mass. 1850).

125. *Fletcher, J., id.* at 366. According to the statute ". . . every person, who shall attempt to commit an offence prohibited by law, and shall in such attempt do any act towards the commission of such offence, but shall fail in the perpetration, may be indicted and punished."

The court based its decision on the following cases: *King v. Higgins*, 2 East 5 (1801); *People v. Bush*, 4 Hill 133 (N.Y. 1843); *Josslyn v. Commonwealth*, 6 Metc. 236 (Mass. 1843); *Rogers v. Commonwealth*, 5 S. & R. 463 (Pa. 1819). None of these cases supports the decision in *Commonwealth v. McDonald*. In *King v. Higgins* the crime charged was solicitation, not attempt. In *People v. Bush* the defendant, who was convicted of a statutory attempt, requested one Kinney to burn a barn and gave him a match for the purpose, but Kinney never intended to commit the crime. In *Josslyn v. Commonwealth* the defendant was convicted of breaking and entering the shop of one Fogg with intent to steal the goods of Fogg. The court in affirming the conviction stated as a dictum the result would be the same "if in fact there were no goods, or no goods of Fogg, in the shop." Shaw, C. J., at 239. In *Rogers v. Commonwealth* it was decided that an indictment for an assault with intent to steal from the pocket need not state the goods or money intended to be stolen, since "The crime was the assault; the intention is only aggravation." Duncan, J., *id.* at 464. The Court of Appeals of New York, under a statute similar to that in Massachusetts, followed the decision in *Commonwealth v. McDonald*. *People v. Moran*, 123 N.Y. 254, 25 N.E. 412 (1890).

It has been held that there can be an attempt to commit larceny where the defendant was observed to open a money drawer although there was no evidence that there was any money or other article in the drawer. *Clark v. State*, 86 Tenn. 511, 8 S.W. 145 (1888). The court relied on *Commonwealth v. McDonald*, *supra*, *Rogers v. Commonwealth*, *supra*, and *State v. Wilson*, *supra* note 123. The North Carolina Supreme Court has held that in an indictment for an attempt to steal from a dwelling house it is not necessary to allege that any particular articles were in the house. *State v. Utley*, 82 N.C. 556 (1880). In Illinois, where grand larceny is a felony and petit larceny a misdemeanor, it is necessary, in charging an attempt to steal, to allege the value of the goods. *People v. Purcell*, 269 Ill. 467, 109 N.E. 1007 (1915).

126. Compare the following: ". . . in the pickpocket case, the emptiness of the pocket was fortuitous; usually it contained things." HALL, *op. cit. supra* note 1, at 124.

127. Compare the following: "This trespass and fear occur when the thief's hand is thrust into the owner's pocket regardless of the presence of property." Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. OF PA. L. REV. 962, 979 (1930).

128. It has been suggested that the defendants in the "pickpocket cases" should be punished "in order to make discouragement broad enough and easy to understand." HOLMES, *op. cit. supra* note 57, at 70.

"The decisions in the empty pocket and unoccupied bed cases make social sense. . . ." HALL, *op. cit. supra* note 1, at 129.

A problem, similar to that of the "pickpocket cases," is whether a person can be guilty of an attempt to commit abortion by using a method, ordinarily successful, upon a woman who is not in fact "quick with child." In a New Jersey case which, so far as the writer can find, is the only case in which the question was squarely raised, the Supreme Court decided that this was not an indictable attempt, stating that there is "neither precedent nor authority" to support a contrary view.¹²⁹ The court then stated that "If the good of society requires that the evil should be suppressed by penal inflictions, it is far better that it should be done by legislative enactments than that courts should, by judicial construction, extend the penal code or multiply the objects of criminal punishment."¹³⁰

Another situation which raises the problem of factual impossibility resulting from an inactive prevention is where a defendant with intent to defraud makes a false representation but fails to obtain any property because the representation is not believed. In this situation he has committed an attempt to obtain property by false pretenses, since he had the requisite intent and his act has produced sufficient danger of damage. The leading case on this point is *Regina v. Hensler*,¹³¹ where the defendant wrote to the prosecutor a letter in which he asked for money

A case frequently discussed in connection with the "pickpocket cases" arose under a statute providing that "every person who shall attempt to commit an offense prohibited by law, and in such an attempt shall do any act towards the commission of such offense, but shall fail in the perpetration thereof, or be intercepted or prevented from executing the same" shall be guilty of a crime. *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902). According to the evidence the defendant, who was planning to kill *W*, fired a pistol through the window of *W*'s bedroom, the bullet striking the pillow of the bed in which *W* usually slept, as was known to defendant, but on this occasion *W* was sleeping in a room on another floor of his house. The Supreme Court, which affirmed the conviction, based its decision on the "pickpocket cases." It is difficult to find that the defendant in firing into the empty room had the intent, as distinguished from the wish, to murder *W*. Suppose that at the time the shot was fired *W* was a hundred miles away or had just died. In neither of these supposed cases can it be established the defendant had the *intent* to murder *W*.

129. *State v. Cooper*, 22 N.J.L. (2 Zab.) 52, 58 (1849).

130. *Ibid.* An English statute, enacted in 1837, provided that "whosoever, with the intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony." 7 WILL. IV & 1 VICT., c. 85, § 6 (1837). The Court for Crown Cases Reserved decided that it was not necessary, under this statute, that the woman be pregnant at the time. *Regina v. Goodchild*, 2 C. & K. 293, (spelled Goodall) 2 Cox C.C. 41 (1846). This statute was enacted in several states in this country and received a similar interpretation. *Commonwealth v. Taylor*, 132 Mass. 261 (1882); *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898); *State v. Russell*, 90 Wash. 474, 156 Pac. 565 (1916); *People v. Axelsen*, 223 N.Y. 650, 119 N.E. 708 (1918). These cases have been cited by some writers for the proposition that there may be a conviction of an *attempt* to commit abortion, although the woman was not pregnant. Skilton, *The Mental Element in a Criminal Attempt*, 3 U. OF PITTS. L. REV. 181, 190 (1937); Comment, 26 COL. L. REV. 1027, 1028 (1926). Professor Strahorn clearly recognized that these cases are not relevant to the problem of an attempt to commit abortion. Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. OF PA. L. REV. 962, 980 (1930).

131. 11 Cox C.C. 570 (1870).

on the basis of a false representation, which the prosecutor knew to be false and consequently did not send the money. The defendant was convicted of an attempt to obtain money by false pretenses and the conviction was affirmed by the Court for Crown Cases Reserved, Kelly, C.B., saying that "as soon as ever the letter was put into the post the offense was committed."¹³² The same result had been reached in the earlier cases of *Regina v. Ball*¹³³ and *Regina v. Roebuck*,¹³⁴ which were not cited in the *Hensler* case. In this country the Supreme Court of Washington made a similar decision in the case of *State v. Peterson*,¹³⁵ but did not cite any of the English cases discussed above. In a recent Mississippi case¹³⁶ the defendants represented to prosecutrix that they had found a pocket-book containing \$105 and would share it with her if she would get \$100 from her bank to add to that amount. The prosecutrix did not believe the representations and notified a police officer. It was held that the defendants were guilty of an attempt to obtain money by false pretenses. In all these cases the defendant on his own initiative communicated a false representation to the prosecutor, thus making a start towards the accomplishment of the intended crime, which later failed of success because the prosecutor did not believe the representation.

In the present connection the much discussed case of *Commonwealth v. Johnson*,¹³⁷ decided by the Supreme Court of Pennsylvania, is important. In that case the defendant, a licensed physician, was convicted of an attempt to obtain property by false pretenses. According to the undisputed evidence two detectives, suspecting the defendant of improper practices, went to his office and stated that they had a sister (which was not the fact) who was failing in health. Defendant then told one of the detectives to write the name of his sister on a piece of paper. The detective wrote a fictitious name and gave the paper to defendant who rubbed it on the knob of what was apparently an electrical instrument, but was in fact not connected with any current. The defendant then informed the detectives that their sister was suffering from various diseases and that he could cure her by absent treatment

132. *Id.* at 573. During the course of the argument for the prisoner Blackburn, J., stated: "You may attempt to steal from a man who is too strong to permit you." Mellor, J., stated: "Or an attempt may be made to steal a watch which is too strongly fastened by a guard." *Id.* at 573.

133. C. & M. 249 (1842).

134. 7 Cox C.C. 126 (1856). *Regina v. Roebuck* and *Regina v. Hensler*, *supra*, were approved and followed in Appeal of Light, 11 Cr. App. 111 (1915).

135. 109 Wash. 25, 186 Pac. 264 (1919).

136. *Williams v. State*, 209 Miss. 902, 48 So.2d 598 (1950).

137. 312 Pa. 140, 167 Atl. 344 (1933), discussed in 82 U. OF PA. L. REV. 61 (1933); 13 B.U.L. REV. 715 (1933); 8 TEMP. L.Q. 272 (1934); and Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. OF PITT. L. REV. 308, 312 (1937).

if paid a certain specified fee. Payment of the fee was made by one of the detectives and shortly thereafter the defendant was arrested. On appeal to the Superior Court the judgment of conviction was reversed. The Commonwealth then appealed to the Supreme Court, which reversed the judgment of the Superior Court, Maxey, J., dissenting. The majority opinion was written by Schaffer, J., who relied on the "pickpocket cases" and the *Ball*, *Roebuck* and *Peterson* cases, cited above.¹³⁸ The principal reason advanced by Maxey, J., for his dissent was that: "The defendant's state of mind was not followed by any substantial overt act which took the defendant *a single step* nearer the consummation of his imagined crime than he was when the criminal intent was conceived."¹³⁹ This conclusion seems to be irrefutable. Again using the analogy of a race the defendant never crossed the starting line.

Other examples of inactive prevention are the following: *A* with the intent to murder *B* shoots at him but the bullet strikes an iron rod and is deflected or strikes a bullet-proof vest which *B* is wearing;¹⁴⁰ a man with the intent to burn a wooden house applies a flame but the wood being damp is not ignited; *A* seizes a satchel in *B*'s hand but is unable to secure it because it is fastened with a chain to *B*'s wrist;¹⁴¹ *A* with the intent to murder *B* injects typhoid fever germs, but *B* has been rendered immune by a preventive vaccine.

The cases of active prevention present no difficulties since in all of them, in addition to the necessary intent, there is damage or the danger of damage, and the fact that it is impossible to complete the crime is entirely immaterial. Examples of active prevention are: *A* with the intent to ravish a girl is unable to overcome her resistance¹⁴² or to catch her as she runs away;¹⁴³ *A* with the intent to murder does not succeed in strangling a resisting man; *A* with the intent to kidnap a child is

138. Schaffer, J., also stated the following reason for the decision of the majority: "If this were held to be no attempt because there was no deception, then criminals of this kind, committing this offense, which is a subtle form of larceny, could go on plying their illicit trade, until they find a dupe, and would thus have a favored status in the law over other thieves." 312 Pa. at 148, 167 Atl. at 347. This statement would seem to be more fitting as an argument to be presented to a legislature for a change in the law than as a reason for a judicial decision.

139. 312 Pa. at 151, 167 Atl. at 344.

140. Beale, *supra* note 1, at 496.

141. "One had his keys tied to the strings of his purse in his pocket, which Elizabeth Wilkinson attempted to take from him, and was detected with the purse in her hand; but the strings of the purse still hung to the owner's pocket by means of the keys." 2 EAST P.C. *356.

142. "But if a real woman occupied the place of the effigy, and he undertook to ravish her, yet unknown to him she carried a revolver, and with it disabled him so that he could not effect his object, surely in reason, and it is believed in law also, he would commit a criminal attempt." 1 BISHOP, *op. cit. supra* note 2, § 742.2.

143. *Lewis v. State*, 35 Ala. 380 (1860).

unable to pull the child from the strong arms of its nurse; *A* attacking *B* with a knife is knocked unconscious by *B* or is shot in the shoulder by him; *A* with the intent to murder *B* gives him a deadly poison but a physician succeeds in saving his life; *A* with the intent to murder *B* points a loaded gun at him but is shot, but not killed, by *B*'s bodyguard or is seized by an officer;¹⁴⁴ *A* puts a venomous snake in *B*'s bedroom but the snake is driven out by a watchful detective;¹⁴⁵ *A* breaks into *B*'s bedroom with intent to murder him but is immediately chased out by *B*'s faithful watch dog; *A* points a pistol at *B* but before he can fire is rendered unconscious by a stroke of lightning; *A* with the intent to burn a house strikes a match to light prepared combustibles but the wind blows out the match.¹⁴⁶

As a conclusion from the foregoing discussion it may be stated that, when it has been established there was the intent to commit a specific crime and to carry out this intent an act or acts were committed, which caused damage or sufficient danger of damage, the fact that for some reason it is impossible to complete the intended crime should not be, and is generally held not to be, a defense to a prosecution for the attempt.

144. See *Stokes v. State*, 92 Miss. 415, 46 So. 627 (1908); *Trent v. Commonwealth*, 155 Va. 1128, 156 S.E. 567 (1931).

145. See CONAN DOYLE, *THE SPECKLED BAND*.

146. See *Queen v. Goodman*, 22 U.C.C.P. 338; Sayre, *supra* note 1, at 847 n.93.