NORTH CAROLINA LAW REVIEW

Volume 33 | Number 4 Article 12

6-1-1955

Criminal Law -- Attempted Perjury -- the Rules of "Legal" and "Factual" Impossibility as Applied to the Law of Criminal Attempts

J. Thomas Mann

pensation is generally denied if the instructions limited the sphere of the employment, but compensation is generally awarded if the instructions merely directed the employees not to do certain acts, or not to do an act within the sphere of the employment in a certain way.[20] If the violation does not take the employee out of the sphere of the employment, he is only guilty of negligence and is not deprived of the protection of the workmen's compensation acts.[21] In addition, where the act is necessitated by an emergency,[22] or the instructions against committing the acts is habitually violated,[23] the employee's case is greatly strengthened.

It is submitted that if there is authority, express or implied, to do acts in furtherance of the employer's good will, such acts should not be held to be a deviation from the course of the employment to the extent that compensation will not be granted. Of course, the courts will have to examine the facts and circumstances of each case and apply a reasonable rule, such as, whether the acts could be reasonably held within the scope of an employer's policy to create good will. The courts might go further and base the award on whether the act did create, or was aimed at creating, good will for the employer; but whatever the theory or basis used, good will should be given careful consideration by the courts when applicable to a particular fact situation.

CALVIN B. BRYANT.

Criminal Law—Attempted Perjury—the Rules of "Legal" and "Factual" Impossibility as Applied to the Law of Criminal Attempts

In a recent decision, *State v. Latiolais*,[1] the Supreme Court of Louisiana upheld a conviction of attempted prejury. So far as is known, this is the first reported conviction of such a crime in the history of law.[2]

[20] Maryland Casualty Co. v. Brown, 131 Tex. 404, 115 S. W. 2d 394 (1938); Prentice v. Twin City Wholesale Grocery, 202 Minn. 455, 278 N. W. 895 (1938); Moss v. Hamilton, 234 Ala. 181, 174 So. 622 (1937).

[21] See note 20 *supra*.

[22] O'Leary v. Brown-Pacific-Maxon, 340 U. S. 504 (1951). Defendant maintained a recreation area for employees. It was forbidden, and signs were erected to that effect, to swim in the channel because of the dangerous currents. The plaintiff's intestate swam in the channel in an attempt to rescue an unknown man and was downed. Compensation was granted.

[23] Archie v. Greene Bros. Lumber Co., 222 N. C. 477, 23 S. E. 2d 834 (1934); Moss v. Hamilton, 234 Ala. 181, 174 So. 622 (1937).

[1] 225 La. 878, 74 So. 2d 148 (1954).

[2] Generally, when courts have been unable to convict a defendant of perjury, the defendant has been acquitted. Where, for example, the officer administering the oath did not have authority to administer it, courts have held that a demurrer to the indictment should be sustained. United States v. Curtis, 107 U. S. 671 (1883); United States v. Garcelon, 82 Fed. 611 (D. Colo. 1897); United States v. Edwards, 43 Fed. 67 (C. C. S. D. Ala. 1890); State v. Phippen, 62 Iowa 54, 17 N. W. 146 (1883).

The verdict in the lower court was returned on an indictment for perjury.[3] The opinion of the court did not relate the facts of the case, but stated that there could be attempted perjury, for example, where "the board or official for some reason was not legally authorized to take testimony, or if the one administering the oath was not authorized or qualified to administer it."[4]

The questions raised by the case are (1) whether the elements of criminal attempts are applicable to the crime of perjury, and (2) if so, whether the so-called "rules" relating to "impossibility," applied in many attempt situations, are relevant to attempted perjury. Each of these will be discussed.

Criminal attempt is defined as an act done with intent to commit a crime, tending but failing to effect its commission.[5] Thus, the elements of attempt are: (1) specific intent to commit the particular crime attempted; (2) some overt act directed toward accomplishment of the crime; and (3) failure of consummation of the crime intended.[6]

The intent. There must be specific intent to commit the particular

[3] Such procedure is permitted in Louisiana by the following statute: "When the crime charged includes another of lesser grade, a verdict of guilty of the lesser crime is responsive to the indictment, and it is of no moment that the greater offense is a felony and the lesser a misdemeanor." LA. REV. STAT. ANN. § 15:406 (1951).

The following states have a similar statute: Alabama, Arizona, California, Connecticut, Florida, Georgia, Indiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

For the federal statute on this procedure, see FED. R. CRIM. P. 31(c).

It would seem, theoretically at least, that states having this statute and the federal courts would permit the return of a verdict of guilty of attempted perjury on a charge for perjury. Much would depend, however, on the substantive law of each jurisdiction.

[4] State v. Latiolais, 225 La. 878, 74 So. 2d 148, 150 (1954). The court actually held that the verdict of guilty of attempted perjury was responsive to the indictment for perjury.

[5] N. Y. PEN. LAW § 2. The Louisiana statutory definition is: "Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose." LA. REV. STAT. ANN. § 14:27 (1951).

The following states have varying statutory definitions of attempt: Montana, Nevada, North Dakota, Utah, Washington, and Wisconsin. All states have general penal statutes for attempt, except: Alabama, Arizona, Arkansas, Colorado, Delaware, Indiana, Iowa, Kentucky, Maryland, Michigan, Nebraska, North Carolina, Ohio, Rhode Island, South Carolina, and Texas. Although these states do not have general penal statutes encompassing all attempted crimes, most of them have statutes punishing specific attempts, such as attempted arson, rape, robbery, etc.

[6] Graham v. People, 181 Ill. 477, 55 N. E. 179 (1899); Scott v. People, 141 Ill. 195, 30 N. E. 329 (1892); Thompson v. People, 96 Ill. 158 (1880); Johnson v. State, 27 Neb. 687, 43 N. W. 425 (1889); State v. Thompson, 31 Nev. 209, 101 Pac. 557 (1909); Hicks v. Commonwealth, 86 Va. 223, 9 S. E. 1024 (1889).

crime attempted,[7] or as stated by one writer, there must be intent to commit a specific crime.[8] The requisite *mens rea* is "the state of mind of the man who intends the consequences of his conduct."[9] In attempt situations, special emphasis is placed on the element of intent.

These generalizations may be more meaningful if we consider the function of the mental element in criminal attempts. It is to identify those who consciously engage in a criminal endeavor and to distinguish those who act negligently[10] and blunderingly[11] from those who will or desire specific consequences which the criminal law proscribes.

Applying this to attempted perjury, it would appear that a defendant, to be convicted in Louisiana and most other states,[12] would have to make

[7] Lewis v. State, 35 Ala. 380 (1860); Dahlberg v. People, 225 Ill. 485, 80 N. E. 310 (1907); State v. Meadows, 18 W. Va. 658 (1881); MILLER, CRIMINAL LAW § 29a (1934); 1 WHARTON, CRIMINAL LAW § 215 (11th ed. 1912); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 837-842 (1928); Turner, *Attempts to Commit Crimes*, 5 CAMB. L. J. 230, 235 (1934).

[8] Keedy, *Criminal Attempts at Common Law*, U. OF PA. L. REV. 464, 468 (1954).

[9] Turner, *supra* note 7, at 235.

[10] Obviously there can be no attempt at negligence, since a negligent act is by definition done without intent. Moore v. State, 18 Ala. 532, 534 (1851); Scott v. State, 49 Ark. 156, 4 S. W. 750 (1886). See also Simpson v. State, 59 Ala. 1 (1879); Morgan v. State, 33 Ala. 413, 414 (1859); White v. State, 13 Tex. App. 259, 261 (1882); MILLER, *op. cit. supra* note 7, § 29a; Sayre, *supra* note 7, at 842.

[11] Definition also precludes blundering into an attempt. Sayre, *supra* note 7, at 842.

[12] The Louisiana statutory definition of perjury is as follows: "Perjury is the intentional making of a false statement in, or for use in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony. In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation and must relate to matter material to the issue or question in controversy." LA. REV. STAT. ANN. § 14:123 (1951).

It should be noted that the Louisiana statutory definition of perjury has incorporated the common law offenses of perjury and false swearing. At common law, false swearing in only judicial proceedings was punished as perjury. CLARK AND MARSHALL, CRIMES § 446 (5th ed. 1952); 2 WHARTON, *op. cit. supra* note 7, § 1058. All other false swearing under oaths required by law was punished under the offense designated "false swearing." Regina v. Hodgkiss, 11 Cox C. C. 365 (1869); Regina v. Chapman, 175 Eng. Rep. 356 (1850); 2 WHARTON, *supra*.

Most states have statutes similar to the Louisiana statute: ARIZ. CODE ANN. § 43-4201 (1939); ARK. STAT. §§ 41-3001 and 41-3002 (1947); CAL. PEN. CODE §§ 118 and 118a (Supp. 1953); CONN. GEN. STAT. § 8481 (1949); IDAHO CODE ANN. § 18-5401 (1948); ILL. ANN. STAT. c. 38, § 473 (1935); IND. ANN. STAT. § 10-3801 (1942); IOWA CODE ANN. § 721.1 (1950); KAN. GEN. STAT. § 21-701 (1949); KY. REV. STAT. § 432.170 (1953) (this statute does not call the offense "perjury," but is similar to the general perjury statutes); ME. REV. STAT. c. 135, § 1 (1954); MD. ANN. CODE GEN. LAWS art. 27, § 531 (1951); MASS. ANN. LAWS c. 268, §§ 1 and 1A (Supp. 1954); MINN. STAT. ANN. § 613.39 (1947); MISS. CODE ANN. § 2315 (1942); MO. ANN. STAT. § 557.010 (1953); MONT. REV. CODES ANN. § 94-3801 (1947); NEB. REV. STAT. § 29-2025 (1943); NEV. COMP. LAWS § 9974 (1929); N. H. REV. LAWS c. 457, § 1 (1942); N. C. GEN. STAT. § 14-209 (1953); N. D. REV. CODE § 12-1401 (1943); OHIO REV. CODE § 2917.25 (1954); OKLA. STAT. ANN. tit. 21, § 491 (1937); PENN. STAT. ANN. tit. 18, § 4322 (1945); R. I. GEN. LAWS c. 605, § 1 (1938); S. D. CODE § 13.1237 (1939); TENN. CODE ANN. § 11073 (Williams 1934); UTAH CODE ANN. §§ 76-45-1, 76-45-7, 76-45-8 (1953); VA. CODE § 18-237 (1950); WASH. REV. CODE §§ 9.72.010 and 9.72.030 (1953); WIS. CRIM. CODE § 346.31 (1953).

However, a few states have preserved the common law distinction between the

a false statement under an oath required by law, in the belief that the person administering the oath was qualified and authorized, and in the belief that the official, board, or judicial proceeding was authorized to receive his testimony (whether written or oral).[13] *Quaere,* whether the defendant would also have to possess the belief that his false statement would be "material," in those jurisdictions where materiality is an element of the substantive crime of perjury.

The overt act. Intent alone, however clear, is of course never enough to constitute an attempt. There must be some overt act directed toward the accomplishment of the crime, by means "apparently suitable" to accomplishment, and this overt activity must be designed to achieve the anticipated results and must go beyond that stage which the courts ambiguously refer to as "mere preparation."[14]

---

offenses of perjury and false swearing: DEL. CODE ANN. tit. 11, §§ 721 and 722 (1953); GA. CODE ANN. §§ 26-4001-4003 (1953); N. J. STAT. ANN. §§ 2-157-1 and 2-157-4 (1939); ORE. REV. STAT. §§ 162.110 and 162.140 (1953) (the latter statute defines false swearing as a false statement not material to the issue in question; otherwise, false statements are perjury); W. VA. CODE ANN. §§ 5999 and 6000 (1949).

The remaining states, though they have not merged into one the general statutes on perjury and false swearing, define false swearing as perjury: COLO. REV. STAT. §§ 40-7-1 and 40-7-2 (1953); FLA. STAT. ANN. §§ 837.02 and 837.01 (1944); MICH. STAT. ANN. §§ 28.664 and 28.665 (1954); N. H. REV. LAWS c. 457, §§ 1 and 2 (1942); N. Y. PEN. LAW §§ 1620 and 1622; S. C. CODE ANN. §§ 16-201 and 16-203 (1952); VT. REV. STAT. §§ 8515 and 8516 (1947).

The general federal statute on perjury is 18 U. S. C. § 1621 (1952).

[13] For example, see the federal statute, and the statutes in New Jersey, Oregon, and West Virginia. *Supra* note 12. In the Louisiana statute, *supra* note 12, materiality is made an element of the crime of perjury, but the court in State v. Latiolais did not discuss what effect, if any, this might have on the requisite nature of the defendant's intent.

This problem would not arise in Arkansas, New York, Utah, and Washington where the offense of perjury has been divided into two degrees. The main distinction between the two classifications is that first degree perjury applies to false swearing as to material matter, and second degree, to immaterial matter. *Supra* note 12.

[14] CLARK AND MARSHALL, CRIMES § 118 (5th ed. 1952); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 99-117 (Indianapolis: The Bobbs-Merrill Co., (1947); MILLER, *op. cit. supra* note 7, § 29f; 1 WHARTON, *op. cit. supra* note 7, § 219.

If the means appear to the defendant sufficient to consummate the crime, the weight of authority is that there is an attempt. Beale, *Criminal Attempts,* 16 HARV. L. REV. 491, 496-500 (1903). Thus, where the defendant points a gun and pulls the trigger, it is an attempt to kill, even though the gun did not go off, People v. Ryan, 55 Hun, 214, 8 N. Y. Supp. 41 (1889), or even though the gun did not have a cap on it, Mullen v. State, 45 Ala. 43 (1871). And it has been held an attempt to kill where one administers a harmless drug to another, thinking it poisonous. State v. Glover, 27 S. C. 602, 4 S. E. 564 (1888). Likewise, placing an insufficient dose of poison into another's cup with intent to kill has been held an attempt. Commonwealth v. Kennedy, 170 Mass. 18, 48 N. E. 770 (1897).

The problem of distinguishing between "mere preparation" and attempt is sometimes difficult, though some of the cases provide rather clear examples. For instance, generally it is held that purchasing or owning some article with which to commit a crime is not an indictable attempt. Purchasing poison would not be indictable as as attempt to poison, but intentionally placing it in the way of other human beings would be. Mullen v. State, 45 Ala. 43 (1871). Owning a false weight would not be an attempt to cheat, but using it as a means of cheating would

The function of the overt act "element" is similar to that of the intent "element." The rationale of attempts assumes that certain acts, which tend but fail to effect the commission of a crime intended to be consummated, ought to be punished.[15] Functionally, then, the act should (1) supply evidence to preclude punishment of mere mental activity; (2) supply evidence that the defendant intended the commission of a specific crime; and (3) supply evidence of some external harm to society[16] (this external harm may be recognizable from the harm inherent in the nature of the overt act itself, or it may be recognizable from the imminent threat of the harm that would result if the substantive crime were committed).[17]

---

be such an attempt. Regina v. Brown, 48 L. T. 270 (1882). If a man, with intent to rape a child, went to the place where the child was located, though that would be some act toward commission of the crime, it would not be indictable. Regina v. Meredith, 173 Eng. Rep. 630 (1838). Holmes has said that "the act must come pretty near to accomplishing that result [intended]." Commonwealth v. Kennedy, 170 Mass. 18, 20, 48 N. E. 470 (1897). And Baron Parke has stated that criminal attempt originates when the actor no longer controls the force which he has set in motion, Regina v. Eagleton, 169 Eng. Rep. 826, 836 (1855), though that would not seem applicable when considering, for example, attempted rape.

So as not to oversimplify the problem of distinguishing between "mere preparation" and attempt, the following will illustrate some of the difficulties: "The defendant bought matches to set a fire; he cannot yet be punished. He solicited another to burn and furnished him with material; there is no punishable attempt. He prepared combustibles at the house, went to a third party, solicited him to set the fire, and started with him toward the house. *Quaere*—whether a punishable attempt has been committed. The combustibles were arranged and another who was on the spot was solicited to light it; the attempt is punishable. The defendant himself having arranged the combustibles lit a match, which went out, or lit a candle and placed it among the combustibles, or lit the combustibles, he has committed a crime." Beale, *Criminal Attemps,* 16 HARV. L. REV. 491, 504-505 (1903).

It is hoped that the ideas developed in this note will be of some assistance in approaching the problem of "preparation."

[15] HALL, *op. cit. supra* note 14, at 99 and 129.

[16] External harm to society may be said to result from the impairment of some legally protectible interest or from a threat of such impairment. Some of these interests are life, limb, privacy, property, public peace, health, morals, welfare, and the like. As applied to perjury, some protectible interests are: effective and efficient functioning of governmental agenices, orderly conduct of legal proceedings, solemnity of the oath, dignity and respect of the court, essential powers of legal agencies for administration of justice, etc.

What constitutes external harm to society will vary with social mores and attitudes and how both are reflected and ingrained into the minds of individuals attempting to determine the external harm. Social mores and attitudes are naturally affected by philosophical, sociological, theological, psychological, political, and economic influences.

External harm is not absolute, but relative to a given society. This is evidenced by the fact that at very early common law attempts to commit crimes were not punished though today they are.

On the subject of external harm, see HALL, *op. cit. supra* note 14, at 15, 61, 96-97, 111, 113, 115-116, 135-136.

[17] It is important to realize that there may be harm inherent in the overt act itself as well as in the threat of the harm of the substantive crime. For example, in attempted perjury, it may be harmful to society for a person to exhibit a contempt for legal proceedings, even under circumstances where his false swearing cannot amount to perjury. It may very well be that the threat of perjury may add to that harm but there is nevertheless harm in the unsuccessful act itself. The same is true of attempted rape, where there is harm both in the unsuccessful acts as well

Functional rather than conceptual application of the elements of attempt may be a more edifying method of determining criminality in specific cases involving alleged attempts. This is true, for example, when considering attempted perjury, where the court should be less concerned with how "dangerously close" the act comes to consummation of the intended crime, and more primarily concerned with the external harm inherent in the defendant's acts, that is, his wilful affront to the solemnity of the oath and to the dignity of a governmental agency.[18]

Accordingly, intentional lying under oath before an official *apparently* authorized to administer the oath should be a sufficient overt act. *Quaere,* whether the following would be sufficient: making an immaterial false statement (in jurisdictions requiring the statement to be material for the crime of perjury); making a false statement on the witness stand which is interrupted before completion; falsifying an affidavit which is never used for the purpose intended; falsifying a written statement which is changed before an oath is taken.

Failure of consummation of the crime intended. Obviously, the overt act must fail to effect the crime, else the law would concern itself with punishing the substantive crime.[19] As reference to particular cases indicates, many circumstances may operate to prevent successful completion. Some may cause interruption of the overt act,[20] preventing the defendant

as in the threat of rape. In some cases of attempted rape, the threat may not in actuality be so important, for example where the offender is impotent.

The extent of the harm in attempts will always be affected by the gravity of the substantive crime, but it is important to recognize that that will not necessarily be exclusive of the extent of the harm.

See note 52 *infra.*

[18] However, in a case of attempted arson, where the defendant's match is blown out before the combustibles are lit, a court could concern itself equally with the problems of proximity (how "dangerously close") and external harm.

The proximity test is often applied by the courts in attempt cases. For a discussion of this aspect of attempts, see Beale, *Criminal Attempts,* 16 HARV. L. REV. 491, 501-506 (1903).

[19] However, the language of this Louisiana statute would seem to be *contra:* "An attempt is a separate but lesser grade of the intended crime and any person may be convicted of an attempt to commit a crime although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt." LA. REV. STAT. ANN. § 14:27 (1951).

Most states do not permit conviction of an attempt when the substantive crime has been consummated. However, several states have statutes similar to the one in Louisiana.

[20] These circumstances involve the over-all question of how far one must go in preparation before being guilty of an attempt. If one preparing to commit arson strikes a match to combustibles, but the match goes out, the person will still be guilty of an attempt. Regina v. Taylor, 175 Eng. Rep. 831 (1859). And where the defendant starts from his house with a dynamite bomb to blow up a railroad track, but is arrested some distance from the track, it has been held that he is guilty of an attempt. People v. Stites, 75 Cal. 570, 17 Pac. 693 (1888). Attempt has also been found where the defendant threw oil on a house with intent to burn it, but was frightened away before igniting the oil. Weaver v. State, 116 Ga. 550, 42 S. E. 745 (1902). "So far as the defendant's criminality is concerned, it would seem to make little or no difference whether the interruption of the defendant's intended acts is due to another's interference or to his own repentance or change of mind. . . . The

from doing what he sought to do, and others may render completion of the crime impossible, even where the defendant does all he planned to do.[21] These latter circumstances have been labeled as "legal impossibility," "factual impossibility," "intrinsic impossibility," "extrinsic impossibility," "absolute impossibility," and "relative impossibility."[22]

Impossibility to commit the crime of perjury may be evidenced where an unauthorized official administers the oath; where a board, investigative committee, judicial proceeding, or any other legal proceeding is unauthorized to receive testimony, or is illegally constituted; where a legal proceeding does not have jurisdiction over the person testifying; where an affidavit given is mistakenly believed to be required by law; and the like.

From this discussion of the elements of criminal attempt, it is evident that they can be made applicable to the crime of perjury.

What is primarily involved in *State v. Latiolais* is the "impossibility" aspect of the case. In the examples cited by the court, where the board or official was not legally authorized to take testimony, or where the one administering the oath was not authorized or qualified to administer the oath, it is impossible under all of the circumstances for the defendant to commit the substantive crime of perjury. The problem therefore is the relevancy of the general "rules" relating to "impossibility" in criminal attempts to these particular circumstances.

Courts and writers generally recognize two kinds of "impossibility," "legal" and "factual."[23]

It is said to be a general "rule" that a defendant cannot be guilty of an attempt where it was "legally impossible" for him to commit the

burglar who, while trying to force the lock on the front door, decides to abandon the attempt is equally guilty whether his change of mind is due to the voice of his own conscience or the voice of an approaching policeman." Sayre, *supra* note 7, at 847.

[21] Some cases in which the defendant has been held guilty under these circumstances are where the defendant attempts to pick an empty pocket, People v. Moran, 123 N. Y. 254, 25 N. E. 412 (1890), Regina v. Ring, 17 Cox C. C. 491, 66 L. T. 300 (1892), Regina v. Brown, 16 Cox C. C. 715, 61 L. T. 594 (1889); attempts an abortion on a woman who is not pregnant, Eggart v. State, 40 Fla. 527, 25 So. 144 (1898), State v. Snyder, 188 Iowa 1150, 177 N. W. 77 (1920), State v. Fitzgerald, 49 Iowa 260 (1878), Commonwealth v. Tibbets, 157 Mass. 519, 32 N. E. 910 (1893), Commonwealth v. Taylor, 132 Mass. 261 (1882); attempts to shoot one who is not in the place where the bullet is shot, People v. Lee Kong, 95 Cal. 666, 30 Pac. 800 (1892), State v. Mitchell, 170 Mo. 633, 71 S. W. 175 (1902); attempts to poison when the intended victim does not actually consume the poison, Commonwealth v. Kennedy, 170 Mass. 18, 48 N. E. 770 (1897).

Cases in which the defendant has not been held guilty in "impossibility" circumstances are discussed in the text under "legal impossibility."

[22] See Keedy, *supra* note 8, at 476-489; Strayhorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. OF PA. L. REV. 962 (1930); Turner, *supra* note 7, at 246.

[23] Other classifications, mentioned in the text elsewhere, are simply variations of "legal" and "factual" impossibility.

intended crime.[24] In *People v. Jaffe*,[25] it was held that the defendant could not be guilty of an attempt to receive stolen goods because the goods were not actually stolen. In *Marley v. State*,[26] it was held that the defendants, members of a county board of freeholders, could not be guilty of an attempt to incur indebtedness on behalf of the county in an amount greater than that provided by law. Another classic illustration of "legal impossibility" is that a boy under fourteen years of age cannot be guilty of an attempt to commit rape, because he is "conclusively presumed to be incapable of committing the crime of rape."[27]

Where, however, the courts have found not a "legal" but a "factual impossibility," it is said to be a general "rule" that the defendant may be guilty of a criminal attempt.[28] It has been stated that "factual impossibility" exists when "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 intervention of some natural force."[29] A man who fails to rape a woman because of a physical impotency is said to be guilty of attempted rape.[30] Inactive prevention may be provided by the absence of a subject of larceny in a man's pocket, though the person who attempts to pick the pocket will be guilty of attempted larceny.[31] Active prevention may be illustrated by the defendant's attempt to rape a girl who runs away from him, in which case the defendant has been found guilty of attempted rape.[32]

Some of the difficulties in "impossibility" are presented when one considers the instant case of attempted perjury. Three writers have said that a person could not be convicted of an attempted perjury (applying the rule of "legal impossibility").[33] However, Wharton states: "An attempt to commit perjury is indictable on the same reasoning as are attempts to commit other offenses. And when the complete offense of perjury is not proved (as where the false oath is taken before an incompetent officer, the defendant believing him to be competent), the defendant may be indicted for the attempt."[34] Yet, none of the cases cited by Wharton recognized the crime of attempted perjury as such.[35] Two

[24] HALL, *op. cit. supra* note 14, at 117.
[25] 185 N. Y. 497, 78 N. E. 169 (1906).
[26] 58 N. J. L. 207, 33 Atl. 208 (Sup. Ct. 1895).
[27] Foster v. Commonwealth, 96 Va. 306, 311, 31 S. E. 503, 505 (1898).
[28] HALL, *op. cit. supra* note 14, at 117.
[29] Keedy, *supra* note 8, at 479.
[30] Preddy v. Commonwealth, 184 Va. 765, 36 S. E. 2d 549 (1946).
[31] State v. Wilson, 30 Conn. 500 (1862); People v. Jones, 46 Mich. 441 (1881).
[32] Lewis v. State, 35 Ala. 380 (1860).
[33] HALL, *op. cit. supra* note 14, at 92; 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 227 (London: MacMillan and Co., 1883); Strayhorn, *supra* note 22, at 995.
[34] 2 WHARTON, *op. cit. supra* note 7, § 1592.
[35] Regina v. Hodgkiss, 11 Cox C. C. 365 (1869); Regina v. Stone, 6 Cox C. C. 235, 169 Eng. Rep. 715 (1853); Regina v. Chapman, 175 Eng. Rep. 356 (1850); Rex v. Taylor, 90 Eng. Rep. 1194 (1738). Each of these defendants was indicted

cases somewhat in point seem to infer that the notion of "legal impossibility" should preclude conviction.[36]

What seems to be involved in the examples cited by the court in *State v. Latiolais* is the label "legal impossibility." Thus, if the general rule of "legal impossibility" is followed, the defendant in such circumstances should be acquitted. But should the determination of whether certain acts constitute criminal attempts turn on the labeling of various circumstances as "legally impossible" or "factually impossible?" That is what the courts have done in many cases, but a reference to them will indicate that this is not a wholly satisfactory procedure.

It is submitted that the rule of "legal impossibility" is of no relevance to attempted perjury (or other criminal attempts). It must be remembered that what is involved in all attempt cases is the absence of a material element of the substantive crime;[37] and that that absence creates the failure of consummation of the intended substantive crime. To label a circumstance "legally impossible" is merely to designate a missing material element of the substantive crime. In that respect, a "legally impossible" circumstance merely possesses what is common to all other attempt situations, that is, a factual circumstance which prevents commission of the substantive crime. Consider a classic case of "factual impossibility"—the thief who picks an empty pocket,[38] with a classic case of "legal impossibility"—the thief who buys goods that he wrongly thinks are stolen from the true owner.[39] In the former the defendant was held *guilty* of attempted larceny, and in the latter the defendant was held *not guilty* of an attempt to receive stolen goods. In the pickpocket case, it was

for perjury. In Rex v. Taylor, the court merely discussed an evidentiary question. In Regina v. Hodgkiss and Regina v. Chapman, no case for perjury could be made out, so the courts found the defendants guilty of a misdemeanor, more for making false affidavits under prohibition of statute than for attempting perjury. No mention of attempt was made at all. The cases seemed to be simply statutory cases of false swearing, for which the defendants had not been properly indicted. There is some sign of attempted perjury in Regina v. Stone. There the defendant swore to a false affidavit for use in the Admiralty Court, but the official did not have authority to give the oath or take the affidavit for that purpose. The court held that the defendant would not be guilty of perjury, but "would be guilty of a misdemeanor—for he would thereby attempt to fraud the court." Regina v. Stone, 6 Cox C. C. at 240. It is interesting to note that the English Reprint report, written in somewhat different language, does not contain the clause "for he would thereby attempt to fraud the court."

[36] One held that the defendant could not be guilty of an attempt to obtain a school warrant from a board of school officials, if the officials had no legal authority to issue a valid warrant. State v. Lawrence, 178 Mo. 350, 77 S. W. 497 (1903). The other held that the defendant could not be guilty of an attempt to bribe an official to vote for awarding a contract, when the official had no legal right or authority to vote on the issue. State v. Butler, 178 Mo. 272, 77 S. W. 560 (1903).

[37] See HALL, *op. cit. supra* note 14, at 117-129.

[38] State v. Wilson, 30 Conn. 500 (1862); People v. Jones, 46 Mich. 441 (1881); People v. Moran, 123 N. Y. 254, 25 N. E. 412 (1890); Regina v. Ring, 17 Cox C. C. 491, 66 L. T. 300 (1892); Regina v. Brown, 16 Cox C. C. 715, 61 L. T. 594 (1889).

[39] 185 N. Y. 497, 78 N. E. 169 (1906).

impossible for the defendant to violate the law of larceny. And in the stolen goods case, it was impossible for the defendant to violate the law of criminal receiving. In one case, the *fact* that the pocket was empty, and in the other, the *fact* that the goods had been surreptitiously returned to the true owner's control prevented commission of the intended substantive crime. In both cases, the law was dealing with thieves who had done all they could to achieve success in a manifestly anti-social enterprise. For penological purposes, both defendants were thieves, and both had engaged in open thievery. In both cases, a *factual* circumstance was the essential factor which prevented the commission of the substantive crime.

The same argument holds true in other cases of "legal impossibility." For example, the *fact* that a boy is under the statutory age precludes his being held guilty of rape.[40] But if he possesses the intent to ravish a woman and does some act toward the accomplishment of that end, why should he not be held guilty of an attempted rape? If it is believed that he should not be so convicted, such a conclusion should be based on reasoning other than that it was "legally impossible" for him to commit the crime of rape.[41] It would seem therefore that the rule of "legal impossibility" is circumscribed by the rule of "factual impossibility." Thus one writer has been led to the conclusion that "there is no such thing as 'legal impossibility,' "[42] and that in criminal attempts only "factual impossibility" is relevant.[43]

The significance of "impossibility" circumstances has been summarized by Professor Hall as follows: "(1) that unless the objective sought is legally proscribed, the doing of it is not criminal nor is any conduct falling short of it a criminal attempt . . . ; and (2) if the end sought is legally proscribed, the failure to attain it, because of the lack of a factual condition necessary to its attainment, is no defense."[44] Thus, it is what the defendant believes he is doing that is important. If what the defendant intends is not a crime, no act falling short of it will be criminal. But if the result which he thinks he can accomplish—his expectations as he conceived them—is a crime, action which does not result in commission of the crime may nevertheless be a criminal attempt.

Thus, since all "impossibility" is "factual," and since that should be no defense, "impossibility" is not a criterion to be utilized in determining whether a given overt act is a criminal attempt, but is merely a term

[40] Foster v. Commonwealth, 96 Va. 306, 311, 31 S. E. 503, 505 (1898).
[41] "[T]he simple holding that age is also a material fact in the criminal attempt suffices." HALL, *op. cit. supra* note 14, at 127.
[42] *Id.* at 118.
[43] *Id.* at 128.
[44] *Id.* at 118.

descriptive of some types of circumstances which operate to prevent commission of the substantive crime.[45]

We are left, then, with the question of what criteria should be utilized in determining when an overt act, failing to effect the commission of the crime intended, becomes a criminal attempt.

It must be remembered that at very early common law attempts to commit crimes were not punished, simply for the reason that they were not regarded as *harmful.*[46] And it was not until the 17th and 18th centuries that the English courts began recognizing certain attempts as criminal.[47] During that period, courts, apparently with no conscious design, began to realize that certain attempts to commit crimes were harmful to society and should be punished. However inarticulate their motivations may have been, courts slowly recognized that certain attempts constituted punishable behavior that was antithetical to the interests of social welfare and detrimental to the existence of a well-ordered society. This rationale of attempts led to the formulation of the doctrine that an attempt to commit a crime is criminal.

Since the origin of this doctrine, the maze created by the voluminous number of court decisions has tended to obscure the rationale and its function. The rationale recognizes that certain attempts to commit crimes ought to be punished. The function of the rationale is the determination of whether the defendant's ultimate objective as he conceived it is legally proscribed, and, if it is, whether the steps taken toward its consummation produce sufficient external harm to society to justify legal cognizance and punishment. What is important is not how "dangerously

[45] The most significant effort to deal with the problems of attempt and "impossibility" is found in WIS. CRIM. CODE § 339.32 (1953): "(2) An attempt to commit a crime requires that the actor have an intent to commit that crime and that he either:

(a) Does all the acts which he believes necessary to commit the crime; or

(b) Does acts which go far enough toward the commission of the crime to demonstrate unequivocally, under all the circumstances, that a person having formed that intent and having gone that far would normally commit the crime except for the intervention of another person or some other extraneous factor. This paragraph does not apply if the actor voluntarily changes his intent and decides not to commit the crime.

(3) It is not a defense to a prosecution under this section that, because of a mistake of fact or law other than criminal law, which does not negative the actor's intent to commit the crime, it would have been impossible for him to commit the crime attempted."

[46] "Apparently in those forthright days, a miss was as good as a mile." *Id.* at 64. Bracton quoted what was apparently a maxim of the day, "'For what harm did the attempt cause, since the injury took no effect?'" 2 BRACTON, DE LEGIBUS ET CONSUETUDINUS ANGLIAE 337, f. 128, 13 (Twiss ed.; London: Longman and Co., 1878).

[47] Authorities are in disagreement as to whether the doctrine of criminal attempts was born in the Court of the Star Chamber. *Compare* HALL, *op. cit. supra* note 14, at 72-81 *with* 2 STEPHEN, *op. cit. supra* note 33, at 223. Stephen is of the opinion that the doctrine originated in that court. But Professor Hall believes that it did not receive expression until 1801. HALL at 87. On the history of criminal attempts, see HALL at 61-88.

close" the act comes within completion of the substantive crime, or how "impossible" it is to commit the crime, but rather whether the external harm created by the overt act is of such magnitude that it can be recognized and identified as an act which ought to be punished.

The determination of the criminality of overt acts must be left to the courts, for the law of criminal attempts presupposes that statutory criminal prohibitions cannot be all-inclusive of human conduct that should be punishable. The law of criminal attempts therefore gives the courts a power[48] to extend the rationale of prohibited substantive crimes to include conduct which, though not within the definition of a substantive crime, ought not to go unpunished.[49]

Criteria that may be applied in determining whether certain acts constitute criminal attempts are: (1) what is the rationale of the prohibited substantive crime;[50] (2) what is the nature of the defendant's intent and overt act;[51] (3) what is the extent of the external harm to society created by the defendant's act;[52] and (4) do the rationale of the substantive crime and the extent of the external harm justify legal cognizance and punishment of the defendant's act?[53]

These criteria can be applied to the instance case. The commission of the crime of perjury is a flagrant exhibition of contempt for the organized proceedings of government, which if left unpunished would eventually lead to a chaotic state of government. The rationale of its statutory prohibition recognizes: (1) the essentiality of soliciting truthful testimony from citizens for effective performance of various governmental functions; and (2) for the purpose of minimizing obstructions to the accomplishment of that end, the essentiality of preserving the solemnity of the oath and the dignity of the courts, tribunals and other agencies of government. The defendant in *State v. Latiolais* intended to commit perjury before an apparently legally authorized governmental

[48] See Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L. J. 53, 75-80 (1930).

[49] Thus, in dealing with a given overt act, it is necessary to understand the rationale of the substantive crime attempted, in addition to the rationale of attempts.

[50] Determination of the rationale of the prohibited substantive crime involves a consideration of what human action is proscribed by the prohibition, a consideration of the policy underlying the particular prohibition (i.e., why such action is deemed punishable), and a consideration of theories of punishment underlying the entire field of criminal law and their relation to the policy of the particular prohibition. This determination lays the foundation for the consideration of whether the defendant's acts should be punished.

[51] This criterion merely involves the determination of the physical aspects of the defendant's actions.

[52] Determination of external harm will depend upon the nature of the defendant's action, the nature (i.e., the physical aspects) and the rationale of the prohibited substantive crime, and the functions of the mental element and the overt act. See notes 16 and 17 *supra* for a discussion of the meaning of external harm and some of the problems involved in recognizing external harm.

[53] This determination will of course depend primarily upon the attitude and approach of each court or jurisdiction.

agency, and made a false statement under oath before that agency. His effort was frustrated only by the fact that for some reason the agency was either unauthorized to receive his testimony or by the fact that the official administering the oath was unauthorized to administer it. The defendant's acts, though not constituting perjury, nevertheless seem to be within the scope of the rationale of the substantive crime.

To permit such actions to go unpunished because of "legal impossibility" would not only condone planned and deliberate contempt of legal proceedings, but would make criminality turn on rules which have no functional relevance to the determination of whether the defendant's behavior should be punished. It would seem under such circumstances that a court should be justified in punishing the defendant's actions as a criminal attempt.

J. THOMAS MANN.

Dead Bodies—Autopsies—Authority to Use Parts Removed in Treatment of the Living

Medical science has made great progress in the use of tissue, bone, and other matter removed from deceased persons in the treatment of living patients,[1] but in North Carolina the sources of supply of such matter are limited because of areas of uncertainty in the law with regard to property and disposition rights in dead bodies.[2]

North Carolina seems to be in accord with the general rule that a dead body is not property, in the ordinary sense.[3] However, a right of testamentary disposition is recognized by the court,[4] and provided for by statute.[5] In the absence of such disposition, there is a right to pos-

[1] "It is becoming increasingly easy to use organs and tissues from deceased persons (cadavers) in treating and sometimes curing, otherwise fatal diseases in living patients. There is a good possibility that within 10 years it will be possible to transplant complex organs from a cadaver to a living person." Letter from John B. Graham, M.D., Department of Pathology, University of North Carolina School of Medicine, to Richard A. Myren, Assistant Director, Institute of Government, University of North Carolina, March 7, 1955. The Raleigh Times, March 28, 1955, p. 9, col. 6, reported the successful transplantation of four ribs, a collarbone, and a breastbone from the body of a deceased person to that of a living person. Colliers, April 25, 1953, pp. 74-77.

[2] Although medical schools obtain cadavers for use in the study of anatomy under the authority of N. C. GEN. STAT. §§ 90-211, *et seq.* (1950), these sections do not authorize the use of parts of such bodies in the treatment of patients.

[3] Travelers' Insurance Co. v. Welch, 82 F. 2d 799 (5th Cir. 1936); Gray v. Southern Pacific Co., 21 Cal. App. 2d 240, 68 P. 2d 1011 (1937); Pierce v. Proprietors, 10 R. I. 227 (1872); Koerber v. Patek, 123 Wis. 453, 102 N. W. 40 (1905). *Accord,* Kyles v. Southern Ry. Co., 147 N. C. 394, 61 S. E. 278 (1908). *But see* Bonaparte v. Fraternal Funeral Home, 206 N. C. 652, 175 S. E. 137 (1934).

[4] Kyles v. Southern Ry. Co., *supra* note 3. 25 C. J. S., *Dead Bodies* § 9 (1941).

[5] ". . . nothing in §§ 90-211 through 90-216, inclusive, shall prevent a person from making testamentary disposition of his or her body after death." N. C. GEN. STAT. § 90-213 (1950). N. C. GEN. STAT. §§ 90-216.1, *et seq.* (Supp. 1953) provides for the testamentary donation of one's body to certain institutions for the rehabilitation of the maimed.