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## CRIMINAL ATTEMPTS.

THE courts and other law writers have experienced great difficulty in defining an attempt. The difficulty is inherent in the subject matter.[1] Though the importance of great care in laying down the law on the subject has been judicially recognized,[2] and it has been said that "the law would not be a practical system if it did not define with precision the nature of an attempt," it is nevertheless true that there is no title less understood by the courts or more obscure in the text books than that of attempts.[3]

In the earlier cases punishment for an attempt is spoken of as if it were punishment for a criminal *intent* whenever evidenced by an act.[4] The present doctrine, which regards the act done in pursuance of the intent as an essential element of the crime and not merely as evidence of the criminal intent, probably originated in the Court of Star Chamber,[5] and was adopted therefrom as a part of the common law by the Court of King's Bench.[6]

### DEFINITIONS.

Some of the definitions to be found in the books are very absurd. "An attempt in law," says the Standard Dictionary, "is an act which, if consummated, would effectuate a criminal intent."

[1] "The law as to what amounts to an attempt is of necessity vague." Stephen's Hist. Crim. Law, Vol. 2, p. 224.

[2] Kelly v. C. 1 Gr. 489.

[3] Stokes v. S., 92 Miss. 415; 21 L. R. A. N. S. 901; Hicks v. C., 86 Va. 226.

[4] Stephen, vol. 2, p. 224.

[5] Hudson on Star Chamber.

[6] Stephen, vol. 2, p. 223.

Nothing could be more erroneous. In the first place to constitute an attempt an act must be consummated,[7] and in the second place, if this act completely effectuates the criminal intent, it ceases to be punishable as an attempt.[8] The Century Dictionary defines an attempt as "an act done in part execution of a design to commit a crime." The same idea is found in the decisions.[9] This definition is too broad. Every act done in furtherance of a design to commit a crime is not a criminal attempt. To render it such it must possess certain other characteristics.

This idea is set forth in a recent case,[10] where it is said, "An attempt, in general, is an overt act done in pursuance of an intent to do a specific thing, tending to that end but falling short of complete accomplishment of it. *In law* the definition must have this further qualification, that 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."

It may be truly stated that no satisfactory definition of an attempt has been found in the books.[11] For present purposes it is sufficient to say that an attempt is an act done in furtherance of a design to commit a crime, which falls short of the complete accomplishment thereof, but is sufficiently proximate thereto to be deemed criminal. This definition is suggestive rather than precise, and invites inquiry rather than answers it. To answer such inquiry is the purpose of this article.

ESSENTIAL ELEMENTS.

An attempt, like other common law crimes, consists of two elements,—a criminal intent and a criminal act.[12] The criminal

[7]See infra.

[8]C. v. Houssell, 20 D. R. 433.

[9]"An attempt is an act done with intent to commit a crime." C. v. Dongherty, 18 D. R. 858. "An attempt is an intent to do a particular criminal thing with an act toward it falling short of the thing intended." C. v. Houssell, 20 D. R. 433. See also Smith v. C., 54 Pa. 213 and the criticism thereof in C. v. Clark, 10 Co. Ct. 447.

[10]C. v. Eagen, 190 Pa. 10.

[11]Many definitions are collected in P. v. Young, (Mich.) 47 L. R. A. 110, Graham v. P., 181 Ill. 447, 47 L. R. A. 734, 3 A. & E. Encyc. 251, Words & Phrases.

[12]The courts sometimes speaks of an "intentional attempt." See Butler v. Stockdale, 19 Super. 98. All attempts are intentional. There is no such thing as an unintentional attempt.

act is composed of a physical and a mental element. This mental element is known, technically, as the "specific intent." It must be distinguished from the "criminal intent." The former denotes the purpose towards the accomplishment of which the act is directed; the latter determines that the act so directed shall be done. The former is an essential element of the criminal act; the latter is concurrent with but not contained in the criminal act.[13]

DISTINGUISHED FROM OTHER CRIMES.

An attempt is to be distinguished from a solicitation and from a conspiracy. One may incur criminal responsibility by merely soliciting another to commit a crime, whether such other consents or refuses, and though nothing further is done towards carrying out the unlawful purpose. If the person to whom the solicitation is addressed refuses, the solicitor is guilty of a solicitation; if he consents, both persons are guilty of a conspiracy; in neither case is either party guilty of an attempt.

There is respectable authority for the proposition that a solicitation is an attempt,[14] but the prevailing view is to the contrary.[15] "In a high moral sense," says Woodward, C. J.,[16] "it may be true that a solicitation is an attempt, but in a legal sense it is not."

It has been said that an attempt is the act of one who is himself to commit the intended offense and who, if the offense is committed will be a principal, while solicitation is the act of one who means to secure another to commit the intended offense and who, if the offense is committed, will be (in case of felony) an accessory before the fact; and that a solicitor to a crime which he does not intend to join in actually committing is not guilty of an attempt[17] This is incorrect. An attempt to commit a crime is at common law a misdemeanor, and the rule of the common law is that whatever would make one an accessory before the fact to a felony makes him a principal in a misdemeanor. Therefore, if A solicits B to commit an offense, and B consents and does an act sufficiently proximate to the intended

[13]Robinson Elementary Law, sec. 471.

[14]Bishop Criminal L. sec. 767; C. v. Smith, 6 Phila. 305.

[15]C. v. McGregor, 6 D. R. 345. Stabler v. C., 95 Pa. 321.

[16]Smith v. C., 54 Pa. 213.

[17]J. H. Beale in 17 H. L. R. 505.

result to constitute an attempt on his part, A is also guilty of an attempt though he does no further act toward the commission of the offense and is not present when the acts upon which B's responsibility is predicated are committed.[18] This is true whether the crime attempted was a felony or misdemeanor and whether A would have been guilty as a principal or as an accessory had the crime attempted been committed.

A conspiracy is not an attempt. "There is a plain and substantial distinction between a conspiracy and an attempt for at common law no overt act was necessary to constitute a conspiracy."[19] It has been said that a conspiracy is less than attempt,[20] but this statement is not consistent with the well established principle that a conspiracy to commit an act which is not itself a crime may be criminal. An attempt to commit such an act would not be criminal.

A distinction is also made and carried into the cases between an attempt to commit a crime and an assault with intent to commit a crime.[21] It has been said that an assault with intent to commit a crime is necessarily an attempt to commit that crime but that an attempt to commit a crime is not necessarily an assault with intent to commit it.[22] In one the question of an assault is not necessarily involved while in the other an assault is an essential element and "under many conceivable circumstances all the essential elements of an attempt may be present and yet no assault be committed."[23] The distinction has been thus stated; "An assault is an act done toward the commission of a battery; it must precede the battery but it does so immediately. The next movement would, at least to all appearances, complete the battery. An act constituting an attempt may be more remote.[24] The importance of the distinction is well illustrated by those cases which hold that where an attempt

[18]S. v. Jones, 83 N. C. 605, 35 Am. Rep. 586. Ahl v. C. 6 Gratt. (Va.) 706. McDade v. P. 26 Mech. 50.

[19]C. v. Richardson, 42 Super. 341 per Rice, C. J.

[20]Hartman v. C. 5 Pa. 60.

[21]Roos v. S., 16 Wyo. 285. 93 Pac. 299. Garrison v. P. 6 Neb. 74. Lewis v. S., 35 Ala. 380. C. v. George, 12 Super. 1.

[22]P. v. Burns (Cal.) 60 L. R. A. 270. Stokes v. S., 92 Miss. 415. 21 L. R. A. N. S. 898. Fox v. S., 34 O. S. 380.

[23]Fox v. S., 34 O. S. 380.

[24]Fox v. S., 34 O. S. 380.

is made to have intercourse with an infant under the statutory age of consent, the accused is not guilty of an assault with intent to commit rape if the infant in fact consented, as the consent destroys the element of assault,[25] but is guilty of an attempt to rape.[26] In Texas it has been held that an assault with intent to commit rape cannot be made by mere threats without force or attempted force but that an attempt may.[27]

THE PHYSICAL ACT.

The law does not undertake to punish a mere intent to commit a crime.[28] It has been said that this is because the law cannot regulate the thoughts and intents of the heart. The best it can do is to punish acts and that it would be unreasonable to require the law "to detect and punish the criminal intent."[29] It is accordingly held that in order to constitute one guilty of an attempt he must have done something more than to to have formed an intent to commit a crime and that the distinction between an intent and an attempt to commit a crime is that the former implies purpose only—a mere condition of the mind; while the latter implies both purpose and an act—a physical endeavor—done to carry that purpose into execution[30] This necessity for the commission of an act has sometimes been expressed by saying that the attempt must be "actual" and not "constructive" or "meditated."[31]

The physical element of an attempt may be, and frequently is, a series of physical acts,[32] and one may by a single act or

[25]The great weight of authority is to the contrary on the ground that the infant cannot consent to such an assault, 33 Cyc. 1434 but that the rule stated prevails in Pennsylvania, see Trickett Crim. L. 653.

[26]23 A. & E. Encyc. 868.

[27]Cox v. S. (Tex.), 44 S. W. 157. Burny v. S., 21 Tex. App. 565.

[28]C. v. McGregor, 6 D. R. 345. Smith v. Blackley, 188 Pa., 206. In C. v. Randolph, 146 Pa. 94, it is said, "The law takes no cognizance of an intent existing only in the mind." Where else could an intent exist?

[29]Smith v. C., 54 Pa. 212. Of course the law cannot punish an "intent." It may however, and frequently does, punish a man, because he entertained an intent. Whenever the law punishes an actor more severely because he acted with a certain intent, it is in reality punishing him because of his intent,

[30]C. v. Clark, 10 Co. Ct. Rep. 447. C. v. Eagen, 190 Pa. 10. Stabler v. C., 95 Pa. 321; Kelly v. C., 1 G., 484.

[31]C. v. Clark, 10 Co. Ct. Rep. 444. Kelly v. C., 1 Grant 484.

[32]C. v. Tadrick v. C. 1 Super. 566. C. v. Eagen, 190 Pa. 10. C. v. Clark, 10 Co. Ct. Rep. 446.

series of acts endeavor to accomplish two or more crimes, in which case he may be punished for an attempt to commit either crime.[33] The same act or series of acts may constitute a substantive crime and an attempt to commit another crime. Thus breaking and entering a dwelling house in the night with the intention of committing rape constitutes burglary and also an attempt to rape.[34] Indeed a very common class of attempts is where the act performed is itself a crime but which becomes aggravated by the unfulfilled specific intent with which it is committed.

The act need not be *per se* criminal. An act which otherwise is innocent or praiseworthy may, if accompanied by the requisite intent, be indictable as an attempt. Thus one who enters a house and takes a seat upon the bed at the instance of the owner is guilty of an attempt to commit larceny, if he entered and sat upon the bed with the intention of stealing money which was hidden in the bed.[35]

Not every act committed in furtherance of a design to commit crime is an attempt. This is true even though the act is unlawful irrespective of its being done in furtherance of such design. It has been said that when the first *unlawful* act in the direction of the commission of a crime, however slight, is committed, the crime is complete.[36] This is clearly incorrect. The act whether *per se* lawful or unlawful must be proximate to the intended result. If A, intending to poison B, should a year before the contemplated poisoning, steal poison with which to do it, he would not be guilty of an attempt to kill, nor is one who, intending to burglarize a house, enters the yard, guilty of an attempt to commit burglary.[37]

### THE SPECIFIC INTENT.

A specific intent to commit a certain crime is an essential element of an attempt to commit that crime.[38] This is true

[33]C. v. Eagen, 190 Pa. 10.

[34]Kelly v. C., 1 Gr. 484.

[35]C. v. Tadrick, 1 Super. 555. See also Rex v. Simons, 1 Wils. 329. But see dictum contra C. v. Eagen, 190 Pa. 10.

[36]C. v. Clark, 10 Co. Ct. Rep. 446, per Pennypacker, J.

[37]C. v. Eagen, 190 Pa. 10. But in Kelly v. C., 1 Gr. 484, the court seems to have been of the opinion that whether certain acts constitute an attempt may depend upon whether these acts are otherwise criminal.

[38]Kelly v. C. 1 Gr. 484. Stabler v. C., 95 Pa. 318. C. v. Tadrick 1, Super. 566. Mears v. C. 2 Gr. 387.

whether or not a specific intent is an essential element of the crime attempted. Thus one who kills another may be guilty of murder though he did not intend to kill, but one cannot be guilty of an attempt to murder unless he acted with the intention of committing murder which includes an intent to kill.[39] This rule does not require that the actor should know or believe that the acts which he attempts would, if consummated, constitute a crime. His opinion as to the innocence or criminality of his actions is immaterial. It is sufficient if he intends to do certain acts if these acts constitute a crime.

The correctness of the rule requiring a specific intent has not been questioned where the act done could not have effected the crime intended unless followed by other acts, but there is apparent authority for the proposition that an act is punishable as an attempt if, supposing it to have produced its natural and probable effect, it would have amounted to a substantive crime, even though the act was not done with the intention of producing that effect.[41]

The theory of the latter doctrine is that as one is frequently held criminally responsible for the effect of his acts, though he acted without the intention of producing such effect, if it was the natural and probable consequence of his acts, he should not escape punishment altogether, if his acts, in spite of their natural tendency, do not, in a particular case, produce the effect which the law declares to be a substantive crime. The doctrine has not met with much favor, and, though it may be admitted that the actor is under such circumstances deserving of punishment, it certainly does violence to the English language to hold him guilty of an *attempt*.

The specific intent must be proved beyond a reasonable doubt to have existed in the mind of the accused as a matter of fact.[42] Its existence may be inferred from the circumstances and need not, and ordinarily cannot, be proved by positive evidence,[43] but whether the evidence is direct or circumstantial the jury must be persuaded of the existence of this intent as a mat-

[39]C. v. Brosk, 8 D. R. 639.

[41]Holmes, Common Law, 66, Reg. v. Delworth, 2 M. & R. 531. R. v. Jones, 5 C. & P. 258.

[42]Kelly v. C. 1 Gr. 484.

[43]C. v. Bell, 13 Super. 579. C. v. Manfredi, 162 Pa. 144.

ter of fact.[44] It cannot be inferred as a matter of law from the acts done. To hold otherwise would be very absurd. The charge is that an act has become criminal or its criminal character has been aggravated by reason of the intent with which it was committed, and it would not be reasonable to infer the existence of this intent as a matter of law from the acts done and then enhance the criminality of these acts by adding this intent.

The specific intent must accompany all of the acts which are relied upon as constituting a part of the attempt.[45] Thus if one should go to a certain place with the intention of robbing another and then strike him with the changed purpose of killing him, and then resolve again upon robbery, but before taking further steps should be frightened away, he could not be punished for an attempt to rob.

The accused must have had sufficient mental capacity to entertain the requisite specific intent. Such capacity is presumed but may be disproved by evidence which indicates that at the time of the commission of the physical act his mind, from any cause whatever, was in such a condition that he could not conduct the mental operations which enter into the formation of the particular intent. The test of this capacity is by no means the same as the test of criminal responsibility. A person may be old enough and sane enough to to be criminally responsible for his external conduct and yet incapable of so estimating ends and selecting means for their accomplishment as to form a specific design to commit a certain crime.[46] For example, the fact that a man was drunk does not ordinarily excuse him from criminal responsibility for his acts, but if one is accused of an attempt the actual condition of his mind is open to investigation, and if he were too drunk at the time he did the physical acts, to put together the factors of the intellectual problem and correllate them in a definite purpose to commit a particular crime, the mental portion of the criminal act constituting the attempt is wanting and he is not guily.[47]

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[44]C. v. Bell, 13 Super. 579.

[45]Kelley v. C 1 Gr. 484, C v. Tadrick 1 Super. 566.

[46]Robinson's Elementary Law 471.

[47]3 A&E. Encyc. 263.

A CRIME MUST HAVE BEEN INTENDED.

If, as a matter of law, the results intended, if accomplished precisely as intended, would not have constituted a crime, an attempt to accomplish these results is not a criminal attempt.[48] Thus an accomplished suicide is not a crime and therefore an attempt to commit suicide is not a criminal attempt;[49] a husband who attempts to have carnal knowledge of his wife forcibly and against her will is not guilty of an attempt to rape because, if he had fully accomplished his purpose, he would not have been guilty of rape;[50] one who forcibly compels another to write an order intending to take the order is not guilty, according to the common law, of an attempt to rob because he would not have been guilty of robbery had he accomplished his purpose;[51] where it is not an offense to cause an abortion unless the woman is "quick," an attempt to produce an abortion of a woman who is not quick is not a criminal attempt.[52]

The reasons for this doctrine are sufficiently obvious. The required specific intent is lacking and, as a matter of practical common sense, it would be unjust to punish one for attempting to do a thing for which, if it had been fully accomplished, he would not have been punishable.

It will be observed, however, that in all of the cases cited the actor would not have been guilty of a crime had he committed all of the acts which he intended to commit and accomplished the precise results which he intended to accomplish. A distinction has been taken between *the results* which the actor intended to accomplish and *the acts* which he intended to do, and it has been said that "the important question is what is the physical act which the defendant has set out to do;" for "an attempt must be a step toward a forbidden physical act" and "if the entire physical act which he set out to perform might have been accomplished without committing a substantive crime, the attempt, not being an actual step toward a criminal

[48]C. v. Wright 11. D. R. 144, C. v. Dougherty 18 D. R. 958.

[49]C. v. Wright 11. D. R. 144, May v. Pennel 101 Me. 516, 7 S. R. A. N. S. 286.

[50]Trazer v. S. 48 Tex. Crim. 142, 13 Ann. Cas. 497.

[51]Rex. v. Edwards 6 C. & P. 521.

[52]S. v. Cooper 22 N. J. L. 52. In Mills v. C. 13 Pa. 630 the defendant was held guilty because in Penna. one may be guilty of an abortion altho the woman was not quick. See also infra Personal Incapacity.

act, cannot be criminal.''[53] To illustrate this distinction the following cases are given: A, wishing to kill his enemy, shoots toward an imperfectly seen object which he believes to be his enemy. The object proves to be a stump. He is not guilty of an attempt because though the ultimate result which he intended to bring about—the death of his enemy—was criminal, the physical act which he intended to commit,—bring a bullet in contact with a stump,—was not. On the other hand, if the object aimed at had in fact been the actor's enemy who wore armor capable of stopping a bullet, A would have been guilty of an attempt because if he had brought about the intended contact with the body at which he shot he would have been guilty of a crime. Again, should a man mistake an effigy in female dress for a woman and undertake to ravish it, he would not be guilty of an attempt to rape because the law holds the ravishment of an inanimate object not to be rape, but if he had undertaken to ravish a real woman he would have been guilty of an attempt though the woman was so strong that he was unable to accomplish his purpose.[54]

The distinction thus stated and illustrated has been criticised;[55] the cases cited as illustrations of it could have been decided in the same way by the application of another undisputed principle;[56] and there are cases which cannot be reconciled with it. It has been held that one may be convicted of an attempt to obtain property by false pretences though the person to whom the pretences were addressed knew of their falsity and could not therefore, be deceived thereby[57] and that one may be convicted of an attempt to extort money through fear although the person to whom the threats were addressed could not, under the existing circumstances, be frightened thereby.[58] The physical acts intended in the first of these cases were the addressing of false pretences to a certain mind and the obtaining of property, and in the second the addressing of threats to a certain mind and the obtaining of property. The accused would not have

[53]J. H. Beale in 16 Har. L. R. 492.

[54]Kunkle v. S., 32 Ind. 230. Bishop Crim. L. 742. P. v. Moran, 7 N. Y. S. 586.

[55]Clark's Crim. L. 134, 16 H. L. R. Anon. Note.

[56]See infra Proximity.

[57]Reg. v. Mills, 7 Cox, 263. Symon's Case 29 Co. Ct. 116.

[58]P. v. Gardner, 144 N. Y. 119.

been guilty of the substantive crime in either case if he had done both of the acts intended, unless his pretences had caused belief and his threats had caused fear. If it is impossible to kill a dummy or ravish a stump, it is equally impossible to deceive a knowing mind or frighten a fearless mind. In either case the actor may succeed in doing the act which he intended to do, to wit, bring a bullet in contact with a certain body or the pretence in contact with a certain mind; in neither is he able to accomplish the precise results which he intended. The cases cannot be distinguished and sufficiently indicate that the distinction under discussion will not reconcile all the cases.

THE CHARACTER OF THE CRIME ATTEMPTED.

It is settled beyond question that an attempt to commit a felony, common law or statutory, is indictable at common law,[59] and it has been frequently stated that an attempt to commit a a misdemeanor, common law or statutory, is indictable at common law.[60]

In other jurisdictions, however, it has been held that an attempt to commit a misdemeanor which is purely statutory and not *malum in se* is not indictable at common law.[61]

Whether this qualification of the rule as generally stated prevails in Pennsylvania, has not been expressly decided. It has been said that "there *may be*, *perhaps*, a distinction between misdemeanors which are *mala in se* and such as are *mala prohibita*, as in case of acts which are not penal *per se* but are made the subject of a statutory fine as a matter of municipal regulation. But when a misdemeanor is stamped as a crime by law, and is punishable by fine and imprisonment, an attempt to commit it is clearly a misdemeanor," [62] and in a recent case the court, without denying or asserting the existence of this qualification, held that it did not apply to an attempt to obtain property by false pretences because obtaining property by false pre-

[59]Smith v. C., 54 Pa. 209. Randolph v. C., 6 S. & R. 397. Symon's Case, 29 Co. Ct. 616.

[60]Smith v. C., 54 Pa. 209. C. v. Rodman, 34 Super, 612. C. v. Rice, 28 Co. Ct. 752. C. v. Morton, 1 Kulp, 276. C. v. Jones, 10 Phila. 211.

[61]3 A. & E. Encyc. 253, 12 Cyc. 177, "The application of the law of attempts to such offenses would be irrational as well as inconvenient.." Crim. Law Mag. vol. 4, p. 14 per Wharton.

[62]C. v. Jones, 10 Phila. 211.

tences was morally wrong of itself and not simply wrong because prohibited by statute.[63]

There is authority for the proposition that there can be no attempt to commit a crime which is itself a mere attempt to do an act or accomplish a result.[64] Thus it has been held that there cannot be an attempt to commit embracery because embracery itself "consists of a mere attempt to do an act or accomplish a result."[65]

It has also been held that there cannot be an attempt to commit an assault because an assault is itself merely an attempt to commit a battery.[66] According to the weight of authority, however, one may be guilty of an assault without having attempted a battery, and if it is held that there cannot be an attempt to commit such an assault, it must be upon some other principle than that there cannot be an attempt to commit an attempt.[67]

By some courts it is held that there cannot be an attempt to commit aggravated assaults because aggravated assaults are nothing more than attempts to commit robbery, rape, murder, etc.,[68] but in New York a sentence for an attempt to commit an assault in the first degree (which was defined by statute as an assault with a deadly weapon with intent to kill) was sustained by the Supreme Court saying, "To make the *assault itself* it was

[63]Symons' Case, 29 Co. Ct. 606 "The distinction is not well established or well founded." S. v. Butler (Wash.) 35 Pac. 1093.

[64]12 Cyc. 179, 3 A. & E. 253, "The refinement and metaphysical acumen that can see a tangible idea in "an attempt to attempt to act" is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity." Wilson v. S., 5 Ga. 305. "An attempt to attempt is hardly understandable." Rex v. Menary 23 Ont. L. Rep. 323. Palmer v. P., 32 Ill. 359.

[65]S. Sales, 2 Nev. 778: "any attempt or effort to corruptly influence a juror, whether it be successful or not, is itself embracery."

[66]Wilson v. S., 53 Ga. 205, Reg. v. King, 14 Cox, 434. In Rex v. Menary, 23 Ont. L. Rep. 320, Meredith, J., said "It is not necessary to consider whether there can be such an offense as an attempt to commit an assault, but as assaults are in many cases no more than attempts I do not at present see how there can be.

[67]An attempt to commit a simple assault without battery would probably be regarded as of too slight consequence to deserve punishment. In Leblanc v. Reg. 2 Quebec it was held that a verdict of attempt to assault was not irregular.

[68]Clark & Marshall 179. Brown v. S., 7 Tex. App. 569.

necessary that the defendant should be so near as to be able to strike him and should attempt to do so. To make an *attempt to assault* required no more than that the defendant should arm himself with a weapon and endeavor to place himself in a position to use it in the execution of his intention to kill.''[69]

There are a number of statutory crimes which are generally classed as aggravated assaults which involve the actual infliction of corporal injury. Of course there can be an attempt to commit these crimes.[70]

The Supreme Court of Washington has held that where the the commission of a crime requires the cooperation of two persons, one person alone can not be guilty of an attempt to commit the crime and that, therefore, it being impossible for one person alone to commit adultery, one person can no more attempt to commit adultery than he can attempt to commit riot.[71] This is not the law. In states where the consent of both parties to the carnal knowledge is an essential element of incest, it has been held a man who atttempts to have carnal knowledge of a woman within the prohibited degrees of relationship, is guilty of an attempt to commit incest, tho the woman refuses to have such intercourse,[72] and in states where a solicitation is considered an attempt, a solicitation to commit adultery has been held indictable.

A California case is sometimes cited for the proposition that an attempt to suborn perjury is not an offense at common law.[73] The court simply decided that an information which charged that the defendant had ''attempted to procure another to commit perjury'' without alleging the acts done, etc. was insufficient. An attempt to suborn perjury is a crime at common law.[74]

PROXIMITY.

The law does not punish as an attempt every act which is done in furtherance of a design to commit a crime and one of

[69]P. v. Connell, 14 N. Y. S. 485. S. v. Herron, 12 Minn. 230, 29 Pac. 819 accord. S. v. Woods, 19 S. D. 260 quere. These decisions are consistent with those which hold that an attempt to commit a crime differs from an assault with intent to commit a crime. See ante.

[70]C. v. Baker 18. D. R. 1018.

[71]S. v. Butler Wash. 33 Pac. 111.

[72]P. v. Gleagon 99 Cal. 359, 33 Pac. 111.

[73]3. A. & E. Ency. C. 253, citing P. v. Thomas 63. Cal. 482.

[74]S. v. Holding 1. McCord S. C. 31 See 17 Ann Cas. 1582.

the chief difficulties in the law of attempts is in determining the relation which the act done must sustain to the intended offense.

It has been stated in varying language that the act done must closely approximate the actual commission of the offense.[75] Thus it has been said that the act done "must proximately lead to the commission of the crime,"[76] "must be proximate and not remote,"[77] "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.[78]

It is frequently said that the act done must amount to more than mere preparation[79] but what constitutes mere preparation is nowhere definitely stated. Indeed the term "preparation" seems to be a mere catchword used by the judges to designate those acts which they do not think sufficiently proximate to be attempts. In some cases the term is used to designate those acts which precede the last act which is contemplated by the actor as necessary to effectuate the crime, but under this definition some acts of preparation may amount to an attempt, for it is well settled that the act done need not be "the last proximate act prior to the consummation of the attempted crime."[80]

Occasionally it is said that the act must be one "which will apparently result in the crime unless interrupted by some intervening cause independent of the actor's will"[81] or "by extraneous circumstances over which he had no control."[82] Such statements are incorrect. Acts which fail to accomplish an intended crime are frequently punishable as attempts although the failure was not due to causes over which the defendant had no control. An act may constitute an attempt although to complete the crime it must be followed by other acts of the defendant himself and one may be guilty of an attempt although he re-

[75]See S. v. Hurley 79. Vt.

[76]C. v. Fhaherty 25 Super. 492.

[77]C. v. Clark 10 Co. Ct. 444.

[78]C. v. Eagen 190 Pa. 10.

[79]C. v. MacGregor, 6 D. R. 345. C. v. Eagen, 190 Pa. 10. C. v. Fhaherty, 25 Super. 492.

[80]C. v. Tadrick, 1 Super. 566. C. v. Eagan, 190 Pa. 10, C. v. Rodman, 34 Sup. 608. C. v. George, 12 Super 1. C. v. Bell, 13 Sup. 579. Stabler v. C., 95 Pa. 392. C. v. Clark, 10 Co. Ct. 444.

[81]C. v. MacGregor, 6 D. R. 345.

[82]C. v. Tadrick, 1 Super. 566.

pented and gave up the project. Both of these cases are opposed to the test just stated. Indeed under such a test one who shot at another but missed because his pistol was poorly aimed would not be guilty.

Common types of attempt are: (1) an act which sets in motion natural forces which would accomplish the crime in the expected course of events but for an unseen interruption as, for instance, where a candle is lighted and placed so that it will eventually set fire to a house but is blown out by the winds or put out by the police; (2) an act which would accomplish the crime but for a mistake of judgment in a matter of nice estimate, as where a pistol is fired at a man but the bullet misses him. In either of these cases the actor has done his last act.[83]

Where the act done is such that further acts are contemplated by the actor as necessary before the substantive crime can be committed, the question is one of proximity for the solution of which the courts have furnished no simple and infallible test. It has been truly said that it is impossible to formulate a rule "which will reconcile the existing authorities and serve as a guide in all future cases."[84] The question must be determined on the facts of each case with references to the greatness of the crime attempted and the degree of apprehension which it is calculated to excite. The analogies furnished by other cases will usually be too imperfect to give much help and it is impossible to decide any case without doing violence to some author or some adjudicated case.[84a] The degree of proximity required is perhaps inversely proportional to the gravity of the crime and the apprehension which it is calculated to excite.[85]

A series of dicta and decisions by the Pennsylvania courts will illustrate the nicety of the distinctions involved. X, intend- to commit burglary procures a complete set of burglar implements; he is not guilty of an attempt. He meets a confederate at a distance from the house; he is not guilty. He walks toward the house; he is not guilty. He arrives in front of the house and watches it; he is not guilty. He prepares some of his im-

[83]C. v. Peaslee, 177 Mass. 267.

[84]Stokes v. S., 92 Miss. 415, 21 L. R. A. N. S. 898. Cornwell v. Asso. 6 N. D. 437, 40 L. R. A. 437.

[84a]Stokes v. S., 92 Miss. 415, 21 L. R. A. W. S. 901.

[85]See C. v. Kennedy, 170 Mass. 18.

plements; he is not guilty.[85a] He breaks the gate of the yard; he is guilty.[86] He enters the yard without breaking the gate; he is not guilty.[87] He hides in the barn; he is not guilty. He assaults the owner in the yard; he is guilty.[88] He goes upon the steps; he is guilty.[89] He inserts key in lock or places a ladder against the window; he is guilty.[90] He removes moulding or breaks transom; he is guilty.[91]

Usually an act which is expected to bring about the desired result without further interference on the part of the actor is sufficiently proximate, but this is not always so. Thus soliciting another to commit a crime and handing the instrument with which to commit it is not an attempt.[92]

FAILURE OF THE ATTEMPT.

"A failure to consummate the intended crime is as much an element of an attempt as the specific intent and the overt act."[93] The failure of an attempt may be due to an abandonment of the criminal design or to the impossibility of its consummation. This impossibility may be due to (1) the personal incapacity of the actor; (2) the inadequacy of the means used; (3) the non-existence or unsuitability of the object upon which the criminal act is to operate.[94]

PERSONAL INCAPACITY OF THE ACTOR.

The incapacity of the actor may be either legal or physical. A person is legally incapable of commiting a crime when the law holds him not to be guilty although he has done the precise physical acts which constitute the crime. Where one is legally incapable of committing a crime he cannot be guilty of an attempt to commit that crime. Accordingly, in those jurisdictions where it is held that a boy under fourteen is incapable

[85a]C. v. Eagan 190 Pa. 10, C. v. Clark 10 Co. Ct. 444.

[86]C. v. Smith 6 Phila. 305.

[87]C. v. Eagan 190 Pa. 10.

[88]C. v. Eagan.

[89]C. v. Clark 10 Co. Ct. 444.

[90]C. v. Smith 6 Phila. 305.

[91]C. v. Fhaherty 25 Super 490, C. v. Morton 1 Kulp 280.

[92]Stabler v. C. 95 Pa. 318.

[93]C. v. Housell 20 D. R. 433.

[94]These three causes of impossibility are closely related but for convenience will be discussed separately.

of committing rape, it is also very properly held that he cannot be guilty of an attempt to commit rape.[95] Had he done all that he had intended to do, he would not have been guilty of rape. Consequently any steps falling short of success cannot be an attempt to rape.[96] This doctrine has been criticized on the ground that "an intention to do an act does not necessarily imply an ability to do it"[97] but this criticism loses sight of the fact that the boy is not exempted from responsibility for the completed crime only in case he cannot perform the physical acts involved therein, but whether he can perform them or not, and even though he does actually perform them.

A person is physically incapable of committing a crime when he cannot perform the physical acts which constitute the crime. In the ordinary affairs of life one frequently attempts to do things which he is physically incapable of doing and there seems to be no good reason why the law should hold that one cannot attempt a crime which he is physically incapable of committing. Accordingly it is held that physical incapacity unknown the accused is not a defense to a charge of attempt.[98] Thus one who is impotent may be guilty of an attempt to rape,[99] and in jurisdictions where there is a prima facie, but not conclusive, presumption that a boy under fourteen years is physically incapable of committing rape, it should also be held that such a boy may be convicted of an attempt to commit rape, whether he is physically capable of completing the offense or not, because had he done all that he intended to do he would have been guilty of rape.[100]

INADEQUACY OF MEANS

There has been a considerable discussion in the cases as to the extent to which the means employed must be adopted to the

[95]3 A. & E. Encyc. 270, 11 Ann. Cas. 1064.

[96]See Supra. A crime must have been intended.

[97]C. v. Green 2 Peck 380. J. H. Beale in 16 Har. L. R. 499. Davidson v. C. 20 Ky. L. R. 540, 47 S. W. 313.

[98]3 A & E Encyc. 270, contra Nugent v. S. 18 Ala. 521.

[99]Terr v. Keyes 5 Dak. 244, 38 N. W. 440.

[100]Clark Crim. L. 136. It has been held, however, that where the presumption of incapacity is merely prima facie one cannot be convicted of an attempt in absence of evidence showing that he was capable of completing the crime. S. v. Fisk, 15 N. Dak. 589. It is difficult to justify these decisions.

accomplishment of the intended crime. In a few cases it has been held that the means employed must be actually capable of accomplishing the intended result.[1] This doctrine unduly limits the law of attempts. The reason why an attempt is not effectual is generally the inadequacy of the means employed.[2] Moreover, of what means can it be said that they are absolutely capable of producing an intended result? Of what poison can it be said that it will not, in the person for whom it is prepared, find a system so tempered by antidotes as to resist its effects? How can it be surely proved that a particular wound will be deadly.[3] And if the means are apparently adequate the effect upon the public and upon the person against whom the attempt is directed is the same as if the means were actually adequate. The overwhelming weight of authority is therefore to the effect that the means employed need not be actually adequate.[4]

By a number of authorities it is said that the means employed must not be obviously unsuitable[5] and that therefore an attempt to kill by witchcraft or by striking with a small stick is not a criminal attempt.[6] The fact that the means used were obviously inadequate would be evidence that the accused did not intend to commit the crime[7] but the present doctrine seems not to be thus limited in its effect. That the actor thought the means were suitable is not sufficient if they were obviously unsuitable. "When the means used are so preposterous that there is not even apparent danger then an indictable attempt is not made out."[8]

It is frequently said that it is necessary that the means should be apparently adequate[9] but what is meant by apparent adequacy is nowhere sufficiently explained. Under this view

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[1]See Bishop Crim. L. sec. 740. Clarissa v. S., 11 Ala. 37. S. v. Swails, 8 Ind. 525. Henry v. S., 18 Ohio, 32.

[2]Mullen v. S., 45 Ala. 43.

[3]4 Crim. L. Mag. 12.

[4]3 A. & E. Encyc. 267. Clark and Marshall 187.

[5]Bishop Crim. L. 749. Clark and Marshall 187.

[6]Att. Gen. v. Sillen, 2 H. & C. 525. Kunkle v. S., 32 Ind. 420.

[7]Kunkle v. S., 32 Ind. 231.

[8]Wharton Crim. L. 183. See C. v. Kennedy, 170 Mass. 137.

[9]3 A. & E. Encyc. 267. Bishop Crim. L. 738, 750. Clark & Marshall, 187 and cases cited.

it is always necessary, but not necessarily sufficient, that the means appear adequate to the actor, and it has been said that if the means appear adequate to both the actor and the person against whom the attempt is directed an attempt is made out,[10] but this is not necessary for an attempt may be directed against a person who is absolutely unconscious thereof.[11] One author has said that the means "must be, to the apprehension of a reasonable man, calculated to effect the purpose,"[12] and another that "even the outward seeming adaptation need not be perfect" for "in most cases wherein an attempt has failed a careful observer could have discerned the defects which lead to failure" and that "if such defect was not absolutely obvious even to the casual eye" the attempt should be punishable because "it did not prevent the disquiet against which the criminal law protects the community."[13]

The test applied by some courts is that of proximity in the determination of which the courts have considered the gravity of the crime attempted, the uncertainty of the result, the seriousness of the apprehension felt, the nearness of the act done to the result intended, the harm likely to result from the act even though it does not effect the result intended, and from there considerations have decided whether the act done was deserving of punishment.[14]

Applying these doctrines it has been held that one may commit an attempt by pointing an empty[15] or defectively loaded[16] gun, or by administering poison in such quantity[17] or form[18] as to be harmless.

There appear therefore to be three theories as to the adequacy of the means used, each of which finds some support in the cases, which have been classified as follows: (1) the subjective theory; (2) the objective theory; (3) the relative sub-

[10]Wharton Crim. L. 182.

[11]Chapman v. S., 78 Ala. 463.

[12]May Crim. L. 184.

[13]Bishop Crim. L. 750.

[14]See C. v. Kennedy, 170 Mass. 18.

[15]S. v. Shepard, 10 Ia. 126.

[16]Mullen v. S., 45 Ala. 43.

[17]C. v. Kennedy, 170 Mass. 18.

[18]Reg. v. Cluderoy 61 C. C. L. 90.

jective theory. According to the first it is sufficient that the actor thought that the means which he employed were adequate; according to the second the means employed must be actually adequate; according to the third which is asserted by the weight of authority the means employed must be "apparently adequate."

UNSUITABILITY OF OBJECT.

A similar conflict exists in the authorities as to the rule to be applied where the attempt fails of success because of the non-existence or unsuitability of the object upon which the criminal act is to operate.

The question has frequenly arisen where an attempt to pick an empty pocket was made. In an early English case such an act was held not to be punishable as an attempt because "an attempt can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully."[19] This case was subsequently overruled in England and it is now the settled rule in both England and the United States that an attempt to pick a pocket is a criminal attempt though unknown to the actor the pocket was empty.[20] In an early Pennsylvania case it was held that an indictment for an assault with intent to steal was sufficient though it did not state the particular goods which the defendant intended to steal. Duncan, J., said, "The intention of the person was to pick the pocket of whatever he found in it and although there might be nothing in the pocket the intention was the same."[21] Similarly it has been held that one may be guilty of an attempt to steal from an empty safe[22] or drawer.[23]

The doctrine of these cases has been extended to other cases. Thus it has been held that one may be guilty of an attempt to commit an abortion upon a woman who was not pregnant,[24] of an

[19]Reg. v. Collins, 9 Cox C. C. 497 Beale 138.

[20]Reg. v. Brown, 24 Q. B. D. 359, 3 A. & E. Encyc. P. v. Moran, N. Y., 10 L. R. A. 111.

[21]Rogers v. C. 5 S. & R. 463.

[22]Harvick v. S. 49 Ark. 519.

[23]Clark v. S. 86 Tenn. 311. See also S. v. Heal, 370 S. 108. These cases are not inconsistent with the proposition that *the physical act* which the actor intends to do must constitute a crime because the physical act intended was not merely the putting of the hands in the pocket, etc., but also clasping it around something in the pocket and pulling it out.

attempt to obtain money by false pretence from one who knew that the pretences were false,[25] of an attempt to extort money from one who could not be frightened because acting in concert with the police,[26] of an attempt to enlist for foreign service one who was not physically fit to be accepted,[27] of an attempt to bribe a public officer tho the officer had no legal authority to bring about the result desired.[28] In all of these cases the actor must be ignorant of the fact that the object upon which the act is intended to operate does not exist or is unsuitable. Otherwise the requisite specific intent would necessarily be lacking.[29]

Relying upon there cases it has been stated as a general proposition that where an act is done with intent to commit a crime, it constitutes a criminal attempt altho because of the non existance or unsuitability of the object to be operated upon the consummation of the crime is impossible.[30] This proposition cannot be accepted without qualification. The aim of the law is not to punish sins but to prevent certain external results and an act tho done with intent to commit a crime may create no apparent danger and no perturbation in the peaceful order of things and be therefore too small for the law to notice. To constitute an attempt "the act must be sufficient in magnitude and proximity and of such apparent aptitude as is calculated to create to outside observation an apprehended danger of its commission."[31] The text writers and courts are therefore agreed that one who attempts to ravish an effigy or who shoots at a dummy or shadow is not guilty of an attempt.[32] If, however, the person intended to be killed was so near that shooting at the shadow or dummy endangered or causeed him to fear for his life it would be of sufficient importance for the law to notice and an attempt would be made out. Thus where a man,shot at a particular spot on a

[24]R. v. Goodchild 61 E. C. L. 293. 3 A. & E.Encyc. 27.

[25]P. v. Mills. 7 Cox. 263, Beale, 727, Symons Case 29 Co. Ct. 606.

[26]P. v. Gardner 144 N. Y. 119.

[27]C. v. Jacobs 9, Allen 275.

[28]In Re Bozeman 42 Kan. 451, 22 Pac. 638.

[29]3. A. & E. Ency C. 272.

[30]3 A. & E. Encyc. 271, See also Bishop Crim. L. 752, Clark Crim. L. 130.

[31]Bishop Crim. L. 737.

[32]Clark Crim. L. 134, May Crim. L. 168, Reg. v. Pherson, Dears & B. Crim. Cas. 201, P. v. Gardner, 25 N. Y. S. 1072.

roof or into a particular room where he supposed another was located, he was guilty of an attempt, tho the other was really at another point on the roof or in another room.[33]

The general doctrine that a person attempting to commit a crime, which under the circumstances he is incapable of commiting, may be criminally responsible, as applied to cases where the act done is not criminal apart from the specific intent with which it is done, has been criticised on the ground that under it persons are punished simply for a mental error. The actor would not have performed the act if he had known that he could not consummate the crime and as his act is not criminal apart from his intent his sole guilt consists in a mental error, in falsely supposing that an act innocent in itself would accomplish an unattainable result.[34]

ABANDONMENT OF THE CRIMINAL DESIGN.

One who has resolved to commit a crime and has proceeded so far in its execution that his acts amount to a criminal attempt may abandon his evil design and thereby prevent its complete accomplishment. It is universally held that where such abandonment is involuntary, e. g. because of fear of detection, belief of physical inability, etc., it is not a defense, but there is authority to the effect that where such abandonment is free and voluntary, there being no outside causes prompting it, the rule is different.[35] This doctrine, which is based on the theory that the offender so long as he is capable of arresting his evil purpose should be encouraged to do so and that to punish him after abandonment, would be to destroy the motive for such abandonment, has found little favor.[36]

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[33]P. v. Lee Kong 95 Cal. 666, 17 L. R. A. 626, S. v. Mitchell 170 Mo. 633, 71 S. W. 175. See Stokes v. S. 92 Miss. 415, 21 L. R. A. N. S. 898 where one lying in wait for another was held guilty of an attempt tho the other never came near. This case was decided under a statute providing that "any overt act towards the commission of a crime should constitute an attempt."

[34]Robinson's Elementary Law sec. 574. See also Stephen's His. Crim. L. vol. 2, p. 225.

[35]Wharton's Crim. L. 187.

[36]In Stephens' Hist. Crim. L. vol. 2, p. 226, it is said, "It is not easy to say on grounds of expediency whether it is or not wise to lay down the rule that an attempt from which a man voluntarily desists is no crime. It would be dangerous to lay down such a rule universally.

In two Pennsylvania cases the court seems to have been of the opinion that such voluntary abandonment would leave the actor guiltless,[37] but in a later case the Supreme Court said, "Subsequent abandonment might prevent the completion of the crime but could not save from the consequences of acts done."[38] The great weight of authority in other jurisdictions is to the same effect. "A crime once committed may be pardoned but cannot be obliterated by repentance."[39]

If the criminal design is abandoned before an act sufficient to constitute an attempt is committed no guilt is incurred,[40] and evidence of a voluntary[41] but not an involuntary[42] abandonment even after such an act has been committed is admissible to negative the existence of the specific intent.

W. H. HITCHLER.

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[37]C. v. Tadrick, 1 Super. 566. C. v. MacGregor, 6 D. R. 344.

[38]C. v. Eagen, 190 Pa. 10.

[39]Lewis v. S. 35 Ala. 389. Glover v. C. 86 Va. 382, Beale 133, P. Marrs. 125 Mich. 376. S. v. Hayes, 78 Mo. 317.

[40]Parkard v. S. 30 Ga. 757. "Every criminal design has its *locus poenitentiae.*" Shannon v. C. 14 Pa. 228.

[41]S. v. Allen, 47 Conn. 121.

[42]Taylor v. S. 50 Ga. 79, Reg. v. Bam 9 Cox 98.

# MOOT COURT

## THE FARMERS' BANK v. JOHN FILSON.

### Liability of Indorser of Non-Negotiable Note—Knowledge by Holder of Maker's Inability to Pay Not Dispensing with Necessity of Presentment.

STATEMENT OF FACTS.

Adam Kirk made a note for $300 payable to Filson in three months at 79 Arch Street, Du Bois (the residence of Kirk). This note was discounted for Filson by the plaintiff bank. On the day it became payable, the cashier of the plaintiff telephoned to Kirk demanding that he pay it. Kirk replied that he could not pay for a week, but would then pay. The cashier replied that he must have payment that day and would send a messenger to get payment. Kirk replied that that would be useless, since he could not pay. The bank then had the note protested and notice of protest duly given to Filson whom it now sues on his indorsement.

Edwards for Plaintiff.
Rooke for Defendant.

OPINION OF THE COURT.

MARIANELLI, J.—Ordinarily presentment of a note to the maker thereof is one of the conditions precedent to the liability of an endorser. This was the law prior to the passage of the Negotiable Instrument Act of May 16, 1901, and is the law now. On this point sect. 134 of the act provides: "The instrument must be *exhibited* to the person from whom payment is demanded and when it is paid must be delivered up to the party paying it." The word "exhibited" means to present, show or produce the instrument to the persons from whom payment is demanded.

But evidently the framers of this act did not contemplate that there should always be an exhibition of the instrument to the person who is liable thereon, for in sect. 142 they have provided that "presentment for payment is dispensed with (1) where after the exercise of reasonable diligence presentment as required by this act cannot be made; (2) where the drawee is a fictitious person and (3) *by waiver of presentment expressed or implied.*"

It is under subdivision (3) that we base our decision. We hold that there was in this case an express waiver of presentment by Kirk, the maker. In this busy age when time is so valuable, it was quite natural for the cashier of the bank to call up by telephone the maker of the note in order so ascertain if presentment would have to be made. Having been told that the maker could not pay, if presentment were made, we are unable to see any wisdom in the law, if it required the holder to go

through the idle ceremony of presenting the note for payment, knowing that it would not be paid. Law is said to be "the perfection of common sense" and if we were to hold that presentment in this case was necessary, the definition would be strikingly inapplicable.

A resort to the reason why presentment is acquired will make clearer the ground of this decision. The party making payment insists on the presentment of the paper by the party demanding payment, in order to make sure that it is at the time in his possession and not outstanding in another; for, if at the time he makes payment it is outstanding, and held by a *bona fide* holder for value, he will be liable to pay it again, and a receipt taken will be no protection. Ogden Neg. Inst. p. 169. Obviously, if the maker cannot or will not pay, he is not confronted with the probability of a double payment, and he needs no protection from a danger which cannot possibly visit him. Nor can the defendant complain that the maker was not given an opportunity to pay. The reason of the rule being absent, the rule itself does not apply. *Cessante ratione ipsa lex cessat.*

Not only is our decision sustainable on principle, but there is authority as well. In Sherer v. Easton Bank, 33 Pa. 134 (decided in 1859, but the law being the same, since, in this respect the act of 1901 is declaratory of the common law) it was held that if the maker of a note payable at a bank had no funds in the bank when it fell due, demand of payment was unnecessary. In that case the absence of funds in the bank dispensed with the formality of demand and presentment; in our case the maker himself accomplished the same object. Hollowell & Co. v. Curry, 41 Pa.332.

Gilpin v, Savage, 112 N. Y. S. 802, holds that the statutory right of the vendor to exhibition of the note is waived and presentment is sufficient where he was called up by telephone by the holder, asked what he was going to do about it and replied that he would not pay. In that case, the same as in the case at bar, the note was made payable at the home of the maker on a certain street. Knowledge of the maker's inability to pay the note when due, on account of his insolvency, was held to amount to an implied waiver of presentment. O'Bannon Co. v. Curran, 113 N. Y. S. 369. If the knowledge of such circumstances was strong enough to raise an implied waiver, *a fortiori* express information from the maker that he will not be able to pay, if presentment is made, makes our position free from doubt.

We are aware that the note in suit is not a negotiable instrument, because it is "payable to Filson" and not to his order or bearer. But the plaintiff is the immediate endorsee of Filson, who was the payee of the note in suit; and in respect to the immediate indorsee of the payee of a non-negotiable promissory note, the indorsement will create the same liabilities and obligations as the indorsement of a negotiable note. Haber v. Brown, 101 Cal. 445. The defendant may be treated as having considered his indorsemeut on the note as though it were negotiable. At any rate he is not defending on the ground that an endorser is not liable on a non-negotiable instrument. On the other hand, he has chosen to avoid liability on another ground which we have already held to be untenable.

Our conclusion is, that where the immediate indorsee of the payee of a non-negotiable promissory note is informed by the maker thereof, on the day of maturity, that if presentment is made he will not be able to pay, and the endorsee protests the note and notice of protest is duly given to the indorser, the latter is liable on his indorsement.

Judgment for plaintiff.

OPINION OF SUPERIOR COURT.

The note against the indorser of which this suit is brought is not a negotiable note, and the question presented is, therefore, what is the liability of an endorser of a non-negotiable note to his immediate endorsee. Upon the question there exists a great conflict of authority In some states it is held that by such indorsement the same liability is created as is created by the indorsement of a negotiable instrument. Haber v. Brown, 101 Cal. 445. In some other states the liability of such indorser is likened to that of a surety against whom the note is collectible provided due diligence is exercised in proceeding against the maker. Castle v. Condee, 16 Com. 223. In still other states it is held that such indorsement is equivalent to the making of a new note and is a direct, positive, unconditional undertaking on the part of the indorser to pay the indorsee. Billingham v. Brown, 10 Ia. 317; Crowell v. Hewitt, 4 N. Y. 491. In a majority of jurisdictions, however, the liability of such indorsee is defined as that of an assignor of a chose in action. Steere v. Trebilcock, 108 Mich. 464; Trenton Bank v. Gay, 70 Mo. 627; South Bend v. Poddock, 31 Kan. 510; Edgewood Co. v. Nowland, 19 Ky. L. Rep. 1740; Pratt v. Thomas, 2 Hill (S. C.) 654.

The last view has been adopted by the courts of Pennsylvania. Wright v. Hart, 44 Pa. 454; Citizens Bank v. Prollet, 126 Pa. 194; Gray v. Donohoe, 4 Watts 400; Trevall v. Fitch, 5 Wharton 325; Charnley Dulles, 8 W. & S. 353; Folwell v. Beaver, 13 S. & R. 311; Shaffstal v. McDaniel, 152 Pa. 598; Wilson v. Martin, 74 Pa. 159; Howard v. Nichols, 1 Law Times 109.

The assignor of a chose in action impliedly warrants to the assignee that the chose assigned is a valid subsisting obligation in his favor against the debtor, but he does not warrant the solvency of the debtor, or that it, the debt, will be paid at maturity. Flynn v. Allen, 58 Pa. 482; Mohlers Ap. 5 Pa. 318; Jackson v. Crawford, 12 L. & R. 165; Lloyd v. McNamara, 19 Pa. 130; Stroh v. Hess, 1 W. & S. 153.

The note assigned in this case was a valid subsisting obligation. The judgment of the learned court below is therefore reversed.

In conclusion we wish to say that even if the note were negotiable, it is at least doubtful whether the position taken by the learned court below could be sustained. In Gilpin v. Savage, 201 N. Y. 167; 94 N. E. 656, 34 L. R. A. 417, reversing Gilpin v. Sadage, 112 N. Y. S. 802, it is held that a demand by telephone of the maker for payment of a note which is payable at the maker's residence, is not a sufficient presentment to charge an indorser, although the one making the demand had the note in his possession at the time the demand is made and so stated to the maker, who refused to pay.

Judgment reversed.

# ISAAC TRESCOTT v. MARTIN GREGORY.

## Deeds—Revesting of Titles—Statute of Frauds—Intentional Destruction of Evidence of Title Generally Ineffective to Revest Ownership—Exception to Rule.

### STATEMENT OF FACTS.

Trescott conveyed a tract of land to Gregory and his heirs for $5,000. Two years later Gregory, being indebted, and desiring to convert the land into money, agreed with Trescott, that he, Trescott, should pay him $5,000; and that he, Gregory, would destroy the deed previously made to him by Trescott, so as to revest the land in the latter. The money was paid to Gregory and he burned the deed, and he accepted an oral lease, from year to year, of the premises for the rental of $300 per year. After occupying the land for four years as tenant, Trescott demands possession. This is ejectment.

Warrington for Plaintiff.
Landis for Defendant.

### OPINION OF THE COURT.

LONG, J.—Trescott sold land to Gregory. The deed was delivered to Gregory and the five thousand dollars to Trescott. The sale was consummated.

The questions before the court are: first, whether the destruction of the deed revested title in Trescott, and if not, then, secondly, whether such destruction with intent to revest title is an equitable exception to the rule requiring conveyances of land interests to be in writing.

The first question must be answered in the negative, "An estate once vested, cannot be divested by the mere annulment and cancellation of the deed." Tate v. Clement, 176 Pa, 550.

Two years after the original conveyance Gregory became indebted and Trescott and Gregory agreed to a rescission of the executed contract. Accordingly, Trescott paid back the $5,000 and Gregory destroyed the deed with the intention to revest title in Trescott. Gregory then rented the property and continued in possession four years, paying to Trescott a yearly rental of $300.

After four years elapsed, Trescott wishing possession of the land brings ejectment, Trescott has believed himself to be the owner of the land for four years. During this time he has allowed Gregory to keep the $5,000, and Gregory in turn has acknowledged Trescott as the owner. He has paid the rent and claimed no rights of ownership in the land. Does Gregory's conduct now preclude him from asserting any such rights of ownership?

It was held in Potter v. Adams, 23 South Western, 490 (Missouri 1894) a grantee who voluntarily destroys an unrecorded deed for the purpose of revesting title in the grantor, is estopped to assert title under such deed. C. J. Black, in his opinion in this case said: "The destruction and cancellation of a deed after it has been delivered does not revest

title in the grantor. Where a deed has been lost or destroyed by accident or mistake, evidence may be introduced of its existence, loss and contents. But a different rule prevails where the grantee has voluntarily destroyed an unrecorded deed for the purpose and with the intention of revesting title in the grantor. In such a case he will not be allowed to prove the contents of the destroyed deed by parol evidence." Potter v. Adams, 125 Mo. 115; Thomas v. Scott, 221 Mo. 271.

In Gugins v. Van Gorder, 10 Mich. 523, a case where the deed was destroyed with the same intention, the Court said: "Is the defendant estopped from introducing parol evidence of title in the original grantor (Goodrich)? We think he is, under the circumstances stated in the case. Secondary evidence cannot be received to prove a fact without first laying a foundation for it in accounting for the absence of that which is primary. The deed is the best evidence of title. That is not produced, and its destruction is accounted for in a way that shows it would be dishonest in him to claim anything under it. It was destroyed in pursuance of an agreement between him and his grantors, after the purchase money had been returned to him with a view of revesting title. It was done with his consent, and for a valuable consideration. The law will not recognize such a state of facts as an excuse for the non production of the deed."

Where the law reqnires a transaction to be in writing it cannot be proved by other evidence. Greenleaf on Evidence, Vol. 1, No. 86; Statute of Frauds, Act Apr. 22, 1856, Vol. 4, P. & L. Dig. 533.

The facts of the case of Bane v. Sutton, 3 Penny. 199, very closely resemble those of the present case. Sutton conveyed a house to Johnson, in June, 1871, giving notes for the price. These notes not being paid in February, 1882, Sutton demanded payment, whereupon Johnson, living in the same house, went ont, procured his deed, and the notes belonging to Sutton, brought them back, threw them into the stove, and burned them aaying, "There, now, you are paid. You have got your property back just as you had it before." Johnson then rented the house from Sutton until 1877, when Johnson's heirs got possession of some of the rooms of the house (a hotel) claiming under Johnson's title. Holding that the ownership was revested in Sutton, the court remarks: "It is not the case of a parol sale from Johnson to Mrs. Sutton so as to permit the statute of frauds to defeat the effect of the act. It is such an act of spoliation, followed by the subsequent action of the parties, as to estop him and his heirs from invoking the aid of that deed."

In the present case Gregory's conduct was similar to that of Johnson. Such were Gregory's acts that he is precluded from asserting rights of ownership. These acts were: (1) his destruction of the deed and assertion never to claim the land; (2) his receiving back the $5,000, and (3) his acting during four years in conformity with his declared intention, by not claiming the land as his own, and by recognizing the vendor as owner in leasing from him the property.

To the second question the answer is, that such a destruction, with an intent to revest title, is in the nature of an estoppel, and Gregory is precluded from claiming title.

Judgment for plaintiff.

## OPINION OF SUPERIOR COURT.

The courts are almost unanimous in declaring that the destruction or cancellation of an unrecorded deed or its redelivery to the grantor for that purpose with intention to reinvest the title in the grantor, will not have the effect of reinvesting the title in the grantor, for the reason that title to lands cannot under the statute of frauds be conveyed by parol. Lutz v. Matthewa, 37 Super Ct. 354; Tate v. Clement, 176 Pa. 550; Cravener v. Bower, 4 Pa. 259; 18 L. R. A. N. S. 1167; Refiner v, Bowman, 53 Pa. 313.

In spite, however, of the general language in which this rule has been aaserted, many authorities annul its effect as *between the parties* by declaring the grantor to have an equitable title sufficient to entitle him to the protection of a court of equity, and to defeat any right of action of the grantee for the property. 18 L. R. A. N. S. 1169. This doctrine is based upon the ground of an estoppel. 9 A. & E. Encyc. 164. It finds support in Clauer v. Clauer, 22 Super. Ct. (Pa.) 395. In this case a married woman purchased land, took a deed therefor, paid a part of the purchase money, and took possession. Subsequently she surrendered possession to the grantor, gave back the deed, and received back the part of the purchase money which she had paid. As to the effect of these acts on her part the court said, "Her surrender of the deed to be canceled with the intention of reconveying the title in the grantor, estops her as effectually as if she had reconveyed it. She put it out of her power at that time to produce a deed to sustain a title; the fact that she was a married woman does not change the rules and decisions which have been enforced time out of mind to prevent frauds." See also Barncord v. Kuhn, 36 Pa. 383.

It will be observed, however, that in this case, as well as in Bane v. Sutton, 3 Pennypacker, 199, upon which the learned court below relies, possession was redelivered to the grantee and there was a return of the purchase money or of the obligations given therefor. In these cases there was in reality a parol repurchase of the land followed by the payment of the purchase money and a taking of possession. These facts were of themselves sufficient to take the cases out of the statute of frauds under the doctrine of part performance.

In the present case Trescott did not take possession of the lands. He cannot therefore rely upon the doctrine of part performance. "Exclusive possession taken and maintained in pursuance of the parol contract is an essential ingredient of part performance." P. & L. Dig. Dec. vol. 2 oc 34702 and cases cited.

To hold that the plaintiff in the present case is entitled to recover, will require us to create an additional exception to the statute of frauds. We do not wish, and are not compelled by the authorities, to do so.

In Finks' Estate, 21 Pa. the question whether the redelivery of a a deed to the grantor was effectual to work a rescission of the deed, was expressly left undecided, In Tate v. Clement 176 Pa. 550, S. conveyed land to M., his daughter, in fee, by a deed which was not recorded. The plaintiff claimed that subsequently this deed with the consent of both parties was "annulled, withdrawn and cancelled." The court said, "The plaintiff's own case showed that he had no title. An estate once

vested cannot be divested by the mere annulment and cancellation of the deed." To the same effect is Lutz v. Matthews, 37 Sup. 359.

In Cravener v. Bowser 4 Pa. 259 it appeared that Bowser, by written articles had sold land to Flanner who entered, cleared, and cultivated it. Subsequently Flanner "threw up his bargain" with Bowser by a "surrender of the articles of agreement" and made a "parol agreement" to become Bowser's tenant. In declaring that the relation between Bowser and Flanner was that of vendor and purchaser, and not that of landlord and tenant, the court said: "No case can be found in the books where the vendee was in actual possession, had paid the purchase money, and made valuable improvements, where a rescission by parol was adjudged sufficient to divest him of his estate and reinvest it in the vendor. Can the act of rescission transfer the title or estate? It is a mere destruction of the written evidence of the vendee's right to demand a conveyance, but does not the abiding evidence of possession and improvement remain? What difference in principle can exist between the mode of transferring a legal and equitable estate? *Yet what lawyer would pretend that a legal estate, after it had been vested by deed, could be transferred to the vendor by the destruction of the deed?* There must be some vehicle to carry the estate out of the owner, and if it is not done by a writing, it cannot be done by a naked parol agreement to rescind or destroy the written evidence of his title. A contrary doctrine would open a door for and let loose upon society the emphatic mischief which the statute of frauds was intended to shut out forever."

In support of this decision we refer to the authorities collected in 18 L. R. A. N. S. 1167; 9 A. & E. Encyc, 163.

Judgment reversed.

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## McDONALD v. DILWORTH.

### Trespass—Battery, What Is—Intention of Battery Question for Jury.

STATEMENT OF FACTS.

Dilworth's granary was set on fire and he suspected the plaintiff, a boy 15 years old, and found him present at a second fire which broke out. The defendant placed his hand on plaintiff's shoulder and asked him if he felt better after he had set the fire. This is trespass for the battery.

Kountz for Plaintiff.

Dorn for Defendant.

OPINION OF THE COURT.

McCALL, J.—Let us first learn what a battery is. The least touching of another person wilfully, or in anger, is a battery, for the law cannot draw a line between different degrees of violence, and therefore prohibits the first and lowest stage of it, every man's person being sacred, and no other having a right to meddle with it in the slightest

manner. 3 Bl. 120, 3 Cyc. 1066-7; 9 L. R. A. 445 n, 1 L. R. A. N. S. 439; Butler v. Stockdale, 19 Sup. (Pa.) 98. An actual specific intent to injure is not necessary to make an actionable assault and battery. Cemtes v. Lister, 15 Phila. 46; Mercer v. Corbin, 3 L. R. A. 221.

Coward v. Bradley, (1 Ames 24 & 14 Mews' Eng. Case Law Dig. 225, 230) is relied upon by the defence. This case lays down the principle "Mere laying of hands on one to attract his attention is not assault and battery." In the same case it is said "any injury whatever, be it never so small, being actually done to a person of a man in an angry or revengeful, or rude or insolent manner, as by spitting on his face, or any touching him in anger or violently jostling him out of way, are batteries in eye of law." The facts of this care were that the defendant touched the arm of the plaintiff who was directing a stream of water on a fire and directed his attention to another point where a fire had broken out, whereupon the plaintiff called a policeman and put him under arrest. But in Richmond v. Fiske, 160 Mass. p. 34, where a milkman, against express commands of one of his customers, entered latter's sleeping room in early morning, took hold of his arms and shoulders, and used sufficient force to awaken him, for the purpose of presenting his bill, he was held guilty of a battery.

Now, since the law does not draw any line between the different degrees of violence to constitute a battery, the only question to decide in the case at bar is the intent of the defendant when he did the act. Does this case fall within Richmond v. Fiske or Coward v. Bradley? In the latter case the intention was of kindness. There was no evidence that anything rude or angry was the motive in causing the party to call the fireman's attention to the new outbreak of fire. The evidence rather tended to show an opposite motive. In Richmond v. Fiske, the court evidently thought it was rude and insulting to be awakened out of a sleep to have a milk bil presented. If such was rude and insulting how much more would it be so to be accused of having set a buiiding on fire when such an act is by statute made an indictable offence? It is a crime involving moral turpitude and would subject one to an infamous punishment. There is no question, then, but that a battery was committed in the case at bar. And more than nominal demages should be allowed. For the words above were slanderous and the facts lack but one element to prevent an action of slander and that is publication. Broker v. Ceffin, 5 Johns, N. Y. 108; Andres v. Kuppenheafer, 3 S. & R. 255; Davis v. Casey, 141 Pa. 314; and damages for his humiliation and mental suffering could be recovered in trespass for battery since that has been established. Richmond v. Fisk, *supra.*

In a case reported in 53 Vt. 585 Pl., a blind girl was staying in the house of the defendant over night and in the night time he went into her room and sat upon her bed soliciting sexual intercourse. In an action of trespass *quare clausum fregit* she recovered substantial damages for her mental suffering owing to his indecent remarks.

Judgment for plaintiff.

OPINION OF SUPERIOR COURT.

To constitute a battery there must be an application of force by one person upon the person of another, but every application of force by one person upon another is not a battery.

The application of the force derives its tortious caste not from the degree or intensity of the force applied nor necessarily, from the want of consent of the person to whom the force is applied, but from the intent with which the force is applied.

The wrong consists not in the touching, nor in the amount thereof, but in the spirit or intent with which it is done.

An intentional touching is frequently justified by the common usage of civil intercourse, and such touching, pushing or the like as is incident to the ordinary conduct of life and is free from the use of unnecessary force, is not tortious. Pollock on Torts 185. "Every laying on hands is not a battery. The party's intention must be considered, for sometimes people will, by way of joke or friendship, clap a man on the back, and it would be ridiculous to say that every such touching constitutes a battery." William v. Jones, Hard. 301, per Ld. Hardwicke.

On the other hand, if the intention is to injure, the touching is unlawful, and this is so whether the intended injurv is bodily pain, a sense of shame or other disagreeable emotion of the mind. 3 Cvc. 1033.

In the present case the defendant placed his hand upon the plaintiff's shoulder and at the same time accused him of a crime. It is a reasonable inference that the purpose of such touching accompanied by the accusation of crime was to intimidate or frighten the plaintiff. Such touching is not justified by the "common usage of civil intercourse" nor is it incident to "the ordinary conduct of life."

The learned court below committed no error in submitting the case to the jury.

In Crawford v. Bergen, Iowa 60 N. W. 205, where the facts were similar to those of the case at bar, the preponderance of the evidence was to the effect that "the defendant placed his hand on plaintiff's shoulder and asked him if he felt better after he had set the fire." The court held that it was a fair question for the jury whether the touching of the plaintiff should be regarded as a battery.

Judgment affirmed.

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## FOX v. MULLIN.

### Liability of Lunatic for Causing Fright.

STATEMENT OF FACTS.

Mullin a harmless lunatic entered a house in which Mrs. Fox rented a room and behaved in such an unusuul manner as to make it evident that he was crazy. The plaintiff being pregnant took fright and suffer-

ed a miscarriage. Defendant poked his head into her room but did not enter it.

The plaintiff seeks, in this action, damages for mere fright unaccompanied by physical injury.

Storey for Plaintiff.

Peppets for Defendant.

OPINION OF THE COURT.

EVANS, J.—The rule in Pennsylvania and many other states is, "There can be no recovery of damages for bodily and mental suffering resulting from fright unconnected with physical injury." Fox v. Borkey 126 Pa. 164; Ewing v. R. R. Co. 147 Pa. 40; Lynn v. Duquesne Boro, 204 Pa. 551; Chittick v. Rapid Transit Co. 224 Pa. 13; Houston v. Freemansburg, 212 Pa. 548; Mitchell v. Rochester Ry. 151 N. Y. 107; Spade v. Lynn & Boston Ry. Co. 168 Mass. 285; White v. Sander 168 Mass. 298; Hampton v. Jones 58 Iowa 317; and Morris v. Lacka. and Wyo. Valley R. R. Co. 228 Pa. 198.

The plaintiff contends that Mullin is liable for his torts and lunacy is no defense to a recovery of compensatory damages, 3 Sup. Ct. 432. Undoubtedly there is great hardship and even injustice in such a rule—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid: That is imposing upon a person already visited with the inexpressible calamity of mental obscurity, an obligation to observe the same care and precaution respecting the rights of others that the law demands of persons in full possession of their faculties.

The second contention is that Mullin was trespassing and the suffering was the natural and probable consequence of the defendant's unusual conduct. This contention is erroneous. The trespass of a harmless lunatic accompanied by unusual behavior not coming within reach of the plaintiff nor even into her room cannot be said to be the natural and probable consequence of his acts with reference to a miscarriage. In determining what is the proximate cause, the rule is, "that the injury must be the natural and probable consequence of the negligent act; such a consequence as under the surrounding circumstances of the case might and aught to have seen by the wrongdoer, as likely to flow from his act. 104 Pa. 306, 93 Pa. 498, 46 Pa. 192. Vale vol. 11 p. 1131. Even if we attribute the same amount of foresight to the lunatic as to a sane man, yet it is absurd to assume a sane man could anticipate such a result. In view of Ewing vs. Ry. Co. 147 Pa. 40, that when the consequence of fright could not have been forseen, the act was not the proximate cause and on the ground of remoteness our decision should go for the defendant. To make out a cause of action the plaintiff must establish not only that defendant was guilty of a negligent act; but that the injury was produced by a cause which might naturally and reasonably be expected to follow the negligent act. Tutein v. Hurley 98 Mass. 211, Lowery v. M. R. Co. 99 N. Y. 158; Ewing v. Ry. Co., 147 Pa. 40. Fright alone, occasioned by the negligent act of another person cannot be made the basis of an action. Wyman v. Leavitt 71 Me. 227. Canning v. Williamstown 1 Cush, 451. Creamer, v. N. E. R. R. Co. 156 Mass. 320.

Ewing v. Ry. Co. is a particularly strong case for it was decided on a demurrer to the statement, setting forth a collision of the cars through the negligence of the defendant by which the cars were overturned and thrown against the dwelling house of the plaintiff, subjecting her to great fright, fear and nervous excitement and distress whereby she became sick and disabled from her usual house work, etc. The question was squarely presented stripped of all its complicating circumstances, and the court said unaminously, per curiam, that there was no cause of action. In Spade v. Lynn and Boston R. R. Co. supra, it was held, there could be no recovery for fright and mental suffering nor for bodily injury resulting solely from mental distress. The exemption from liability is based not on the ground that fright and anxiety do not constitute actual injury or that mental and physical effect may not be directly traceable as a consequence of unintentional negligence; but on the ground that in practice it is impossible to administer any other rule without opening a wide door to unjust claims, which cannot be satisfactorily met. The decided trend of decision both in this country and in England is against the maintainance of such actions, or the allowance for mental suffering as an element of damages when distinct from physical injury. In Augusta v. Sommerville R. R. Co. v. Randall 85 Ga. 297, it was held that the mental suffering because of disappointed hopes caused by the premature birth of a child as a result of an injury was not the subject of compensation. In Wyman v. Leavitt supra. recovery was denied for fright and anxiety caused by the apprehension of danger. In Smith v. Postal Telegraph Cable, Co. 174 Mass., no recovery was allowed for sickness due to fright caused by rocks being thrown upon one's house by a blast near by of which she had no notice. In Morris v. Lacka. & Wyo. Valley R. R. Co. 228 Pa. 198 the plaintiff claimed damages for a miscarriage caused by a nervous shock, to which she was subjected while riding in the defendant's electric car, which bumped over the tracks at an open switch. There was evidence of negligence, yet it was stated, "that there can be no recovery of damages for bodily or mental suffering resulting from fright unconnected with physical injury." This is a very much stronger case than the one at bar and when we note the fact, it was decided in 1910, and is in line with all the leading cases in Pennsylvania on the subject, the plaintiff's case appears hopeless.

There are two prominent reasons why Pennsylvania courts have taken this "seemingly" arbitrary view, that no recovery can be had for mental and bodily suffering unaccompanied by physical injury; 1st. "The scope of accident cases would be greatly enlarged," and we also agree that it is the business of the courts to administer justice; but the difficulty of furnishing safe proof of its existence and degree is a justification for their refusing redress. 2nd. That the defendant cannot anticipate every kind of corporal injury that may follow from the fright caused by the act. This seems very reasonable. Let us take a supposititious case. A acts foolishly with the intention to frighten B. Must A anticipate that he will kill B by a little fright, or that B will become a hopeless lunatic or give a premature birth? Thequestion itself speaks negatively, and it suggests another question. Why do we not regard the plaintiff by the same strict rule as we do Mullin, the lunatic? Is it more unreasonable to judge

her an ordinaryly strong healthy woman, than to impose on a lunatic the same care and precaution as the law demands of persons in full possession of their faculties? It again speaks in the negative.

With the realization of the plaintiff's serious mishap and due respect to the authorities cited by the learned counsel, I feel bound both by the law on the subject and the equity of such a case to decide in favor of the defendant.

## OPINION OF SUPREME COURT.

The defendant is alleged to have committed a wrong. Our task will be to ascertain whether this allegation is supported by the evidence.

It appears that he was a "lunatic," a "harmless lunatic." He behaved in such a way as to reveal his lunacy to observers, "as to make it evident that he was crazy." Is it wrong to be a lunatic, and to seem to be a lunatic? Hardly. A man may be ugly, corporeally deformed, mentally deformed, without infringing any right of any other human being. Other human beings may dislike deformity, find it shocking and abhorrent. It is not the duty of one man to refrain from being crazy because other men are so hyperesthetic, as to be disgusted, pained, or frightened by the sight of him. If Mrs. Fox chooses to take fright when lunatics show themselves, she cannot say that in letting themselves be seen, they have committed a wrong against her; that they should have put a veil over their faces, or submitted to confinement in a cell.

But, it is suggested that this defendant, not content with being and evidently being a lunatic, committed a tort in being in the house, or in "poking his head" into the plaintiff's room.

Precisely what this tort was, does not appear. He entered the house. But did he do so with the express or tacit invitation of the owner or tenant? Was he a trespasser? It does not appear that he was. If he was, it would not follow that he became liable to Mrs. Fox. She was not the owner or the tenant of the house. The fact that, while committing a trespass against the owner, he showed himself to Mrs. Fox, could hardly be thought to entitle her to sue, if his mere apparition could not have entitled her. How she could found a right upon a breach of a duty to another, is not clear.

"The case of Troth v. Wills, 8 Super. 1, is brought to our attention. There were atrong dissents from the judgment there pronounced. Had the plaintiff not been a member of the family of the owner of the land on which the cow intruded and, as such, and as an agent of the owner, made the effort to expel the cow, during which she was gored, the decision would probably have been different. If instead of holding such a relation, she had been a mere licensee walking over the ground, or a trespasser, it would be extremely difficult to believe that so learned a court would have held that she acquired through the cow's trespass a right which she otherwise could not have had; to be compensated for the injury.

But, the lunatic defendant was not merely a trespasser in the house, it is said; he was a trespasser in the plaintiff's room, a trespasser within or upon her *clausum*. We are not prepared to concede this. In White v. Maynard, 111 Mass. 250, it is maintained that a roomer and boarder

"acquires no interest in the real estate." He cannot maintain ejectment. He can maintain no action founded on possession, either against a person under whom he is a roomer, or against a stranger. So far as appears, the defendant was not a trespasser. Perhaps however, if the action of trespass *quare clausum fregit* is not open to Mrs. Fox, she would be entitled to some other action for the disturbance of her sole [if not possession, shall we say] lodgment. Possibly so. She ought to have such action, if she has not.

We have not felt sure whether the cause of the fright which produced the abortion, was the being in the house or the poking of the head into the room. The special verdict is that Mullin entered a house and behaved in an unusual way, and that the plaintiff took fright, etc. If the poking of the head into the room, followed the affright, it is impossible to perceive its relevancy. The verdict says that the defendant did not enter. But if his head or any part of it was put within the threshold, he, or that part of him, entered the room. We shall assume that he, the whole of him, entered the room. That act, if wrongful, could have given a right only to a trifling compensation, unless the effect of it was serious. We fail to see that the fright was the consequence of the intrusion. Would Mrs. Fox not have been scared, if she had seen Mullin just outside the door? She probably would have been. *Perhaps* she would not have been. Perhaps the fear was awakened by the purpose of Mullin to enter the room made apparent by his poking his head inside, though from poking the head only inside, could hardly be inferred that there was such purpose. If the fright was not caused by the entrance of one-third or one-half of the defendant's head, then there can be no liability for its consequence. Let us however suppose that it was thus caused.

It is a principle widely applicable that of a tort, the doer is liable only for the natural and probable consequences. "Natural" in this relation is not illuminating. Were the fright and the miscarriage, the expectable result? Was it day or night? Was Mullin armed or without weapon? Were other people in the house; in the next room possibly; in the hall possibly? Nothing shows that even a sane man ought to have foreseen that fright would ensue. But would a sane man have to keep in mind, the possibility that the woman was gravid and that fright would work an abortion? Hardly. Mullin probably did not know that abortion followed fright, or fright the display of himself in a door. The law allows for the incompetence of immature persons to attend, to see and hear closely, to remember well, to control their muscular movements. Their inexperience of the interrelation of things as cause and effect, excuses them in cases in which an adult would not be excused. But, how should it matter whether this incapacity to foresee, is due to extreme youth or due to arrested nerve and cerebral development? We concede however, that this reasoning is inconsistent with some cases. Cf. Ins. Co. v. Showalter, 3 Super. 452; Shepherd v. Wood, 2 Lanc. L. Rev. 175.

It is suggested that the principle which limits liability to the forseeable consequences, is not applicable when these consequences are the consequences of a tort against property rights. We are not ready to concede this. Property is no more sacred than person. One whose act may affect the bodies of others, owes to them the duty of care to avoid

injuring them. But, if he violates this duty, he is not responsible for every actual consequence. Nor is he, if trespassing on land, or against personalty, responsible for damages of an unimaginable and unpredictable kind.

The first effect of the apparation of Mullen at the door was fright, the second or third effect, mediated through the fright, was the abortion. Indefensible as is the doctrine, it obtains in Pennsylvania, that for such effect, there is no right to compensation. The cases cited by the learned court below maintain this doctrine. In Talbot v. Abinger, 14 Dick. Law Review, 109, we have had occasion to comment on most of the Pennsylvania cases.

It is suggested however, that this doctrine is not applicable when the fright was occasioned by a tort to property or person. We can not accept this as a limitation. There are no torts, except torts to person or property; Nay, there are no torts except to person. Duties are not owed to things but to the owners of things. The reasons assigned for disallowing damages for injury through fright apply to any injuries from fright. The courts illogically make a sensible exception, when the fright and the resulting harm were purposed. The desire to penalize the malice overcomes the scruple concerning the risk of fabricating injuries through psychic states.

This opinion is unduly long already. We have concluded that although the lunatic defendant did a wrong (or what, if done by a sane man would have been a wrong) in presenting himself at the door, he is not responsible for the consequences of the ensuing fright of the plantiff.

Affirmed.