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Impossibility In Conspiracy

As a means of protecting the bank from unfair loss, section 4-407(c) of the *Uniform Commercial Code* subrogates the bank to the drawer's rights against the payee.[27] Presumably the bank recovers from the payee in assumpsit on a theory of unjust enrichment. Though at present there is little authority supporting this approach, it is fair and logical.[28]

It is submitted that the following step-by-step approach offers an acceptable solution to the problem presented by the principal case: (1) Invalidate the exculpatory clause on a theory of public policy or lack of consideration; (2) With the clause invalidated require the depositor-drawer to establish that he has sustained a loss before the bank will be denied the right to charge his account; (3) If the drawer establishes a loss, give the bank a defense if it can prove that it exercised reasonable care in paying the check contrary to the stop-payment order; and (4) If the bank cannot prove it exercised reasonable care so that it cannot charge the drawer's account, subrogate the bank to the drawer's rights against the payee.

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IMPOSSIBILITY IN CONSPIRACY

Ordinarily, a crime cannot be committed unless the defendant accomplishes some result that the law seeks to prevent. There are two exceptions to this general proposition: the inchoate crimes of conspiracy and attempt. In both conspiracy and attempt, the consummation of

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cannot establish a loss under § 4-403(3), quoted in text, it would appear that the bank could charge the drawer's account, thus eliminating any alternative remedy against the drawer on the grounds of double recovery. Another aspect of this conflict is discussed in Law Revision Commission (State of New York), Study of Uniform Commercial Code 111 (1954).

[27]"If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights . . .

(c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose."

This section is a reasonable extension of section 4-403(3). It would appear that the drawer would have to establish his loss before the bank would have any rights of subrogation against the payee.

[28]Clarke and Bailey, Bank Deposits and Collections (under the Uniform Commercial Code) 124 (1955). For a discussion of the procedural difficulties involved, see id. at 126 and Third Nat. Bank in Nashville v. Carver, 31 Tenn. App. 520, 218 S.W.2d 66, 68 (1948).

the defendant's purpose is not an element of the crime.[1] This gives rise to the question whether these crimes of conspiracy and attempt can be committed when the substantive crime contemplated is impossible, either inherently or legally. For instance, it is inherently impossible to pick an empty pocket. Some courts have held that to try to do so constitutes attempted larceny[2] and another court has held that it does not.[3] Similarly, under the common law it is legally impossible for a boy under fourteen to be convicted of rape, because he is conclusively presumed to be incapable of committing rape.[4] Nevertheless, some courts have said he can be convicted of an attempt to commit rape and others have held that he cannot be.[5]

Ventimiglia v. United States[6] presents the problem of whether there can be a conviction of conspiracy to commit a crime which, under the circumstances, it is legally impossible to accomplish. The individual defendants, Ventimiglia and Parran, were the general manager and labor relations advisor of the defendant company, Weather-Mastic, Inc. They were charged with four substantive violations and with a conspiracy to violate section 186(a) of the Taft-Hartley Act.[7] This section prohibits an employer paying money to "any representative of any of his employees." Defendants paid money on four occasions to Martin, the business agent for a labor organization, so that the company's non-union men could work on a job on which union labor was required. The district court acquitted defendants of the four alleged substantive violations, since Martin was not a representative of any of defendants' employees. The trial court sustained a conviction of conspiracy, however, on the theory that the crime was committed if

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[1]Miller, Criminal Law § 31 (1934).

[2]People v. Moran, 123 N.Y. 254, 25 N.E. 412 (1890); People v. Jones, 46 Mich. 441, 9 N.W. 486 (1881); Regina v. Ring, 17 Cox C.C. 491, 66 L.T.R. (N.S.) 300 (1892); Ryu, Contemporary Problems of Criminal Attempts, 32 N.Y.U.L. Rev. 1170, 1185 (1957); Sayre, Criminal Attempts, 41 Harv. L. Rev. 821, 855 (1928).

[3]Regina v. Collins, 9 Cox C.C. 497, 169 Eng. Rep. 1477 (1864) (overruled by Regina v. Ring, note 2 supra); Ryu, Contemporary Problems of Criminal Attempts, 32 N.Y.U.L. Rev. 1170, 1184 (1957); Sayre, Criminal Attempts, 41 Harv. L. Rev. 821, 854 (1928).

[4]Miller, Criminal Law 300 (1934).

[5]Cases supporting a conviction: Davidson v. Commonwealth, 20 Ky. L. Rep. 540, 47 S.W. 213 (1898); Commonwealth v. Green, 2 Pick. 380 (Mass. 1824). Cases contra: McKinny v. State, 29 Fla. 565, 10 So. 732 (1892); Foster v. Commonwealth, 96 Va. 306, 31 S.E. 503 (1898). For discussion see Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 Yale L.J. 53, 56 (1931); Beale, Criminal Attempts, 16 Harv. L. Rev. 491, 498 (1903); Sayre, Criminal Attempts, 41 Harv. L. Rev. 821, 840 (1928).

[6]242 F.2d 620 (4th Cir. 1957).

[7]61 Stat. 157 (1947), 29 U.S.C. § 186 (1952).

defendants intended to deal with Martin as a representative of their employees.[8] The Fourth Circuit Court of Appeals reversed the conviction. Since Martin was not a representative of defendants' employees, there could not be a substantive violation of section 186(a). Therefore, the court held there could not be a conspiracy to violate the statute even if defendants mistakenly thought Martin a representative of their employees.[9]

One basis on which the Court of Appeals rested its conclusion was the following authority which holds that there cannot be a conviction for attempt where there is a legal impossibility of committing the substantive crime. *People v. Jaffee*[10] held that a person who receives goods, believing them to be stolen, is not guilty of an attempt to receive stolen goods if the goods in fact are not stolen, since it is legally impossible for him to commit the substantive act. *Foster v. Commonwealth*[11] held that a boy under fourteen cannot be guilty of attempted rape, since it is legally impossible for him to commit rape.

The prosecution's position that an indictable conspiracy can be committed even though it is legally impossible to accomplish the object of the conspiracy has what seems to be additional authoritative support. *People v. Gardner*[12] held that an attempt to extort was committed, even though extortion was legally impossible, because the intended victim, a police officer, experienced no fear, an element essential to the crime of extortion. More pertinent to the present case is *Beddow v. United States,*[13] where a conviction of conspiracy to defraud the United States was sustained notwithstanding the fact that it was legally impossible to commit the substantive crime, owing to the defendants' mistake in having the forged bonds witnessed by a notary public instead of designated officials who alone were authorized to witness assignments of the bonds. In another case involving legal impossibility, *Craven v. United States,*[14] the defendants were charged with conspiracy to import liquor and beer without paying customs duties. An instruction to the effect that it was sufficient to convict for conspiracy if the defendants thought the liquor was of foreign origin, even if it were not, was held by the Court of Appeals to be proper.

Even though rightminded men can have divergent views concern-

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[8]145 F. Supp. 37 (D. Md. 1956).
[9]242 F.2d 620, 626 (4th Cir. 1957).
[10]185 N.Y. 497, 78 N.E. 169 (1906).
[11]96 Va. 306, 31 S.E. 503 (1898).
[12]144 N.Y. 119, 38 N.E. 1003 (1894).
[13]70 F.2d 674 (8th Cir. 1934).
[14]22 F.2d 605 (1st Cir. 1927).

ing inchoate crimes and the weight to be given legal and inherent impossibility,[15] it is diffidently submitted that the reasoning and holding in the principal case are tenuous for the following reasons: (1) lack of differentiation between attempt and conspiracy;[16] and (2) failure to distinguish between a legal impossibility which covers both the intent and the act, and a legal impossibility which covers only the act and does not cover the intent.

Although attempt and conspiracy are both inchoate crimes, there is a significant distinction between the two[17] which the Court of Appeals did not seem to note. Proximity to success is critical in attempt. Under the common law of conspiracy, on the other hand, the crime is complete when two or more persons with criminal intent make an agreement to assist each other in consummating the act.[18] For instance, if a man shoots at a stump mistakenly thinking it to be a man, it is doubtful that he is guilty of an attempt to kill.[19] Under the common law if two persons agree to kill another, the crime of conspiracy has been committed as soon as the agreement is made.[20] Under the federal statute, which requires an overt act, the crime would be committed if one of the persons bought a gun or committed some other overt act.[21] Therefore, attempt cases do not, without qualification, apply to conspiracy. The holding in *People v. Jaffee* that the defendant was not guilty of an attempt to receive stolen goods, because the goods were not in fact stolen, does not mean necessarily that Jaffee could not have been guilty of a conspiracy to receive stolen goods. If Jaffee had agreed with another to receive stolen goods, he would have been guilty of conspiracy under the common law rule, which does not require an

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[15]The following seem to be at least three reasons for divergent views: (1) subjective and objective views of crime and punishment; (2) nature of crime of conspiracy; and (3) history of crime of conspiracy. Concerning reason 1, see Sayre, Criminal Attempts, 41 Harv. L. Rev. 821, 849 (1928); Ryu, Contemporary Problems of Criminal Attempts, 32 N.Y.U.L. Rev. 1170, 1187 (1957); concerning reason 2, see Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624 (1941); concerning reason 3, see Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393 (1922).

[16]Hyde v. United States, 225 U.S. 347, 387 (1911) (Justice Holmes dissenting); Miller, Criminal Law § 31 (1934); Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393, 399 (1922).

[17]See note 16 supra.

[18]Poulterer's Case, 9 Co. Rep. 556, 77 Eng. Rep. 813, 814 (1611); Piracci v. State, 207 Md. 499, 115 A.2d 262, 269 (1955); Hurwitz v. State, 200 Md. 578, 92 A.2d 575 (1952); Perkins, Criminal Law 531 (1957); Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624, 625, 629 (1941).

[19]Regina v. M'Pherson, Rears. & Bell 197, 169 Eng. Rep. 975, 976 (1857); Ryu, Contemporary Problems of Criminal Attempts, 32 N.Y.U.L. Rev. 1170, 1183 (1957).

[20]See note 18 supra.

[21]62 Stat. 701 (1948), 18 U.S.C. § 371 (1953); United States v. Rabinowich, 238 U.S. 78, 85 (1915); Marino v. United States, 91 F.2d 691, 694 (9th Cir. 1937).

overt act.[22] And if he had received goods he thought stolen but which were not, it would seem that this would be an overt act necessary to complete the crime.

The second distinction which the Court of Appeals failed to note is that there is a difference between a legal impossibility which extends only to the substantive act and a legal impossibility which extends to both intent to commit the act and to the consummation of the act. An act is a crime only when declared to be so by law. When the law declares that an act by a boy under a certain age is not a crime, it would seem that it is a legal impossibility, not only for the boy to commit the substantive crime, but also to commit the inchoate crimes of attempt and conspiracy. The reason he cannot commit the inchoate crimes is that the law declares that his intent to do such an act is not criminal intent.[23] Since criminal intent is the major element of an inchoate crime,[24] obviously such a crime cannot be committed unless there is criminal intent. This was the situation in the *Foster* case: the boy was incapable of committing any crime, either inchoate or substantive, by intending forcibly to know carnally a female and by forcibly knowing her. This was so because the law declared that such intent or such act by a boy under fourteen was not attempted rape or rape. The legal impossibility existed from the mind's conception of the act.

This argument also applies to *O'Kelley v. United States*,[25] relied upon by the Court of Appeals in the principal case. This case held that there could not be a conspiracy to commit larceny of an interstate shipment of sugar because there could not be any substantive violation, inasmuch as the sugar had lost its interstate character. There, the legal impossibility extended not only to the act but to the intent as well. The reason is that the evidence did not show an intent to steal interstate sugar, but the evidence showed that the defendants intended to steal sugar that had lost its interstate character. Therefore, it would appear that the legal impossibility extended to the intent as well as to the act. On the other hand, if the defendants had agreed to steal interstate sugar and had committed the overt act of taking sugar that had lost its interstate character, this would seem not to result in a legal impossibility which would negative the criminal intent to steal interstate sugar.

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[22]See note 18 supra.
[23]Perkins, Criminal Law 494 (1957).
[24]Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624 (1941).
[25]116 F.2d 966 (8th Cir. 1941).

In the principal case the significant difference[26] from the *Foster* case and the *O'Kelley* case is that the legal impossibility extends only to the substantive act and not to the intent, because the legal impossibility does not exist from the time of the conception of the act but arises only at the time of the act. Obviously, there was nothing to prevent defendants in the principal case from violating section 186(a). The federal law declares that it is a crime when more than one conspire to violate a federal statute and an overt act is committed.[27] Prior to the time defendants paid Martin, there was no legal impossibility which prevented the commission of the inchoate crime of conspiracy. The legal impossibility in this case arose only at the time defendants paid Martin, who was not in fact a representative of defendants' employees. Therefore, the legal impossibility extended only to the act and not to the intent which existed earlier, or from the time of the conception of the act or agreement. Unless a legal impossibility arising at the time of the act relates back to cover the intent which precedes the substantive act and makes it non-criminal, the legal impossibility that the Court of Appeals relies upon in its decision is only applicable to the substantive act.[28] It does not apply to the inchoate crime of conspiracy with which the defendants were charged. Therefore, if defendants agreed to deal with Martin as a representative of their employees and they committed the overt act of paying Martin, the crime of conspiracy would seem to be complete, notwithstanding the fact that Martin was not a representative of defendants' employees. Neither legal impossibility nor mistaken identity prevented commission of the crime of conspiracy.

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[26]A third significant distinction which the Court of Appeals failed to make is between inherent impossibility and legal impossibility. In fact, the court spoke only of their similarity. The distinction is that where there is an inherent impossibility there can nevertheless be criminal intent, but where there is a legal impossibility which exists from the conception of the act or agreement there can be no criminal intent, since the law says such intent is not criminal. This difference is discernible in the contrary holdings of the Foster case and Hunt v. State, 114 Ark. 239, 169 S.W. 773 (1914). In the latter case a conviction of assault with intent to rape of an impotent man seventy-four years old was upheld. In the Foster case criminal intent was impossible, since a legal impossibility extended to both intent and act. But in the Hunt case criminal intent was legally possible even though consummation of the crime of rape was inherently impossible.

[27]See note 21 supra.

[28]Furthermore, the Court of Appeals says, "the present case is on the facts of an even more extreme variety," for the prosecution claimed merely that "defendants *intended* to deal with Martin as their employees' representative." If the defendants intended to do and agreed to do what is forbidden by section 186(a) and they paid Martin in order to achieve their ends, the conspiracy would seem to be complete, even if they knew Martin was not such a representative. 242 F.2d 620, 625 (1957).