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is unascertainable, then the faith of the parent or parents shall be guiding.

Any interested party aggrieved by any order or decree of the court may appeal to the district court where the matter is heard in a trial *de novo*.[27] The pendency of an appeal on such a matter, however, does not affect or suspend the order of the juvenile court unless so ordered by the appellate court.[28] If, on appeal, the decision of the juvenile court is affirmed or modified, the order of the juvenile court stands as if the appeal had not been taken.[29] Final decrees or orders of the court may be modified at any time on the court's own motion when in the best interests of the child.[30] A parent, guardian, or next friend may petition the court to have custody restored to that person or to make further orders affecting the child. The court, in its discretion, may modify any such former order.

Unique in procedure, the juvenile court has been criticized for its deviation from strict adherence to the common law adversary system. However, the act has provided a particular kind of court for which there is an apparent, expanding need, and gives the state an example of how an appointed judge for a court with broad powers might function.

Joe A. Cannon

ATTEMPTED CRIMES UNDER THE DOCTRINE OF IMPOSSIBILITY AND THE ROLE OF THE JUDGE IN SHAPING FUTURE LEGISLATION

The recent case of *Booth v. State*, 398 P.2d 863 (Okla. 1964) is of interest, as much for the court's technique as for its holding. Faced with an opportunity and a need to establish "new law", the Court of Criminal Appeals, in a decision written by Judge Nix, chose to refrain from entering an area not specifically opened to it by the legislature. But, realizing a greater judicial responsibility, the court did not stop here; it suggested corrective legislation and then actively aided in the consideration of that legislation.

This method contrasts with the methods chosen by the California and New York courts in recent cases involving the same principle of law — the defense of impossibility to a charge of criminal attempt.[1] The Oklahoma, California and New York courts answered differently the question: Should a judge legislate? The *Booth* opinion may well represent a middle road in the area of the judge as legislator that Justice Cardozo saw need of over forty years ago:

> The theory of the older writers was that judges did not legislate at all. A pre-existing rule was there, imbedded, if concealed, in the

[27] 20 OKLA. STAT. § 846 (1961).
[28] 20 OKLA. STAT. § 846 (1961).
[29] 20 OKLA. STAT. § 846 (1961).
[30] 20 OKLA. STAT. § 823 (1961).

[1] People v. Rollino, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (1962); People v. Rojas, 55 Cal.2d 252, 10 Cal.Rptr. 465, 358 P.2d 921, 85 A.L.R.2d 252 (1961).

> body of the customary law. All that the judges did was to throw off the wrappings, and expose the statute to our view. Since the days of Bentham and Austin, no one, it is believed, has accepted this theory without deduction or reserve, though even in modern decisions we find traces of its lingering influence. Today there is rather danger of another though an opposite error. From holding that the law is never made by judges, the votaries of the Austinian analysis have been led at times to the conclusion that it is never made by anyone else.[2]

In the *Booth* case the police recovered a stolen sport coat, which was later re-delivered to the self acclaimed thief to be sold to an awaiting purchaser, the defendant. Upon delivery, Booth was arrested for receiving stolen property.[3] Subsequently convicted of *attempting* to receive stolen property, his appeal presented the question of whether impossibility could be a defense to a charge of criminal attempt. Reversing Booth's conviction, the court reasoned that, absent legislative direction to the contrary, an attempted crime could not be committed if the ultimate crime was legally impossible. It then pointed out that Booth was undoubtedly morally guilty and that steps should be taken to make such action criminal.[4]

Then in recognition of the fact that courts do have a valid place to fill in the legislative process it set out an excerpt from the Model Penal Code[5] which would correct the inequity present:

> (1) DEFINITION OF ATTEMPT: A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or,
>
> (b) when causing a particular result in an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or,
>
> (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

Broadly speaking, the entire concept of impossibility encompasses possibility.[7]

The court ordered a copy of the decision sent to the legislature; thereupon, a bill incorporating the suggestions of the court was introduced.[6] During the hearings on the bill Judge Nix and the other members of the Court of Criminal Appeals appeared before the committee to which it was assigned. The court emphasized that in its view such legislation would resolve the problem presented by the doctrine of im-

[2] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 124 (1921).
[3] 21 OKLA. STAT. 1713 (1961).
[4] Booth v. State, 398 P.2d 863, 872 (Okla. 1964).
[5] ART. 5.01
[6] Senate Bill 187 by Smith (1965).
[7] Criminal Jurisprudence Committee, minutes for March 10, 1965.

all that might prevent the completion of a crime except a voluntary or involuntary cessation by the accused.[8] Such a defense was contemplated at the very birth of criminal attempts. Certain impossibilities, later to be known as factual, were felt by the court to be no defense.

"(I)s it no offense to set fire to a train of gunpowder with the intent to burn a house, (if) by accident, or the interposition of another the mischief is prevented(?)"[9]

Thus a factual impossibility occurs whenever some condition, unknown to the defendant, renders the crime impossible of completion. Factual impossibilities have been held, both in England and in the United States, to not prevent conviction of a criminal attempt. The courts have held that a defendant was guilty of attempted larceny in trying to steal from an empty pocket or cash box,[10] likewise, they have found a defendant guilty for firing a gun into an empty bed he believed to be occupied.[11] The Oregon court found that the fact that a young woman was pregnant in the fallopian tube rather than the uterus did not prevent a conviction of attempted abortion, even though, the fetus could not have been aborted by the method used.[12]

While the courts have not allowed factual impossibilities to bar convictions, they have treated legal impossibilities with a great deal more deference. A legal impossibility exists where the acts of the defendant would not have constituted the ultimate crime, even if completed. Thus, in jurisdictions where this rule obtains, one offering money to a person he thought to be a member of a jury was not guilty of attempting to bribe a juror.[13] And in the *Booth* case one could not attempt to receive stolen property when the property was not in fact stolen.[14]

Little imagination is required to realize the difficulty in classifying various impossibilities as factual or legal. The classical jurisprudential argument over what is law and what is fact is involved. It has never been resolved and may never be.

If, in fact, the object of prosecuting attempted crimes is to punish culpability and prevent repetition, have the courts not erected another distinction without a difference? If two soldiers intend to murder their sergeant, is there any difference in their culpability when one is prevented by killing an enemy soldier through mistake and the other is prevented by choosing an unloaded weapon? In the first instance a legal impossibility arises to the defense and in the second a factual impossibility does not.

Military courts have acknowledged the confusion resulting from the bifurcation of impossibilities and do not recognize a difference between the two types. The distinction was dealt a death blow in a court martial

[8] Regina v. McPherson, Dears & Bell 197 (1857).

[9] Rex v. Schofield, Cald. 397 (1784); the word "because" changed to "if" for clarity.

[10] State v. Wilson, 30 Conn. 500 (1862); Clark v. State, 86 Tenn. 511, 8 S.W. 145 (1888).

[11] State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902).

[12] State v. Elliott, 206 Or. 82, 289 P.2d 1075 (1955).

[13] State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939).

[14] Booth v. State, *supra,* note 4.

trial for attempted rape, wherein the victim was dead at the time of the attack.[15] The defendants did not know this, merely believing that she was unconscious. Whether it was the *fact* that she was dead or the change in her *legal status* on death that controlled in determining the type of impossibility present, lead the United States Military Court of Appeals to observe:

> . . . to follow civilian authorities into the intracacies and artificial distinctions they draw in the field of criminal attempts . . . would lead military jurisprudence into the morass of confusion in which civilian jurisprudence finds itself immobilized, and from which heroic efforts are being made to extricate it.[16]

Perhaps the situation is not as dire as indicated; however, confusion is present.

One path from the "morass of confusion" has been taken by the California court in holding that defendant could be found guilty of attempting to receive stolen goods even though the goods had lost their stolen nature.[17] This, in spite of the fact that the ultimate crime, i.e. receiving of stolen goods, was legally impossible of commission. In so holding, the court overturned substantial precedent.[18] More interesting yet, the court compared the legal impossibility present with a factual impossibility in a previous case,[19] stating that the situations were materially alike. Apparently in California the dichotomy has ceased to exist. There now being only one type of impossibility and it being no defense to a charge of criminal attempt.

One year later the New York court, apparently recognizing the California view as better and more enlightened, felt constrained to follow a contrary precedent of some forty-six years priority.[20]

> Some courts have by 'heroic efforts' taken what I consider to be a progressive and more modern view on the subject than is permitted by the decisional law in this state.[21]

The court stated that it had to follow the previous case although it did not approve of the holding.[22]

Thus faced with the same problem California and New York chose two opposing paths, the New York court expressing the feeling that the courts have no right to create new law and the California court showing no hesitancy in doing so.

In the *Booth* case the Oklahoma court charted a course nearer initially to that of New York — refusing to strike down the doctrine of legal impossibility by court edict. Then swinging in the direction taken by California the court first suggested and then helped the legislature

[15] United States v. Thomas and McClellan, 13 U.S. M.C.A. 278, 32 C.M.R. 278, (1962).
[16] *Ibid.*
[17] People v. Rojas, *supra,* note 1.
[18] People v. Werner, 16 Cal.2d 216, 105 P.2d 927 (1940).
[19] People v. Camodeca, 52 Cal.2d 142, 338 p. 903 (1959).
[20] People v. Rollino, *supra,* note 1.
[21] *Ibid.*
[22] *Ibid.*

write a statute which would specifically and unequivocally eliminate the doctrine of impossibility, both legal and factual.

The Oklahoma court has attempted to redefine the role of the judge as legislator and has chosen that path to which Justice Cardozo pointed, neither legislating alone on the one extreme nor refusing to accept its responsibility to shape the law on the other.

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