

Criminal Intent Generally and as Applied to Crimes Mala in Se and Crimes Mala Prohibita

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compensation therefor. Later while in the employ of another, a slip as he was holding a heavy weight resulted in a fracture of the breast bone. The prior accident was held to have had no relation to the present one, which was caused by slipping. Here there were two accidents. Each was separate and unconnected with the other. The slip could, and did, of itself cause such an accident while one was holding a heavy weight.

From the foregoing it is deduced that: (A) if a casual relationship exists between the first and second accidents, the first employer is liable. (B) If the second accident is separate and independent of the first then the second employer is liable. (C) When there are two distinct accidents, but the subsequent one is aggravated by the original one, then both employers become equally liable and the compensation will be apportioned between them. These rules are just and equitable. They have arisen to satisfy the requirements of that great piece of paternal legislation, the Workmen's Compensation Law, which seeks to alleviate and soften our "harsh common law rules giving the master such defenses as the fellow servant rule and others furnishing just ground for the charge of class selfishness."⁴ The liability for compensation is placed upon the employer under whom the accident occurs. This is the motivating purpose behind the Act. The above rules give power and expression to the motive.

HARRY B. SAMES.

CRIMINAL INTENT GENERALLY AND AS APPLIED TO CRIMES MALA IN SE AND CRIMES MALA PROHIBITA.

Criminal intent and criminal acts, as well as the laws governing attempts to commit crimes, have been discussed and analyzed in numerous treatises and periodicals by contemporary legal writers.¹ And yet it would seem that that most elusive term "criminal intent" is still beyond explanation.

We say in discussing a case such as *State v. White*² where the defendant was found guilty of beating a drum within the compact part of the town, contrary to the provisions of the statute, that the criminal intention is to be inferred from the criminal act. On the other hand, we say that in larceny the prosecution must establish both the criminal intent and the criminal act to prove its case.³ At the

⁴ EDGAR, LAW OF TORTS (1st ed. 1927) §58 at p. 41.

¹ CLARK, CRIMINAL LAW (3d ed. 1915); Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law* (1917) 26 YALE L. J. 645; Beale, *Criminal Attempts* (1903) 16 HARV. L. REV. 491.

² 68 N. H. 48, 5 Atl. 828 (1891).

³ *People v. Jackson*, 8 Barb. 637 (N. Y. 1850).

same time, in larceny cases where a defendant is arrested for pick-pocketing, the district attorney establishes the people's case by showing that the defendant put his hand into the pocket of the prosecuting witness and removed an article therefrom.⁴ If explanation is asked we say the intent can be inferred from the act. *Quaere*, why then must the State prove criminal intent, as well as the criminal act, in cases *mala in se*, while in cases *mala prohibita* proof of the forbidden act itself is deemed sufficient?

Again, most states have a provision similar in tenor to the last of section 2 of the Penal Law of New York,⁵ "An act done with intent to commit a crime, and tending but failing to effect its commission is an attempt to commit that crime." The statute is generic; it refers to all crimes. Can there be an attempt to commit such a crime as was prohibited in the case of *State v. White*?⁶ We say ignorance of the law does not excuse the commission of crime. Mistake of fact, however, if found by the jury, establishes the defendant's innocence. Would mistake excuse the defendant if he sold oleomargarine without giving notice of such as in *Welch v. State*?⁷

By what means is the presence of this essential element "criminal intent" determined? Obviously we must resort to such external acts as experience has taught are a manifestation of the internal condition.⁸ But, if our conclusions would be accurate, we ought to take cognizance of "those limitations in the capacity of choosing rightly which arise from abnormal instincts, want of education, lack of intelligence, and other defects which are most marked in the criminal classes."⁹ Within well-known broad exceptions, the law considers none of these. Practically it cannot, because it is administered through judges and juries, human instrumentalities, who cannot look into the hearts of men. We are confined to the "visible physical manifestations" as indicia of the "accomplishment determined upon."¹⁰

Men are judged by their acts, and to determine the presence of criminal intent in certain of these acts the law relies upon the "reasonable man" theory applying the same test as that used to fix civil liability in tort. What the reasonable man would have intended by those same acts, is deemed to be the intent of the accused. If the accused pleads ignorance, he is informed that every man is deemed to

⁴ *People v. Moran*, 123 N. Y. 254, 25 N. E. 412 (1890).

⁵ N. Y. PENAL LAW, LAWS OF 1909, c. 88, §2.

⁶ *Supra* note 2.

⁷ 145 Wis. 86, 129 N. W. 656 (1911).

⁸ *People v. Conroy*, 97 N. Y. 62 (1884).

⁹ HOLMES, THE COMMON LAW (1881) p. 45.

¹⁰ "The intent formed is the secret and silent operation of the mind, and its only visible, physical manifestation is in the accomplishment determined upon. The individual whose intent is sought to be ascertained may remain silent, or if he speaks may, and probably will, if he has a crime to conceal, speak untruly, and thus the mind is compelled from necessity to revert to the actual physical manifestations of the intent exhibited by the result produced as the safest, if not the only, proof of the fact to be ascertained." Ruger, *Ch. J.*, *supra* note 8, at 77.

know the law. Ignorance is no excuse, and although intent is absent liability may be imposed.¹¹

Certain substantive rules of law cannot otherwise be well explained. Men are presumed to intend the natural consequences of their acts. Ignorance of the law and, in some cases, mistake of fact do not excuse the criminal act. Justification of such harsh rules is found in the policy of sacrificing the welfare of the individual to that of society as a whole. If the criminal could shield himself behind ignorance he would be encouraged rather than deterred. But the law requires him to conform to the norm of conduct recognized by the community as moral. If he is punished for acts not actually blameworthy in him, the fault is his, not that of the law.¹²

Advancing to a consideration of crimes *mala in se*: An act *malum in se* is a wrong in itself; an act involving illegality from the very nature of the transaction, upon principles of natural, moral and public law.¹³ In prosecuting an accused for such an act, it is said that the *mens rea* must be established as an independent fact. But as pointed out above, the finding of intent will be no more than a conclusion by the jury that a reasonable man, acting under the same circumstances, would have intended to commit that crime.

Thus, where one stabs another in the heart with a knife it will be presumed that he intended to take life.¹⁴ Where the instrument used is such a one as might reasonably be presumed to cause death, the killing is murder even if committed in a sudden affray;¹⁵ and where the person inflicting the wounds on deceased, from which he died, used such means as were likely to produce death, the killing was murder.¹⁶ It was correct to charge the jury that if the evidence shows that the defendant used a weapon likely to produce death and used such weapon in an unlawful, improper, and cruel manner upon the deceased, and had committed such an act as in its consequences naturally tended to destroy the life of the child and from which the child died, *although he may not have intended to kill him* yet it would be murder.¹⁷ (Italics ours.)

Again in those cases where one is charged with causing the death of another "by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of an individual,"¹⁸ intent is not

¹¹ HOLMES, THE COMMON LAW, p. 50.

¹² *Ibid.* at 47, 48.

¹³ STORY, AGENCY §346.

¹⁴ Thomas v. People, 67 N. Y. 218 (1876).

¹⁵ People v. Tuhi, 2 Wheeler Cr. Cas. 242 (N. Y. 1820).

¹⁶ People v. Cunningham, 6 Parker Cr. Rep. 398 (N. Y. 1786).

¹⁷ William v. State, 57 Ga. 478 (1876); Lewis v. State, 72 Ga. 164, 53 Am. Rep. 835 (1883); see U. S. v. Freeman, 4 Mason 505 (U. S. 1827); Mayer v. People, 106 Ill. 306, 46 Am. Rep. 698 (1893); Wellar v. People, 30 Mich. 16 (1878).

¹⁸ *Supra* note 5, §1044, subdv. 2.

an element of the crime.¹⁹ Guilt will be determined from the degree of danger attending the acts.²⁰

However, in the law of attempts intent plays an important role. Here the statute defines as criminal those acts which tend toward but fall short of completing a crime. Certainly such acts standing alone can do no harm, for by the statutory definition itself, they tend but fail to effect the commission of a crime. Once the *mens rea* is present the entire picture is changed, then the situation is the same as in the principal crime, except that some unforeseen circumstance has prevented the consummation of the final act; and the analysis which was made of criminal intent in crimes *mala in se* applies here. Nevertheless, the decisions are not in harmony; courts have been unable to give us a rule by which we may know where preparation ends and attempt begins. Nor have they reconciled such decisions as *People v. Jaffee*,²¹ wherein it was held that defendant could not be convicted of an attempt to receive stolen goods where he purchased twenty yards of cloth which he believed stolen, but which, in fact, were not, with *People v. Moran*,²² in which case the defendant was convicted of an attempt to commit grand larceny because he attempted to steal from the person of a woman and no evidence was introduced to show that the woman had anything in her pocket; or with such cases as *Mullen v. State*²³ in which the defendant, because he aimed a gun at another and pulled the trigger was convicted of an attempt to commit murder although the cartridge had no cap on it and could not have been discharged;²⁴ or with *Lewis v. State*,²⁵ where a slave, who ran after a white girl but desisted before he caught her, was convicted of an attempt to commit rape. No doubt the apprehensions of a community and its abhorrence of certain crimes will influence juries as in the last case *supra*, but the law should be above prejudice and passion.

When we come to a consideration of statutory crimes or those denoted "*mala prohibita*" we encounter greater difficulty in harmonizing the decisions with the general rule. In the texts and opinions of judges it is frequently said that intent is inferred. If this is true then intent is equally an element of statutory crimes, because, whether inferred or found, it must be present, the only distinction being the manner in which its presence is determined.

It is submitted that the inference of intent in crimes *mala prohibita* is a mere legal fiction used by courts to arrive at a result at a

¹⁹ *People v. Sheehan*, 49 Barb. 217 (N. Y. 1867); *People v. Darragh*, 141 App. Div. 408, 126 N. Y. Supp. 522 (1st Dept. 1910), *aff'd*, 203 N. Y. 527, 96 N. E. 1124 (1911).

²⁰ HOLMES, *op. cit. supra* note 9, p. 60.

²¹ 185 N. Y. 497, 78 N. E. 169 (1906).

²² *Supra* note 4.

²³ 45 Ala. 43, 6 Am. Rep. 691 (1871).

²⁴ It was just as impossible for Mullen to murder another as it was for Jaffe to purchase stolen goods.

²⁵ 35 Ala. 380 (1860).

time when it was thought that there could be no crime without the criminal intention and such fiction has been retained to this day. There is an abundance of evidence in support of the statement that intent is not an element of statutory crimes by the weight of authority, mistake of fact is not a valid defense in such cases.²⁶ A religious belief in plural marriages is not a defense to a charge of polygamy,²⁷ nor that defendant believed the prosecutrix had attained the age of consent, when charged with the crime of rape in the second degree,²⁸ nor that one accused of bigamy believed his former wife was dead when in fact she was living at the time he contracted the second marriage.²⁹

In the case of *Commonwealth v. Mixer*,³⁰ wherein the defendant was accused of illegally transporting intoxicating liquor into the city of Lynn, Rugg, J. made the following comment: "In the prosecution of crimes under the common law, apart from statutes, ordinarily it is necessary to allege and prove a guilty intent, and, as a general principle, a crime is not committed if the mind of the person doing the act is innocent. An evil intention and an unlawful action must concur in order to constitute a crime. But there are many instances in recent times where the legislature in the exercise of the police power has prohibited under penalty the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was promoted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether the deed is within the prohibition of any criminal statute." And other judges have written to the same effect.

Perhaps the rule as above stated is burdensome in individual cases, but it does not work a greater hardship than requiring all to measure up to a given standard, as in crimes *mala in se*. No state has yet attained the ideal society where "men do unto others as they would be done by." It is, therefore, necessary to formulate rules of conduct forbidding certain acts, not necessarily criminal in themselves, but which tend toward discord, unfair advantage, and the destruction of life and property. Stringent traffic laws, anti-trust laws, and the like, compelling strict conformity, and the punishment for their

²⁶ *Commonwealth v. Mixer*, 207 Mass. 141, 93 N. E. 249 (1910) and cases cited therein; see also *Reynolds v. U. S.*, 98 U. S. 145, 25 L. ed. 244 (1878); *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2 (1878).

²⁷ *Reynolds v. U. S.*, *supra* note 26.

²⁸ *People v. Marks*, 146 App. Div. 11, 130 N. Y. Supp. 524 (1st Dept. 1911).

²⁹ *Dotson v. State*, *supra* note 26.

³⁰ *Commonwealth v. Mixer*, *supra* note 26, at 142, 93 N. E. at 249.

infraction, may vary according to the frequency of the recurrence of such inimical acts. Such laws are necessary in the endeavor to maintain a harmonious society, and in cases involving the presence of criminal intent *dicta* to the effect that such is inferred misleads, is confusing, and unnecessary to a finding of guilt. The forbidden acts alone suffice.³¹

In conclusion: We have attempted to show that the statements "there can be no crime without the criminal intention," and "the intent is inferred from the act" are not applicable to all crimes. We must first turn to the statute. If such words as "intent" or "knowingly" are there, then the above statements are relevant and mistake or intoxication may be a defense because they show an absence of the intent. On the other hand, if the statute does not require knowledge or intent, such statements as "there can be no crime without the criminal intent" and "the intent is inferred from the act" are irrelevant. They can serve only to confuse the jury whose task, in these cases, is merely to determine from the evidence whether the defendant did those acts required by the statute. The intent with which they are done does not lessen or aggravate the crime.

LEO G. HOSENFELD.

³¹ In the light of the Penal Law, the distinction between crimes *mala in se*, and *mala prohibita*, seems obsolete. See NOTE (1930) 30 COL. L. REV. 74.