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Impossibility as a Defense to Criminal Attempt

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Impossibility as a Defense to Criminal Attempt

Two Navy airmen on a "bar hopping" spree stopped at a tavern. While one of the men was dancing with a young woman, she collapsed in his arms. Unaware of the cause of her collapse, they subsequently had sexual intercourse with the apparently unconscious woman. An autopsy revealed that the woman had died of a heart ailment at the time of her collapse and prior to the acts of sexual intercourse. *Held*: To uphold a conviction for rape, it must be shown beyond a reasonable doubt that the victim is alive at the time of the offense. However, the crimes of attempted rape[1] and conspiracy to rape are established even though, unknown to the accused, the "victim" is dead at the time of the offenses. *United States v. Thomas*, 13 U.S.C.M.A. 278 (1962).

I. Attempt

The offense of attempt originated in the earliest days of the common law when convictions for this crime were based on a doctrine borrowed from the ecclesiastical courts.[2] Under that doctrine, the will was taken for the deed.[3] However, its application was restricted, and only attempts to commit the more atrocious crimes, such as killing and robbery, were punished.[4] Subsequently, the formulation of specific substantive offenses covering some of the more common attempts broadened the scope of punishable conduct.[5] Nevertheless, the reluctance of courts to expand these specific substantive offenses left unpunished a variety of anti-social acts that were dangerous to the public.

In the late eighteenth century, a decisive conceptual extension of criminal attempt emerged under the influence of Lord Mansfield's opinion in *Rex v. Scofield*.[6] Although Scofield could not have been

[1] The instant case proceeded under article 80 of the Uniform Code of Military Justice, which provides for the substantive offense of an "attempt" in the following terms: "(a) An act, done with specific intent to commit an offense . . . amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." 64 Stat. 134 (1950), 50 U.S.C. § 674 (1951).

[2] Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821, 827 (1928).

[3] See Curran, *Criminal and Non-Criminal Attempts*, 19 Geo. L.J. 185, 316 (1931); Hall, General Principles of Criminal Law 569 (2d ed. 1960); Sayre, *supra* note 2.

[4] Sayre, *supra* note 2, at 827. Hall, *op. cit. supra* note 3, at 560-61.

[5] See 7 Geo. II, ch. 21 (1733), a statute which made certain attempts to rob punishable as assaults with intent to rob. 1 Bishop, Criminal Law § 437 (8th ed. 1892). See Hall, *op. cit. supra* note 3, at 562-69; Sayre, *supra* note 2.

[6] Cald. 397 (1784). Lord Mansfield announced:

> So long as an act rests in bare intention, it is not punishable by our laws; but immediately when an act is done, the law judges, not only of the act done,

found guilty of any criminal attempt then recognized,[7] his conviction was based upon the concept that the offense of an "attempt" could exist independent of any specific crime attempted.[8] This view gained rapid acceptance;[9] by 1837 Baron Parke was able to assert, without citing authority, that "an attempt to commit a misdemeanor is a misdemeanor whether the offense is created by statute or was an offense at common law."[10] The significance of Scofield's conviction and the rapid acceptance of the accompanying theoretical basis indicated judicial extension of criminality to conduct which had not been punishable under the old ecclesiastical theory or specific statutory prohibitions.

The offense of attempt today is the culmination of efforts to devise a standard that will serve two major functions: (1) to punish conduct which, though incomplete, is dangerous to society and at the same time (2) to prevent punishment (a) for acts done with criminal intent but not dangerous to society or (b) for mere criminal intent.[11] At the core of the modern doctrine is the clearly defined substantive offense of an attempt to commit another crime. The elements of an attempt are: (1) an intent to commit a specific crime, (2) an overt act which extends beyond mere preparation and tends to effect the commission of the crime, and (3) a failure to consummate the offense initially intended.[12] Thus, the offense of attempt includes a wide range of anti-social conduct as a distinct crime against society.

II. Impossibility

Although the requisite specific intent to commit a crime and the necessary overt act are established in an attempt prosecution,[13] legal

> but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. *Id.* at 402-03.

See Hall, *op. cit. supra* note 3, at 571. Sayre, *supra* note 2.

[7] Sayre, *supra* note 2, at 834.

[8] Arnold, *Criminal Attempts—The Rise And Fall of An Abstraction,* 40 Yale L.J. 53, 59 (1930).

[9] Curran, *supra* note 3, at 316-17; Sayre, *supra* note 2, at 836.

[10] Rex v. Roderick, 7 C. & P. 795, 796, 173 Eng. Rep. 347 (N.P. 1837).

[11] For the historical development of the law of attempt, see Curran, *supra* note 3, at 191-202, 316; Hall, *op. cit. supra* note 3, at 558-74; Sayre, *supra* note 2, at 821-37.

[12] See Clark & Marshall, Crimes § 4.06 (6th ed. 1958); Hall, *op. cit. supra* note 3, at 574-586.

[13] For the purpose of establishing the elements of a criminal attempt, both the intent of the accused as well as the nature of his acts must be viewed *in relation to a specific crime* and not from some concept of inherent dangerousness of the accused. Thus, it is established that the accused must have an intent to commit a *specific crime* and that an intent to be

impossibility is a recognized defense.[14] Factual or physical impossibility is not.[15] The basis for the distinction lies in the reason for the failure of the accused to consummate his plans.[16]

A. *Legal Impossibility*

The grounds for the defense of legal impossibility can be conceptually divided into two general categories: (1) the intended result is not a crime[17] and (2) the consummation of the intended crime is rendered unattainable by virtue of some rule of law.[18] The distinction is not semantic but conceptual. In the first category, the desired result is not prohibited, *e.g.*, homicide by witchcraft. Therefore, an attempt to commit homicide by witchcraft is not an offense. In the second category, although the final result may be a crime, a rule of law based upon policy or logic makes the crime legally impossible.

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dangerous is insufficient. Keedy, *Criminal Attempts At Common Law*, 102 U. Pa. L. Rev. 464, 466-68 (1954).

Moreover, it follows that despite the disagreement of authorities as to what constitutes the necessary kind of overt act, it must also be viewed in relation to the crime contemplated. Justice Holmes expressed this requirement in Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897), as follows:

> As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. . . . [I]t is not necessary that the act should be such as inevitably to accomplish the crime by the operation of natural forces but for some casual and unexpected interference. *Ibid.*

[14] State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939); State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903); Clark & Marshall, *op. cit. supra* note 12, at § 4.12; Hall, *op. cit. supra* note 3, at 586; Perkins, Criminal Law 494 (1957); Sayre, *supra* note 2, at 839; Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. Pa. L. Rev. 962, 968 (1930).

[15] State v. Wilson, 30 Conn. 500 (1862) (reaching into another's pocket is an attempt to commit larceny although the pocket is empty); Commonwealth v. Williams, 312 Mass. 553, 45 N.E.2d 740 (1942); State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902) (shooting at a bed believing victim was there when in fact victim was in another room is attempted murder); People v. Moran, 123 N.Y. 254, 25 N.E. 412 (1890). For a comprehensive survey of cases where factual or physical impossibility has not been allowed as a defense, see Model Penal Code, comment 30-38 (Tent. Draft No. 10, 1960). Also see Clark & Marshall, *op. cit. supra* note 12, at §§ 4.10-.11; Hall, *op. cit. supra* note 3, at 586; Sayre, *supra* note 2, at 858-59.

[16] See generally Clark & Marshall, *op. cit. supra* note 12, at § 4.06; Arnold, *supra* note 8; Beale, *Criminal Attempts*, 16 Harv. L. Rev. 491 (1903); Cook, *Act, Intention and Motive in the Criminal Law*, 26 Yale L.J. 645 (1917); Curran, *supra* note 3; Hoyles, *The Essential of Crime*, 46 Can. L.J. 393 (1910); Keedy, *supra* note 13; Sayre, *supra* note 2; Skilton, *The Mental Element in a Criminal Attempt*, 3 U. Pitt. L. Rev. 181 (1937); Strahorn, *supra* note 14; Tulin, *The Role of Penalties in the Criminal Law*, 37 Yale L.J. 1048 (1928); Turner, *Attempts to Commit Crimes*, 5 Camb. L.J. 230 (1934).

[17] Burdick, Crime § 143 (1946); Clark & Marshall, *op. cit. supra* note 12, at § 4.12; Williams, Criminal Law § 150 (1953).

[18] State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939); State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903); State v. Guffey, 262 S.W.2d 152 (Mo. App. 1953); State v. Porter, 125 Mont. 503, 242 P.2d 984 (1952); Marley v. State, 58 N.J.L. 207, 33 Atl. 208 (Sup. Ct. 1895); People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906); Bishop, New Criminal Law § 755 (1892); Burdick, *op. cit. supra* note 17, at § 143; Hall, *op. cit. supra* note 3, at 595-96; Perkins, *op. cit. supra* note 14, at 494.

For example, in a jurisdiction that presumes a fourteen year old boy is legally incapable of committing rape, the presumption prevents the commission of an attempt to rape, even though a boy under that age physically attempts to have intercourse with a woman against her will.[19]

The defense of legal impossibility does not deny the existence of the accused's evil intent nor the occurrence of certain acts of the accused pursuant to that intent.[20] Rather, the defense vitiates the criminality of the attempt if the final result would not be a crime or would be legally impossible to accomplish.[21] Furthermore, if the defense of legal impossibility applies, the accused's failure to consumate his plans is irrelevant, despite the fact that an essential element of an attempt is the failure to achieve the anticipated result.[22]

B. *Factual Impossibility*

Factual or physical impossibility is based upon the absence or occurrence of some physical or factual event that is unknown to the defendant and prevents the achievement of the contemplated result.[23] The disallowance of this event as a defense is justified because the accused's acts, done in pursuance of an evil intent, present a threat to society. Also, contrary to legal impossibility, the completed act

[19] Foster v. Commonwealth, 96 Va. 306, 31 S.E. 503 (1898). See also May v. Pennell, 101 Me. 516, 64 Atl. 885 (1906); Frazier v. State, 48 Tex. Crim. 142, 86 S.W. 754 (1905); Perkins, *op. cit. supra* note 14, at 494.

The justice in allowing the defense of legal impossibility in the second category lies in the fact that the impossibility was a consequence of the conceptualization of the consummated crime and has the same legal effect as if the accused intended to achieve a result which is no crime at all. Since in both categories the accused is ignorant of a rule of law and since the accused's intent must relate to a *specific crime*, it is submitted that there is legally no difference in the accused's intent. Convictions in those cases in which the crime was legally impossible to commit would have to be based upon the accused's evil intent, would involve the use of the doctrine of attempt to remedy defects in the criminal law, and would endanger the very grounds upon which legal impossibility is based, *e.g.*, the nonexistence of a crime. See Strahorn, *supra* note 14, at 990. *Contra,* Model Penal Code, comment 30 (Tent. Draft No. 10, 1960).

[20] The defense of legal impossibility is based upon the premise that *despite* the accused's acts and intent, the particular course of conduct is not criminal in law. Regardless of whether the completed desired result was not prohibited or was legally impossible to achieve, the defense in either case is based on the accused's misunderstanding of the scope of prohibitions or of some legal rule which renders the completion of the desired result impossible.

[21] Hall, *op. cit. supra* note 3, at 586; Williams, *op. cit. supra* note 17.

[22] Clark & Marshall, *op. cit. supra* note 12, at § 4.12; Hall, *op. cit. supra* note 3, at 586.

[23] See Keedy, *supra* note 13, at 479-89; Sayre, *supra* note 2, at 843-55. The three groups of attempt cases in which the problem of factual impossibility arises are: (1) the consummation of the crime was prevented by the interruption of the defendant from completing all his intended acts or by his voluntary withdrawal, (2) the consummation of the crime was prevented after the completion of the defendant's intended acts by the interposition or operation of extraneous forces unexpected by the defendant, and (3) the consummation of the crime was prevented by some mistake of fact on the part of the defendant. *Id.* at 858-59. See Strahorn, *supra* note 14, for a discussion of the relation between impossibility and liability of the accused.

would have constituted a punishable crime.[24] Therefore, the ignorance of the accused as to the probability of his success does not vitiate the criminality of his attempt.[25]

One justification for convictions in which factual and not legal impossibility is pleaded is termed the "reasonable man" test.[26] Under this view, if the defendant has failed, but a reasonable man acting under the same circumstances might have expected his acts to be a crime, the failure is attributed to factual or physical occurrences. For example, under most conditions a reasonable man knows that a dummy is not a woman and is not subject to rape, but no matter how poor a marksman he may be, a reasonable man knows that the mere pointing and shooting of a weapon toward another can result in the latter's death.

III. Overlap of Attempt and Impossibility

Although legal or factual impossibility is conceptually distinct from the offense of attempt, it is difficult to isolate the determination of the applicable kind of impossibility from the problem of whether a given attempt is criminal. Because an attempt by definition involves the failure to consummate a certain desired result, the impossibility, though dealing with the reason for the failure, always follows automatically from a prior determination of whether the attempt is criminal. Similarly, a determination that a given reason for the failure is either legal or factual impossibility will necessarily dictate whether or not the attempt is criminal.

Present authorities are divided as to the purpose of attaching criminality to an attempt. This disagreement stems from divergent views on the two essential questions underlying the offense of attempt. The first question involves the determination of the extent to which punishment should take into account the importance of the evil intent of the accused contrasted with the danger to society presented by his acts.[27] The second question considers the seriousness

[24] Hall, *op. cit. supra* note 3, at 586-97.

[25] See examples cited in note 15 *supra*. In cases of legal impossibility, the accused is ignorant either as to a rule of law which renders consummation of a specific crime incapable or as to the absence of prohibitions on certain results. In cases of factual or physical impossibility, the accused is ignorant of the existence or absence of circumstances which are essential to the consummation of his plan.

[26] Sayre, *supra* note 2, at 848.

[27] Sayre, *supra* note 2, states:

> Under the retributive or expiative theory, the object of criminal justice is conceived to be punishment qua punishment, and the aim is to make the defendant suffer in exact proportion to his guilt. Since the proportionment of an individual's guilt cannot be divorced from moral and psychological considerations, punishment for a criminal attempt under this theory must be

of the attempted crime in determining whether the attempt should be an offense.[28] Because the definition of attempt gives no standard of criminality,[29] the recognition of the defense of legal impossibility often depends upon such factors as the court's view of the facts, its espousal of a particular theory of criminal justice, and its susceptibility to policy questions.[30]

IV. The Thomas Case

United States v. Thomas is a case of first impression[31] and presents an unusual intertwining of legal and factual impossibility with the offense of attempted rape. The facts could be interpreted as presenting a case of either legal or factual impossibility with the distinction between the two depending upon the recognition of the legal consequences of the death rather than the description of the victim's death as an "event" or a "fact." It is arguable that the crime of rape cannot legally be committed upon a dead person because the crime involves the suffering of a living female only.[32] Hence, by virtue of a rule of law and not the accused's ignorance of a fact, the crime was incapable of completion. This recognizes the consequence of the woman's death upon her legal status as a living female; thus, the ignorance of the accused as to the woman's true *legal status* is irrelevant. The status itself or more precisely the lack of the status as a living person precludes the criminality of the attempt. On the

> determined from an essentially subjective viewpoint, i.e., a defendant will deserve punishment if he actually intended to consummate a crime and committed such acts as from his viewpoint would be effective in achieving the crime, quite regardless of whether in the world of facts his acts could or could not cause the criminal consummation desired. If, on the other hand, one follows the more modern utilitarian theory of criminal justice, i.e., that the end of criminal law is to protect public and social interests, and that criminality should depend primarily therefore, not on moral guilt but on whether or not social or public interests are unduly injured or endangered, then it follows that the question of punishment for a criminal attempt must be determined from an objective viewpoint. Under this view the question of the criminality of an attempt will depend primarily not on what may have been passing through the mind of the individual defendant, but on the degree of actual danger to social or public interests arising from his acts. *Id.* at 849.

[28] *Compare* Beale, *supra* note 16, at 491 *with* Curran, *supra* note 3, at 333; and *compare* Curran, *supra* note 3, at 335-36 *with* Strahorn, *supra* note 14, at 971.

[29] For the definition of attempt, see text accompanying note 12 *supra*. It is apparent that there is no unequivocal indication whether the intent of the accused coupled with certain acts, or the danger to society from acts done in pursuance of an evil intent, is the focal point for determining the criminality of an attempt.

[30] Note the difference in approach between the New York and California courts on the problem of an attempt to receive stolen cars discussed in 6 Vill. L. Rev. 575 (1961).

[31] Although the majority does not make reference to the problem of rape in the field of attempt, the dissent indicates that the majority is at least aware that they are dealing with a case of first impression. See 13 U.S.C.M.A. at 295.

[32] See 75 C.J.S. *Rape* § 38 (1952); 13 U.S.C.M.A. at 295 (1962).

other hand, if the effect of the death on the woman's legal status is not recognized by the court, the death is merely another "fact" or "event" essential to the failure of the intended crime of rape. Under this view, the ignorance of the accused as to the woman's true *condition* constitutes a mere mistake of fact and, as such, is not a defense.[33]

The court, when faced with this difficult choice between factual or legal impossibility, rejected the defense of legal impossibility in the second category, *i.e.*, the consummation of the intended crime is rendered impossible by virtue of some rule of law. The United States Court of Military Appeals relied entirely upon the Model Penal Code,[34] a mere suggestion of the American Law Institute which is without force of law and which had not been argued by either side.[35] The Model Penal Code, in effect, partially rejects the legal impossibility defense in order "to reverse the results in cases where attempt convictions have been set aside on the ground that it was legally impossible for the actor to have committed the crime contemplated."[36] In other words, the Model Penal Code provides that the defense is available only in the first category, *i.e.*, the intended result is not a crime.[37] The Code justifies rejection of the second category—the consummation of the intended crime is rendered impossible by virtue of some rule of law—on the theory that criminal purpose has been clearly demonstrated, the actor has gone as far as he could in implementing the purpose, and thus his "dangerousness" has been manifested.[38]

Regardless of the validity of the Code's rejection of this category of legal impossibility, the court apparently founded its rejection on

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[33] See text accompanying notes 23-26 *supra*.

[34] Model Penal Code § 5.01 (Tent. Draft No. 10, 1960) states:

> (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 the 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 is 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. *Id.* at 17.

[35] An examination of the briefs of the prosecution and defense reveals no reference to the Model Penal Code. Furthermore, it is interesting to note that the theory of the prosecution was quite different from that under which the court convicted the defendants. The prosecution's theory was essentially based on the reasonable man test, *i.e.*, the woman's death prior to the attack was not important since a reasonable man would have, under the circumstances, believed that the woman was drunk, hence alive. Brief for Prosecution, p. 5.

[36] See Model Penal Code, comment 30 (Tent. Draft No. 10, 1960).

[37] See text accompanying note 19 *supra*.

[38] See note 36 *supra*.

what it considered to be a hopeless confusion in existing authority and the consequential denial of true and substantial justice.[39] The court was diligent in citing many of the leading authorities and cases[40] in the field of attempts. However, the majority opinion did not deal specifically with the restricted area of attempted rape, but sought to harmonize all the attempt cases.[41] Although the court concluded that the distinction between legal and factual impossibility is "nebulous,"[42] the authorities do not bear out this conclusion.[43] However, the court's own, though debatable, conclusion of the denial of true and substantial justice under existing authorities[44] must have been instrumental in its search for a more "progressive and modern view."[45]

By basing its decision upon the Model Penal Code, the court avoided the choice between factual and legal impossibility. If the court had treated *United States v. Thomas* as presenting a case of factual impossibility, it would have rejected those authorities which uphold the defense of legal impossibility when the crime is legally impossible

[39] 13 U.S.C.M.A. at 285. However, note Judge Ferguson's dissatisfaction with the attitude of the court. 13 U.S.C.M.A. at 295-301.

[40] 13 U.S.C.M.A. at 282-85 (1962).

[41] Despite the court's citation of authorities in the field of attempt, the opinion makes reference only to Arnold, Hall, Sayre, and Strahorn. These writers, on the points for which they are quoted, are not representative of the remaining authorities that are only cited by the court. See 13 U.S.C.M.A. at 284-85. Moreover, of these four authorities, two were seriously misconstrued by the court. Compare the court's utilization of Strahorn, 13 U.S.C.M.A. at 285 with Strahorn's own views. See Strahorn, *supra* note 14. Note the court's distortion of Arnold's position by carefully comparing 13 U.S.C.M.A. at 285 with Arnold, *supra* note 8, at 71.

[42] 13 U.S.C.M.A. at 287.

[43] For example, the court, in reading Perkins, *op. cit. supra* note 14, at 494, failed to consider the following statement:

> If a certain act of forcible intercourse with a woman does not constitute rape (husband with wife, for example), an attempt to do so, or even the completed act, does not constitute an attempt to commit rape, even if it does constitute a different crime,—assault and battery. The answer is the same even if the husband made the attack in the dark *thinking the woman was not his wife.* The actual attempt, as distinguished from a mental abstraction, was to have an act of intercourse which was not rape. (Emphasis added.)

See also 1 Bishop, *op. cit. supra* note 5, at § 753; Sayre, *supra* note 2, at 858; Smith, *Two Problems in Criminal Attempts,* 70 Harv. L. Rev. 422, 439-42 (1957); Strahorn, *supra* note 14, at 986; Burdick, *op. cit. supra* note 17, at § 144; Williams, *op. cit. supra* note 17, at § 150.

[44] 13 U.S.C.M.A. at 285. See note 43 *supra.*

[45] 13 U.S.C.M.A. at 285, 286. After citing the provision of the Model Penal Code dealing with attempt, the court said:

> After having given this entire question a great deal more than casual attention and study, we are forced to the conclusion that the law of attempts in military jurisprudence has tended toward the advanced and modern position, which position will be achieved for civilian jurisprudence if The American Law Institute is *completely successful* in its advocacy of this portion of the Model Penal Code. (Emphasis added.) *Ibid.*

The implication as to the Code's persuasiveness in advocating the attempt provision is erroneous. See Model Penal Code, *supra* note 15.

to commit even though it is shown that the accused had an evil intent and acted pursuant to it.[46] The court would also have rejected analogizing the problem of the instant case to an attempt to murder a corpse, which is recognized as not being a criminal attempt.[47] Furthermore, such a view of the case would have entailed rejection of the prevalent view that a dead body cannot be subject to the same crimes as a living person.[48] Finally, the court would have punished more on the basis of evil intent than on the basis of the injury or threat of injury to the particular victim.[49] On the other hand, if the court had recognized the defense of legal impossibility, it would have applied only slight punishment although the accused had an evil intent to commit a heinous crime.[50] Moreover, the court would have rejected the theory that punishment of an individual who has demonstrated his dangerousness is justified to protect all women and not just the particular victim.[51] Finally, this view of the case would have been tantamount to rejection of the well-recognized "reasonable man" test.[52]

V. Conclusion

The Model Penal Code was not essential to the decision of this case. Under existing authorities, the court could have applied the "reasonable man" test or viewed the particular circumstances as presenting a case of factual impossibility. However, both the court and the Model Penal Code are wrong in rejecting legal impossibility in the second category, *i.e.*, the consummation of the intended crime is rendered impossible by virtue of some rule of law. Although the court is correct in noting that the authorities are in confusion, there is, contrary to the court's view, general agreement that the legal impossibility defense is sound. The confusion results from disagree-

[46] See notes 17-21 *supra.*

[47] See Curran, *supra* note 3, at 185-86; Keedy, *supra* note 13, at 468. Although the court cited State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939), and State v. Guffey, 262 S.W.2d 152 (Mo. 1953), it failed to apply the holdings in both cases that it is no crime to attempt to murder a corpse because it cannot be murdered.

[48] See Brooks v. Boston & N. St. Ry., 211 Mass. 277, 97 N.E. 760 (1912), where the court said: "It is axiomatic that a corpse is not a person. That which constitutes a person is separated from the body by death and that which remains is 'dust and ashes,' sacred to kin and friends, whose feelings and rights in this regard receive the protection of the law. . . ." In Deeg v. City of Detroit, 345 Mich. 371, 76 N.W.2d 16 (1956), the Michigan Supreme Court also recognized this distinction by holding that mutilation of a corpse was a cause of action based upon injury or damage to the feelings of the next of kin, but not for damage to the corpse since there is no property right in a corpse.

[49] Strahorn, *supra* note 14; see note 27 *supra.*

[50] The prosecution had established that the accused had committed sexual intercourse on the woman. The offense of lewd and lascivious conduct in violation of article 134 of the Uniform Code of Military Justice was therefore undisputedly committed.

[51] See Arnold, *supra* note 8; Curran, *supra* note 3; Sayre, *supra* note 2.

[52] See text accompanying note 26 *supra.*