ONTARIO REPORTS.

COMMON PLEAS.

The Queen v. Goodman.

Criminal law—Attempt at arson—Evidence.

On an indictment for attempt to commit arson, the evidence showed that one W., under the direction of the prisoner, after so arranging a blanket, saturated with oil, that if the flame were communicated to it, the building would have caught fire, lighted a match, held it till it was burning well, and then put it down to within an inch or two of the blanket, when the match went out, the flame not having touched the blanket:

Held, that the prisoner was properly convicted, under 32 & 33 Vict., ch. 22, sec. 12, of an attempt to commit arson.

[22 C. P. 338.]

The prisoner was tried at the last Spring Assizes, at Hamilton, before S. Richards, Q. C., under an indictment containing two counts; the first, charging that one Francis Waters, unlawfully, and maliciously, did attempt feloniously, unlawfully and maliciously to set fire to a certain dwelling-house, by then and there saturating a blanket with coal oil, and placing it against said dwelling-house, and sprinkling coal oil upon the doors and sides thereof, and attempting to apply a burning match to said oil, said house being at the time inhabited.

The second count charged that the prisoner, before the commission of the said felony, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command said Waters, the felony in manner and form aforesaid to do and commit, against, &c.

The evidence showed that Waters, after arranging under prisoner's directions the saturated blanket, lighted a match, and held it in his fingers till it was burning well, and then put it down towards the blanket, and got it within an inch or two of the blanket when the match went out, the blaze not touching the blanket, and he throwing away the match, and leaving without making any second attempt.

At the conclusion of this evidence prisoner's counsel objected that the evidence of a felony having been committed by Waters was insufficient; that sec. 12, of ch. 22, of 32 & 33 Vict., required an overt act to complete the offence under that section; that the overt act must be of such a nature as to be capable of setting fire to the building, and that at most Waters' act was only an attempt to commit an overt act.

The learned Queen's Counsel overruled the objection, but reserved the question for the consideration of this Court, and he charged the jury that if they believed Waters poured the oil against the building, and also placed the pieces of blanket saturated with oil on the sills of the doors, and that while at the front door he lighted the match, and while so lighted stooped down to apply it to the oil, intending then to set fire to the oil in the saturated blanket, and thereby to set fire to the house, and was in the act of placing the burning match against the oil, and had reached within an inch or two of it, when the light went out, as he had stated in his evidence—then that these acts constitute a sufficient attempt and overt act within sec. 12, of ch. 22, although the match, while in a flame or burning, never touched the oil or blanket, and although no fire was actually communicated to the oil or blanket.

The Attorney General, for the Crown, contended that the charge was fully sustained by the evidence, and the case brought within the 12th sec. of ch. 22, 32 & 33 Vict. He referred to *Regina* v. *Taylor*, 1 F. & F. 511; *Regina* v. *Esmonde*, 26 U. C. 152: *Regina* v. *Bain*, 9 Cox 98.

Robertson, contra, contended that it was not such an overt act, within the meaning of the Statute, as would render the prisoner liable to be convicted.

Hagarty, C. J., delivered the judgment of the Court.

The fact of Waters going away, or ceasing further action after the match went out (not by any act or will of his), seems to put the matter just as if he had been interrupted, or was seized by a peace officer at the moment.

It seems to me the attempt was complete, as an attempt, at that moment, and no change of mind or intention, on prisoner's part, can alter its character.

I see no objection to the charge. There was no doubt the combustible matter was so arranged that if the flame were communicated to it, the building would have caught fire, and the full crime of arson been complete. It would be a reproach to the law if such acts as were here proved do not constitute an overt act towards the commission of arson.

In *Regina* v. *Cheeseman* (L. & C. 145), Blackburn, J., says: "There is no doubt a difference between the preparation antecedent to an offence, and the actual attempt. But if the actual transaction has commenced which would have ended in the crime, if not interrupted, there is clearly an attempt to commit the crime. Then, applying that principle to this case, it is clear that the transaction which would have ended in the crime of larceny had commenced here."

Regina v. *McPherson* (D. & B. 202). Cockburn, C. J.: "The word, attempt, clearly conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed. * * Attempting to commit a felony is clearly distinguishable from intending to commit it.

Regina v. *Taylor* (1 F. & F. 512). The prisoner was indicted for that he by a certain overt act, (*s.c*) by then and there lighting a certain match, &c., near to a certain stack of corn, &c., unlawfully, maliciously, and feloniously, did attempt to set fire to said stack, &c. Prisoner called at prosecutor's house and applied for work; on refusal he asked for money, and on being again refused threatened to burn up the prosecutor. He was watched and seen to go to the stack, kneel down close to it, and strike a match; but seeing he was watched, he blew it out and went away. The stack was not at all burned. Pollock, C. B., told the jury that "If they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, in his opinion this was in law a sufficient attempt to set fire to the stack." After stating that buying a box of matches, with intent to set fire to a house, would not be sufficient, he adds: "The act must be one immediately and directly tending to the execution of the principal crime, and committed under such circumstances that he has the power of carrying his intention into execution." The jury found that they were not satisfied that prisoner intended to set fire to the stack, but they thought he intended to extort