CRIMINAL LAW — ROBBERY — ONE WHO USES BARE FISTS IN THE COMMISSION OF A ROBBERY IS NOT ARMED WITH A DANGEROUS OR DEADLY WEAPON WITHIN THE MEANING OF CALIFORNIA PENAL CODE SECTION 211a; FIRST DEGREE ROBBERY CONVICTION REDUCED TO SECOND DEGREE. *People v. Dozie* (Cal. App. 1964).

The defendants McClinton and Dozie met the victim and drank with him in several bars. They later drove him to a rural area, beat him into unconsciousness with bare fists, robbed him, and stole his car. The defendants were convicted of car theft and first degree robbery, the trial court holding that fists were dangerous or deadly weapons within the meaning of California Penal Code § 211a.[1] On appeal the judgment was modified by reducing the conviction of first degree robbery to robbery of the second degree.[2] The use of naked hands or fists does not make the crime robbery with a "dangerous or deadly weapon" within the meaning of § 211a. *People v. Dozie*, 224 Cal. App. 2d 474, 36 Cal. Rptr. 728 (1964).

There was no question that the defendants had committed robbery. The significant question on appeal was whether the use of bare fists during the commission of a robbery placed the defendant within the statutory classification of persons perpetrating a robbery while armed with a dangerous or deadly weapon. The answer to this question is determinative of the degree of the crime under Penal Code § 211a. The distinction between first and second degree robbery in California is important because of the difference in minimum sentences.[3]

In *Dozie* it was declared that the distinction between first and second degree robbery hinges upon the character of the instrumentality with which the offender was armed. A two-step test was applied, viz. was the defendant armed at the time of the commission of the robbery, and if so, was the character of the instrument with which he was armed such that it was of a dangerous or deadly nature?[4] Under this viewpoint a determination of the defendant's

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1 "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon, . . . is robbery in the first degree. All other kinds of robbery are of the second degree." CAL. PEN. CODE § 211a, as amended.

2 CAL. PEN. CODE § 1260 provides that the court may reduce the degree of the offense or the punishment imposed as an incident to modification of the judgment.

3 CAL. PEN. CODE § 213 prescribes a minimum sentence of imprisonment for one year for persons convicted of second degree robbery while the minimum sentence prescribed for first degree robbery is imprisonment for five years. Probation may be granted where there has been a conviction of first degree robbery if the defendant was armed with only a dangerous but not a deadly weapon. CAL. PEN. CODE §§ 211a, 1203, People v. Raner, 86 Cal. App. 2d 107, 194 P.2d 37 (1948).

4 224 Cal. App. 2d at 476, 36 Cal. Rptr. at 730.

use of or intent to use the weapon is immaterial. In applying this test the court said that an offender is armed when "he equips himself with some object, device or instrumentality *extrinsic to his own body* . . . ."[5] (Emphasis added.), and since the defendants were not armed within the scope of this definition it was unnecessary to decide whether fists are of a dangerous or deadly nature.

It is difficult to rationally dispute the wisdom of the decision reached in this case because the legislative intent in dividing the crime of robbery into two degrees seems to have been to deter would-be felons from carrying any instrument which might cause great bodily harm to their intended robbery victims.[6] However, in light of several earlier California cases it appears that the *Dozie* court took too narrow a view of the purpose of the robbery statutes.

In *People v. Wood*[7] the defendant knocked his robbery victim down and kicked him. The defendant was charged with first degree robbery and convicted. In rejecting the defendant's contention that there was no evidence that he was armed with a dangerous or deadly weapon the court held that: "A shod foot is not a weapon in the strict sense. *But it is capable of being so used.*"[8] (Emphasis added.) The court had no doubt that a shod foot, used as the defendant intended to and in fact did use it, is a dangerous and might well be a lethal weapon.[9]

In *Wood* the court applied the test set out in *People v. Raleigh*[10] which specifies that in situations where the instrumentality is not a weapon in the strict sense of the word, but may be used as such, there is a question of fact to be determined in fixing the degree of robbery. The character of the instrumentality is established by an examination of the intent of the defendant and the capability of the instrumentality for dangerous or deadly use. A finding that the instrumentality is capable of dangerous or deadly use, that the defendant intended to use the instrumentality in a dangerous or deadly manner, and that the defendant had the present ability is tantamount to a finding that the defendant was armed with a dangerous or deadly weapon.

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[5] *Ibid.*

[6] The Legislature in amending CAL. PEN. CODE § 460 made the use of weapons a factor in dividing burglary into offenses of the first and second degree at the same time that § 211a dividing robbery into two degrees was enacted.

[7] 192 Cal. App. 2d 393, 13 Cal. Rptr. 339 (1961).

[8] *Id.* at 396, 13 Cal. Rptr. at 341.

[9] There was evidence that the defendant might have used a broken wine bottle in perpetrating the robbery.

[10] 128 Cal. App. 105, 16 P.2d 752 (1932).

In *People v. Bennett*,[11] where the victim was kicked unconscious and robbed, another test was applied.[12] The court considered the nature of the object or instrument, the manner of its use, the location on the body of the injuries inflicted, and the extent of such injuries in determining whether an instrument which was not inherently deadly or dangerous had assumed such characteristics. Applying these criteria the defendant's use of a shod foot to injure his robbery victim was held to constitute robbery of the first degree.

Comparing the test used in *Dozie* with the tests applied in the *Raleigh* and *Bennett* cases it is difficult to see a distinguishable difference between the utilization of a fist or an ordinary shoe in perpetrating a robbery. It is hard to conceive that a court or jury would find that a defendant was 'armed' merely because he committed the crime while wearing shoes, even though a shoe is technically extrinsic to the body.

Under the *Dozie* viewpoint the trained karate expert who spends years fashioning his hand into a weapon, and the trained prize fighter would, apparently, not be armed with a dangerous or a deadly weapon were they to use their bare hands in perpetrating a robbery.

Does the element of attempted use, which was not a factor in the *Dozie* decision, necessarily affect the determination of whether a defendant is guilty of first or second degree robbery? California courts have answered this question affirmatively in at least two instances. In *People v. O'Neal*[13] it was said that a dangerous or deadly weapon or instrument is characterized by the manner with which it is used or attempted to be used if it is likely to produce death or cause great bodily harm. The question is one of fact for the jury. *O'Neal* was cited with approval in 1959 in *People v. Liner*.[14]

It is curious that the courts have discussed cases involving the crime of assault with a deadly weapon[15] when dealing with cases arising under the robbery statutes,[16] especially since the court said as early as 1925 in *People v. Seawright*[17] that first degree robbery does not require an assault, but requires only that the accused be armed with a dangerous or deadly weapon.

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11 208 Cal. App. 2d 317, 25 Cal. Rptr. 257 (1962).
12 See People v. Russell, 59 Cal. App. 2d 660, 139 P.2d 661 (1943). This case involved an assault with a deadly weapon (CAL. PEN. CODE § 245) and is therefore doubtful authority in robbery cases.
13 2 Cal. 2d 551, 38 P.2d 430 (1934).
14 168 Cal. App. 2d 411, 335 P.2d 964 (1959).
15 CAL. PEN. CODE § 245.
16 CAL. PEN. CODE §§ 211, 211a.
17 72 Cal. App. 414, 237 Pac. 796 (1925).

It is apparent that a uniform test should be promulgated by the California Supreme Court so that there will be consistency in the decisions of the California District Courts of Appeal when they deal with the California robbery statutes. It is submitted that a reasonable test could be phrased in the following terms:

First: A robbery is of the first degree if during the commission of the robbery the defendant was armed with an inherently dangerous weapon, or a deadly weapon such as a loaded firearm, a knife with a blade exceeding a specified length (*e.g.*, 5 inches), or an instrumentality mentioned in Penal Code § 12020.[18]

Second: The robbery is also of the first degree if during the commission of the robbery the defendant possessed the means to inflict great bodily injury and intended to inflict, or threatened to inflict, or actually did inflict great bodily injury.

Third: Robbery perpetrated in any other manner is of the second degree.

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[18] CAL. PEN. CODE § 12020. "Any person . . . who . . . possesses any instrument or weapon of the kind commonly known as a blackjack, slung shot, billy, sandclub, sandbag, or metal knuckles, or who carries concealed upon his person any explosive substance, other than fixed ammunition, or . . . any dirk or dagger, is guilty of a felony, ..."