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Robbery-Mental Element at the Time of Force or Putting in Fear

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NOTE

ROBBERY — MENTAL ELEMENT AT TIME OF FORCE OR PUTTING IN FEAR

The offense of robbery is composed of two constituent physical acts: (1) the assault, violence, or putting in fear; and (2) the felonious taking of property as a result thereof.[1]

We are here concerned with the mental element necessary at the time of the assault, violence, or putting in fear; is it necessary that the violence or putting in fear be used for the purpose of accomplishing the theft, and should it be necessary?

Apparently, the majority of the cases on the point hold the defendant guilty of robbery, even though at the time of the force or threats, there was no intent whatsoever to steal. While attempting to commit rape upon a woman, the de-

[1]Diaz et al v. State, 182 S. W. 2d 805 (Tex.).

fendant accepted money which she offered him voluntarily in order to induce him to desist from his purpose. He was held to be guilty of robbery, even though his intention was clearly not to obtain money.[2] After overcoming his opponent, in a fight resulting from a quarrel, the defendant decided to take his money and took it. It was held to be robbery.[3] A gang of poachers assaulted a game keeper and left him senseless; one of them later formed the intent to steal from him and returned and stole, the one who returned was held to be guilty of robbery.[4] Where thieves assaulted a watchman to get a safe combination and after the watchman was disabled, saw and took a key, the court said, "It is not important . . . whether taking the key . . . was an afterthought suggested by seeing it on the table or was planned before entering the room or putting the watchman in fear."[5] The court's charge that if money is taken following another crime upon victim, it is robbery, was held not to be error.[6] The defendant assaulted a woman with intent to commit rape, she offered him money to desist, he desisted from his purpose and followed her to her home, where she gave him a dollar. He was held guilty of robbery.[7]

It will be seen that in all these cases the force was a criminal act. However, the case of Diaz et al v. State[8] brings the doctrine to the ultimate. In that case the force used was justifiable self-defense, with no intent to rob, the intent to rob being formed after defendant's opponent was helpless. It was held that "the fraudulent taking of property from a party injured as a result of an assault constitutes robbery." This case certainly carries the doctrine to ends out of keeping with some basic premises of the criminal law and is a good example of what happens when courts start stretching points in order to convict a man of a more serious crime than that of which he is actually guilty. The force in this case was no force at all, legally; had the episode ended with the force, the state would have had no criminal action against the defendant nor would the victim have had a civil action. The defendant used the force rightfully, with no unlawful intent, and it was not excessive.

There is some authority to the effect that the force must have been used with the intention of committing larceny.[9] Wynn v. Com.[10] affirms this view. In this case it is said, ". . . if the deputy marshal searched persons in good faith and not for the purpose for robbing them, but after thus getting the money, feloniously kept and converted it to his own use, his act constituted petit larceny

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[2]Rex v. Blackham, 2 East, P. C. 711.
[3]People v. Jordan, 135 N. E. 729 (Ill.).
[4]Rex v. Hawkins, 3 Carr. & P. 392.
[5]Hope v. People, 83 N. Y. 418.
[6]State v. Covington, 126 So. 431 (La.).
[7]State v. Nathan, 5 Rich. L. (S. C.) 219.
[8]182 S. W. 2d 805 (Tex.).
[9]May's Criminal Law, 3d Ed., p. 235.
[10]135 Ky. 447, 122 S. W. 516.

and not robbery." This is flatly contrary to Diaz v. State,[11] although it is perhaps distinguishable from the cases cited in footnotes 2 to 7 incl. in that the condition taken advantage of in those cases was brought about by a criminal act. Some other cases in which it is required that defendant have the intent to commit larceny at the time of the volence are

1. U. S. v. Birmeda,[12] where victim was tied for a reason entirely foreign to the idea of taking the money and sometime later the defendant got the idea of taking the money and took it, it was held not to be robbery.
2. Reg. v. Edwards,[13] where it was said, that in order to constitute the offense of robbery, not only must the force be employed by the person charged therewith, but it is necessary to show that that force was used with intent to accomplish the robbery.
3. Mahoney v. People,[14] holds that force as used in robbery generally implies the overcoming or attempt to overcome, an actual resistance or the preventing of such resistance, through fear. The case goes on to say that it ought not to be held that every assault and battery that results in a taking, constitutes that element of violence.

It does seem that these cases are more in keeping with certain premises of the criminal law, to be mentioned shortly.

The position of the Pennsylvania courts on this question is perhaps open to debate. However, from the cases of *Com. v. Stelma*[15] and *Com. v. Patterson*,[16] we get the impression that they would not require the force to have been used with the intent to effect a larceny. In the first of these cases, the assault was made allegedly with no intention of taking money. After the victim was helpless, the defendant decided to take his money. The victim died as a result of the assault, and the defendant was convicted of murder in the first degree under the felony murder theory. The upper court said, "The time when the intent to rob was formed is immaterial." This statement was merely dictum, because the court goes on to say that from the facts of the case it was obvious that the defendant intended to rob his victim at the time he assaulted him. It does however give us an idea of that court's view of the matter. In the other case, the county court seems to take it for granted that although the intent to steal was formed after the assault, the taking was robbery; here, again, the assault resulted in the death of the victim. These two cases indicate that probably the Pennsylvania courts would hold that whether the defendant formed the intent to steal before or after he used violence is immaterial to the crime of robbery.

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[11] Footnote 8.
[12] 4 Philippine 229.
[13] 1 Cox C. C. 32.
[14] 3 Hun (N. Y.) 202.
[15] 327 Pa. 317, discussed in 42 Dick. L. R. 85.
[16] 41 D. & C. 215.

The basis of all the decisions holding that it is not essential to the crime that the force or putting in fear be used for the purpose of stealing seems to be that the defendant took advantage of the helpless condition of the victim. If that is so, it seems but a short step to make any larceny in which the victim is in a helpless condition brought about by force, either lawful or unlawful, robbery, whether the force was applied by the defendant or by a stranger. In only one authority do we find an express statement that the force must have been used by the defendant. This is in Corpus Juris[17] where it is said, "Even though the violence precedes the taking and results from causes other than an intent to rob, feloniously taking the property of a victim rendered helpless *by one's own violence* has been held robbery."

It is fairly certain that the mere taking advantage of the force used by a stranger to effect a felonious taking would not constitute robbery and yet, just how different are the two situations? In both the force and the taking are two separate and distinct acts. In the cases cited in footnotes 2 to 7 incl., the force would have been punishable as a crime in itself and in most the taking would have been punishable as larceny. Mentally and temporally, there is no more connection between the violence and the taking when both are committed by the same person than when both are committed by different persons.

There seems to be no good reason for punishing a man for a crime more serious than the one of which he is actually mentally and physically guilty. The theory of constructive crime is a dangerous one and must be applied carefully.[18] The purpose of the criminal law should not be only retribution; the main objective should be the rehabilitation and reform of the offender.[19] If a man is to be taught to live in society, he must be convinced that society will be fair with him and punishing him without regard to his mental element will certainly not achieve this objective. It will, in fact, achieve the opposite result.

The doctrine applied in these cases in order to obtain a conviction for robbery is very analogous to the tort principle of trespass ab initio which has been expressly repudiated by the criminal law. "Two elements of act and intent must coexist. So, if the defendant does an act in a non-criminal state of mind, a later-arising criminal intent cannot be referred back to that act so as to make it criminal . . .; the doctrine of trespass ab initio has no place in the criminal law."[20] "To constitute a crime, act and intent must concur."[21] In the case of State v. Moore,[22] and this has particular bearing upon Diaz v. State, it was

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[17]54 C. J. 1018.

[18]In Reg. v. Franklin, 15 Cox C. C. 163, Field, J. said, "I have a great abhorrence of constructive crime."

[19]"The object of the criminal law is retribution, or deterrence, or, in modern times, the segregation and rehabilitation of the socially unfit." Hitchler's Criminal Law, vol. 1, p. 141.

[20]May's Criminal Law, pp. 5-6.

[21]Miller's Criminal Law, p. 73.

[22]12 N. H. 42.

said, "When the law invests a person with authority to do an act, the consequences of an abuse of that authority by the party should be severe enough to deter all persons from such an abuse. But has this 'policy of law' ever been extended to criminal cases? We are not aware that it has. It is true that, in order to ascertain the intent of the accused, the law often regards the nature of the act committed. But this is generally such an act as could not have been committed with any other than a criminal purpose." Even in the field of torts the doctrine of trespass ab initio is not applied freely; it is becoming more and more restricted. It will not be applied at all in case of a license in fact[23] and not always in case of a license in law.[24] The truth is that even in the field of torts the doctrine is falling into disfavor.

It seems to this writer that the better plan would be to have a rebuttable presumption of concurring intent arising from the accused's subsequent act of taking. This would prevent an injustice to the defendant and still would not create any additional burden upon the prosecution.

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[23]Stone v. Knapp, 29 Vt. 501.
[24]Atchison, T. & S. F. R. Co. v. Hinsdell, 76 Kans. 74, 90 Pac. 800.