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keynote by urging that the regulation of the mode of procedure under indictments be allowed by legislation if the substance of constitutional rights is unimpaired. They have advocated that unessential formalities of the grand jury system be modified from time to time to meet changing needs of the general welfare.<sup>40</sup>

To advocate this does not imply removing all distinctions between indictments and informations, or removal of the grand jury system altogether. The grand jury, in fact, has a number of advantages. It has an unlimited scope of investigatory powers. In addition, it provides a means of controlling the activities of the prosecution, and were it abandoned, the danger of placing too much discretion and power in the prosecuting attorney would arise. It should be remembered that, even under the present system, the grand jury may still be impanelled whenever needed even in those states where the information is freely resorted to.<sup>41</sup> In the face of the common law approach to the problem, the only practical alternative to freer amendment, open to prosecutors, is to abandon the indictment procedure altogether wherever possible and resort, instead, to the information. This course, which is often followed, would seem no less violative of any constitutional rights than allowing indictments to be amended, subject to the qualifications already discussed. Thus not only will the interests of time, economy, and efficiency be served, but the advantages of the grand jury method, rather than being destroyed, will actually be fostered.

The grand jury should be considered primarily a fact-finding body, providing the facts on which the prosecution is to build its case. But it should be recognized that the grand jury stage is a preliminary one, and the court should be free to use its discretion to apply the finishing touches, including authorization of any amendment which does not destroy the defendant's constitutional safeguards. Courts might be well advised to re-examine the bases of the historical doctrines, even as modified, and attempt to achieve an acceptable compromise adapted to modern usage while preserving historical values.

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### SHOULD THE FORCIBLE RECOVERY OF GAMBLING LOSSES CONSTITUTE ROBBERY?

Howard Joseph

One of the most striking instances of leniency in robbery prosecutions is exhibited when a loser at gambling retakes his losses forcibly. As a general rule most courts refuse to view this as an act of robbery.<sup>1</sup> Remaining within the usual robbery formula, they have avoided conviction by emphasizing the requirement that a specific intent to steal be present as an essential element of the crime. While the rule indicates the difficulty of securing robbery convictions in these cases, it has not been applied when the accused recovered

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40. *Com. v. Snow*, 269 Mass. 598, 606, 169 N.E. 542, 545 (1930).

41. The CODE OF CRIMINAL PROCEDURE (1930) provides, in §113, that "All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment or information," and in §114 that "No grand jury shall be summoned . . . except upon the order of a judge thereof when in his opinion the public interest so demands, except that a grand jury shall be summoned at least once a year in each county."

1. *People v. Rosen*, 11 Cal. 2d 147, 78 P. 2d 727 (1938); *People v. Hughes*, 11 Utah 100, 39 P. 492 (1895); *State v. Price*, 38 Utah 149, 219 P. 1049 (1923).

more than he lost,<sup>2</sup> and might be similarly ignored if an unreasonable time elapsed before the recovery was attempted.<sup>3</sup> In addition, the rule itself does not bar the normal consequences of the accompanying assault.<sup>4</sup>

The intent requirement has been used to justify the desired result in every case,<sup>5</sup> whether resulting in conviction or acquittal; the presence or absence of this necessary factor depends on the view taken as to the ownership of the money lost. The courts taking the more liberal view hold that the loser at gambling does not lose title to his money, concluding that if he merely retakes his own property he cannot have the intent to steal. Only the Texas courts, holding that title passes to the winner in every case where the winning was not fraudulent, have departed from the usual result to decide that conviction for robbery should follow.<sup>6</sup>

Three closely related title arguments have been adopted to decide intent. *People v. Rosen*,<sup>7</sup> representing the view of the California Supreme Court, was decided within the framework of the theory that either party to a gambling transaction comes into the court with "unclean hands" in an action against the other involving the transaction.<sup>8</sup> The court reasoned that since the winner could not be adjudged the holder of title to the money, ownership was retained by the loser, even though he parted with possession. It concluded that the winner himself could not be a complaining witness against the loser on a robbery charge where the latter forcibly recovered the money. When the Supreme Court of Michigan considered the problem in *People v. Henry*,<sup>9</sup> it held that since Michigan has a recovery statute allowing a right of replevin for the recovery of losses, the loser must be considered the legal owner of the money. Under either view the courts concede the presence of constructive intent from the presence of a taking in excess of the loss, the question of title becoming non-essential in such a case.<sup>10</sup>

The Texas courts supplied the third title argument in such cases as *Carroll v.*

2. *People v. Lain*, 134 P. 2d 284 (Cal. App. 1943).

3. *See People v. Rosen*, 11 Cal. 2d 147, 152, 78 P. 2d 727, 729 (1938) (During several months prior to the date of the offense defendant had lost money gambling, but while he recovered \$198 by force he had lost only \$55 the same night. The Court said, "It was for the jury to determine whether the defendant's expressed intent to get his own money back was bona fide, or because of remoteness from the time of loss . . . it was merely a pretext for an act of robbery)."

4. *People v. Rosen*, 11 Cal. 2d 147, 151, 78 P. 2d 727, 729 (1938) "This view neither condones nor invites the commission of crime inasmuch as the accused must pay the penalty for the violation of any applicable penal law."

5. "In every crime or public offense there must exist a union, or joint operation of act and intent . . ." Cal. Penal Code (Deering 1941) §20. The Illinois courts hold that intent is presumed from the use of a dangerous weapon, and need not be proved. *People v. Emerling*, 341 Ill. 424, 173 N.E. 474 (1930).

6. *Livingston v. State*, 214 S.W. 2d 119 (Tex. Crim. App. 1948); *Carroll v. State*, 57 S.W. 99 (Tex. Crim. App. 1900).

7. 11 Cal. 2d 147, 78 P. 2d 727 (1938).

8. As the court stated in the *Rosen* case, "It is the law in this state that certain games of chance are illegal; that the winner gains no title to the property at stake, nor any right to possession thereof; and that the participants have no standing in a court of law or equity." 11 Cal. 2d 147, 150 (1938). Simply expressed, "The principle of public policy is this: . . . no court will lend its aid to a man who founds his cause of action on an immoral or illegal act . . ." 5 WILLISTON ON CONTRACTS 4561 (1937).

9. 202 Mich. 450, 168 N.W. 534 (1918) (Actually a larceny conviction, although an armed assault was committed; the principle advocated is not altered by this fact).

10. *People v. Lain*, 134 P. 2d 284 (Cal. App. 1943); *Gant v. State*, 115 Ga. 205, 41 S.E. 698 (1902); *Cf. People v. Farrell*, 31 Cal. 576 (1867), where the court explains that if the motive or intent assigned is inconsistent with the external circumstances it must be discarded as false.

*State*,<sup>11</sup> when they interpreted the doctrine of unclean hands to mean that the parties would be left in status quo in a civil suit for the losses. They thus implied that a court would neither approve nor disapprove the condition of the parties. Whereas the California court said that the winner can not get title to the money, the Texas courts added that the loser is not in any better position; the result is that title remains in the winner simply because he has possession. When the winning was fraudulent, the Texas courts reason that since the winner himself is subject to conviction for theft he does not gain control of the money.<sup>12</sup>

Because the California and Texas views use the same rule of law with contrary results, it would seem that one of them is applying it wrongly. This, however, is unimportant, since it would seem that the doctrine of "unclean hands" has been erroneously appropriated from equity. This doctrine has been used by equity where one party to an illegal undertaking seeks to obtain an accounting from his partner, the court refusing to lend its aid in such a situation,<sup>13</sup> the theory being that as the complainant is equally as guilty as the defendant he should be denied satisfaction from his co-conspirator. It would seem then that the applicability of this doctrine is limited to deciding rights between the parties to an illegal act. Hence, without the presence of recovery statutes, courts may be justified in saying that a civil suit for the gambling losses would be of no avail. In robbery cases, however, the state is the real plaintiff, and bears no relationship to either party beyond its police power over them. Presumably its interest in the public peace is greater than the interests of the parties and their rights in a civil suit; and, since the state summons the victim of the taking to appear in its behalf, it is frivolous to suppose that the latter has no right to be a complaining witness. Certainly the state is not a party to the illegal transaction. An added fallacy in the reasoning of the California and Texas courts is the fact that while both assert the impossibility of adjudicating the question of title as between the parties, they themselves hold it to be in the loser and winner, respectively.<sup>14</sup>

The Michigan theory, based on the presence of a recovery statute, fails to consider the statute's true nature. The Illinois version of a recovery statute, for instance, provides that anyone can sue the winner for the amount lost after six months have elapsed without suit by the loser. Treble damages are awarded.<sup>15</sup> The Michigan statute itself makes it a misdemeanor for the loser not to bring such an action.<sup>16</sup> Neither statute presents any indication that

11. 57 S.W. 99 (Tex. Crim. App. 1900).

12. *Temple v. State*, 215 S.W. 965 (Tex. Crim. App. 1900) (Use of marked cards by the winner); *Fisher v. State*, 277 S.W. 386 (Tex. Crim. App. 1925). (Use of a short deck by the winner.)

13. The classic example is *Central Trust and Safe Deposit Co. v. Respass*, 112 Ky. 606, 66 S.W. 421 (1902), where two betting agents came to court as plaintiff and defendant, and the court refused to entertain a suit for an accounting of the profits made from various gambling enterprises.

14. The California and Texas views may be further negated, and the recovery statute justified, by the statement of Lord Mansfield in *Browning v. Morris, Cowper*, 790, 792 (1778): "If a man pays a sum of money by way of a bribe he can never recover it in an action, because both plaintiff and defendant are equally criminal. But where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of men—the one, from their situation and condition, being liable to be oppressed or imposed upon by the other—then the parties are not . . . equally guilty; and in furtherance of these statutes the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." Gambling between an expert and a novice may fall into this qualification.

15. Ill. Rev. Stat. (1949) c. 38 §330.

16. Mich. Stat. Anno. (1938) §28.547.

title remains in the loser, nor any justification for their use in a criminal action; they present the naked intent to penalize the winner for the purpose of discouraging gambling. Thus a statutory replevin merely enlarges the scope of the writ, without deciding the title question.

The Michigan court's interpretation is further discredited as an encouragement of self-help. Since violent self-help is punishable without a statute enabling peaceful recovery,<sup>17</sup> there appears no justification for making a statutory remedy the basis of a right to accomplish the identical thing by violence. It might better be argued that one of its purposes is to eliminate forcible recovery of gambling losses.

Actually the question of title need not bear any weight in these cases. Although intent is an element that must be accounted for in any robbery case, the fact of possession is a more accurate guide than title to the resolution of the intent question. While the taker cannot be guilty of robbery when he has clear title to the property,<sup>18</sup> a taking may be robbery although the person from whom the property is taken does not have good title to it.<sup>19</sup> For purposes of determining intent, it is sufficient as against anyone not holding a clear title that the person robbed have possession of the property. Since the question of title cannot be decided, it is a simple matter, legalistically, to say that intent is present.

The present views would be puzzling if it were not for the policy implications behind them. The majority rule seems to reflect the feeling that existing laws demand leniency. Since gambling statutes and recovery statutes alike have as at least one purpose, the protection of the unskilled gambler from the professional, a decision in favor of the ill-equipped loser seems consistent with legislative intent. However, coupled with the desire to follow the supposed legislative policy may be a fear on the part of the court of invading the legislative prerogative of stating public policy.<sup>20</sup> While the view of the Texas courts indicates that punishment for acts of violence takes precedence over sympathy for the loser, they have not accomplished conviction by the shortest route. Since the same result could be reached on the basis of possession alone, their preoccupation with the doctrine of "unclean hands" must be for the purpose of contradicting the majority view in theory as well as result.

One step toward properly accounting for the intent factor would be an abandonment of the present title approach now followed by a majority of the courts, regardless of policy considerations. Unless the type of taking in question is specifically exempted from the robbery field by statute, it would seem that in the absence of a better guide those courts now practicing leniency should use possession alone to determine the question of title. Thus assuming that the winner in a gambling transaction has title to his winnings, any effort on the part of the loser to forcibly recover his losses would fall within the robbery formula. While it is true that such a result might appear to deal

17. *Cf. Curlee v. Scales*, 200 N.C. 612, 158 S.E. 89 (1931). (Retaking of a check by a party who thought he was entitled to its possession); *Donnell v. Great Atlantic and Pacific Tea Co.*, 229 Ala. 320, 156 So. 844 (1934) (Butcher slapping customer and retaking package of meat on customer's refusal to pay 3¢ balance on purchase price).

18. 2 BURDICK, LAW OF CRIME 410 (1946).

19. *State v. Montgomery*, 181 Mo. 19, 79 S.W. 693 (1904) (Taking an employer's money from his clerk); *Com. v. Weiner*, 255 Mass. 506, 152 N.E. 359 (1926) (Taking jewelry from a jewelry store clerk); *People v. Cabassa*, 249 Mich. 543, 229 N.W. 442 (1930) (Taking money from a gas station attendant). Even stolen money on the person of a thief may be the subject of robbery. 2 Burdick, Law of Crime (1946) 411.

20. It may also be the fear of those criminally inclined passing off robbery as recovery of gambling losses. *See People v. Rosen*, 11 Cal. 2d 147, 153, 78 P. 2d 727, 730 (1938) (Dissenting).