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ENTRAPMENT AS A DEFENSE IN CRIMINAL CASES

W. H. Hitchler

ENTRAPMENT BY THE VICTIM

The fact that a person, who suspects or believes that another intends to commit a crime against him or his property, makes no effort to prevent its commission, or furnishes the most ample and complete opportunities and facilities for its commission,\(^1\) or even hopes that it will be committed,\(^2\) does not constitute a defense if the other person commits acts which otherwise would constitute the crime.

Thus one who steals or embezzles another's property is guilty although the other knew of his purpose and left the property exposed in order to entrap and prosecute him.\(^3\) In a prosecution for burglary it is not a defense that the occupant of the house knew of the accused's intention and, instead of locking the door more securely than usual, or as securely, left it unlocked and waited to arrest the accused as he opened the door and entered.\(^4\) In a prosecution for robbery it is not a defense that the victim, with marked money, went where he believed the robbers were in order that he might entrap them.\(^5\) The rule is applicable to other crimes.\(^6\)

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\(^2\)Norden's Case, Foster C.L. 129; Tones v. S., 48 Tex. Cr. 363, 88 S.W. 217, 1 L.R.A.N.S. 1024.


\(^6\)S. v. Dudouat, 47 La. Ann. 977, 17 So. 685 (Bribery); P. v. Liphardt, 103 Mich. 80, 62 N.W. 1022 (Bribery); Dalton v. S., 113 Ga. 1037, 39 S.E. 1037 (Train wrecking); S. v. Salisbury Ice Co., 166 N.C. 403, 81 S.E. 956, Ann. Cas. 1916C 728 (False pretenses); S. v. West, 157 Mo. 309, 57 S.W. 1071 (Stopping train).
QUALIFICATIONS

The rule is not applicable if (1) lack of consent is an essential element of the crime and the conduct of the victim or his authorized agent amounts to consent; or if (2) the victim or his authorized agent performs or renders unnecessary some act which is an essential element of the crime.

CONSENT

The conduct of the victim or his authorized agent may be such as to constitute consent, and if it does, and lack of consent is an essential element of the crime, it follows that the crime is not committed. Thus if a person who suspects that another intends to steal his property, instead of merely lying in wait, actually delivers the property to the other, larceny is not committed, because the conduct of the victim amounts to consent and lack of consent is an essential element of larceny.

In such cases, where the conduct of the victim or his agents is such as to constitute consent, it is immaterial that the criminal intent originated in the mind of the accused, or that consent was given merely for the purpose of entrapment, or that the accused was unaware that the person consenting was the victim or his authorized agent.

ACTS OF VICTIM

The victim or his authorized agent may perform or render unnecessary some act which is an essential element of the crime, and, if this is the case,

7See infra notes.

8See infra notes.

9Adams v. S., 13 Ala. Ap. 330, 69 So. 357; Love v. P., 160 Ill. 501, 43 N.E. 710, 32 L.R.A. 139; P. v. McCord, 76 Mich. 200, 42 N.W. 1106; Speiden v. S., 3 Tex. Ap. 156; Topolewski v. S., 130 Wis. 244, 109 N.W. 1037, 7 L.R.A.N.S. 1037. See 18 A.L.R. 149 note; 66 A.L.R. 482 note. Where the victim authorizes a third person to act with the accused and be present when the crime is committed, it has been held that if the criminal intent originates with the accused and he does every act necessary to constitute the crime, he is not rendered guiltless by reason of the fact that the third person with the knowledge and approval of the victim, or even by his direct employment appears to cooperate with the accused and is present at and aids in the commission of the crime. Lowe v. S., 44 Fla. 499, 32 So. 956; Dalton v. S., 113 Ga. 1037, 29 S.E. 468; S. v. Neeley, 90 Mont. 300 Pac. 561; S. v. Currie, 13 N.D. 635, 102 N.W. 875, 66 L.R.A. 403; Lowe v. S., 50 Tex. Cr. 92, 96 S.W. 937; P. v. Lanzit, 70 Cal. Ap. 498, 233 Pac. 816. But see contra, S. v. Hull, 33 Ore. 56, 54 Pac. 159; S. v. Adams, 115 N.C. 775, 20 S.E. 722.


the accused is not guilty, because no act performed by the victim or his authorized agent can be imputed to the accused.\(^\text{14}\) Thus burglary is not committed if the occupant of a house, or his servant by his authority, opens the door and admits a suspected burglar, because the opening of the door, which is an essential element of the crime, is done, not by the accused, but by the victim or his agent.\(^\text{15}\)

**ENTRAPMENT BY OFFICERS**

The defense of "entrapment" has been invoked in many cases in which it was alleged that the commission of the crime was instigated by officers of the law.\(^\text{16}\) These cases have given rise to difficult questions concerning (1) the validity and scope of the defense; (2) the reasons underlying the defense; and (3) the procedure which should be followed when the defense is invoked.\(^\text{17}\)

**VALIDITY OF DEFENSE**

It has been said truly that the law as to entrapment "is not so entirely settled as to be easy of application."\(^\text{18}\) The authorities agree that "entrapment" by an officer is a defense where it has (1) eliminated a physical condition which is an essential element of the crime charged;\(^\text{19}\) or (2) been done with the authority of the victim or his agent and amounts to consent, if lack of consent is an essential element of the crime charged;\(^\text{20}\) or (3) created a mistake of fact on the part of the defendant as to the existence of an essential

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\(^\text{17}\) Sorrells v. U.S., supra.


element of the crime charged. The great weight of recent authority is to the effect that these cases "neither in reasoning or effect prescribe limits for the doctrine of entrapment," but for the determination of the precise extent of the defense, beyond these cases, the decisions announce confused and conflicting rules or no particular rules at all. The decision in each case, it has been said, depends on its own circumstances and "must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object."

ELEMENTS OF DEFENSE

"Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." The defense consists of two elements, to each of which the courts have given varying degrees of emphasis: (1) The origin of the criminal entent in the mind of the officer;

21U.S. v. Healey, 202 Fed. 349; Vores v. U.S., 247 Fed. 191; S. v. Seidler,— (Mo.)—, 267 S.W. 424. As, e.g., where liquor is sold to an "Indian who was so disguised as to mislead the defendant" into believing he was not an Indian. Sorrels v. U.S., supra. The rule is applicable even though the crime is a statutory crime and such a mistake would not ordinarily constitute a defense. U.S. v. Healy, supra. See 28 Columbia Law Review 1068; 17 Minnesota Law Review 331.


24Becker v. U.S., 62 Fed. (2d) 1007. The courts indulge in such generalities as: "The courts do not look to see who held out the bait but who took it," (P. v. Mills, 178 N.Y. 289, 70 N.E. 786, 67 L.R.A. 131) or "It is not the purpose of officers to create criminals but to prevent crime." (Scriber v. U.S., 4 Fed. (2d) 971).


28See 28 Columbia Law Review 1068. In C. v. Wasson, 42 Pa. Super. 38, it is said that the officer must have acted "to accomplish some private purpose of his own." But it is generally held that the motive or purpose of the officer is immaterial. See 38 Dickinson Law Review 191; P. v. Everts, 112 Mich. 294, 70 N.W. 430; S. v. Beeson, 106 Ore. 134, 211 Pac. 907; S. v. Rippey, 127 S.C. 550, 122 S.E. 397.
and (2) the inducement of the defendant by the officer. These elements are closely related. The fact that no inducement was used by the officer is evidence that the criminal intent originated in the mind of the defendant, and the fact that such inducement was used is evidence that the criminal intent originated in the mind of the officer.

**ORIGIN OF CRIMINAL INTENT**

The essence of the defense is that "criminal intent" originated in the mind of the officer and not in the mind of the accused. The validity of the defense does not, however, depend upon whether the intention to commit the particular crime with which the defendant is charged originated in the mind of the officer or of the accused. The defense is not available if, previous to the "entrapment," the defendant intended to commit a crime of the same type, or a crime which is morally indistinguishable and of the same kind, or if the defendant has been induced merely to furnish a specific instance of a course of habitual criminal conduct.

**CONDUCT OF OFFICER**

The defense of entrapment is not available unless the defendant was "induced" by the officer to commit the crime. Some degree of persuasion is

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necessary. The courts have not defined the precise extent or scope of the persuasion which is necessary, and it seems to differ in different crimes. The fact that the officer merely furnished the defendant an opportunity to commit the crime is not sufficient. It has been held that the defense is not available where the officer did nothing to overcome the defendant's shrinking reluctance, or simply resorted to the normal coaxing of a liquor purchaser, or displayed the common symptoms of a drug addict, or subjected the defendant to no more than the ordinary temptation to which he was likely to be subjected in the discharge of his duties.

On the other hand it has been held that the defense is available where there had been advances on the part of the officer extending over a period of time, or where the officer had resorted to pleas of desperate illness, or persistent coaxing, or threats, or "any conduct of enticement, beguilment, suggestion, procurement, or aiding that goes beyond the mere offering of opportunity."

**REASONABLE BELIEF**

The validity or invalidity of the defense of entrapment has by some courts been made to depend upon the non-existence or existence, respectively,

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38 "The scope of activities permitted an officer differs in different crimes, due consideration being given to the repugnancy of the offense and the difficulty of procuring evidence." 28 Columbia Law Review 1067. See also 44 Harvard Law Review 109.


41 U.S. v. Wray, 8 Fed. (2d) 424.


of a reasonable belief on the part of the officer that the accused was, or was about to be, engaged in the commission of a crime. This test is incorrect. If the criminal intent originated in the mind of the defendant, he should not be excused because the officer had no reasonable grounds to suspect him, and if the criminal intent originated in the mind of the officer and he induced the defendant to commit the crime, the defendant should be excused even though the officer had reasonable grounds to suspect him. The test has been severely criticized and in the later and better considered cases has been rejected.

CRIMES TO WHICH ENTRAPMENT IS A DEFENSE

It has been held that entrapment is a defense to both common law and statutory crimes, felonies and misdemeanors, crimes mala in se and crimes mala prohibita, and crimes of which "criminal intent" is an essential element.

ENTRAPMENT BY THIRD PERSONS

The fact that the defendant was entrapped by a third person, who was neither the victim of the crime, his authorized agent, or a public officer, is


55Sorrels v. U.S., supra, per Roberts concurring.


not a defense. This is true even though this person intended to betray the defendant to the government and later did so. The courts do not seem to have established any definite rules as to what persons may be considered public officers for the purpose of rendering the defense available.

**Basis of Defense**

It is agreed quite generally that the defense of entrapment is not based on the theory that the state is estopped by the conduct of its officers; nor upon the theory that the officer's consent to the acts done by the defendant deprives them of an essential element of criminality, but is based upon public policy. As is usual in such cases, the courts fail to state clearly the precise public policy which the recognition of the defense is designed to advance. It is quite probable that public sentiment, a distrust of agents provocateurs, an appreciation of the ease with which charges may be framed, a desire to shield the innocent, and to maintain the purity and integrity of the executive and judicial branches of the government, all have contributed to the recognition of the defense.

**Procedure**

There is a conflict of authority as to whether the defense of entrapment (1) must be introduced under the plea of not guilty and determined as a
question of fact by the jury, or (2) is a matter for determination by the court at any time and in whatever manner the question may be raised. The first rule is based on the theory that an "entrapped" defendant is not guilty of the crime. The second is based on the theory that, although the defendant is guilty, public policy requires, in order to protect the purity of the government and its processes, that the courts must be closed to the trial of a crime instigated by the agents of the government.

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78See 56 Harvard Law Review 848.