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CRIMINAL LAW

John S. Baker, Jr.*

UNAUTHORIZED USE OF MOVABLES

The unauthorized use of movables statute¹ addresses mainly the problem of automobile joyriding but applies to the unauthorized use of any movable.² *State v. Bias*³ involves the attempted application of the statute to the breach of a rental agreement on a television.

Bias had "rented"⁴ a television, but he breached the rental agreement by discontinuing weekly payments after the sixth payment and also by moving the television to his new place of residence without receiving permission from the owner.⁵ When contacted, Bias agreed to resume payment, although he never did so. The trial court convicted Bias on the theory that discontinuing payment without notifying the television owner of its new location constituted unauthorized use.⁶ The supreme court reversed, holding that Louisiana Revised Statutes 14:68 "must reasonably be construed to require the existence of fraudulent intent."⁷ The court's holding was based on its conclusion that "otherwise, every breach of a rental contract would be included within the reach of the statute."⁸

The court's rationale included several points. First, the court did not believe the legislature intended every breach of a rental agree-

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1. CRIMINAL CODE: LA. R.S. 14:68 (1950 & Supp. 1980 & 1981) provides in pertinent part:

Unauthorized use of a movable is the intentional taking or use of a movable which belongs to another, either without the other's consent, or by means of fraudulent conduct, practices, or representations, but without any intention to deprive the other of the movable permanently. The fact that the movable so taken or used may be classified as an immovable, according to the law pertaining to civil matters, is immaterial.

2. See LA. R.S. 14:68, comments.

3. 400 So. 2d 650 (La. 1981).

4. The defendant argued that the agreement with the furniture dealer who had supplied the television should have been construed as a sale rather than a lease, thus making the defendant the owner. The court avoided deciding this question and reversed for insufficient evidence. *Id.* at 651 n.1.

5. *Id.* at 651.

6. *Id.* at 652 n.3.

7. *Id.* at 652.

8. *Id.*

ment to constitute a violation of Criminal Code article 68. Second, even if the legislature so intended, the court considered the statute ambiguous and construed it in favor of the defendant. Finally, the court referred to the principle that every crime must have a *mens rea*.

The court's rationale rests on recognized principles of construction. Its conclusion reflects a very legitimate concern for the implications of affirming the conviction. Nevertheless, its guidance for future cases of this sort is questionable in that it notes "the state may produce direct or circumstantial evidence of 'fraudulent intent' in unauthorized use cases involving the initial acquisition of property by rental agreement."⁹ This statement implies that if the original "taking" in a rental agreement is apparently lawful, it is not permissible to prove the "use" thereafter became unlawful through fraud or lack of consent. The statute's inclusion of the word "use," as an alternative to "taking," covers at least two types of situations which would not otherwise be covered because of common law limitations on "taking."¹⁰ First, where a taking is unlawful because it is without consent or through fraud, the defendant may not have been responsible or may not be proven to have been responsible for the taking, even though he "uses" the property knowing full well that the "use" is unlawful. Suppose, for instance, a case where a bicycle taken from X is found in the possession of Y, who claims to have received it from a friend, Z, for temporary use.¹¹ The evidence may prove that, at some point after receiving the bicycle, the defendant realized his use was without the consent of the owner, but he nevertheless continued to use it, although without an intent to permanently deprive. Such a case should constitute unauthorized use. Second, the "use" of a thing which is originally lawful because the "taking" was with consent and without fraud may become unlawful sometime during the use of the

9. *Id.* at 653 (emphasis added).

10. The common law definition of "larceny" limited the crime to a "trespassory taking" from the possession of the owner. This limitation excluded from "larceny," and left to legislation, what have become known as the crimes of embezzlement and false pretenses. The theft statute, LA. R.S. 14:67 (Supp. 1968, 1970 & 1972), which consolidated these three separate crimes by eliminating the common law distinctions, uses the word "misappropriation" as an alternative to "taking." See LA. R.S. 14:67, comments. The unauthorized use statute is a lesser included offense of theft which basically incorporates this alternative form, except that "use" is employed instead of "misappropriation." *In re Batiste*, 367 So. 2d 784, 789 (La. 1979), impliedly equates "use" and "misappropriation." The difference in terminology between the two statutes seems due to the more limited object of the unlawful act in the unauthorized use statute, a "movable," rather than "anything of value," which is the object of the unlawful act in the theft statute. See *State v. Gisclair*, 382 So. 2d 914 (La. 1980).

11. These facts are similar to those of *In re Batiste*, 367 So. 2d 784 (La. 1979), except that the evidence in *Batiste* indicated that the defendant had obtained the bicycle lawfully. *Id.* at 789.

thing. Suppose the owner, X, lends property to Y for a definitely stated, limited period of time. The evidence may prove that the defendant took lawfully, with an intent to return the property at the stated time, but later he decided to keep the property for an extended period of time—again without the intent to deprive permanently. This also should constitute the crime of unauthorized use of movables.

Proof of a violation of article 68 consists of two basic elements, each involving an alternative formulation: (1) intentional taking or use, and (2) either without the other's consent or by means of fraudulent conduct. Analytically then, there are four possible ways to violate the statute: (1) an intentional taking without consent, (2) an intentional taking by means of fraudulent conduct, (3) an intentional use without consent, and (4) an intentional use by means of fraudulent conduct.

In *Bias*, situation (1) does not apply because the taking was with consent. Situation (2) also is inapplicable given the court's reversal because of lack of evidence establishing the taking was accomplished through fraud.¹² The court rules out the possibility that situations (3) and (4) can be established by failure to make rental payments.¹³ Situation (3) would have been inapplicable in any event because the defendant's continued "use" of the television was apparently consented to a second time by the company when the defendant agreed to resume payments.¹⁴ This suggests the possibility that when the owner consented a second time the consent was "induced" by a fraudulent representation of the defendant's intent to pay. Although the court concluded that the evidence was insufficient to establish fraud at the initial taking, it seems not to have considered the possibility of evidence of fraud at a later point.

Should *Bias* be limited to its facts or should the proof of unauthorized use in any rental agreement necessarily involve proof of fraud at "the initial acquisition of the property by rental agreement"?¹⁵ Certainly, the court must be concerned about routinely treating the breach of rental agreements as crime.¹⁶ The criminal courts ought not to be congested with matters that are essentially civil. On the other hand, the word "use" in article 68 is intended to have some meaning. It is not difficult to imagine a fraudulent scheme in which the original taking under a rental agreement involves a consent from the owner obtained by fraud which can not be proven as

12. *State v. Bias*, 400 So. 2d at 653.

13. *Id.* at 652.

14. *See id.* at 651.

15. *Id.* at 653.

16. This transaction, while in the form of a lease, was arguably a sale. See note 4, *supra*.

such. Whether the lessee who fails to continue payments or to return the property, where there is no proof of an intent to deprive permanently, should be immune in all circumstances involves the problem of proving fraud.

The historical development of the law related to theft has excluded certain types of fraud based on promises.¹⁷ In eliminating the common law distinctions associated with larceny, the Criminal Code purports to punish in theft, and therefore in the lesser included offense of unauthorized use, what had previously been characterized as only civil fraud.¹⁸ Nevertheless, as pointed out in last year's symposium article on criminal law, the Criminal Code does not define fraud.¹⁹ In the absence of a definition, it is not surprising to see the court handle cases involving fraud on an ad hoc basis. It appears, however, that without utilizing common law distinctions, the court is prepared to inhibit the prosecution of certain commercial types of fraud. While the common law made such distinctions to protect the seller,²⁰ the court is clearly siding with the consumer—at least in rental arrangements.

ATTEMPTED RAPE—THE MENTAL ELEMENT

State v. Parish,²¹ on rehearing, set aside a conviction of attempted aggravated rape and substituted the lesser conviction of attempted forcible rape.²² In reaching what may have been the correct result in this case, the plurality opinion²³ created confusion regarding the mental element required in attempted aggravated rape.

The facts of the case persuaded four of the justices—a slightly different majority from that which produced the judgment—that the defendant was not guilty of so serious a crime as attempted

17. See J. HALL, *THEFT, LAW AND SOCIETY* 45-46 (2d ed. 1952) and R. PERKINS, *CRIMINAL LAW*, 303-06 (2d ed. 1969), for a discussion of fraud in false pretenses.

18. See LA. R.S. 14:67, comments.

19. Hargrave, *Developments in the Law, 1980-1981—Criminal Law*, 42 LA. L. REV. 541, 547-48 (1982).

20. See J. HALL *supra* note 17, at 70 & 76.

21. 405 So. 2d 1080 (La. 1981) (on rehearing).

22. *State v. Byrd*, 385 So. 2d 248 (La. 1980), allows the substitution of a lesser included conviction when it is necessarily found by the jury in the case.

23. Six justices thought the defendant was guilty of at least attempted forcible rape. Justice Dennis, in an opinion also reflecting the views of Chief Justice Dixon and Justice Calogero, determined that the evidence supported only an attempted forcible rape conviction. Justice Lemmon, who thought the conviction of attempted aggravated rape should be affirmed, nevertheless concurred in the result in order to achieve a majority for the judgment. Justices Blanche and Marcus, dissenting, would have affirmed the attempted aggravated rape conviction. Justice Watson, dissenting, would have reversed and discharged the defendant.

aggravated rape. The defendant initially acted as one about to commit an aggravated rape, including making a threat to kill the victim.²⁴ Then, however, he apologized and voluntarily left the apartment. This voluntary abandonment decisively influenced the court's view of the case.²⁵ Although it did not cure the attempt,²⁶ the abandonment did seem to diminish the attempt's seriousness in the view of some of the justices more so than if the completed crime had been prevented because the defendant was seized or frightened away. While six justices thought the defendant was guilty of an attempted rape, a plurality of three justices determined that the evidence proved that the defendant was guilty only of the lesser form, attempted forcible rape.

Influenced by the fact of abandonment, the plurality opinion seems to distinguish between attempted aggravated rape and attempted forcible rape on the basis of a lack of sexual contact.²⁷ Such a distinction, however, goes to the difference between rape and either assault or battery, as reflected in the dissent of Justice Watson.²⁸ If the lack of sexual contact is deemed decisive, then it should negate any form of rape, for it suggests the defendant's acts were not "proximate" enough to the harm of rape.²⁹ The plurality opinion seems to confuse the type of harm (rape versus assault or battery) with the degree of harm (aggravated versus forcible).

If, however, the defendant's acts were sufficient to establish some form of attempted rape, what distinguishes the harm of attempted aggravated rape from that of attempted forcible rape? First of all, "[t]he only distinction between aggravated and forcible rape is the degree of force employed and the extent to which the victim resists."³⁰

24. "The victim testified that the defendant obtained entry to her apartment under false pretenses, seized her by the throat, clasped her mouth, said he wanted to make love, warned that he would kill her if she screamed, and dragged her toward a bedroom." 405 So. 2d at 1087. See also *id.* 1082, for the more complete statement of facts found in the original opinion.

25. The plurality notes that abandonment in the situation where there is no outside cause is a defense in some states. *Id.* at 1086 n.3. The concurring opinion notes that the "case is difficult because defendant withdrew before completing the rape, perhaps indicating he never intended to carry out the threats that he had made." *Id.* at 1089.

26. See *id.* at 1089 n.2 (Lemmon, J., concurring). But see *id.* at 1086 n.3 (Dennis, J., plurality).

27. "He did not fondle the victim or subject her to any sexual indignity." *Id.* at 1087; see also *id.* at 1083 (Dennis, J., dissenting in the original decision).

28. *Id.* at 1090 (Watson, J., dissenting).

29. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 583-86 (2d ed. 1960), for a discussion of the common law theory of attempt in terms of the distinction between "proximate" and "remote."

30. *State v. Turnbull*, 377 So. 2d 72, 76 (La. 1979).

The force and resistance *evidence* lack of consent.³¹ In fact, the victim either does or does not consent. If sufficient force and resistance are proven to establish lack of consent, the only factual distinction between aggravated and forcible rape involves the degree of force used. Likewise, in an attempt, the degree of force must distinguish attempted forcible rape from attempted aggravated rape. Must, however, the defendant also have specifically intended to use the greater degree of force?

The plurality applies the specific intent requirement of the attempt statute, not only to the elements of rape as defined in article 41,³² but also to those circumstances which distinguish aggravated rape from forcible rape. This construction, the writer submits, involves a misreading of the applicable articles of the Criminal Code. Article 41, which is not mentioned by the plurality, defines the word "rape." Articles 42, 42.1, and 43 specify the different kinds of rape and provide different punishments. These latter articles differ not in terms of the essential elements of rape, which are defined in article 41, but in terms of the *circumstances* in which it can be said the victim did not consent.³³ In any attempted rape, as in all attempts, the defendant must have "a specific attempt to commit a crime."³⁴ Article 10 states that specific intent exists when "the offender actively desired the prescribed criminal *consequences* to follow his act or failure to act."³⁵ In an attempted rape, therefore, the defendant must have specifically intended the criminal consequence, as defined in article 41: "sexual intercourse with a male or female person who is not the spouse of the offender, committed without the person's lawful consent."³⁶ That is, the defendant must have specifically intended to do the act *without the victim's consent*. There seems to be no reason, however, why it must also be proven that he specifically intended those circumstances which *evidence* the lack of consent.

The plurality's statements about specific intent were unnecessary

31. Compare LA. R.S. 14:41 (Supp. 1978) with LA. R.S. 14:42 (Supp. 1978 & 1981) & 14:42.1 (Supp. 1978).

32. LA. R.S. 14:41 provides in pertinent part: "Rape is the act of anal or vaginal sexual intercourse with a male or female person who is not the spouse of the offender, committed without the person's lawful consent. Emission is not necessary; and any sexual penetration, vaginal or anal, however slight is sufficient to complete the crime."

33. Simple rape can be a responsive verdict to the charges of aggravated and forcible rape. *State v. Turnbull*, 377 So. 2d 72 (La. 1979); *State v. Miller*, 237 La. 266, 111 So. 2d 108 (1959). Currently, however, simple rape is not a listed responsive verdict to either aggravated or forcible rape. See LA. CODE CRIM. P. art. 814, as amended by 1982 La. Acts, No. 763, § 1.

34. LA. R.S. 14:27 (Supp. 1970 & 1975).

35. LA. R.S. 14:10 (1950) (emphasis added).

36. LA. R.S. 14:41 (Supp. 1978).

to the decision. The plurality may have been justified in concluding that the evidence did not prove sufficient acts of force to establish the circumstances necessary for attempted aggravated rape. The court could have reached this conclusion without construing the crime of attempted aggravated rape to require proof that the defendant specifically intended not only the consequences, but also the attendant circumstances.³⁷

SECOND-DEGREE BATTERY—THE MENTAL ELEMENT

The court in *State v. Fuller*³⁸ affirmed a conviction of second-degree battery against an off-duty "bouncer" whose blow to the head permanently blurred the vision of his victim. In holding that the evidence supported the conviction, the court stated that the second-degree battery statute requires proof of specific intent.³⁹

The second-degree battery statute,⁴⁰ enacted in 1978, fills a gap in the law which occurs when the defendant inflicts serious injury without using a dangerous weapon. Simple battery, which includes any nonconsensual, unlawful touching without a dangerous weapon, no longer carries a sufficient maximum possible punishment to do justice in cases of serious injury.⁴¹ While aggravated battery does carry a more serious penalty, it does not apply to a battery resulting in serious injury inflicted without a dangerous weapon.⁴² Second-degree battery, with a greater penalty and no requirement of a dangerous weapon, does apply to batteries resulting in serious injury.

37. It might clarify matters if in the intent articles the Criminal Code distinguished between circumstances and consequences. The Model Penal Code initiated, and the proposed Federal Criminal Code has carried forward, distinctions in the state of mind requirements as to "conduct," "circumstances," and "result." MODEL PENAL CODE § 1.13(9) (Official Draft 1962). See H.R. 1647, 97th Cong., 1st Sess. § 301 (1981) (as introduced); S. 1630, 97th Cong., 1st Sess. § 30 (1981) (as introduced). While such distinctions are analytically useful, they may unnecessarily confuse a jury if incorporated into jury instructions. See NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT § 302, comments (1971).

38. 414 So. 2d 306 (La. 1982).

39. *Id.* at 310.

40. LA. R.S. 14:34.1 (Supp. 1978) provides in pertinent part: "Second degree battery is a battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury."

41. LA. R.S. 14:35 (1950 & Supp. 1968), simple battery, was amended in 1968 to reduce the maximum possible imprisonment from two years to six months. 1968 La. Acts, No. 647, § 1. This and many other misdemeanors were amended to avoid the jury trial requirement made applicable to the states for offenses carrying a possible term of imprisonment exceeding six months. *Duncan v. Louisiana*, 391 U.S. 145 (1968); see also *Baldwin v. New York*, 399 U.S. 66 (1970).

42. LA. R.S. 14:34 (1950 & Supp. 1980) provides in pertinent part: "Aggravated battery is a battery committed with a dangerous weapon."

Unlike aggravated battery, second degree-battery does require actual proof of serious injury.⁴³ Yet, does the statute reflect an intention to require proof that the serious injury was specifically intended? Like the simple and aggravated battery statutes, second-degree battery incorporates the definition of battery found in article 33.⁴⁴ That article itself includes a general intent. Second-degree battery adds a second intent, namely, "when the offender *intentionally* inflicts serious bodily injury." Citing principles of genuine construction, the court concludes that by adding a second intent the legislature meant to require a specific intent.⁴⁵

Standing alone, the clause "when the offender intentionally inflicts serious bodily injury" involves only a general intent. As provided in article 11, the terms "intent" and "intentional" have reference to general intent "in the absence of qualifying provisions."⁴⁶ Because the second-degree battery statute added the word "intentionally" as an element in addition to the general intent already required in the definition of battery, the court concludes the statute requires a specific intent, but it does not explain why the crime could not provide for two general intents.

This case demonstrates the confusion created by the division of intent into general and specific.⁴⁷ Although traditional, this distinction is somewhat artificial because the character of any intentional conduct is that it is focused on something specific.⁴⁸ The definition of "specific intent" clearly conforms to commonly understood notions of intentionality because the defendant's intention must focus not only on the act but also on the "prescribed criminal consequences."⁴⁹ For example, in theft the defendant must not only intentionally take, but also intend to deprive permanently.⁵⁰ The definition of "general intent" conforms less well because, while referring to "prescribed criminal consequences," it indicates the defendant's mind need not have actively desired them, but only have "adverted" to them "as

43. 414 So. 2d at 309 (citing *Legislative Symposium—Criminal Law*, 39 LA. L. REV. 101, 229 (1978)).

44. LA. R.S. 14:33 (1950) provides: "Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another."

45. 414 So. 2d at 310.

46. LA. R.S. 14:11 (1950).

47. See J. HALL, *supra* note 29, at 142-44.

48. *Id.* at 142.

49. "Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." LA. R.S. 14:10(1) (1950).

50. LA. R.S. 14:67 (Supp. 1968, 1970 & 1972).

reasonably certain to result from his act or failure to act."⁵¹ As applied in at least some general intent crimes, such as battery, the intention relates primarily to the act because the act and the criminal consequences are almost inseparable. That is, the intentional act of striking a person thereby produces the criminal consequence of battery—unless, of course, the striking was done in self defense or with consent.

Can a statute such as second-degree battery incorporate two intent requirements? Or, does the statute's dual use of "intentional(ly)" in effect equal a single specific intent? Second-degree battery requires the defendant to have intended and completed a particular type of battery, one involving serious bodily injury. Unlike the specific intent crimes such as theft and burglary, however, this more particularized consequence does not relate to a second intentional act but to the one act of striking. The act of battering or striking, if sufficiently strong, will produce not only a battery but also the more particularized consequence, serious bodily injury. Apparently, the two intents relate to the one act. In a specific intent crime such as theft or burglary, by contrast, one's intentional act (taking or entering) may in fact complete the crime—insofar as the act requirement is concerned. The proof also must establish a specific intent, namely, "the intent to commit a felony or any theft therein."⁵² This second intent, however, actually relates to a second act which in fact need not occur. The specific intent element of each statute refers to further consequences (depriving the owner permanently or committing a felony or any theft therein) which must be intended, but not necessarily completed. For these further consequences in fact to occur, as they do in many cases, would require a second act or omission (failure to return the property or the commission of a felony or theft).

This analysis should suggest the insufficiency for some purposes of characterizing statutes simply as general intent or specific intent crimes. In fact, each statute has its own particular mental element defined by the relationship of intent, act, and consequences.⁵³ For example, consider the following rewording of the second-degree battery statute: "Second-degree battery is the intentional infliction of serious bodily injury on the person of another committed without the consent of the victim." Such a formulation, combining the definition of battery and the requirement of serious bodily injury, utilizes the word

51. "General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act." LA. R.S. 14:10(2) (1950).

52. LA. R.S. 14:62 (Supp. 1972, 1978 & 1980).

53. J. HALL, *supra* note 29, at 142.

"intentional" only once and without qualifying provisions, clearly creating a general intent crime. Except for the label "general intent," rather than "specific intent," this alternative version differs from the actual statute in form, but not in effect.

The actual statute, although mentioning two intentional acts, qualifies the specific consequences produced by a single act of battery. It appears the legislative draftsmen may have chosen this form in order to qualify the consequences produced by the act of battery without qualifying the intent as a specific intent. The principal reason for doing so would have been to avoid intoxication as a defense because intoxication can negate specific, but not general, intent.⁵⁴ Otherwise, there is essentially no practical difference between making second-degree battery a general or a specific intent crime. The common sense of a jury is likely to lead it to the same verdict, whether it is told the crime requires two general intents or a specific intent. Such a common sense approach more nearly coincides with the view, already noted, that the distinction between general and specific intent is somewhat artificial. Nevertheless, given the ambiguous wording of the statute, it is understandable that the court labelled the intent a qualified intent and therefore a specific intent.

Although not at issue in this case, the court's analysis of the second-degree battery statute suggests a problem involving the responsiveness of a verdict of second-degree battery to a charge of aggravated battery, as provided for in article 814 of the Code of Criminal Procedure. Second-degree battery requires proof of an element (serious bodily injury) not required by aggravated battery. As construed in *Fuller*, second-degree battery requires proof of specific intent, while aggravated battery requires only general intent. Thus, second-degree battery requires proof of two elements not required in the proof of aggravated battery. Under the decisions of the state supreme court, even though legislatively designated as a responsive verdict, a lesser verdict cannot be upheld constitutionally as a lesser verdict if it involves proof not required by the greater crime.⁵⁵

54. LA. R.S. 14:15 (1950) provides in pertinent part:

The fact of an intoxicated or drugged condition of the offender at the time of the commission of the crime is immaterial, except as follows:

(2) Where the circumstances indicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or of special knowledge required in a particular crime, this fact constitutes a defense to a prosecution for that crime.

55. See *State v. Booker*, 385 So. 2d 1186, 1191-1192 (La. 1980) (on rehearing); *State v. Peterson*, 290 So. 2d 307 (La. 1974).

HOMICIDE—PRINCIPALS AND CAUSATION

In *State v. Batiste*,⁵⁶ the supreme court affirmed the manslaughter conviction of a defendant who had inflicted one of two mortal wounds on the victim. The evidence established that despite Batiste's fatal wounding of the victim, another person, Bolden, wounded the victim in a way that was "immediately fatal."⁵⁷ Batiste contended, therefore, that only Bolden could be convicted of a completed homicide. Rejecting this argument, the supreme court stated both that Batiste was guilty as a principal and that "[s]eparate fatal wounds inflicted in one encounter by two individuals make each guilty of the homicide."⁵⁸

Justice Dennis's concurrence is worth noting because he thought it was unnecessary "to broach the complex subject of causation in this case."⁵⁹ The practical wisdom of Justice Dennis's position can be seen from the potentially misleading statements about causation in the majority opinion. The statements of the majority require clarification of the relationship between the rule on principals and the principles of causation.

Criminal Code article 24, codifying the rule on principals, often plays a necessary part in the proof of the "act" requirement for criminal conduct.⁶⁰ A defendant's act, *e.g.*, driving the getaway car in a robbery, may not be sufficient to produce the criminal harm with which the defendant is charged, robbery. As a principal, however, the defendant stands responsible for the act of another, the hold-up man, if the defendant's acts "aid and abet" or "counsel or procure" commission of the crime.⁶¹

What justifies the rule on principals? Is it merely a fiction to avoid proof of the act requirement? Is one indicted as a principal responsible for all the acts of his partners in crime? Answers to these and related questions can be derived from the principles of causation.

The Criminal Code contains no rules as such on causation;⁶² nevertheless, the principles of causation are necessary to explain the relationship between criminal conduct and legally proscribed harms.⁶³ In

56. 410 So. 2d 1055 (La. 1982).

57. *Id.* at 1056.

58. *Id.* at 1057.

59. *Id.* at 1058 (Dennis, J., concurring).

60. LA. R.S. 14:24 (1950); *see* LA. R.S. 14:8 & comments (1950).

61. LA. R.S. 14:24.

62. The "year and a day rule" which relates to causation in homicide has been eliminated from article 29 of the Criminal Code. *See* 1978 La. Acts, No. 393, § 1, *amending* LA. R.S. 14:29.

63. J. HALL, *supra* note 29, at 247.

criminal law, as opposed to tort law, causal relationships usually are easily recognized because they are based on voluntary conduct, such as when one person shoots another.⁶⁴ Occasionally, a homicide may pose a problem of legal causation in terms of "direct" causation; for instance, when a minor blow leads to a death. It also may cause a problem in terms of "intervening" causation; for instance, when a mortal wound is followed by the negligent or intentional conduct of another which leads to death.⁶⁵ Although not often addressed in these terms, the rule on principals also involves the principles of causation.⁶⁶ If one "counsels or procures" another to commit a crime, one has legally caused the other to commit a crime in the sense of "motivating" the criminal conduct.⁶⁷ If one aids and abets another in a crime, the act of one is the act of the other⁶⁸ and, depending on the mental element of each, will make the one who aids guilty of the same, a greater, or lesser crime.⁶⁹

In *Batiste*, the defendant apparently argued that Bolden's subsequent fatal blow presented a problem of intervening causation.⁷⁰ Presumably, the defendant would have characterized Bolden's act as a "superseding cause" which terminated his own liability for the victim's death.⁷¹ However, the court, in effect, characterized the two wounds as "contributory causes"⁷² by stating that "[s]eparate fatal wounds inflicted in one encounter by two individuals make each guilty of homicide."⁷³ The court quoted language from a Kentucky case which stated: "The law will not stop, in such a case, to measure which wound is the more serious, and to speculate upon which actually caused the death"⁷⁴ After citing a number of cases,⁷⁵ the court also stated

64. *Id.* at 256.

65. See *id.* at 257-70.

66. See R. PERKINS, *supra* note 17, at 686.

67. J. HALL, *supra* note 29, at 251-52 & 270.

68. R. PERKINS, *supra* note 17, at 686.

69. See *State v. McAllister*, 366 So. 2d 1340, 1343 (La. 1978).

70. See 410 So. 2d at 1057.

71. See R. PERKINS, *supra* note 17, at 698.

72. See *id.* at 699.

73. 410 So. 2d at 1057.

74. 410 So. 2d at 1057 (quoting *Bennett v. Commonwealth*, 150 Ky. 604, 606, 150 S.W. 806, 808 (1912)).

75. The court refers the reader to the following cases: *Jordan v. State*, 82 Ala. 1, 2 So. 460 (1887); *Brinson v. State*, 144 Fla. 228, 198 So. 15 (1940); *Jones v. Commonwealth*, 281 S.W.2d 920 (Ky. 1955); *Commonwealth v. Gross*, 271 Ky. 455, 112 S.W.2d 689 (1938); *Farley v. Commonwealth*, 268 Ky. 277, 104 S.W.2d 972 (1937); *Payne v. Commonwealth*, 255 Ky. 533, 75 S.W.2d 14 (1934); *Palmer v. State*, 223 Md. 341, 164 A.2d 467 (1960); *Anderson v. State*, 43 Tex. Crim. R. 275, 65 S.W. 523 (1901). The court refers the reader to *People v. Lewis*, 124 Cal. 551, 57 P. 470 (1899), a case not involving principals. This case has been criticized for holding the defendant was guilty of homicide in a situation where the victim committed suicide following a fatal wound inflicted by the defendant. See J. HALL, *supra* note 29, at 165-167.

that the defendant was guilty as a principal.⁷⁶

Although the facts of the case involve persons acting as principals, it is not clear whether the court would apply its statements on causation to persons acting independently. This writer submits that the court's rather broad statements on causation may be misleading if uncritically applied to persons acting independently. First, the Kentucky case and all but one of the others cited involve persons acting together. While persons acting together to cause a death are contributory causes, persons acting independently may or may not be contributory causes.⁷⁷ If Bolden had been acting independently from Batiste in this case, Batiste should have been guilty of no more than attempted homicide, because the other, second blow was "immediately fatal." If the second fatal blow is independent and in fact "immediately fatal," the first blow would not be a contributory cause of the death.

The relationship between the rule on principals and the principles of causation becomes particularly important for problems presented by the felony-murder rule.⁷⁸ The felony-murder rule has been much criticized for extending a felon's liability to a homicide which was not actually "caused" by him.⁷⁹ In Louisiana, by strictly construing the statute rather than relying on the principles of causation, the court has limited the felony-murder/felony-manslaughter doctrine in a way that prevents a felon from being liable for a death where the injury was actually inflicted by the victim or a third party.⁸⁰

In *State v. West*,⁸¹ the court affirmed a felony-murder conviction in terms which do not rely on, but can be explained consistently with, the principles of causation. West accompanied McDonald during the armed robbery of a female victim. He then drove McDonald's automobile, and McDonald drove with the victim in her automobile to a location several blocks away. After a time, McDonald left the victim, entered his own automobile and, as he was driven away by West, fired shots which killed the victim of the robbery. The "[d]efendant argue[d] that the killing did not occur in the course of an armed robbery because the robbery occurred several blocks away and had been completed before McDonald shot the victim."⁸² The court affirmed the conviction while concluding both that the events "constituted

76. 410 So. 2d at 1057.

77. See R. PERKINS, *supra* note 17, at 698-701.

78. J. HALL, *supra* note 29, at 274-81.

79. R. Perkins, *supra* note 17, at 721-22; W. LAFAVE & A. SCOTT, CRIMINAL LAW 265-66 (1972).

80. *State v. Garner*, 115 So. 2d 855 (La. 1959).

81. 408 So. 2d 1302 (La. 1982).

82. *Id.* at 1305.

essentially a single criminal incident" and "that the killing occurred as part of the armed robbery."⁸³

On what basis can the court's conclusion be justified when the necessary elements of the armed robbery had been completed at in different location, sometime before the killing? For purposes of analysis, suppose that the facts had been the same except that West had departed after the money had been taken from the victim. Under such circumstances, West would still have been a principal to the robbery. However, would the killing by McDonald, which occurred as part of the armed robbery, have been imputed to West? Would the acts occurring after his participation had ceased have been imputed to West, even if it was agreed that "but for" his participation in the robbery, the killing would not have occurred? Under these facts, the court would likely have concluded that the killing was not within the scope of the joint conduct.⁸⁴ West's liability as a principal would have been limited to those consequences reasonably related to the acts occurring during his participation in the crime.

Resort to the principles of causation may be necessary to limit or explain the scope of a felon's liability in a case of felony-murder. Failure to limit the felony-murder rule consistently with the principles of causation has led to some unwarranted extensions of the rule.⁸⁵ The result in *West* does not represent any unwarranted expansion of the scope of liability. In terms of causation, it can be explained because West's acts were related to the robbery not only in terms of time and plan but also in terms of his continuing voluntary conduct and criminal state of mind which aided the actual killer.⁸⁶

83. *Id.*

84. *See* State v. Witherspoon, 292 So. 2d 499 (La. 1974). Whether or not the killing falls within the scope of the felony is a question of fact in Louisiana. State v. Bessar, 213 La. 299, 34 So. 2d 785 (1948).

85. *See* J. HALL, *supra* note 29, at 274-78.

86. *See id.* at 281-84.