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Provocation--Assault and Battery as Sufficient Provocation to Reduce an Intentional Homicide to Manslaughter

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PROVOCATION—ASSAULT AND BATTERY AS SUFFICIENT PROVOCATION TO REDUCE AN INTENTIONAL HOMICIDE TO MANSLAUGHTER

No rule of law is more widely accepted and quoted in the criminal field than that an intentional killing resulting from heat of passion aroused in the killer by adequate legal provocation will be reduced to voluntary manslaughter.[1] The rule, founded upon the theory long entertained in the law, that there are certain provocations which arouse in man such rage or passion as to render him "incapable of cool reflection"[2] has been recognized since, and perhaps even before, the decision in the leading case of *Regina* v. *Mawgridge*.[3] One such provocation, recognized equally as long as the doctrine itself, is an assault and battery by the deceased upon the slayer.[4] Yet, despite long acceptance and frequent recitation, it appears that in many instances the patently simple rule that an assault and battery will be considered adequate provocation is quite different in its application from what would be expected. It has been held, for example, in one jurisdiction, that a jury was justified in finding that a kick by the deceased upon the person of the defendant did not constitute adequate provocation to reduce the offense to manslaughter;[5] while in another it has been found that abusive language followed by a wild shot, constituting no battery whatsoever, may be sufficient.[6] Obviously, such divergence of view results in uncertainty and confusion in the law, as does any conflicting construction of a given rule of law. It is the purpose of this note to examine the degrees of violence said by various jurisdictions to constitute the legal provocation of "assault and battery" and to suggest the requirement which would appear best to serve society today.

In order clearly to comprehend the import of the language employed by the courts it is thought that a word concerning definition might prove helpful. Much confusion of the rule is needlessly caused by the loose manner in which many courts have used "assault" as synonymous with "assault and battery." Clearly the two are not synonymous and, being technical phrases, should be employed separately. For purposes of this note, the common definitions are to be observed; thus an assault is considered an unlawful offer or attempt, coupled with an apparent present ability, to

[1] McKaskle v. State, 96 Tex. Crim. Rep. 638, 260 S.W 588 (1924), Hannah v Commonwealth, 153 Va. 863, 149 S.E. 419 (1929) *See* People v Ryczek, 224 Mich. 106, 194 N.W 609, 611 (1923)

[2] Holcomb v State, 103 Tex. Crim. Rep. 352, 281 S.W 202 (1926).

[3] Kel. J. 119, 84 Eng. Rep. 1107 (1707)

[4] *Id.* at 135, 84 Eng. Rep. at 1114.

[5] United States v Edmonds, 63 F Supp. 968 (1946).

[6] Roberson v. State, 217 Ala. 696, 117 So. 412 (1928).

injure the person of another, which creates a reasonable apprehension of a battery A battery is considered to be "the unlawful touching of the person of another by the aggressor himself or by any substance put in motion by him."[8] Thus it is seen that, ordinarily, a "battery includes assault, but assault does not include battery. When the assault culminates in a battery the offense is assault and battery "[9] Logically then, to apply these definitions to the general rule that an assault and battery will constitute adequate provocation, it would follow that any unlawful touching of the slayer would constitute adequate provocation; and since even the slightest touch in anger has been held to constitute an unlawful touching,[10] that slight violence may be concluded sufficient if the rule be strictly applied. Even the most hurried examination of the cases applying the rule, however, is sufficient to show that such logic has not been practiced by the courts.

One example of the strict application of the rule, however, is in the case where words alone are sought to be introduced by way of mitigation. This the courts have unanimously held insufficient,[11] and necessarily so since they are equally of one voice in declaring that words alone can never constitute an assault.[12] It appears that the same cannot be said in cases involving a mere assault unaccompanied by a battery for cases are to be found which at least use language indicating that an assault alone may be sufficient provocation.[13] It is, of course, the overwhelming majority rule that a homicide upon such provocation will not be mitigated.[14] The greatest difficulty in drawing the line as to what shall constitute adequate provocation appears to be encountered in situations involving a slight or trivial assault and battery Here may be found all of the elements to satisfy the general rule, when heat of passion is aroused in a slayer by an action of the deceased which amounts technically to an assault and battery though it be slight and harmless in result.

Historically, at common law, such an assault and battery would undoubtedly have been adequate; for in *Regina* v. *Mawgridge*[15] it was said that " pulling by the nose, or filliping upon the

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[8] Note, 33 KY. L. J. 189 (1945). Many jurisdictions so define an assault as to require *actual* present ability

[9] BALLENTINE, LAW DICTIONARY 142 (1930)

[10] Harris v State, 15 Okla. Cr. 369, 177 Pac. 122, 123 (1919)

[11] Hunt v People, 53 Ill. App. 111 (1893), Crosswhite v Barnes, 139 Va. 471, 124 S.E. 242 (1924)

[12] People v Manzo, 9 Cal. 2d 594, 72 P 2d 119 (1937) People v. Ortiz, 320 Ill. 205, 150 N.E. 708 (1926).

[13] Jenkins v Kentucky Hotel, 261 Ky 419, 87 S.W 2d 951 (1934) Johnson v Sampson et al., 167 Minn. 203, 208 N.W 814 (1926)

[14] Roberson v State, 217 Ala. 696, 117 So. 412 (1928) Lamp v. State, 37 Ga. App. 829, 142 S.E. 202 (1928) State v. Crawford, 66 W Va. 114, 66 S.E. 110 (1909).

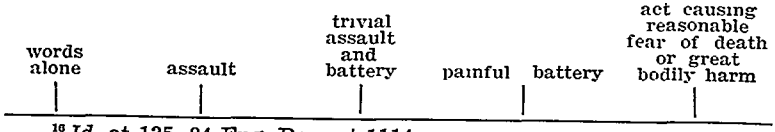
[15] State v Biswell, 352 Mo. 698, 179 S.W 2d 61 (1944).

[15] Kel. J. 119, 84 Eng. Rep. 1107 (1707)

forehead '"[16] would be sufficient. Similar language was quoted with approval in two recent cases in Missouri[17] which reaffirmed the previously adopted "personal violence" rule.[18] A differing view, however, has been taken in the recent case of *United States* v. *Edmonds*,[19] which states that the law requires more than a "trivial" assault and battery in order to reduce the offense. A number of authorities may be cited in support of the latter view,[20] and, while it cannot be said with certainty what degree of violence many jurisdictions might require, there can be no doubt that a conflict exists.

This conflict raises the question of which is the most desirable place to draw the line. In order to suggest an answer it is essential to discuss the doctrine in the light of present-day needs. As has been stated above, the rule is based upon the theory that men may at times, become so provoked by certain situations as to render themselves "deaf to the voice of reason."[21] This is undoubtedly true; yet the fact remains that not every killing which occurs during such a fit of passion is mitigated to manslaughter. Clearly one might be greatly provoked, possibly to the extent of taking life, by insulting language, but the law will not recognize this as adequate provocation,[22] to cite only one example. Thus it is seen that an arbitrary line is drawn at some point and certain provocations defined either as adequate or inadequate. It is submitted that the question of where the line should be drawn—whether to include as adequate words alone, or any assault and battery, or only more serious batteries—is a matter of public policy for society must eventually decide upon the standard of self-control which it is to require that its members maintain at their peril.

The degrees of personal violence any of which might be arbitrarily selected as the lowest which the law will recognize as adequate to reduce an intentional killing to voluntary manslaughter may be presented graphically on a scale running from that degree involved in insulting language alone to that degree which gives rise to the right of self defense. Thus the scale would appear as follows:



[16] *Id.* at 135, 84 Eng. Rep. at 1114.

[17] State v. Biswell, 352 Mo. 698, 179 S.W 2d 61, 66 (1944), State v. Bongard, 330 Mo. 805, 51 S.W 2d 84, 88 (1932)

[18] State v Starr, 38 Mo. 270 (1866).

[19] See note 5 *supra.*

[20] State v. Fisko, 58 Nev. 65, 70 P 2d 1113 (1937), Commonwealth v. Webb, 252 Pa. 187, 97 Atl. 189 (1916) 2 BURDICK, THE LAW OF CRIME sec. 462d (1946).

[21] State v. Honey, 22 Del. (6 Pennewill) 148, 65 Atl. 764 (Ct. Oyer and Ter. 1906).

[22] See note 11 *supra.*

Clearly, under present holdings, words alone cannot be considered adequate; and since it is not believed to be in accord with the trend in the law or in the best interest of society to afford increasing clemency in cases of homicide, it is thought that words alone as provocation can be summarily dismissed. In the case of assault, however, the same cannot be said, especially in those cases in which the assault consists of a demonstration with a deadly weapon. For here the arbitrary exclusion of the assault as adequate provocation might appear to lead to a harsh result; and it is thought that this fact has caused some courts to mitigate the assault and battery rule so as to afford clemency in such cases. As has been stated, however, the great majority of jurisdictions now hold a mere assault insufficient;[23] so that to deem that degree adaquate would be to relax the policy of the law. Such a relaxation in this case is open to the same objections as in the case of words alone. The Missouri court is thought to have stated well the case against assaults as sufficient:

> "It may seem illogical to say the insulting but comparatively harmless jostling of a person on the highway or a mere tweaking of the nose, may be sufficient to constitute lawful provocation, whereas a hostile demonstration with a deadly weapon threatening imminent danger to life will not, though accompanied by vile and insulting language. But the law cannot have a rule exactly accomodating itself to the varied dispositions of people and altogether putting a premium on turbulent tendencies. For the proper administration of justice some absolute standard of conduct is required. Where the defendant believes, and has reasonable ground for belief, that an impending assault imminently threatens his life or great bodily harm, he can act in self defense and be completely exculpated, though there be no battery."[24]

If, then the extension of adequate provocation so as include words alone or a mere assault be rejected, the problem of the degree of violence to be required may be simply stated: The law may either (1) recognize any assault and battery as sufficient, or (2) require some specified degree of violence between a trivial assault and battery and one which would give rise to the right of self defense.

In the case of the first, the possibility of an absurd result has already been mentioned in the extract from the Missouri case, *supra*. It might result, for example, in the holding of an insignificant assault and battery sufficient while denying the adequacy of other provocations just as enraging. In addition, it would seem that our present-day society placing emphasis as it does, upon the value of human life, should adopt a more stringent requirement in order that homicides upon such trivial cause be discouraged. These objections.

[23] See note 14 *supra*.

[24] State v Bongard, 330 Mo. 805, — 51 S.W 2d 84, 89 (1932)

in the opinion of the writer, outweigh the obvious advantage of certainty which might be provided by an absolute rule that any assault and battery is sufficient, if the jury find that heat of passion was in fact present in a particular case.

Deciding, therefore, upon a more stringent rule, it becomes necessary to determine the most desirable point at which to draw the line and to formulate that rule so as to convey to the trial judge and to the jury the extent of the violence to be held adequate. It is submitted that the lowest degree which would reduce the homicide should be a "painful" assault and battery; for does it not appear more reasonable that the actual pain added to the insult of an assault should be much more likely to produce in man such heat of passion as the law requires in order that a killing may be reduced? Admittedly, this increases the burden of the jury which, if such a rule should be adopted, might be charged with determining whether a battery might be classified as "painful." Yet, it is believed that this would not be too difficult of application if it be understood that no especial degree of pain is required. Any "pain" would be sufficient to bring an assault and battery within the rule, which, while hardly stringent enough in view of the discussion above, has the value of a degree of certainty and of greatly decreasing the chances that a mere jostling or tweaking of the nose might be held sufficient provocation; for it is doubted that any jury would arrive at the conclusion that such slight batteries could be painful, if the ordinary meaning of the word be preserved. Any other attempt, it is submitted, to formulate a more stringent rule fails to meet the test of sufficient certainty. For example, if a "serious" battery, or one "more than trivial" were required to mitigate a homicide rather than a "painful" battery, it is feared that those phrases would admit of even more varied interpretations by trial judges and by juries than would the word "painful."

It is therefore submitted, in conclusion, that the "assault and battery" rule should be restated so as to require that an assault and battery, in order to be adequate, should be a "painful" one, thus amending the rule to hold that an intentional killing resulting from heat of passion aroused in the killer by a painful assault and battery thereupon by the deceased would be reduced to voluntary manslaughter.

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