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IS A CRIMINAL ASSAULT A SEPARATE SUBSTANTIVE CRIME OR IS IT AN ATTEMPTED BATTERY?

An examination of the criminal assault cases which have been decided during the last two hundred years discloses the fact that the courts have used two fundamentally different theories in defining the offense. Different results have been reached in describing and punishing the same offense, depending largely upon whether the courts have looked upon the offense as a separate substantive crime or whether they have looked upon it as an attempted battery. There is little indication that the courts have carefully thought it out one way or the other.

A simple civil assault is generally defined as any unlawful offer or attempt coupled with an apparent present ability to injure the person of another, and the act must be such that it creates a reasonable apprehension of imminent peril in the mind of the assaulted person. If the assaulted person is put in reasonable apprehension of bodily harm, there need be only apparent present ability on the part of the actor to carry out his threat. The key words here are apparent, present, and apprehension.


2 In numerous ways the great majority of the courts closely tie it up with a criminal battery by defining it, broadly speaking, as an attempt to commit a battery. Brown v. State, 57 Ga. App. 904, 197 S. E. 82 (1938); State v. Roby, 194 Iowa 1032, 188 N. W. 709 (1922); State v. Linville, 150 Kan. 617, 95 P. (2d) 332 (1939); State v. Aleck, 41 La. Ann. 83, 5 So. 639 (1889); Commonwealth v. McCan, 277 Mass. 199, 178 N. E. 633 (1931); State v. Martinez, 30 N. M. 176, 230 Pac. 379 (1924); Perez v. State, 114 Tex. Cr. R. 473, 22 S. W. (2d) 309 (1929).

3 Prosser, Torts (1941) sec. 10; Restatement, Torts (1934) sec. 21.

hension. Mere words are never sufficient, and words which show that the assaulter cannot or does not intend to carry out his threats will prevent there being an assault.

The common law apparently followed the tort rule in its definition of the criminal assault. As Bishop points out, the stipulation in definitions today that there must be "a present ability" to carry the threat or offer into effect is not found in the common law, which required only apparent present ability on the part of the assaulter. For example, a man could be held criminally for an assault with an unloaded gun.

Most states have changed the definition of a criminal assault either by statute or by decision. Many common law rules have been properly changed in this way. However, in the present instance, it would seem that what the statutes and decisions are calling criminal assaults are, in many instances, attempted batteries.

The great majority of the courts seem to define a criminal assault as any unlawful offer or attempt on the part of the assaulter, coupled with a present ability, to commit an injury upon the person of another. This is similar to the tort offense in that both must be present offenses as opposed to threats of future harm. It differs chiefly in that there is the requirement of an actual ability on the part of the assaulter to carry out his threat. Some courts hold that the act must be such that it would constitute a criminal battery if some intervening force

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6 Brooker v. Silverthorne, 111 S. C. 553, 99 S. E. 350 (1919); Turberville v. Savage, 1 Mod. 3 (K. B., 1669). Compare with criminal assault. People v. Lilley, 43 Mich. 521, 5 N. W. 982 (1880) (which held that there was no assault if defendant voluntarily abandoned his purpose before coming into striking distance); State v. Daniel, 136 N. C. 571, 48 S. E. 544 (1904) (holding bare words are never sufficient for assault).

7 2 BISHOP, CRIMINAL LAW (9th ed. 1923) sec. 32(3).

8 2 BISHOP, CRIMINAL LAW (9th ed. 1923) sec. 32(3). State v. Shepard, 10 Iowa 126 (1859); State v. Archer, 8 Kan. App. 737, 54 Pac. 927 (1896); Commonwealth v. White, 110 Mass. 407 (1872); State v. Cherry, 11 Ired. 475, 33 N. C. 336 (1850).

9 State v. Shepard, 10 Iowa 126 (1859); State v. Archer, 8 Kan. App. 737, 54 Pac. 927 (1896).

10 See note 2 supra.
did not prevent the battery from coming into being.\textsuperscript{11} Other courts go so far as to hold that there must be present in the mind of the assailter a specific intent to commit some particular offense.\textsuperscript{12}

These last two requirements, actual ability and specific intent on the part of the actor, are the same as two of the elements which are embodied in the definitions of two other distinct and separate criminal offenses; namely, criminal attempts and aggravated assaults. This fact raises the problem of whether a criminal assault is, or should be, a separate offense, or whether it is, in fact, either an attempt or an aggravated assault. In order to solve this problem we must have clearly in mind just what elements constitute the two offenses involved.

An attempt has been defined as "any overt act done with the intent to commit a crime and which, but for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime. It consists of two important elements: first, an intent to commit the crime; and second, a direct ineffectual act done towards its commission."\textsuperscript{13} These two elements are essential to the commission of a criminal attempt,\textsuperscript{14} and they apparently are the same elements that some courts have embodied in their definitions of a criminal assault.\textsuperscript{15} It seems, however, that we can distinguish the offense of a simple criminal assault from that of an attempted battery. Is not the person who points an unloaded gun at another with the intention merely of causing apprehension in the mind of the

\textsuperscript{11}Hulen v. State, 25 Ala. App. 401, 147 So. 450 (1933); cf. People v. Heise, 217 Calif. 671, 20 P. (2d) 317 (1933) ("battery" is a consummated assault); Anderson v. Crawford, 265 Fed. 504 (C. C. A. 8th, 1920) (An assault is an attempt which, if consummated, would result in a battery).

\textsuperscript{12}U. S. v. Hand, 26 Fed. Cas. (Case No. 15,297) 103 (C. C., D. Pa. 1810); People v. Sylva, 143 Calif. 62, 76 Pac. 814 (1904); People v. Yslias, 27 Calif. 630 (1885); Woodworth v. State, 145 Ind. 276, 43 N. E. 933 (1896); State v. Hehner, 199 N. C. 778, 155 S. E. 879 (1930).

\textsuperscript{13}May, Criminal Law (4th ed. 1938) sec. 130; 8 R. C. L. 277; Balleinie, Law Dictionary (1930) p. 122.


\textsuperscript{15}People v. Yslias, 27 Calif. 630 (1865); State v. Lichter, 7 Boyce 119, 102 Atl. 529 (Ct. of Gen. Sess., Del. 1917); Woodworth v. State, 145 Ind. 276, 43 N. E. 933 (1896).
other, and who does cause such apprehension, guilty of a crime that is distinct from the crime which requires specific intent to do bodily harm to the other as well as a direct ineffectual act done towards accomplishing that purpose? There is, and should be, a distinction between these two offenses. The first is the simple criminal assault as it was known to the common law, the second is an attempt, a separate substantive crime which should be punished as an attempted battery.

While some courts and state statutes do not speak of aggravated assaults as such, they do speak of what the authorities call aggravated assaults, under the terms of assault with intent to kill, rape, rob, et cetera.16 At common law any assault accompanied by aggravating circumstances was considered an aggravated assault and was generally punished as a misdemeanor.17 It could be made out either by showing specific intent on the part of the assaulter or by the use of a deadly weapon.18 The requirement of one or the other of these two elements is continued in many state statutes today;19 in other statutes a specific

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16 The statute definitions of aggravated assaults, while similar in essential elements, vary greatly in detail. As to the element of specific intent necessary, see: Note (1944) 32 Ky. L. J. 352. Gen. Stat. Kan. (1935) 21 sec. 431 (providing for assault with felonious intent to beat, kill, maim, ravish ...); Gen. Laws Mass. (1932) 265 sec. 15 (assault with intent to murder), 265 sec. 24 (assault with intent to rape), 265 sec. 29 (assault with intent to commit a felony); Ohio Gen. Code (1939) sec. 12421 (assault with intent to kill, rape, rob); Texas Stat. (Vernon, 1936) Art. 1160 (assault with intent to murder), Art. 1162 (assault with intent to rape), Art. 1163 (assault with intent to rob).

17 May, Criminal Law (4th ed. 1938) sec. 160: "...it might be punished more severely where the punishment was within the discretion of the court or jury." Cornelison v. Commonwealth, 84 Ky. 583, 597, 2 S. W. 235, 238 (1886) ("There are no degrees of the offense of assault and battery, except that in imposing the punishment the circumstances of the one case demand a greater punishment than the other. A mere assault is not as high an offense against the law as when accompanied with a battery, and an assault and battery, with the intent to rob or murder, is a more aggravated assault than a mere assault and battery, and it may be said in this way that there are degrees of the offense. The punishment is graded by the enormity of the offense."). But see Hall v. State, 9 Fla. 203 (1860) and Levi Wilson v. The People, 24 Mich. 410 (1872) (both holding that assault with intent to kill was no different at common law than the simple criminal assault).

18 Hall and Glueck, Cases and Materials on Criminal Law (1940) p. 66, Note on Aggravated Assault.

intent to commit some felony, as well as actual ability to carry out that intent, are made essential elements of the offense.\textsuperscript{29} The question is now raised, are all criminal assaults in fact aggravated assaults? There evidently is no crime which is defined as an assault with intent to commit a battery. If there were such a crime it would undoubtedly be classified as an aggravated assault. It is conceivable that there might be such an intent in the mind of an assaulter, who might wish to do an act which is more severe than a simple civil assault and yet is not as severe, for instance, as an assault with intent to kill. Let us suppose that $X$ intends to hit $Y$ over the head with a club, but is prevented from doing so by the intervention of $Z$. $X$ would be guilty of an aggravated assault (assault with intent to commit a battery), and this offense is more severe than if $X$ had raised the same club only for the purpose of putting fear of bodily harm into the mind of $Y$. These two offenses are certainly distinguishable, and for this reason it would seem that all criminal assaults are not necessarily aggravated assaults.

We now come to the question of whether all aggravated assaults are attempted batteries. The answer to this question is probably "no." While many aggravated assaults are undoubtedly attempted batteries, an assault with intent to rob, for instance, need not be committed with any intent to do bodily harm to another.

However, in spite of this reasoning, the fact remains that the definition given and approved by the great majority of the courts and by their state statutes is, in effect, that of an attempted battery, and that there could and probably should be another crime, that of the simple criminal assault. This offense should be a crime which would stand alone on its own base, with its own distinct elements, and should not be dependent upon those elements which constitute the crimes of aggravated assaults and attempted batteries.

It has been argued that the civil and criminal assaults

\begin{itemize}
\item[(1937)] chap. 38, sec. 60 (assault with deadly weapon);
\item[\textit{Ohio Gen. Code} (1936)] sec. 12416 (assault with dangerous weapon);
\item[\textit{Texas Stat.} (Vernon, 1936)] Art. 1147(8) (deadly weapons).
\item[\textit{Colo. Stat. Ann.} (1935)] chap. 48, sec. 67 (deadly weapon and intent to commit bodily harm upon another);
\item[Ky. R. S. (1942)] 433.150 (armed assault with intent to rob);
\item[\textit{Gen. Laws Mass.} (1932)] 265, sec. 18 (with dangerous weapon and intent to rob or murder).
\end{itemize}
should have different definitions because they serve different functions, that the tort was originated to give the plaintiff compensation for damages, while the criminal offense was created to protect society against a breach of the peace.\textsuperscript{21} This reasoning does not appear to be sound. Is there not just as great a disturbance of the peace by one who with only apparent ability to carry out his threats creates a reasonable fear of bodily harm in the minds of peaceful citizens as there is by one who does so with the actual ability to carry out his threats? It would seem that, whether you look at the situation objectively or subjectively, the result as far as the peace of the community is concerned is the same.\textsuperscript{22} Both acts should be punished as criminal offenses.

A word must be said here upon the provisions found in the various state statutes concerning the definition of the criminal assault. They are, apparently, neither consistent nor classifiable. Some statutes give no definition of the simple criminal assault.\textsuperscript{23} A few define it in terms similar to the common law concept,\textsuperscript{24} while a few others have drawn up elaborate provisions dividing the crime into first, second, and third degree categories.\textsuperscript{25} The language used in these statutes varies greatly. However, it must be noted that regardless of this fact the courts have used, on the whole, only two definitions, that of the attempted battery, and the separate and distinct simple civil assault.

There are two final questions to be raised. First, should the test of apprehension be objectively or subjectively applied? Second, if we make no fundamental distinction between a simple civil assault and a simple criminal assault how are we to distinguish them?

Answering the first question, it seems sound to hold that the test probably should be objectively applied; that is, would a

\textsuperscript{21} Note (1938) 11 Rocky Mt. L. Rev. 104; Note (1909) 57 U. of Pa. L. Rev. 249.
\textsuperscript{22} Burgess v. Commonwealth, supra note 1.
\textsuperscript{23} Conn., Kan., Mass., Ohio, Pa., Va.
\textsuperscript{24} While Rev. Stat. Me. (1930) 129, sec. 27 makes the requirement of present ability, its courts have held that their statute is declaratory of the common law; State v. Mahoney, 122 Me. 483, 120 Atl. 543 (1923); State v. Creigton, 98 Me. 424, 57 Atl. 592 (1904).
\textsuperscript{25} Rev. Codes Mont. (1935) secs. 10976, 10977, 10978; N. Y. Penal Law (1939) secs. 240, 242, 244.
reasonable man under all of the circumstances have been put in apprehension and fear of serious bodily harm? Apparently in the civil assault the test for apprehension is objective. However, the plaintiff must be aware of the act of the assaulter or there is no liability upon the part of the actor, although the plaintiff does not have to be aware of the assaulter's presence. Even though the plaintiff is too courageous to be frightened he is not deprived of his action against the actor, but if he is extremely timid the courts have been reluctant to protect him. However, they may protect a timid person if it is specifically found that the actor knew of this characteristic and took advantage of it.

As given in the Restatement of Torts the test for apprehension is whether the plaintiff reasonably believes "that the act [of the assaulter] may result in immediate contact unless prevented from so resulting by . . . [his, the plaintiff's own] self-defensive action or by his flight or by the intervention of some outside force." However, even though one of these elements prevents the bodily touching, and the plaintiff knew that it probably would, the assault has been completed. All of this amounts to no more than saying that, with the exception of the assaulter who takes advantage of the timid person, the test for apprehension in civil assault cases is probably objective. With like reasoning it would seem that the test of apprehension in criminal cases could be applied in the same manner.

The second question as to the distinction between the civil and criminal assaults is more difficult. If there are certain offenses for which an action will lie both civilly and criminally, there is no absolute necessity to distinguish between the criminal

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1 Prosser, Torts (1941) sec. 10.
2 Idem.
3 Restatement, Torts (1934) sec. 27.
4 Restatement, Torts (1934) sec. 24.
5 Restatement, Torts (1934) sec. 24, comment b.
6 Idem.
7 See, however, Nelson v. State, 42 Ohio App. 252, 181 N. E. 448 (1932) (which apparently applies the subjective test for apprehension).
8 The writer queries whether there are not companion offenses in civil and criminal law. Is not the intentional battery one of these and false imprisonment another? For a discussion of the relation between crimes and torts see Jerome Hall, Interrelations of Criminal Law and Torts (1943) 43 Col. L. Rev. 753, concluded at 967; see especially at 975.
and civil assault, unless, perhaps, there is an action for a negligent civil assault\textsuperscript{33} while there is, or should be, none criminally.\textsuperscript{34}

In conclusion, the writer believes that the civil and the criminal assaults are very closely allied;\textsuperscript{35} that the test for apprehension in both instances should probably be objective; that the minority rule that one who causes apprehension with only apparent present ability to carry out his threats is just as guilty of a criminal assault as the actor who has the actual ability to carry out his threats is the better rule; and that the offense which the great majority of the courts are calling and punishing as a criminal assault is in effect an attempted battery, which is, and probably should be punished as, a distinct and separate criminal offense.

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\textsuperscript{31}Note (1942) 30 Ky. L. J. 421.

\textsuperscript{32}The writer here queries whether the distinction between the two offenses, if there is one, is not one of degree. Are, or must, criminal offenses be more severe than civil offenses? Must there necessarily be a distinction between civil and criminal offenses? In this connection see also, note 32, \textit{supra}.

An analogy to the negligent battery in civil and criminal law is perhaps applicable. It would seem that the main distinction between these two offenses is almost wholly a matter of degree, all negligent crimes requiring a higher degree of negligence than corresponding civil offenses. For negligent civil and criminal batteries, see, respectively, Note (1942) 31 Ky. L. J. 75, and Note (1942) 30 Ky. L. J. 418. In considering whether there may also be negligent civil and criminal assaults, see \textit{supra}, notes 32 and 33, especially 30 Ky. L. J. 421, 422, footnote 8.