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Criminal Law - Assault with an Unloaded Firearm

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The Louisiana courts have usually recognized the divorce decrees of sister states on the grounds of comity.[21] The *Haddock* decision did not foreclose such recognition. *Voorhies v. Voorhies*[22] and *Aarnes v. Aarnes*[23] involved "Reno" divorces. In both cases the burden was on the person attacking the foreign decree to prove there was no bona fide residence. The intent to reside permanently in Reno was found by the court in both cases. Apparently the decisions in the *Williams* cases will not preclude Louisiana from following the rule applied in the above cases.

One may safely generalize that, for the time being at least, a state in which one of the spouses is domiciled is empowered to issue a valid divorce decree. Such decree will be entitled to full faith and credit in all states. The question of domicile will depend upon intent to reside permanently in the state that issues the divorce. The plaintiff's fault in leaving the matrimonial domicile will have no effect upon the validity of the decree.[24] Thus the only time a state court can refuse full faith and credit to a divorce decree of another state is upon a finding that there was no bona fide domicile of either spouse in the other state. Since the state which issued the divorce naturally found a bona fide domicile, the refusal of another state to recognize the divorce is subject to review by the United States Supreme Court.

E. P. C.

CRIMINAL LAW—ASSAULT WITH AN UNLOADED FIREARM—The defendant, a member of the New Orleans police force, had been engaged in an argument and fight with a soldier. While in an intoxicated condition and in pursuit of his adversary, defendant entered the residence of a third person, pointed his unloaded revolver at the occupants and pulled the trigger several times simultaneously demanding, "Where is my man? Tell me where he is or I will kill you." The defendant was forthwith charged with and convicted of aggravated assault. In affirming his conviction the supreme court took the position most favorable to

21. Aarnes v. Aarnes, 162 La. 648, 135 So. 13 (1931); Voorhies v. Voorhies, 184 La. 406, 166 So. 121 (1936). See Comment (1939) 14 Tulane L. Rev. 96.

22. 184 La. 406, 166 So. 121 (1936).

23. 172 La. 648, 135 So. 13 (1931).

24. "In view of *Williams v. North Carolina,* the jurisdictional requirement of domicil is freed from confusing refinements about 'matrimonial domicil.'" C. C. H., 5 U. S. Sup. Ct. Bull. 1495, 1497 (May 21, 1945). Apparently *Haddock v. Haddock* is not reinstated by the second *Williams* case.

the defendant, stating ". . . it will be assumed that the revolver was not loaded at the time it was pointed and clicked at Mr. and Mrs. Chantagnier and their guests," and further remarking, "We shall attempt to determine only the resulting question of law, namely: Does an assault with an unloaded revolver, under the circumstances of the case, constitute an assault with a dangerous weapon?" *State v. Johnston*, 20 So. (2d) 741 (La. 1944).

A sharp conflict of judicial opinion exists as to whether an assault is limited to an attempted battery,[1] or whether it also contemplates the placing of another in reasonable apprehension of receiving a battery.[2] Article 36 of the Louisiana Criminal Code adopted the broad view, stating that "assault is an attempt to commit a battery, *or* the intentional placing of another in reasonable apprehension of receiving a battery." (Italics supplied). In conformity with this definition, it constitutes an assault to point an unloaded gun at another, if the victim is placed in reasonable apprehension of being shot.

The further question presented in the principal case is whether an assault with an unloaded gun constitutes an aggravated assault[3] or a simple assault. This ultimately depends upon whether or not the unloaded gun constitutes a "dangerous weapon" within the definition of Article 2 of the Louisiana Criminal Code, which adopts the test that the weapon must be such that "in the manner used [it] is calculated or likely to produce death or great bodily harm."

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1. Chapman v. State, 78 Ala. 463, 464, 56 Am. R. 42 (1885); Somerville, J., delivering the opinion of the court said: "On this question, the adjudged cases, both in this country, and in England, are not agreed, and a like difference of opinion prevails among the most learned commentators on the law. We have had occasion to examine these authorities with some care, on more occasions than the present; and we are of the opinion that the better view is, that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages. The conflict of authority on this subject is greatly attributable to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's 'right to live in society without being put in fear of a personal harm;' and can often be sustained by proof of a negligent act resulting in unintentional injury.—Peterson v. Haffner, 59 Ind. 130, 26 Am. R. 81; Cooley on Torts, 161. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by violence."

2. Clark and Marshall, The Law of Crimes (4 ed. 1940) 248, 251, §§ 195, 200, it is declared that "the better opinion" is to the effect that a reasonable putting in fear is sufficient to constitute a criminal assault, and that the actual intent and ability to commit the threatened battery are not necessary.

3. Art. 37, La. Crim. Code of 1942: "Aggravated assault is an assault committed with a dangerous weapon."

After posing this question, and citing the controlling articles of the Criminal Code[4] the court proceeded to analyze the case from the standpoint of the victim's apprehension, stating that the assaulted could assume that the gun would fire. "Clearly," said the court, "the revolver, under these circumstances or in the manner that it was used by defendant, was likely to produce, at least, great bodily harm to those assaulted. It, therefore, was a dangerous weapon."[5] This statement, however, is not completely accurate. Under the assumption that the court postulated, namely, that the pistol was not loaded,[6] the revolver was not used by the defendant in a manner which was likely to produce great bodily harm to those assaulted. Empty pistols do no harm unless used as a bludgeon, and the evidence does not disclose that there was any attempt to so use the revolver in question.

Article 2 of the Louisiana Criminal Code defines a dangerous weapon as including "any gas, liquid or other substance or instrumentality, which, *in the manner used,* is calculated or likely to produce death or great bodily harm." What manner of use, then, was made of the pistol? It was empty; defendant only pointed the revolver at the assaulted and clicked it. According to the use made of the revolver it was not calculated or likely to produce death or great bodily harm. Giving the statute a strict interpretation, as must be done in criminal cases, an unloaded revolver is not a "dangerous weapon." The criterion for determining what is a dangerous weapon is the actual nature of the weapon in the manner used, and not the apprehension created in the mind of the assaulted. If the latter had been intended, Article 2 of the Criminal Code would have been phrased "or instrumentality, which, in the manner used, is calculated or likely, *or appears to the person assaulted to be calculated or likely,* to produce death or great bodily harm." The notion which the victim entertains with reference to the qualities of the instrument in the manner used does not alter its actual character or potentialities for harm. If the reasoning of the Louisiana court is carried to its ultimate conclusion, then it should also constitute an aggravated assault where one points a toy gun or a stick of wood at another in a

4. Arts. 2, 36, 37, La. Crim. Code of 1942.
5. State v. Johnston, 20 So.(2d) 741, 744 (La. 1944).
6. Id. at 743. Possibly when the court made the statement in question it was impressed with the district judge's opinion that the revolver was loaded when the assault was committed and subconsciously gave some weight to the fact that the gun might have actually been loaded when the assault was committed.

menacing manner, provided the latter thinks that he is in danger of being shot. An unloaded revolver used in such a manner as it was in the principal case does not meet the test of being "calculated or likely to produce death or great bodily harm."

Under the express provision of Article 36[7] one may advert to the apprehension created in the mind of the victim in determining whether an assault has been committed; but an aggravated assault requires two indispensable elements. It is an assault plus the use of a dangerous weapon. The former may be either objective or subjective; whereas, the latter is solely objective, since the Criminal Code specifically enumerates the attributes of a dangerous weapon. Failure to prove the use of a dangerous weapon, consistently with the definition in Article 2 of the Criminal Code, must necessarily preclude conviction for an aggravated assault.

In adopting the opinion of the district court, in further justifying its decision, the supreme court quoted, "The complainants, in order to repel their assailant, would have been justified if they had either inflicted great bodily harm upon him or slain him, because it was reasonable for them to believe that their lives were placed in danger by the conduct of the defendant." However, the right of self-defense which the defendant's act vested in his victims is based upon apparent danger[8] and is not necessarily indicative of the actual character of a weapon in the manner used. It is one thing to say that the weapon, as used, created a reasonable apprehension of danger in the victim's mind, so as to give him a right of self-defense. It is quite another to say that the weapon was actually "dangerous" within the meaning of Article 2 of the Criminal Code.

In *Price v. United States*[9] a federal circuit court declared that "The use of a dangerous weapon is what distinguishes the crime of an assault with a dangerous weapon from a simple assault. A dangerous weapon 'is one likely to produce death or great bodily injury.' Or perhaps it is more accurately described as a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm. And it is perfectly clear that an unloaded pistol, when used in the manner shown by

7. Art. 36, La. Crim. Code of 1942.

8. Art. 20, La. Crim. Code of 1942. In view of the fact that the sole basis of self defense are subjective appearances, it is at once palpable that to interpret this article so as to impart constructively dangerous characteristics to the instrument used is logically spurious and renders Article 2, which defines what a "dangerous weapon" may be, absolutely nugatory.

9. 156 Fed. 950 (C.C.A. 9th, 1907).

the evidence in this case, is not, in fact, a dangerous weapon."[10] Other decisions in point[11] are also at variance with our Louisiana Supreme Court's decision in the *Johnston* case.

When the Wisconsin Supreme Court held that an unloaded gun did not constitute a "dangerous weapon,"[12] the legislative body of that state enacted a statute[13] which expressly stated that an assault with a firearm, *whether loaded or unloaded,* would constitute an aggravated assault. If it is socially desirable, because of the serious disturbance of the peace which may result,[14] that the person who threatens another with an unloaded firearm be held for an aggravated assault, then it is submitted that the remedy should be by direct legislative action, rather than by a judicial interpretation which involves an abandonment of the general rule that criminal statutes are to be strictly construed in favor of the accused.

J. M. S.

CRIMINAL LAW—SENTENCE—METHOD OF EXECUTION—The defendant was tried and convicted of murder. On August 8, 1940, the judge sentenced him to death "by hanging by the neck until dead." When the transcript of the proceedings was sent to the Governor to have the date of execution fixed, the defendant, alleging that he could not be hanged because Article 569 of the Code of Criminal Procedure had been repealed by Act 14 of 1940,[1] and that the latter statute would be ex post facto if applied

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10. Id. at 952.

11. Territory of Arizona v. Gomes, 14 Ariz. 139, 125 Pac. 702 (1912); People v. Sylva, 143 Cal. 62, 76 Pac. 814 (1904); People v. Montgomery, 15 Cal. App. 315, 114 Pac. 792 (1911); State v. Godfrey, 17 Ore. 300, 20 Pac. 625 (1889). In State v. Napper, 6 Nev. 113 (1870), a threat with an unloaded firearm was held not to constitute an assault under a statute defining an assault to be "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another."

12. Luitze v. State, 204 Wis. 78, 234 N.W. 382 (1931). In this case the assailant pointed an unloaded revolver at another. The question of law to be decided was whether this constituted an assault with a dangerous weapon. The court held that this was not an assault with a dangerous weapon, *no matter how much the person at whom it was pointed may have been put in fear.*

13. Wis. Stats. (1935) § 340.40.

14. In view of the strain which was placed upon the context of the controlling articles in the principal case, it may be safely inferred that the court is of the opinion that serious disturbance of the peace is very likely to result from such an assault. The writer concurs in this opinion. It is a not too uncertain likelihood that a victim may suffer serious mental pain and injury. And in cases where the victim has a weak heart, his life may be endangered or his condition aggravated.

1. Dart's Code of Crim. Law and Proc. (1943) Arts. 569-570.