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Notes

AGGRAVATED BATTERY—THE FIST OR TEETH AS A DANGEROUS WEAPON—Defendant had been convicted of aggravated battery, the attack upon his victim having been perpetuated by means of the offender's teeth and fists. The supreme court ordered the verdict and sentence annulled, and the case remanded on a procedural point. However, Justice Kennon in speaking for the court, significantly declared:

"It is true that portions of the human anatomy may be dangerous and the bare hands of a merciless assailant may

quite readily 'produce death or great bodily harm,' particularly if the victim be young or weak, but the fact remains that there must be proof of the use of some *inanimate instrumentality* before a defendant can be held guilty of assault 'with a dangerous weapon'.¹

State v. Calvin, 209 La. 257, 24 So. (2d) 467 (1945).

This statement, if considered alone and without relation to the facts of the instant case, would indicate that a "dangerous weapon" must consist of some "inanimate instrumentality." The Louisiana Criminal Code specifically provides that a "dangerous weapon" includes any instrumentality, "which, in the manner used, is calculated or likely to produce death or great bodily harm."² Since the question presented by this decision is *res nova* in Louisiana it is necessary to consider the jurisprudence of sister states to ascertain the merit of the interpretation placed on the above codal provision in the principal case.

In the Arkansas case of *Warren v. State*,³ the defendant was convicted of aggravated assault under a statute requiring a "deadly weapon, instrument, or other thing."⁴ The victim had been knocked down, unmercifully beaten, and kicked in the head while he was down. The court stated, "There was no evidence to show that Warren assaulted Tardy, 'with a deadly weapon, instrument, or other thing,' and he therefore could not have been legally convicted of an aggravated assault."⁵ This position was affirmed in a later case⁶ in which the court stated:

"[The case of *Warren v. State*] shows that where one attacks another using no other weapon than by striking with his fist, or kicking he does not use a deadly weapon in the sense of the statute. The shoes which a man wears as part of his ordinary apparel, in the common acceptance of the term, are not deadly weapons within the meaning of the statute. . . . A powerful man—a Dempsey or Firpo—might kill one by striking with the fist or kicking with the foot; but a great bodily injury by this means would not be an assault with a deadly weapon, instrument, or other thing, in the sense of the statute."⁷

1. 209 La. 257, 266, 24 So.(2d) 467, 469 (1945).

2. Art. 2, La. Crim. Code of 1942.

3. 88 Ark. 322, 114 S.W. 705 (1908).

4. Ark. Dig. Stat. (Pope, 1937) § 2960.

5. 88 Ark. 322, 323, 114 S.W. 705 (1908).

6. *Wilson v. State*, 162 Ark. 495, 258 S.W. 972, 33 A.L.R. 1182 (1924).

7. 162 Ark. 494, 496, 258 S.W. 972, 33 A.L.R. 1182, 1183. A dissent, while apparently conceding that kicking does not constitute an assault with a

In evaluating these decisions it is significant to note that the Arkansas statute requires a "deadly weapon," as distinguished from a "dangerous weapon" required by the Louisiana Criminal Code.⁸

California's statute specifically covers all types of weapons, embracing "Every person who commits an assault . . . with a deadly weapon, or instrument or by means of force likely to produce great bodily injury."⁹ The California court has held several times that the fist may be the "means of force likely to produce great bodily injury."¹⁰ Arizona¹¹ and Idaho¹² have similar statutes. A New York statute specifically covers the situation, providing that

"A person who wilfully and wrongfully wounds or inflicts grievous bodily harm upon another either with or without a weapon; or wilfully . . . assaults another by the use of a weapon, or other instrument . . . is guilty of assault in the second degree."¹³

Under a Texas statute an assault or battery becomes aggravated when serious injury is inflicted upon the person assaulted; when committed by a person of robust health, or strength upon an aged person; when committed with a deadly weapon under circum-

"deadly" weapon, states that the statute governing the case does not require that the assault be committed with a "deadly" weapon, but with anything that could be used as such to produce great bodily injury.

8. A deadly weapon is a weapon likely to produce death or great bodily injury, while a dangerous weapon is a milder term yet otherwise of same meaning, for a weapon may be dangerous without being deadly. *State v. Walden*, 41 N.M. 418, 70 P.(2d) 149, 150 (1937).

While "deadly" and "dangerous" are not equivalents, deadly is more than the equivalent, and includes the full signification of dangerous. A dangerous weapon may possibly not be deadly, but a deadly weapon, one which is capable of causing death, must be dangerous. *State v. Lynch*, 88 Me. 195, 33 Atl. 978 (1895).

9. Cal. Pen. Code (Deering, 1937) § 245.

10. Defendant struck Lepter several severe blows in the face in an effort to get away and avoid arrest after Lepter caught him rifling his car. Held; these blows constitute an assault with force and justified a conviction of aggravated battery if the court believed from the evidence that the force used was "likely to produce great bodily injury." *People v. Score*, 48 Cal.(2d) 495, 120 P.(2d) 62 (1941).

Defendant committed a battery on Mrs. Bryan by choking her and beating her neck and face with his fist. Held; whether the force applied is likely to produce great bodily injury is a question of fact for the triers of facts. *People v. Schmedt*, 68 Cal.(2d) 253, 152 P.(2d) 1021 (1944). See *People v. Bunbaugh*, 48 Cal. (2d) 791, 120 P.(2d) 703 (1942); *People v. Collup*, 27 Cal.(2d) 829, 161 P.(2d) 576 (1945); *People v. Tallman*, 27 Cal.(2d) 716, 166 P.(2d) 857 (1945); *People v. Pilgrim*, 166 P.(2d) 636 (Cal. 1946); *People v. Orona*, 164 P.(2d) 769 (1946).

11. Ariz. Rev. Code Ann. (Struckmeyer, 1928) § 43-605.

12. Idaho Code Ann. (1932) § 17-1206.

13. N. Y. Penal Law § 242.

stances not amounting to an intent to murder or maim; and when committed with premeditated design and by the use of means calculated to inflict great bodily injury.¹⁴ It has been held by the Texas court that the hand or fist may be the means calculated to inflict great bodily injury.¹⁵

None of the cases have classified the fist or teeth as a "dangerous weapon," but neither is there any authority for the proposition that a weapon must be "inanimate." The weight of authority and the Louisiana Criminal Code classify a dangerous weapon as "any instrumentality, which, in the manner used is likely to produce death or great bodily harm."¹⁶ Webster defines instrumentality as a means, but does not qualify it as either animate or inanimate.¹⁷ Hence, the word "instrumentality," as used in the Louisiana Criminal Code, may be interpreted broadly enough to include both animate and inanimate implements.

Many undesirable results might follow from a strict adherence to the test enunciated in the principal case. The offender who put out his victim's eye with his finger would pay only the penalty for simple battery, while his fellow offender who put out his victim's eye with a pencil would pay the penalty for aggravated battery. An offender causing serious injury with artificial dentures could be convicted of aggravated battery, while an offender causing the same kind of injury with his natural teeth would be held only for simple battery. The potential danger of the method used should be the test of a "dangerous weapon," whether it be a knife, the teeth, the fist, a gun, a stick, a dog, or any other animate or inanimate instrumentality. When and if a proper aggravated case arises, it is hoped that this approach to the problem will be followed by the supreme court.

RUBY STOUT

14. Tex. Ann. Pen. Code (Vernon, 1938) Art. 1147.

15. Defendant struck his victim, who was a prisoner in custody of an officer, a blow on the head, and knocked him down some steps, saying, "I intend to knock you down those steps." Held; that an aggravated assault can be committed with the fist, and that such means when used with premeditated design are and may be calculated to inflict great bodily injury are abundantly attested by the facts in the case. *Keley v. State*, 12 Tex. Crim. App. 245 (1882).

Defendants banded together, caught their victim, and while part of them held him the others gave him a severe beating in the face with their fists. The court stated, "In our view, the circumstances of this case show that six stalwart men banded themselves together to give Dial a serious beating with their fists, and under the circumstances the means used were such as were calculated to inflict great bodily injury on prosecutor." *Yeary v. State*, 66 S.W. 1106 (1902).

16. Art. 2, La. Crim. Code of 1942.

17. Webster defines instrumentality as "that which is instrumental; means; medium; or agency."