AMERICAN CASEBOOK SERIES

CASES ON TORTS

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CASES ON TORTS

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PART 1

INTENDED INTERFERENCE WITH THE PERSON OR TANGIBLE THINGS

CHAPTER 1

THE WRONG

SECTION A.—TRESPASS TO THE PERSON

1. Assault and Battery

I. DE S. and Wife v. W. DE S.

At the Assizes, coram Thorpe, C. J., 1348 or 1349.
Year Book, Liber Assisarum, folio 99, placitum 60.

I. De S. & M. uxor ejus querunt de W. De S. de eo quod idem W. anno, &c., vi et armis, &c., apud S., in ipsam M. insultum fecit, et ipsam verberavit, &c. And W. pleaded not guilty. And it was found by verdict of the inquest that the said W. came in the night to the house of the said I., and would have bought some wine, but the door of the tavern was closed; and he struck on the door with a hatchet, which he had in his hand, and the woman plaintiff put her head out at a window and ordered him to stop; and he perceived her and struck with the hatchet, but did not touch the woman. Whereupon the inquest said that it seemed to them that there was no trespass, since there was no harm done. Thorpe, C. J. There is harm, and a trespass for which they shall recover damages, since he made an assault upon the woman, as it is found, although he did no other harm. Wherefore tax his damages, &c. And they taxed the damages at half a mark. Thorpe, C. J., awarded that they should recover their damages, &c., and that the other should be taken. Et sic nota, that for an assault one shall recover damages, &c.

Townsind v. Nutt, 1877, 19 Kan. 282. Defendant, on horseback, rode toward the plaintiff with intent to run her down and was prevented from doing so only by the act of the plaintiff in seizing the horse's bridle. *Held*, an assault, although no harm may have ensued to plaintiff.

Ashby v. White, 1703 Queen's Bench, 2 Ld.Raym. 938. Action against officers appointed to receive votes at an election for members

of Parliament, for refusing to receive plaintiff's vote. On motion in arrest of a judgment given after verdict for plaintiff, *Held,* judgment arrested [for various reasons]. HOLT, C. J. dissenting, "My brother Powell indeed thinks that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking of them, yet he shall have an action. So if a man give another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury." [This judgment was reversed and judgment was given for the plaintiff by the House of Lords, 1 Bro.Parl.Cas. 45.]

WEBB v. PORTLAND MFG. CO., Cir.Ct.D.Me. 1838, Fed.Cas.No. 17,322, 3 Sumn. 189. Bill in equity to restrain defendant from using water to which plaintiff was entitled, but for which he had no immediate need. STORY, J. . . . "I can very well understand that no action lies in a case where there is damnum absque injuria; that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can be correctly said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words, that injuria sine damno is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong there is a remedy to redress it; . . . and, if no other damage is established, the party injured is entitled to a verdict for nominal damages."

MORNINGSTAR v. LAFAYETTE HOTEL CO., 1914, 211 N.Y. 465, 105 N.E. 656, 52 L.R.A.,N.S., 740. Action brought against a hotel keeper for refusal to serve plaintiff as a guest, on the ground that he had theretofore refused to pay a bill presented to and disputed by him. CARDOZO, J., in reversing judgment for the defendant, said: "It is no concern of ours that the controversy at the root of this lawsuit may seem to be trivial. That fact supplies, indeed, the greater reason why the jury should not have been misled into the belief that justice might therefore be denied to the suitor. To enforce one's rights when they are violated is never a legal wrong, and may often be a moral duty. It happens in many instances that the violation passes with no effort to redress it—sometimes from praiseworthy forbearance, sometimes from weakness, sometimes from mere inertia. But the law, which creates a right, can certainly not concede that an insistence upon its enforcement is evidence of a wrong. A great jurist, Rudolf von Ihering, in his 'Struggle for Law', ascribes the development of law itself to the persistence in human nature of the impulse to resent aggression, and maintains the thesis that the in-

What does the court call it? Assault.

Judge and Jury

How are facts determined?

(a) Each party brings in his witnesses, Rules of Evidence

(b) Two methods of submission to jury – (1) General Charge

(2) Special Issues

Submission.

"Injury" where he has a right that is in dispute

But of course the question

Equitable Relief

Note, the court's statement about two requirements: (1) Intention (2) Act - why was this not an assault?

How does it happen that the 11th got judgment? Be sure that attendant realizes how the problem came up? It committed no assault but the Δ did commit a battery -

(1) "Get out of this house or I will shoot" He walked out and then sued for an assault

(2) "Shut your mouth or I will shoot your dead" and he pulled out his pistol. Is that an assault?

How are these cases to be distinguished. Where the cons. words convey a command showing an intent to injure unless the command is complied with, then there is an assault -

Should a person be allowed to go about frightening others while doing that he wants done?

dividual owes the duty to himself and to society never to permit a legal right to be wantonly infringed. There has been criticism of Ihering's view, due largely, it may be, to the failure to take note of the limitations that accompany it, but it has at least its germ of truth. The plaintiff chose to resist a wrong which, if it may seem trivial to some, must have seemed substantial to him; and his readiness to stand upon his rights should not have been proved to his disparagement."

TUBERVILLE v. SAVAGE.

King's Bench, 1669. 1 Mod. 3.

Action of assault, battery, and wounding. [The report of the same case in 2 Keble, 545, adds: "The defendant pleaded the plaintiff began first, and the stroke he received, whereby he lost his eye, was on his own assault, and in defense of the defendant."] The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "If it were not assize-time, I would not take such language from you." The question was, if that were an assault?

The court agreed that it was not; for the declaration of the plaintiff was that he would not assault him, the judges being in town; and the intention as well as the act makes an assault. Therefore, if one strike another upon the hand or arm or breast, in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. In the principal case the plaintiff had judgment.

STATE v. CROW, 1841, 1 Ired. L., N.C., 375. A conviction for assault was reversed where within striking distance the defendant raised a whip and shook it at Grayson, saying: "Were you not an old man, I would knock you down."

STATE v. HAMPTON, 1868, 63 N.C. 13. Within striking distance, with fist clenched and arm bent but not drawn back, the defendant said to the prosecutor: "I have a great mind to strike you." *Held*, a criminal assault.

STATE v. DANIEL, 1904, 136 N.C. 571, 48 S.E. 544, 103 Am.St.Rep. 970. Charge that "if the defendant cursed the prosecutor, Alston, and ordered him to come to him, and Alston obeyed through fear, the defendant was guilty of an assault". *Held*, error. To constitute assault "bare words will never do, for, however violent they may be, they cannot take the place of" force. "They are often the exhibition of harmless passion, and do not themselves constitute a breach of the peace."

STEPHENS v. MYERS.

Nisi Prius, 1830. 4 C. & P. 349.

Assault. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea: Not guilty.

It appeared that the plaintiff was acting as chairman at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made that he should be turned out, which was carried by a very large majority. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched toward the chairman, but was stopped by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman, but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman.

TINDAL, C. J., in his summing up, said: It is not every threat, when there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman if he had not been stopped; then, though he was not near enough at the time to have struck him, yet, if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff. Damages, 1s.

PEOPLE v. LILLEY, 1880, 43 Mich. 521, 5 N.W. 982. *Held,* reversing a conviction of assault with intent to commit manslaughter, that it was error for the trial court to decline to charge that, "if the prisoner started to strike or cut McKenzie, and before he got within striking or cutting distance stopped and voluntarily abandoned his purpose, or before coming within striking or cutting distance was stopped by others, and then voluntarily abandoned his purpose", it was not an assault.

I What is meant by saying, Tindal in his summing up said! To whom was he saying this? For what purpose was he summing up? note, now the procedure. The judge charges the jury as to the law and the jury applies the law to the facts"

(a) B comes to A's office and an argument ensues. A threatens to shoot B and moves to his desk to get a revolver, he opens the drawer but is overpowered at that point. Did A commit an assault on B? discuss similar illustrations.

(b) A taps on the floor with his walking stick. A was dressed in woman's clothes, and his purpose was to frighten and not to hurt; Is that an assault?

(c) Calls him up over telephone & says "I'm coming over again"

(c) note charge "there must be the means of carrying the threat into effect."

(D)

(Ref)

Texas Bus Lines V. Anderson,
233 SW (2d) 961 (Feb 1950)

Bus driver refused in violation of contract to permit Π to board bus. Evid. showed that bus driver was forced to back Π if he tried to get on -

Held, no assault,

Under § 3 of Art 1141 of Penal code one "who is at so great a distance from the person by the use of means which he makes the attempt is not guilty of an assault;

((Bus. driver "neither of you sons of bitches can ride my bus under any circumstances!"))

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237 N.E. 199, 74 SE (2d) 543
(frightening words)

READ v. COKER.

Common Pleas 1853. 13 C.B.R. 850.

Assault and false imprisonment. The first count charged an assault committed by the defendant on the plaintiff on the 24th of March, 1853, by thrusting him out of a certain workshop. Plea: Not guilty "by statute," upon which issue was joined.

[The plaintiff, a paper stainer, being in arrears for rent, on February 23, 1852, induced the defendant to pay off the landlord and carry on the business for their mutual benefit, defendant to pay the rent and other outgoings and to allow the plaintiff a certain sum weekly.]

The defendant, becoming dissatisfied with the speculation, dismissed the plaintiff on the 22d of March. On the 24th, the plaintiff came to the premises, and, refusing to leave when ordered by the defendant, the latter collected together some of his workmen, who mustered round the plaintiff, tucking up their sleeves and aprons, and threatened to break his neck if he did not go out; and, fearing that the men would strike him if he did not do so, the plaintiff went out. This was the assault complained of in the first count. Upon this evidence the learned judge left it to the jury to say whether there was an intention on the part of the defendant to assault the plaintiff, and whether the plaintiff was apprehensive of personal violence if he did not retire. The jury found for the plaintiff on this count. Damages, one farthing. [Only so much of the case is given as relates to the question of assault.]

Byles, Serjt., on a former day in this term, moved for a rule nisi for a new trial, on the ground of misdirection, and that the verdict was not warranted by the evidence. That which was proved as to the first count clearly did not amount to an assault. [JERVIS, C. J. It was as much an assault as a sheriff's officer being in a room with a man against whom he has a writ, and saying to him, "You are my prisoner," is an arrest.] To constitute an assault, there must be something more than a threat of violence. An assault is thus defined in Buller's Nisi Prius, p. 15: "An assault is an attempt or offer, by force or violence, to do a corporal hurt to another, as by pointing a pitchfork at him, when standing within reach; presenting a gun at him, within shooting distance; drawing a sword, and waving it in a menacing manner, &c. The Queen v. Ingram, 1 Salk. 384. But no words can amount to an assault, though perhaps they may in some cases serve to explain a doubtful action: 1 Hawk.P.C. 133; as if a man were to lay his hand upon his sword, and say, 'If it were not assize-time, he would not take such language,'—the words would prevent the action from being construed to be an assault, because they show he had no intent to do him any corporal hurt at that time: Tuberville v. Savage, 1 Mod. 3." So, in Selwyn's Nisi Prius, 11th ed., 26, it is said: "An assault is an attempt, with force or violence, to do a corporal injury to another, as by holding up a fist in a menacing

manner; striking at another with a cane or stick, though the party striking may miss his aim; drawing a sword or bayonet; throwing a bottle or glass with intent to wound or strike; presenting a gun at a person who is within the distance to which the gun will carry; pointing a pitchfork at a person who is within reach, Genner v. Sparks, 6 Mod. 173, 1 Salk. 79; or by any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, see Stephens v. Myers, 4 C. & P. 349, of using actual violence against the person of another." So, in 3 Bl.Comm. 120, an assault is said to be "an attempt or offer to beat another, without touching him; as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him but misses him: this is an assault, insultus, which Finch (L. 202) describes to be 'an unlawful setting upon one's person.'" [JERVIS, C. J. If a man comes into a room, and lays his cane on the table, and says to another, "If you don't go out I will knock you on the head," would not that be an assault?] Clearly not: it is a mere threat, unaccompanied by any gesture or action towards carrying it into effect. The direction of the learned judge as to this point was erroneous. He should have told the jury that to constitute an assault there must be an attempt, coupled with a present ability, to do personal violence to the party; instead of leaving it to them, as he did, to say what the plaintiff thought, and not what they (the jury) thought was the defendant's intention. There must be some act done denoting a present ability and an intention to assault.

A rule nisi having been granted.

JERVIS, C. J. I am of opinion that this rule cannot be made absolute to its full extent; but that, so far as regards the first count of the declaration, it must be discharged. If anything short of actual striking will in law constitute an assault, the facts here clearly showed that the defendant was guilty of an assault. There was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution.

MAULE, J., CRESSWELL, J., and TALFOURD, J., concurring.

Rule discharged as to the first count.

DURIVAGE v. TUFTS, 1947, 94 N.H. 265, 51 A.2d 847. Action for an assault. Defendant said to plaintiff: "If I had my gun, I would shoot you." *Held*, non-suit affirmed. "Apparent present ability to execute a threat of physical harm is necessary to constitute an assault."

BEACH v. HANCOCK.

Superior Court of Judicature of New Hampshire, 1853.
27 N.H. 223, 59 Am.Dec. 373.

TRESPASS, for an assault.

Upon the general issue it appeared that, the plaintiff and defendant being engaged in an angry altercation, the defendant stepped into his office, which was at hand, and brought out a gun, which he aimed at the plaintiff in an excited and threatening manner, the plaintiff being