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Aggravated Assaults

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Robbery, like other crimes, is composed of two elements, a physical element and a mental element. An essential factor of the mental element is an intention to steal.⁵ No physical acts done without this intention can constitute robbery or an attempt to rob.⁶ A homicide resulting from acts done without this intention therefore does not occur in the perpetration of or in an attempt to perpetrate robbery.

The defendant was fighting for his life; he had presented a reasonable contention; he was entitled to a more adequate answer than the laconic statement "it is immaterial."

W. H. HITCHLER.

AGGRAVATED ASSAULTS

In cases of assaults with intent to kill, or with some similar specific intent, difficult questions arise when the victim is not the person whom the assailant really desired to injure. This situation is presented in cases of mistaken identity and in cases of accident.

In cases of mistaken identity as, for example, where A, desiring to kill B, assaults C, believing him to be B, A is guilty of an assault with intent to kill C.¹ In such cases, there is no need to invoke the doctrine of transferred intent as is done in some of the decisions.² Since the assailant believes the victim to be the one whom he desires to kill, he desires to kill the victim. Thus, where the defendant lay in wait for the driver of a milk wagon, believing the driver to be the one whom he desired to kill when he was actually another, the defendant was convicted of assault with intent to kill the victim. The court said, "It was not a mistake as to the intent; it was merely a mistake as to the identity of him as to whom the intent was harbored. He intended . . . to strike the identical person whom he did strike believing him to be some other person."³ In a similar case of mistaken identity, it was said, "The purpose of the assailant was to accomplish the end immediately in view, and the actual victim was no less the intended direct physical object of the attack because at the time he may have been taken for some one else."⁴

In cases of accident, as, for example, where A shoots at B and accidentally hits C, the statute governing, and the indictment alleging the intent must be con-

⁵C. v. White, 133 Pa. 182; Rex v. Hall, 3 Car. & P. 409.

⁶Hanson v. S., 43 Ohio St. 375, 1 N. E. 136.

¹State v. Wansong, 271 Mo. 50; 195 S. W. 999.

²Reg. v. Smith, 33 E. L. & Eq. 567; contra, Rex v. Holt, 7 C. & P. 609.

³State v. Wansong, 271 Mo. 50; 195 S. W. 999.

⁴State v. Costa, 95 Conn. 140; 110 A. 875.

sidered. A is clearly guilty if the statute requires and the indictment alleges an "intent to kill," merely, and not an intent to kill the person injured.⁵ Under these circumstances, the intent to kill is proved by showing an intent to kill B.

However, if the statute requires and the indictment alleges an intent to kill the particular person injured, it would seem that an intent to kill C must be proved. Accordingly, it has been held that under the provisions of such a statute, there are two essential elements necessary to constitute the offense; first, that the defendant shot at C, and second, that he did so with intent to kill him, and before a conviction can be had upon this charge, it is incumbent upon the state to establish by proof both elements of the offense.⁶ Nevertheless, this doctrine does not uniformly prevail, for at least one jurisdiction has construed such a statute broadly, saying that the defendant is guilty "where a shot discharged at one injures another who is, at the time, known to be in such position or proximity that his injury may be reasonably apprehended as a probable consequence of his act; in which case, the law does not permit such reckless disregard of and indifference to results to pass with impunity, but will hold the intent to have embraced the victim."⁷

Where the indictment alleges but the statute does not require, an intent to kill the particular person injured, A is guilty. In these cases, the jury is permitted to find the intent to kill C as charged in the indictment upon proof of an intent to kill B.⁸ The basis for these decisions is that if C were to die from his injuries, A would be guilty of murdering C and that, therefore, A must be held to have had the intent to commit the greater crime that would have been the result had C died.⁹ As expressed by one court, "It would be a strange perversion of reasoning, for instance, to hold in the present case that, if Edwards had been killed, the defendant would have been guilty of murder or of murder in the first degree as determined by his intent to kill Major Gaynor but that such intent is not to determine his guilt of an assault with such intent."¹⁰ This view, however, is not adopted in all jurisdictions. A few states hold that proof of an intent to kill B will not permit the jury to find the defendant guilty of an assault with intent to kill C.¹¹ In these states, it is said that the intent to kill the person injured must be proved to the full satisfaction of the jury because the intent is the essence of the crime charged.¹² This latter doctrine is the law of Illinois, but the rule there is relaxed by a corollary doctrine that "where a person deliberately shoots at one

⁵State v. Thomas, 127 La. 576; 53 So. 868.

⁶State v. Mulhall, 199 Mo. 202; 97 S. W. 583; Morgan v. State, 13 S. & M. 242 (Miss.).

⁷Callahan v. State, 21 Ohio 306.

⁸Walker v. State, 8 Ind. 290; Dunaway v. People, 110 Ill. 333; State v. Gallagher, 85 A. 207 (N.J.); Smith v. State, 95 S. W. 1057 (Texas).

⁹Ibid.

¹⁰State v. Gallagher, 85 A. 207 (N.J.).

¹¹Scott v. State, 49 Ark. 156, 4 S. W. 758; Jones v. State, 251 S. W. 690 (Ark.); People v. Robinson, 6 Utah 101, 21 Pac. 403; People v. Bollman, 163 N. E. 437 (Ill.).

¹²Jones v. State, 251 S. W. 690 (Ark.); People v. Bollman, 163 N. E. 437 (Ill.).

person and in the direction of another who is wounded by the shot, an intention to kill the latter is established, although no actual malice or ill feeling toward him is shown, and a conviction may be had of an assault upon the injured person with intent to kill and murder him; as the malice requisite to murder is presumed, where the proof is that the act was committed deliberately and was likely to be attended by serious consequences."¹³

Most of the cases on this subject do not treat the question expressly as a matter of pleading, but where the question has been so treated, the court has held that the intent to kill the person injured must be proved as alleged in the indictment.¹⁴

The prevailing view, then, is that in cases of assault requiring a specific intent it is no defense that the victim is not the person whom the assailant desired in fact to injure. The only exceptions are in cases of accident where the statute of the jurisdiction expressly requires an intent to kill the very person assaulted, and, in a few states, where the statute does not require, but the indictment alleges such intent.

HENRY S. MACHMER.

THE LEGAL RIGHTS OF A PERFORMING ARTIST 1a

A French writer has declared recently that "when the dramatic author writes a play, when the composer finishes the score of an opera or a symphony, when the cinema writer completes a scenario, and when the words or notes have been placed upon paper, actually printed, and the work corrected and issued, the aim of the author has not yet been fulfilled if the play, the opera, the symphony or the scenario is not performed." . . . "It is the actor, the singer, the dancer, the performer, who, as veritable animators of the author's thoughts, create through their sensibility and their intelligence the expressive power without which the public would not be moved."¹

What are the legal rights of these "performing artists," the artists, actors, or performers who interpret the poet's thoughts, bring to life the dramatist's conceptions, animate for us the scenarist's vision, or express the sentiments noted on the score of the composer? Has a "performing artist" a legal right, under any

¹³People v. Cohen, 137 N. E. 511 (Ill.)

¹⁴State v. Shanley, 104 N. W. 522 (S.D.)

^{1a}For a complete discussion of this topic see Nathan Bass, *Interpretative Rights of Performing Artists*, page 57 of this issue.

^{1R.}R. Homberg, *Le Droit d'Interpretation des Acteurs et des Artistes excutantants*. Translated by Maurice J. Speiser.