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plication remains to be seen from future litigation,[58] but the present decision would seem to be conducive to greater freedom of expression in this area. In the meantime, North Carolina—a state which has apparently never had an obscenity case reach its highest court—stands in the unique position of having an obscenity statute which, properly applied,[59] ranks with the most modern and liberal in the nation and represents an acme toward which the law appears to be presently moving.

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Criminal Law—Assault on a Female—"Show of Violence" Rule in North Carolina

In *State v. Allen*,[1] the evidence tended to show that the defendant followed prosecutrix in his automobile on several occasions as she walked to a place on a public street where she customarily awaited her ride to work, that the defendant stopped within a few feet of prosecutrix but made no attempt to approach her or to communicate with her in any way, that defendant gazed constantly at her, making motions with the lower part of his body, and that because of fear of him, prosecutrix quit walking the usual way to the place for her ride. These acts, on the occasion before his arrest, caused prosecutrix to run to the steps of a public school. This evidence was held sufficient to go to the jury in a prosecution for assault on a female.[2]

The principal case is the latest of several recent borderline cases of assault on a female which have been brought before the North Carolina Supreme Court, and it serves well to illustrate the difficult problem confronting the court in determining whether or not the particular acts of a defendant are sufficient in law to constitute the criminal offense.[3]

[58] In three per curiam decisions since the preparation of this Note, the Court has struck down prohibitions on the mailing of magazines which lower courts had held to be obscene, as well as a similar ban on the showing of a motion picture. In all of these cases the Court relied upon its decision in the *Roth* case.

See One, Inc. v. Olesen, 26 U.S.L. WEEK 3204 (U.S. Jan. 14, 1958) *reversing* 241 F.2d 772 (9th Cir. 1957) (over-turning the lower court's affirmance of a post-office ban on "One," a magazine concerned with homosexuality, on grounds that it was obscene); Sunshine Book Co. v. Summerfield, 26 U.S.L. WEEK 3204 (U.S. Jan. 14, 1958), *reversing* 128 F. Supp. 564 (D.C. Cir. 1955) (nudist magazines, Sunshine and Health and Sun Magazine, not excludable from the mails as obscene); Times Film Corp. v. Chicago, 355 U.S. 35 (1957), *reversing* 244 F.2d 432 (7th Cir. 1957) (reversing Chicago censorship of the French motion picture "Game of Love" on obscenity grounds). The Court's only explanation of these one-sentence decisions was in its citation of the *Roth* case. Their inference, however, would seem to be that the Court has imposed tight limits on permissible censorship for obscenity. See also, Lewis, *Censorship Limited in 'Obscenity' Cases*, The New York Times, January 19, 1958, § E, p. 9, col. 6-8.

[59] See note 16 *supra*.

[1] 245 N.C. 185, 95 S.E.2d 526 (1956).

[2] N.C. GEN. STAT. § 14-33 (1953).

[3] Technically, assault on a female is not a specific type of assault, as the degrees of assault specified by statute relate to the extent of punishment and do not create

The facts in this case present a very close question, and in many jurisdictions it is doubtful that the conviction would have been sustained;[4] particularly where the offense is prosecuted under definitive criminal statutes, most of which define the crime as an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another.[5] In North Carolina, there is no statutory definition of assault, and the crime remains one governed by the rules of the common law.

The common law offense of assault is generally defined as an intentional offer or attempt,[6] by force or violence,[7] to do physical injury to the person of another.[8] Under this rule, a present intent to inflict bodily harm is essential;[9] but it may be inferred from the acts, and if the act itself is essentially wrongful or unlawful, intent will be presumed.[10] There must be an overt act,[11] amounting to an attempt,[12] and mere words, however insulting or abusive, will not constitute an assault, because however violent they may be, they cannot take the place of that force required to complete the offense.[13] Violence, threatened or offered, is an essential element, and mere preparation to do violence will not suffice.[14] A split of authority exists on the question of whether there need be actual present ability to inflict the injury, and North Carolina

separate offenses. State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932). Further, an assault on a female by a boy or man over 18 years of age is a general misdemeanor, punishable in the discretion of the court. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954); State v. Church, 231 N.C. 39, 55 S.E.2d 792 (1949); State v. Jackson, 226 N.C. 66, 36 S.E.2d 706 (1946).

[4] *Compare* State v. Allen, 245 N.C. 185, 95 S.E.2d 526 (1956) *with* Loid v. State, 55 Tex. Crim. 403, 116 S.W. 807 (1909).

[5] *E.g.*, "Any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault . . . . By the term 'coupled with an ability to commit,' . . . is meant: 1. That the person making the assault must be in such a position that, if not prevented, he may inflict a battery upon the person assailed. 2. That he must be within such distance of the person so assailed as to make it within his power to commit the battery by the use of the means with which he attempts it." TEX. PEN. CODE arts. 1138, 1141 (1948). See also Brimhall v. State, 31 Ariz. 522, 255 Pac. 165 (1927); *Ex parte* McLeod, 23 Idaho 257, 128 Pac. 1106 (1913); People v. Lee Kong, 95 Cal. 666, 30 Pac. 800 (1892).

[6] For a distinction between "offer" and "attempt" see State v. Myerfield, 61 N.C. 108 (1867).

[7] The terms "violence" and "force" are synonymous when used in relation to assault. People v. James, 9 Cal. App. 2d 162, 48 P.2d 1011 (1935).

[8] State v. Sutton, 228 N.C. 534, 46 S.E.2d 310 (1948); State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930); State v. Reavis, 113 N.C. 677, 18 S.E. 388 (1893); State v. Davis, 23 N.C. 125 (1840).

[9] State v. Hemphill, 162 N.C. 632, 78 S.E. 167 (1913); State v. McAfee, 107 N.C. 812, 12 S.E. 435 (1890); State v. Myerfield, 61 N.C. 108 (1867); State v. Crow, 23 N.C. 375 (1841).

[10] State v. Hemphill, *supra* note 9.

[11] State v. Ingram, 237 N.C. 197, 74 S.E.2d 532 (1953); State v. Morgan, 25 N.C. 186 (1842).

[12] State v. Davis, 23 N.C. 125 (1840).

[13] State v. Daniel, 136 N.C. 571, 48 S. E. 544 (1904); State v. Morgan, 25 N.C. 186 (1843); State v. Davis, *supra* note 12.

[14] State v. Davis, *supra* note 12.

requires only that there be an apparent present ability, reasoning that it is the imminent danger threatened which is decisive rather than the actual ability to inflict the injury.[15]

If the principal case had been governed strictly by the above rules, it is likely that the defendant's motion for nonsuit would have been allowed.[16] Through the application of a somewhat broadened rule which has developed in North Carolina, as well as in a number of other jurisdictions,[17] the acts of the defendant take on a different hue and present a question for the jury. The rule, as stated by the court in the *Allen* case, is as follows: "A show of violence, causing the 'reasonable apprehension of immediate bodily harm' . . . whereby another is put in fear, and thereby forced to leave a place where he has a right to be, is sufficient to make out a case of assault."[18]

The rule, of course, is not original with the *Allen* case. It evolved from dicta in earlier cases where the *threatened use of weapons* caused the person assailed to retreat, to change his course, or to leave a place sooner than he had intended.[19] Perhaps the first clear statement of the principle was made in *State v. Shipman*,[20] where the rule was adopted as a part of the law in North Carolina with respect to criminal assault; since that time, it has governed in numerous adjudications on the subject by the court.

Thus, in North Carolina, there are two rules, either or both of which may be applied in prosecuting a defendant for an alleged assault: (1) the general common law rule, and (2) the "show of violence" rule. Under the former, the emphasis is upon the state of mind of the person accused.[21] Under the latter, the emphasis shifts to a consideration of the apprehension of the person assailed, limited by the requirement that the

[15] If a reasonable man would be led to believe that he would immediately receive injury unless some force intervened, the assailant is *within striking distance*, even though not near enough to reach the person assailed. State v. Martin, 85 N.C. 508 (1881). And see State v. McIver, 231 N.C. 313, 56 S.E.2d 604 (1949).

[16] It seems reasonable that the defendant's acts could amount to no more than a preparation to do violence, as distinguished from violence begun to be executed. Can it be said as a matter of law that these acts amount to an offer to do immediate physical injury? Or an attempt? See State v. Milsaps, 82 N.C. 549 (1880) (using insulting language, and picking up a stone about 12 feet from complainant, but not offering to throw it, held not to constitute an assault, but only a menace of violence).

[17] See, *e.g.*, Cittadino v. State, 199 Miss. 235, 24 So. 2d 93 (1946); State v. Hazen, 160 Kan. 733, 165 P.2d 234 (1946); State v. Lynn, 184 S.W.2d 760 (Mo. App. 1945); State v. Rush, 14 Wash. 2d 138, 127 P.2d 411 (1942).

[18] State v. Allen, 245 N.C. 185, 189, 95 S.E.2d 526, 529 (1956).

[19] State v. Rawles, 65 N.C. 334 (1871) (manure fork, hoe and gun); State v. Church, 63 N.C. 15 (1868) (pistol, uncocked).

[20] 81 N.C. 513 (1879).

[21] The element of fear or apprehension on the part of the person against whom the attempt is made cannot be controlling, or in any way influence the determination of the criminal liability of the aggressor, for the reason that "one may obviously be assaulted although in complete ignorance of the fact, and therefore entirely free from alarm." State v. Godfrey, 17 Or. 300, 302, 20 Pac. 625, 628 (1889). See also People v. Lilley, 43 Mich. 525, 5 N.W. 982 (1880).

apprehension be reasonable. The state of mind of the accused is no longer the determining factor in those cases where the "show of violence" rule is applied.[22]

Under the "show of violence" rule, it appears that there are three basic elements: (1) a show of violence; (2) reasonable apprehension of immediate bodily harm or injury; and (3) such apprehension and fear causing the person assailed to leave a place where he had a right to be, or to restrain from some act or conduct which he had a right to exercise. The apprehension of the assailed, and a showing that such fear and apprehension caused the assailed to forego some legal right, become necessary parts of the evidence to be considered in determining the guilt or innocence of the accused.[23] With the possible exception of the third element, it is evident that this rule is, in effect, the identical rule used in cases where the plaintiff seeks compensation for damages he has suffered as a result of a civil assault.[24] The traditional distinction between civil assault and criminal assault vanishes where the rule is applied in criminal prosecutions.[25]

Although the "show of violence" rule has been applied in various types of assault cases, it has had its most frequent application in cases of assault on a female. There has been a definite trend in North Carolina to extend criminal liability in this area. The question as to what acts of a defendant are sufficient to constitute a show of violence is difficult, if not impossible, to answer. An examination of the leading cases presents the only reasonable approach.

In *State v. Williams*,[26] words amounting to an indecent proposal were held to be a sufficient display of force when taken in light of the fact that they were made by a negro man on several occasions to a fifteen year old white girl, causing her to become so frightened that she fled in a direction that she had not intended to go.

In *State v. Sutton*,[27] the accused, in a drunken condition, entered the office where the prosecutrix worked, asked her a proper question, and followed her into the hall, staring at her constantly. She became frightened, screamed, and ran up the steps as the defendant ran up the steps behind her. This was held to be a sufficient show of violence

[22] "Whether there has been an assault in a particular case depends more on the apprehension created in the mind of the person assaulted than upon the undisclosed intention of the person committing the assault." State v. Rush, 14 Wash. 2d 138, 139, 127 P.2d 411, 412 (1942) citing Peasley v. Puget Sound Tug & Barge Co., 13 Wash. 2d 485, 125 P.2d 681 (1942).

[23] State v. Stansberry, 197 N.C. 350, 148 S.E. 546 (1929) (by implication).

[24] See RESTATEMENT, TORTS § 21 (1934).

[25] For a comparison of civil assault with criminal assault, emphasizing the importance of apparent ability and apprehension in civil actions, see Note, 30 TEX. L. REV. 120 (1951).

[26] 186 N.C. 627, 120 S.E. 224 (1923).

[27] 228 N.C. 534, 46 S.E.2d 310 (1948).

to sustain a conviction, although these facts amount to an assault under either rule.

In *State v. McIver*,[28] upon facts strikingly similar to those in the *Williams* case, the court held that if the character of the threat were such as to cause another to go where she would not otherwise have gone, or to leave a place where she had a right to be, that this was sufficient to make out an assault. The conclusion to be drawn from the *Williams* and *McIver* cases is that words amounting to an indecent proposal, where made on repeated occasions,[29] may, of themselves, constitute a sufficient show of violence if they cause reasonable fear in the prosecutrix whereby she leaves a place where she had a right to be.[30]

In *State v. Ingram*,[31] the famous "leering" case, the defendant drove his automobile slowly along a public road and "leered" at the prosecutrix some distance away. She became frightened and began to run upon hearing the motor of the automobile stop, although she could not see the defendant because of a small wooded area between the prosecutrix and the place where the automobile was stopped. Upon clearing the woods, the prosecutrix resumed walking, and when she saw the defendant approaching, some sixty-five or seventy feet away, she continued walking to her destination. The conviction of the lower court was reversed, the court saying: "It cannot be said that a pedestrian may be assaulted by a look, however frightening, from a person riding in an automobile some distance away."[32] Although both rules are mentioned, it is not clear whether the case turned on the finding of the court (a) that there was no overt act, or (b) that the fear occasioned by the prosecutrix was not reasonable under the circumstances. In either event, the case cast some doubt upon the future applicability of the "show of violence" rule in North Carolina.

The holding in the principal case clarifies any misunderstanding in this latter respect, and definitely establishes the fact that both rules are in full force today in this jurisdiction.

Failure to observe the distinction between civil and criminal liability has resulted in conflict, as well as confusion, among the authorities. It has unquestionably tended to enlarge the scope of the criminal law as it pertains to assault. Perhaps there is some merit in the criticism advanced by some writers that through the use of the civil rule as a standard in criminal prosecutions, a danger has arisen that unsuspecting

[28] 231 N.C. 313, 56 S.E.2d 604 (1949).
[29] Words amounting to an indecent proposal where made only on one occasion did not constitute a show of violence. State v. Silver, 227 N.C. 352, 42 S.E.2d 208 (1947).
[30] Annot., 12 A.L.R.2d 967, 974 (1950).
[31] 237 N.C. 197, 74 S.E.2d 532 (1953).
[32] *Id.* at 202, 74 S.E.2d at 536.

males may find themselves prosecuted for crimes heretofore unknown.[33] On the other hand, there is strong argument in favor of its use. The individual right of citizens to be free from fear and apprehension of injury by such offensive and threatening conduct as displayed in the principal case deserves the protection of the state. Through the use of such a rule, a gap in the criminal law has effectively been closed. A definitive statute might bring more certainty to a field of the law where certainty is of the utmost importance.

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Domestic Relations—Procedure—Abatement of Actions by Pendency of Prior Actions

The question as to whether a pending action in the alimony-divorce area will abate a subsequent independent action in the same area with the parties reversed has again been passed on by the North Carolina Supreme Court in the case of *Beeson v. Beeson*.[1]

The court initially held in *Cook v. Cook*[2] that where the husband commenced proceedings for absolute divorce and the wife thereafter sued for divorce from bed and board in separate proceedings and during pendency of the husband's prior suit, the former action did not abate the latter. This decision seems to indicate that although a divorce action, either absolute or from bed and board, may be brought as a counterclaim, such is not mandatory. Later, however, the court in *Cameron v. Cameron*[3] held that whether the first action abated the second depended upon certain well established tests.

The facts in the *Cameron* case were substantially as follows: The wife sued for divorce from bed and board alleging abandonment. While this suit was pending, the husband instituted an independent action in a different county for absolute divorce on the grounds of two years separation.[4] The wife pleaded the pendency of her action in abatement of the husband's subsequent suit. Her plea was sustained by the Supreme Court. After stating the general rule to be that a subsequent action is not abatable on the ground that the plaintiff therein might obtain the same relief by a counterclaim or cross demand in a prior suit pending against him, the court pointed out that this general rule is not applicable where the cause of action asserted by the plaintiff in the second action is essentially a part of the first action and will necessarily be

[33] *A Survey of the Decisions of the North Carolina Supreme Court for the Spring and Fall terms of 1953*, 32 N.C.L. REV. 379, 425 (1954). *Cf.* Notes, 13 U. DET. L.J. 227 (1950), 11 ROCKY MT. L. REV. 104 (1939).

[1] 246 N.C. 330, 98 S.E.2d 17 (1957).
[2] 159 N.C. 47, 74 S.E.2d 639 (1912).
[3] 235 N.C. 82, 68 S.E.2d 796 (1952).
[4] N.C. GEN. STAT. § 50-6 (1950).