THE LAW OF INDICTABLE NON-SEXUAL ASSAULTS

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I. Introduction

Statutory offences of assault proliferate. They range from common assault to assault with intent to murder, and many of them overlap. It is convenient to distinguish between common assault and aggravated assault. The former is assault *simpliciter,* the latter common assault with some circumstance of aggravation added which the law regards as making the commission of the offence more serious. If the rules of punishment exactly corresponded to the scheme of the law, an aggravated assault would always be punishable more severely than a common assault; but although this is usually the case, it is not always so.[1]

Circumstances of aggravation are of many different kinds and follow no consistent scheme. They may be broadly divided into intentions to cause particular types of harm by means of the assault, such as assault with intent to commit murder, or to commit a felony, or to obstruct an official in the execution of his duty; assaults on particular classes of people, such as women, policemen, or clergymen on the way to perform a lawful burial of the dead; and assaults which actually cause a particular type of harm, such as obstruction or grievous bodily harm to the person. This tripartite classification of aggravated assaults into assaults with particular intentions, assaults on particular persons, and assaults with particular results, is, however, only a very general one. The definitions of many offences are made up of an amalgam of common assault with more than one of these additional distinguishing characteristics of aggravation. Also there is a large class of miscellaneous offences which are of the same type, or lead to the same consequences, as some of the aggravated assaults but technically do not include an assault. Examples are resisting or obstructing a policeman without actually assaulting him, abandoning or exposing children, and failing to supply necessaries to one's family or to others for whom one is responsible.

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[1] Compare the following sections: Crimes Act 1900, ss. 56, 58, 61 (N.S.W.); Crimes Act 1958, ss. 37, 48, 40 (Vic.); Tasmanian Code, ss. 183, 184, 389 (3). In the other states common assault is punishable on indictment with not more than one year's imprisonment, which is less than the maximum for aggravated assaults: Criminal Law Consolidation Act 1935-1957 ss. 39 ff (S.A.); Queensland Code, ss. 335 ff; Western Australian Code, ss. 313 ff.

It should be remembered that although there is an offence of common assault,[2] there is usually no offence of aggravated assault as such.[3] The importance of the term 'aggravated' is that it is sometimes used in statutes to authorize the imposition of a greater punishment on summary conviction of common assault than would otherwise be the case. The presence of a circumstance of aggravation enlarges magistrates' powers of sentencing without affecting the actual conviction.[4] An important consequence of the structure of the law of assault, whereby aggravated assaults are simply common assaults with something added, is that a verdict of common assault can always be returned on an indictment for an aggravated assault if the jury do not find the circumstance of aggravation to be proved.[5] The position is analogous to the returning of a manslaughter verdict on an indictment for murder, for in the same way murder may be regarded as manslaughter with something added.

II. Definition of Assault

In framing the definition of assault in the Queensland Code, section 245, Sir Samuel Griffith attempted to reproduce the common law.[6] The definition is as follows.

> A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault.
>
> The term "applies force" includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.

With this may be contrasted section 182 of the Tasmanian Code.

> (1) An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening by any gesture to apply such force to the person of another if the person

[2] Crimes Act 1900, s. 61 (N.S.W.); Crimes Act 1958, s. 37 (Vic.); Criminal Law Consolidation Act 1935-1957, s. 39 (S.A.); Queensland Code, s. 335; Western Australian Code, s. 313; Tasmanian Code, s. 184. Common assault is also universally made a summary offence, but a court of summary jurisdiction has a much more limited power of punishment than a superior court.

[3] The Tasmanian Code is an exception: s. 183.

[4] Criminal Law Consolidation Act 1935-1957, s. 47 (S.A.), Queensland Code, s. 344; Western Australian Code, s. 322. *Cronin v. Hamilton-Smith* [1958] Qd.R. 24.

[5] *McKenzie v. Dabonde* [1952] V.L.R. 177.

[6] Letter of 29th October, 1897, to the Attorney-General of Queensland, reprinted in Wilson & Graham, *Criminal Code of Queensland* (1901), XIV. The Western Australian Code, s. 222, is identical with the Queensland section in the text.

making the attempt or threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; or the act of depriving another of his liberty.

(2) Words alone cannot constitute an assault.

(3) An act which is reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse, and which is not disproportionate to the occasion, does not constitute an assault.

(4) Except in cases in which it is specially provided that consent cannot be given, or shall not be a defence, an assault is not unlawful if committed with the consent of the person assaulted unless the act is otherwise unlawful, and the injury is of such a nature, or is done under such circumstances, as to be injurious to the public, as well as to the person assaulted, and to involve a breach of the peace.

It is not easy to find a statement of the common law of assault which is both authoritative and precise, but there appears to be little substantial difference between the foregoing statutory definitions and the common law.[7] One difference is terminological only. At common law a distinction is drawn between assault and battery. Battery is the actual application of force to the person of another, assault the mere threat or attempt to do so, whence it is said that although every battery includes an assault, the converse is not true. The codes discard the term 'battery' and use assault in its popular sense to include the actual application of force as well as the threat or attempt to do so.

The terminology adopted in the codes will be used in this article, but it should be noted that even at common law the customary distinction between assault and battery has no practical consequences. In *The Queen v. Kingston*[8] D was charged with the statutory offence of assault occasioning actual bodily harm. He had accidentally shot V in the head when, for a joke, aiming at his hat, which had a high crown. Counsel took the ingenious point that the actual bodily harm was caused, not by the assault, but either by the battery or at least by the assault and battery combined, and that D was therefore not within the statute. This argument derived some support from the fact that D had shot from behind, so that V had known nothing until he was hit. The Full Court of South Australia, however, dismissed V's appeal from conviction, in effect declining to countenance any contention based on the distinction between assault and battery if it meant defeating the plain object of the statute.

A second difference from the common law is that whereas under the codes it seems to be possible for D to assault V without V's knowing anything about it, this does not appear to be possible at common law except where actual physical force is applied to V's person. Under

[7] Hawkins, *P.C.* (8th ed. 1824) i, 110, 483-484; Chitty, *Criminal Law* (2nd ed. 1824) iii, 820b ff; Stephen, *Digest of the Criminal Law* (5th ed. 1894) art. 262.

[8] (1884) 18 S.A.L.R. 76.

the Queensland and Western Australian Codes this result follows from the words, 'a person who . . . attempts or threatens to apply force . . . under such circumstances that the person making the attempt or threat has actually . . . a present ability to effect his purpose' commits an assault. A similar analysis can be made of section 182 (1) of the Tasmanian Code. Dr Turner, by contrast, after a survey of the English authorities, defines an assault at common law as being 'when any person intentionally, or recklessly, by active conduct threatens to apply unlawful physical force to the person of another in such a manner as to create in the mind of that other a belief that such force is about to be so applied',[9] which appears to limit assault to the usual case where D is threatening V and V knows it.

It has to be remembered that Dr Turner's formulation covers only an assault in the strict common law sense, *i.e.*, the situation where there has been no battery. It is undoubtedly true as much at common law as under the codes that D can assault V to the extent of battery without V's knowing anything about it, as for example where V is unconscious and D kicks him. The point upon which the jurisdictions seem to diverge is the case where D has an actual ability to apply force to V but no apprehension of this fact arises in V's mind because V knows nothing of D's actions.[10] For example, D may point a loaded gun at V from a place of concealment, intending to shoot V and being able to do so, but desist at the last moment because a third person comes on the scene. Although this is clearly an assault by D under the codes, it is apparently not an assault at common law.[11]

A third difference is that although there is no doubt that at common law the application of force, provided that there is adequate evidence of causation, can be indirect as well as direct, the definition in the Queensland and Western Australian Codes to include heat, light, electricity, gas, odour and other unspecified substances, appears to go beyond what has actually been decided at common law, although probably not beyond the spirit of the law.

It will be observed that the three codes accept the view that an assault cannot be constituted by words alone, Tasmania expressly in subsection (2) and Queensland and Western Australia by using wording appropriate only to physical gestures or substances. Although the contrary has been strongly urged by Dr Glanville Williams,[12] and, as the learned author demonstrates, authority is both slight and inconclusive, the generally accepted opinion is that at common law

[9] Radzinowicz and Turner (eds.), *The Modern Approach to Criminal Law* (1945), 344, 345.

[10] Assaults which depend to some extent on V's state of mind are discussed below.

[11] Stephen, relying on Hawkins, is ambiguous on this point. He gives the example of D striking at V with a stick and missing, but does not say whether V knew anything about it. Stephen, *op. cit.* 203, illustration (6).

[12] 'Assault and Words', [1957] *Criminal Law Review* 219.

also words alone cannot amount to an assault. This rule does not seem to be a particularly commendable one, for there are many situations in which a physical gesture would add nothing to a threat conveyed by word of mouth. Williams cites as examples[13] a threat coming from an obviously armed man, or from behind the victim, where the threatener cannot be seen. If Williams's view were accepted in Australia a divergence would be introduced between the common law and the codes. The most one can say at present is that the common law of Australia on the point is uncertain.[14]

The Tasmanian Code differs from the other two codes by including in the definition of assault in section 182 (1) 'the act of depriving another of his liberty'. There appears to be a similar rule at common law, although the common law offence is regarded not as an assault but as the separate misdemeanour of false imprisonment.[15]

III. Mental Element

Two questions arise as to the mental element in an assault: what is the mental element in common assault and what degree of knowledge by D, if any, is required of the circumstance of aggravation in an aggravated assault?

It is clear that an assault can be committed intentionally, for if it could not there would be no offence of assault at all. It is equally clear that normally an assault cannot be committed negligently, although this rule follows less from the nature of things than from the traditional limitations on the law of criminal assault.[16] There remains the possibility of reckless assault, the situation where D indulges in conduct which he knows may harm someone, or may give someone reasonable grounds for supposing that he intends to inflict harm upon him, and which in fact has one of these results even though D does not actually intend it. Examples would be if a bricklayer deliberately dropped a brick from a building into a crowded street, or if a motorist deliberately applied his brakes only at the last possible moment when approaching a crossing on which there was a pedestrian.

[13] *Ibid.* 224.

[14] Such authority as there is, is consistent with the codes: *The Queen v. Cleary* (1870) 9 S.C.R. (N.S.W.) (L) 75, 80.

[15] *The Queen v. Macquarie* (1875) 13 S.C.R. (N.S.W.) (L) 264; *Rex v. Linsberg* (1905) 69 J.P. 107. Stephen appears to be in error in including false imprisonment within his definition of assault: Stephen, *op. cit.* art. 262 (c). Cf. Chitty, *op. cit.* 835 ff.

[16] Exceptions are unlawful wounding in common law jurisdictions, which can be committed by criminal negligence: *The King v. Newman* [1948] V.L.R. 61; and statutory offences of negligently causing harm, e.g. Crimes Act 1900, s. 54 (N.S.W.); Crimes Act 1958, s. 26 (Vic.); Criminal Law Consolidation Act 1935-1957, ss. 37, 38 (S.A.); Queensland Code, s. 328; Western Australian Code, s. 306; Tasmanian Code, s. 172 (negligence not mentioned but apparently covered). *The King v. Nicholson* [1916] V.L.R. 130. The general rule appears clearly from the code sections and common law sources cited above.

Since the decision of the High Court in *Vallance v. The Queen*[17] in 1961 there is little room for doubt that reckless assault is within the meaning both of the codes and of the Australian common law. D, a youth of seventeen, was charged under section 172 of the Tasmanian Code with unlawfully wounding V, a young girl. He had fired an airgun in her direction and a slug had hit her. D maintained that he had not intended to hit V but only to frighten her. By section 13 (1) of the Tasmanian Code there is a general rule that 'no person shall be criminally responsible for an act unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.' In consequence of section 13 (1) the trial judge directed the jury that to be guilty of the offence charged D must not only have intended to fire the gun but also have intended to wound V; and that to have intended to wound V he must have both foreseen and desired this likely result of firing the gun.

The High Court unanimously held that this was a misdirection because it was too favourable to D. Notwithstanding the word 'intentional' in section 13 (1), D could be convicted if it were proved that he foresaw the likelihood of wounding V and ignored the risk. In other words, recklessness sufficed for the offence charged, which was in substance an assault aggravated by the actual infliction of a wound.[18] It may be objected that *Vallance v. The Queen* does not entirely carry the point that an assault can be committed recklessly, for the act of firing the gun in order to frighten V was intentional in the strictest sense, and this act alone was enough to constitute an assault; recklessness was applied to the infliction of a wound, which was a circumstance of aggravation only. The answer to this argument is that the decision in *Vallance v. The Queen* depended on reading section 13 (1) to include recklessness, and section 13 (1) applied to all the elements of the offence charged, not merely to the circumstance of aggravation.

The question also arose whether recklessness was excluded by the second limb of section 13 (1), which says that there shall be no criminal responsibility 'for an event which occurs by chance'. It was argued that an event occurred by chance unless it was both foreseen and desired by D. The High Court declined to accept the view that the test of chance was wholly subjective, depending entirely on the desires and foresight of D, and held that there should also be taken into account the question whether the event was of so unlikely a character that no ordinary person would have expected it to happen in the

[17] (1961) 35 A.L.J.R. 182; [1963] A.L.R. 461.

[18] 'A wound is something which breaks the inner and the outer skin': *The Queen v. Spartels* [1953] V.L.R. 194, 197; *Vallance v. The Queen* [1963] A.L.R. 461, 476. Grievous bodily harm in assaults bears the same meaning as in murder: *The Queen v. Weeding* [1959] V.R. 298.

particular circumstances. Only if the event was objectively unlikely in this sense as well as unforeseen by D could it be described as occurring by chance.

Although *Vallance v. The Queen* was strictly concerned only with the relevant sections of the Tasmanian Code, there can be little doubt that the High Court, if called upon to do so, would apply the same rule to assaults under the other codes and at common law. The rule may therefore be stated that an assault, whether common or aggravated, may be committed either intentionally or recklessly with respect to all the elements of its definition. At common law, however, the symmetry of this rule is disturbed not only by the special case of unlawful wounding[19] but also by another recent decision of the High Court which appears to establish that in one class of aggravated assaults D can be convicted on proof, in effect, of mere negligence in respect of the circumstance of aggravation.

The case is *The Queen v. Reynhoudt*,[20] in which D was charged with assaulting a policeman in the execution of his duty.[21] This offence is apt to raise difficult problems of interpretation because policemen engaged in criminal investigation frequently conceal their occupation by wearing plain clothes. It is therefore often not easy to prove that D knew that V was a policeman. This difficulty has led some courts to lay down the rule that if P proves an assault by D on V, and also proves that V was a policeman acting in the execution of his duty, the question whether D knew V was a policeman so acting is irrelevant, so that D may be convicted whether he knew D's status or not.[22] This rule is open to the objection that it introduces an element of strict responsibility into the definition of an indictable offence, which ought always to be avoided as productive of serious injustice.

[19] In *The King v. Newman* [1948] V.L.R. 61, Barry J. regarded unlawful wounding among non-fatal assaults as corresponding to manslaughter in homicide, and therefore capable of being committed by criminal negligence.

[20] (1962) 36 A.L.J.R. 26.

[21] Crimes Act 1958, s. 40 (Vic.); Crimes Act 1900, s. 58 (N.S.W.); Criminal Law Consolidation Act 1935-1957, s. 43 (b) (S.A.); Queensland Code, s. 340 (2); Western Australian Code, s. 318 (2); Tasmanian Code, s. 114 (1). Cases on this offence often turn not on virtually undisputed facts but on the scope of a policeman's powers. An unfortunate result is that D's liability to conviction often depends less on the realities of the situation, particularly the reasonableness of the conduct of the people concerned, than on a relatively unimportant technicality: *The Queen v. Smith* (1876) 14 S.C.R. (N.S.W.) (L) 419; *The Queen v. Huxley* (1882) 8 V.L.R. (L) 15; *The Queen v. Ryan* (1890) 11 L.R. (N.S.W.) 171 (an exception to the foregoing generalization); *McLiney v. Minster* [1911] V.L.R. 347; *Horne v. Coleman* (1929) 46 W.N. (N.S.W.) 30; *The King v. Elias* (1948) 65 W.N. (N.S.W.) 285. Cf. *Long v. Rawlins* (1874) 4 Q.S.C.R. 86, a rare instance of a prosecution for the analogous offence of assaulting a lawfully officiating clergyman. Assaulting a policeman cannot be charged merely as 'resisting lawful arrest': *McKeering v. McIlroy* [1915] St.R.Qd. 85.

[22] *Reg. v. Forbes* (1865) 10 Cox 362; *Rex v. Maxwell* (1909) 2 Cr. App. R. 26. Cf. *Rex v. Mark* [1961] *Criminal Law Review* 173. For a more detailed review of the law see Howard, 'Assaulting Policemen in the Execution of Their Duty', (1963) 79 *Law Quarterly Review* 247.

In Australia the rather different rule was first laid down by the Victorian Full Court in *The Queen v. Galvin (No. 1)*[23] that although P need not prove knowledge by D that V was a policeman on duty, and that therefore if there were no evidence on the matter one way or the other D might be convicted, yet it was open to D to defend himself by proving affirmatively, on the balance of probability, that he believed on reasonable grounds that V was not a policeman on duty. This statement of the law was later rejected by a differently constituted and larger Victorian Full Court in *The Queen v. Galvin (No. 2)*[24] in favour of a rule that P must prove knowledge in D that V was a policeman on duty in just the same way, and to the same extent, as he has to prove the assault itself. In *The Queen v. Reynhoudt*, however, the High Court, by a majority of three to two, re-established the law as stated in *The Queen v. Galvin (No. 1)* and overruled *The Queen v. Galvin (No. 2)*.

A rule that D may exculpate himself by proving that he acted under the influence of a objectively reasonable mistake of fact is in effect a rule of responsibility based on negligence. *The Queen v. Reynhoudt* establishes that this rule of negligence extends to the circumstance of aggravation in the offence of assaulting a policeman in the execution of his duty. The question is whether the rule extends to all circumstances of aggravation which depend on knowledge of facts, or only to one class of them, or only to the particular offence under consideration in *The Queen v. Reynhoudt*. If the tripartite classification of aggravated assaults made above[25] is borne in mind, into assaults with particular intentions, assaults on particular persons, and assaults with particular results, the answer is fairly clearly that the rule in *The Queen v. Reynhoudt* extends to aggravated assaults in which the circumstance of aggravation is that V has a particular status, such as being a policeman in the execution of his duty or a clergyman on his way to perform a lawful burial of the dead. A rule based on neglect in D to ascertain relevant facts can hardly apply to assaults requiring an actual intention to do something, such as commit murder or obstruct an official in the execution of his duty, for unless all the relevant facts are known to D he cannot form the necessary intention. On the other hand, it is improbable that such an important decision as *The Queen v. Reynhoudt* is properly confined to the particular offence with which it was concerned.

Where the definition of the assault charged includes an intention by D to achieve a specified result, it has been held that P must prove this intention strictly as laid in the indictment. In *The Queen v.*

[23] [1961] V.R. 733.
[24] [1961] V.R. 740.
[25] Above, p. 328.

Cook[26] in 1886 D was charged with wounding V with intent to murder V. In fact D had shot with intent to murder X, hitting V only 'accidentally'. It was held that D could not be convicted of the offence charged because he had had no intention of murdering V. Similarly it has been held that if D is charged with shooting with intent to prevent lawful apprehension, he must be proved to have known the facts, such as that V was a policeman, which gave V the right lawfully to arrest him.[27]

It was conceded in *The Queen v. Cook* that if D had shot at V with intent to murder X because he had mistaken V for X, D could have been convicted.[28] Nowadays, especially since the decision in *Vallance v. The Queen* discussed above, an Australian court would regard the circumstances of the 'accident' as relevant, for intention is now generally regarded as a concept wide enough to include recklessness; so that if D shot at X with a reckless disregard of the risk that he might hit V instead, and in fact hit V, he could be convicted of wounding V with intent to murder V. An instance of the modern awareness of the utility of the recklessness concept in such situations is *The Queen v. Safi*[29] in 1958. D was charged with maliciously shooting at V with intent to do grievous bodily harm to V. V was proved at the time to have been struggling with X. The trial judge instructed the jury that D must be proved to have aimed at V, but the New South Wales Court of Criminal Appeal qualified this direction by saying that the question whether D could possibly have avoided hitting either V or X was material to ascertaining D's intention. In other words, if the situation was such that shooting at either V or X entailed a substantial risk of hitting the one not aimed at, and D must have appreciated this risk, it was nothing to the point that D hoped to hit the person he missed.

Except in the code jurisdictions, where the word is not used,[30] offences in this part of the law are sometimes defined to include 'malice', a term which nowadays[31] has no other significance than to exclude responsibility for criminal negligence[32] and strict responsibility from the scope of the offence in question. It is clear that malice includes recklessness in offences against the person. There are several

[26] (1886) 12 V.L.R. 650. *The Queen v. Juzod* (1885) 1 W.N. (N.S.W.) 163. But cf. *The Queen v. Grandison* (1862) 1 W. & W. (L) 132.

[27] *The King v. McCabe* [1904] S.A.L.R. 115.

[28] *The Queen v. Supple* (1870) 1 V.R. (L) 151.

[29] (1958) 75 W.N. (N.S.W.) 191.

[30] Except accidentally: heading to Queensland Code, s. 322; sidenote to Western Australian Code, s. 300. On the deliberate abandonment of the word 'malice' in drafting the Queensland Code see Sir Samuel Griffith's letter of 29th October, 1897, to the Attorney-General of Queensland, reprinted in Wilson & Graham, *op. cit. x.*

[31] For an historical survey see Edwards, *Mens Rea in Statutory Offences*, (1955) Ch. 1.

[32] *The Queen v. Lubienski* (1893) 14 L.R. (N.S.W.) (L) 55.

reasons for this statement of the law. The first is that if, as has just been seen, a specifically stated requirement of intention is to be understood as including recklessness to the forbidden consequence, it is incredible that the vaguer requirement of malice should not also be satisfied upon proof of recklessness. Secondly, the point has been expressly decided under the statutory definition of malice in New South Wales,[33] a definition which has been judicially characterized, by reason of circularity, as adding nothing to the general law.[34] Thirdly, in *The Queen v. Smyth*,[35] Sholl J., of the Supreme Court of Victoria, accepted as a correct statement of the law the proposition that in any statutory definition of crime malice includes recklessness.

IV. Consent

'The term assault of itself involves the notion of want of consent. An assault with consent is not an assault at all.'[36] This simple statement of the law, although true as a general principle, needs qualification in certain circumstances.

In the first place it is obvious that a consent extracted by force or by threats of force is not relevant, for the force or threats in themselves would constitute an assault. Secondly, it is universally enacted that consent is no defence to certain sexual assaults.[37] Thirdly, as appears from the definitions of assault in the Queensland and Western Australian Codes,[38] fraud sometimes negatives consent. In those two codes the word 'fraud' is used as if any kind of fraud negatived consent to assault. but this is not so at common law and it is highly improbable that the code sections would be interpreted by the courts in any such sense.

By analogy with rape,[39] which is simply a particular kind of sexual assault, fraud negatives consent only if it is 'as to the nature of the act itself, or as to the identity of the person who does the act'.[40] In *Reg. v. Clarence*,[41] for example, D was charged with an assault upon his wife occasioning actual bodily harm. He had had intercourse with

[33] Crimes Act 1900, s. 5 (N.S.W.) *The Queen v. Sadler* (1900) 21 L.R. (N.S.W.) (L) 380, overruling dicta in *The Queen v. Harvey* (1887) 8 L.R. (N.S.W.) (L) 39, which seemed to suggest that recklessness did not amount to malice.

[34] *Mraz v. The Queen* (1955) 93 C.L.R. 493, 510 *per* Fullagar J.

[35] [1963] V.R. 737, following *Reg. v. Cunningham* (1957) 41 Cr. App. R. 155. Cf. *The Queen v. Whitehead* [1960] V.R. 12.

[36] *The Queen v. Schloss* (1897) Q.C.R. 337, 339.

[37] For an illustration of the importance of distinguishing between assaults in which the absence of consent is material and those in which it is not see *The Queen v. Brady* (1876) 14 S.C.R. (N.S.W.) (L) 468.

[38] Above, pp. 329-330.

[39] For statutory definitions see Queensland Code, s. 347; Western Australian Code, s. 325.

[40] *Reg. v. Clarence* (1889) 22 Q.B.D. 23, 44. Similarly code definitions of rape: Queensland Code, s. 347; Western Australian Code, s. 325. *Papadimitropoulos v. The Queen* (1957) 98 C.L.R. 249.

[41] (1889) 22 Q.B.D. 23.

her at a time when he knew himself to be suffering from gonorrhoea and had thereby infected her. His wife did not know that D was diseased in this way and would have withheld her consent to intercourse, which she would have been justified in doing, if she had known of his condition. P argued that D's suppression of this fact amounted in the circumstances to a fraud which negatived his wife's consent to intercourse and therefore rendered the communication of the disease by intercourse an assault. The Court for Crown Cases Reserved held that even if D's concealment of his condition amounted to a fraud, the deception was not relevant to consent. His wife understood the act of intercourse and knew that the man with whom she was undertaking it was her husband. The communication of a disease was not in itself an unlawful degree of harm to inflict. The decision illustrates well the dislike the courts have always shown for the idea of constructive assault. If V understands the true nature of the physical contact made, and knows who is making it, he cannot retrospectively withdraw his consent because he failed to appreciate all the risks involved.[42]

The last qualification to be made to the general statement that consent is always an answer to a charge of assault is that V cannot in law consent to the infliction upon himself of a degree or kind of harm which is in itself unlawful. This limitation on consent received attention in *Reg. v. Clarence,* when the court decided that the communication of gonorrhoea was not of itself unlawful,[43] but has since been discussed at greater length by the English Court of Criminal Appeal in *Rex v. Donovan.*[44] D, to satisfy a sexual perversion, severely beat a seventeen-year-old girl with a cane 'in circumstances of indecency'.[45] He was convicted, *inter alia,* of common assault, to which his defence had been consent. The conviction was quashed on other grounds, but the court took the opportunity to consider whether consent would in any event have been an answer to the charge, and decided that it would not.

> If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. . . . As a general rule, although it is a rule to which there are well-established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.[46]

[42] In the Tasmanian Code definition of assault, above, pp. 329-330, the word 'consent' alone is used without reference to an exception for fraud. It may be taken that the meaning of consent is the same as at common law.

[43] It is possible that in view of the decision in *Rex v. Donovan,* which immediately follows, this point would be decided differently at the present day.

[44] (1934) 25 Cr. App. R. 1.

[45] *Ibid.* 5. [46] *Ibid.* 10. Cf. Tasmanian Code, s. 182 (4), above, pp. 329-330.

The exceptions listed were lawful sports and rough but well-intentioned horseplay, neither of which activities was said to be motivated by the desire to inflict bodily harm. The existence of other exceptions, such as reasonable chastisement of a child, was conceded but not inquired into in detail because none of them had bearing on the facts of the case.

These dicta are difficult to evaluate.[47] At first sight there seems to be an element of circularity in the suggestion that the infliction of bodily harm negates consent because it is unlawful, when the obvious source of the unlawfulness, the fact that the infliction of bodily harm constitutes an assault, depends in turn on the presence or absence of consent. This circularity is avoided if *Rex v. Donovan* is understood as confirming an arbitrary rule that, subject to certain exceptions, consent for the purposes of the law of assault cannot be given to the infliction on oneself of a serious degree of bodily harm. Such a rule would need to be clarified from time to time by way of indicating with as much exactness as is practicable what kinds of bodily harm are within its scope, but its general purport would be clear.

Unfortunately the obscurities of the dicta in *Rex v. Donovan* are not confined to circularity of reasoning. The existence of exceptions is recognized, but the manner in which they are delineated is perfunctory. The difference between unlawful harm and lawful sport is not the presence or absence of a motive to injure, for boxing is lawful, and to suggest that in boxing, or at all events professional boxing, the motive is not to injure but to train oneself in a 'manly diversions'[48] is to ignore realities. The same applies, although perhaps in lesser degree, to wrestling, and possibly to other combative sports. The motive of horseplay, however innocent, is frequently to produce amusement by injuring someone. The reasonable chastisement of a child is not a true exception, for the right exists independently of the consent of the person assaulted, the child.[49]

An obvious exception to the bodily harm rule which was not mentioned in *Rex v. Donovan* is the case of surgical operation, to which it is not only lawful to consent but which may be performed in emergency without consent.[50] This seems to be the only context in which the distinction between lawfulness and unlawfulness based on motive works with reasonable precision; for the surgeon's motive in operating may be regarded for the present purpose as being to help V in a socially beneficial way, which cannot be said of D's caning V in *Rex v. Donovan*.

[47] Williams, *The Sanctity of Life and the Criminal Law* (1958) 103-105.
[48] (1934) 25 Cr. App. R. 1, 12.
[49] Below, p. 350.
[50] Cf. Queensland Code, s. 282; Western Australian Code, s. 259; Tasmanian Code, s. 51 (3).

It is probable that the nearest one can get to an exact statement of the rule under discussion is that for the purposes of the law of assault, V cannot consent to the infliction of bodily harm upon himself unless D is acting in the course of a generally approved social purpose when inflicting the harm. In the absence of an authoritative statement by an Australian court this rule may be taken not only as the correct understanding of the relevant code sections[51] but also to apply at common law.

V. V's State of Mind

It was observed above[52] that at common law conduct probably does not constitute an assault if V knows nothing about it, unless there is actual application of force to V's person. It does not follow, however, that D's conduct, even if intended to be an assault on V, amounts to an assault simply because V does know about it. The rule is that 'the person to whom violence is offered, to whom the threat is made, must . . . believe that violence is to be feared'.[53]

This rule does not mean that V must be put in actual fear, although it is sometimes carelessly expressed in that way. If it were the law that D must be put in actual fear, D's liability to conviction would depend on V's personal courage, which is not the case. The terminology adopted in the codes brings out the point clearly. The Queensland and Western Australian Codes[54] require that if D is charged with an assault by way of threatened application of force, he must be proved to have had 'apparently a present ability to effect his purpose'. The Tasmanian Code[55] requires that V 'believe on reasonable grounds that [D] has present ability to affect his purpose'. It is immaterial whether V is put in fear. The question is whether from D's threatening action V reasonably anticipates the application of force to his person.

There have been a number of cases arising out of the pointing of firearms by D which illustrate this rule by establishing that if V reasonably believes that the firearm may be loaded, and that he is within its range, D's action may amount to an assault whether the gun is actually loaded or not. In *The King v. Everingham*[56] for ex-

[51] Tasmanian Code, s. 182 (4), above, p. 330. Queensland Code, s. 246, Western Australian Code, s. 223: 'The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.'

[52] Above, p. 331.

[53] *The Queen v. McNamara* [1954] V.L.R. 137, 138. *Brady v. Schatzel* [1911] St. R. Qd. 206. Cf. *Greaves v. Police* [1963] N.Z.L.R. 853 (conditional threat not an assault). [54] Ss. 245 and 222 respectively, above, p. 329. [55] S. 182 (1), above, pp. 329-330.

[56] (1949) 66 W.N. (N.S.W.) 122. *Brady v. Schatzel* [1911] St.R.Qd. 206. In the light of these decisions *The Queen v. Cleary* (1870) 9 S.C.R. (N.S.W.) (L) 75, which was also doubted in *The Queen v. Hamilton* (1891) 12 L.R. (N.S.W.) (L) 111, cannot be regarded as good law. On loaded firearms see also *The Queen v. Abrahams* (1886) 3 W.N. (N.S.W.) 6; *The Queen v. Simpson* (1959) 76 W.N. (N.S.W.) 589, 592; *Kwaku Mensah v. Rex* [1946] A.C. 83, 91.

ample, D pointed a harmless toy pistol at a taxi driver, who was deceived and thought the threat had substance. The New South Wales Court of Criminal Appeal held that these facts disclosed 'as clear a case of assault as one can well imagine'.

VI. Justifications for Assault

An action which otherwise amounts to an assault under the foregoing rules is not criminal if it is justified for any of the reasons which follow. If P proves a *prima facie* case of assault against D and D relies on some ground of justification, and introduces evidence to support his argument, it is for P to prove beyond reasonable doubt that D's assault was not justified in the manner stated.[57]

(a) *Common Intercourse*

It is clear from the discussion above of the mental element in assault that the purely accidental, or even to some extent negligent, application of force to another is not an assault; so that if D trips over an obstruction and in falling unavoidably or carelessly strikes V, he does not commit a criminal assault against V. The normal incidents of life, however, entail a certain amount of intentional or reckless infliction of force by people upon one another. For example, much deliberate, but in the circumstances reasonable, pushing takes place in crowded public transport vehicles in the rush hour.

Incidents of this kind are not criminal assaults. The rule is well expressed in the Tasmanian Code, section 182 (3): 'An act which is reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse, and which is not disproportionate to the occasion, does not constitute an assault'.[58]

(b) *Arrest*

A person exercising a lawful power of arrest is entitled to use reasonable force, if necessary, to effect the arrest.[59] There is a corresponding right to use reasonable force to resist unlawful arrest.[60] Force used within the limits of these rules is therefore not a criminal assault.

[57] In accordance with the general principle: *Sodeman v. The King* (1936) 55 C.L.R. 192, 216-217; *Ex p. Patmoy* (1944) 44 S.R. (N.S.W.) 351, 357-358; *May v. O'Sullivan* (1955) 92 C.L.R. 654.

[58] Cf. Stephen, *op. cit.* art. 262, proviso.

[59] Queensland Code, s. 254; Western Australian Code, s. 231; Tasmanian Code, s. 231; Tasmanian Code, s. 26 (1). At common law this power follows *a fortiori* from the rule that under certain circumstances it is lawful to kill the person sought to be arrested, even though no question of self-defence arises. On this rule see *Russell on Crime* (11th ed. 1958) i, 485 ff. A statutory power to enter premises to perform a public duty carries with it an implied right to use reasonable force to effect entry: *Fowler v. Taylor* [1957] V.R. 593.

[60] *The Queen v. Ryan* (1890) 11 L.R. (N.S.W.) (L) 171; *McLiney v. Minster* [1911] V.L.R. 347.

What amounts to reasonable force is a question of fact which depends on the circumstances of the particular case, but in the present context force quickly becomes unreasonable. For example, no-one is entitled to inflict grievous bodily harm or to kill in resistance to unlawful arrest.[61] The reason for this is no doubt that if one is unlawfully arrested there exist legal remedies, by way of *habeas corpus* proceedings and actions for damages for assault and false imprisonment, to redress the wrong done without resort to a degree of self-help which would amount to a serious breach of public order and might encourage violent resistance to arrest in general.

How much force might be reasonable to effect a lawful arrest is uncertain, but probably, because submission to lawful arrest ought to be encouraged rather than discouraged in an orderly society, the limits of reasonableness here are rather wider than in resistance to unlawful arrest. The reason why the question is uncertain is that the increasing efficiency of police detection procedures renders the use of force progressively less necessary.[62] Nowadays it is usually of little consequence if the person to be arrested escapes, for he will have the utmost difficulty in remaining at large if his crime was sufficiently serious to warrant the use of much force to detain him in the first place.

Questions relating to the degree of force which may reasonably be used merely in order to effect an arrest should be distinguished from other matters which may become relevant, such as self-defence or the defence of others. For example, D, a policeman, may try to arrest V, who has just shot someone dead. If D is armed he is not justified in shooting at V merely in order to arrest him; but he is justified in shooting at him if V shows signs of resisting arrest by shooting either at D or at other people, for D is then concerned not merely with the arrest but also with defending either himself or others. This sort of situation is not uncommon when violent criminals are pursued, and is not to be evaluated by reference only to the law of arrest.

Powers of arrest under the present law are complex because they represent one of the points of greatest tension between two important social interests: the interest in law and order and the interest in individual freedom. This has the unfortunate result that many cases arising out of an attempted arrest turn more on the technical legality of the arrest than on the realities of the situation.[63]

(c) *Defence*

There are wide powers of defence of person and property which

[61] *The Queen v. Ryan* (1890) 11 L.R. (N.S.W.) (L) 171.
[62] *Russell on Crime, op. cit.* 487. [63] Cf. n. 21.

correspond approximately to the common reactions of mankind. They are conveniently summarized in the codes and may be shortly stated as follows.

In self-defence a distinction is to be drawn between defence of oneself against an unprovoked assault and defence of oneself against an assault provoked by one's own actions.[64] Provocation here bears the same meaning as in the law of homicide, so that a lawful action, such as a duly authorized arrest, is not regarded as provoking resistance.[65] Force may be used in resistance to an unprovoked assault to the extent which D reasonably believes is necessary for his own defence, 'even though such force may cause death or grievous bodily harm',[66] although force of this order is not reasonable defence unless D believes himself to be in danger of similar harm. The same applies to self-defence against a provoked assault except that where D started the conflict with the intention of killing or inflicting grievous bodily harm upon someone, he must first retreat 'as far as . . . practicable'.[67]

There is a rule of the law of homicide that if in the exercise of a lawful power to use force D exceeds the limits of the power by using more force than the occasion warrants, and thereby kills, he is not guilty of murder by reason only of the excessive force, but only of manslaughter, allowance thereby being made for what is in effect no more than an error of judgment under difficult circumstances.[68] A similar problem arises where D, by the use of more force than the occasion warrants, injures V more seriously than he was entitled to do. The Queensland and Western Australian Codes say merely that 'the use of more force than is justified by law under the circumstances is unlawful',[69] which does not solve the problem because the question is not whether the use of excessive force is unlawful at all, for it is unlawful by definition, but the degree to which it is unlawful. Upon this depends the seriousness of the conviction to which D is liable for his error of judgment.

The Tasmanian Code appears to envisage a solution similar to the homicide rule, but does not indicate with precision what the practical result might be. Section 52 says:

> A person authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes such excess.

[64] Queensland Code, ss. 271, 272; Western Australian Code, ss. 248, 249; Tasmanian Code, ss. 46, 47.

[65] Provocation as to a defence to assault is discussed below, p. 345.

[66] Queensland Code, s. 271; Western Australian Code, s. 248; Tasmanian Code, s. 46 (2).

[67] Queensland Code, s. 272; Western Australian Code, s. 249; Tasmanian Code, s. 47 (2) (a) (ii). The Queensland and Western Australian sections are obscurely drafted but the statement in the text seems to express what is intended.

[68] Morris and Howard, *Studies in Criminal Law* (1964), iv.

[69] Queensland Code, s. 283; Western Australian Code, s. 260.

This wording seems to mean that D should be responsible only for the extent of his error, but evades the problem of measuring the error in terms of liability to conviction. If D is entitled to inflict bodily harm but not grievous bodily harm, and he inflicts grievous bodily harm, of what offence should he be convicted which corresponds to the difference between bodily harm and grievous bodily harm?

In view of the homicide rule it is likely that section 52 of the Tasmanian Code expresses the law in all the Australian States with respect to assaults less than homicide, but there is as yet no case elucidating its practical application. It seems probable that the actual course of events would be to charge D with the most serious offence of which he could reasonably be convicted if he had no ground of justification, such as assault occasioning actual bodily harm or with intent to cause grievous bodily harm, and leave it to the jury to convict him only of some lesser offence, in all probability common assault, if they found that D was justified but exceeded the limits of his justification.

D is entitled not only to defend himself but also to go to the defence of any other person.[70] He is not, however, entitled to inflict punishment on V for having attacked another if the need for defence is over. In *Saler v. Klingbiel*[71] V, at a party, became viciously drunk and quarrelsome, knocking down a man with an artificial leg and a woman who tried to pacify him. D thereupon remonstrated with him, evaded two blows aimed at himself, and then knocked V down with six or seven blows of considerable force. V was an ex-prize fighter and a big man. Richards J. held that D was justified in acting as he did, not only in self-defence but also to prevent further injury to others. In cross-examination D appeared to admit that he had been partly influenced by anger that V had hit a disabled man and a woman. P therefore suggested that D should be convicted of assault because he used a degree of violence which went beyond mere defence and showed a desire to punish. Upon this Richards J. observed:

> It must of course be conceded that it is not the function of a protecting intervener to go further than protection and administer punishment; but one must not weigh conduct on such an occasion with "golden scales", and if the force used may have been somewhat in excess of what was *actually* necessary, or of what would to a reasonable man have *appeared* necessary, in the circumstances, it might be unreasonable to regard the force used as criminal.[72]

This case is instructive from several points of view. It illustrates well the fact that when a ground of justification is put forward for an

[70] *Saler v. Klingbiel* [1945] S.A.S.R. 171. Cf. *The Queen v. Spartels* [1953] V.L.R. 194, 197. Queensland Code, s. 273; Western Australian Code, s. 250; Tasmanian Code, s. 39. [71] [1945] S.A.S.R. 171. [72] *Ibid.* 172. Italics in original.

assault, the courts do not attach too much importance to the precise technical limitations of the justification relied on but prefer to regard the reasonableness of D's behaviour in the circumstances as the decisive factor. The case also brings out the manner in which the various justifications for assault tend to merge in practice. This phenomenon has already been commented upon under arrest above, where it was noted that arrest by force can easily include elements of self-defence. In *Saler v. Klingbiel* it is obvious that if the defence had been available in South Australia[73] D could also have urged provocation, possibly from witnessing V's attack on relatively helpless people, but certainly from the blows to himself. It also seems that D might have been able to argue that he was acting in the prevention of a violent felony, or, if matters had gone further without his intervention, to arrest a felon.

As one would expect, the right to defend property is more limited than the right to defend people. This is expressed in the Queensland and Western Australian Codes, but not in the Tasmanian Code, by limiting this justification for assault to the case where no bodily harm, defined in section 1 as 'any bodily injury which interferes with health or comfort', is done to V.[74] At first sight this seems to be an unduly restrictive limitation on the law, but here again other closely allied justifications for assault have to be borne in mind. Threatened injury to property would justify interference on other grounds, such as arrest or prevention of felony, if it were serious, and these other grounds would allow the use of reasonable force even if it entailed bodily harm. Also, as Stanley J. observed in *Greenbury v. Lyon*,[75] 'in cases like this one should remember the frailties of excitable human nature and the necessity for quick action, and not strain to confine too closely the conception of reasonable force.'

(d) *Provocation*

The Australian law of provocation in non-fatal assaults is at an interesting stage. Queensland and Western Australia have a statutory rule that provocation is a complete defence to a charge of assault.[76] In Victoria it has been held at common law that provocation is a qualified defence to an assault which is defined to include the word 'murder'.[77] The Tasmanian Code does not include a section cor-

[73] Below, p. 346.

[74] Queensland Code, ss. 274-279; Western Australian Code, ss. 251-256. The power to defend one's dwelling house, however, is not limited in this way: ss. 267 and 244 respectively. The Tasmanian Code, ss. 41-45, requires only that any harm inflicted be not grievous or deadly.

[75] [1957] St.R.Qd. 433, 438.

[76] Ss. 269 and 246 respectively.

[77] *The King v. Newman* [1948] V.L.R. 61; *The Queen v. Spartels* [1953] V.L.R. 194; *The Queen v. Carter* [1959] V.R. 105.

responding to the Queensland and Western Australian rule, but the Criminal Code Act says in section 8 that,

> All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to a charge upon indictment, shall remain in force and apply to any defence to a charge upon indictment, except in so far as they are altered by, or are inconsistent with, the Code.

New South Wales and South Australia have nothing relevant in either their statutes or their case law.

The Queensland and Western Australian rule requires little discussion. The definition of provocation is the same here as in the law of homicide,[78] although in practice provocation is allowed a wider ambit as a defence to assault, especially minor assaults, than as a qualified defence to homicide because of the requirement of credibility that D's attack be an understandable response to the provocation given. In *The King v. Nakayama*,[79] for example, it was held that cheating at cards when playing for money was capable of amounting to sufficient provocation to justify an assault, but it is highly improbable that any form of cheating would amount to provocation for the purposes of the law of homicide.

Similarly, these two states have a rule that D may assault V to prevent the repetition of an act or insult which if committed or uttered would be provocation to D for an assault.[80] The object of this rule seems to be to justify D in preventing V from indulging in a course of provocative conduct which does not at first cause D to lose his self-control but may do so if persisted in. Under this rule D is not justified in causing death or grievous bodily harm. This is consistent with the purpose of the rule and affords another indication of the difference between provocation which mitigates a killing and provocation which justifies an assault. The rule that provocation is a complete defence to a charge of assault has worked satisfactorily in Queensland and Western Australia and might well be adopted in other jurisdictions.

The Victorian development has taken place along logical lines but at present leads to paradoxical results. In *The King v. Newman*[81] D was charged with wounding with intent to murder. There was evidence of provocation. Barry J. directed the jury that they should convict of wounding with intent only if they found the necessary intent to murder, *i.e.*, only if they found that had D killed instead of wounded, he would have committed murder. But if they found such

[78] On which see Morris and Howard, *Studies in Criminal Law* (1964) 100 ff.
[79] [1912] St.R.Qd. 287.
[80] Queensland Code, s. 270; Western Australian Code, s. 247.
[81] [1948] V.L.R. 61.

an intent, and found also that the intent had been caused by sufficient provocation, they would have to bear in mind that if D had in fact killed V, the killing would not have amounted to murder, but only to manslaughter, owing to the provocation. In this situation they should convict, not of wounding with intent to murder, which corresponded to murder, but of unlawful wounding, which corresponded to manslaughter.[82]

A slightly more complicated situation arose in *The Queen v. Spartels*[83] because D was charged with malicious wounding with intent to do grievous bodily harm[84] as an alternative to the count of wounding with intent to murder. In his charge to the jury on the count of wounding with intent to murder Sholl J. followed the same reasoning as Barry J. in *The King v. Newman,* and directed that should they find an intent to murder caused by sufficient provocation, which would have been reasonable on the evidence, they should convict of unlawful wounding only. He did not, however, direct them to take provocation into account on the charge of wounding with intent to do grievous bodily harm.

The latest reference to this rule was made in *The Queen v. Carter,*[85] where Sholl J. regarded *The King v. Newman* and *The Queen v. Spartels* as having established that provocation might be material to a charge of wounding with intent to murder. In that case the matter was not carried any further as there was no evidence of provocation.

The basis of the reasoning in *The King v. Newman* is that the definition of murder includes by implication the doctrine of provocation. The word 'murder' is a term of art which refers to the whole law of murder, including the law of provocation. It follows that where the definition of an offence less than murder, such as wounding with intent to murder, includes this term of art, the doctrine of provocation is relevant to that offence.

This argument depends entirely on the definition of the offence in question and may lead to some odd consequences. For example, it seems to follow that although provocation is relevant to a charge of wounding with intent to murder, it is not relevant to a charge of wounding with intent to kill; for whereas 'murder' is a term of art in the law, 'kill' is not and therefore does not carry any implication with respect to the doctrine of provocation. In law it is not possible

[82] See now Crimes Act 1958, s. 11 (1) (Vic.): 'whosoever . . . by any means wounds or causes to any person any bodily injury dangerous to life, with intent . . . to commit murder, shall be guilty of felony'; and s. 19: 'whosoever unlawfully and maliciously wounds or inflicts grievous bodily harm upon any other person, shall be guilty of a misdemeanour.'

[83] [1953] V.L.R. 194.

[84] See now Crimes Act 1958 (Vic.), s. 17: 'whosoever unlawfully and maliciously wounds or causes any grievous bodily harm to any person . . . with intent in any such case to do grievous bodily harm to any person . . . shall be guilty of felony.'

[85] [1959] V.R. 105.

to murder if one is acting under sufficient provocation, but it is perfectly possible to kill.

Similarly, as *The Queen v. Spartels* shows, provocation does not apply to wounding with intent to inflict grievous bodily harm because 'grievous bodily harm' is not a term of art in the law carrying a necessary reference to the doctrine of provocation.[86] The consequence is that if D is provoked into attempting murder, he may be charged with wounding with intent to murder but convicted, if provocation is proved, only of unlawful wounding; whereas if he is provoked into attempting to inflict grievous bodily harm only, the provocation cannot be taken into account, and he may be convicted of wounding with intent to do grievous bodily harm. In other words, it becomes more advantageous to be provoked into attempting murder than merely grievous bodily harm, which is a strange state of affairs.

Again, unless there is a power to return a verdict of a lesser offence than the one with which D is charged, proof of provocation should cause D to be acquitted altogether, which is in effect the same rule as in Queensland and Western Australia. In *The King v. Newman* and *The Queen v. Spartels* no difficulty was found on the wounding with intent to murder count because there is statutory power[87] to return a verdict of unlawful wounding alone if the intent to murder is not proved. But suppose D shoots at V, misses him altogether, and is charged with attempted murder.[88] Proof of provocation would negative the intent to murder and would therefore require D to be acquitted of the attempt. To put the argument in a different way, D could not be convicted of an attempt to murder unless it would have been murder if he had succeeded, and it would not have been murder to kill upon provocation. But if on these facts D cannot be convicted of the attempt, it appears that he must be acquitted altogether, for there is no power to convict him of anything else.[89]

It is clear from these examples that the defect in the present Victorian rule lies in its unduly close attachment to the word 'murder'. The scope of the rule is at present to be deduced by reference to semantics rather than to realities. The importance of provocation in murder is the effect which it has upon the formation of an intention or desire to kill. The existence of that intention or desire is not dependent on whether D actually kills. The social significance of the effect of provocation on D's mind is not diminished merely because V

[86] *The King v. Miller* [1951] V.L.R. 346, 357; *The Queen v. Weeding* [1959] V.R. 298.

[87] See now Crimes Act 1958, s. 423 (Vic.).

[88] *Ibid.* s. 14.

[89] Even if there is such an offence as attempted manslaughter, it could hardly apply in these circumstances because attempt requires an actual intention to perform the forbidden actions charged as attempted, and intention is the very element in the offence negatived by provocation.

by good fortune escapes death. It follows that provocation ought to diminish or extenuate guilt in any offence which depends on a state of mind identical with the mental element in murder. For example, an intention to inflict grievous bodily harm is an instance of the mental element in murder; therefore if grievous bodily harm is inflicted under the influence of adequate provocation, the conviction ought to be unlawful wounding in the same way as if wounding with intent to murder is charged. The same applies to offences dependent on an intent to kill. Where a technical difficulty presents itself about powers of conviction, as seen with attempted murder above, complete acquittal should follow unless and until the legislature decides to the contrary and enacts an appropriate power.

The foregoing observations are made with particular reference to Victoria because the Crimes Act of that state uses the terminology 'intent to murder' which prompted the direction in *The King v. Newman*.[90] No similar problem arises under the codes of Queensland and Western Australia because they have an express rule that provocation applies to non-fatal assaults.[91] In New South Wales exactly the same considerations arise as in Victoria because the Crimes Act of that state also uses the expression 'intent to murder',[92] but whether the Victorian rule will be followed, either as it stands or in a modified form, cannot be foretold. The South Australian Criminal Law Consolidation Act does not refer to intents to murder, and therefore leaves no opening for the *The King v. Newman* reasoning. However, this does not mean that the extension of provocation to assaults which include the mental element in murder cannot be made in that state, for it is open to the South Australian courts to argue, in the manner outlined above, that the true basis of *The King v. Newman* is not semantics but realities, and that therefore provocation is relevant to the mental element in murder wherever that state of mind comes in question.

The position under the Tasmanian Code is a little more obscure. The term 'intent to murder' is not used and section 8 of the Criminal Code Act, quoted above, leaves open common law defences except so far as they are inconsistent with the code. It may therefore be that in effect the position is the same as in South Australia, the courts being free to follow the Victorian lead if they see fit. However, the Tasmanian 'inconsistency' rule has to be taken into account also. It may be that since provocation is already legislated for in section 160 of the code, and therein confined to murder, a new head of provocation arising at common law, especially one which has appeared long

[90] Crimes Act 1958, ss. 11-13 (Vic.).
[91] Ss. 269 and 246 respectively.
[92] Crimes Act 1900, ss. 27-29 (N.S.W.).

after the first enactment of the Tasmanian Code in 1924, would be regarded as inconsistent with section 160.

(e) *Domestic Discipline*

The law recognises and allows for the almost universal belief that corporal punishment of children is sometimes necessary, not only by a parent but also by certain other persons to whom the care and discipline of the child may be entrusted. The rule is clearly expressed in the Queensland and Western Australian Codes.[93]

> It is lawful for a parent or a person in the place of a parent, or for a schoolmaster or master, to use, by way of correction, towards a child, pupil, or apprentice, under his care such force as is reasonable under the circumstances.

The rule in the Tasmanian Code[94] is expressed in the same terms except that no reference is made to the relationship of master and apprentice. This difference is probably of no practical importance because nowadays circumstances are unlikely to arise under which it would be lawful for a master (in itself an outmoded term) to use force towards an apprentice by way of correction alone. Apprenticeships are now entered into at a later age than formerly, and the reasonableness of forcible correction has correspondingly declined.

The usual defendants to charges of assault by way of excessive correction are schoolteachers, and in this context the courts, although their opinions have moved with the times, have shown themselves reluctant to interfere with D's discretion. For example, in *White v. Weller*[95] in 1959, V, 'a well-grown athletic boy' of fifteen, was punished for insolence by being slapped several times on the head and shoulder by his schoolteacher D. Notwithstanding that punishment by slapping the head was 'irregular' under teachers' regulations in any circumstances, the Queensland Full Court held that, without condoning such punishment, it would be going too far to say that slapping a pupil's head could never be reasonable within the meaning of the code. The dismissal of the information was upheld.[96]

Parents usually come before the courts in extreme circumstances which, although they may occasion a restatement of the general rule, leave no doubt that D's actions were highly unreasonable. Examples

[93] Ss. 280 and 257 respectively. Cf. ss. 281 and 258 respectively, on ship discipline. For statements of the common law position to the same effect see *Smith v. O'Byrne* (1894) Q.C.R. 252, 253; *The Queen v. Terry* [1955] V.L.R. 114, 116-117.

[94] S. 50.

[95] [1959] Qd.R. 192.

[96] In earlier years the courts were prepared to accept quite severe caning of children of eight years by schoolteachers as reasonable: *Armat v. Little* [1909] St.R.Qd. 83 (conviction quashed for wrongful admission of evidence, but opinion expressed that Full Court would not itself have convicted in the first place); *Byrne v. Hebden* [1913] St.R.Qd. 233 (a girl). It would be unwise to expect judicial opinion to be the same today.

are *The Queen v. Terry*,[97] in which Sholl J. of the Victorian Supreme Court had no difficulty in holding that D, who was living with the child's mother and might therefore be regarded as *in loco parentis*, exceeded the law by striking an infant girl of nineteen months several hard blows with his hand which caused her death;[98] and *The Queen v. Hamilton*,[99] which affirms the proposition, for what it is worth, that a father is not entitled to coerce his son, a little boy, by pointing a loaded firearm at him. It is therefore not clear as a matter of law whether a parent is entitled to inflict more severe punishment than a schoolteacher. In practice, because of the absence of publicity in the home and the general reluctance to interfere with family relationships except under extreme circumstances, a parent's powers of corporal punishment short of the infliction of grievous bodily harm are limited by little else than his own sense of responsibility.

VII. Robbery

Robbery is an aggravated form of stealing[1] which in some forms consitutes an assault. The circumstance of aggravation is the use or threat by D of violence to person or property.[2] The statutes distinguish between different degrees of robbery, the offence becoming more serious if committed in company with others, or with an offensive weapon, or if someone is actually hurt.[3] As with other assaults, robbery by threats is sometimes described in terms of D's putting V in fear. This brings out the assumption underlying the law that V loses his property either because he has been overpowered or because he has been frightened into non-resistance. However, the actual scope of the law is wider than these two situations would suggest.

D's guilt of robbery by threats does not depend any more than any other assault on whether he actually frightens V but on the use of

[97] [1955] V.L.R. 114.

[98] Many such cases lead to homicide prosecutions because unless the child dies the brutality does not become generally known. For other examples see *The Queen v. Clarke* [1959] V.R. 645; *Reg. v. Ward* [1956] 1 Q.B. 351; *The King v. Miller* [1951] V.L.R. 346; *Rex v. Grey* (1666) Kel. 64.

[99] (1891) 12 L.R. (N.S.W.) (L) 111.

[1] Thus the word 'rob' implies theft: *The Queen v. Holmes* (1885) 2 W.N. (N.S.W.) 6.

[2] In the old case of *Rex v. Donnally* (1779) 1 Leach 193, a threat to accuse of an 'unnatural' crime was held sufficient for robbery. *Sed quaere*. The definitions of robbery in the Queensland (s. 409) and Western Australian (s. 391) Codes are confined to violence to person or property, or threats thereof, and they were almost certainly intended to reproduce the common law on this point. It seems probable that *Rex v. Donnally* was an attempt to make robbery cover a situation nowadays accounted for by extortion. The word 'rob' in the Tasmanian code has the same meaning as at common law: *Brown v. The Queen* [1955] Tas. S.R. 141.

[3] Crimes Act 1900, ss. 94-98 (N.S.W.); Crimes Act 1958, ss. 117-120 (Vic.); Criminal Law Consolidation Act 1935-1957, ss. 155-158 (S.A.); Tasmanian Code, s. 240; Queensland Code, ss. 409-413; Western Australian Code, ss. 391-395. It has been held under s. 412 of the Queensland Code that the same act may constitute both the assault and the threat required by the section: *Dearnley v. The King* [1947] St.R.Qd. 51.

methods calculated to frighten him. 'Actual terror need not exist, if circumstances exist which are sufficient to excite terror.'[4] Similarly, in the case of robbery by force, where actual personal violence is charged it does not follow that the person attacked need be the person robbed,[5] for the statutes require only that D strike or injure 'any' person at the same time as, or immediately before or immediately after, the robbery.[6] It has also been held that since robbery accompanied by actual wounding is merely robbery with an additional circumstance, there can be a conviction of robbery if the wounding is not proved, without special statutory power.[7]

The foregoing might suggest that robbery is an aggravated form, not of stealing in general but of stealing from the person. This is not so. Robbery is committed if D takes property in V's presence, although not from his person. Presence is construed liberally, so that if V has been rendered unconscious, a theft committed in his vicinity is committed in his presence notwithstanding that he was unaware of what was taking place.[8] Nevertheless in *The King v. Langlands*[9] the Full Court of Victoria uttered a warning against extending this rule too far. D and an accomplice detained V in a room while another accomplice stole money from the till of V's adjoining shop. There was a door from the room to the shop, but the evidence tended to show that it was closed at the relevant time. D's conviction of robbery was set aside, and a verdict of larceny substituted, on the ground that the actions of himself and his accomplices did not come within the technical definition of robbery.

The court said:[10]

> There is no doubt that the governing idea of robbery was, so far as the element of theft is concerned, that the theft should be a theft from the person: but the law has long since sanctioned some slight extension of the common idea of a theft from the person, and convictions have been upheld where the theft of the property was not of property actually upon the person of the victim of the crime, but merely of property in his presence. The present case gives rise to the difficult question: What are the limitations to be put upon the meaning of "in his presence"? Much reliance has been placed upon phrases used in the judgments in *R. v. Grocock*,[11] and *R. v. Selway*,[12] as justifying the contention that the theft is sufficiently a theft of property in the presence of the victim of the crime if it be a theft of property in his

[4] *The Queen v. Cheshire* (1864) 3 S.C.R. (N.S.W.) (L) 129, 136.
[5] *The Queen v. Wells* (1880) 5 Q.S.C.R. 181.
[6] Crimes Act 1900, s. 95 (N.S.W.); Crimes Act 1958, s. 119 (Vic.); Criminal Law Consolidation Act 1935-1957 s. 158 (c) (S.A.); Tasmanian Code, s. 240 (1) (a); Queensland Code, s. 412: Western Australian Code, s. 394.
[7] *The Queen v. Stewart* (1886) 12 V.L.R. 567. The code sections, however, (previous footnote), contemplate that the wounding will be for the purpose of the robbery.
[8] *The Queen v. Grocock* (1888) 14 V.L.R. 51.
[9] [1932] V.L.R. 450.
[10] *Ibid.* 452
[11] (1888) 14 V.L.R. 51.
[12] (1859) 8 Cox 235.

control or under his custody. We think that there would be a grave danger of a considerable change in the law if we were to substitute what has been suggested for the ancient and approved words "in his presence".

On the basis that the door between the shop and the room in which V was detained was shut, the theft in the shop could not be said to have been committed in D's presence.

VIII. Abortion

There are three indictable offences connected with abortion: the attempted abortion of V by D;[13] the attempted abortion of V by V herself;[14] and the supply of means for abortion with knowledge that those means are intended to be used for that purpose.[15] Only the first of these offences is an assault, but it is convenient to mention the other two at the same time. The various definitions of attempted abortion are substantially the same. Section 65 of the Crimes Act, 1958 (Vic.), is typical:

> Whosoever with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing,[16] or unlawfully uses any instrument or other means with the like intent, shall be guilty of felony.

As the reservation that it is immaterial whether V is pregnant or not[17] implies, the overriding element in attempted abortion is D's intention.[18] This rule receives its most important application in connection with the word 'unlawfully', which excludes surgical operations performed in good faith from the scope of the offence. The Queensland and Western Australian Codes have the following rule:[19]

[13] Crimes Act 1900, s. 83 (N.S.W.); Crimes Act 1958, s. 65 (Vic.); Criminal Law Consolidation Act 1935-1957, s. 81 (b) (S.A.); Queensland Code, s. 224; Western Australian Code, s. 199; Tasmanian Code, s. 124 (2).

[14] Crimes Act 1900, s. 82 (N.S.W.); Crimes Act 1958, s. 65 (Vic.); Criminal Law Consolidation Act 1935-1957, s. 81 (a) (S.A.); Queensland Code, s. 225; Western Australian Code, s. 201; Tasmanian Code, s. 135.

[15] Crimes Act 1900, s. 84 (N.S.W.); Crimes Act 1958, s. 66 (Vic.); Criminal Law Consolidation Act 1935-1957, s. 82 (S.A.); Queensland Code, s. 226; Western Australian Code, s. 201; Tasmanian Code, s. 135.

[16] In N.S.W. the reference is to 'any drug or noxious thing'.

[17] Only in Queensland and Western Australia does this reservation apply to the case where V attempts to abort herself. The other states make this a crime only where V is actually pregnant. Whatever the charge, if V actually is pregnant, it is immaterial that the foetus is dead: *The King v. Trim* [1943] V.L.R. 109.

[18] On this point different considerations arise where the charge is supplying, for here D must have knowledge of someone else's intention to abort but need not himself intend to abort. The cases are not consistent on what amounts to such knowledge. Contrast *The Queen v. Drake* (1887) 13 V.L.R. 498, *The King v. Duffy* (1901) 1 S.R. (N.S.W.) 20, and *The King v. Neil* [1909] St.R.Qd. 225, with *The Queen v. Hyland* (1898) 24 V.L.R. 101.

[19] Ss. 282 and 259 respectively. In *The Queen v. Ross* [1955] St.R.Qd. 48, 81, it was said to be a sufficient direction to the jury simply to read this section without comment.

> A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

The equivalent section in the Tasmanian Code[20] is not limited to the case where D believes the abortion to be necessary to preserve V's life, but merely lays down the general requirement of reasonableness in all the circumstances. At common law the only case directly in point is the well-known prosecution in *Rex v. Bourne*,[21] where an obstetric surgeon of the highest qualifications deliberately drew the attention of the English authorities to his performance of an abortion on a young girl, who had been badly raped, in order to provoke proceedings which would clarify the law. He was acquitted after the trial judge had directed the jury substantially to the same effect as the Queensland and Western Australian rule quoted above.

Other limitations on attempted abortion arise from the statutory statements of the means which are prohibited by law. The words 'poison' and 'instrument'[22] are reasonably clear, and it has been held that a 'noxious thing' in this context is limited to something likely to harm a pregnant woman.[23] All the statutes, however, include an apparently general reference to 'other means', which might be understood as bringing within the offence any attempt to induce abortion. however ridiculous the method used. As to this, the South Australian Court of Criminal Appeal in *The King v. Lindner*[24] declined to accept the view that the legislature intended to catch people who might believe in the efficacy of prayer or witchcraft, and limited 'means' to 'something that is, in the common experience of mankind and in some reasonable degree, capable of producing the result'.

[20] S. 51 (1).

[21] [1938] 3 All. E.R. 615, also reported at [1939] 1 K.B. 687, after substantial revision by the trial judge. The two reports differ in many respects. For a full critique of the law see Williams, *The Sanctity of Life and the Criminal Law* (1958) 150-170.

[22] The Queensland and Western Australian Codes refer to the use of force, not to the use of an instrument.

[23] *The King v. Lindner* [1938] S.A.S.R. 412. Cf. *The King v. Barton* (1931) 25 Q.J.P.R. 81.

[24] [1938] S.A.S.R 412, 415.