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Assault and Battery—Criminal Responsibility—Offenses—Assault with Dangerous or Deadly Weapon

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3 Wyo. 189. Failure to state all he has suffered in one complaint defeats his right to sue for what he has omitted, as was held in *Birmingham Southern Ry. Co. v. Linter,* 141 Ala. 420. Injury to person and damage to bicycle good in one cause of action, *Braithwaite v. Hall,* 168 Mass. 38, 46 N. E. 398. Damage to person and clothing, one cause of action and recovery for former bars suit for latter. *Knoulton v. R. Co.,* 147 Mass. 606, 18 N. E. 580. Basis of the majority view is that as defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong. E. C. F. '27.

ASSAULT AND BATTERY—CRIMINAL RESPONSIBILITY—OFFENSES—ASSAULT WITH DANGEROUS OR DEADLY WEAPON.—One Williamson was indicted, tried, and found guilty of aggravated assault under a statute defining such assault with reference to the use of a deadly weapon in its commission. A writ of error was taken to this court and one of the grounds assigned for reversal was the finding of the jury that an automobile used in this assault was a deadly weapon. *Held,* that an automobile may be so used as to constitute a deadly weapon within the meaning of the statute and hence conviction was affirmed. *Williamson v. State,* (Fla., 1926), 111 S. 124.

Of course, in cases of this nature, the character of the weapon used constitutes the gist of the offense and distinguishes it from mere common assault. An assault with a dangerous or deadly weapon is, unless otherwise provided by statute, merely a common assault, although of an aggravated kind, *Commonwealth v. O'Donnell,* 150 Mass. 502, 23 N. E. 217. In cases where statutes have been enacted and specifically describe the weapons to be used, the weapon employed must comply with the specific description, *Commonwealth v. Hawkins,* 11 Bush (Ky.) 603. In most states, however, the statutes if there are any relating to this matter refer only in a general way to "dangerous or deadly weapons." Thus, the question resolves itself into one of construction of these terms. Webster, in defining a weapon, says in part that it is "an instrument of offensive or defensive combat;—*anything used* or designed to be used in destroying, defeating, or injurying an enemy, etc.;" and from the cases it appears as if the courts have practically followed this definition in construing the meaning of our term. A dangerous or deadly weapon is a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm, *People v. Leyba,* 74 Cal. 407, 16 P. 200. Of course, a weapon capable of producing death is not necessarily deadly or dangerous, *Pittman v. State,* 25 Fla. 648, 6 S. 437; and conversely a weapon may be deadly or dangerous although not primarily made or designed for the taking of life or the infliction of injury, *State v. Scott,* 39 La. Ann. 943, 3 S. 83. In case the weapon is not deadly *per se,* its character will depend on the manner of its use, the size and physical condition of the parties, and its own nature, *State v. Archbell,* 139 N. C. 537, 538, 51 S. E. 801. So an axe may be a deadly weapon, *State v. Hertzog,* 41 La. Ann. 775, 6 S. 622; but it is not necessarily so, *Bush v. State,* 52 Tex. Cr. 398, 107 S. W. 348; a pistol is ordinarily regarded as a deadly weapon *per se, State v. Baker,* 20 R. I. 275, 38 A. 653; a striking with the fist is not an assault with a deadly weapon, *Little v. State,* 61 Tex. Cr. 197, 135 S. W. 119. The general trend of judicial opinion and the gist of the above cases is reflected in a decision by the U. S. Supreme Court when it held that "anything, no matter what it is—whether it was made by him for some other purpose—if it is a thing with which death can be easily and readily produced, the law recognizes it as a deadly weapon," *Acers v. U. S.,* 164 U. S. 388, 41 L. Ed. 481. In following and applying the above doctrine, the Illinois courts have twice held that an automobile may be a deadly weapon under some circumstances and in so doing have probably blazed a trail which will likely be oft trod in the future,

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People v. Clink, 216 Ill. App. 357; *People v. Anderson*, 310 Ill. 389, 141 N. E. 727. In Mo., our statute, R. S. Mo. 1919, Sec. 3262, provides that an "assault or beating of another with a deadly weapon or any other means or force likely to produce death or great bodily harm etc.;" a general provision such as this incorporating a construction of the disputed term virtually deprives the court of its function and resolves the question into one solely for the jury. Prior to such statute however, Missouri followed the general rule of construction and held that if the wound were dangerous, the weapon need not be deadly *per se;* and conversely that if the weapon were deadly, the wound need not be dangerous, *Carrico v. State*, 11 Mo. 579.

Thus it would seem that the question of what is a dangerous weapon as a matter of law is well settled and practically has virtually resolved itself into a question for the jury to determine under the peculiar facts in each particular case; and when the broad definition of a deadly weapon and the ever increasing use of the automobile with its attendant, potential power to harm are considered, the finding of the jury in this case is neither startling nor illogical but on the contrary is wholly sound. E. L. W. '28.

AUTOMOBILES—VIOLATION OF STATUTE HELD NEGLIGENCE AS A MATTER OF LAW. —Plaintiff's intestate who was riding home from work in a car, alighted, and in crossing the street to his home, received injuries from the defendant's speeding car, which caused his death. Instruction by the trial judge that violation of statute which sets a speed limit was evidence of negligence, *held* to be error that such violation was negligence as a matter of law. But it was for the jury to decide whether such negligence was the proximate cause of the injury. *Sandhofner v. Calmenson*, (Minn., 1927) 212 N. W. 11.

It is a general rule that liability for damages because of a violation of a statute or ordinance imposing some duty on a person is not affected by the fact that it is made a misdemeanor. *Parker v. Barnard*, 135 Mass. 116. But there is a great conflict of opinion as to how great weight such violation should have to show negligence. Many courts hold that a violation of a statute when an injury occurs is negligence as a matter of law, or negligence *per se*, while others say that it is only evidence of negligence, or prima facie evidence. Prof. Thayer sets down a very convincing reason for the former holding in an article in 27 HARV. LAW REV. 317, from which we quote, "And when eminent courts, using familiar phraseology, state that the breach of an ordinance is not 'negligence *per se*,' but only 'evidence of negligence,' and leave the question of negligence as a fact for the jury, they are doing nothing less than informing that body that it may properly stamp with approval, as reasonable conduct, the action of one who has assumed to place his own foresight above that of the legislature in respect of the very danger which it was legislating to prevent." But most courts that adopt the rule that it is negligence *per se*, add that it is not actionable negligence. In other words, it is negligence as a matter of law if the other elements of actionable negligence exist. *Steinkrause v. Eckstein*, 170 Wis. 487. The violation must be the proximate cause of the injury. *Hopkins v. Droppers*, 184 Wis. 400. *Conrad v. Railroad Co.*, 240 Ill. 12, 88 N. E. 180, holds that if the violation is the proximate cause, proof of the ordinance is negligence *per se*. See also *Oregon Box Co. v. Jones Lumbar Co.*, 244 Pac. (Ore.) 313.

The other class of cases on this subject holds that a violation of a statute is merely evidence, competent evidence, or prima facie evidence, to be considered along with the other elements and facts, and that it is for the jury to decide. States holding to this doctrine are, Maine, Massachusetts, Minnesota, New York, Ohio, and Pennsylvania. See *Ubelmann v. American Ice Co.*, 209 Pa.