Journal of Criminal Law and Criminology

Volume 21
Issue 3 *November*

Article 9

Fall 1930

Recent Criminal Cases

RECENT CRIMINAL CASES

Prepared by
STUDENT PUBLICATIONS BOARD OF
NORTHWESTERN UNIVERSITY LAW SCHOOL
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CRIMINAL LAW—ACCOMPLICE—DEFINITION AND NECESSITY OF CORROBORATION. —[Minnesota] The defendant and one Maurer, Minneapolis aldermen, agreed to divide equally any money which might be obtained in exchange for their votes in the city council. An agent for an automobile concern offered Maurer as a bribe a ten per cent commission if he and the defendant would vote to authorize the purchase of a truck from the company. The defendant refused to deal directly with the agent but voted for the purchase of the truck. After the said authorization had been obtained the agent gave Maurer $810 and Maurer gave the defendant his share, or $405. The defendant was convicted of the offense of receiving a bribe, and the validity of this conviction was questioned on appeal. The defense contended that Maurer was an accomplice of the defendant and that the conviction was invalid since it was admitted that it rested upon his uncorroborated testimony. *Held:* upon appeal (one judge dissenting), that Maurer was not an accomplice of the defendant because he could not have been indicted for the same offense as that of the defendant, for his receiving the bribe from the agent and his giving a bribe to the defendant were offenses distinct from the acceptance by the defendant of a bribe from him: *State* v. *Sweeney* (Minn. 1930) 231 N. W. 225.

Under the common law the value placed upon an oath rendered the testimony of an accomplice of equal weight with that of other witnesses: 3 *Wigmore* "Evidence" (2d ed. 1904) § 2056. It was later regarded with suspicion because of the obvious advantages of perjury: *Ibid.* § 2057. Juries were cautioned respecting the credibility of an accomplice, but a conviction might be supported upon his testimony alone: See *Re Meunier* [1894] 2 Q. B. 415, 418. This rule prevails in the Federal and some State courts today: *Harrington* v. *United States* (C. C. A. 8th, 1920) 267 Fed. 97; *People* v. *Vovitz* (1914) 262 Ill. 514, 104 N. E. 887; see *Caminetti* v. *United States* (1916) 242 U. S. 470, 495; *People* v. *Cotell* (1921) 298 Ill. 207, 214, 131 N. E. 659. It seems that the courts upon appeal have held this rule not to preclude a reversal of a conviction based upon the uncorroborated testimony of an accomplice, which the court, taking into consideration his accomplicity, believes to have been insufficient to establish guilt beyond a reasonable doubt: *People* v. *Aiello* (1922) 302 Ill. 518, 135 N. E. 62; see *Waters* v. *People* (1898) 172 Ill. 367, 50 N. E. 148. Statutes, however, in slightly more than half of the States render invalid a conviction resting upon the uncorroborated testimony of an accomplice: 3 *Wigmore* "Evidence" (2d ed. 1904) § 2056.

The courts appear to disagree upon a test to determine whether a witness is or is not an accomplice. Some courts have defined an accomplice as any person concerned in the commission of a crime, whether he has directly participated in the act constituting the offense, or has aided and abetted in, or, not being present, has advised and encouraged its commission: *People* v. *Coffey* (1912) 161 Cal.

433, 119 Pac. 901; *People* v. *Winant* (1898) 24 Misc. Rep. 361, 53 N. Y. S. 695; *Levering* v. *State* (1909) 132 Ky. 666, 117 S. W. 253; see *People* v. *Hyde* (1913) 156 App. Div. 618, 625, 141 N. Y. S. 1089, 1094; *Egan* v. *United States* (Ct. of App. D. C. 1923) 267 Fed. 958, 966. Other courts have declared that to be an accomplice a witness must be indictable for the same offense, as a principal or an accessory before the fact, or as an aider and abettor: *Bailey* v. *State* (1918) 76 Fla. 103, 79 So. 748 (see dissent of Brown, C. J., 76 Fla. 108); 1 *Wharton* "Criminal Evidence" (10th ed. 1912) § 440; see *People* v. *Sapp* (1917) 282 Ill. 51, 67, 118 N. E. 416, 417; *State* v. *Wappenstein* (1912) 67 Wash. 502, 527, 121 Pac. 989.

The decision in the instant case rests upon the latter of the above tests, that of indictability for the same offense. Of the five cases cited therein as authority for this definition, however, only one holding lends support, while three cases support it in dicta and one leaves it an open question. In *State* v. *Durnam* (1898) 73 Minn. 150, 75 N. W. 1127, upon which the greatest reliance appears to have been placed, the defendant was indicted for soliciting a bribe. One witness, who had refused to give the requested bribe, was held not to have been an accomplice. But he could in no sense have been considered an accomplice according to either test mentioned above. In *State* v. *Renswick* (1901) 85 Minn. 19, 88 N. W. 22, the court, while saying that in an indictment for procuring subornation of perjury the suborned would not be an accomplice, held that as to the completed perjury the suborned was an accomplice. *State* v. *Gordon* (1908) 105 Minn. 217, 117 N. W. 483, is the one case which in its holding supports the instant case. There, on an indictment for receiving stolen goods, the boys who had stolen the goods were held not accomplices of the defendant who had bought them. *State* v. *Lyons* (1919) 144 Minn. 348, 175 N. W. 689, held that an accessory after the fact, who had in no way co-operated in the alleged crime of fraudulently putting ballots in the ballot box, was not an accomplice. While the indictability test is referred to, no mention is made of whether the witness is indictable for the same offense charged against the defendant, and the decision is placed upon other unrelated tests. The most surprising case cited is *State* v. *Price* (1916) 135 Minn. 159, 160 N. W. 677, wherein the witness, who was held not to have been an accomplice, had actually been indicted for the same offense as the defendant. It was held that although the rule might be that if a witness is not indictable for the same offense he is not an accomplice, yet it does not follow that if he is so indictable he is an accomplice. The real test, it was said, is whether the witness co-operated with, aided, or assisted the person on trial in the commission of that crime either as a principal or accessory: *Ibid.* at 164. The decision reveals that what the justices in the instant case considered a test "to determine whether a witness *is* or *is not* an accomplice," is but one of several means of determining when a witness is *not* an accomplice. If, therefore, an affirmative determinant is required, it is necessary to revert to the test of the Federal and some of the State courts, making any *particeps criminis* an accomplice, one which the instant case states to be "what some may term the more logical test" but which precedent prevents it from following.

The principal case presents a factual situation in which two parties, according to a prior agreement, participated in a criminal transaction which by nature could not have been consummated but for the co-operation of both parties. Under the common law, and logically, both were guilty of one and the same offense, bribery, and were accomplices one of the other; see *People* v. *Coffey,*

supra, at 447, 119 Pac. at 903. Yet, if by statute this single transaction is divided as it is in Minnesota into two distinct crimes on the basis of the physical acts involved, namely, giving and receiving the money or other consideration, then obviously neither party can be indicted for having committed the same offense as the other in any one transaction. The indictability test in this new legal situation must necessarily hold neither is an accomplice of the other, although the co-operation of each is essential to the completion of the other's crime. According to such a test, then, those who are logically accomplices are by a mere technicality rendered no longer accomplices.

GEORGE KEVIN RAY.

CRIMINAL LAW—COMMENTS BY TRIAL JUDGE AS REVERSIBLE ERROR.—[Indiana] Defendant was found guilty of murder in the first degree by a jury which fixed the penalty at death. The important question in the case was whether the defendant had fired the fatal shot. According to one Winnegar, a witness, he [Winnegar] was in front of the restaurant where he worked and had an unobstructed view of all that had occurred, and testified that the first shot fired had killed deceased. There was evidence that defendant had fired only the second shot. In repudiation of Winnegar's testimony one Woods testified that he was working with Winnegar at the rear of the restaurant and that they were both quite a distance from the front of the building at the time the shots were fired and that he was positive Winnegar was not outside the restaurant at the time of the shooting. During the examination and cross-examination of Woods the court asked several questions, in effect, tending to discredit Winnegar, and saying, later, "I have no reason to doubt this man [Woods]." He then called the contradictory evidence particularly to the attention of the prosecuting attorney. The jury was present at the time. After conviction the defendant appealed, assigning as one ground of error the remarks of the court. *Held*: upon appeal, that there was prejudicial error, especially in view of the conflicting evidence and the death penalty. *Rhodes* v. *State* (Indiana 1930) 172 N. E. 176.

The decision in the instant case is consistent with prior cases in Indiana and follows the general line of reasoning of earlier cases: *Welty* v. *State* (1912) 180 Ind. 411, 100 N. E. 731; *Unruh* v. *State* (1885) 105 Ind. 117, 42 N. E. 453; *Garfield* v. *State* (1881) 74 Ind. 60; *Sutherlin* v. *State* (1897) 148 Ind. 695, 48 N. E. 246.

The question raised in this case is really a phase of the larger one—may a trial judge express his opinion as to the weight of the evidence and the credibility of witnesses to the jury? Although the point may seem, at first glance, to be a very minor one, yet the power to give an opinion may be vitally important in many cases, particularly, as in the principal case, in a trial for murder where the evidence is conflicting. The majority of the States, either by constitution or by statute, remove the trial judge's discretion in this matter. The reason given is that an opinion by a judge on any fact, especially where the evidence is conflicting, will unduly influence the jury: *McDuff* v. *Journal Co.* (1890) 84 Mich. 1, 47 N. W. 671; *People* v. *Simmons* (1916) 274 Ill. 528, 113 N. E. 887; *People* v. *Melnick* (1914) 263 Ill. 24, 104 N. E. 1111; *People* v. *Jacobs* (1910) 243 Ill. 580, 90 N. E. 1092; *Commonwealth* v. *Foran* (1872) 110 Mass. 179; *People* v. *Wood* (1891) 126 N. Y. 249, 27 N. E. 362; *People* v. *Hill* (1899) 37 App. Div. 327, 56 N. Y. S. 282. On the other hand, our Federal

courts and the English courts follow the common law in asserting that it is proper and desirable in some cases for the judge to have the power to give an opinion. They insist that if a judge cannot give an opinion he becomes a mere umpire, a figurehead with no authority, when he should be the guiding and directing force at the trial: *Foster* v. *United States* (1911) 188 Fed. 305, 110 C. C. A. 283; *Hyde* v. *United States* (1912) 225 U. S. 347, 32 S. Ct. 793; *Anderson* v. *United States* (1898) 170 U. S. 481, 18 S. Ct. 689; 5 *Wigmore* "Evidence" (2nd ed. 1923) sec. 2551; *Arthur Train* "The Prisoner at the Bar" pp. 180-189; *Cartwright* "Present But Taking No Part" (1916) 10 Ill. L. Rev. 537; *Kavanagh* "The Criminal and His Allies" pp. 213-5. It is believed that the latter view is the preferable one. It may be suggested, however, that in jurisdictions in which the judges are elected for a limited term instead of being appointed for a long term or for life, an element of political bias or personal gain may creep into a judge's opinion. With this factor present, a judge's opinion, always influential in a close case, may cause verdicts which are unjust. Such a condition in existence might defeat the purpose for which the Federal rule was adopted. The solution of this should be to lengthen the terms of judges or make the judiciary appointive, rather than deprive the jury of the value inherent in the excellent theory of comment by trial judges. Or, the terms of judges might be left as they are, and the question answered as it was in a recent excellent survey of this same subject, which resulted in a plea for the general adoption of a statute allowing comment by trial judges: "The Law of Evidence" (1927) Chapter II, pp. 9-21. It quotes Mr. Moorfield Storey (pp. 18-19) as having decisively answered the objection. His argument is, in effect, that as only a small percentage of cases are handled by a jury; and in the majority of cases the judges decide every question; and as judges have the power to set aside verdicts absolutely, they surely should be allowed to comment on the weight of the evidence and the credibility of witnesses in the minority of cases: (1918) 43 Reports of American Bar Association, p. 37.

O. C. KNUDSEN.

CRIMINAL LAW—CHANGE OF VENUE—DISCRETIONARY POWER OF TRIAL COURT. —[Texas] The defendant, under the influence of liquor, attacked his wife with a hand mirror and threatened to kill her. Under apprehension of death she jumped from a window, broke her spine and died three weeks later. The defendant was indicted for murder and upon trial the jury returned a verdict of guilty of "homicide." Upon appeal a new trial was ordered on the ground that there was no such offense as "homicide." The defendant then applied for a change of venue, alleging prejudice in the community, as evidenced by the character of the testimony of several witnesses at the former trial. The trial court denied the application. *Held:* upon appeal, that a judgment denying the application for a change of venue will not be disturbed on appeal unless it appears that the trial court has abused its discretion. Judgment affirmed: *Whiteside* v. *State* (Texas 1930) 29 S. W. (2nd) 399.

It has generally been held that if two conflicting theories as to prejudice arise from the evidence the trial court, in passing on an application for a change of venue, has discretionary power to adopt either theory: *Bishop* "New Criminal Procedure" (2nd ed. 1913) §§ 67a-76. Hence it is impossible to state when and upon what evidence a change of venue will be granted, but a study of the various cases may tend to show the process and results of this

power. It is not arbitrary, but is subject to review by higher courts: *People* v. *Yoakum* (1879) 53 Cal. 566 The burden is on the accused to show that an impartial trial within the jurisdiction is impossible: *Shelburne* v. *State* (1928) 111 Tex. Crim. R. 182, 11 S. W. (2nd) 519. Apparent ease or difficulty in securing a jury can be taken into account in passing upon an alleged abuse of discretion: *Bianchi* v. *State* (1919) 169 Wis. 75, 171 N. W. 639. Thus, it is strong evidence against prejudice in the community when there has been no trouble in securing a jury and the accused has not exhausted his peremptory challenges: *Miller* v. *United States* (C. C. A. 1923) 287 Fed. 864. Considerable publicity, as a rule, is not in itself sufficient to warrant a change of venue: *State* v. *Cianflone* (1923) 98 Conn. 454, 120 Atl. 347. Though some prejudice may exist against the accused at the place of the homicide, a change of venue need not be awarded unless such prejudice is shown to exist generally in other portions of the community: *Walker* v. *State* (1924) 98 Tex. Crim. R. 663, 267 S. W. 988. And the prejudice alleged must exist at the time the publication is made: *Phipps* v. *State* (1925) 100 Tex. Crim. R. 607, 272 S. W. 209. The threats of friends and relatives of the deceased are not conclusive of the existence of prejudice: *Griffin* v. *Commonwealth* (1924) 204 Ky. 783, 265 S. W. 327. When witnesses testify as to the existence of prejudice, more weight is given to the evidence of residents than non-residents: *McDonald* v. *Commonwealth* (1917) 177 Ky. 224, 197 S. W. 665.

It has been held an abuse of discretion not to award a change of venue when the accused's application has complied with all the requirements of the statute authorizing change of venue and has thus established a prima facie case, which the state's witnesses have not negatived: *Shipp* v. *Commonwealth* (1907) 124 Ky. 643, 99 S. W. 945. And it has been held that a change of venue should be awarded even when there is conflicting evidence, if the application shows a reasonable apprehension that the prejudice of the community will prevent a fair trial: *People* v. *Pfanschmidt* (1914) 262 Ill. 411, 104 N. E. 804. When difficulty has been had in obtaining a jury because of prejudice, the selecting of one from another jurisdiction will not cure the prejudice: *Bradley* v. *Commonwealth* (1924) 204 Ky. 635, 265 S. W. 291. Popularity and influence of the prosecutor has been held to be one of the grounds for showing the impossibility of a fair trial: *State* v. *Jackson* (1918) 110 S. C. 273, 96 S. E. 416.

The courts have declared that the accused has certain constitutional rights, relative to change of venue, which they will protect. He has a right to offer evidence and have it put in the record to show that he cannot obtain a fair and impartial trial within the jurisdiction: *State* v. *Morgan* (1917) 142 La. 755, 77 So. 588. And mandamus will lie to compel a court to take action upon an application which it has refused to pass upon: *Crocker* v. *Justices of Superior Court* (1911) 208 Mass. 162, 94 N. E. 369. But mandamus will not lie to compel a court to grant a change of venue: *State* v. *Gofford* (1894) 119 Mo. 408, 24 S. W. 1009; *State ex rel. Alfani* v. *Superior Court* (1926) 139 Wash. 125, 245 Pac. 929. It is generally held unconstitutional for a court to grant a change of venue against the consent of the accused: *State* v. *Charles and John Denton* (1869) 46 Tenn. 539; *Dougan* v. *State* (1875) 30 Ark. 41; *State* v. *Knapp* (1888) 40 Kan. 148, 19 Pac. 728. *Contra: Phipps* v. *State* (1925) 100 Tex. Crim. R. 607, 272 S. W. 209; Texas Crim Stat. (1925) Art. 560, 561.

This right may be waived however by the accused's failure to object: *State* v. *Albee* (1881) 61 N. H. 423.

JAMES A. CARLSON.

CRIMINAL LAW — HOMICIDE — INDICTMENTS. — [Oklahoma] An Oklahoma statute provides that homicide committed in the following situations is murder:

"First. When perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of another human being."

* * * * *

"Third. When perpetrated without any design to effect death by a person engaged in the commission of any felony." Okla. Comp. Stat. (1921) sec. 1733. The defendant was indicted for murder under subdivision 1 of the above statute. A conviction was procured on evidence that the defendant was intoxicated while driving the car which struck and killed the deceased, driving a car while intoxicated being a felony in Oklahoma. The conviction of the defendant, therefore, was procured on proof of a killing in the commission of a felony as stated in subdivision 3 of the statute. *Held:* upon appeal, that the state may charge a crime under subdivision 1 of the statute and prove the offense under any of the other subdivisions of the murder statute. These subdivisions were not intended to create different kinds of degrees of murder or to regulate questions of pleading, but only to enumerate the classes of evidence by which a murder may be proved: *Ware* v. *State* (Okla. 1930) 288 Pac. 374. Accord: *Holmes* v. *State* (1911) 6 Okla. Cr. Rep. 541, 119 Pac. 430; *Jones* v. *State* (1919) 15 Okla. Cr. Rep. 547, 179 Pac. 619.

A few courts insist that under an indictment for a specific statutory type of murder evidence of the commission of another specific type is inadmissible, being a variance between the allegations of the indictment and the proof; *Sheppard* v. *State* (1915) 120 Ark. 160, 179 S. W. 168; *Rayburn* v. *State* (1901) 69 Ark. 177, 63 S. W. 356; *State* v. *Reddington* (1895) 7 S. D. 368, 64 N. W. 170 (under a statute similar to that in the instant case). In cases involving the sufficiency of indictments for murder, however, the majority of the courts, as in the instant case, have been reluctant to construe murder statutes strictly. This trend toward liberal construction has been activated by the desire of the courts to seek freedom from technicalities in indictments. This movement may be traced back to the English statute of 14 & 15 Victoria, ch. 100 (1857) which summarily states that it is not necessary to set forth in the indictment for murder the manner in which the death of the deceased was caused; it is sufficient to charge in the indictment that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased. Where an indictment for murder charges that the offense was wilful and premeditated and the proof indicates that the crime was committed while perpetrating one of the felonies named in the murder statute, some courts, in order to reconcile the variance between the allegations in the indictment and the proof will imply that the intent to commit the felony in itself constitutes deliberation and premeditation: *State* v. *Mangana* (1910) 33 Nev. 511, 112 Pac. 693; *Wharton* "Criminal Law" (3rd ed. 1896) sec. 119; 1 *McClain* "Criminal Law" (1st ed. 1897) sec. 355. Some states prescribe by statute the indictment which is to be used for murder. Such indictment is similar to the English statute previously mentioned and consists mainly of allegations of premeditation and deliberation. The courts in these states will permit at the trial the introduction of proof that the crime was committed within

any of the statutory definitions of murder, and they consider the failure to set out the manner in which the murder was committed and the means used as an immaterial and non-prejudicial variance: *People* v. *Page* (1917) 198 Mich. 524, 165 N. W. 755. Similarly, in most states where murder is by statute divided into various subdivisions and an indictment for murder is not prescribed by statute, the indictment for murder containing merely the common law counts is sufficient to permit the admission of proof at the trial that the crime was committed within one of the statutory definitions of murder. *People* v. *Giblin* (1889) 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757; *State* v. *Mangana,* supra; *cf. Fouts* v. *State* (1858) 8 Ohio State 98; *State* v. *McCormick* (1869) 27 Iowa 402, contra. (Note that under an indictment as prescribed by statute Iowa will permit proof that the murder was committed while perpetrating a felony. *State* v. *Johnson* (1887) 72 Iowa 395, 34 N. W. 177). But *cf. Smith* v. *State* (1882) 50 Conn. 193 which holds that a common law indictment is sufficient provided an averment be added that the defendant committed the murder in the first degree. See also *Bergman* v. *Backer* (1894) 157 U. S. 655, 15 Sup. Ct. 727, which upholds the constitutionality of a state statute permitting the sufficiency of the common law indictment for murder. Despite the liberality extended to indictments for murder, the courts have been careful to protect the substantive rights of the defendant when the indictment for murder does not furnish the defendant with sufficient information to prepare his defense. Thus, in a proper case, the court will order or grant a bill of particulars. *People* v. *Beady* (1916) 272 Ill. 401, 112 N. E. 126 (held to be an absolute right); *People* v. *Davis* (1911) 39 R. I. 276, 97 Atl. 818 (held to be within the sound discretion of the court).

NORMAN A. KORFIST.

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—SPECIFIC INTENT.—[Texas]. The defendant in his attempt to coerce *A* into returning his ring, which the defendant accused *A* of having stolen, severely beat and wounded him. The defendant used only his fists and feet, but injured *A* so badly that he almost died. Upon proof of the above facts, the defendant was indicted for an assault with intent to murder, and a verdict of guilty was returned. *Held:* upon appeal, that the judgment of the trial court be reversed because the specific intent necessary to constitute the particular crime had not been proved: *Hawkins* v. *State* (Texas 1930) 29 S. W. (2d) 384.

Most state statutes have graded assault into various degrees, and when specific intent by statute is made a part of a crime, that particular intent must be proved: *State* v. *Mulhall* (1906) 199 Mo. 202, 97 S. W. 583, 7 L. R. A. (N. S.) 630, 8 Am. & Eng. Ann. Cas. 781; *Lacefield* v. *State* (1879) 34 Ark. 275, 36 Am. Rep. 8; *People* v. *Keefer* (1861) 18 Cal. 637, Ann. Cas. 1912A, 1063; *Commonwealth* v. *O'Donnell* (1890) 150 Mass. 502, 23 N. E. 217. All the cases agree that intent to take life is an essential element of the crime charged; *United States* v. *Tharp* (1838) 5 Cranch C. C. 390, Fed. Cases No. 16,458; *State* v. *Musick* (1890) 101 Mo. 260, 14 S. W. 212; *Watts* v. *State* (1891) 30 Tex. App. 533, 175 S. W. 1092; *Johnson* v. *State* (1861) 29 N. J. L. 453; *Wharton* "Criminal Law" (11th ed. 1912) Vol. II secs. 838, 839 and cases cited. Divergence of opinion, however, prevails as to the proof of that specific intent. Most courts hold that the specific intent to take life is not proved by the mere acts of the defendant which constitute the assault charged, no matter how harmful they may be. Therefore, no presumption is indulged in as to the

existence of this specific intent, and the prosecution must show by other evidence that the defendant was possessed of the "mens rea": *State* v. *Taylor* (1896) 70 Vt. 1, 39 Atl. 447; *Commonwealth* v. *Barlow* (1808) 4 Mass. 439; *State* v. *Neal* (1854) 37 Me. 468; *Watson* v. *State* (1891) 2 Wash. 504, 27 Pac. 226; *State* v. *Hill* (1911) 25 Del. 537, 82 Atl. 221. The principal case also maintains this position. That a presumption of malice may arise from such acts, which supplies the specific intent necessary to the crime charged, is held by the courts of Illinois: *Conn* v. *People* (1886) 116 Ill. 458, 6 N. E. 463 (reckless discharge of pistol); *Crosby* v. *People* (1891) 137 Ill. 325, 27 N. E. 49 (kicking and beating); *People* v. *Cohen* (1922) 305 Ill. 506, 137 N. E. 511 (shooting but wounding another); *People* v. *Haskins* (1929) 337 Ill. 131, 169 N. E. 18 (threat with loaded pistol). Acts held insufficient to raise presumption of malice: *Freidrich* v. *People* (1893) 147 Ill. 310, 35 N. E. 472 (brandishing a stick); *Meyer* v. *People* (1895) 156 Ill. 126, 40 N. E. 490 (one fist blow). Unanimity of judicial decision, however, prevails in the application of the objective test of whether or not the defendant used a dangerous weapon, i. e., the courts imply the necessary intent to charge the defendant with this particular crime when it is shown that he used a dangerous weapon in a threatening manner, and that instrument was capable of doing "great bodily harm": *People* v. *Conners* (1912) 253 Ill. 266, 97 N. E 643, 39 L. R. A. (N. S.) 143, Ann. Cas. 1913A, 196; *State* v. *Durham* (1875) 72 N. C. 447; *Read* v. *Commonwealth* (1873) 22 Gratt (Va.); *Louisiana* v. *Thomas* (1911) 127 La. 576, 53 So. 868, 37 L. R. A. (N. S.) 172.

It is submitted that the principal case reaches a rather undesirable result, for in that case *A* was beaten unmercifully, being abandoned in an apparently dying condition, yet no intent of murder being proved, the defendant goes scot free, at least as far as this charge is concerned. We might note that in another type of case in which the defendant threatens *A* with a drawn loaded pistol, he may be held guilty of an assault with intent to kill: *People* v. *Connors* (1912) 253 Ill. 266, 97 N. E. 643.

J. E. SERHANT.