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CONSTITUTIONAL LAW—PRESENCE OF ALTERNATE JUROR IN JURY ROOM. —[California] Defendant was found guilty of kidnapping, a felony under the California Law: Cal. Pen. Code (Deering, 1931) §209. This appeal is from the judgment entered against him. At the trial, the judge foresaw that the proceedings might be protracted, and after the regular jury had been sworn, he swore in two persons as alternate jurors, in accordance with the Alternate Juror Statute: Cal. Pen. Code (Deering, 1931) §1089. At the close of the trial, but before the jury had retired to deliberate, in order to determine the meaning of the 1933 amendment to the Code regarding the custody of alternate jurors, it was stipulated with the consent of the defendant that the two alternate jurors be allowed to accompany the jury to the jury room so as to profit by the discussions of the jury in the event they should be needed later as substitutes, but otherwise to take no part in the deliberations. *Held:* on appeal, reversed. Presence in jury room during deliberations of jury in criminal case of alternate jurors to whom the case had not been submitted for decision is reversible error: *People* v. *Bruneman,* (Cal. App., 1935) 40 Pac. (2d) 891.

Cal. Pen. Code (Deering, 1931) §1089, permitting alternate jurors, was adopted in 1895, and allows the trial court to have one or two alternates appointed, within his discretion when it appears to him that the trial may be protracted. Such alternates are afforded the same opportunity to hear the proceedings of the trial as the regular panel of twelve. As the statute was originally, the alternate juror might be substituted for any juror who became ill or died, or was forced to withdraw from the jury for any other valid reason before the case was finally submitted to the jury. If no need had arisen for the substitution of an alternate by the time the case was submitted to the jury, the alternates were dismissed. In 1933, §1089 was amended. Alternate jurors were selected in the same manner and under the same circumstances as before, and were also afforded the same opportunity to hear the proceedings of the trial. The change in the statute was that they should not be discharged on the final submission of the case to the jury, but should be kept in the custody of the sheriff until the final discharge of the original jury, and they should be available for substitution for any of the regular jurors in case of need, either before or after the final submission of the case to the jury. The important question here involved is whether this amendment permits of the al-

ternates' being present in the jury room during the deliberations.

Perhaps the most recent, and most carefully drafted Criminal Code in this country, is the one now being considered in Illinois, which was planned by a committee of the Illinois State Bar Association. It is interesting to note that this proposed code contains a section permitting the selection of alternate jurors if the judge thinks the trial is apt to be protracted: §434 of the proposed Illinois Criminal Code. This provision is very much like that in force in California prior to its amendment, and calls for the discharge of the alternates upon the final submission of the case to the jury, if they have not been needed prior to that time. Similar measures are being considered by a large number of Bar Associations: *e. g.,* 25 J. Crim. L. 466.

The California Constitution provides that the right to trial by jury shall remain inviolate: Cal. Const., art. I, §7. In *People* v. *Powell* (1891) 87 Cal. 348, 25 Pac. 481, this was construed as guaranteeing the right as it existed at common law. However, the qualifications of the jurors may be fixed by statute: *Ex parte Mana* (1918) 178 Cal. 213, 172 Pac. 986. In *People* v. *Peete,* (1921) 54 Cal. App. 333, 202 Pac. 51, it was decided that the appointment by the court of alternate jurors, and even the substitution of one of these jurors, when done in the manner provided by statute does not impair the right to a trial by jury as known at common law, but it was merely a reasonable regulation respecting the enjoyment of such right. The basis for this decision was that at common law there are three requisites to trial by jury: that issues of fact be passed on by twelve persons; that these persons be impartial; that their decision be unanimous. See *Jennings* v. *State* (1908) 134 Wis. 307, 114 N. W. 492; *Harris* v. *People* (1889) 128 Ill. 585, 21 N. E. 563. Under the Alternate Juror Statute, at all times there were only twelve jurors considering issues of fact, and it was intended as a mere procedural change from the common law, where the entire jury would have to be discharged if any one juror became unable to serve, by allowing substitutions to keep the jury at its full number of twelve during the entire trial. The recent amendment to the act was not intended to alter the numerical requirement of twelve persons serving on a jury, but went one step further in allowing a substitution even after the deliberations of the jury had commenced.

In the instant case the California Appellate Court decided that the provision of the Statute calling for the keeping of these alternates in the custody of the sheriff was not intended to allow the alternates to be present during the deliberations of the jury. The right of a jury to deliberate in private has long been a part of the common law, dating at least to 1628: "Co. Litt." §366. The principle still obtains in England, having been recently applied in *The King* v. *Wood,* Ex parte *Anderson,* [1928] 1 K. B. 302, where it was held reversible error for a coroner to go into the jury room after the jury had retired to consider their verdict. In Canadian criminal cases, the rule has not been so strictly applied, and the test has been whether the presence or act of the person whose presence in the jury room was unauthorized, has resulted in a miscarriage of justice: *Rex* v. *Batterman* (1915) 24

Can. C. C. 351; *Rex* v. *Meharg,* (1921) 51 O. L. R. 229. There is also some division of opinion in this country, but all courts agree at least that if the defendant could reasonably be prejudiced by the presence of an outsider in the jury room, the error is reversible: *People* v. *Knapp* (1879) 42 Mich. 267, 3 N. W. 927; *Rickard* v. *State* (1881) 74 Ind. 275. The same reasoning has been applied to the deliberations of the grand jury: *State* v. *Bowman* (1897) 90 Me. 363. The California court relies on the *Knapp* case, *supra,* and the *Rickard* case, *supra,* and concludes that since the alternate juror is not one of the jurors until he has actually been substituted (*People* v. *Peete, supra*), it was error to allow these strangers to be present during the deliberations of the jury, an error so prejudicial that it can be assumed the defendant was harmed thereby.

This result does not seem to be based on sound reasoning. The fact that the defendant consented to the presence of the alternates in the jury room would indicate that he did not consider their mere presence, in silence, prejudicial. In the absence of a showing of some harmful result from their presence, other courts have held that the presence of a stranger in a jury room is not reversible error. *Doles* v. *State* (1884) 97 Ind. 555, an Indiana case later than the *Rickard* case, *supra,* relied on by the California court holds that where the presence of a stranger in the jury room is not prejudicial, the error is not reversible. The court seems to disregard its own decision of *People* v. *Rowell* (1901) 133 Cal. 39, 65 Pac. 127, holding that unless such misconduct affects the impartiality of the jury, or disqualifies them from the proper performance of their duties, it is not such misconduct as will affect their verdict. See also *Coats* v. *State* (1911) 101 Ark. 51, 141 S. W. 197.

It is to be noted that the present decision does not declare the amendment to the California Statute unconstitutional, but merely says that the procedure here used was not in conformity with the intent of the legislature in drafting this statute. When this question arises, it is possible that the California court will extend the doctrine of *People* v. *Peete, supra,* by saying that so long as the alternate juror is not allowed in the jury room until he is needed, it would then be proper to substitute him for a regular juror in accordance with the amendment, for in this way the jury would at all times consist of twelve people. The advisability of sustaining this amendment is doubtful, for if the alternate juror were actually substituted at any time after the final submission of the case to the jury, he would be deprived of that part of the deliberations of the jury that had preceded his substitution, and the questions there discussed might not recur after his substitution, perhaps to the defendant's prejudice.

E. V. Moore.

Criminal Contempt — Conclusiveness of Defendant's Answer. —[Illinois] Three assistant state's attorneys and an agent of the governor were ordered to show cause why they should not be punished for contempt of court. The petition was based on the defendant's alleged participation in a consummated agreement to avoid a writ of habeas corpus. Individual sworn answers were filed by each defendant denying the charge. The judge

held them guilty of indirect criminal contempt and clearly indicated that his decision was based on the facts as stated in all the answers considered collectively. *Held:* on appeal, reversed. Each answer is to be deemed conclusively to be true, and if sufficient in itself to purge the contempt, its author is entitled to a discharge regardless of impeaching information otherwise brought to the knowledge of the judge: *People* v. *Northup et al.* (1935) 279 Ill. App. 129.

It is undeniable that this principle of purgation as stated by the appellate court has been the rule consistently applied to indirect criminal contempts in law actions in this state. A complete statement is found in *People* v. *McLaughlin* (1929) 334 Ill. 354, 166 N. E. 67, where the court speaking of indirect criminal contempts proceedings said, "In such cases the defendant is tried upon his answer alone. No other evidence may be heard. If the party charged shows by his answer under oath that he is not guilty of the contempt charges, his answer is conclusive. If the answer is false, the remedy is by indictment for perjury. The answer must be taken as true, and if sufficient to purge the party of the contempt he is entitled to be discharged." This rule, however, is inapplicable to civil contempts: *O'Brien* v. *People* (1905) 216 Ill. 354, 75 N. E. 108; to equity proceedings: *Storey* v. *People* (1875) 79 Ill. 45; to contempts based on special statutes providing for a definite procedure in trying violations thereof, *People* v. *Sylvester* (1926) 242 Ill. App. 565.

The chain of justification suggested in the Illinois decisions is threefold: 1) our statute adopts the English common law, 1606. Ill. Rev. Stat. (Cahill, 1933) c. 28, §1. 2) The declaration in *Welch* v. *People* (1889) 30 Ill. App. 399, that Blackstone is the conclusive authority in Illinois as to the common law at that date. 3) The dictum based on Blackstone in *Crook* v. *People* (1885) 16 Ill. 534, considered as a controlling statement of the application of the rule.

The historical basis for the rule that in proceedings of indirect criminal contempts the defendant's answer is the exclusive and conclusive evidence available to the court has been discredited by Sir John C. Fox. His recent thorough investigation of the actual English procedure demonstrates that contempts committed by strangers out of court against the dignity of the common law courts were punished not summarily but by information or indictment until 1641: *Fox*, "The History of Contempt of Court" (1927). It was not until the abolition of the Star Chamber that the court of the King's Bench was given power by Parliament to punish all contempts summarily: 16 Car. 1, cc. 10, 11. This authority, however, was not exercised by the court as to indirect criminal contempts until 1721 in the case of *King* v. *Barber* (1721) 1 Strange 244; see also, *Curtis and Curtis*, "The Story of a Notion in the Law of Criminal Contempt" (1927) 41 Harv. L. Rev. 51. Forty-four years only elapsed between this first exercise of the power and C. J. Wilmot's statement in *King* v. *Almon* that the practice in the afore-mentioned case was "immemorial." (1765) Wilm. 243. A clear and vigorous repudiation of this treatment of the defendant's answer came thirty-one years later in England when the court said that it was a better policy to allow the

judge to hear whatever evidence was available under the rules of a full trial procedure: *In the Matter of Crossby* (1796) 6 T. R. 701.

But the error of Wilmot was preserved for some American jurisdictions by Blackstone who quoted the former without investigation as to his accuracy: 4 Bl. Comm. *288 (1765). The Appellate Court, moreover, would seem to have been in error in *Welch* v. *People, supra,* when it stated that Blackstone was the conclusive authority on the common law as it existed in England in 1606. For in *People* v. *Bruner* (1931) 343 Ill. 146, 175 N. E. 400, the supreme court in reaching its decision as to whether the jury at common law in 1606 was the trier of the law as well as of the facts, searched the entire field of legal literature for information. Thus, since the historical basis no longer exists, upon what other theory can the doctrine be upheld? None has been suggested by decisions involving the question: *O'Brien* v. *People* (1905) 216 Ill. 354, 75 N. E. 108; *Hake* v. *People* (1907) 230 Ill. 174, 82 N. E. 561; *People* v. *Seymour* (1916) 272 Ill. 295, 111 N. E. 1008; *People* v. *McDonald* (1924) 314 Ill. 548, 145 N. E. 636; *People* v. *Rongetti* (1931) 344 Ill. 107, 176 N. E. 292; *People* v. *Whitlow* (1934) 357 Ill. 34, 191 N. E. 222.

The objections to enforcing the rule have been numerous. One of the most serious is that the principle of purgation in compelling the defendant to answer violates the constitutional privilege against self-incrimination. The courts have felt themselves so bound by the traditional sanctioning of requiring the defendants to answer regardless of their objection, that they have been forced to evade the question as a practical necessity; that is, if the court could not require the defendant to answer, and if his answer was the exclusive evidence upon which the court determines the question of guilt or innocence, there would be no method of upholding the dignity of the tribunal without nullifying the rule: *O Neil* v. *People* (1904) 113 Ill. App. 195; *People* v. *Seymour, supra; Kanter* v. *Clerk of Circuit Court* (1903) 108 Ill. App. 287. Unjustifiable distinctions have been attempted as replies to the charge of self-incrimination such as distinguishing between contempt proceedings which are criminal or quasi-criminal in nature and those which are of a remedial character, and thus not within the privilege. It has also been claimed that the contempt proceeding is not a trial and that therefore the defendant is not answering in the capacity of a witness so that his answers cannot be considered as evidence. These vague generalities have been scoffed at by common sense judges who have insisted upon the fair administration of court proceedings by allowing the judge to consider a large variety of evidence and thus to protect the defendant's privilege of silence: In re *Verdon* (1916) 89 N. J. L. 16, 97 Atl. 783; see also, Justice Holmes' statement in *U. S.* v. *Shipp* (1906) 203 U. S. 563, 27 S. Ct. 165.

The expressions of dissatisfaction with the rule made by the very judges who have applied it in Illinois is a potent argument in favor of the abolition of the rule: *Welch* v. *People, supra; O'Brien* v. *People, supra,* and the opinion in the instant case. This could be done by the legislature with the added advantage of certainty: *Welch* v. *People, supra* (concurring opinion of J. Moran). That body, however,

has taken no action after the judicial suggestion was made in 1889 and now, that Sir John Fox has clearly demonstrated that the basis upon which the Illinois doctrine rests is erroneous, the court should exercise its power to put this jurisdiction among the enlightened group whose tribunals by their own initiative have eliminated this antiquated practice: In re *Matter of Crossby, supra; U. S.* v. *Shipp, supra; Clark* v. *U. S.* (C. C. A. 8th, 1932) 61 Fed. (2d) 695; Ex parte *Bankhead* (1917) 200 Ala. 102, 75 So. 478; *Pel* v. *Thompson* (1932) 91 Colo. 566, 17 Pac. (2d) 538; *Huntington* v. *McMahon* (1880) 48 Conn. 174; *Dobbs* v. *State* (1875) 55 Ga. 272; *Ex parte Gould* (1893) 99 Cal. 360, 33 Pac. 1112; In re *Nickell* (1892) 27 Kans. 734, 28 Pac. 1076; *Ramsay* v. *Ramsay* (1921) 125 Miss. 715, 88 So. 280; In re *Haines* (1902) 67 N. J. L. 442, 51 Atl. 929; *Crow* v. *State* (1859) 24 Tex. 12. This would be the better policy of judicial administration in allowing the judge to gain the benefit of all the available evidence instead of being hindered by the "blinders" imposed by the instant holding. The opportunities for bold perjury under sanction of the present rule would disappear. The temptation now existing to those who know of the technical restrictions on the judge's power to act in indirect criminal contempt proceedings, to take advantage of the opportunity given to gain unethical ends (such as here were obtained by the state's attorneys) would be abolished.

HORTENSE KLEIN.

HOMICIDE COMMITTED IN PERPETRATION OF ARSON AS MURDER—NECESSITY OF INTENT TO KILL.—[Ohio] Defendant set fire to a store owned by him and others for the purpose of obtaining the insurance thereon. Upper floors of the building were used as apartments and were occupied at the time. Several of the occupants died in the ensuing fire. Defendant was convicted of murder in the first degree. *Held:* on appeal, modified to manslaughter. To constitute murder in the first degree there must be a specific intent to kill. *Turk* v. *State* (Ohio, 1934) 194 N. E. 425.

At common law any homicide resulting from the perpetration or attempt to perpetrate a felony was murder. Intent to kill was an essential ingredient of murder, but such intent could always be conclusively presumed where the homicide occurred during the commission of a felonious act: *Clark and Marshall* "Crimes" (2d ed., 1895) §242; *State* v. *Glover* (1932) 330 Mo. 709, 50 S. W. (2d) 1049, 87 A. L. R. 400; *State* v. *Cooper* (1833) 13 N. J. L. 361, 25 Am. Dec. 490; *Washington* v. *State* (1930) 187 Ark. 1011, 28 S. W. (2d) 1055. A limitation on the above rule was expressed in *Reg* v. *Serne* (1887) 16 Cox C. C. 311, requiring that the felony be one known to be dangerous to human life before the homicide could be murder. This restriction has been adopted in some jurisdictions: *People* v. *Olesen* (1889) 80 Cal. 127, 22 Pac. 125; *Lamb* v. *People* (1880) 96 Ill. 73; *State* v. *Glover, supra.* It has been said that if the unlawful act were only a misdemeanor and a homicide resulted, the crime would be murder at common law, *State* v. *Shelledy* (1859) 8 Iowa 477, but that doctrine is usually restricted to cases where the misdemeanor involves a breach of the peace, *Brennan* v. *People*

(1854) 15 Ill. 511, or where the unlawful acts are such as would endanger human life: *U. S.* v. *Ross* (1813) 27 Fed. Cas. No. 16, 196; *State* v. *Jimmerson* (1896) 118 N. C. 1173, 24 S. E. 494; *State* v. *Finely* (1896) 118 N. C. 1161, 24 S. E. 495.

The great majority of states have adopted the common law rule by legislation, and no intent to kill need be shown where the homicide is the result of the perpetration of a felony. Thus, death resulting from the commission of the crime of arson is murder: *Riddick* v. *Com.* (1895) 17 Ky. 1020, 33 S. W. 416; *State* v. *Meadows* (1932) 330 Mo. 1020, 51 S. W. (2d) 1033. In a recent Illinois case the defendant set fire to his store for the purpose of collecting the insurance thereon. The partition wall between defendant's store and an adjoining residence was burnt through and several occupants of the dwelling were burned to death. The conviction of defendant for murder under Ill. Rev. Stat. (Smith-Hurd, 1933) c. 38, §363, was upheld: *People* v. *Goldvarz* (1931) 346 Ill. 398, 178 N. E. 892. Even in the absence of express statutory provisions, the requirement of an intent to kill has been satisfied by presuming that the defendant intended the natural and probable consequences of his acts: *People* v. *Chiaro* (1911) 200 N. Y. 316, 93 N. E. 931; *State* v. *Stitt* (1908) 146 N. C. 643, 61 S. E. 566, 17 L. R. A. (N. S.) 308; *Turner* v. *State* (1912) 8 Okla. Cr. 11, 126 Pac. 452; *People* v. *Bennett* (1911) 161 Cal. 214, 118 Pac. 710. The policy of the majority rule would seem to be a healthy one. The ruthless perpetrators of criminal acts which, by their very nature, tend to jeopardize human life and safety should be punished to the extent of the law.

The Ohio court in the instant case concluded that the statute requires a specific intent to kill before a homicide committed in the perpetration of arson can be murder. The statute reads: "Whoever purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another, is guilty of murder in the first degree." Code of Ohio (Throckman, 1934) c. 3, §12,400. While it is true that a literal construction of the statute would require that an intent to kill exist in the mind of the defendant at the time the homicide was committed, yet there is nothing in the statute to prevent the court from implying that intent as in the majority of jurisdictions. The Ohio court cites no authorities and inspection of previous Ohio cases reveals none. In fact there are strong dicta in previous Ohio cases in which the court has indicated that it viewed with approval the doctrine of presumed intent applied by the courts of all other jurisdictions: *Jones* v. *State* (1894) 51 Ohio St. 331, 38 N. E. 79; *Conrad* v. *State* (1906) 75 Ohio St. 52, 78 N. E. 957. True, in *Robbins* v. *State* (1857) 8 Ohio St. 151, homicide resulting from administering poison for purposes of producing an abortion was held not to be murder in absence of an intent to kill, but this situation is covered in Ohio by a statute making death by abortion a crime of lesser degree than murder: Code of Ohio (Throckmorton, 1934) c. 3, §12,412. Also, in *Fouts* v. *State* (1857) 8 Ohio St. 98, it was held that where death resulted from an assault and battery an allegation of intent to kill had to be made in the indictment before a conviction could

be had for murder, but it is to be noted that ordinary assault and battery is not a felony and the holding in that case offers no authority for the result of the instant case. Here, the court infers that there might be a case in which intent would be presumed but declines to do so, stating that *the death was not the natural and probable consequence of the defendant's act.* It is difficult to conceive of a case where the resulting death could be more probable than one where a building which is being used and occupied is set afire. If the court will not indulge in the presumption in such a case it probably will never do so.

It is submitted that the decision is based upon an unnecessarily narrow construction of the Ohio statute and is difficult to justify on principle or by precedent.

W. J. STELLMAN.

ASSAULT WITH INTENT TO ROB—PRESENT ABILITY.—[Illinois] The defendant was convicted of assault with intent to rob and sentenced to the penitentiary for a period of from one to fourteen years as provided by Ill. Rev. Stat. (Smith-Hurd, 1933) c. 38, §58. The accused met one Hyman Washan on stairs leading from the second to the first floor of an apartment building in Chicago, thrust his right hand into the left side of the witness and said, "Stick 'em up.' As the witness raised his hands the defendant started to go through Washan's pockets with his left hand. Washan moved slightly at the start of these operations and defendant's hands slipped. The victim looked down and saw, for the first time, that the defendant did not have a gun, whereupon he seized the defendant's hands and pushed him down-stairs into the arms of two police officers who had just entered the vestibule of the building. The Public Defender of Cook County contended that the evidence showed not an *assault* as charged in the indictment but an *attempt to commit robbery* and therefore punishable under §581 of the Criminal Code by from one to five years. *Held:* on appeal, affirmed. It is sufficient to support a conviction of assault with intent to rob that the victim is put in fear of suffering a violent injury: *People* v. *Rockwood* (1934) 358 Ill. 422, 193 N. E. 449.

Since the crime is statutory, before we begin any discussion of the problem, we must understand the legislative intent as expressed by the statutes themselves. "An assault is an unlawful attempt *coupled with the present ability* to commit a violent injury upon the person of another." Ill. Rev. Stat. (Smith-Hurd, 1933) c. 38, §55. "An assault with intent to commit murder, rape, mayhem, robbery, larceny or other felony shall subject the offender to imprisonment in the penitentiary for a term of not less than one nor more than fourteen years." Ill. Rev. Stat. (Smith-Hurd, 1933) c. 38, §58. "Whoever attempts to commit any offense prohibited by law, and does any act towards it but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished, when the offense thus attempted is a felony, by imprisonment in the penitentiary not less than one, nor more than five years." Ill. Rev. Stat. (Smith-Hurd, 1933) c. 38, §581.

To convict for the offense of assault with intent to commit a fel-

ony the elements of an assault must clearly be proved as well as an intent to commit the felony: *State* v. *Greco* (1918) 30 Del. 140, 104 Atl. 637 (assault with intent to rape); *Foss* v. *State* (Ohio App. 1930) 173 N. E. 296 (assault: intent to rob).

The Illinois Court has not been consistent in interpreting the assault with intent statute. *People* v. *Connors* (1912) 253 Ill. 266, 97 N. E. 643, did not require a specific intent to commit a murder to convict of assault with intent to murder (the demand of the assailant was in the alternative). Later, in *People* v. *Parker* (1914) 264 Ill. 36, 105 N. E. 740, the court declared it was as essential in a charge of assault with intent to murder to prove the intent as it was to prove the assault, and to prove it with the same certainty. In *People* v. *Henry* (1934) 356 Ill. 141, 190 N. E. 361, no specific intent was deemed necessary in a charge of assault with intent to rob. However, in *People* v. *Jenkins* (1931) 342 Ill. 238, 174 N. E. 30, the court insisted upon a factual intent coupled with the present means of effecting this intent in a charge of assault with intent to rape. It is to be noted that this last offense has never been interpreted as strictly as the offense in the instant case: see *Franey* v. *People* (1904) 210 Ill. 206, 71 N. E. 443. And to support an indictment for an assault with intent to commit mayhem it must appear that the means employed were adequate and the assailant intended to employ these means for the purpose of mayhem: *Dahlberg* v. *People* (1907) 225 Ill. 485, 80 N. E. 310.

It is conceded by the Public Defender that the defendant had the intent to rob, but the question is whether he had the intent to commit a violent injury on the victim, an intent which is manifested by proving *a present ability* in the defendant to commit the violent injury. Does a man's finger constitute such present ability as is capable of inflicting a violent injury upon the person of another? This is the question upon which the case turns. In the instant case and *People* v. *Henry, supra,* the court has adhered to the practice of judicial legislation and altered the statute written by the Illinois Legislature to read, "An assault is an unlawful attempt coupled with *real or apparent* present ability to inflict a violent injury on the person of another."

Apparent Present Ability: The courts, at common law, were evenly divided as to whether a menace with an unloaded gun was sufficient to constitute a criminal assault. Under a statute making it a felony to assault another with a loaded weapon, even so technical a judge as Baron Parke held that the statutory assault was committed by pointing an unloaded gun: *Reg.* v. *St. George* (1840) 9 C. & P. 483. Sir Frederick Pollock in his "Treatise on Torts" (11th ed., 1920) p. 215, thought that this rule should be followed, but as will be shown later in this comment different fundamental policies are involved in criminal law. The later English cases expressly reversed Baron Parke's holding and insisted that a present ability should exist: *Reg.* v. *James* (1844) 1 Car. & K. 530; *Reg.* v. *Baker* (1844) 1 Car. & K. 254.

Many American courts, under the common law or under variously worded statutes, have held that "putting in fear" is sufficient to constitute the offense. None of these courts were interpreting an assault statute worded as the Illinois Statute: *People* v. *Tremaine* (1927) 129

Misc. Rep. 650, 222 N. Y. Supp. 432 (the New York statute expressly declares that pointing an unloaded firearm at another in a threatening manner constitutes an assault, where the party at whom it is pointed does not know that it is not loaded, or has no reason to believe that it is not, and is, by the act of the menacing party put in fear of bodily harm); *Price* v. *U. S.* (C. C. A. 9th, 1907) 156 Fed. 950; *Crumbley* v. *State* (1878) 61 Ga. 582 (here the defendant actually fired a light powder charge at the victim as a "prank"); *State* v. *Atkinson* (1906) 141 N. C. 734, 53 S. E. 228 (N. C. Code Ann. (Michie, 1931) §4216, expressly makes pointing of an unloaded gun, an assault); *Ford* v. *State* (1904) 71 Neb. 246, 98 N. W. 807; *Commonwealth* v. *White* (1872) 110 Mass. 407; *State* v. *Shepard* (1859) 10 Ia. 126. *Contra: State* v. *Jerome* (1891) 82 Ia. 749, 48 N. W. 722; *State* v. *Lewis* (1915) 173 Ia. 643, 154 N. W. 432 (changing the Iowa rule). Mr. Justice Wells in *Commonwealth* v. *White, supra,* presented as reasons for adhering to this view that it is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack he is justified in resorting to defensive action. The same rule applies, said this judge, to the proof necessary to sustain a criminal complaint for an assault, for it is the outward demonstration that constitutes the mischief which is punishable as a breach of the peace.

As expressed by Professor C. A. Keigwin in "Is an Intent to Do Harm Requisite to a Criminal Assault?" (1928) 17 Georgetown Law Journal 56, the essence of the wrong is the violation of security, the disturbance of mental composure, and the generation of fear in the mind. Such views have been uttered by many leaders in Criminal Law: 2 *Bishop,* "Criminal Law" (9th ed., 1923) §32 (assault is defined as an apparent attempt to do corporal hurt to another); *Clark & Marshall,* "Crimes" (2d ed., 1905) §206.

Actual Present Ability: It seems that theoretically, at least, an opposite view would be the correct one. An able exponent of this idea states that crimes are usually considered subjectively, not objectively; the state of mind of the accused is the important consideration, and not the state of mind of the person injured: *Miller,* "Criminal Law" (1934) p. 305. The test should be the intent of the accused, not the fear of injury of the victim of the alleged assault. Larceny is committed because the taker has the intent to steal, not because the victim thinks he is robbed; burglary is only committed when the intruder enters with intent to commit a felony, not when, in the absence of such intent, the householder is put in fear by an entry with some other intent. Furthermore, it is a general principle of law that there is no crime unless intent accompanies the crime. For an able discussion of the maxim, *"Actus non facit reum, nisi mens sit rea"* see *Levitt,* "The Origin of the Doctrine of *Mens Rea*" (1922) 17 Ill. Law Rev. 117; *Levitt,* "Extent and Function of the Doctrine of *Mens Rea*" (1923) 17 Ill. Law Rev. 578. Also assault is generally considered an attempt to commit a battery, and in attempts to commit crimes it is universally held that an

intent is an essential element: *Dahlberg* v. *People, supra.*

The view that intent and, as a necessary corollary, present ability is not necessary proceeds on two grounds. The first is that an act of the defendants putting the victim in fear would justify the victim in repelling the force with which he is menaced. This is true enough, but not because the defendant is guilty of an assault, but rather on the ground of mistake of fact: *Steinmeyer* v. *People* (1880) 95 Ill. 383; *People* v. *Welch* (1888) 71 Mich. 548, 39 N. W. 747. The second ground is the application by some courts of the tort doctrine of assault in criminal cases. (See *Beach* v. *Hancock* (1853) 27 N. H. 223; *Allan* v. *Hannaford* (1926) 138 Wash. 432, 244 Pac. 700.) This was done by Baron Parke in *Reg.* v. *St. George, supra,* and Mr. Justice Wells in *Commonwealth* v. *White, supra.* Admittedly, one who has suffered from the act of another should be entitled to recover damages in a civil action whether there was any actual intent to harm or not. Such civil actions lie since they rest on the invasion of a person's right to live in society without being put in fear of personal harm. But generally the criminal law extends its protection against certain acts only to benefit the state and punishment is inflicted on the ground of injury to the public at large. Therefore, an act which would constitute a cause of action for which damages might be recovered by an injured individual is not necessarily such an act as the State wishes to prosecute for its own protection. For a fine discussion of the distinction between crimes and torts see *Miller, op. cit. supra,* p. 20.

The Rule that an actual present ability must exist to convict for a criminal assault is widely accepted in many American jurisdictions: *People* v. *Pape* (1885) 66 Cal. 366 ("apparent" ability does not mean that it must be apparent to the person against whom the alleged assault is made); *State* v. *Godfrey* (1889) 17 Ore. 300, 20 Pac. 625; *People* v. *Lilley* (1880) 43 Mich. 521, 5 N. W. 982 (the test in criminal cases cannot be the mere fact of unlawfully putting one in fear, or in creating alarm in the mind, for one may obviously be assaulted although in complete ignorance of the fact, and therefore entirely free from alarm); *State* v. *Napper* (1870) 6 Nev. 113; *State* v. *Fastbinder* (1884) 42 Ohio St. 341; *Robinson* v. *State* (1868) 31 Tex. 171; *Chapman* v. *State* (1885) 78 Ala. 463; *Klein* v. *State* (Ind. App., 1894), 36 N. E. 763; *State* v. *Sears* (1885) 86 Mo. 169; *People* v. *Leong Yune Gun* (1889) 77 Cal. 636, 20 Pac. 27. Several jurisdictions demand a present ability but make it a matter of defense for the defendant to prove at trial: *McNamara* v. *State* (1897) 24 Colo. 61, 48 Pac. 541; *State* v. *Herron* (1892) 12 Mont. 230, 29 Pac. 819.

Statutory Assault: The authorities are neither in agreement in regard to the majority rule at common law, nor as to which rule should be followed. However, they agree that no common law rule should be authority for the statutory definition of the offense. This last view the Supreme Court of Illinois has consistently refused to recognize. It is distinctly noted, even by those courts and text writers inclined to the view that the question of assault should be determined by the test of whether it induces fear in the assailed rather

than by the test of whether the assailant possessed an actual present ability to commit bodily injury, that where a statute defines assault in the language of the statute in force in this state, the existence of *actual* present ability is indispensable to support a conviction of the crime of assault and *apparent* present ability is not sufficient. The Circuit Court of Appeals, 9th Circuit, in *Price* v. *U. S., supra,* although following the opposite view admitted that its decision would, necessarily, be different under a statute similar to the Illinois Assault Statute. Of like tenor is *State* v. *Shepard, supra. Clark & Marshall, loc. cit. supra,* cites Ark. Dig. Stat. (Crawford & Moses, 1921) §2330, as a type of statute which alters the common law rule and expressly requires actual ability to inflict a battery. Bishop, "Statutory Crimes" (3rd ed., 1901) §512, points out that present ability to inflict an injury is indispensable under Ind. Ann. Stat. (Burns, 1933) §10-402. *Miller, op. cit. supra,* §99, cites the Arkansas Statute, Tex. Ann. Digest (Paschal, 1878) §2137, and Cal. Pen. Code (Deering, 1931) §240, as examples of those which expressly demand an actual present ability to inflict the injury intended. The language of all the above statutes is similar to §55 of the Illinois Criminal Code which demands "present ability."

Decisions under these and identical statutes have uniformly applied the test of actual present ability as an essential element of a criminal assault: Ark. Dig. Stat. (Crawford & Moses, 1921) §2330; *Parsley* v. *State* (1921) 148 Ark. 518, 230 S. W. 587; *Hine* v. *State* (1919) 139 Ark. 223, 213 S. W. 381; *Pratt* v. *State* (1887) 49 Ark. 179, 4 S. W. 785. The Supreme Court of Arkansas in *Hunt* v. *State* (1914) 114 Ark. 239, 169 S. W. 773, held that an impotent man might be guilty of an assault with intent to rape. The question of a present ability to assault was not there involved, but rather the ability of the assailant to complete the felony itself. It was decided that an impotent man might be capable of statutory rape. The latest decision, *Dodd* v. *State* (Ark., 1934) 75 S. W. (2d) 799, quotes with approval that portion of 2 R. C. L., §9, which states that it is not necessary at all that the defendant's words should be accompanied or followed by an actual battery, but he must either offer to do violence, as by drawing back his fist or raising a stick; or attempting to do it, as by aiming a blow at another which does not take effect because it is warded off by a third person, or by shooting at another and missing the mark. Arizona makes lack of present ability a matter of defense to be proved by the defendant at trial. Ariz. Code (Struckmeyer, 1928) §4611; *Richardson* v. *State* (1928) 34 Ariz. 139, 268 Pac. 615; *Brimhall* v. *State* (1927) 31 Ariz. 522, 255 Pac. 165. However, present ability is still the test of criminal assault. An excellent dissent by Mr. Justice Duffy points out the error in the Arizona view: *Territory* v. *Gomez* (1912) 14 Ariz. 139, 125 Pac. 702. To constitute the crime of assault there must be the unlawful attempt to commit a violent injury upon the person of another, and with the making of such attempt there must be co-existent the ability to carry such attempt into execution; i. e., to commit the injury. Each is a necessary element of the crime, and both must concur. If either one is missing, the accusation fails. Each then is

a necessary allegation of the indictment. Both must be alleged, states Mr. Justice Duffy, and the existence of each must be established by competent evidence beyond a reasonable doubt. When the weapon used is a pistol, to presume, or infer, or take for granted that the pistol is loaded is to presume the existence of one of the material allegations of the indictment; in other words, it presumes the guilt of the defendant, and compels him to prove his innocence by proving the non-existence of one of the material elements of the offense to-wit, the ability to inflict injury. Originally, Texas required present ability: Tex. Ann. Digest (Paschal, 1878) §2137; *McKay* v. *State* (1875) 44 Tex. 43; *Gann* v. *State* (Tex. Crim. App. 1897) 40 S. W. 725. But the rule has been changed by a new assault statute, Tex. Pen. Code (1925) Art. 1141, §3, making the test the putting in fear of the assailed. See *Oliver* v. *State* (1910) 60 Tex Crim. 62 In other states present ability is the test: Idaho Code (1932) §17-1201; *State* v. *Yturaspe* (1912) 22 Idaho 360, 125 Pac. 802; *State* v. *Bush* (1930) 50 Idaho 166, 295 Pac. 432; Nev. Comp. Laws (Hillyer, 1929) §10094; *State* v. *Napper, supra; State* v. *MacKinnon* (1917) 41 Nev. 182, 168 Pac. 330; Ind. Ann Stat. (Burns, 1933) §10-402; *Klein* v. *State, supra; Howard* v. *State* (1879) 67 Ind. 401; *West* v. *State* (1877) 59 Ind. 113 (holding that the indictment, to be correct, must allege present ability in the defendant); Cal. Pen. Code (Deering, 1931) §240; *People* v. *Pape, supra; People* v. *Sylva* (1904) 143 Cal. 62, 76 Pac. 814. The Supreme Court of Illinois in the instant case as well as in *People* v. *Henry, supra,* through misapprehension, cited this California case as supporting the very opposite conclusion from that actually reached in that case. *State* v. *Napper, supra,* and *Fastbinder* v. *State, supra,* were also erroneously cited. This error was rectified in the official reports and the instant case now rests on the authority of *Beach* v. *Hancock, supra,* a tort case, and *State* v. *Shepard, supra,* a decision which has been overruled by the Iowa court.

Illinois View: In *People* v. *Ryan* (1909) 239 Ill. 410, 88 N. E. 170, the supreme court held that placing a newspaper under the chin of the victim and attempting to extract a diamond stud from his tie was not an assault with intent to rob. It is to be regretted that Mr. Justice Stone, in the instant case, could not distinguish the *Ryan* case. The court here declares that it is sufficient to support the charge alleged if the victim has been intimidated. Ill. Rev. Stat. (Smith-Hurd, 1933) c. 38, §501, defines robbery as a felonious taking by force or intimidation. The presence of the element of intimidation does not prove the assault in the offense charged. The view uttered by Mr. Justice Stone is found in the Attorney-General's Report and Opinions (1930) where Attorney-General Oscar E. Carlstrom stated, "Under the definition contained in paragraph 501 aforesaid, if there is a felonious taking of property from the person of another, the crime of robbery is consummated, if not, the crime of robbery has failed and the perpetrator is not guilty of robbery. On the other hand, if a person makes an attempt to commit a robbery *and has the ability to commit the robbery* at the time of the attempt, but for some reason or another fails in the attempt, he is

guilty of an assault with an intent to commit robbery." Mr. Carlstrom was clearly in error. Robbery may be committed by intimidation but an *assault* demands an element of actual ability to inflict a *violent injury*. To accept Carlstrom's view we must alter the wording of the Assault Statute and also assume that the Illinois Attempt Statute was passed for no practical purpose.

Illinois was one of the earliest states to adopt a liberal construction statute (1845). This statute, Ill. Rev. Stat. (Smith-Hurd, 1933) c. 131, §1, states that all general provisions, terms, phrases and expressions used in any statute shall be liberally construed, *in order that the true intent and meaning of the legislature may be fully carried out.* The rule of liberal construction of penal statutes has not been widely accepted in this state; the courts favor a reasonable construction: *People* v. *Fox* (1915) 269 Ill. 300, 110 N. E. 26; *People* v. *Mueller* (1933) 352 Ill. 124, 185 N. E. 239; or they retain the common law view of strict construction: *People* v. *Peacock* (1881) 98 Ill. 172; *Albrecht* v. *People* (1875) 78 Ill. 510. For an excellent discussion, see *Hall,* "Strict or Liberal Construction of Penal Statutes" (1935) 48 Harv. Law Rev. 748. Irrespective of whether it might be deemed advisable to provide that merely apparent present ability should be sufficient to constitute the crime of assault, there exists no power in the court to extend the plain words of the statute. In *C., R. I., & P. Ry. Co.* v. *People* (1905) 217 Ill. 164, 75 N. E. 368; the supreme court declared that penal statutes are, by well settled principles of law, to be strictly construed and matters and things which are not clearly included cannot be brought within the operation of such statutes by mere construction. And in *People* v. *Patten* (1930) 338 Ill. 385, 170 N. E. 280, the court uttered the belief that even if the legislature accidentally or inadvertently failed to express its intention to declare that certain conduct shall constitute a crime or misdemeanor, yet it is powerless to correct the error or to supply the omission no matter how plainly the conduct in question is within the mischief intended to be remedied by the statute.

The test of "apparent present ability" applied by the court is not only contrary to the statute in force in Illinois but has also been held to be erroneous as a test in all states with a similar statute, and by many jurisdictions even in the absence of such statutes. An apparent present ability is no present ability at all; and such a test violates the statute.

In the instant case the defendant had no actual present ability to carry out any threat (it was not alleged that he attempted to use his fist, or that it was capable of inflicting a violent injury). The intimidation lay solely in the deception of the complaining witness by the defendant into making him believe that he was in possession of a gun. The punishment, for the offense, assessed against the defendant was measured on the idea that it would curb the use of dangerous weapons. It is not our province to say that the legislature should set against all those attempting crimes the punishment of one day in jail or a life time in the penitentiary, but neither is it within the power of the courts to alter the reasonable punishment for offenses designated by legislature.

The Draft Code of Criminal Law and Procedure, proposed by the

Committee on Revision, Section of Criminal Law and its Enforcement of the Illinois State Bar Association in cooperation with the Judicial Advisory Council of Cook County has revised the assault statute now to read (§6 of House Bill No. 712 in 59th General Assembly) "An assault is an unlawful attempt coupled with apparent present ability to commit a violent injury on the person of another." The proposed change in this offense is some indication that the test of apparent present ability has been erroneously applied under the present statute. Until such time as the proposed criminal code is adopted, the assault statute should be correctly interpreted to conform to the intent of the legislature and the uniform holdings of the other states.

PAUL FREEMAN.