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requirements that a certain number of the attesting witnesses be able to sign their names, the number being tailored to the type of will.[30] The additional requirements do not exclude application of article 1592 to testaments governed by the Civil Code, so it may well be doubted that the amendment should be construed as having that effect with regard to statutory wills.

The court advanced each of the arguments discussed above but neglected to mention on which of the three it based its holding. Although none of the lines of reasoning seems adequate to justify the decision, the court may reasonably have concluded that its result was in accordance with a liberal interpretation of the statutory will. Nonetheless, the decision is regrettable in that it denies effect to an important safeguard for the proper confection of testaments and casts doubt on the applicability of the Civil Code's scheme to the statutory will.

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### An Unloaded and Unworkable Pistol as a Dangerous Weapon When Used in a Robbery

The defendant was charged with armed robbery. While conceding that the revolver he used in the robbery was unloaded and not capable of being fired, the state argued that it was nevertheless a dangerous weapon. In affirming the conviction, the supreme court *held*, one who commits robbery by pointing an unloaded and unworkable pistol[1] at the victim can be found guilty of armed robbery. *State v. Levi*, 250 So.2d 751 (La. 1971).

R.S. 14:64(A) defines armed robbery as "the theft of anything of value . . . while armed with a dangerous weapon."[2] A dangerous weapon is defined in R.S. 14:2(3) as any "instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm."[3]

In the instant case the supreme court has, for the first time, interpreted R.S. 14:2(3)[4] in relation to the commission of an

30. La. Civ. Code arts. 1580, 1582, 1587.

1. The court in reaching the decision makes no distinction between a gun which is unloaded and one which is unworkable, but rather treats these conditions as being equivalent. The courts of other states have handled this problem in a similar manner. *See* note 11 *infra*.

2. La. R.S. 14:64 (1950).

3. *Id.* 14:2(3).

4. *Id.*

armed robbery. However, the court has interpreted the statute in criminal assault cases on several occasions prior to the instant decision. This jurisprudence, with one exception,[5] stresses the manner in which the weapon was actually used in determining whether it was dangerous.[6] These cases emphatically reject the inherent nature of the instrumentality as a test and appear to follow the statutory standard closely by requiring an objective test of whether the weapon, in the manner in which it was used, placed the victim in actual danger of losing his life or suffering great bodily harm.[7] It should be noted however that none of these cases dealt with a firearm.[8]

In contrast, *State v. Johnston*[9] held that assault with a dangerous weapon occurred when the defendant pointed and clicked an unloaded pistol while threatening to kill the persons present. The court reasoned that the persons against whom the threat was directed could assume the gun would fire and that such a situation invites escape, retaliation or rescue, any of which could lead to serious injury or death for the assailant, the victims or innocent third persons. Thus, following this reasoning, a pistol is a dangerous weapon not only because of its actual capacity to inflict harm, but also because of the psychological impact upon the victims caused by the presence of the pistol. Logically then, a pistol is an inherently dangerous weapon irrespective of its condition or the manner in which it is used.

5. State v. Johnston, 207 La. 161, 20 So.2d 741 (1946); Note, 6 LA. L. REV. 294 (1945). *See* text accompanying note 9 *infra*.

6. State v. Murff, 215 La. 40, 39 So.2d 817 (1949) (mower blade held to be a dangerous weapon when used in an assault); State v. Reynolds, 209 La. 455, 24 So.2d 818 (1945) (a beer bottle held to be a dangerous weapon); State v. Penton, 157 La. 68, 102 So. 14 (1924) (scantling, a piece of timber, held to be a dangerous weapon).

7. *See* State v. Murff, 215 La. 40, 39 So.2d 817 (1949); State v. Reynolds, 209 La. 455, 24 So.2d 818 (1945). In these cases the court disregards inherent nature as a factor in determining whether an instrumentality is a dangerous weapon under the statute. The court expresses the test as whether the instrumentality, when used in the manner in which it was used, placed the victim in actual danger of death or serious bodily injury. Inherent nature refers to the intrinsic character of the object; for example, a tool, a piece of wood, a weapon. Capability refers to the potentiality of a thing to be used for a purpose, for example, an object to be a potential bludgeon must have a certain weight and hardness. The statute presumes that the instrumentality used had the capability of inflicting death or serious bodily injury and then requires an inquiry as to whether the instrumentality possessing this capability was used in a manner which was calculated or likely to inflict the injury. Thus capability is always a factor under the statute while the inherent nature of the object is irrelevant. The court in *Levi* fails to distinguish between these terms.

8. *See* note 6 *supra*.

9. 207 La. 161, 20 So.2d 741 (1945).

The court apparently formulates a subjective test with the inquiry directed toward determining if the weapon placed the particular victim in fear of losing his life. This test seems to contravene the objective statutory standard which requires the victim to be placed in actual danger.

The courts of other states which have confronted the question have generally, with one notable exception,[10] found that an unloaded or unworkable gun is a dangerous weapon.[11] The prevailing rationale in these jurisdictions bears a strong resemblance to that used by our supreme court in the instant case. The general result reached is that the presence of a gun at the scene of a robbery makes the likelihood of violence and the seriousness of that violence so great that, based upon public policy, any pistol used in a robbery is a dangerous weapon as a matter of law.[12] This policy is so strong in some jurisdictions that convictions have been brought in for the use of objects that are not true firearms at all, but mere facsimiles.[13]

The federal courts have on several occasions dealt with the

10. Luitze v. State, 204 Wis. 78, 234 N.W. 382 (1931), *overruled legislatively* by WIS. STAT. § 939.22(10) (1955), which provides, in pertinent part: "Dangerous weapon means any firearm, whether loaded or unloaded . . . ."

11. *See, e.g.*, State v. Reed, 159 Conn. 464, 254 A.2d 449 (1969); People v. Roden, 21 N.Y.2d 810, 235 N.E.2d 776, 288 N.Y.S.2d 638 (1968); State v. Ashland, 259 Iowa 728, 145 N.W.2d 910 (1966); State v. McLean, 192 N.E.2d 208 (Ohio 1962); State v. Montano, 69 N.M. 332, 367 P.2d 95 (1961); Turner v. State, 300 S.W.2d 920 (Tenn. 1957); Hayes v. State, 211 Md. 111, 126 A.2d 576 (1956); Commonwealth v. Nickologines, 322 Mass. 274, 76 N.E.2d 649 (1948); People v. Ash, 88 Cal. App. 2d 819, 199 P.2d 711 (1948); Moore v. Commonwealth, 260 Ky. 437, 86 S.W.2d 145 (1935). The courts in these cases do not appear to be interpreting a statutory definition of a dangerous weapon, but rather seem to rely on common law concepts.

12. Turner v. State, 300 S.W.2d 920 (Tenn. 1957); Hayes v. State, 211 Md. 111, 126 A.2d 576 (1956); Moore v. Commonwealth, 260 Ky. 437, 86 S.W.2d 145 (1935). The courts of California have advanced the rationale that a gun is a dangerous weapon per se because it can easily be used as a bludgeon. Unlike Louisiana, California does not have a statutory definition of a dangerous weapon; the CALIF. PENAL CODE § 211(a) (Deering 1959) prohibits robbery with a dangerous weapon, but the defining of a dangerous weapon is left to the courts. In People v. Freeman, 86 Cal. App. 374, 260 P. 826 (1927), the rationale that a gun is a dangerous weapon because it can easily be used as a bludgeon was first put forth. In that case the robber did not threaten or even indicate that he would use the gun as a bludgeon, and did not come closer than thirteen feet to the victim; however, the court reasoned that since the weapon had the *capability* to be used as a bludgeon, the culprit had the present ability to so use the weapon if he desired, and robbers did at times use pistols as bludgeons, the pistol was a dangerous weapon. This reasoning seems rather tenuous but has been heavily relied upon by the California courts.

13. Jackson v. State, 231 Md. 591, 191 A.2d 432 (1963) (a starter's pistol). *But see* Cooper v. State, 297 S.W.2d 75 (Tenn. 1956), where the Tennessee Supreme Court found a toy pistol is not a dangerous weapon when used in a robbery.

problem posed in *State v. Levi*. All of the circuits which have examined the statutes forbidding armed bank and mail robbery have interpreted them strictly, ruling that the victim must have been placed in actual danger as a result of the use of a weapon.[14] In order to avoid having the construction of the statutes place an intolerable burden of proof on the prosecution, the federal courts have devised several procedural devices which, in effect, shift the burden of proof to the defense. The most prevalent method is to permit the jury to *infer* that the weapon was in fact dangerous, and thus that the victim was in actual danger.[15] The Eighth Circuit constructs a rebuttable presumption that any gun used in a robbery places the victim in actual danger.[16] The Fifth Circuit has recently taken the position that, as a matter of law, when a gun is used in a robbery the victims are placed in a state of danger regardless of whether it was loaded.[17] This position apparently places the Fifth Circuit in conflict with the other circuits which employ an objective test. However the strong language is somewhat suspect because the court uses more force than necessary to achieve the result it seeks. These decisions come in response to requests by the defense that the prosecution be forced to prove that an objective state of danger in fact existed. It remains to be seen whether the 5th Circuit will adhere to its position when confronted with proof by the defense that the gun did not pose an objective threat, especially in light of the fact that the court continues to rely on *Smith v. United States*[18] which employs an objective test.

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14. Morrow v. United States, 408 F.2d 1390 (8th Cir. 1969) (bank robbery with sawed-off shotguns); United States v. Roach, 321 F.2d (3d Cir. 1963) (robbery of a savings and loan association with a revolver); Smith v. United States, 284 F.2d 789 (5th Cir. 1960) (mail robbery with the use of a gun and knives); United States v. Donovan, 242 F.2d 61 (2d Cir. 1957) (mail robbery with a revolver).

15. United States v. Marshall, 427 F.2d 434 (2d Cir. 1970); Evalt v. United States, 382 F.2d 424 (9th Cir. 1967); Lewis v. United States, 365 F.2d 672 (10th Cir. 1966); United States v. Roach, 321 F.2d 1 (3d Cir. 1963); Wagner v. United States, 264 F.2d 524 (9th Cir. 1959).

16. Wheeler v. United States, 317 F.2d 615 (8th Cir. 1963). *But see* Morrow v. United States, 408 F.2d 1390 (8th Cir. 1969), where the court speaks of the jury inferring that the gun was loaded. This may indicate the Eighth Circuit is abandoning the rebuttable presumption in favor of the inference used by the other circuits.

17. Baker v. United States, 412 F.2d 1069 (5th Cir. 1969); Thomas v. United States, 418 F.2d 567 (5th Cir. 1969).

18. 284 F.2d 789 (5th Cir. 1960). The court discussed the test used in this case in these terms: "In this atmosphere we do not believe that a jury could have been confused as to the meaning of 'putting in jeopardy the life' of the victims. Here at least the jury would resaonably consider

The rationale in *State v. Levi* is precisely the same as that in *State v. Johnston*;[19] in fact, a large portion of the *Johnston*[20] decision is quoted by Justice Sanders. The court felt that the use of a gun to commit robbery creates a situation that is so highly charged with the likelihood of violence that the use of any sort of gun is condemned. The gun is a dangerous weapon, not because of its ability to inflict harm, but because it is a catalyst that is likely to precipitate violent reaction. This reaction to the use of a gun is likely to result in injury or death to the culprit, the victim, or to third persons.

The decision in *Levi* is entirely proper if viewed as an expression of the public policy against the use of firearms in criminal activity. However this decision does not seem in accord with the statutory definition of a dangerous weapon. The statute requires that the weapon be used in such a manner as to place the victim in actual danger of losing his life or suffering serious bodily injury. This definition clearly contemplates that the capability of the instrumentality to inflict death or serious injury be assessed in light of the manner in which it was used,[21] an objective test.

Although the instant case is consistent with the prior case of *State v. Johnston*,[22] it conflicts with the weight of the jurisprudence interpreting R.S. 14:2(3)[23] which follows the statutory standard closely and provides that the victim must have been actually placed in danger by the weapon in the manner in which it was used. Since *Johnston*[24] and *Levi* are the only cases involving firearms, the court obviously views firearms as so inherently dangerous that public policy forbids their use in any criminal endeavor regardless of their condition.

The court advances two additional rationales to buttress its

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that the usual meaning was likewise the law's meaning—life was in peril, not merely thought to be. Nothing said or unsaid in the balance of the charge could possibly have been interpreted to mean or even suggest that the jury could evaluate it in terms of the subjective fears of the two victims. The test laid down was the objective one that their lives had to be in fact in danger." *Id.* at 792.

19. 207 La. 161, 20 So.2d 741 (1945). *See* note 9 *supra* and accompanying text.

20. State v. Johnston, 207 La. 161, 20 So.2d 741 (1945).

21. *See* note 7 *supra* and accompanying text.

22. 207 La. 161, 20 So.2d 741 (1945).

23. LA. R.S. 14:2(3) (1950) defines a dangerous weapon as "any . . . instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm."

24. State v. Johnston, 207 La. 161, 20 So.2d 741 (1945).

conclusion: First, that a pistol also has the capability of being used as a bludgeon[25] and second, that to decide this case otherwise would make the task of law enforcement impossible because to secure a conviction the robber would almost have to be caught in the act. The first rationale cannot be supported under the statutory standard which requires the court to look at how the weapon actually was used, not how it *may* have been used.[26] Obviously a gun that was only pointed, as in *Levi*, was not used as a bludgeon. The second rationale finds little substance in fact.[27] The court, through the use of a rebuttable presumption or by permitting the jury to infer that the weapon was dangerous, could achieve the desired policy without hampering law enforcement. As pointed out above, the majority of the federal circuits take such an approach.[28] In addition, the use of these devices would permit the statutory standard to be more closely followed.

In the instant decision the Supreme Court of Louisiana was apparently attempting to effectuate the strong public policy against the use of firearms to commit robbery. This has been achieved. Unfortunately the vehicle used to reach this result does severe violence to the language of R.S. 14:2(3).[29] The court in this decision substitutes a subjective standard, without any clearly ascertainable limitations, for the clear objective standard required by the statute. The same policy considerations could be implemented within the terms of the statute by use of different reasoning. However, if the court does not or cannot effectuate the policy through other means, the statute should be amended to properly include the position taken in *Levi*.

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25. The court relies on People v. Ash, 88 Cal. App. 2d 819, 199 P.2d 711 (1948), and makes no reference to the statutory standard in LA. R.S. 14:2(3) (1950).

26. *See* note 7 *supra* and accompanying text.

27. The argument under this rationale would be that if the culprit were not apprehended during the actual commission of the crime, he would have time to discard bullets or file down a firing pin. Using an objective test, the argument continues, the prosecution would have a difficult burden to carry in proving that the gun was *actually* dangerous at the time of the crime.

28. *See* notes 15 and 16 *supra* and accompanying text.

29. LA. R.S. 14:2(3) (1950).