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## ALTERNATE JURORS—A REMEDY FOR FELONY MISTRIALS?

**A**MONG the factors impairing the effectiveness of the judicial process in its role in the administration of criminal justice is the time-consuming and expensive mistrial. This failure in judicial operation is attributable in a significant measure to the death, illness or incapacity of jurors occurring after prosecution has begun, necessitating retrial with a resultant danger of loss of evidence due to the death, illness or absence of witnesses. To whatever extent promptness in the trial and conviction of criminal offenders is thus prevented, the courts become less efficient as a social agency for the deterrence of crime. Experimentation in almost a score of jurisdictions with alternate-juror statutes would seem to afford a simple and practicable device for minimizing the obstructive effect of such unpredictable events;<sup>1</sup> such statutes generally provide for an alternate or additional juror or jurors somewhat comparable to "substitute" players in "reserve" who see and hear all that happens but do not otherwise participate until one of the "regulars" is removed. Moreover, as a means of facilitating the uninterrupted conduct of a trial in the event that a regular juror is excused for cause, this practice has elicited favorable comment from time to time from members of the Texas Bar.<sup>2</sup> The alternate-juror development seems especially note-

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<sup>1</sup> For earlier treatment of the subject of alternate jurors see Perkins, *Proposed Jury Changes in Criminal Cases* (1931) 16 IOWA L. REV. 223; Note (1942) 21 NEB. L. REV. 26; Note (1931) 4 SO. CALIF. L. REV. 303; (1937) 85 U. OF PA. L. REV. 539; (1936) 11 WASH. L. REV. 109; (1935) 9 U. OF CINN. L. REV. 307; (1929) 8 N. C. L. REV. 122.

<sup>2</sup> See, e.g., the following statement from the Report of the Committee on Criminal Law and Procedure of The Texas Bar Association: "Within the last 18 months the writer has had occasion to assist in the prosecution of two capital cases, in each of which instances a juror was taken sick which resulted in the discharge of the jury and a continuance of the case for the term, at an enormous expense to the taxpayers. We recommend that a thirteenth juror be impaneled and sworn to sit with his brethren until the time for

worthy in view of the recent adoption of Federal Rule of Criminal Procedure 24(c), which continues with slight variation the federal practice begun in 1932 of providing for alternate-jurors.<sup>3</sup>

The Constitution of Texas provides for "a speedy public trial by an impartial jury" as a right of the accused in all criminal prosecutions<sup>4</sup> and that "the right of trial by jury shall remain inviolate."<sup>5</sup> A further provision specifies that petit juries in the District Courts shall be composed of twelve men but excepts civil cases and criminal cases below the grade of felony in both of which a verdict may be rendered by as few as nine jurors concurring.<sup>6</sup> The Legislature, however, is directed to "pass such laws as may be needed to regulate" the right of trial by jury and "to maintain its purity and efficiency"<sup>7</sup> and from time to time has passed various statutes determining the method of trial by jury in criminal cases. Thus it has provided in the Code of Criminal Procedure that in a felony case the entire jury may be discharged if one juror is excused after deliberation has commenced<sup>8</sup> and

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their deliberation takes place, when he is excused from further service, provided none of the 12 jurors have become incapacitated to serve." (1934) 53 PROC. TEX. BAR ASSO. 160, 162. The recommendation favoring alternate jurors has frequently been made to the Texas Bar. See (1937) 56 PROC. TEX. BAR ASSO. 131, 132; (1938) 57 *Id.* 121, 122; (1941) 60 *Id.* 46, 47.

<sup>3</sup> The full text of Rule 24(c) is as follows:

"ALTERNATE JURORS: The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror."

<sup>4</sup> TEX. CONST. (1876) Art. I, § 10.

<sup>5</sup> *Id.*, Art. I, § 15.

<sup>6</sup> *Id.*, Art. V, § 13.

<sup>7</sup> *Id.*, Art. I, § 15.

<sup>8</sup> TEX. CODE CRIM. PROC. (1925) art. 680.

that not fewer than twelve jurors concurring can render a verdict.<sup>9</sup> In misdemeanor cases, however, the jury may dwindle to as few as nine men and still be permitted to render a verdict.<sup>10</sup>

In the application of such provisions of the Constitution and the Code, the Court of Criminal Appeals has held that a court has no power to discharge or excuse a juror who has been sworn in a felony case without discharging the entire panel.<sup>11</sup> This has been held to be necessary at any stage in the proceeding, even during the process of selecting jurors, although the language of the Code<sup>12</sup> would seem to provide for discharge of the entire jury only after retirement. Moreover, the Court has held that such discharge is mandatory in the absence of waiver by the defendant personally,<sup>13</sup> notwithstanding that the Code provision would seem merely to be directory. As a result, when sickness or other cause renders it impossible to proceed with a jury as constituted, the only course open to the trial court is to organize another one. The waste of the court's time and the resulting expense to the state are obvious whenever an entire jury must be thus discharged after a trial is well in progress.

Since the enactment of the California alternate-juror statute in 1895, provisions designed to reduce the occurrence of mistrials resulting from the disqualification of jurors have been widely adopted. Although only twelve states had enacted such a statute at the time of the approval by the American Law Institute of its Code of Criminal Procedure in 1931, which embodied provi-

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<sup>9</sup> TEX. CODE CRIM. PROC. (1925) art. 687.

<sup>10</sup> *Id.*, art. 688.

<sup>11</sup> *Currasco v. State*, 101 Tex. Crim. Rep. 91, 274 S. W. 155 (1925); *Crow v. State*, 89 Tex. Crim. Rep. 149, 230 S. W. 148 (1921); *Sterling v. State*, 15 Tex. App. 249 (1883); *Ellison v. State*, 12 Tex. App. 557 (1882); *Hill v. State*, 10 Tex. App. 618 (1881). *Cf. Hillyard v. State*, 116 Tex. Crim. Rep. 567, 34 S. W. (2d) 601 (1931); *Adams v. State*, 92 Tex. Crim. Rep. 264, 243 S. W. 474 (1922).

<sup>12</sup> TEX. CODE CRIM. PROC. (1925) art. 680.

<sup>13</sup> See *Sterling v. State* and *Hill v. State*, note 11 *supra*.

sions for alternate jurors,<sup>14</sup> seven additional jurisdictions including the federal courts adopted alternate-juror provisions during the six years following.<sup>15</sup> In general, two types of alternate-juror statutes have been adopted. Some states have enacted what may be designated a "substituted-juror" type of statute providing for twelve regular jurors and one or two alternates, who are substituted in the trial when one or more of the regular jurors are excused.<sup>16</sup> The other type, an "eliminated-juror" statute, provides for a jury consisting of thirteen or fourteen men from the outset

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<sup>14</sup> AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1931) § 285 reads as follows:

"Alternate jurors. Whenever in the opinion of the court the trial is likely to be a protracted one, the court may, immediately after the jury is impanelled and sworn, direct the calling of one or two additional jurors, to be known as 'alternate jurors.' Such jurors shall be drawn from the same source, and in the same manner, and have the same qualifications as regular jurors, and be subject to examination and challenge as such jurors, except that each party shall be allowed one peremptory challenge to each alternate juror. The alternate jurors shall take the proper oath or affirmation and shall be seated near the regular jurors with equal facilities for seeing and hearing the proceedings in the cause, and shall attend at all times upon the trial of the cause in company with the regular jurors. They shall obey all orders and admonitions of the court, and if the regular jurors are ordered to be kept in the custody of an officer during the trial of the cause, the alternate jurors shall also be kept with the other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the cause to the jury. If, before the final submission of the cause, a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his place in the jury box. If there are two alternate jurors the court shall select one by lot, who shall then take his place in the jury box. After an alternate juror is in the jury box he shall be subject to the same rules as a regular juror."

<sup>15</sup> See Case J., dissenting in *State v. Dolbow*, 117 N. J. Law 560, 189 Atl. 915, 919, 920, 109 A. L. R. 1488, 1494, 1495 (1937), (1937) 85 U. OF PA. L. REV. 539.

<sup>16</sup> The California statute is typical of this variety and is herewith set out in full to show the procedure in detail.

"[*Alternate Jurors: When to be called: Procedure governing: Drawing of Alternate.*] Whenever in the opinion of a judge of a superior court about to try a defendant against whom has been filed any indictment or information for a felony, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impanelled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as 'alternate jurors.'

"[*Drawing: Qualification: Peremptory challenges.*] Such jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already sworn, and be subject to the same examination and challenges; provided that the prosecution and the defendant shall each be entitled to one peremptory challenge to such alternate jurors.

"[*Seating: Oath: Attendance.*] Such alternate jurors shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and must attend at all times upon the trial

of the trial until the judge's charge to the jury, at which time a court official draws lots to determine which twelve of the jurors will deliberate and render the verdict.<sup>17</sup>

Alternate-juror statutes of both types generally permit the trial court, in its discretion, to call for additional jurors only if, in the opinion of the presiding judge, a trial seems likely to be protracted.<sup>18</sup> The alternate juror is examined in the same manner as a regular juror and must have the same qualifications; all persons considered for service as alternate jurors are also subject

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of the cause in company with the other jurors; and for a failure so to do are liable to be punished for contempt.

"[*Obedience of court orders: Confinement: Discharge.*] They shall obey the order of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff during the trial of the cause, such alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury such alternate jurors shall be kept in the custody of the sheriff and shall not be discharged until the original jurors are discharged, except as hereinafter provided.

"[*Drawing of alternate: Grounds: Substitution.*] If at any time, whether before or after the final submission of the case to the jury, a juror die or become ill, so as to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." CAL. PEN. CODE (Deering, 1941) § 1089.

<sup>17</sup> See, e.g., the New Jersey statute, which reads as follows:

"1. Any judge of the court of oyer and terminer, or judge of the court of quarter sessions, before whom a trial shall be commenced, which trial is likely to be protracted, may, in his discretion, order a jury empanelled not to exceed fourteen members, the members of which jury shall have the same qualifications and shall be empanelled and sworn in the same manner as is, or may be, provided by law for the empanelling of juries in such courts of oyer and terminer and courts of quarter sessions.

"2. All said jurors shall sit and hear said cause. Should any condition arise during the trial of said cause, which, in the opinion of the trial court, justifies the excusal of any of the jurors so empanelled from further service, he may do so, and the said trial shall proceed, unless the number of said jurors be reduced to less than twelve.

"3. In the event there shall be more than twelve jurors left on said jury, after the charge of the court, the clerk of the court, in the presence of said court, shall place the names of all of said jurors on slips, folded so as to conceal the names thereon, in a suitable box provided for that purpose by the clerk, and shall draw therefrom twelve names, the first drawn to act as foreman. The twelve members thus drawn shall then proceed to determine the issue presented, in the manner provided by law." N. J. ST. ANNUAL (1985) §§ 53-11a — 53-11c.

<sup>18</sup> State v. Heathcoat, 119 N. J. Law 33, 194 Atl. 252 (1937) (not reversible error for judge to impanel only 12 jurors instead of 14).

to peremptory challenge.<sup>19</sup> Statutes provide that the alternate shall sit "near" or "with" the jury; that he shall hear the entire testimony and see all exhibits; and in some states it is provided that he may sit with the regular jury after its retirement and listen to its deliberations but must remain silent and refrain from participating in the verdict. Under a statute with the latter provision an alternate juror could be available and qualified to substitute for an excused juror at any time after the opening of the trial until the final verdict.

The constitutionality of the "substituted-juror" type of statute was considered by the District Court of Appeal of California in *People v. Peete*,<sup>20</sup> a prosecution for murder. The trial judge, having concluded that the trial would probably be protracted, called an alternate juror who was seated near the regular jury after being examined, sworn, and accepted by both sides. After the trial had progressed for about two weeks, one of the regular jurors who became ill and was unable to continue was replaced by the alternate, and the trial proceeded to verdict and sentence. The defendant attacked the alternate-juror statute as a violation of the California constitutional guarantee that the right to trial by jury shall remain inviolate.<sup>21</sup> The California court stated that the right of trial by jury is not impaired so long as there are preserved "the essential and substantive attributes or elements of jury trial"—number, impartiality and unanimity of jurors. The court held that the alternate-juror statute does not affect "number" inasmuch as a full panel of twelve jurors decides and determines the issues of fact and renders the verdict; that there is no

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<sup>19</sup> It is possible that no additional peremptory challenge be allowed. The following alternative provisions for peremptory challenge have been suggested: (1) the prosecution and defense be each allowed one peremptory challenge to all alternate jurors; (2) the prosecution be allowed one and the defense two; (3) the prosecution and the defense be each allowed two such challenges; and (4) each side be allowed one peremptory challenge to each alternate juror. See Perkins, *Proposed Jury Changes in Criminal Cases* (1931) 16 IOWA L. REV. 223, 237.

<sup>20</sup> 54 Cal. App. 333, 202 Pac. 51 (1921), *Supreme Court hearing denied* (1921).

<sup>21</sup> California has substantially the same constitutional provision as Texas preserving inviolable the right of trial by jury. See note 5 *supra*.

loss of "impartiality" since the alternate juror hears and sees all the trial, is subject to the same examination as are regular jurors, takes the same oath, and the safeguards of impartiality thus attach to him as well as to all the regular jurors; and finally that "unanimity" is not sacrificed as all twelve jurors who finally decide the case must agree unanimously or there is no verdict at all. The decision of the California court that the constitutional right of trial by jury is not infringed by a statute permitting the court to call an additional juror who may later be substituted for a discharged juror has been followed in later California decisions and in several other jurisdictions.<sup>22</sup>

The "eliminated-juror" type of statute, providing for the drawing of lots to determine which twelve jurors out of the fourteen called will render the verdict, was more recently upheld by the New Jersey Court of Errors and Appeals in *State v. Dolbow*,<sup>23</sup> also a felony prosecution. Although in this case no juror was excused during the course of the trial, defendant alleged that the statutory procedure violated both the federal constitutional requirement of due process and the provision providing that the right to trial by jury shall remain inviolate. The court said that the statute was clearly in conformity with the spirit of the constitution and that a contrary holding would prefer form over

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<sup>22</sup> *People v. Lanizan*, 22 Cal. (2d) 569, 140 P. (2d) 24 (1943); *Commonwealth v. Fugmann*, 330 Pa. 4, 198 Atl. 99 (1933); *People v. Von Badenthal*, 8 Cal. App. (2d) 404, 48 P. (2d) 82 (1935), (1936) 11 WASH. L. REV. 109, (1936) 24 CALIF. L. REV. 735; *State v. Dalton*, 206 N. C. 507, 174 S. E. 422 (1934); *People v. Tinnin*, 136 Cal. App. 301, 28 P. (2d) 951 (1934); *People v. Mitchell*, 266 N. Y. 15, 193 N. E. 445, 96 A. L. R. 791 (1934), (1935) 9 U. OF CINN. L. REV. 307. *Cf. People v. Howard*, 211 Cal. 322, 295 Pac. 333, 71 A. L. R. 1385 (1930), Note (1931) 4 So. CALIF. L. REV. 303, *superseding* 289 Pac. 830, 70 A. L. R. 182 (1930). In this case the juror disclosed to the court that she had personal acquaintance with, and prejudice against, some of defendant's witnesses. The court excused her and substituted an alternate juror. The statute provided for alternates to be called only in the event that a regular juror became ill or died. The California Supreme Court held that the statute did not apply but upheld the conviction on the ground that the substitution was at most only an irregularity which did not substantially affect the defendant's rights, defendant himself having consented to such substitution.

<sup>23</sup> 117 N. J. Law 560, 189 Atl. 915, 109 A. L. R. 1488 (1937), (1937) U. OF PA. L. REV. 539, *appeal dismissed for want of substantial federal question*, 301 U. S. 669 (1937). *Accord: State v. Then*, 118 N. J. Law 31, 190 Atl. 495 (Sup. Ct. 1937); *State v. Augustine*, 191 Atl. 805 (Sup. Ct. 1937).



substance. The court pointed out that there was no injury to the defendant merely because two potential jurors sat throughout the trial since they were obligated to participate as regular jurors until the final designation of those who should ballot.

A third significant decision on the constitutional issues presented by such statutes is *Robinson v. United States*,<sup>24</sup> which sustained the validity of the federal code provision of the substituted-juror type against the defendant's contention that it amounted to an invasion of his inviolable right to trial by a jury of twelve persons. A single alternate, having been selected and seated near the jury-box, heard and saw all that occurred in the progress of the trial. When a regular became ill and was excused, defendant's counsel agreed to substitute the alternate who thereafter sat with the regular jury and participated in the verdict. The circuit court of appeals held that no right of the defendant had been violated, commenting that the alternate-juror statute was forward-looking legislation and permitted a needed procedural reform.<sup>25</sup>

The experience of California courts would seem to suggest the desirability of a provision in alternate-juror statutes that the alternate should be permitted to sit with the jury following its retirement and during its deliberations. In two of the earlier California cases<sup>26</sup> it was held that the mere presence of an alternate juror in the jury-room during the deliberations constituted ground for reversal, notwithstanding that the alternate had been specially instructed not to express any opinion or to participate

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<sup>24</sup> 144 F. (2d) 392 (C. C. A. 6th, 1944), *aff'd*, 324 U. S. 282 (1945) (without discussion of alternate-juror issue).

<sup>25</sup> In *American Tobacco Co. v. United States*, 147 F. (2d) 93 (C. C. A. 6th, 1944), *aff'd*, U. S. Sup. Ct., June 10, 1946, the circuit court of appeals said that the purpose of the alternate-juror statute was remedial and minor irregularities in applying it would not constitute reversible error.

<sup>26</sup> *People v. Britton*, 4 Cal. (2d) 622, 52 P. (2d) 217, 102 A. L. R. 1065 (1935), (1936) 24 CALIF. L. REV. 735 (one alternate in jury-room); *People v. Bruneman*, 4 Cal. App. (2d) 75, 40 P. (2d) 891 (1935) (two alternates in jury-room).

by word or action in the deliberations.<sup>27</sup> Following these decisions, based upon the absence of a statutory provision authorizing attendance by alternate jurors upon the deliberations, the California statute was amended to permit such attendance. If, as a practical matter it should be deemed difficult for an alternate juror to remain silent during discussions extending over a prolonged period, it would perhaps be the better practice to forbid the alternate from sitting with the jury during the deliberations. On the other hand, the continuing danger of unexpected illness of a regular juror would seem sufficiently great to justify attendance by the alternate juror until the balloting has been concluded; certainly the alternate would be better qualified to substitute for an excused juror if the alternate had had the opportunity to hear the discussion that had taken place during the deliberations prior to his being called in as a regular juror. The advantage of allowing alternates to sit with the jury in its deliberations would thus seem considerable whether the procedure be under the substituted-juror or the eliminated-juror type of statute.

The Legislature of Texas is empowered, under the Texas Constitution, to enact either type of alternate-juror statute. The constitutional provisions which have been unsuccessfully relied upon in the California, New Jersey and Federal cases by defendants attacking the statutes have been practically identical with the Texas constitutional provisions. Article 680 of the Code of Criminal Procedure, providing for discharge of the entire jury in the event that one juror is excused, would be the only statute which would require revision if an alternate-juror procedure should be adopted. This article could be made applicable only in felony cases in which the trial court fails to call an alternate juror.

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<sup>27</sup> In *People v. Britton*, note 26 *supra*, Curtis and Seawell, JJ., dissenting, stated that "No possible injury was sustained by the defendant by reason of the presence in the jury room of the alternate juror during the deliberations of the jury. . . . Although it might be error, as no injury resulted it should not be reversed." One judge had dissented without opinion in *People v. Bruneman*, note 26 *supra*.

If, however, a provision requiring or permitting the selection of an alternate juror or jurors in felony trials is not adopted in Texas, the risk of abortive mistrials following the excusal of a juror in the progress of a prosecution could be eliminated by allowing the jury to be reduced below the common-law number of twelve. Thus, if only eleven, ten, or even nine jurors should remain in the panel at the close of the trial, these jurors might well be permitted to proceed to deliberate and render a verdict, as may a panel reduced to nine in misdemeanor cases at present. Even if an alternate-juror provision should be adopted, a procedure for continuing felony trials with a diminished panel would also seem desirable to prevent frustration of the policy of the alternate-juror measure should the judge inaccurately predict the duration of a trial and fail to impanel alternate jurors. However, in view of the Texas constitutional provision guaranteeing the defendant a trial by a jury of twelve men, a constitutional amendment would be necessary before a felony trial could be conducted with fewer than twelve jurors.

The alternate-juror procedure operates without unfairness to the accused; its adoption in Texas would deprive the criminal defendant of only the undeserved advantages of mistrial, delay and the possibility of a less vigorous subsequent prosecution or perhaps none at all. It seems beyond doubt that the interest of the state in prompt and effective prosecution which would be served by this procedure can be weighed favorably against the expense of one or two additional jurors and the time that the judicial process would devote to their selection. Moreover, such a procedure should enable trial judges to become more lenient in excusing jurors for causes other than illness and thus making jury service less onerous for the hurried business man. Only slightly more difficult is an evaluation in terms of basic policy considerations of the proposal for verdicts by juries of fewer than twelve in felony cases. The issue becomes whether the risk

of erroneous verdict is significantly greater when as few as nine men concur in it than when it is reached by as many as twelve. If there is appreciably greater risk of error in verdicts by fewer than twelve, the magnitude of the risk must be compared with the greater efficiency in judicial administration which would be realized by reliance upon such verdicts for the elimination of one cause of mistrials.

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