YOES *vs.* THE STATE.

A crime or misdemeanor consists in a violation of public law, in the commission which there must be a union or joint operation of act and intention or criminal negligence. *Digest, p.* 319.

The mere fact of a person going to a place with the intention to assault another, will not subject him to the penalty of such an offence, unless he carry his intention into effect.

If the assault be made, the preconceived intention may be proven in aggravation.

Where a witness has made a different statement from the one made by him on trial, he is not thereby discredited, unless the discrepancy is wilful.

Appeal from the Washington Circuit Court.

Enos Yoes was indicted in the Washington circuit court for an assault and battery upon James C. Hughs. He was tried on the plea of not guilty, at the May Term, 1847, before the Hon. WM. W. FLOYD, judge, convicted and fined ten dollars. Pending the trial, he took a bill of exceptions, from which it appears:

The said Hughs, sworn as a witness for the State, testified that on the 28th July, 1848, he was at a place, in Washington county, where there was a meeting—was some eighty yards from the meeting house, when defendant came up, and said he wished to speak to him, and called him aside—he followed; defendant and he conversed for some time, when defendant gave witness the lie, or witness gave him the lie; defendant kicked witness, he struck defendant, and then they fought.

Being interrogated thereto, by defendant's counsel, witness denied that he had, on the same evening, after the fight, at night meeting, told one Tulk that when defendant gave him the lie, he threw off his hat and attempted to collar defendant—witness was positive that he had told Tulk no such thing.

Another witness for the State testified that he was present, heard defendant call Hughs out—thought defendant was in an

ill humor—presently, he heard a noise like a kick, looked and saw Hughs and defendant fighting, but did not know which commenced the fight.

Another witness heard defendant say to Hughs, "come this way, I wish to speak to you," and soon afterwards saw them fighting, but did not know who began it.

Tulk, witness for defendant, testified, that on the evening after the fight, at night meeting, and just about sun-down, said Hughs told him that defendant gave him (Hughs) the lie, and that he (Hughs) threw off his hat and attempted to collar defendant, when defendant kicked him. Witness was present when defendant called Hughs out, but did not know which commenced the fight.

This being all the testimony, the State's Attorney asked the court to charge the jury "that if they believed, from the evidence, that defendant went to the meeting-house yard, and called Hughs out for the purpose of having a difficulty with him, they must find defendant guilty." Also, "if the jury believed from the evidence, that Hughs made a different statement about the difficulty to Tulk, to that which he now makes, they will not disregard Hughs' testimony, unless they believed the different statements were made wilfully and knowingly."

To the giving of which instructions, the defendant objected, but the court gave them, and he excepted.

FOWLER, for appellant.

WATKINS, Attorney General.

JOHNSON, C. J. The circuit court manifestly erred in giving the first instruction asked by the State. The instruction is, that if the jury believe from the evidence that the defendant went to the meeting-house yard and called Hughs out for the purpose of having a difficulty with him, they should find him guilty. A crime or misdemeanor consists in a violation of public law,

in the commission of which there must be a union or joint operation of act and intention or criminal negligence. See 1*st sec. of chap.* 44 *of the Revised Statutes.* The mere fact of going to a place with the intention of doing an unlawful act, will not of itself subject the party to the punishment denounced against such act, unless he also carries his intention into effect. If the defendant below actually made an assault upon Hughs in pursuance of his preconceived and settled intention, then it was that the motives, which induced him to go to the place where Hughs was, might have been legitimately inquired into in aggravation of the fine, but could not under any state of case have furnished conclusive evidence of his guilt. No valid objection is perceived to the last instruction. But for the error in giving the first, the judgment must be reversed.