Journal of Criminal Law and Criminology

Volume 4 | Issue 1 Article 8

1913

Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

CHESTER G. VERNIER, ELMER A. WILCOX, JOHN LISLE.

CONSENT IN SODOMY.

The "National Economic League," with headquarters at 6 Beacon Street, Boston, Mass., and a membership scattered over every state and territory in the Union, by vote of sixty-five per cent of its membership, have declared that the issue of paramount consideration for 1913 is "Efficiency in the Administration of Justice;" i. e. the means whereby to secure efficiency in the administration of justice in our courts. The laws are all right, and there are plenty of good laws to secure the accomplishment of almost every end desired, if they were but properly enforced. The trouble lies with the administration of justice and not with the laws on the statute books. Careless and dishonest officials do much to bring the administration of the law into disrepute, and are a great source of the breakdown and failure of justice in this country. Incompetency on and off of the bench is another great source of or cause of the failure of efficiency in the administration of justice—the enforcement of the law. The active machinations of the predatory interests and the powers of darkness and vice and crime, is another source from which springs the want of efficiency in the administration of justice—and particularly so when the persons charged with the duty to see quiet and order preserved, and the public officers charged with the enforcement of the laws deliberately join in plans to defeat the operation of the laws, and deliberately join in frame-ups to "get" an honest and fearless public officer who knows neither high nor low, rich nor poor in preserving order and decency and in the enforcement of the laws, as was the case in the recent notorious Guy Eddie case, in Los Angeles, Cal.; a case reeking with mendacity and perjury on the part of law officers and others charged with the enforcement of the laws and the preservation of peace and good order.

But it is not only in the petty offices that the proper and efficient enforcement of the laws break down. Not unfrequently the world is startled by a pronounciamento from the bench of some supreme court of a state which sets at defiance all the established rules of law and the dictates of common sense. Such a case recently occurred in California, in which it is held, in effect, that the revolting crime of sodomy is a sort of "gentleman's agreement" in those cases where the pathic consents to the act, and that in such a case the principal cannot be convicted on a charge of an assault to commit the crime against nature where it appears that the subject consented to the act. (*People vs. Dong Pok Yip,* California Supreme Court, Nov. 9, 1912, 127 Pac. Rep. 1031.)

If the doctrine of this case were good law, or had any support in the principles of criminal jurisprudence, a degenerate, a low and vicious-minded person of depraved nature or morals, could, merely by consenting to the act—that is, by becoming a *particeps criminis* or an accomplice—deprive of its criminality the most beastly of crimes known to modern times, and send out unwhipped of justice the miscreant who perpetrated it; in other words, such a person, by his mere consent, could override and nullify the will of the legislature and set the laws of the state at defiance.

In the above California case the alleged victim of the assault was a boy nine years of age. The only evidence given with reference to the episode which culminated in the defendant's arrest was furnished by one Rodrigues, bookkeeper for a certain transportation company at Antioch, and by the boy who was called as a witness by the defendant. Mr. Rodrigues testified that from his office on the wharf he saw the boy and the Chinaman, Dong Pok Yip. The former had been fishing, and the latter had been playing with another lad; but after a time the witness observed them seated together and the Chinaman was teaching the boy how to fish. Subsequently he noticed the boy fishing while the defendant, who had his arm around the child, was whispering to him. This attracted the particular attention of Mr. Rodrigues, who watched the two from the door of his office. As he was thus observing them, the Chinaman arose, helped the boy to his feet, and they walked hand in hand along the wharf; but as they passed the office they were not holding hands. The boy seemed to the witness to be going willingly, and the latter observed no coercion of any sort on the part of the Chinaman. A few minutes later the witness followed in the direction taken by the boy and the defendant. He found them near an oil tank in some brush, which was about a foot in height in the direction from which he was looking, but high enough to screen them from any one who might look from the opposite side. They were both stooping; the boy, who faced Rodrigues, was in front of the defendant with his back to the latter, and defendant had his hands on the sides of the boy's waist. Rodrigues did not see the lad's person, but he did observe that the back of the boy's overalls hung down and that the Chinaman's trousers were unbuttoned in front. When they saw Rodrigues they quickly changed their positions; the boy slipping one of the suspenders of his "bib overalls" over his shoulder, and the Chinaman fastening the top button of his trousers.

In commenting on the evidence the court says: "If it could be fairly said that the evidence in the present case compelled the conclusion that the boy knowingly consented to the commission of the crime charged against the defendant, there would be no escape from a reversal of the judgment" of conviction of simple assault.

And further on in the opinion we find this language:

"In the case at bar the jury was properly instructed by the trial court that, if the boy consented to the assault complained of, the defendant should be found not guilty. Presumably the jury, in its deliberations, heeded this instruction, but upon weighing the evidence concluded, justly, we think, that the boy victim of the assault merely submitted to the act attempted by the defendant without knowing the nature of the act or realizing the design of the defendant. These views are, in our opinion, correct and are hereby adopted by this court."

This is a very novel doctrine, to say the least. The court cites no authority in support of its conclusion, and this opinion is thought to stand alone in announcing this doctrine.

The well-established rule of the criminal law is (See Kerr's Wharton on Cr. L. §762) that the consent of the catamite or pathic does not in any way affect the criminality of the act or attempted act; it simply makes the consenting party an accomplice in the act, and his testimony as to the act must be corroborated to be sufficient to warrant a conviction of the actor, under the rules of evidence. (*Commonwealth vs. Poindexter,* 133 Ky. 720, 11 S. W. 943; *State vs. Wilkins,* 221 Mo. 414, 120 S. W. 22. See *Commonwealth vs. Snow,* 1 Mass. 411; *Commonwealth vs. Smith,* 14 Luzerne Leg. Reg. 114; *Jordan vs.*

State (Tex. Cr. App.), 137 S. W. 114; *Deary vs. State* (Tex. Cr. App.), 137 S. W. 699.) Such consent cannot be interposed as a defense, because the crime is against society and the state, and not primarily against the victim. *Commonwealth vs. Smith,* 14 Luzerne Leg. Reg. 362; *Reg vs. Jellyman,* 8 Car. & P. 604, 34 Eng. C. L.; *Reg. vs. Allen,* 2 Car. & K. 869, 61 Eng. C. L., 3 Cox. C. C. 270, 1 Den. C. C. 364, Temple M. 55, 18 L. J. Mag. Cas. (N. S.) 72, 13 Jur. 108. In simple assault it is different, and the same rules of law do not apply, because there the injury is to the feelings of the victim, primarily, and not an offense against society or the state.

The court, in the California case, has hopelessly confused the rules of law applicable to the two classes of offenses or crimes, and the result is a doctrine unsound in principle, and one which will not meet the approval of the California supreme court on more mature deliberation.

It is submitted that, on principle, the boy involved in the California case cannot, as a matter of law, be considered as consenting, both by reason of his tender years and his defective mentality. (*Reg. vs. Lock,* L. R. 2 C. C. 10, 12 Cox C. C. 244. See also Kerr's Wharton on Cr. L. §699, §750 and authorities there cited.) The California supreme court says:

"While the little fellow was evidently not a child of even ordinary intelligence, the learned judge of the superior court, who presided at the trial, after a very careful examination permitted him to be sworn as a witness."

Recognizing this fact it was the duty of the California court to dismiss, of its own motion, the consideration of the question of consent injected into the case wrongfully by the attorneys for the defendant, because, as a matter of law, it was manifest there could be no delictum on the boy's part because of (1) his tender years, and (2) his defective mentality, which was so low that the trial court was in serious doubt whether he was of sufficient intellect to be admissible as a witness in case. (See *Mascolo vs. Montesanto,* 61 Conn. 50, 29 Am. St. Rep. 170, 23 Atl. Rep. 714.

[Since the foregoing comment was received, its author has communicated the following material which was brought together for another purpose, and which goes more fully into the matter—EDS.]

Consent as a defense.—In a prosecution on a charge of an attempt to commit the infamous crime against nature, the jury are properly instructed that if the boy, the subject of the assault, consented thereto, the defendant should be found not guilty * * * *People vs. Dong Pok Yip* (Cal. Sup. Ct. Nov. 9, 1912), 127 Pac. Rep. 1031.

This holding of the court is in harmony with the prior holding by the same court in the case of *People vs. Hickey,* 109 Cal. 275,277, 41 Pac. 1027, which decision cites no authorities to justify the holding of the court, and is out of harmony with all other cases, and is thought to be wrong on fundamental principle.

Consent of the catamite, pathic or subject in no case can, on any well-recognized principle of the law, by any possibility be or constitute a valid defense to a prosecution on a charge of sodomy, or of an attempt to commit sodomy in any of its branches. The fact of the consent of the subject to the commission, or to the attempt to commit the crime of sodomy can in no wise affect the criminal nature of the act prohibited, or prevent it from being a crime under a statute in which the element of consent is not found. (See

authorities I Kerr's Whart. Cr. L. §762). Otherwise a degenerate or a person of low and depraved mind or character could, by a consent to the beastly act, nullify the act of the legislature.

Two kinds of crimes and offenses exist: (1) Those which affect the individual only, and (2) those which affect the public at large; that is (a) the welfare of the people as a whole, or (b) the morals of the people or the perpetuity of the race. Both these are the proper concern of the government. Sodomy is properly classed as (2) (b), and is one of the class of crimes which an injured party is without power to condone, compromise, or to accept compensation for—and thus wipe out the criminal character of the act and relieve the accused of all liability to punishment under the law, made for the good of the whole people.

Same—Rules of law applicable to and governing in the first class of crimes named above, are not applicable in the prosecution for crimes affecting the public at large or the public welfare, and to apply them in the trial and determination of this class of criminal cases is error. The application of the rule of law governing in a case of simple assault (which affects the individual only) to a charge of an assault to commit sodomy (which affects the public at large as being injurious to the general welfare), is manifestly fundamental error.

Presumption of innocense rule requiring every one charged with the commission of crime be regarded as innocent until his guilt is clearly proved, undoubtedly applies to such a case; but, had the crime charged against Dong Pok Yip been buggery instead of plain sodomy, the court surely would not have been justified in invoking the further presumption of the "consent" of the beast, and on that ground discharged the accused; but this would not have been more fundamentally violative of the principles applicable to the case.

Consent no defense to a prosecution on a charge of sodomy or of an attempt to commit sodomy, is the doctrine of all the cases outside of California. See *Marcalo vs. Montesanto,* 61 Conn. 50, 29 Am. St. Rep. 170, 23 Atl. 714; *Territory vs. Mahaffey,* 3 Mont. 112; *Means vs. State,* 125 Wis. 650, 104 N. W. 815; *R. vs. Allen,* 2 Car. & K. 869, 3 Cox. C. C. 270, 1 Den. C. C. 364, 13 Jur. 180, 18 L. J. M. C. 72, T. & M. 55, 61 Eng. C. L. 869; *R. vs. Jellyman,* 8 Car. & P. 604, 34 Eng. C. L. 547. See also I Kerr's Whart. Cr. L. §762.

Consent does not in any way take away the criminal character of the act of the accused, or relieve him from liability to punishment for the act; it affects the person consenting only, and has the effect (1) to make him a principal in the crime, and liable to punishment as such (*R. vs. Allen,* 2 Car. & K. 869, 3 Cox. C. C. 270, 1 Den. C. C. 364, 13 Jur. 108, 18 L. J. M. C. 72, T. & M. 55, 61 Eng. C L. 869; 1 Hale P. C. 669), and (2) to make him an accomplice, and require corroboration of his testimony before a conviction can be secured. See *Com. vs. Snow,* 111 Mass. 411; *Territory vs. Mahaffey,* 3 Mont. 112; *People vs. Deschessere,* 69 App. Dec. (N. Y.) 217, 74 N. Y. Supp. 761; *Medis vs. State,* 27 Tex. App. 194, 11 Am. St. Rep. 192, 11 S. W. 112; *R. vs. Jellyman,* 8 Car. & P. 604, 34 Eng. C. L. 547. See also 2 Bishop's Cr. L. 1018; 1 Kerr's Whart. Cr. L. §761.

Same—In Illinois the rule is otherwise, and conviction may be had upon the uncorroborated testimony of the consenting subject. *Honselman vs. People,* 168 Ill. 172, 48 N. E. 304; *Kelly vs. People,* 192 Ill. 119, 85 Am. St. Rep. 323, 61 N. E. 425.

Inability of child of tender years to consent to the crime of sodomy, is universally recognized—outside of the two California cases above cited. In the principal case above the child was but nine years of age, and the court says, "the little fellow was evidently not a child of ordinary intelligence." This being so it was the duty of the court to disregard the plea of the consent of the child, because he was, by reason of his tender years and his inferior grade of intelligence, incapable of consenting, under the well-established rules of law applicable to the case.

Same—Boy of seven years of age cannot consent to an act of sodomy. *Means vs. State,* 125 Wis. 650, 104 N. W. 815; *R. vs. Lock,* 12 Cox C. C. 244, 2 C. C. 10, 42 N. J. M. C. 5, 27 L T. R. (N. S.) 661, 21 W. R. 144.

Same—Boy of twelve years of age is held to be incapable of consenting to such an act, although he submits without resistance. *Marcolo vs. Montesanto,* 61 Conn. 50, 29 Am. St. Rep. 170, 23 Atl. 714.

And where the evidence showed that the defendant, charged with buggery, was but ten or twelve years old, conviction was set aside, because of his incapacity to commit the crime charged. *Williams vs. Co.* (Va.) 22 S. E. 859.

HENRY M. HANSON, of the Dayton, Ohio, Bar.

The decision criticised above by Mr. Hanson is noticed by Mr. James M. Kerr in Cal. Cumulative Digest for April, Vol. II, No. 2, as follows: The above case and the case of *People v. Hickey,* 109 Cal. 275, 277, 41 Pac. 1027 (not cited in the principal case), stand alone in so holding. Consent of the catamite, pathic or subject can in no case, by any possibility, be or constitute a valid defense, or any defense, to a charge of the crime of sodomy, in any of its branches, or to a charge of an attempt to commit that crime; but such consent has the effect—and this is absolutely its only effect—to make the pathic or subject an accomplice with the actor, and his testimony is required to be corroborated. To hold otherwise is to ignore and disregard the well-established and fundamental distinction between the rules of law governing in the trial of crimes which affect the individual injured and crimes which affect the general public welfare. The fact of consent by the pathic or subject of the prohibited crime can in no wise affect the nature of the prohibited act, or prevent the act or the attempt to commit the act from being a crime under a statute in which the element of consent is not found. Otherwise a degenerate or viciously lewd person of low and depraved mind and instincts and perverted moral character could, by consenting, nullify the act of the legislature—a proposition that is unthinkable. See authorities and discussion in Kerr's "Consolidated Supplement" to the California Cyclopedic Codes (now in press), Penal Code part, section 286; and Kerr's Wharton on Criminal Law, vol. 1, section 762.

CONSTITUTIONAL LAW.

People v. Kennedy, 138 N. Y. Supp. 581. *Referendum provision.* The referendum provision of Bronz County Act (Laws 1912, c. 548, approved April 19, 1912, sec. 15), to the effect that it should be inoperative unless at the general election in November, 1912, a majority of the votes cast should be in its favor, was not unconstitutional as a delegation of legislative power, since on approval the power of the Legislature was exercised, and on an affirmative vote the act would be effective, not by virtue of the popular vote, but by virtue of its enactment by the Legislature.

Rosenthal v. The People of the State of N. Y. U. S. Supreme Court, Oct. Term, 1912. *Police regulation of junk dealers.* No unconstitutional interference with the liberty of contract is made by the provisions of the N. Y. laws, 1903, chap. 326, amending Pen. Code, section 550, which, as construed by the highest court of the state, made it a criminal offense for a dealer in or a collector of junk, metals, or second-hand materials, to buy or receive any stolen wire, cable, copper, lead, solder, iron or brass used by or belonging to a railroad, telephone, telegraph, gas, or electric light company, without making diligent inquiry whether the person selling or delivering it has a legal right to do so, but such legislation is well within the legitimate bounds of the police power of the state.

EMBEZZLEMENT.

State v. Strasser. N. J. 85 Atl. 227. An attorney at law agreed to prepare and file a certificate extending the corporate existence of a company at a total expense to the company of $75 including filing fees. The company's check for $30 was paid to the attorney for the state filing fee, deposited by him, and his own check for $30 which he sent to the Secretary of State, was protested. The company obtained its certificate by the payment to the Secretary of State of $30. Upon his trial for the fraudulent conversion of the $30 that had been paid to him, the defendant offered evidence to show that the company had not paid him the $75 it had agreed to pay for its certificate. Held, that the exclusion of this evidence was error, as it was competent and material upon the question whether any fraudulent conversion of the company's money had resulted or could have resulted unless the company paid more for its certificate than it had agreed to pay, and hence was relevant upon the question of a fraudulent intent.

State v. Grills, R. I. 85 Atl. 281. A depositor in a bank directed the banker to set aside $600 of the deposit for transmission by the banker to a bank in a foreign country. The banker entered in the pass book the withdrawal of $600 from the deposit, and made an entry of the amount of the balance, and gave the depositor a receipt for $600 for transmission to a foreign bank. He did not transmit the money nor give any reason for his failure to do so. Held, that the general deposit was converted into a special deposit to the amount of $600, and became a fund in the hands of the banker, and he was guilty of embezzlement when he fraudulently converted the same to his own use.

Commonwealth v. Stone, 236 Pa., p. 35. An indictment against private bankers under the Act of June 12, 1878, P. L. 196, cannot be sustained where the indictment shows on its face that the money which the prosecutrix claims had been embezzled had been deposited to her credit in a banking institution of which defendants were members. Monies deposited in the bank ceased to be the property of the depositor and became the property of the bank.

EVIDENCE.

Effler v. State, Dela. 85 Atl. 731. *Evidence of other offenses.* Defendant was prosecuted for conspiracy to steal, in that he induced the prosecuting witness to purchase a dry goods business, witness to put in $3,600 cash, defendant and one of his associates $5,000 each in cash, and that, while the defendant was counting his money, men claiming to be detectives broke in, stated that it was counterfeit, took the money of the witness, mixed it with that of the defendant, and disappeared. The court admitted, to show defendant's intent and design, testimony

of a witness that three months afterward he had been robbed of money in the same way by defendant, and those whom the evidence tended to identify as the same associates. Held, that, as the testimony of the other offense had no direct connection with the offense charged, its admission was reversible error.

GRAND JURY.

People v. McCauley, Ill. 100 N. E. 182. Cr. Code, div. 11, section 3 (Hurd's Rev. St. 1911, c. 38, section 405), providing that the grand jurors, being dismissed before court adjourns, may be summoned again on any "special occasion" at such time as the court directs, does not limit the power of the grand jury, when recalled, to a consideration of matters within the special purpose for which they are recalled; but they may investigate and return indictments on any matter submitted to them.

Even if grand jurors were limited by Cr. Code, div. 11, section 3 (Hurd's Rev. St. 1911, c. 38, section 405) to a consideration of the special matters for which they were reassembled, it would not be presumed, in the absence of any showing to the contrary, that the matter for which they indicted the defendant was not among such matters.

A grand jury being reassembled by the court under Cr. Code, div. 11, sec. 3 (Hurd's Rev. St. 1911, c. 38, section 405), even if for consideration of business for which the court had no power to recall it, was a *de facto* grand jury, whose acts cannot be set aside by writ of error, in the absence of a motion to quash the indictment or a challenge to the array in the trial court.

A grand jury recalled under Cr. Code, div. 11, section 3 (Hurd's Rev. St. 1911, c. 38, section 405), after being dismissed, to discharge some additional duties during the same term at which it had been impaneled and sworn need not be resworn; the oath prescribed by Hurd's Rev. St. 1911, c. 78, section 18, "to diligently inquire into the true presentment make of all such matters and things as shall be given you in charge, or shall otherwise come to your knowledge, touching the present service," being broad enough to cover all service such jury may render during the term—"present service" meaning all the services that may be lawfully required of such jury during its existence as an organized body.

HOMICIDE.

People v. Spohr, N. Y. 100 N. E. 444. *Murder in the first degree.* Where accused, upon finding another man in the company of a girl to whom he had paid attentions, wounded the man and upon his escape killed the girl accidentally, the assault upon the man, though with a deadly weapon, will not render accused guilty of murder in the first degree for Penal Law (Consol. Laws, 1909, c. 40), section 1044, subd. 1, defines "murder in the first degree," as the killing of a human being with a deliberate and premeditated design to effect death, while "murder in the second degree" is defined by section 1046 as a killing when committed with a design to effect death but without deliberation or premeditation, and section 240 defines "assault in the first degree" as the act of a person who, with intent to kill a human being, assaults another with a loaded firearm.

LARCENY.

Commonwealth v. Cline, Mass., 100 N. E. 358. *Attempt to commit larceny from the person.* An indictment for an attempt to commit larceny from the per-

son of one unknown to the jurors may be established by proof of a general intent to commit larceny and the doing of overt acts toward its accomplishment, and without showing the amount which might have been stolen, so that it is not necessary to describe the property or allege its value, or even that the person unknown had anything on his person, which could have been the subject of larceny.

MANSLAUGHTER.

Welty v. State, Ind., 100 N. E. 73. *Provocation and cooling time.* An instruction, on trial for homicide, that to constitute manslaughter the provocation must have been such that the accused was not the master of his understanding, and that, if sufficient time had elapsed for reason to resume its sway, the offense was not mitigated to manslaughter, was not erroneous, on the theory that, if the accused's temperament was such that he was still controlled by passion, the offense would be manslaughter only, since while the jury may consider the physical organization and state of mind of the accused and the question of cooling time, the court cannot fix a rule of law as applying to different temperaments.

Commonwealth v. Colandro, 231 Pa. 343. Voluntary manslaughter is a homicide intentionally committed under the influence of passion. The term "passion" as here used includes both anger and terror provided they reach a degree of intensity sufficient to obscure temporarily the reason of the person affected. Terror from the belief on the part of the slayer that his life is in danger is sufficient though such belief is not reasonable.

The border line between self defense and this character of manslaughter seems to be the existence as a moving course of a reasonably found belief of imminent peril to life or great bodily harm as distinguished from the influence of an uncontrollable fear or terror conceivable as existing but not reasonably justified by the existing circumstances. If the circumstances are both adequate to raise and sufficient to justify a belief in the necessity to take life in order to save one's self from such a danger where the belief exists and is acted upon the homicide is excusable upon the theory of self-defense; while, if the act is committed under the influence of an uncontrollable fear of death or great bodily harm caused by the circumstances but without the presence of all the ingredients necessary to excuse the act on the ground of self defense, the killing is manslaughter.

Commonwealth v. Brent, 233 Pa., 381. On the trial of an indictment for murder where drunkenness is set up as a defense and a number of witnesses are produced by the defendant in support of such defense, a verdict of guilty of murder of the first degree will not be reversed where nearly a dozen witnesses for the Commonwealth testified that he was not drunk and the trial judge carefully defines the difference between murder in the first degree and murder in the second degree and otherwise properly and adequately instructs the jury.

The Judge had charged: "The Commonwealth must satisfy your minds beyond a reasonable doubt of every material element of the charge against the defendant but when the defendant sets up as a defense that he was intoxicated to a degree that he was incapable of forming a wilful, deliberate and premeditated intent to take a life the burden rests on the defendant to satisfy you of such degree of intoxication not beyond a reasonable doubt but by a predominance of the others."

Commonwealth v. De Masi, 234 Pa., 570. *Murder. Testimony of an accomplice.* There is no rule of law in Pennsylvania that forbids a conviction of murder on the uncorroborated testimony of an accomplice.

MONOPOLIES.

U. S. v. Patten, 33 Sup. Ct. Repr. 141. *Corner in Cotton.* A conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of interstate trade and commerce, to be accomplished by purchases for future delivery, coupled with a withholding from sale for a limited time, thereby enhancing artificially its price to buyers throughout the country, is within the terms of the anti-trust act of July 2, 1890, section 1, which makes it a criminal offense to engage in a conspiracy in restraint of interstate commerce, since by its necessary operation it will directly and materially impede and burden such commerce.

A conspiracy to corner the market in a commodity, though it may tend to stimulate competition for a time, is within the provisions of the anti-trust act of July 2, 1890, making it a criminal offense to engage in a conspiracy in restraint of interstate commerce, if it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

PUNISHMENT.

People v. Becker, 138 N. Y. Supp. 771, *Indeterminate Sentence.* Penal Law (Consol. Laws 1909, c. 40) sec. 2189, provides that a person never before convicted of a crime punishable by imprisonment in the states prison, who is convicted of a felony other than murder in the first or second degree and sentenced to the states prison, shall be given an indeterminate sentence. Held, that under section 21, providing that the provisions of the law shall be construed according to their fair import, section 2189 did not apply only to those persons who had been previously convicted of a felony in New York; and hence where accused, on being convicted of a felony, was shown to have been previously convicted in Ohio of two crimes for which he would have been punishable by imprisonment in the states prison in New York, had they been committed there, he was not entitled to an indeterminate sentence under section 2189.

People v. Carlesi, 139 N. Y. Supp. 309. *Second offense after first offense pardoned.* Under Penal Law (Consol. Laws, c. 40) sec. 1941 which provides that a person who, after having been convicted in this state of a felony, or under the laws under any other government of a crime, which, if committed in this state, would be a felony, commits any crime, is punishable upon conviction as for a second offense, a prior conviction of a felony under the federal statute, after pardon and restoration to civil rights, may be the basis of a conviction of a subquent crime as a second offense; since the punishment inflicted is solely for the second offense to which a greater degree of criminality is thereby attached.

RECEIVING STOLEN GOODS.

People v. O'Reilly, 138 N. Y. Supp. 776. *Elements of the offense.* Where a lawyer, while representing thieves in obtaining a reward for the return of stolen

property, receives the property, knowing it to have been stolen, and keeps it until the reward is paid, and then delivers it over to the representative of the owner, he is guilty as principal, within Penal Law (Consol. Laws 1909, c. 40) sec. 1308, of receiving stolen property knowing it to have been stolen, or withholding it for reward, and it is immaterial that for his own protection he has induced the owner's representative to nominally retain him to assist in recovering the property.

REVIEW.

State v. Merkle, N. J., 85 Atl. 330. *Harmless error.* An indictment, charging the soliciting of a bribe to vote for one Hannis, omitted to state that it was Hannis who was solicited, which was made the ground of a motion to quash, which was denied. The motion disclosed that the fact that it was Hannis' name that was omitted was known to the defendant, who was in no wise prejudiced at the trial by such omission. Held that the denial of a motion to quash being a matter of discretion, was not reviewable upon error assigned on a bill of exceptions.

SENTENCE.

State v. Sturgis, Me., 85 Atl. 474. *Alternative sentence.* A sentence in a criminal case must be definite and certain, and not dependant upon any contingency or condition, and, in the absence of a statute, a sentence in the alternative is bad for uncertainty.

Rev. St. C, 136, section 5, which provides that, when a convict is sentenced to jail, the court may, in addition, sentence him to the other punishment provided by law for the same offense, with the condition that if he cannot be received at the jail to which sentenced, or if at any time before the expiration of the sentences he becomes incorrigible or unsafe, the inspector of jails may order that he suffer such alternate sentence, is special and limited in its operation, its very enactment emphasizing the fact that alternative sentences without statutory authority are void, and does not authorize alternative sentences generally.

SPECIFIC INTENT.

State v. Gallagher, N. J., 85 Atl. 207. The offense charged by the allegation in an indictment that the defendant committed an assault upon E, with intent to kill the said E may be sustained by proving that the assault was made upon E with intent to kill G.

The general principle of the criminal law that the intent with which an act is done determines the legal character of its consequences, although such consequences operate upon a different person from that intended applies to statutory as well as to common law crimes.

Upon the trial of the accused for committing an assault upon E with intent to kill E, proof that his intention was to kill G, is relevant, and not evidence of a distinct offense.