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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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Decision of the Supreme Court of New Jersey on the Sterilization Law. —The following copy of the opinion of the Supreme Court of New Jersey, with respect to the validity of the sterilization law in that state has been received through the courtesy of Mr. Nelson B. Gaskill, assistant attorney general of New Jersey. It is published here in full. [Ed.]

Alice Smith, Prosecutrix, v. Board of Examiners of Feeble-Minded (including Idiots, Imbeciles and Morons), Epileptics, Criminals and Other Defectives, defendant.

Submitted July 3, 1913. Decided November 18, 1913.

1. The artificial regulation of the welfare of society by means of surgical operations for the prevention of procreation being based upon the suppression of the personal liberty of individuals must be accomplished, if at all, by a statute that does not deny to the persons thus injuriously affected the equal protection of the laws guaranteed by the fourteenth amendment to the constitution of the United States.

2. The Board of Examiners created by "An act to authorize and provide for the sterilization of feeble-minded (including idiots, imbeciles and morons), epileptics, rapists, certain criminals and other defectives" (P. L. 1911, p. 353), ordered that the operation of salpingectomy be performed upon one Alice Smith, an epileptic inmate of a state charitable institution, as the most effective operation for the prevention of procreation.

Held: That the statute in question was based upon a classification that bore no reasonable relation to the object of such police regulation, and hence denied to the individuals of the class so selected the equal protection of the laws guaranteed by the fourteenth amendment to the constitution of the United States.

On *Certiori.*

The order brought up by this writ of *certiorari* is as follows:

"The Board of Examiners of Feeble-Minded (including idiots, imbeciles, and morons), epileptics, criminals and other defectives, together with David F. Weeks, the chief physician of the New Jersey State Village for Epileptics, having on the thirty-first day of May, 1912, regularly convened at the Administration Building at the New Jersey State Village for Epileptics (according to the provision of Chapter 190, page 353, of the Laws of 1911, Statutes of the State of New Jersey), and at that time, in the presence of Azariah M. Beekman, counsel regularly appointed to represent Alice Smith, an inmate of said village, committed thereto on August 19, 1902, by Alfred F. Skinner, judge of the Court of Common Pleas of Essex County, application for the appointment of said counsel having been made to, and the appointment having been made, previous to the holding of said hearing, by the judge of the Court of Common Pleas of the County of Somerset, in which county the institution in which the said Alice Smith is an inmate is located, having examined into the mental and physical condition of the said Alice Smith, do find and declare her to be an epileptic person within the meaning of said act; and the said board, together with the chief physician of said institution, having

unanimously found in the case of said Alice Smith, that procreation by her is inadvisable, and that there is no probability that the condition of said Alice Smith, so examined, will improve to such an extent as to render procreation by said Alice Smith advisable."

"It is, therefore, on this the thirty-first day of May, nineteen hundred and twelve, ordered, that the operation of salpingectomy, as the most effective operation for the prevention of procreation, be performed upon the said Alice Smith in accordance with the motion at said hearing unanimously adopted."

The pertinent parts of the statute under which this order was made are as follows:

"An act to authorize and provide for the sterilization of feeble-minded (including idiots, imbeciles and morons), epileptics, rapists, certain criminals and other defectives. *(P. L. 1911, p. 353.)*

"WHEREAS, Heredity plays a most important part in the transmission of feeble-mindedness, epilepsy, criminal tendencies and other defects; "BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

"I. Immediately after the passage of this act, the governor shall appoint by and with the advice of the senate, a surgeon and a neurologist, each of recognized ability, one for a term of three (3) years and one for a term of five (5) years, their successors each to be appointed for the full term of five years, who in conjunction with the Commissioner of Charities and Corrections, shall be known as and is hereby created the 'Board of Examiners of Feeble-Minded (including idiots, imbeciles and morons), Epileptics, Criminals and other Defectives,' whose duty it shall be to examine into the mental and physical condition of the feeble-minded, epileptic, certain criminal and other defective inmates confined in the several reformatories, charitable and penal institutions in the counties and state.

"2. The criminals who shall come within the operation of this law shall be those who have been convicted of the crime of rape, or of such succession of offenses against the criminal law as in the opinion of this board of examiners shall be deemed to be sufficient evidence of confirmed criminal tendencies.

"3. Upon application of the superintendent or other administrative officer of any institution in which such inmates are or may be confined, or upon its own motions, the said board of examiners may call a meeting to take evidence and examine into the mental and physical condition of such inmates confined as aforesaid, and if said board of examiners, in conjunction with the chief physician of the institution, unanimously find that procreation is inadvisable, and that there is no probability that the condition of such inmate so examined shall improve to such an extent as to render procreation by such inmate advisable, it shall be lawful to perform such operation for the prevention of procreation as shall be decided by said board of examiners to be most effective, and thereupon it shall and may be lawful for any surgeon qualified under the laws of this state, under the direction of the chief physician of said institution, to perform such operation."

Before Justices GARRISON, TRENCHARD and MINTURN.

For the prosecutrix, *Azariah M. Beekman.*

For the defendant, *Nelson B. Gaskill, Assistant Attorney General.*

(*Elmer T. Elver, Esq.,* of the Wisconsin Bar, on the brief.)

The opinion of the court was delivered by GARRISON, J.

The question propounded is whether or not the statute under which the order now before us was made is a valid exercise of the police power. The statute, it will be observed, applies also to criminals, in which aspect it does not now concern us since the prosecutrix is an epileptic, an unfortunate person but not a criminal.

The order is made by the Board of Examiners provided by the act of 1911 (P. L., p. 353). Briefly stated, the order after reciting that Alice Smith is an epileptic inmate of a state charitable institution, that procreation by her is inadvisable, and that there is no probability that her condition will improve to such an extent as to render procreation by her advisable, orders that the operation of salpingectomy be performed upon the said Alice Smith.

Salpingectomy is the incision or excision of the fallopian tube, *i. e.*, either cutting it off or cutting it out. The fallopian tube is an essential part of the female reproductive system and consists of a narrow conduit some four inches in length that extends on each side of a woman's body from the base of the womb to the ovary upon that side. These three organs, *i. e.*, the ovary, the fallopian tube and the uterus, are all concerned in normal child-bearing, the relation between them being that the unfecundated ovum which is periodically produced in the ovary passes down through the fallopian tube into the body of the uterus where, if fecundation by the male seed takes place, or has taken place, the embryo is formed and developed into the fœtus or unborn child.

The statute is broad enough to authorize an operation for the removal of any one of these three organs essential to procreation. These organs are in pairs on either side of the body excepting the uterus, which is a single organ lying deep in the pelvis, back of the bladder. The operation of salpingectomy, therefore, to be effective must be performed on both sides of the body, and hence is in effect two operations, both requiring deep-seated surgery under profound and prolonged anæsthesia, and hence involving all of the dangers to life incident thereto, whether arising from the anæsthetic, from surgical shock or from the inflammation or infection incident to surgical interference with the peritoneal cavity. These ordinary incidents and dangers of such an operation are not lessened where the operation is not sought by the patient, but must be performed upon her by force at least to the extent of the production of such anæsthesia as shall completely destroy all liberty of will or action. The order is addressed to no one and is silent as to the person by whom this operation is to be performed, and the statute likewise is silent upon this subject, excepting that when an order is made, "thereupon it shall be and may be lawful for any surgeon qualified under the laws of this state, under the direction of the chief physician of said institution, to perform such operation."

The prosecutrix falls within the classification of the statute in that she is an inmate of the State Village for Epileptics, a state charitable institution, "the objects of which," as stated in the act creating it, are "to secure the humane, curative, scientific and economical care and treatment of epilepsy." (4 Comp. Stat., p. 4961.)

The prosecutrix has been an inmate of this charity since 1902, and for the five years last passed she has had no attack of the disease. From this statement of the facts it is clear that the order with which we have to deal threatens possibly the life and certainly the liberty of the prosecutrix in a manner forbidden by both the state and federal constitutions, unless such order is a valid exercise of the police power. The question thus presented is, therefore, not one of those constitutional questions that are primarily addressed to the legislature, but a purely legal question as to the due exercise of the police power which is always a matter for determination by the courts.

This power, stated as broadly as the argument in support of the order re-

quires, is the exercise by the legislature of a state of its inherent sovereignty to enact and enforce whatever regulations are in its judgment demanded for the welfare of society at large in order to secure or to guard its order, safety, health or morals. The general limitation of such power, to which the prosecutrix must appeal is that under our system of government the artificial enhancement of the public welfare by the forceable suppression of the constitutional rights of the individual is inadmissible.

Somewhere between these two fundamental propositions the exercise of the police power in the present case must fall and its assignment to the former rather than to the latter involves consequences of the greatest magnitude. For while the case in hand raises the very important and novel question whether it is one of the attributes of government to essay the theoretical improvement of society by destroying the function of procreation in certain of its members who are not malefactors against its laws, it is evident that the decision of that question carries with it certain logical consequences having far-reaching results. For the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the legislature, be a distinct benefit to society. If the enforced sterility of this class be a legitimate exercise of governmental power, a wide field of legislative activity and duty is thrown open to which it would be difficult to assign a legal limit.

If in the present case we decide that such a power exists in the case of epileptics, the doctrine we shall have enunciated cannot stop there. For epilepsy is not the only disease by which the welfare of society at large is injuriously affected; indeed, not being communicable by contagion or otherwise, it lacks some of the gravest dangers that attend upon such diseases as pulmonary consumption or communicable syphilis. So that it would seem to be a logical necessity that, if the legislature may, under the police power, theoretically benefit the next generation by the sterilization of the epileptics of this, it both may and should pursue the like course with respect to the other diseases mentioned with the additional gain to society thereby arising from the protection of the present generation from contagion or contamination. Even when these and many other diseases that might be named have been included, the limits of logical necessity have by no means been reached.

There are other things besides physical or mental diseases that may render persons undesirable citizens or might do so in the opinion of a majority of a prevailing legislature. Racial differences, for instance, might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue. Even beyond all such considerations it might be logically consistent to bring the philosophic theory of Malthus to bear upon the police power to the end that the tendency of population to outgrow its means of subsistence should be counteracted by surgical interference of the sort we are now considering.

Evidently the large and underlying question is how far is government constitutionally justified in the theoretical betterment of society by means of the surgical sterilization of certain of its unoffending but undesirable members. If some, but by no means all, of these illustrations are fanciful, they still serve their purpose of indicating why we place the decision of the present case upon a ground that has no such logical results or untoward consequences.

Such a ground is presented by the classification upon which the present statute is based, which is of such a nature that the persons included within it are not afforded the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, which provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws." Under this provision it has been uniformly held that a state statute that bears solely upon a class of persons selected by it must not only bear alike upon all the individuals of such class, but that the class as a whole must bear some reasonable relation to the legislation thus solely affecting the individuals that compose it.

"It is apparent," said Mr. Justice Brewer in *Gulf, Colorado, &c., R. R. Co. v. Ellis* (165 U. S., p. 150), after a review of many cases, "that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

This summarizes a mass of cases that might be cited.

Turning our attention now to the classification on which the present statute is based and laying aside criminals and persons confined in penal institutions with which we have no present concern, it will be seen that—as to epileptics, with which alone we have to do—the force of the statute falls wholly upon such epileptics as are "inmates confined in the several charitable institutions in the counties and state." It must be apparent that the class thus selected is singularly narrow when the broad purpose of the statute and the avowed object sought to be accomplished by it, are considered. The objection. however, is not that the class is small as compared with the magnitude of the purpose in view, which is nothing less than the artificial improvement of society at large, but that it is singularly inept for the accomplishment of that purpose in this respect, viz., that if such object requires the sterilization of the class so selected, then *fortiori* does it require the sterilization of the vastly greater class who are not protected from procreation by their confinement in state or county institutions.

The broad class to which the legislative remedy is normally applicable is that of epileptics, *i. e.*, all epileptics. Now, epilepsy, if not, as some authorities contend, mainly a disease of the well-to-do and over-fed, is at least one that affects all ranks of society, the rich as well as the poor. If it be conceded for the sake of argument that the legislature may select one of these broadly defined classes, *i. e.*, the poor, and may legislate solely with reference to this class, it is evident that by the further sub-classification of the poor into those who are and those who are not inmates in public charitable institutions, a principle of selection is adopted that bears no reasonable relation to the proposed scheme for the artificial betterment of society. For not only will society at large be just as injuriously affected by the procreation of epileptics who are not confined in such institutions as it will be by the procreation of those who are so confined; but the former vastly outnumber the latter and are in the nature of things vastly more exposed to the temptation and opportunity of procreation, which indeed in the cases of those confined in a presumably well-conducted public institution is reduced practically to nil.

The particular vice, therefore, of the present classification is not so much

that it creates a sub-classification based upon no reasonable basis, as that having thereby arbitrarily created two classes, it applies the statutory remedy to that one of those classes to which it has the least, and in no event a sole, application, and to which indeed, upon the presumption of the proper management of our public institutions, it has no application at all. When we consider that such statutory scheme necessarily involves a suppression of personal liberty and a possible menace to the life of the individual who must submit to it, it is not asking too much that an artificial regulation of society that involves these constitutional rights of some of its members shall be accomplished, if at all, by a statute that does not deny to the persons injuriously affected the equal protection of the laws guaranteed by the federal constitution.

The suggestion that the classification might be sufficient if the scheme of the statute were to turn the sterilized inmates of such public institutions loose upon the community and thereby to effect a saving of expense to the public is not deserving of serious consideration. The palpable inhumanity and immorality of such a scheme forbids us to impute it to an enlightened legislature that evidently enacted the present statute for a worthy social end upon he merits of which our present decision upon strictly legal lines is in no sense to be regarded as a reflection.

The conclusion we have reached is that without regard to the power of the state to submit its citizens to surgical operations that shall render procreation by them impossible, the present statute is invalid in that it denies to the prosecutrix of this writ the equal protection of the laws to which under the constitution of the United States she is entitled.

The order brought up by this writ is set aside.

The Meaning of the White Slave Act as Shown by Federal Decision.—It being stated in associate press dispatches that, lately, it has been held in a district court in Kansas, that the Mann or White Slave Act does not reach, for constitutional reasons, and presumptively was not intended to reach, mere personal immorality in one taking a female from one state to another for the gratification of his own lust, or to live with him in concubinage, it becomes useful to refer to Supreme Court decisions, construing this act, rendered February 4, 1913. *Hoke v. U. S.*, 227 U. S. 308, 33 Sup. Ct. 281; *Athanasaw v. U. S.*, 227 U. S. 326, 33 Sup. Ct. 285; *Bennett v. U. S.*, 227 U. S. 333, 33 Sup. Ct. 288; *Harris v. U. S.*, 227 U. S. 340, 33 Sup. Ct. 289.

In our former comment in 76 C. L. J. 261, we spoke of these cases marking another step in national power, in which the intent of the defendant, rather than the quality of his act, showed the exercise of a national police power in behalf of the morality of our country as a whole. As the view above alluded to appears to us to fail to admit such interpretations of those decisions, we shall endeavor to show that it was upon this conception that they proceeded.

All of these cases, except the Athanasaw case, appear to relate to keepers of houses of ill-fame importing girls for the plying of the trade of prostitutes therein, but this circumstance is in no wise stressed in the elaborate opinion by Justice McKenna, rendered in the Hoke case. The Athanasaw case, however, was very different. The inducement and transportation was for an apparently legitimate purpose—for the female's employment as a chorus girl at a stated salary in the state to which she was being transported.

Of course, it is to be conceded, that, if this was but the ostensible purpose with the real intent to lead the female into a life of debauchery or prostitution, all of the cases would be upon the same footing, but the burden would be upon the prosecution to show this. It is, therefore, necessary to look further and see if this requirement was met.

The evidence showed that upon arrival at her destination the female appeared at the theatre and took part in rehearsals, having never before had any stage experience. One of the defendants, on the same day, made improper proposals to her, saying he wanted her for his girl and not to let any of the boys fool her. She was thrown into association with boys who were smoking, cursing and drinking. She became frightened, and, getting word to a policeman, was taken out of the place.

The court stated that the charge was that she was transported with the intent to induce her or entice her to enter upon a course of debauchery, and that such intent was "to corrupt in morals or principles, to lead astray morally into dishonest and vicious practices; to lead into unchastity."

The defendants contended that defendants must have had a deliberate intent to debauch her when she came there; that either one or the other intended to debauch her or to get somebody else to debauch her.

The Supreme Court approved the instructions, and denied this contention, saying: "The plan and place justified the instructions. The plan might have succeeded if the coarse precipitancy of one of the defendants and the ribaldry of the habitues of the place had not shocked the modesty of the girl. And the employment to which she was enticed was an efficient school of debauchery of the special immorality which defendants contend the statute was designed to cover."

It is perceived that it appears to have been conceded that, if defendants or either of them intended to debauch the girl, there would have been a case under the act, and the court ruled that the act was more comprehensive than this—embracing this and more than this.

But concede that all of this is *arguendo* in the opinion, then we refer to the Hoke case, where the constitutionality and purpose of the statute is more fully considered and we see that in answering the objection to constitutionality that it is "a subterfuge and attempt to interfere with the police power of the states to regulate the morals of their citizens, and assert that it is in consequence an invasion of the reserved powers of the states. There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which congress alone has power; and, if such power be exerted to control what the states cannot, it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the states."

We pause to say, that, if this does not mean that congress can control what the state cannot and in the same way the state could, if its jurisdiction there extended, this is about as misleading argumentation as it was within the power of the learned justice to pursue.

He does not, however, stop with this or qualify in any way its apparent assertion of a national police power, but on the contrary, seems to state it more

emphatically in saying: "Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."

Have we still a doubt of the court's belief of national police power being identical within national zone with state power in its zone? If so, then interpret what the learned justice says in his summary of his own reasoning. "The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that congress has power over transportation 'among the several states'; that the power is complete in itself and that Congress, as an incident to it, may adopt not only means necessary, but convenient to its exercise, and the means may have the quality of police regulations."

It is unfortunate, indeed, that such an opinion should have been written, if it yet may be successfully argued, that one may transport a woman from one state to another for any immoral purpose pertaining to sexual relations. Indeed, it seems to us to be less clearly within national power that probable or ultimate interstate traffic in prostitution is attempted to be prevented, that the intent by one still in the federal zone may be penalized. Consequences wholly within state jurisdiction are its exclusive concern. But whether this view be sound or unsound, what do these decisions mean?—From *Central Law Journal*, Oct. 10, 1913.

CONSTITUTIONAL LAW.

Morse v. Brown, 206 Fed. 232. *Meaning of "reputed."* Acts Conn. 1907, c. 122, provides for sentence by fine or imprisonment on any person who shall be convicted of keeping a house which is, or is reputed to be, a house of ill fame, or which is resorted to or is reputed to be resorted to, for purposes of prostitution and lewdness. Held, that since the Connecticut Supreme Court of Errors prior to the adoption of such statutes had held that the word reputed as so used in other statutes, would be construed as limited to reputation founded on facts, and not on mere irresponsible rumor, the statute so construed, was not unconstitutional, as violating the federal constitution, as justifying a conviction of an offense on irresponsible rumor.

CONSTRUCTION OF STATUTES.

Johnson v. State, Ala. 63 So. 163. *Convict sentenced to imprisonment for life.* The Alabama statute provides that "any convict sentenced to imprisonment for life, who commits murder in the first degree while such conviction remains in force against him must, on conviction, suffer death." The defendant had been convicted of murder in the first degree, and sentenced to be hanged. The governor commuted the sentence to life imprisonment. While the defendant was serving this commuted sentence he killed a fellow convict. It was objected that the case did not fall under the above statute, as he had not been sentenced to imprisonment for life, but had been sentenced to be hanged. Held, that the effect of the commutation was to make him a life convict under judgment of conviction for murder in the first degree and that he was properly convicted under the statute.

Robertson v. State, Tex. Cr. App., 159 S. W. 713. *Enactment of inconsistent provisions in code.* The Texas code of 1895 made certain forms of

gambling a misdemeanor, punishable by fine. In 1907 a county attorney was killed by a gambler for trying to enforce the gaming laws. The legislature, which was then in session, made the same acts felonies, punishable by imprisonment in the penitentiary. Both sets of these statutes were incorporated in the code of 1911. Defendant was convicted and sentenced under the section making the offense a felony. He appeals upon the ground that the two sets of provisions are in conflict, and hence nullify each other. Held, that the act of 1907, covering the same ground as the sections in the code of 1895, repealed them by implication. The commissioners who prepared the code of 1911 were instructed to omit repealed acts. Their failure to omit the repealed sections of the code of 1895 was due to oversight. The history of the various enactments shows that the legislature did not intend to re-enact the repealed articles by incorporating them in the code. "Where a statute upon a special subject has been repealed, not expressly but by implication by the enactment of a later statute on the same subject inconsistent with the first, and both laws are subsequently included in a revision or codification, they still have the same relative force and effect as before the codification; that is to say, the earlier remains repealed by the later statute." Hence the defendant was properly convicted under the act of 1907.

CONTEMPT.

United States v. Huff, 206 Fed. 700. *Misbehavior so near the court as to obstruct administration of justice.* In the provision of Rev. Stat., Sec. 725, and Judicial Code, Sec. 268, limiting the power of federal courts to punish for contempt to "misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice," the second clause is not restricted in meaning to acts committed so near in point of distance to the place of holding court as to be obstructive to orderly procedure, which are covered by the preceding clause as construed by the Supreme Court, but applies to all acts of misbehavior whose natural tendency and effect are to interfere with the administration of justice, wherever the acts may be committed.

ERRONEOUS JUDGMENT.

Ex parte Robinson, Ala., 63 So. 177. *Sentence to Wrong Prison.* The Alabama statute authorizes the jury to fix the length of a term of imprisonment. It also provides that when the term is one year or less it shall be served in the county jail. The petitioner was convicted of manslaughter and the jury fixed his punishment at one year in the penitentiary. The court entered judgment in accordance with the verdict. On appeal, the Court of Appeals first ordered a new trial, but on reconsideration set aside this order and remanded the case for re-sentence in accordance with the statute. Petitioner then brought the case by *certiorari* to the Supreme Court. Held, that the portion of the verdict fixing the place of punishment might be disregarded as surplusage, so there was no error until the judgment was rendered. Hence the verdict should not be set aside but the judgment alone should be reversed and the case remanded for a lawful judgment. The action of the Court of Appeals was approved. A prior decision of the Supreme Court, which held the other way on this point, was expressly overruled, and concurrent expressions in two later cases were disapproved.

ERROR WITHOUT PREJUDICE.

Vick v. State, Tex. Cr. App., 159 S. W. 50. *Improper cross-examination.* Defendant, while on trial for murder, took the stand in his own behalf. While he was a boy, thirteen years before this trial, he had been convicted of horse stealing, but had been pardoned. Out of hearing of the jury, the defendant's attorney stated these facts to the judge and county attorney, and asked the court to instruct the county attorney not to ask questions seeking to bring out this fact on cross-examination. The court said he had no power to give such instructions, and refused to do so. On cross-examination the county attorney asked defendant if he had not been so convicted. The defendant objected. The court made no ruling. Before the question was answered the county attorney had the minute book showing the prior conviction brought into court. The judge examined the book and then sustained defendant's objection to the question, and instructed the jury not to consider what had just occurred. Held, the evidence was inadmissible, as the prior conviction occurred while defendant was a boy, about eighteen years old; there was no showing that he had not reformed, and especially as he had been pardoned. But it was error for the court to refuse to instruct the county attorney not to examine as to the prior conviction. The court had the power and it was his duty to do so, and he should have used the whole power of the court to enforce his instructions. If the county attorney had "asked or attempted to ask such questions the court should have inflicted such immediate and esvere punishment that would not only deter him but any other prosecuting officer in the future to desist." But as the court at last sustained the objection to the question and specifically instructed the jury not to consider what had occurred and in allowing the bill of exceptions stated that in hearing the testimony of the jurors on a motion for new trial it was shown that this matter had no effect on them, the error was without prejudice sufficient to require a reversal. The conviction was affirmed.

Anderson v. State, Tex. Cr. App., 159 S. W. 847. *Admission of incompetent evidence.* On trial of defendant for burning a barn, the state was permitted to prove that there was a large quantity of grain, hay and millet, and also eleven head of horses, all burned in the barn. The defendant objected to the evidence as being "irrelevant, immaterial, prejudicial, and calculated to arouse the passions of the jury and prejudice them against the defendant." Defendant was convicted and the jury assessed the minimum punishment. Held, that if the evidence was improperly admitted, the verdict shows that no passion or prejudice was aroused against him, hence the error was without prejudice. But the court thought the evidence was properly admitted, as it was shown that the defendant knew the contents of the building. The conviction was affirmed.

Seymour v. State, Fla., 63 So. 7. *Rulings at the trial.* Appeal on account of error in giving or refusing charges, in rulings on the admissibility of testimony, and other matters of procedure. Held, as the errors, if any, did not affect any fundamental rights of the defendants, and it appears from the whole record that they were not prejudicial, "the evidence of guilt being ample and positive," the judgment should be affirmed.

EVIDENCE.

People v. Burger, Ill. 102 N. E. 751. *Admissibility of evidence of other offenses. Harmless error.* On a trial for larceny of goods in a department store, the testimony of a police officer as to a conversation with accused imme-

diately after her arrest, disclosing that the officer charged her with having been arrested and convicted in another city, and with having previously stolen other goods from the department store, followed by a display in the presence of the jury of accused's picture, taken in the other city was improper.

But where the undisputed proof of guilt of accused is so strong that it would not have been possible for the jury to have returned any other verdict than that of guilty, the error in admitting improper testimony was harmless.

FORMER JEOPARDY.

United States v. Gonzales, 206 Fed. 239. *Conviction of lower offense.* Under the rule of the federal courts, a defendant indicted for murder in the first degree, but convicted of an included crime, by procuring such conviction to be set aside by the trial court or an appellate court, waives the right to use the judgment by plea of former jeopardy, and may be again tried for murder in the first degree.

IMPEACHMENT.

People ex rel. Robin v. Hayes, warden, 143 N. Y. Supp. 325. *When power may be exercised.* The constitution empowers the assembly to impeach the governor, but it does not specify when the power shall be exercised, and the assembly is the sole judge of the time as well as the grounds of impeachment, free from control by the executive or the courts.

Hence the impeachment of the governor by the assembly while in extraordinary session is valid, though const. art. 4, sec. 4, provides that no subject shall be acted on at such a session except such as the governor recommends, and it had not been recommended, as the power of impeachment is a judicial and not a legislative power and one that should always be independent of outside control.

INDICTMENT.

Zoborowsky v. State, Ind. 102 N. E. 825. *Allegation of age in rape.* Burns' Ann. Stat., 1908, Sec. 2250, provides that whoever unlawfully has carnal knowledge of a female child under 16 years of age is guilty of rape. Held, that an indictment charging that accused did unlawfully touch the person of N— with the unlawful and feloneous intent to ravish her, she being then a child under the age of 12 years, to wit, 10 years of age, was not objectionable, as using the words "twelve years," instead of "sixteen years," the statutory age of consent; since the statute merely fixes a definite time below which the crime is committed, without reference to the consent of the female, and an allegation that the age of the victim is below the statutory limit of consent is sufficient.

People v. Waldhorn, 143 N. Y. Supp. 484. *Allegation of attempt to commit arson.* Pen. Code, par. 2, defines an "attempt to commit a crime" to consist of an act done with intent to commit the crime, and tending, but failing, to effect its commission. Sec. 221 declares that a person who wilfully burns or sets on fire in the night-time a building wherein to the knowledge of the offender there is at the time a human being is guilty of arson in the first degree. Code Crim. Proc., Sec. 275, provides that an indictment shall contain a plain and concise statement of the act constituting the crime. Held, that an indictment for attempt to commit arson in the first degree, charging that accused on a specified date did feloneously, etc., set fire to and burn the structure described,

wherein to his knowledge there was a human being, and by such manner and means did attempt to commit arson in the first degree, was fatally defective for failure to allege the act or acts showing the manner in which defendant attempted to fire the building.

INDICTMENT AND INFORMATION.

Coulter v. Commonwealth, Ky. App., 159 S. W. 557. *Alternative pleading.* Defendant was convicted of perjury on an indictment which charged that at one hearing he "did then and there, knowingly and falsely state and swear that he did not hear Milton Brown tell R. G. Railly at Railly's office or anywhere else on the face of the earth to burn or destroy said deed," and that at a later hearing he "did wilfully, knowingly and falsely state and swear that he did hear Milton Brown tell R. G. Railly at Railly's office, to burn or destroy said deed. One or the other of said statements so made by said Coulter is and was false and untrue and was known to be false and untrue by said Coulter at the time he made same. But which one of said statements was false and untrue is to this grand jury unknown, but was known to said Coulter to be false and untrue when he made same, when in fact and in truth said Coulter did or did not hear Milton Brown tell said Railly to burn or destroy said deed, but whether he did or did not hear said Brown so state is to this grand jury unknown, but is and was known to said Coulter when he made same." A statute required indictments to be direct and certain as regards the offense charged and to set out the particular circumstances thereof. Held, that as there was no provision in the code authorizing alternative pleading, the indictment was fatally defective, as it did not negative by special averment the matter alleged to have been falsely stated. Instead of pointing out the testimony that was false the indictment expressly states that the grand jury did not know which was true. The conviction was reversed.

JURY.

State v. Turner, La., 63 So. 169. *Exclusion of negroes.* Defendant, who was a negro, was convicted of shooting another negro with a dengerous weapon. He appeals upon the ground that the names of no negroes were put into the venire box. There were about 1,600 white men and 200 negroes qualified to serve on juries. Three hundred names were put into the box. There was some testimony that the jury commissioners had for years discriminated in favor of white jurors. The commissioners who selected the names from which this jury was drawn testified that they had not selected any negroes and did not think it necessary to select negroes, as long as they had "good, solid, competent white men to fill this position." Held, that the jury commissioners are to select jurors according to their real qualifications. They are to select some, and exclude others not because they are white or black, but because they are competent or incompetent, and each commissioner is to determine as to the qualifications of the juror whom he concurs in selecting, upon his individual responsibility, and according to his conscience and best judgment. If the commissioner is a white man, in that part of the country his associates are white men, and his acquaintance among negroes may be extremely limited. It would be inexcusable if he should pass over white men whom he knew to be competent, good and true, to select jurors from among negroes or other white men of whose qualifications he was ignorant or whom he knew to be incompetent. Hence in the intelligent, legal and proper exercise of a plain duty, white com-

missioners will be apt to select white jurors rather than colored. As the record indicates that he received as fair and impartial a trial before an all-white jury as he would have had before an all-colored or a mixed jury, there was no error in the selection of the jurors.

PARDON.

People ex rel. Robin v. Hayes, Warden, 143 N. Y. Supp. 325. *Granted by an impeached governor.* Under Const. art. 4, sec. 6, providing that "in case of the 'impeachment' of the governor * * * the powers and duties of the office shall devolve upon the lieutenant governor * * * until the disability shall cease," after "impeachment," which is a method of procedure in a criminal case against a high official, the reins of government are transferred to the lieutenant governor, and a pardon granted by the governor, while under impeachment, is void.

PRESUMPTIONS.

Miller v. State, Miss., 63 So. 269. *That a person is not a physician or dentist.* The defendant was convicted of making an unlawful sale of cocaine to a negro boy. He appeals on the ground that the state did not prove that the sale was not made to a legally licensed physician or dentist, or upon a physician's prescription. Held, that if the sale was made upon a prescription, the fact is peculiarly within the knowledge of the defendant, and consequently he should prove it. It is presumed "that what is common in general, prevails in particular," and "a fact, the existence of which is once shown continues." As the right to practice medicine and dentistry is granted only to exceptional persons, and not to the mass of the people, and as the negro boy was not a licensed physician or dentist at birth, there is a double, prima facie presumption that he was not a licensed physician or dentist at the time of the sale. This presumption is sufficient to support the state's case. The conviction was affirmed.

SENTENCE.

Kenny v. State, Md. 87, Atl. 1109. *For a second offense.* Where accused is indicted for the sale of liquor on Sunday, after having been previously convicted of the same offense, and the verdict is simply guilty, he cannot be sentenced to the additional penalty provided for the second offense, since the verdict does not show that the jury found him guilty of a second offense.

Stevens v. M'Claughry, warden, 207 Fed. 18. *Where different offenses are part of the same act.* The sentence of a defendant, convicted under separate counts of an indictment under Section 5469, Revised Statutes, of larceny of a mail pouch containing registered letters and of letters, and also of larceny of registered letters and of embezzlement of their contents, committed at the same time and place, and as parts of a continuous criminal act to separate punishments, is beyond the jurisdiction of the court and void as to the excess above the maximum punishment that may be imposed for a single offense; and, after the defendant has satisfied such a sentence, he is entitled to his relief by *habeas corpus.*

Separate offenses which are committed at the same time and are parts of a continuous criminal act, inspired by the same criminal intent which is an essential element of each offense, are susceptible of but one punishment.