1893

A Discussion of Section 676 of the New York Penal Code

J. A. Hamilton
Cornell Law School

A DISCUSSION

of

Section 676 of the New York Penal Code

With Reference

To Its Constitutionality

A Thesis for the Degree of L. L. B.

by

F. A. Hamilton Ph. B.

1895

A discussion of Section 676 of the New York Penal Code, with Reference to its Constitutionality.

Sec. 676 of the Penal Code of the State of New York reads as follows:

Acts committed out of the State.- A person who commits an act without this state which affects persons or property within this state, or the public health, morals, or decency of this state, and which, if committed within this state would be a crime, is punishable as if the act were committed within this state.

This section thus apparently holds on its face that a person may be punished in this state and by the laws of this state for an act which he committed in another state. Inasmuch as it has been often expressly asserted by our highest court that the laws of this state have not extra-territorial effect, and that a crime must have been committed within the state in order to be punished by state laws,(a) an inquiry into this apparent anomaly may be justifiable.

(a) People v. Mosher, 2 Park. 195. &c.

But not alone from its anomalous character is this section interesting. Well defined principles of the common law, and recent decisions of the highest courts of other states, as well as one of the amendments to the Constitution of the United States suggest the possibility, at least, of its unconstitutionality. The fact that the Court of Appeals of this state has not, as yet, directly or indirectly passed upon the section in question, renders possible the following discussion of its probable intent, effect, and constitutionality.

The note under Sec. 676 refers to Sec. 678, indicating that the two may be construed together. Sec. 678 declares that any act punishable by this code, is not less so because it is punishable under the laws of another state. This plainly indicates that Sec. 676 was intended to cover criminal acts whose criminal effects were felt in the state in which they were committed, as well as in this state. It appears, therefore, that any ordinary crime committed in another state, if it affected in any way persons, property, morals, health, or decency in this state, could be tried out and punished in this state, as if it had been committed within this state.

But what can be said to affect persons or property within this state, or the public health, morals, or decency of

this state" within the meaning of this statute? Here is a very elastic provision, which may be made to cover every kind of ill effect, from the presence of the criminal in the community to a pestilence. Let us begin at the bottom. Nothing can more clearly come within the provisions of the section than the first ill effect mentioned above, viz.: that arising from the presence of the criminal in the community. If a criminal flees from the scene of his crime, and comes into our midst, his presence here is a direct result,- an effect of the crime. Nothing can be more injurious to the morals of a community than the evil presence and example of a criminal element.

Here then we have the simplest possible case that could come under Sec. 678. A. stabs B. in Chic, and flees to New York. His mere presence in this state brings him under the provisions of the paragraph in question and he is tried and sentenced as though the stabbing had taken place here.

It is certain that if upon such a hypothetical case as that just stated, the constitutionality of the section could be upheld, it certainly could upon any less far-fetched application. And, although the great weight of opinion seems to be against the constitutionality of such a case, arguments of the strongest kind are not wanting in its support.

First, assuming that such acase might be brought under the section in question, the query would be,"Can a state punish a party for a crime committed in another state, simply because it has obtained personal jurisdiction over him?" Each state has full control and power over its own citizens wherever they may be, and ordinarily, over all persons within its borders. Upon these, therefore, it may exercise its power by punishing them in any way it sees fit, for any act whatever or for no act, except as its power is limited or taken away by its Constitution, the Constitution of the United States, and the rules of the common law not changed by these constitutions or its statutes.

But by the 14th Amendment to the Constitution of the United States it is decreed that "No state shall deprive any person of life, liberty, or property without due process of law." "Due process of law" is a phrase which has in the past been the occasion of much difficulty and uncertainty, but the courts have so thoroughly discussed its meaning and intent, that most of the immunities and privileges which it was intended to convey are now made plain. It may be taken for granted that the phrase as used in this amendment has the same meaning that it has in the 5th Amendment, and to obtain its meaning as there used, we must go back as in near-

ly every case of constitutional construction, to the common law in force when that amendment was adopted.(1791)

One of the oldest rules of the common law, and one that has been of the greatest service in securing justice for the accused, is that providing that all accused persons shall be tried by a jury of the vicinage. On this point Henry Wade Rogers says(a) "It is a very old rule of the common law that requires every offence tried in the Common Law courts, to be inquired of in the county where the act took place. The peculiar character of the early jury affords an explanation and reason for the rule. Jurors were originally witnesses as well as triers, and were expected to act upon their own knowledge of the facts involved, and of the character of the witnesses on either side. But when they became simply triers of fact, the rule was already firmly established, and it was seen that there were marked and strong advantages in selecting the jurors from the county in which the crime had been committed. It would be a great burden and injustice, if a man could be carried to a distant part of the state and compelled there to make his defence at a distance from the place in which the act complained of occurred. And as the old rule

---

(a) American Law Register, Vol. XXVIII.

was retained, even after the original reason for its existence had ceased. The same principle is observed in the criminal jurisdiction of the Federal government. For the judicial purposes of that government, the states are not divided into counties but are organized into districts. In some of the states there is but one judicial district, while in others there are two or more of them, and the 6th Amendment to the Constitution of the United States declares that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. The denial of the right to a trial by a jury of the vicinage is one of the causes which led to a separation from the mother country. The Declaration of Independence arraigns George III: 'For transporting us beyond seas to be tried for pretended offenses.'"

Paragraph 988 of the Code of North Carolina illustrates how this fundamental right may be overlooked. It enacted as follows: "If any person, being married, shall marry any other person during the life of the husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, every such offender and every other person counselling, aiding or abetting such offender shall

be guilty of a felony, and imprisoned in the penetentiary or county jail for any term not less than four nor more than ten years, and any such offense may be dealy with, tried, and determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offense had been actually committed in that county." In State v. Cutshall, S. E. Reporter, June 21, 1892,(a) this statute was relied on by the prosecution, but was declared unconstitutional by the court. Avery, J. in his deciding opinion, states that trial by a jury of the vicinage has always been one of the fundamental rights claimed by the people of the United States. By this sort of trial the accused will be more easily able to prove his innocence, if innocent, and will not be put to the disadvantage of a trial far from home, where witnesses are secured with difficulty. After alluding to a somewhat similarly worded statute of Missouri, and distinguishing it, he continues: "It is the subsequent co-habitation, and not the fact that the person simply invades the jurisdiction of its courts, which subjects the offender to the same punishment as would the bigamous marriage, had it been celebrated within that state."Under our statute , we provide for the punishment of any person who has contracted a bigamous mar-

---

(a) State v. Cutshall, S. E. Reporter, June 21, 1892.

riage in another state, if he can be caught here, even in transitu to another state."

It would thus seem plain, that, by the Constitution of the United States a state statute attempting to punish a man for a crime committed in another state, would be unconstitutional. That much seems to be settled. But now comes the most difficult question of all. Is Sec. 676 of our penal code intended to punish men for crimes committed in other states, or is it intended to punish them for some resultant acts or effects which took place within its jurisdiction?

It is upon this point that Sec. 676 must stand or fall. Take now the hypothetical case cited of the man who commits a crime in Ohio and flees to New York. Suppose he were tried under the statute just mentioned and sentenced. Would he be sentenced because he committed the crime in Ohio, or because as a result of that crime he came to New York and w while in New York contaminated the morals of the community by reason of his crime? On this point might depend his fate. On this point might depend the constitutionality or unconstitutionality of Sec. 676. If the former reason were given or defended, the statute would be held unconstitutional. If the latter reason were given and explained, the the statute ought to be held constitutional.

Having now reached the conclusion that one possible intent or construction of the statute is unconstitutional, let us look at the second possible construction mentioned, viz: that punishing the criminal for some act connected with and resulting from the crime, but committed within the state. The mere presence of the man, and his immoral influence, furnish the slightest possible foundation for a punishment which could, by any chain of reasoning be brought within the scope of Sec. 676. It is for that reason that it has been used heretofore, in illustration, and before going on to other cases which fall more unequivocally under our statute, let us see whether even the illustration mentioned might not be constitutional if Sec. 676 were to be stretched so far.

Each state is a sovereign. It is to decide what acts are, and what are not inimical to its welfare, and under its police powers it exercises an absolute right to forbid and punish what acts it pleases, provided it honestly considers these acts to be detrimental to the health or morals of its people. If then it decides that a certain criminal class of people contaminate morals around them, it can eject them from the state, or incarcerate them for a length of time, as it thinks proper.

Merriman, C. J. in the opposing opinion in the case of State v. Cutshall (ante) states this theory most eloquently and cogently. He takes the position that the North Carolina statute before mentioned is perfectly constitutional and sound, for it punishes the bigamist <u>because he is here, and an offense to society and a danger to it</u>. "Criminals have no right to commit crime and go from one country to another inflicting themselves upon society wherever they may be. The state must protect itself. This power exists and it is not the province of the court to determine when it shall or shall not be exercised." The Honorable Chief Justice ends his opinion with a strong argument that the police power of a state includes the right to keep from society all persons dangerous to it. He says:- "The right of the state to make and enforce such laws is fully recognized in City of New York v. Miln.(a) In that case the court said: 'We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limitsas any foreign nation, where that jurisdiction is not surrendered to or restrained

---

(a) City of New York v. Miln, II Peters, 102.

by the Constitution of the United States. That by virtue of this, it is not only the right but the bounden and solemn duty, of a state to advance the safety, happinessand prosperity of its people and to provide for the general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise is not surrendered or restrained in the manner just stated. That all these p powers which relate merely to municipal legislation or what may perhaps more properly called 'internal police', are not surrendered or restrained: and that consequently in relation to these the authority of a state is complete, unqualified and exclusive."

That case is cited with approval in Holmes v. Jennison(a) C. J. Taney saying for the court: "Again the question under this habeas corpus is in no degree connected with the power of the states to remove from their territory any person whos presence they may think dangerous to their peace, or in any way injurious to their interest. The power, in that respect, was fully considered by this court and decided in the case o New York v. Miln, II Peters, 102. Undoubtedly they may remove from among them any person guilty of or charged with

---

(a) Holmes v. Jennison, 14 Peters, 540.

crime, and may arrest and imprison them in order to effect t this object. This is a part of the ordinary police power of the states, which is necessary to their very existence, and which they have never surrendered to the general government. They may, if they think proper, in order to defer offenders from other countries from coming among them, make crimes committed elswhere punishable in their courts, if the guilty party shall be found within their jurisdiction. In all of these cases the state acts with a view to its own safety, and is in no degree connected with the foreign government, in which the crime was committed. It is difficult to see any substantial reason why the legislature may not, by proper enactment, make it indictable- a misdemeanor or a felony- for persons who have done acts in one of the states deemed to be dangerous to its safety, or that of the morals, property or prosperity of its people,- to be found within its limits."

The first assertion made by the honorable judge, viz., that states may"make crimes committed elswhere punishable in their courts" is, according to all the weight of authority, erroneous as has been shown.(a) But the second theory advanced, that a state may punish the criminals of other states for being found within its limits, is exactly the point

---

(a) American Law Register, Vol. XXVIII, p. 22.
People v. Mosher, 2 Park C. C., 195.

which I have been attempting to present. They may be punished for coming into the state, corrupting its morals, and endangering its safety. We have now discussed Sec. 676 under two assumptions.

First, assuming that it was the intention of the state to inflict punishment for the crime committed without the state, would it be constitutional? The decision was that the best reasoning pointed to the conclusion that it would not be.

Second, assuming that the presence of a foreign criminal within the state should be considered by the courts to be a result affecting the morals or decency of this state to a sufficient extent to come under the statute in question, would the statute be sustained? In view of all the arguments, considering the fact of state supremacy within its own limits, and the fact that he is punished for a result proceeding from him while within the territorial limits of the state, it seems possible that even with such an interpretation, the statute might be upheld as a legal exercise of the state police power. It bears, however, somewhat of the stamp of sophistry.

Before we take up the third and most reasonable assumption under which to discuss this statute, let us, with the second assumption in our mind (for it includes the third)

look at the clause providing that the person committing "an act without this state etc.. which if committed within this state would be a crime, is punishable as if the act were committed within this state." This is the most difficult portion of the statute to reconcile with our sense of constitutionality. It is evident that it is not worded with enough care, if such a construction as our first assumption is to be avoided. We are too inclined to read it, "As if the act for which he is to be punished," instead of, "As if the act for the effects of which, direct or indirect, within this state he is to be punished. And yet, if a reasonable and constitutional meaning and intent is searched for, it is easily found. Suppose, as we have, that the prisoner is to be punished for the harm done by his presence. It is reasonable to conclude that the more desperate criminal he is, the more harm is done and the more danger results from his presence. The worse the crime, the worse the criminal; therefore the crime, though committed in another state, is taken as conclusive proof of the harm done or danger resulting in this state, and the punishment is guaged by the penalty for the same crime when committed within this state.

The act committed in another state must be a crime by the laws of this state. This provision is, of course, only just, as otherwise our courts might be punishing for the

supposedly evil results of an act which, committed within this state, was legally free from evil consequences.

We will now take up the third assumption, or theory, under which to disouss this act. It is,- assuming that mere presence within the state is not regarded as sufficient to confer jurisdiction under this section, but only direct tangible results are so regarded, would the statute be constitutional? There seems reason to think so. It would be impossible to classify the numberless different circumstances under which the statute, so interpreted, might be called into action, but they would all have the same characteristics,- the criminal act committed outside of the state, the coming into the state, the direct effect either of the act itself or of its continuance, and the resulting evil.

Without attempting to classify, we will examine a few instances where the statute would apply.

A, in Pennsylvania, sets fire to a house on the border, which in turn ignites a dwelling on the New York side. A can could be tried and sentenced in New York state to the same term as if he had committed the crime in New York.

A, in Ohio, ships contagious rags to a town in New York, and thereby causes an epedemic. A, if he enters New York, is liable in the same manner.

A great many cases would necessarily be either "contin-

uing crimes", so called, or distinguished from them with difficulty. The theory of the "continuing crime" is very similar to that adopted in construing this statute, the wording of which is elastic enough to cover either a crime on the theory that it is a continuing crime, and hence was actually committed in this state, or on the theory that though committed without the state, it has affected persons or property within the state, or the public health, morals, or decency of the state. A common case of this kind is larceny.

Mr. Rogers says: "In the law of larceny, the principle is well established that if one steals goods in one county and carries them into a second county, he may be indicted for theft in either county.(a) But this is no contradiction of the principle that a crime is to be punished in the county where it was committed. The indictment in the second county is for the larceny committed in that county, and not for that which was committed in the first county. The legal possession of the goods stolen continues in the owner, and every moment's continuance of the trespass is said to amount in legal contemplation to a new caption and asportation. Hence the venue may be laid in any county into which the thief conveys them, as the offense of taking and converting is there in itself complete. Some of the earlier American decisions decline to apply this principle where goods have

---

(a) People v. Burke, II Wend., 129, 130.

been stolen in one state and carried by the thief into another state. They have held that under such circumstances the thief could not be indicted for larceny in the latter state. The first of thes cases was afterward, in 1834, disapproved by Mr. Chief Justice in People v. Burke(a) and later cases hold that the thief may be convicted in any state into which he takes the goods.

In some states statutes have been passed governing the matter above discussed, and in some cases the courts have been required to pass on the constitutionality of their provisions. Such a question was presented in the People v. Williams.(a) The statute provided as follows: "Every person who shall feloniously steal the property of another, in any other state or county, and shall bring the same into this state may be convicted and punished in the same manner as if such larceny had been committed in this state."etc. Mr Justice Cooley, in writing the opinion sustaining the statute said: "Now it may be true that this wrong would not have been an offense at the common law, but that does not prevent its being made so by statute." This decision is most interesting for while the Michigan statute which was upheld differed

---

(a) People v. Williams, 24 Mich., 157.
(b) People v. Burke. II Wend., 129.

widely from the one which we are discussing, it also contained important and numerous points of resemblance. In both cases there must be a crime committed outside of the state. The crime must be felt within the state, and the criminal "may be convicted and punished in the same manner as if the crime had been committed in the state." The similarity of the last phrase in the two statutes is to be specially noted in view of the importance given in this discussion to that phrase in our own statute, and of the fact that the Michigan statute was sustained.

In the People v. Jas. W. Thompson, tried before the Moot Court of this law school in November, 1892, the fourth indictment was brought under this section of the Penal Code. The statement of facts showed that Thompson, a resident of this state, and married, had gone into Pennsylvania and there married a second time, after which he and the other party to the second marriage had returned to this state, and had continued to co-habit as man and wife in this state. Cole, J., in writing the opinion of the court, held that, although the case came directly under the provisions of Sec 676, the statute was unconstitutional for the reason that it did not give the criminal the benefit of a trial by the jury of the vicinage. The eminent judge failed to take into account the fact which I have endeavored to demonstrate, namely, that

assuming a statute should be given that construction most favorable to its constitutionality, the statute in question evidently aimed at punishing the criminal for a wrongdone within the state, either to the property, morals or health of its citizens. Under this construction the criminal is tried by a jury of the vicinage, for he is tried where the wrong is done. If the right to a jury of the vicinage is to forbid the conviction of a criminal under this section, then Judge Cooley's decision was wrong, and the Michigan statute should not have been upheld, for in that case, also, the original crime was committed outside the state. Yet Judge Cooley's decision was directly in line with the common law doctrine, which held that a larceny might be punished wherever the criminal with the goods in possession, might be taken. But the original taking might have occurred far away. Why did not the common law theory of vicinage apply there? The scene of the original crime, his family, neighbors and friends might all have been in another part of the country.

Because the wrong for which he was punished was held by law to be committed where he was taken into custody, and therefore he <u>was</u> tried by a jury of the vicinage.

The learned Judge who wrote the opinion in The People v. Thompson was also inclined to think that the principles of the Inter State Commerce Law would be seriously trampled

upon if such a paragraph as Sec. 678 were allowed to exist. How, he inquires in effect, could a man transact business in this state with that tranquility of mind so essential to the arts of peace, if he was liable at any moment to have his negotiations interrupted and his liberty taken away from him for a crime which he had committed far away in another state? He would not come into this state at all. He would go to New Jersey, where the laws are more liberal, and there transact his business. Thus we should obstruct the wheels of commerce and drive away trade.

This is indeed a serious arraignment of the statute which we are laboring so to interpret as to make it consistent with the rights of our fellow men. It obstructs commerce! Unfortunately, such laws are but too common, and few judges are high-minded enough to advance trade between the states at the expense of one or two of their narrow-spirited statutes. Section 508 of the Penal Code, obstructing the manufacture of burglar's tools, and section 643 of the same, hindering progressive advertizing are among the most flagrant instances in this state.

To recapitulate the conclusions reached in this discussion, they are:

Ist. That in Sec. 678 the verb "affect" was apparently intended to mean, to affect directly and tangibly, not in-

directly as by the mere presence of the criminal within the state.

2nd. That the section was intended to provide a punishment for that direct, tangible and wrongful effect and not for the crime committed outside the state.

3d. That its framers considered the originalcrime, of which the wrong to be punished was the result, to be the proper gauge for the punishment of the criminal, and provided that it should be so taken.

4th. That under this construction, Sec. 676 should be held to be constitutional.

5th. That even if Sec. 676 were construed to cover the mere presence of a criminal within the state, and the evil effect resulting from his presence, the statute might be upheld as constitutional.

C I T A T I O N S
