INDEX

(Endorsement.)

New Jersey Supreme Court.

STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

WILLIAM WHITE, otherwise known as "Beansey,"
Plaintiff-in-Error.

WRIT OF ERROR.

STEIN & STEIN,
Attorneys of Plaintiff-in-Error,
126 Market Street, Paterson, N. J.

Writ presented Feb. 4, 1925.
Let return be made.

JOS. A. DELANEY,
Judge.

New Jersey, ss:

To Joseph A. Delaney, Esq., Judge of the Court
(Seal) of Quarter Sessions of the County of Passaic:

Because in the record and proceedings, and also in giving of judgment upon a certain indictment against William White, late of the City of Paterson, County of Passaic and State of New Jersey, for assault and carnal abuse of a woman child.

Pro ut the said indictment and the several counts therein, whereof, before you, he hath been indicted, and has pleaded non vult, as it is said, manifest error hath intervened to the great damage of the said William White, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said William White, command you that if judgment be thereon given, then that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same to our Justices of our Supreme Court of the State of New Jersey, on the fourth day of February, next, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the law ought to be done.

Witness, William S. Gummere, Esq., our Chief Justice, at Trenton aforesaid, the fifteenth day of January, nineteen hundred and twenty-five.

EDW. J. KELLEHER,
Clerk.

Stein & Stein,
Attorneys.

STATE OF NEW JERSEY

Passaic County, to wit: Be it remembered, That at a Court of Quarter Sessions, held at Paterson, in and for the said County of Passaic, on the Twenty-first day of November, in the year of our Lord One thousand nine hundred and twenty-four, being the day on which the Grand Jury heretofore summoned to come before the Court of Oyer and Terminer and now sitting in and for said County, desires to present bills and no Justice of the Supreme Court being present at the Court House in said County, before the Honorable Joseph A. Delaney, Judge of the said Court of Quarter Sessions in and for the said County of Passaic, according to the form of the statute in that case made and provided; by the oath of

1. William D. Plumb, Foreman
2. Frank Vreeland
3. William H. Bailey
4. Joseph A. Dougherty
5. George H. Crawford
6. Charles H. Albonica, Jr.
7. Morris Rhode
8. Matthew A. Pierce
9. Mrs. Nelle A. Frazier
10. Eli Mirandon
11. Richard Randall
12. John Wagner
13. James Rigby
14. Mrs. Kate Paton
15. Miss Ethel H. Moulton
16. William S. McDermott
17. Joseph Boyle
18. James Beckett, Jr.
19. Joseph Keil
20. Ernest Barber
21. Mrs. Sarah L. Miller
22. Mrs. Gertrude Van Riper
23. Max Thomson

good and lawful men of the said County of Passaic, duly summoned and then and there sworn and charged to inquire in behalf of the State of New Jersey in and

for the said County of Passaic; it is presented in manner and form following, to wit:

The Bills herewith presented are true Bills.

WILLIAM D. PLUMB,
Foreman.

J. WILLARD DE YOE,
Prosecutor.

COURT OF OYER AND TERMINER IN AND FOR THE COUNTY OF PASSAIC.

September Term A. D. Nineteen Hundred and Twenty-four.

PASSAIC COUNTY, to wit: The Jurors of the State of New Jersey, in and for the body of the County of Passaic, upon their oath present, that William White, otherwise known as "Beansey," late of the City of Paterson, in the County of Passaic aforesaid, on the Twentieth day of October, in the year of our Lord nineteen hundred and twenty-four, with force and arms, at the City aforesaid, in the County aforesaid, and within the jurdisdiction of this Court, in and upon one Mary Isselin who was then and there a woman child under the age of sixteen years, to wit, of the age of eleven years, did make an assault and her, the said Mary Isselin, then and there did unlawfully and carnally abuse, he the aforesaid William White, otherwise known as "Beansey," being then and there over the age of sixteen years, to wit, of the age of twenty-five years, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

And the Jurors aforesaid, upon their oath aforesaid,

do further present that the said William White, otherwise known as "Beansey," on the Twentieth day of October, in the year of our Lord nineteen hundred and twenty-four, with force and arms at the City of Paterson aforesaid, in the County of Passaic aforesaid, in and upon the said Mary Isselin, who was then and there a woman child under the age of sixteen years, to wit, of the age of eleven years, did make an assault and her, the said Mary Isselin then and there, with her consent, did unlawfully and carnally abuse, he, the said William White, otherwise known as "Beansey," being then and there over the age of sixteen years, to wit, of the age of twenty-five years, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said William White, otherwise known as "Beansey," on the Twentieth day of October, in the year of our Lord, Nineteen hundred and twenty-four, with force and arms at the City of Paterson aforesaid, in the County of Passaic aforesaid, in and upon the said Mary Isselin who was then and there a woman child under the age of sixteen years, to wit, of the age of eleven years, did make an assault and her the said Mary Isselin then and there without her consent did unlawfully and carnally abuse, he, the said William White, otherwise known as "Beansey," being then and there over the age of sixteen years, to wit, of the age of twenty-five years, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

J. WILLARD DE YOE,

Prosecutor of the Pleas.

Witness
Alfred Isselin.

Thereupon the said Court of Quarter Sessions did receive such Indictment and the Clerk of the said Court of Quarter Sessions did file the same in the said Court, and also did thereupon make entry thereof in the Minutes of said Court at the then session of said Court, and afterwards, to wit, at the same term of said Court of Quarter Sessions, holden at Paterson, in and for the County of Passaic aforesaid, to wit, on the Twenty-eighth day of November Nineteen Hundred and Twenty-four, at a session thereof before the Honorable Joseph A. Delaney, Judge of said Court, in and for said County of Passaic, according to the statute in such case made and provided, comes the said William White, otherwise known as "Beansey," in his own proper person, and now touching the premises in said Indictment above specified and charged against him, being him, being asked in what manner he will acquit himself, says, he is not guilty and of this he puts himself upon the country, etc., and J. Willard De Yoe, Esquire, who prosecutes for the State of New Jersey, in this behalf, doth the like.

Therefore, let a jury come here before the Judge aforesaid, at Paterson aforesaid, in the County of Passaic aforesaid, at a session of the Court of Quarter Sessions aforeaid, on the fifth day of December next ensuing, being of the Term of September, A. D., Nineteen Hundred and Twenty-four, of twelve good and lawful persons, each of whom shall be a citizen of this State, and a resident within the County of Passaic aforesaid, above the age of twenty-one years, and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are not of kin to the said William White, otherwise known as "Beansey," to recognize upon

their oaths whether the said William White, otherwise known as "Beansey, be guilty as in the said Indictment specified, or not guilty, because as well the said J. Willard De Yoe, Esquire, Prosecutor of the Pleas for the said County of Passaic aforesaid, who prosecutes for the State of New Jersey aforesaid, in this behalf, as the said William White, otherwise known as "Beansey," have put themselves upon the said jury, and the same day is given to the parties aforesaid, at the same place.

And thereupon on the Fifth day of December, A. D., Nineteen Hundred and Twenty-four, the said William White, otherwise known as "Beansey" appeared in said Court of Quarter Sessions and retracted the plea of not guilty heretofore entered by him to said indictment, and entered a plea of non vult contendere, and it being demanded of the said William White, otherwise known as "Beansey," if he hath or knoweth anything to say wherefore the Court here ought not upon the premises and verdict proceed to judgment against him, who nothing further says, unless as he has before said.

Wherefore, all and singular, the premises being seen and by the Court here and fully understood, it is considered by the Court, at the morning session, and the sentence of the law is that the said William White, otherwise known as "Beansey," shall be confined in the State Prison, at hard labor, for the maximum term of seven years and the minimum term of four years and at the afternoon session, the Court of its own motion opened and vacated the judgment heretofore entered in this case and ordered that said William White, otherwise known as "Beansey," be confined in the State Prison, at hard labor, for the maximum term of thirty years and the minimum term of twenty years.

JOS. A. DELANEY,
Judge.

State of New Jersey, } ss:
County of Passaic, }

I, John McCutcheon, Clerk of said County, and Clerk of the County Courts thereof, do hereby certify, that the foregoing is a transcript of the record and proceedings in the case of William White, otherwise known as "Beansey," convicted of Assault Upon a Woman Child Under the Age of Sixteen Years in our Court of Quarter Sessions, on the Fifth day of December, A. D., Nineteen Hundred and Twenty-four, as the same is taken from and compared with the original, recorded in Book of Records of the Court of Quarter Sessions, and now remaining on file and of record in my Office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Courts and County, at Paterson, this Sixth day of February, A. D., Nineteen Hundred and Twenty-five.

JOHN McCUTCHEON,
Clerk.

New Jersey Supreme Court.

STATE OF NEW JERSEY, *Defendant-in-Error,* vs. WILLIAM WHITE, *Plaintiff-in-Error.*	On Error to Passaic Quarter Sessions Assignments of Error.

1: The court erred in imposing the sentence of not more than thirty years nor less than twenty years in State Prison, upon the defendant, as the indictment to which the defendant pleaded "non vult," charged him with an offence of assault upon a woman child under the age of sixteen years, imprisonment for which, by statute, is fixed at not more than fifteen years maximum.

2: The court erred in revoking a previous sentence of not more than seven years nor less than four years in State Prison upon the defendant hitherto, against the objection of the defendant, and re-sentencing him to not more than thirty years, nor less than twenty years in State Prison.

STEIN & STEIN,
Attorneys for Plaintiff-in-Error.

Service of a copy of the within Assignment of Error is hereby acknowledged, this 17th day of January, 1925.

J. WILLARD DE YOE,
Attorney for Defendant-in-Error.

New Jersey Supreme Court.

No. 2, May T., 1925.

STATE OF NEW JERSEY,
vs.
WILLIAM WHITE.
} Opinion of the Court.

Error to Passaic Quarter Sessions.

Argued before Gummere, C. J., and Justices Kalisch and Campbell.

For the plaintiff in error, Stein & Stein.

For the State, J. W. DeYoe, Prosecutor of the Pleas.

PER CURIAM.

The defendant in this case, a man twenty-five years of age, was indicted for criminal abuse of a girl under the age of twelve years. He pleaded non vult to the indictment. The court, thereupon, sentenced him to be confined in the State's Prison at hard labor for a maximum term of seven years and a minimum term of four years. On the same day the Court, of its own motion, vacated this sentence, and ordered the defendant to be confined in the State's Prison at hard labor for the max-

imum term of thirty years and the minimum term of twenty years.

The first ground upon which we are asked to reverse this conviction is that the sentence finally pronounced is in excess of the term permitted by the statute; counsel for the defendant asserting that the maximum penalty for the crime charged in the indictment is fixed by the statute at fifteen years. An examination of the statute itself shows that this contention is without basis of fact. Section 115 of our Crimes Act (Comp. Stat. p. 1783) provides "that any person who, being of the age of sixteen or over, shall unlawfully and carnally abuse a woman child under the age of twelve years, with or without her consent, shall be guilty of a high misdemeanor and punished by a fine not exceeding $5,000 or imprisonment at hard labor not exceeding thirty years or both." In the present case the averment of the indictment was that the child who had been carnally abused by the defendant was under the age of twelve years; and the defendant by his plea admitted this fact.

The only other ground of reversal urged before us is that the trial court was without power to change the sentence after it had once been pronounced. We consider this contention unsound. After sentence has been pronounced, and the defendant has begun the service of that sentence, the court is powerless thereafter to change it by increasing the term of imprisonment; but the court may alter the sentence in its discretion and on its own motion at any time during the term and before the defendant has begun serving the sentence originally pronounced. This is the common law rule and is embodied in section 55, of our Criminal Procedure Act (Comp. Stat. pl. 838).

The conviction under review will be affirmed.

New Jersey Supreme Court.

STATE OF NEW JERSEY, *Defendant in Error,* *vs.* WILLIAM WHITE, *Plaintiff in Error.*	On Appeal from Supreme Court. Order on Affirmance of Judgment.

This cause having been duly argued at the October Term, 1925 of this Court by Stein & Stein, of counsel for the Plaintiff in Error, and J. Willard DeYoe, of counsel for the Defendant in Error, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this Second day of March, in the year of our Lord, one thousand, nine hundred and twenty-six, ORDERED and adjudged that the judgment of the Court of Quarter Sessions, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Court of Quarter Sessions to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

(Signed) J. W. DE YOE,
Attorney for Defendant-in-Error.

New Jersey, ss:

(Seal) The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, GREETING:

Because in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between the State of New Jersey and William White, defendant upon an indictment, manifest error hath intervened to the great damage of the said defendant, as by his complaint we are informed; we being willing that the error if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send under your seal, the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the twenty-ninth day of March, 1926, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon, for correcting that error what of right and according to the law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the ninth day of March, 1926.

THOMAS F. MARTIN,
Clerk.

STEIN & STEIN,
Attorneys.

A TRUE COPY:

THOMAS F. MARTIN,
Clerk.

New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* WILLIAM WHITE, *Plaintiff-in-Error.*	On Error to Supreme Court. Assignments of Error.

NEW JERSEY, ss.: Afterwards, to wit, on return of said writ, before the New Jersey Court of Errors and Appeals at Trenton, came the said William White, by Stein & Stein, his attorneys, and says that in the record and proceedings aforesaid, and also the giving of judgment, there are manifest errors, to wit:

1: Because the Supreme Court erred in giving judgment for the State of New Jersey, and affirming the judgment of the Passaic County Court of Quarter Sessions, instead of giving judgment for the plaintiff-in-error, and reversing the judgment of the Passaic County Court of Quarter Sessions, for the several reasons set forth in the Assignments of Error and Specifications for Reversal.

STEIN & STEIN,
Attorneys of Plaintiff-in-Error.

Service of a copy of the within Assignments of Error, is hereby acknowledged, this Fifteenth day of March, 1926.

JAMES M. DUNN,
Attorney of Defendant-in-Error.

NEW JERSEY ~~SUPREME~~ COURT OF
ERRORS & APPEALS.

STATE OF NEW JERSEY, Defendant-in-Error, vs. WILLIAM WHITE, Plaintiff-in-Error.	On Error to ~~Passaic Quar-~~ ~~ter Sessions.~~ NEW JERSEY SUPREME COURT

BRIEF OF PLAINTIFF-IN-ERROR.

STATEMENT OF FACTS

This writ of error brings up for review, a judgment of the Passaic County Court of Quarter Sessions. The facts are not in dispute; William White, the plaintiff-in-error, entered a plea of "non vult" to an indictment for carnal abuse of a child under the age of sixteen. This plea was entered into on the morning of December 5, 1924, and immediately thereafter, the Court imposed a sentence upon the plaintiff-in-error, confining him to the State Prison at hard labor for the maximum term of seven years, and the minimum term of four years.

On the same day at about 3 P. M. and against the objection of the said plaintiff-in-error, the Court called him for re-sentence under the Act of 1921, and ordered and adjudged that the plaintiff-in-error be confined in the State Prison at hard labor, for the maximum term of thirty years and the minimum term of twenty years. Exception was taken at the time to the imposition of the said re-sentence.

There are two errors assigned for the reversing of this sentence.

POINT I.

The Court erred in imposing the second sentence, for the reason that the indictment charged him with an offense of an assault upon a woman child under the age of sixteen years, imprisonment for which, by Statute, is fixed as, not more than fifteen years, maximum.

By reference to the indictment, it appears that the charge against the plaintiff-in-error was, "in and upon one Mary Isselin, who was then and there a woman child under the age of sixteen years," etc., the penalty for which is fixed by Statute at fifteen years. There is a further allegation in the indictment alleging that the person assaulted was eleven years old; but it appears that the State elected to present an indictment against the plaintiff-in-error charging him with the lesser of the offenses. The situation is analogous to other offenses against the law that may be committed in various degrees, and where the State elects to present a charge of a lesser nature against the defendant.

The Court was clearly without power to impose a sentence of thirty years upon the plaintiff-in-error when the indictment charged him with an offense, the maximum penalty for which, by the Crime's Act, is fifteen years.

POINT II.

The Court erred in revoking a previous sen-

tence imposed upon defendant, and re-sentencing him to a much larger one.

The Court, at the morning session of December 5, 1924, (See State of Case, page 7, line 25) imposed the maximum term of seven years and the minimum term of four years, and at the afternoon session, the Court, of its own motion, opened and vacated the judgment, and ordered the plaintiff-in-error, to be confined for the maximum term of thirty years and the minimum term of twenty years.

It is admitted by the defendant-in-error that the re-calling of the first sentence, and the imposing of the second sentence, was against the objection of the plaintiff-in-error and that proper exception was taken at the time. While the State of Case does not set forth this fact, the minutes of the Court indicate that the proceedings had at the afternoon session were against the objection of the plainiff-in-error.

The State attempts to justify the action of the Court of Quarter Sessions by virtue of Chapter 236 of the Laws of 1921. This Section provides, "that after conviction and sentence, the Court, before said conviction was had, *upon the application of the defendant for a new trial,* shall have power at any time within the period of six months from the date of the entry of such conviction, to open and vacate the same and grant a new trial," and it also provides, "and may also, at any time within the period of six months from the date judgment was entered, *upon application of the defendant or on its own motion,* open and vacate the judgment entered on any conviction and re-sentence the defendant as right and justice may seem to require, and discharge the defendant from custody upon bail, pending such re-sentence." This section

essentially follows the supplement to the Criminal Procedure Act, approved March 16, 1914 (Pamphlet Laws 1914, page 34), the only difference being that in the Statute of 1914, the power of the Court was limited to the term during which the judgment was entered, and the Statute of 1921, extended the period of six months after the entry of the conviction.

The power and authority of a Court of Criminal Jurisdiction under the Statute of 1914, has been a subject of decision and comment by this Court in the case of Caprio vs. the Home of Good Shepherd, 91 N. J. Law, page 14. The only distinction between the Caprio case and the case at Bar, is that the defendant in the Caprio case had commenced to serve the sentence originally imposed.

In the Caprio case, (on page 16) it is said, "a broader inquiry is whether such Statute deals at all, with re-sentences that increase the duration or extent of the punishment imposed by a previous sentence that had gone into operation. That such purpose was not expressed by Section 55 of the Revision of 1898 which is the Parent Act, is clear from the construction of its language." As was stated by Justice Garrison in the case above referred to, the object of the Act was clearly remedial.

It has been held in this State, prior to the Caprio case, that, "a single sentence exhausted the power of the Court to punish the offender after its judgment has gone into operation." State vs. Addy, 43 Law, page 113.

In the Caprio case, 91 N. J. Law, on page 17, the Court said, "For if such contention prevail, the Legislature in 1908, expressed the intention that every criminal sentence thereafter pronounced, might at any time in the future, be increased in

duration and in extent whereby all sentences were rendered uncertain and the duration of all punishments rendered indefinite. To state this contention is to state a thing most abhorent to the principles of the Criminal Law, viz; uncertainty as to its Judgments. It has been seriously considered whether such uncertainty did not render a punishment "cruel" within the meaning of the constitution;" citing in re: Marlow, 75 N. J. Law, page 400.

"Such an intention is not to be imputed to the Legislature on the language of this statute."

By further reference to the Caprio case, 91 N. J. Law, on page 18, the Court also said, "The amendment of 1914, which is the act on which the state relies, presents an even more formidable objection to the state's contention, in fact, an insuperable barrier. For if the uncertainty of punishment is to include convictions theretofore had, there is clearly introduced into the pains and penalties that had been theretofore meted out an element of uncertainty and possible extension of punishment that was unknown to the law at the time judgment was pronounced and sentence imposed. The statute thus construed would be in the strictest sense an ex post facto law, and for that reason unconstitutional." The amendment of 1921, paragraph 2, provides that this act "shall include convictions hereinbefore had in any Court;" and contains the element of ex post facto similar to the statute construed in the Caprio case.

There is another question to be considered in discussing the power of the Court to change a sentence, and that is hinted at in the Caprio case also. This involves the power of the Court of Criminal Jurisdiction to change a sentence in behalf of the defendant, and for his benefit. The question is whether or not the judicial power attempted to be

conferred by the statute of 1921, entrenches unconstitutionally upon the jurisdiction of the Court of Pardons. The Supreme Court mentions this in the Caprio case on page 18.

We desire to call the attention of the Court particularly to the fact that the sentence originally imposed by the Court of Quarter Sessions of Passaic County was a lawful and a legal one. There is no suggestion or intimation that there was a fraud imposed upon the Court of Quarter Sessions or that there were misrepresentations made to it, by which its judgment was not properly exercised in accordance with Justice and Order. For a Criminal Court of original jurisdiction to have the power that was exercised in the case at Bar, would lead us into a most peculiar and difficult situation. No defendant before the Bar of Justice, would know what the punishment for his crime was even after it was imposed, because if the Court has power under this statute to change the sentence five or six hours after it has been imposed, it would have the same power to change a sentence within six months after it had been imposed. This is clearly repugnant to the provisions of the Constitution that, "No person shall be put in jeopardy twice for the same offense." In the case of State vs. Addy, 43 Law, on page 113, the Court said, "The citizen cannot be so put twice in jeopardy; by submitting to the demands of the Court, he pays the penalty of his offense, and the power of the State to punish him therefor is exhausted."

We cannot think of more vicious legislation in the Criminal Law than would exist if the Statute of 1921 were held to confer the powers claimed by the State.

In conclusion, it appears that Chapter 236 of the Laws of 1921, did not intend to confer power

on a Court to increase a sentence, after a lawful one had been imposed, and, secondly, that if it did intend to create such power, the statute is clearly unconstitutional for the reasons hereinbefore set forth.

STEIN & STEIN,
Attorneys for Plaintiff-in-Error.

Benj. L. Stein

OF COUNSEL.

New Jersey Court of Errors and Appeals

State of New Jersey, Defendant in Error, vs. William White, Plaintiff in Error,	On Error to the Supreme Court, Trial at Passaic Quarter Sessions.

BRIEF OF DEFENDANT IN ERROR

STATEMENTS OF FACTS

The writ of error brings up for review a judgment of the Court of Quarter Sessions of Passaic County.

William White, the plaintiff in error, was indicted by the Grand Jury for unlawful and carnal abuse of Mary Isselin, who, as the indictment charges was "a woman child under the age of sixteen years, to wit: of the age of eleven years." The defendant White, as alleged in said indictment, was twenty-five years of age.

On the morning of December 5, 1924, the said William White pleaded non vult to the indictment and was sentenced to State's Prison at hard labor for the maximum term of seven years and the minimum term of four years. On the same day when the Court reconvened in the afternoon and before the sentence had been entered on the records of the Court or any order had been made thereon and before the said White had commenced to serve his sentence, the Court recalled said White from the County Jail, set aside the sentence and resentenced

him and ordered and adjudged that he be confined at State's Prison, at hard labor, for the maximum term of thirty years and the minimum term of twenty years.

The defendant White now seeks to set aside this later sentence on the following grounds:

(a) That the Statute fixes the penalty for the offense charged in the indictment at a maximum of not more than fifteen years in State's Prison.

(b) That the Court had no power to re-sentence said White by imposing a heavier penalty.

The State insists:

I.

THE PENALTY IMPOSED IS NOT GREATER THAN THAT FIXED BY THE STATUTE.

The indictment to which said White pleaded non vult charged the carnal abuse of a woman child eleven years of age and that the age of defendant White was twenty-five years.

The Crimes Act 1783, Section 115, provides

That any person "who being of the age of sixteen years or over, shall unlawfully and carnally abuse a woman child under the age of twelve years with or without her consent, shall be guilty of a high misdeameanor and punished by a fine not exceeding $5000.00 or **imprisonment not exceeding thirty years or both.**"

The Court, therefore, had the right to impose the sentence as the defendant was alleged, in said indictment, to be twenty-five years of age and the woman child of the age of eleven years.

II.

THE COURT HAD THE RIGHT TO RE-SENTENCE THE DEFENDANT WHITE AND IMPOSE A HEAVIER PENALTY.

The facts as admitted are that the Court sentenced the defendant White on the morning of December 5, 1924, to State's Prison, at hard labor, for the maximum term of seven years and the minimum term of four years and that on the afternoon of the same day, when the Court reconvened, before the sentence had been entered in the records of the Court and before any record had been made therein and before defendant had commenced to serve his sentence, the Court set aside the sentence given said White in the morning and imposed the increased sentence of the maximum of thirty years and minimum of twenty years.

There can be no question, under our decisions, as to the power of the Court to set aside a sentence and impose a heavier sentence at any time during the term and before any part of the sentence has been executed.

In Commonwealth vs. Weymouth, 84 Mass., 144, the Court held,

> A Judge of the Supreme Court has power to revise and increase a sentence imposed upon a convict, during the same term of Court, and before the original sentence has gone into operation and before any action has been had upon it.

It appeared in this case that the prisoner on February 18, 1861, was sentenced to be confined in the House of Correction for two years; and, on the same day, after the issue of the warrant by virtue of which he was ordered to be committed to the House of Correction, but before the service or the execution thereof, the court ordered that the execution of the warrant be stayed until a further hearing, and on the next day the court imposed a sentence to confinement in State's Prison for three and one-half years, the first two days of which were to be solitary.

The Supreme Court of Massachusetts held that until something was done to carry the sentence into execution by subjecting the prisoner to the warrant in the hands of the officer, the Court had the right to revoke the sentence first pronounced and substitute in its stead the one under which the prisoner then stood charged.

40 L. R. A. (N. S.) 90. Under note, Power to amend commitment or sentence by increasing punishment says:

The rule, adopted with practical unanimity by the Courts, is that a Court may alter its sentence by increasing the punishment during the same time before any part of the sentence has been put into effect.

In Lee vs. State, 32 Ohio, 113, it was held,

When a Court is under misapprehension in passing sentence, it may, during the same term and before any part of the sentence has been executed,

set it aside and impose a greater sentence; and, in the absence of a showing, to the contrary, it will be presumed that there are sufficient reasons for the action of the Court.

This practice is sustained in this State.

In State vs. Grey, 37 N. J. L. 368, where the Court held that the Court which renders the judgment cannot vacate it or render a new judgment after the term at which it was pronounced is ended or the judgment is executed or the punishment partly borne.

In the case of Caprio vs. Mother Superior of the Home of Good Shepherd, 91 N. J. L. 14, cited in the brief of the plaintiff in error, it appears that an appeal had been taken from the sentence, the judgment affirmed and the prisoner remanded to the State Home for Girls to serve her original sentence. That after she had served a part of her sentence, the Court vacated the judgment and committed her to the House of Good Shepherd until December 20, 1917, and then to be released upon probation for the period of three years conditioned to make certain payments.

The Court held that this sentence was pronounced after the expiration of the term at which sentence had been pronounced and that said judgment had gone into operation and the punishment imposed by it partly borne, and therefore, was illegal, and that the Statute of 1914 being the fifty-fifth section of the Criminal Procedure Act did not authorize such a re-sentence.

Counsel also cites in his brief, State vs. Addy, 43 N. J. L. 113.

This case also sustains the contention that after the sentence has been wholly or partly complied with by the defendant, the power of the Court over the defendant is exhausted.

The case sustains the contention of the State that before the term has expired, and before the sentence has gone into effect, the Court has the power to vacate a sentence and impose a second sentence, increasing the punishment.

The State insists, in this case, that the Court did not exceed its power and the writ of error should be dismissed.

Respectfully submitted,
J. Vincent Barnitt,
Prosecutor of the Pleas and
of Counsel with Defendant
in Error.