New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, GEORGE O. OSBORNE, Keeper State Prison, Defendant in error, vs. JOHN MAHANEY, Plaintiff in error.	*On Error to* *New Jersey* *Supreme Court.*

STATEMENT OF FACTS.

The writ of error brings up for review the refusal of the Supreme Court to discharge John Mahaney on habeas corpus proceedings brought by him in that Court.

Mahaney at the December Term, 1899, of the Hudson Quarter Sessions, on indictment No. 53, September Term, 1899, was convicted of breaking with intent, and sentenced to seven years in the State Prison, and on indictment No. 55 pleaded guilty and was sentenced to five years' imprisonment. Both sentences were imposed January 4, 1900, and on the 22d of the same month, Mahaney was removed to the State Prison.

As a result of deductions for good behavior, the sentence of seven years expired on the 25th of August, 1905.

Mahaney was refused his discharge, however, on the ground that the sentences imposed were cumulative, not concurrent. The commitments did not state when the sentences should begin to run, but on the back of the commitment for five years is endorsed: "This term to begin at the expiration of sentence imposed in indictment No. 53, Sept. Term, 1899."

Mahaney, on setting out these facts in a petition to the Supreme Court, obtained a writ of habeas corpus, challenging the validity of his present imprisonment on the grounds (1) that the Court had no power to impose cumulative sentences; (2) that conceding such power, there was nothing to show that such power was exercised, and (3) that by virtue of the 69th section of the criminal procedure act, the petitioner should have been removed to the prison within twenty days after sentence, and his second sentence should have commenced to run immediately after his arrival at said prison.

The return of the keeper of the State Prison was that he held the petitioner on the second sentence, and did so by virtue of the judgment record of the Hudson Quarter Sessions (case p. 9). The judgment record after setting out the sentence of five years shows "this sentence do commence upon the expiration of the sentence imposed on indictment No. 53, Term September, 1899."

I.

IN THE ABSENCE OF STATUTORY AUTHORITY, THE COURT HAD NO POWER TO IMPOSE CUMULATIVE SENTENCES.

The crime was purely statutory; the jurisdiction of

the Court statutory; the procedure statutory, and the character of the sentence statutory. The Court did not therefore, and could not exercise a common law jurisdiction in the imposition of the cumulative sentence in this case, and his authority must therefore have been based on some statute. As was said in the case of SONN vs. PEOPLE, 12 WEND. 348, "The criminal courts have no power by the common law to sentence a defendant to be imprisoned for a term commencing at a future day." Such was the common law of New York, and although cumulative sentences are now legal in that State, it is by virtue of statute (Revised Statutes, 700, Sec. 11, cited in Tweed's case, 60 N. Y., 561).

In Ex Parte Meyers, 44 No. 279, the Court said: "Since the Courts have no common law jurisdiction to impose a cumulative sentence in felonies, they have no power to impose a cumulative sentence on a prisoner except where it is *strictly provided by statute.*"

The Courts of other States have been equally emphatic, as the following citations will show:

"The Courts have no authority to adjudge on several convictions, that one term of imprisonment shall commence at the expiration of another."—Kennedy vs. Howard, 74 Ind. 87.

"Prior to the adoption of the criminal code, there was no statutory provision in force in this State authorizing the Courts where punishment was confinement in the penitentiary, to render a judgment ordering the terms of imprisonment to commence at a future period, or after the expiration of a previous period of confinement."—James vs. Ward, 59 Ky. (2 Metc.) 271.

"A second sentence of imprisonment in the penitentiary

imposed on the same day as the first, to begin after the expiration of the first, is void for indefiniteness, as the first may be shortened, if the convict has in the opinion of the prison officials, conducted himself well."—In re Lamphere 61 Mich. 105, 27 N. W. 882.

"A sentence is not valid which fixes the term in the penitentiary to commence at the expiration of another term."—Prince vs. State, 44 Tex. 480.

"Imprisonment cannot be ordered to commence at a future time, as at the expiration of a previous sentence, without statutory authority, and in the absence of it, it seems that the two terms run concurrently."—Miller vs. Allen, 11 Ind. 389.

Nearly all those States which now recognize the legality of cumulative sentences do so by virtue of statute, instance, Texas, Crim. Code, Sec. 800; Kansas, Crim. Code, Sec. 250; Kentucky, James vs. Ward, 59 Ky. 271; United States, Revised Statutes, 7237; Georgia, Crim. Code; Nebraska, Crim Code, Sec. 518; Missouri, Wag. Statutes, pp. 518, 519; New York, Revised Statutes; Arkansas, State vs. Oliver, 35 Ark. 395. The same is undoubtedly true of other States, but counsel have only been able to collate the above.

In many of the States, these statutes were passed as a result of the opinions in the Appellate Courts refusing to uphold cumulative senten[illegible]. Thus among the citations in the opinion of the Court below is that of in re Esmond, 42 Fed. 827, in which the cumulative sentence was upheld because of statutory authority (Revised Statutes, 7237).

The Supreme Court s[illegible]ks to uphold cumulative sentences because of the embarrasing consequences which may issue, such as change of the personnel of the prose-

cutor's office or of the Court. We submit that this reasoning from a strictly legal standpoint is unsound. The courts ought not because of possible consequences seek to place either strained constructions upon the statutes, or as in this case, read entire inactments into the statutory law. The matter should be one purely of legislation, as in those States to which reference has been made.

The statutes being silent, it is submitted that the Court, far from adopting a construction against the prisoner, should adopt one in favor of his liberty.

II.

IF THE COURT HAD POWER TO IMPOSE CUMULATIVE SENTENCES, IT MUST CLEARLY APPEAR THAT THE COURT IN THE IMPOSITION OF SENTENCES INTENDED THEM TO BE CUMULATIVE, OTHERWISE THEY WILL BE REGARDED AS CONCURRENT. SUCH INTENTION MUST BE LEGALLY AND TECHNICALLY EXPRESSED.

"Upon a plea of guilty to three indictments, the District Court pronounced sentence upon the accused that he be confined 'for the term of five years upon each of the three indictments above named, said terms not to run concurrently.' HELD, that the words 'said terms not to run concurrently' are uncertain and incapable of application, and therefore void, and that the sentences com-

menced at once and ran concurrently."—United States vs. Patterson, 29 Fed. 775.

See also in re Jackson, 3 MacArthur, 24 (D. C.); James vs. Ward, 59 Ky. 271.

It was practically conceded at the argument below by counsel; in fact, it could not be satisfactorily contested that the commitments did not warrant the keeper of the prison in holding the petitioner. Recourse was then had to the judgment record of the court. Granting that such recourse may be had, it is submitted that the record legally and technically ended with the pronouncement of a sentence authorized by statute. The pronouncing of sentence was purely ministerial, and not an act of discretion. Hence, a further statement of the Court that "the sentence do commence upon the expiration of the sentence imposed on indictment No. 53 of the Term Sept., 1899" (case p. 16), was an unwarranted addition to the record, and an equally unwarranted reference to another judgment record was so much surplusage, and rendered that part of the judgment void.

III.

BY VIRTUE OF NO. 69 OF THE CRIMINAL PRO. ACT, EVERY PERSON SENTENCED TO STATE PRISON WAS TO BE REMOVED THERETO WITHIN TWENTY DAYS AFTER SENTENCE; TERMS OF IMPRISONMENT COMMENCES FROM THE DATE OF ENTRY TO THE PRISON.

Section No. 69 of our procedure act provides in effect that the person sentenced shall (unless writ of error is taken out, etc.) shall be removed to the prison within twenty days after imposition of sentence. The decisions are numerous to the effect that the term commences either from the date of sentence or from actual delivery to the prison. The latter practice, it is believed, is the recognized rule in this State. Hence if the petitioner must be delivered to the prison within twenty days after sentence to commence his, he could not be sentenced to a term not to take effect for seven years.

A case directly in point is that of Fuller 34 Neb. 581, 32 N. W. Rep. 577.

"Under criminal code, No. 518, providing that every person sentenced to the penitentiary shall within thirty days, and as early as is practicable, after his sentence, be confined to the penitentiary by the sheriff, there to be kept until the term of his imprisonment shall have expired, the term of imprisonment in the penitentiary dates from the sentence."

"A sentence of imprisonment takes effect from the first day of actual incarceration."—People vs. McEwen, 32 How. Pr. 226.

"Time begins when prisoner is removed to State Prison."—Bradford vs. People, 22 Colo. 157.

While counsel cannot find any reported cases in this State on the question involved, they submit the following:

On the 20th day of June, eighteen hundred and ninety-two, John Farrel was sentenced from Mercer County, on two charges of ten and five years each. Two months after

the expiration of the ten-year sentence he was brought before Justice Van Syckle of this Court, on writ of habeas corpus, and was discharged May 5, 1900, on the same grounds as alleged in this case.

It is respectfully submitted that the judgment of the Supreme Court, remanding the petitioner, should be reversed and the petitioner discharged from custody.

WARD & McGINNIS,

Attorneys and of Counsel with Plaintiff in Error.

New Jersey Court of Errors & Appeals

THE STATE OF NEW JERSEY, Defendant in Error, *vs.* JOHN MAHANEY, Plaintiff in Error.	On Habeas Corpus. On Error to Supreme Court.

BRIEF OF DEFENDANT IN ERROR.

The within brief was submitted to the Justices of the Supreme Court who heard the case in that court. Counsel for the State of New Jersey does not desire to add any reasons to it upon the argument in this Court other than those which will be found in the learned opinion of the Supreme Court in this case.

WM. H. SPEER,
Prosecutor of the Pleas,
Hudson County, N. J.

NEW JERSEY SUPREME COURT.

ON HABEAS CORPUS.

THE STATE OF NEW JERSEY,

vs.

JOHN MAHANEY.

Hon. J. J. J. Fort, Garretson and Reed, Justices of the Supreme Court,

Dear Sirs:—

Although the court at the argument this morning intimated that I need not furnish a brief in the above entitled matter, still I can see that I ought not to let the court do all the work of searching out the cases, and have decided to submit the following memorandum, which has necessarily been thrown together hastily, but which I will believe will be found accurate and of service.

1. There can be no discharge of the prisoner in this case. His petition, the keeper's return to the writ of habeas corpus, and the certified copy of the judgment record all show that the prisoner is to be detained until the costs of prosecution shall have been paid. The petition does not allege their payment. The return of the keeper alleges "that said costs of prosecution have not been paid." This fact must, therefore, be taken as true. "If the prisoner does not controvert the return as made

it must be presumed that the facts stated by the keeper are true." Patterson v. State, 20 Vroom, 331.

2. The return shows that the authority and cause of detention is the judgment record of conviction, a certified copy of which is annexed to the return, which shows that the five years' sentence was to commence at the expiration of that for seven years. That this is the judgment record is not denied or controverted by the prisoner. "In cases where a party has been tried and convicted of a crime the office of a commitment is superceded by the judgment. The accused may then be detained in custody by virtue of a certified copy of the judgment, and a formal commitment is not necessary. and if necessary can be supplied at any time; but a defect in the commitment is no ground for the discharge of the accused so long as there is a valid judgment of conviction behind it." People vs. Hagan, 170, N. Y. 52; People vs. Baker, 89, N. Y. 460; in re Rogers 55 Atl. Rep. 661, and in re William Thayer 69 Vt. 314, it was held "that a good mittimus may be substituted at any time in place of a defective one, even *after* the issue of a writ of habeas corpus."

3. This brings us to the prisoner's one remaining point in the case. "That the court had no power to impose cumulative sentences," and to a consideration of the effect thereon of the 69th section of the Criminal Procedure Act, which directs that the prisoner shall be taken to the State Prison within 20 days after the sentence.

Has the court the power to impose cumulative sentences in the State of New Jersey. The

practice has the sanction of uniform and inveterate usage in its favor. Prisoner's argument is that, in the absence of a statute authorizing it, such sentences are illegal. Let us see first how the practice in this respect was at the common law from which we have derived our jurisprudence.

"When the defendant is in execution on a former judgment, sentence of imprisonment, and other penalties, may be given against him to commence from the expiration of the existing sentence." 1 Chit. Crim. Law 718; Rex v. Wilkes, 4 Burrows, 2577. And it is held in England, (and in some of our States), that where a person is charged with several offences at the same time, of the same kind, he may be sentenced to several terms of imprisonment, one to commence after the conclusion of the other. 1 Chit. Crim. Law, 718; Castro v. Regina, 6 App. Cas. 229; Rex. v. Williams, 1 Leach, Crown Cas. 536; Brown v. Comm. 4 Rawle (Pa) 259; In re Walsh 37 Neb. 454, 55 N. W. 1075; In re White, 50 Kans. 299; In re Packer 19 Colo. 525.

In Hughes Crim. Law & Prac. S. 3340, the learned author says "Cumulative sentences in most of the states, as well as England, have been sustained *without the aid of a statute*," citing Henderson v. James, 52 Ohio St. 242, 39 N. E. 805. In Clark's Crim. Prac. S. 187, p. 495 the learned author enunciates the same doctrine.

"Where a prisoner is convicted and sentenced to imprisonment for one offence, and during the same term is convicted of others, he may be sentenced also on these last, each

term of imprisonment commencing from and after the preceding one. Comm. v. Leachs, 1 Virg. Cas. 151, Russell v. Con.m. 7 Serg. v. Rawle. 489; State v. Smith, 5 Day 175. This is the rule laid down in Archbold Crim. Plead. & Practice, Bishop, in his work on Crim. Prac. vol. 2 S. 1327, says "By the common law, as held in England and generally in our State, though in some States it is denied or is otherwise by statute, the court may order the imprisonment on one count or indictment to begin on the expiration of that on another; and, where it has the power, it should put the sentence in this form." Rex. v. Wilkes, 19 Howell, St. Tr. 1075, Rex. v. Hart, 30 Howells, St. Tr. 1131, 1321; Martin v. People 76 Ill, 499, Mullinix v. People, 76 Ill. 211, Stock v. People, 80 Ill. 32; Exparte Roberts, 9 Nev. 44.

It remains to be considered what effect, if any, the statute, section 69 Crim. Proc. Act. Rev. 1898, has on the question. This statute provides an elaborate scheme of duties for the clerk of the court in which the conviction was had, for the sheriff and the State prison keeper, and specifies the number of days and the manner in which each shall perform his respective functions. This statute is manifestly directory only. Otherwise a writ of error, a rule to show cause, a motion in arrest of judgment, a judge's order, would each and all transcend its provisions, and it would lie in the power of ministerial officers to absolutely nullify the sentences of the court. If the statute is mandatory and confers upon the prisoner a new right, then if he be not taken to the State prison in twenty

days, the time thereafter spent outside said prison should be subtracted from his sentence, and it would be doubtful if the sheriff would have any right to convey him to prison after twenty days. On the theory that the statute is mandatory instead of merely directory, what would be the legal situation if the court clerk should not perform his duty within the time limited by the act? Or if the Sheriff should defer for a longer time than twenty days the performance of his duties? These inquiries, it would seem, answer the question. There seems to be no good reason for construing this statute to be mandatory rather than directory. Thus, the statutes in reference to the times and places of holding quarter sessions are construed to be directory. Rex. v. Leicester, 7 B. & C., 14 Eng. C. L. 3. In regard to discriminating between mandatory and directory statutes, Lord Penzance, in Howard v. Boddington, 2 P. Div. 203, said "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect, decide whether the matter is what is called imperative or only directory. Viewing this statute in that aspect it seems perfectly clear that these provisions were intended to be directory only.

Great force, it would seem, is lent to this view when it is borne in mind, as said by Van Syckel, J., in re George W. Edwards, 14 Vroom

557. "The essential part of the sentence is the punishment which is graduated according to the character of the crime, and is measured not with reference to the time at which it is to be borne, but by the extent and kind of punishment imposed."

The case of a prisoner who escaped from the custody of the Sheriff and remains away long after the twenty days have expired is an illuminative case. No one will dispute that such person, when captured, will be sent to State's Prison to serve his sentence. See in re George W. Edwards, 14 Vroom 558, and cases there cited. These cases and many others show that time is not of the essence of a sentence. The matter is thus summed up in the case last cited. "It does not appear that the time at which the punishment is undergone is any more of the essence of the sentence to imprisonment than it is to the death penalty. In the latter case the practice is unquestioned in this state; where the day fixed for execution has passed by reason of proceedings for review, the court will order execution of the former judgment. The punishment is regarded as the substance of the judgment, which is not to be evaded because not undergone at the time specified."

In State v. Cocherham, 2 Ired. 204, the court said "That the time at which a sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution "

In Hollan v. Hopkins, 211 Kan. the Supreme Court said: "That the amount of punishment prescribed inhered in the sentence and was the essential part of it, while the time at which it was to be undergone was comparatively ministerial and substantially no part of it, and that expiration of the time without imprisonment was in no sense as execution of sentence.

In Stephens v. State, 24 Vroom, 250, Beasley, C. J., held that no injury was done to a defendant convicted by a jury of larceny and embezzlement on the one trial, by a joint judgment being pronounced on this finding. This judgment was not discriminative or distributed and therefore part belonging to one of the counts must necessarily have commenced after that belonging to the other had been concluded.

This case also holds a statute as to drawing a jury for a criminal trial "is merely directory as to all proceedings except the certificate."

In Bishop's New Crim. Proc. vol. I., 4th ed. S. 1327, pp. 814, 815, in note 3, there is a very full and thorough discussion, and an exhaustive citation of authorities, in support of the views contended for in this brief. The learned author there states that the English view is in favor of cumulative sentences and against the doctrine of Tweed's case, and cites cases in England, Mass. Conn. Penn. Mo. Ill., Me. Ohio, Ark. Wis. Cal. In England the case of Castro v. Reg, 6 app. cas. 229 (the famous Tichborne Case) was one where the claimant was indicted and convicted on two counts for perjury, and sentenced to seven years' imprisonment on each, the sentence on the second count to be exe-

cuted on the expiration of that on the first. When the first seven years had expired the Attorney General gave his fiat to reverse the remainder of the sentence, out of respect to the New York Court on it's decision in Tweed's Case. The case was held before the Court of Appeals, and on further appeal before the House of Lords. The result was that at each step the original decision was sustained, and not one judge was found, and not one judicial word was uttered, in any degree favoring the New York doctrine, which they declared to be "startling if not shocking."

The cases cited by prisoner's counsel either admit the existence of the common law rule, and claim that the particular State practice is different therefrom, or, as in Indiana, are based on the repeal of a statute formerly permitting cumulative sentences, or are flatly overruled as People v. Liscomb (Tweed's Case), 60 N. Y. 599, concerning which Bishop says Crim. Prac. vol. I, S. 1327. "In this case it was held that on a conviction for several misdemeanors charged in separate counts the sum of the sentences must not exceed the extreme limit of the law for a single offence; a doctrine elsewhere never heard of before, and generally rejected since."

The result is that the writ of Habeas Corpus should be dismissed and the prisoner remanded into the custody of the Keeper of the State Prison.

Respectfully submitted,

WILLIAM H. SPEER,
Prosecutor of the Pleas.
Hudson County, N. J.

NOTE.—The sole question is as to the power of the Court to impose cumulative sentences. That the Court had such power at Common Law is beyond dispute. That the Legislature did not intend by section 69 of the Crim. Proc. Act to take away that power is perfectly clear from a perusal of that Act. Therefore, that power was intended to and still does remain in the Court. It is apparent that the 69th section of the Act was not intended to apply to cumulative sentences, for neither the scope and purpose of the Act nor the intention of the Legislature would be forwarded by such application. The intent of the Legislature was to expedite the beginning of the service of his sentence as a criminal, such a purpose could manifestly have no relation to the second or cumulative sentence which begins immediately at the time and place of the expiration of the first sentence, to which the provisions of section 69 do apply.

WILLIAM H. SPEER,
Prosecutor of the Pleas,
Hudson County, N. J.

New Jersey Court of Errors and Appeals.

JOHN MAHANEY, Plaintiff in Error, vs. STATE OF NEW JERSEY, Defendant in Error.	*On Error* *to* *New Jersey* *Supreme Court.*

STATE OF CASE.

NEW JERSEY, ss:

(SEAL) THE STATE OF NEW JERSEY, to the Chief Justice and other Justices of our Supreme Court of Judicature, GREETING:

Forasmuch as 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 George O. Osborne, headkeeper of the New Jersey State Prison, upon the petition of John Mahaney for writ of Habeas Corpus, manifest error hath intervened to the great damage of the

said petitioner John Mahaney as is said; we being willing to correct the error in due manner, if any error there be, and that full and speedy justice 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 aforesaid, with all things touching the same, to our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the twenty-eighth day of April, instant, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for the correcting of 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 Court of Errors and Appeals at Trenton aforesaid the twenty-third day of April, nineteen hundred and six.

WARD & McGINNIS,

Attorneys.

S. D. DICKINSON, Clerk.

Filed May 4, 1906. S. D. DICKINSON, Clerk.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMORE, C. J. (SEAL)

To the Justices of the New Jersey Supreme Court:

The petition of John Mahaney, late of the City of Jersey City, in the County of Hudson, respectfully shows that he is now confined in the State Prison at Trenton, and has been so confined since the twenty-second day of January, in the year nineteen hundred.

That the cause of his detention is as follows:

That at the September Term, eighteen hundred and ninety-nine, two indictments were found against him for breaking with intent. On the first indictment he was tried and convicted, and on the second indictment by advice of counsel he plead guilty thereto. On said first indictment he was by his Honor John A. Blair, Judge of the Hudson County Quarter Sessions, sentenced to be imprisoned in the State Prison for the term of seven years at hard labor, and on the second indictment to imprisonment in the State Prison for five years at hard labor. That said sentences were imposed at the December Term, eighteen hundred and ninety-nine of said Court, and on the twenty-second day of January, in the year nineteen hundred, was taken to the State Prison to begin his sentence, where he has remained until the present time.

Your petitioner further shows that by virtue of certain deductions from his term of imprisonment, because of good behavior, his sentence of seven years expired on the twenty-fifth day of August, nineteen hundred and five. That your petitioner was not discharged, however, but has been imprisoned as he is informed and believes, by virtue of said second sentence of five years.

Your petitioner further shows that copies of the commitment by virtue of which he is now detained and

imprisoned, are hereunto annexed, and made part of this petition.

Your petitioner further shows that his imprisonment is illegal in this:

(1). That nothing appearing in said commitments to show the contrary, said sentences should have run together, and therefore the second sentence of five years expired a considerable period of time before the expiration of the first sentence of seven years.

10 (2). That by virtue of an act entitled "An act relating to courts having criminal jurisdiction and regulating proceedings in criminal cases (Revision of 1898)," commonly known as the "Crimes Act," it is provided that all defendants sentenced to imprisonment in the State Prison, shall be removed thereto within twenty days after sentence is pronounced (No. 69, Crim. Pro.), and by the laws and customs of this State, all sentences shall begin from the day the person so sentenced is received at said

20 prison.

Your petitioner further shows that he is desirous of testing the validity of his imprisonment, and therefore waives the production of his body.

Your petitioner therefore prays that a writ of habeas corpus may be granted to him, directed to the keeper of the State Prison, requiring in accordance with the statute in such case made and provided, to the end that your petitioner may be discharged out of custody and released from further restraint; and your petitioner will ever

30 pray, etc.

JOHN MAHANEY,
Petitioner.

(Verification.)

At a Court of Quarter Sessions, holden at Jersey City, in and for the County of Hudson, in the State of New Jersey, of the term of December, in the year of our Lord one thousand eight hundred and ninety-nine.

The Court met, present, John A. Blair, Presiding Judge of Hudson Common Pleas.

THE STATE,
vs.
No. 53, Sept., 1899,
JOHN MAHANEY, alias
JACK SHEPPARD.

Sur Indictment
for Breaking and Entering.

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On motion of the Prosecutor of the Pleas, the Court order that the Sheriff set the defendant to the bar to receive his sentence, and he being accordingly set to the bar, the Court do thereupon order and adjudge that the defendant John Mahaney, alias Jack Sheppard, be imprisoned in the State Prison of this State for the term of seven (7) years, at hard labor upon this conviction and that he pay the costs of this prosecution, and that he be further imprisoned from and after the expiration of the said term of seven (7) years until the costs of this prosecution are paid.

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State of New Jersey, County of Hudson, ss:

I, John G. Fisher, Clerk of the Court of Quarter Sessions, in and for the County of Hudson aforesaid, do hereby certify that the foregoing is a true copy from the

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records of said Court in the sentence of John Mahaney, alias Jack Sheppard, above named.

In testimony whereof, I have hereunto set my hand and the seal of said Court at Jersey City, in said County, the 18th day of January, in the year of our Lord, one thousand nine hundred.

(SEAL) JOHN G. FISHER, Clerk.

Endorsed on back of commitment.

No. 53, September, 1899. Hudson Quarter Sessions. December Term, 1899. Sentence of John Mahaney, alias Jack Sheppard, for the term of seven (7) years State Prison at hard labor, and costs of prosecution.

At a Court of Quarter Sessions, holden at Jersey City, in and for the County of Hudson, in the State of New Jersey, of the Term of December, in the year of our Lord, one thousand eight hundred and ninety-nine.

The Court met, present, John A. Blair, Presiding Judge of Hudson Common Pleas.

THE STATE,
vs.
No. 55,
JOHN MAHANEY, alias
JACK SHEPPARD.

Sur Indictment for Breakiug with Intent.

On motion of the Prosecutor of the Pleas, the Court ordered the Sheriff to set the defendant to the bar to receive his sentence, and he being accordingly set to the

bar, the Court do thereupon order and adjudge that the defendant, John Mahaney, alias Jack Sheppard, be imprisoned in the State Prison of this State for the term of five years at hard labor, upon this conviction that he pay the costs of this prosecution, and that he be further imprisoned from and after the expiration of the said term of five years until the costs of this prosecution are paid.

State of New Jersey, County of Hudson, ss:

I, John G. Fisher, Clerk of the Court of Quarter Sessions, in and for the County of Hudson aforesaid, do hereby certify that the foregoing is a true copy from the records of said Court of the sentence of John Mahaney, alias Jack Sheppard, above named.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Jersey City, in said County, the 18th day of January, in the year of our Lord, one thousand nine hundred.

(SEAL) JOHN G. FISHER, Clerk.

A true copy. WILLIAM RIKER, JR.

Commitment endorsed as follows:

No. 55, September, 1899. Hudson Quarter Sessions. December Term, 1899. Sentence of John Mahaney, alias Jack Sheppard, for the term of five (5) years State Prison at hard labor, and the costs of prosecution. This term to begin at the expiration of sentence imposed on indictment No. 55, September Term, 1899.

WRIT OF HABEAS CORPUS.

THE STATE OF NEW JERSEY, to George O. Osborne, Head Keeper of the New Jersey State Prison:

(SEAL)

We command you that you have the body of John Mahaney by you imprisoned and detained, as is said, together with the day and cause of the taking and detaining of the said John Mahaney, by whatsoever name the said John Mahaney shall be called or charged, before the Supreme Court at the State House in Trenton, on Friday, the 24th day of November, instant, at ten o'clock in the forenoon to do and receive what shall then and there be considered, concerning the said John Mahaney. And have you then and there this writ.

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WITNESS, William S. Gummere, Chief Justice of our said Supreme Court, at Trenton, this 16th day of November, in the year nineteen hundred and five.

WM. RIKER, JR., Clerk.

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WARD & MCGINNIS, Attorneys.

A true copy. WM. RIKER, JR., Clerk.

Endorsed:

This writ has been allowed by me this 14th day of November, 1905, let it be sealed. The production of the body being waived.

WM. S. GUMMERE, C. J.

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The execution of this writ appears in a certain schedule hereto annexed.

GEORGE O. OSBORNE,
Keeper, N. J. State Prison.

New Jersey Supreme Court.

THE STATE OF NEW JERSEY,
vs.
JOHN MAHANEY.

On Habeas Corpus.

Return, &c.

I, George O. Osborne, keeper of the New Jersey State Prison, do hereby make return to the within writ of habeas corpus to me directed. I return that I have the body of the said John Mahaney in my custody as keeper of the New Jersey State Prison, wherein the said Mahaney is imprisoned, and I do further return and certify that the authority and true cause of such imprisonment, detention and restraint is as follows:

That at the September Term, eighteen hundred and ninety-nine, of the Hudson Oyer and Terminer, inter alia, two indictments were found against him for Breaking with Intent, etc., these indictments were presented into said Court on November 29th, 1899, and were then handed down to the Court of Quarter Sessions, in said County. On the first of said two indictments he was tried and convicted, and on the said second indictment he pleaded guilty. On the said first indictment, which was indictment No. 53, September Term, 1899, he was by his Honor John A. Blair, Judge of said Hudson Quarter Sessions, sentenced to be imprisoned in the New Jersey State Prison for the term of seven years, and thence until the costs of prosecution were paid. And on the said second indictment he was sentenced to imprisonment in

the State Prison for a period of five years, and thence until the costs of prosecution were paid, which last mentioned sentence was ordered to commence upon the expiration of the sentence imposed on indictment No. 53, of the Term September, 1899, which is the one hereinbefore last mentioned.

That said sentences were imposed at the December Term, eighteen hundred and ninety-nine, of said Court, and on the twenty-second day of January, in the year nineteen hundred, he was taken to the State Prison to begin his sentence, where he remained until the present time.

And I do hereby annex and return as part hereof a copy of the judgment record in said indictment No. 55, by virtue of which I hold said John Mahaney, and by virtue of which he is imprisoned and detained in said State Prison, and I do hereby proffer and will produce on the hearing on this writ of habeas corpus the certified copy of the judgment record, and commitment under and by virtue of which I hold him in custody, and as keeper of the New Jersey State Prison detain him therein.

And I do further return that said costs of prosecution hereinbefore mentioned have not been paid.

GEORGE O. OSBORNE,

Keeper, New Jersey State Prison.

STATE OF NEW JERSEY, Hudson County, to wit:

Be it remembered that at a Court of Oyer and Terminer, holden at Jersey City, in and for the said County of Hudson, on the second Tuesday of September, in the year of our Lord, one thousand eight hundred and

ninety-nine, before the Honorable Job H. Lippincott, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Hon. John A. Blair, Judge of the Inferior Court of Common Pleas, in and for said County of Hudson, according to the form of the statute in such case made and provided, by the oaths of: 1, David W. Lawrence, foreman, and 2, William E. Pearson; 3, John H. Carnes; 4, James H. Love; 5, E. W. Kingsland; 6, Benjamin Edge; 7, Chas. M. Prior; 8, Maxwell Abernethy; 9, Garwood Ferris; 10, John W. Heck; 11, William Reed; 12, J. Warren Dusenberry; 13, John E. Halladay; 14, William V. Garrison; 15, Edwin A. Stevens; 16, Elbridge V. S. Besson; 17, Oscar Frommel; 18, Edward Harwood; 19, Joseph H. Woodman; 20, James G. Morgan; 21, Herman Walker; 22, James A. Exton; 23, Mathew W. Ballard, good and lawful men of said County, sworn and charged to inquire for the State in and for the body of the said County of Hudson, it is presented in manner and form following; that is to say, that the bills following are true bills.

DAVID W. LAWRENCE,
Foreman.

(SEAL). Endorsed. Clerk's office, Nov. 29, 1899.

Hudson County. Hudson Oyer and Terminer. September Term, A. D. 1899. Caption to Indictments. Third Presentment. Filed Nov. 29, 1899. John G. Fisher, Clerk.

Presented Nov. 29, 1899, and handed down to the Court of Quarter Sessions. John G. Fisher, Clerk. Indictments Nos. 42 to 118, inclusive.

HUDSON OYER AND TERMINER. SEPTEMBER TERM, A. D. 1899.

HUDSON COUNTY, to wit:

The Grand Inquest of the State of New Jersey, in and for the body of the County of Hudson, upon their respective oaths present, that John Mahaney, alias Jack Sheppard; Ernest Edwards, alias Ernest McIntyre, and Charles Wilson, late of the City of Jersey City, in the said County of Hudson, on the twenty-sixth day of March, in the year of our Lord, one thousand eight hundred and ninety-nine, with force and arms, at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, the shop and building of W. L. Douglass Shoe Co., a corporation, there situate, by night, wilfully and maliciously did break and enter, with intent, the goods and chattels of the said W. L. Douglass Shoe Co., a corporation in the said shop and building then and there being found, then and there feloniously to steal, take and carry away, 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 Grand Inquest aforesaid upon their oath aforesaid, do further present that the said John Mahaney, alias Jack Sheppart; Ernest Edwards, alias Ernest McIntyre, and Charles Wilson on the day aforesaid, in the year aforesaid, at the City of Jersey City aforesaid, in the County of Hudson aforesaid, within the jurisdiction of this Court, the shop and building of W. L. Douglass Shoe Co., a corporation there situate, by day wilfully and maliciously did break and enter, with intent, the goods and chattels of W. L. Douglass Shoe Co., a corporation in the

said shop and building, then and there being found, then and there feloniously to steal, take and carry away, contrary to the form of the statute in such case made and provided against the peace of this State, the government and dignity of the same.

And the Grand Inquest aforesaid upon their oath aforesaid, do further present, that the said John Mahaney, alias Jack Sheppard; Ernest Edwards, alias Ernest McIntyre, and Charles Wilson on the day aforesaid, in the year aforesaid, at the shop and building of W. L. Douglass Shoe Co., a corporation in the County of Hudson aforesaid, and within the jurisdiction of this Court, the shop and building of W. L. Douglass Shoe Co., a corporation there situate, wilfully and maliciously enter, without breaking the same, with intent the goods and chattels of the said W. L. Douglass Shoe Co., a corporation in the said shop and building then and there being found, then and there feloniously to steal, take and carry away, contrary to the form of the statute in such case made and provided, against the peace of this State, the government and dignity of the same.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further present, that the said John Mahaney, alias Jack Sheppard; Ernest Edwards, alias Ernest McIntyre, and Charles Wilson on the day aforesaid, in the year aforesaid, at the shop and building of W. L. Douglass Shoe Co., a corporation aforesaid, and within the jurisdiction of this Court, two hundred and forty-two pairs of shoes of the value of three dollars and fifty cents each, and forty-two pairs of shoes of the value of three dollars each, all of the value of nine hundred and seventy-three dollars, of the goods and chattels of W. L. Douglass Shoe Co., a corporation then and there being found

feloniously and wilfully did then and there steal, take and carry away contrary to the form of the statute in such case made and provided against the peace of this State, the government and dignity of the same.

JAMES S. ERWIN,

Prosecutor of the Pleas.

Endorsed as follows:

10 No. 55. Hudson Oyer and Terminer. September Term, 1899. The State vs. John Mahaney, alias Jack Sheppard.

Indictment for Breaking with Intent, etc.

James S. Erwin, Prosecutor of the Pleas.

A true bill. David W. Lawrence, Foreman.

Presented Nov. 29, 1899, and handed down to the Court of Quarter Sessions. John Rotherman, Clerk.

20 And afterwards, to wit, on the fourth day of November in the year of our Lord, one thousand eight hundred and ninety-nine, at a session of the Court of General Quarter Sessions of the Peace of the County of Hudson aforesaid, being as yet of the Term of September aforesaid, before the Honorable John A. Blair, Judge of said Court at Jersey City aforesaid, in the County of Hudson aforesaid, here cometh the said John Mahaney, alias Jack Sheppard, under the custody of Carl H. Ruempler, Esquire, Sheriff of the County of Hudson aforesaid, in
30 whose custody he has been before committed for the cause aforesaid, being brought to the bar here in his proper person by the Sheriff aforesaid, to whom he is also here committed, and having heard the indictment read and

forthwith being commanded of and concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he sayeth he is not guilty thereof, and therefore for good and evil he puts himself upon the country, and James S. Erwin, Esquire, Prosecutor of the Pleas for said County of Hudson, who prosecutes for the State of New Jersey, in this behalf doth the like.

Therefore let the said indictment be continued until and a jury come here before the said Honorable John A Blair, Judge as aforesaid, at Jersey City, in the County of Hudson aforesaid, on the fourth day of January, in the year of our Lord, one thousand nine hundred, being of the Term of December, in the year of our Lord, one thousand eight hundred and ninety-nine, of twelve good lawful men of this State, and resident within the County of Hudson 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 kin to the said John Mahaney, alias Jack Sheppard, to recognize upon their oath whether the said John Mahaney, alias Jack Sheppard, be guilty of the breaking with intent or not guilty, because as well the said James S. Erwin, Esquire, Prosecutor of the Pleas for the County of Hudson aforesaid, who prosecutes for the State of New Jersey, aforesaid, in this behalf, as the said John Mahaney, alias Jack Sheppard, have put themselves upon the said jury, and the same day is given to the parties aforesaid at the same place. At which time, that is to say on the fourth day of January, in the year of our Lord, one thousand nine hundred, and being as yet of the Term of December, in the year of our Lord, one thousand nine hundred, at Jersey City aforesaid, in the County of Hudson afore-

said, before the said Judges of the Court as aforesaid, here cometh as well the said James S. Erwin, Esquire, Prosecutor of the Pleas aforesaid, who prosecutes as aforesaid, as the said John Mahaney, alias Jack Sheppard, under the custody of the Sheriff as aforesaid, being brought to the bar here in his proper person by the said Sheriff, and the said John Mahaney, alias Jack Sheppard, doth relinquish his plea of not guilty by him aforesaid pleaded and saith he cannot deny but that he is guilty as charged. Whereupon the Court doth order that a plea of guilty as charged be entered against him, and thereupon the said John Mahaney, alias Jack Sheppard, is committed to the custody of the Sheriff, there to remain until the eighteenth day of January, in the year of our Lord, one thousand nine hundred, at which said last mentioned day the said John Mahaney, alias Jack Sheppard, being produced in and before the said Court at the City of Jersey City aforesaid, by the said Sheriff, and being in his custody. Whereupon all and singular the premises being seen and by the Court here fully understood. It is considered and adjudged that the said John Mahaney, alias Jack Sheppard, be and is sentenced to be confined to the State Prison of this State at hard labor for a period of five (5) years and thence until the costs of prosecution are paid.

And it is further ordered that this sentence do commence upon the expiration of the sentence imposed on Indictment No. 53, of the Term September, 1899.

Judgment signed this January 18th, 1900.

JOHN A. BLAIR,
Judge.

STATE OF NEW JERSEY, Hudson County, ss:

I, John Rotherham, Clerk of the County of Hudson aforesaid, and also Clerk of the Court of Quarter Sessions holden therein.

Do hereby certify, that the foregoing is a true and correct copy of a certain judgment in the case of the State of New Jersey vs. John Mahaney, alias Jack Sheppard, on Indictment for Breaking with Intent, etc., No. 55, of Term of September, 1899, as the same is taken from and compared with the original as recorded in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Courts and County at Jersey City, this 22d day of November, 1905.

JOHN ROTHERHAM,
Clerk.

STATE VS. MAHANEY. SUPREME COURT OF NEW JERSEY. DEC. 5, 1905.

1. After conviction upon two indictments for breaking with intent, the Court has power to impose a sentence of imprisonment upon one of the convictions to begin at the expiration of sentence imposed upon the other conviction.

2. This power to impose consecutive sentences is not affected by the provisions of Section 67 of the Criminal Procedure Act (P. L., 1898, p. 891).

(Syllabus by the Court.)

Before Garrison, Fort and Reed, J.

REED, J. The petition for the writ sets out that John Mahaney was convicted at the December term of 1899, of

the Hudson County Court of Quarter Sessions on two indictments for the crime of breaking with intent, and that he was sentenced on the first indictment to be imprisoned for the term of seven years, and on the second indictment for the term of five years in the State Prison. The petition states that the sentence of seven years expired on the 25th day of August, 1905, and that he is still imprisoned by virtue of the second sentence of five years. Copies of the commitments are annexed to the petition. The first commitment recites that the petitioner was sentenced to hard labor for the term of seven years, and that he pay the costs of prosecution, and be further imprisoned from and after the said term of seven years until the costs of prosecution are paid. The second conviction recites that he be imprisoned for the term of five years, with the same conditions. On the back of the second conviction is endorsed: "This term to begin at the expiration of the sentence imposed in indictment No. 53, September term, 1899."

The return to the writ contains a certified copy of the judgment record, setting out that in the September Term, 1899, two indictments were found against the petitioner for breaking with intent, and that on the first of these indictments he was tried and convicted, and on the second indictment he pleaded guilty. On the first indictment, indictment No. 53, he was sentenced to be imprisoned in the New Jersey State Prison for the term of seven years, and thence till the costs of prosecution were paid, and on the second indictment he was sentenced to be imprisoned for the period of five years, and thence till the costs of the prosecution were paid, which last-mentioned sentence was ordered to commence upon the expiration of the sentence imposed under indictment No. 53 of the September Term,

1899. Thus the judgment record shows that, as a part of the sentence of five years, it was adjudged that the sentence do commence upon the expiration of the sentence imposed on indictment No. 53 of the term September, 1899. A prisoner confined on a sentence will not be released on habeas corpus for errors in the mittimus when the Court has the judgment before it. Sennot's Case, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344. The judgment is the source of the right of the keeper of the State Prison to detain the petitioner. Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 933, 29 L. Ed. 89; People vs. Baker, 89 N. Y. 461.

The question then is, whether the Court had the power to pronounce the second judgment imposing a sentence to commence after the term of the preceding sentence should terminate. That a Court possesses this power was decided in England before the period of the American Revolution. In 1770 John Wilkes, having been twice convicted of libel, was sentenced to a term of imprisonment on each indictment, the sentence on the last to begin at the end of the period for which he was sentenced on the first. This judgment was taken by writ of error to the House of Parliament, and by that house the question was propounded to the bench of judges, whether the judgment upon the second conviction to commence from and after the termination of the imprisonment to which he was sentenced for another offense, was good in law. The answer was that the judgment of imprisonment is good in law. This case of Rex vs. Wilkes is reported in 4 Burrows, 2577, and in 19 Howell's State Trials, 1133, 1134. As appears from the opinion of Chief Justice Wilmot, reported in the last-mentioned book, the doctrine was confined to misdemeanors, the reason being that in treason

and felonies a certain known judgment which cannot be departed from, namely, in the present tense of the subjunctive, must be imposed, but in misdemeanors, where is punishment is discretionary, the limitation as to time seems only to be that the punishment shall take place before the total dismission of the party. A punishment shall not hang over a man's head when he has once been discharged. This declaration respecting felonies has no application in the present case, for the reason that the offenses of which the petitioner was convicted are, under our statutes, high misdemeanors, and the Court has a discretion as to limitation of time in the imposition of punishment. This right to impose consecutive sentences, which had its origin before the American Revolution, is one well recognized in common law. 1 Chitty, Cr. Law, 718; Bish. Cr. Law, Sec. 953; Bish. Cr. Pro. Sec. 1327; Castro vs. Reg., 6 App. Cas. 229. The doctrine is one resulting in common sense, as well as in authority. It is apparent, that unless consecutive sentences can be imposed, the Court must either suspend sentence for one offense until the expiration of the time of imprisonment named in the other sentence, at which time the personnel of the Court and of the Prosecutor's office may have changed, and the facts essential to the imposition of a sentence become difficult of ascertainment, or else the court must impose concurrent sentences, the effect of which is to entirely nullify the effect of one of them. For these reasons the great weight of authority in this country is that, without any statutory provision for consecutive sentences, the power to impose them resides in the Court. Church on Habeas Corpus, 534. Kite vs. Comm. 11 Metc. (Mass.) 581; Williams vs. State, 18 Ohio, St. 46; Brown vs. Comm., 4 Rawle, 259, 26 Am. Dec. 130; Mills vs. Comm., 13 Pa.

631; In Re Esmond (D. C.) 42 Fed. 827; In Re Fry, 3 Mackey, 135; Johnson vs. People, 83 Ill. 431. The practice of imposing consecutive sentences has, so far as I am aware, been followed in this State during the entire period of its existence as a State. Nor do I find anything in our statutes which in any degree modifies the power of the Court in this respect.

The counsel for the petitioner insists that a provision of the criminal procedure act, now embodied in Section 67, p. 891, of the criminal procedure act of 1898, exhibits a legislative intent inconsistent with the imposition of consecutive sentences. The provision in substance enacts that upon a sentence of imprisonment in the State Prison the Sheriff or his deputy shall, within fifteen days after sentence and receipt of a copy of the taxed bill of costs, transport to the said prison, and deliver to the custody of the keeper thereof, the person so sentenced. It then provides that the person delivered shall be safely kept therein until the time of his confinement shall have expired, and the costs of prosecution be paid or remitted or otherwise discharged by law. It is perceived that the first part of this provision contains only directions to the Sheriff respecting the time he shall have to remove the prisoner to the said prison. The only part of the section which can be regarded as at all in point is the declaration that the person so delivered shall be safely kept in the said prison until the time of his confinement shall have expired. But, conceding the power to impose consecutive sentences, the time of confinement of this petitioner was fixed by the sentences, namely, first seven years and then five years, and the time of his confinement mentioned in the provision will expire when both terms end. So there seems nothing

inconsistent between the declaration of the statute and the imposition of the sentence.

For these reasons we think the petition should be dismissed and the petitioner remanded.

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New Jersey Supreme Court.

November Term, 1905.

STATE OF NEW JERSEY, vs. JOHN MAHANEY.	*On Petition of John Mahaney for writ of habeas corpus, etc.* *Order to Remand.*

John Mahaney having presented his petition to this Court for a writ of habeas corpus directed to the Keeper of the New Jersey State Prison, to the end that he might be liberated from imprisonment therein on the grounds that the commitments whereunder he was detained therein were for concurrent instead of consecutive sentences, and this Court having granted and allowed said writ of habeas corpus directed to said Keeper of the New Jersey State Prison, as aforesaid, and the Keeper having made return thereto that said John Mahaney was detained in said State Prison, under and by virtue of a judgment record, a certified copy whereof was annexed to said return, in and by which said judgment record, it appeared that the sentence therein pronounced was to run consecutively and not concurrently with the other sentence mentioned in said petition for said writ of habeas corpus and in the return to said writ, and it appearing to this Court that the said second sentence is still in force and effect and that the said John Mahaney is legally detained thereunder and is not entitled to be discharged from imprisonment, and it

further appearing to the Court that said consecutive sentence is a legal one and that the relator is not unlawfully restrained of his liberty.

It is on this fifth day of December, A. D. nineteen hundred and five, on motion of William H. Speer, Prosecutor of the Pleas in and for the County of Hudson, and attorney for said Keeper of the New Jersey State Prison, ordered that said John Mahaney be and he hereby is remanded to the custody of the Keeper of the New Jersey 10 State Prison, and that the said petition for the said writ of habeas corpus be and the same hereby is dismissed with costs.

Entered December 8, 1905, on motion of William H. Speer, Prosecutor, etc.

I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the rule made by said Court in the above 20 stated cause and entered in the minutes thereof.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fourth day of May, A. D. nineteen hundred and six.

(SEAL) WILLIAM RIKER, JR.,
Clerk.

New Jersey Court of Errors and Appeals.

JOHN MAHANEY, Plaintiff in Error, vs. STATE OF NEW JERSEY, Defendant in Error.	*On Habeas Corpus.* *On Error* *to* *New Jersey* *Supreme Court.*

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ASSIGNMENTS OF ERROR.

And now at this day, the plaintiff in error assigns the following causes of error:

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1. Because the Supreme Court decided that the mittimus does not govern the sentence of a prisoner confined in the State Prison.

2. Because the Supreme Court decided that the judgment is the source of the right of the Keeper of the State Prison to detain the petitioner in this cause, and not the mittimus.

3. Because the Supreme Court decided that errors in a mittimus might be corrected by the judgment, which judgment had not been relied upon for the detention of the petitioner until a return made to a writ of habeas corpus.

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4. Because the Supreme Court admitted a judgment to correct the mittimus under which the petitioner was held in custody.

5. Because the Supreme Court decided that the petitioner having been convicted on two indictments, on the first of which he was sentenced to seven years' imprisonment, and on the second of which he was sentenced to five years' imprisonment, and the sentence of seven
10 years having expired on the twenty-fifth day of August, 1905, and the petitioner being imprisoned by virtue of the sentence of five years, and that under the judgments the said sentences were not to run concurrently; the Court in imposing the sentence had the power to pronounce the second judgment imposing a sentence to commence after the term of the preceding sentence should terminate, and that such second judgment and sentence were valid.

6. Because the Supreme Court decided that a Court has power to pronounce judgments imposing cumulative
20 sentences.

7. Because the Supreme Court decided that a provision of the Criminal Procedure Act, now embodied in Sec. 67, page, 891, of the Criminal Procedure Act of 1898, permitted the detention of the petitioner under a sentence which could not be begun within twenty days after the imposition of such sentence, and at an indefinite period in the future.

8. Because the Supreme Court decided that the second
30 sentence of the petitioner might begin after the expiration of his first sntence, although at the time of the imposition of such second sentence, the period when it might take effect was indefinite, and although such second sentence

commenced at a period after the expiration of twenty days from its imposition.

9. Because the Supreme Court committed error in refusing to discharge the petitioner from custody for the reasons set forth in his peition.

10. Because the Supreme Court ordered that the petitioner's petition be refused, and that he be remanded to the custody of the Keeper of the State Prison, and that the writ of habeas corpus be dismissed.

For the errors aforesaid, the said John Mahaney prays that the judgment aforesaid may be reversed, annulled and for nothing holden, and that he may in all things be restored what he has lost on the occasion thereof.

WARD & McGINNIS,
Attorneys and of Counsel with Plaintiff in Error.

(Joinder of Error in usual form.)

WM. H. SPEER,
Prosecutor of Pleas of Hudson County.