

START

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CASE

3151

COURT OF GENERAL SESSIONS OF THE PEACE,
CITY AND COUNTY OF NEW YORK. part 1.

-----X
THE PEOPLE OF THE STATE OF NEW YORK, *

Before:

-against-

* HON. WARREN W. FOSTER, J

J O S E P H B U R N S.

* and a jury.
-----X

Indictment filed April 10, 1912.

Indicted for burglary in the third degree.

New York, April 25, 1912.

A P P E A R A N C E S.

FOR THE PEOPLE: ASSISTANT JAMES A. DELANEY.

FOR THE DEFENDANT: MR. FRANCIS D. GALLAGHER.

Peter P. McLoughlin,
Official Stenographer.

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MR. DELIBIANTY: I understand counsel for the defense concedes the following facts: For the purpose of the record being represented by Mr. Francis D. Gallatin, and being himself personally present in court and the jury being empanelled and sworn to try the case, the defendant concedes, as a fact, concerning which no evidence need be given that heretofore in the County of New York at the premises 646 Lenox avenue there existed a six story building on the ground floor of which was located a store occupied by one Max Rothman.

The defendants further concede that in the night time on the 31st day of March, 1912, and at about half past six in the evening on that day the said premises so occupied as a store by Max Rothman, were securely locked and closed and in particular that window in the rear of said premises and a part of the premises occupied as a laundry was securely locked and fastened.

The defendant concedes that thereafter and between the hours of 6.30 p.m. and 10 o'clock p.m., the said premises, so occupied as a store by Max Rothman, were burglariously entered by some persons, by breaking and entering into the said premises through the window mentioned above.

The defendant further concedes that the persons

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who so burglariously entered the premises stole from the premises a quantity of wearing apparel and other articles, consisting of a suit, fifteen shirts, forty collars, one dozen shirts, five bed spreads and underwear.

The defendant further concedes that subsequently to the said theft, and on the same night the defendant, Joseph Burns received from one or more of the thieves some of the property hereinabove mentioned as having been stolen, knowing that the same had been stolen from those premises and with the intention not to return it to the owner nor to the said premises but to appropriate the same to his own use or that of other persons than the owner of said premises or the owners of the property. That is your concession?

The defendant's counsel and the defendant each state that the foregoing concession stated upon the record by the representative of the District Attorney is in all respects correct.

THE PEOPLE REST.

D E F E N S E.

JAMES BURNS, a witness called on behalf of the defendant being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GALLATIN:

Q Where do you live? A 2445 8th Avenue.

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Q Mr. Burns, are you the father of this defendant,
Joseph Burns? A Yes, sir.

Q You are married, of course? A Yes, sir.

Q What was the name of your wife? A Margaret Keegan.

Q Is she living? A No, sir.

Q How long ago did she die? A November 5th last.

Q The 5th of last November? A Yes, sir.

Q How old is this boy? A Well, he is sixteen.

Q What is the date of this boy's birth? A April 17,
1896.

Q Is this a certificate of baptism which you procured?

A Yes, sir.

MR. GALLATIN: I offer it in evidence.

(Marked in evidence as Defendant's Exhibit 1.)

Q Is this a certificate of birth which you procured from
the Health department? A Yes, sir.

MR. GALLATIN: I offer that in evidence.

(Certificate of birth marked Defendant's Exhibit 2.)

Q Are these the working papers of your boy? A Yes, sir.

(Marked in evidence Defendant's Exhibit 3.)

MR. DELEHANTY: At this present time he is sixteen
years and seven days of age, but at the time of the
commission of the offense it is claimed he was under
sixteen.

Q When did the mother write that? (Showing witness

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a book) A About a year ago.

Q Did you see her write it? A Yes, sir.

BY MR. DELEHANTY:

Q Now, Mr. Burns, what was the occasion for keeping this book, it seems somewhat unusual? A When I moved to this address we lost the book we had the record of the children's births in. When I moved to my present address we had a book with the records of the children but lost it or mislaid it somewhere and I asked the wife to write a memorandum of the children's birth and she did.

Q What sort of a book was that that you had the names written in? A Well, it was something similar to that kind of a book there.

Q This sort of a book? A Just a plain book I think it was.

Q You say your wife is dead? A Yes, sir.

Q How long since? A Last November, the 5th.

Q November the 5th? A Yes, sir.

Q I see a note here that this is copied on November 14th?

A Well my oldest son did that; he copied that. I asked him to do so in ink.

Q After your wife's death? A Yes, sir.

Q Now what is this boy's name? A Joseph. The boy that wrote it, his name is John, the oldest one.

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Q Has this boy any middle name? A Joseph M., Michael.

Q What is the middle name, Michael? A Yes, sir.

Q You did not have the births of your children entered in your family Bible, did you? A No, sir.

Q Didn't have any other record than this? A No, sir.

(The book just referred to is admitted in evidence, and marked Defendant's Exhibit 4.)

BY MR. DELEHANTY:

Q Where was your son born? A Astoria, 85 Fulton street.

Q What did you say your wife's maiden name was?

A Keegan.

Q The first name? A Margaret.
in

Q I see that this baptismal certificate apparently the words or figures 23 have been written over the figure 17. Do you know when that was done? A I brought that from Astoria not long ago.

Q Do you know when that change in the figure was made?

A That is the way I got it, the priest gave it to me that way.

Q That is the way the priest handed it to you? A Yes, s

Q The date of the baptism is the third of May, 1896. Have you any independent recollection on that subject? A No, sir.

Q What is that? A No, sir.

Q A recollection of the third of May -- have you any

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recollection that that was the date of his baptism? A Not at all.

Q Have you any recollection yourself as to the date of his birth? A Certainly.

Q Well I wonder why it was you had this book kept if you had an independent recollection? A I had so many in the family I couldn't keep a record of all their ages, I had to have some little book like that.

Q I only want to have the matter clear before the jury. I want to find out your own personal recollection as to the boy's birth. You say you personally recollect that he was born in April, sixteen years ago? A Fifteen years ago last April, that is April 17th.

Q How old was he the 17th of April? A He was 16 years old.

Q How many children have you in all? A Nine.

J O S E P H B U R N S, the defendant being duly sworn,
testified in his own behalf as follows:

DIRECT EXAMINATION BY MR. GALLATIN:

Q Where do you live? A 2445 8th avenue.

Q How old are you, Joseph? A Sixteen.

Q When were you sixteen? A April 17th.

Q What was the date of your birth? A April 17th, 1896.

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BY THE COURT:

Q How do you know? A Well, I know when my birthday was.

Q Do you know anything about it? A My birth certificate, that is how I know.

Q You have seen your birth certificate? A Yes, sir

Q Is that the one that is offered here in evidence?

A I did not see it, your Honor.

Q What birth certificate did you ever see? A Well, when I was to be confirmed I went over to the church to get a birth certificate, but they didn't have it then, the priest wasn't there, they sent it over here, that is when I had to get it.

Q You have seen it? A Yes, sir.

Q Now, do you remember anything more about your birthday than what you have told us? A Well, I know I was born April 17th, 1896.

Q How do you know it? A I read it upon the record and the birth certificate.

Q The birth certificate tells you you were born the 17th of April? A Yes, sir.

Q Now, have you any other sources of information?

A Not that I know of.

BY MR. GALLATIN:

Q Did your mother ever tell you your age? A Yes, sir.

Q Now do you remember the 31st day of March, this year?

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A Yes, sir.

Q Will you tell the jury now frankly and fully exactly what you did that night? A Well, I was standing on St. Nicholas avenue with two other fellows I met there and just took a walk because if we are caught standing around the policeman comes along and chases you. We took a walk up around 150th street, and we went down Lenox avenue and went near a lot there. I sat on a wagon and two fellows went over near this place where it was said to be robbed, and one fellow handed the bundles to the other fellow -- only one fellow went in the store and handed the bundles to the other fellows and the fellow handed me one bundle, the other two fellows they were supposed to go to 153rd street and 7th avenue. I did not go up that way. I went down 7th avenue to 137th street. I went up in this house 137th street and 8th avenue, and left the bundle there that night. The next morning I went up to get the bundle, I was going to give to the fellows and this woman had it on the second floor and she wanted to notify the police and three days later I was standing on the stoop and Mr. Inright, the detective came up and caught me. That is all I have to say.

CROSS EXAMINATION BY MR. DELEHANTY:

Q You saw a boy in the store handed the stuff out to the other boy, didn't you? A No, sir; I didn't see him handing

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it out.

Q How did you know there was only one boy went in?

A That is what he told me.

Q They told you that they had stolen the stuff?

A I was quite a distance from it.

Q They told you they had stolen the stuff in the package, didn't they? A Yes, sir; I knew it was a stolen package.

Q Where were you going to get the money on it, where were they going to sell it? A I could not tell you.

Q They were going to sell it? A I didn't know they were going to sell it at all, they just offered me a bundle and I took the bundle.

Q You carried it up ⁱⁿ to the house that Mrs. Moore lived in? A Yes, sir.

Q You found out afterwards that Mr. Moore had it in her flat? A Yes, sir.

Q You went there and told her that you worked for a laundry and that you had lost a bundle and you wanted her to give it back to you? A Yes, sir; I tried to claim the bundle.

Q You tried to claim the bundle, and she told you she would take it down to the laundry and you asked her not to do that
it / but give it to you? A Yes, sir.

Q Is that right? A Yes, sir.

Q Then afterwards you found out that she had dis-

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covered that the laundry was stolen, and that the detectives were notified? A Yes, sir.

Q Is that right? A Yes, sir.

Q When Officer Enright arrested you he brought you up to Mrs. Miller to identify you and you told Officer Enright and Mrs. Miller that you knew the stuff was stolen? A Yes, sir.

Q When taken into the police court didn't you sign your name to that paper? (Showing witness a paper) A Yes, sir.

Q Now just look at the question "What is your name?" Do you recall that you told the clerk that you were Joseph Burns? A Yes, sir.

Q Do you see the next question. Just read that.

A Yes, sir.

Q "How old are you? Q What is the answer? A "16 and eleven months."

Q Now, in March, at the time of your arrest assuming that you were born in 1895 you would be 16 and eleven months, wouldn't you? A Yes, sir.

Q Now will you tell us how you explain that change in your statement? A Well, I don't know how I did that up in the court.

Q You just simply say you don't know how you happened to do it? A No, sir.

Q At that time you told the clerk that you were 16

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years and eleven months, didn't you? A Yes, sir.

Q He asked you your age and you told him? A Yes, sir.

Q He didn't tell you to say that? A No, sir.

Q You just simply said, "I am 16 years and eleven months old? A Yes, sir.

Q You knew you would be seventeen this month, didn't you? A I didn't know I would be. I must have been or was nervous there at the time.

Q That is nervousness? A I do not know how I gave that out at that time, 16 and eleven months.

Q Now let me understand you that was the day you were arrested or was it in the night time? A Yes, sir it was Wednesday night about seven o'clock.

Q You were not brought into the police court until the next day? A I was brought to the station house that night and the next day I went to 121st street.

Q On Thursday, the 4th, you were brought before Judge Butts? A Yes, sir.

Q Before you were brought before the Judge you were in the clerk's room? A Yes, sir.

Q Now, you had been in custody all that night hadn't you? A yes, sir.

Q You still say you were nervous when you said you were sixteen years and eleven months old? A Yes, sir.

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Q That is the only reason why you said that? A Yes, sir.

Q Is it? A Yes, sir.

Q Stand up please. (Witness does so). How long have you been wearing long trousers? A Since about August.

Q Of 1911? A Yes, sir.

Q How long have you been working? A About a year and a half or so.

BY MR. GALLATIN:

Q Have you ever been to the Truant School? A Yes, sir.

BY A JUROR:

Q What age did you give the police lieutenant at the desk when you were arrested? A 16.

Q 16? A Yes, sir.

Q Then the next morning you gave the age of 16 and 11 months? A Yes, sir.

BY MR. DELLEHANTY:

Q Now, when you said 16 to the police lieutenant did you mean you were past 16? A Just said 16.

TESTIMONY CLOSED:

MR. GALLATIN: I move to dismiss the indictment, for the sake of the record on the ground that it has been clearly proved that this defendant was under the age of 16 at the time of the commission of the offense, and this offense not being one which, if com-

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mitted by an adult, would be punishable by death or life imprisonment, he was not guilty of a crime but an act of juvenile delinquency for which no indictment would be legally found.

THE COURT: Why could it not be legally found?

MR. GALLATIN: The law clearly says that a person under sixteen who commits an act which if not punishable by death or life imprisonment, by a person under the age of 16 years shall not be deemed guilty of any crime but an act of juvenile delinquency only. I think it is section 2137.

THE COURT: That is a point I had never thought of. It is very new to me. Have you anything to say to that that no indictment could lie for juvenile delinquency?

MR. DELEHANTY: If your Honor will look at Section 2136 you will see that there is some language at the end of section. I have never had any construction of it, and the proposition, as far as I know has never arisen. Here is the last sentence in the section, "Any child charged with any act or omission which may render him guilty of juvenile delinquency shall be dealt with in the same manner as now is or may be hereafter be provided in the case of adults charged with the same act or omission except as especially provided heretofore in the case of children under the age of 16 years"

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Now the last phrase there seems to me to be pure surplusage because it is only children under 16 who are rendered guilty of juvenile delinquency and it seems to me that it is possible to construe that last section or that last sentence to mean that the procedure in court may be the same. It seems to me that it is possible to charge that a child may be prosecuted in accordance with the same formula, but the effect of the jury finding or the Court finding is to render him guilty of no crime but only of this minor character of offense which is termed juvenile delinquency.

MR. GALLATIN: The answer to that is that section 50 of the Code of Criminal Procedure reads as follows: (Reading) Sections 50 and 50) This not being a crime it seems to me that the Court of General Sessions has no jurisdiction.

THE COURT: I have never viewed it in that light.

MR. GALLATIN: It says in chapter 659 of the Laws of 1910 that the Children's Court shall have jurisdiction over all cases of juvenile delinquency. Now I suppose your Honor would say that you would have concurrence jurisdiction with them.

THE COURT: I feel bound to deny your motion.

MR. GALLATIN: Well then, your Honor, I shall move on the same grounds as before, and also because the

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court has no jurisdiction either over the offense or over the person of the defendant. I also move that the jury be instructed to acquit on the ground that the People have failed to make out a case it having clearly been shown that no crime has been committed.

Motion denied; exception.

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THE COURT'S CHARGE.

FOSTER, J.- Gentlemen of the jury:

It was said long ago that of the making of books there is no end and I think that the distinguished author of that saying, were he alive today, would strike out the words "books" and insert the word "laws" -- of the making of laws there is no end. It sometimes almost seems to be an actuating principle that whatever is wrong and therefore we should change the law. Reformers have changed our law until now it is in such condition that even lawyers and judges oftentimes do not understand it and are nonplussed at the questions that arise. When we attempt to impose sentence, though we have accountants who figure up what sentence may lawfully be imposed, and though we have very voluminous printed records of the sentences that may be imposed, even then when we impose a sentence we wonder whether we are not running afoul of some new and recent law that reformers and philanthropists have induced the Legislature to pass.

This boy has concededly done what if he were of full age would amount to criminally receiving stolen property.

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The facts and elements that go to make up that charge are conceded. First it is conceded that the defendant possessed the property in question. Second that the property in question was stolen and, third, that the defendant when he had it in his possession knew it was stolen. All those elements are conceded.

It appears that when the defendant was brought into the Magistrates Court and into the police station he asserted that his age was sixteen. Now sixteen is the dividing line. Under sixteen they do not commit crime under this new Legislation. Over sixteen they do commit crime. And the Magistrate and the police officials very properly on the evidence that was before them, held the defendant and the case came down to this court in the regular course of business and the Grand Jury on the evidence before them found this indictment. Then and not until then was it brought to the attention of the Judge, or the Court, that the defendant claimed to be under sixteen and that the Court had not jurisdiction. It having been judicially determined up to that time that the defendant was over sixteen I refused to dismiss the indictment or to send the case to the Children's Court. The question is now raised whether or not this court has jurisdiction owing to the age of the defendant. You have seen the defendant; you

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have heard the testimony of the boy's father and you have heard the testimony of the boy himself, on these points. The question which I shall submit to you in a moment is this boy's age. In determining that you may have regard to the testimony of the father. I don't know whether the father was present at the birth or whether he knows anything about it except what he has told you. You have heard his testimony and you will weigh it for yourselves. There are certain cases in which we may receive hearsay testimony in matters of pedigree-- that may be proved by hearsay testimony. Age may be proved by hearsay testimony. It is obvious I think in the course of human events that no one individual knows his own age except through hearsay. I think no individual has his mind or memory so developed at the time of his birth that he is able to remember that interesting and to him important event. He must acquire whatever knowledge he has touching it from hearsay evidence and hearsay testimony. Therefore the boy was allowed to testify as to his age. I asked him a question as to the source of his information if I remember his testimony aright he did not pretend that he had ever heard any one speak of his age nor had he any testimony other than he had seen the birth certificate. It is for you to weigh that evidence and it is for you to weigh the evi-

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dence, and it is for you to weigh the evidence of his father. It is for you to regard the appearance of the boy and to regard the statements that he has made elsewhere, and having regard to it all to determine his age.

I shall submit to you the question in a new and novel way and I submit it with some doubt as to its propriety because with this interlacing of laws the one conflicting with the other, it is well nigh impossible in the hurry of a trial to have them all in mind. If this boy therefore, I charge you, was under the age of sixteen at the time of this alleged crime you may return a verdict of juvenile delinquency against him. If you find that at the time in question he was over the age of sixteen and that this is but an after thought, this reduction of age, you will find him guilty of criminally receiving stolen property.

Of course the defendant is entitled to the benefit of whatever reasonable doubt may exist. If you have a reasonable doubt about his age at all, he is entitled to a conviction of only juvenile delinquency. You are bound to follow the evidence and a true verdict to find in accordance therewith.

MR. GALLATIN: May I ask your Honor to charge that they may take into consideration the certificate of birth?

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THE COURT: Yes, whatever is in evidence. Every-
thing that is in evidence.

MR. GALLATIN: I would like also to move that the
jury be directed to acquit. This is simply repeating my
other motion -- on the ground that the People have failed
to make out a case.

Motion denied; exception.

MR. GALLATIN: And that if the jury should find
that the defendant was under the age of sixteen years at
the time of the commission of the offense they must acquit
him.

THE COURT: I decline to charge that.

MR. GALLATIN: I take an exception.

(By consent the jury take the exhibits in the case.)

The jury return a verdict of guilty of juvenile
delinquency.

MR. GALLATIN: I move for a new trial on the
ground that the Court misdirected the jury in a matter
of law and erred in his direction to the jury or his re-
fusal to charge as required by the defendant to which the
defendant excepted.

MR. GALLATIN: I move for a new trial on the ground
that the verdict is contrary to law and clearly against
the evidence.

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Motion denied. Exception.

MR. GALLAGHER: I move in arrest of judgment on the ground that the Court has no jurisdiction over the subject of the indictment either as to the offense charged or as to the person of the defendant or in any other manner whatsoever.

THE COURT: You may submit to me your brief. You want to appeal this case I suppose?

MR. GALLAGHER: Yes, your Honor I presume so. I have been assured that it would be.

THE COURT: It is a nice question of law and I would very likely be disposed to grant you a certificate of doubt. I am disposed to hold the commitment-- to impose sentence and then grant you a certificate of doubt to the end that the law may be settled.

MR. GALLAGHER: Then your Honor I move in arrest of judgment because the facts charged do not constitute a crime.

THE COURT: You may submit your authorities. I will remand the defendant until such time as you may wish.

MR. GALLAGHER: When will your Honor hear me in that matter?

THE COURT: I will examine your authorities any time you wish and hear you at any time that you desire to be

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heard.

MR. GALLATIN: I can be ready tomorrow, I think.

THE COURT: I haven't the slightest objection if Mr. Kimball can make his report.

MR. GALLATIN: Perhaps we had better put it over until Monday.

THE COURT: Say Tuesday and ask Mr. Kimball to make a report to me giving me any ideas that he can on the law. You may see Mr. Lindsay of the Gerry Society and submit to me what Mr. Lindsay says and whatever other evidence you can submit to me. The question is a brand new one. I think I have raised all the points in my charge to the jury fully.

MR. GALLATIN: It is understood that I have an exception to the denial of each of the motions made?

THE COURT: Yes. I will remand the defendant until Tuesday. You can submit to me all your authorities and ask Mr. Kimball to make a very thorough investigation and submit to me any recommendation as to the law on behalf of the Prison Association. When the matter comes up you may say what you have to say.

MR. GALLATIN: Shall I give notice to the District Attorney?

THE COURT: It will come up when the defendant is

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brought up for sentence. You may then be heard.

(Defendant remanded to Tuesday, April 30, 1912.)

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THE PEOPLE
V.
JOSEPH BURNS.

New York, April 30, 1912.

The defendant being arraigned for sentence.

MR. GALLATIN: If your Honor please, before sentence I would like to make certain motions in order to have the record clear in the matter.

THE COURT: Have you not made them?

MR. GALLATIN: Yes, sir, but I am simply going to repeat them so as to have them clearly on the record on the ground that the verdict of the jury is clearly against the evidence and against the law.

THE COURT: If you have made them once it is unnecessary to make them twice. Who do you want to make them again.

MR. GALLATIN: To make them a little more clearly. I did not state in the motion the other day that the verdict of the jury clearly imports that the boy was under sixteen.

THE COURT: Motion denied.

MR. GALLATIN: Exception.

THE COURT: Burns, there is a nice legal question involved in your case which illustrates the danger of this constant tinkering with the law. You were taken into the Magistrates' Court and said you were sixteen. It was the duty of the Magistrate to send you to this Court. When

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you got down here you changed your mind and said you were under sixteen. The jury have found that you were under sixteen and there is a question whether or not this Court has any jurisdiction, and a question whether or not an astute boy near the bordering line of age can lie out of any punishment whatever, but that is the condition of our law. Zealous reformers with the best of intentions have succeeded in mixing up and entangling the law so that Judges and Courts don't know what it is. I shall parol you in the custody of the Catholic Probation League. I deny the motion. Now you can appeal from this as well as you can from a sentence to prison.

MR. GALLATIN: It is considered as a sentence?

THE COURT: If you want to appeal, yes.

MR. GALLATIN: Certainly.

THE COURT: I shall postpone the sentence paroling you in the custody of the Catholic Probation League.

Now these two other boys, Smith and Commerford, they deserve no special mercy. Smith has pleaded guilty to Criminally Receiving Stolen Property and Commerford to Burglary. I am disposing of this case on the theory that these defendants told the truth when they said they were guilty.

DEFENDANTS' COUNSEL: Of course they were guilty.

THE COURT: There is only one thing for me to do in

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such a case. There is no reason for mercy. These defendants have been in the City Reformatory and the disciplinary influences of that institution have not made good citizens of them. I am going to try the Elmira Reformatory this time. Your stay there will depend upon your conduct. They may keep you both for five years.

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