LAW REPORT.

("New Zealand Law Reports," Vol. xxxii, page 428.)

[COURT OF APPEAL—(STOUT, C.J., DENNISTON, EDWARDS, COOPER, AND CHAPMAN, JJ.)—1ST AND 21ST OCTOBER, 1912.]

REX *v.* TIER.

Criminal Law — Habitual Criminal — "Previously convicted" — "Four Occasions" — Indictment containing Numerous Counts for Separate Offences—The Crimes Act, 1908, Section 29.

The prisoner pleaded guilty to an indictment charging him with breaking and entering a certain shop. The presiding Judge sentenced him to five years' imprisonment with hard labour and declared him to be an habitual criminal, relying in support of such declaration on a conviction under a general verdict of "Guilty" upon an indictment containing five counts charging five offences in respect of four separate acts, and upon a plea of "Guilty" to a further indictment containing four counts charging four offences in respect of two separate acts. Both the conviction and the plea of "Guilty" were taken upon the same day.

Held by the Court of Appeal (*Edwards, Cooper,* and *Chapman, JJ.*; Stout, C.J., and Denniston, J., dissenting), That the declaration should be quashed, the prisoner having been "previously convicted" on two occasions only, and not "on at least four occasions" within the meaning of section 29 of the Crimes Act, 1908

CASE stated by His Honour Mr. Justice Chapman for the opinion of the Court of Appeal, pursuant to section 442 of the Crimes Act, 1908. The case was as follows:—

The prisoner pleaded guilty before me to an indictment charging him with breaking and entering a shop on Lambton Quay and stealing therein the property of Charles Hill and Sons. On the 9th of August, 1912, I sentenced him to five years' imprisonment with hard labour, and declared him to be an habitual criminal. In so sentencing him I relied on several previous convictions in respect of charges embodied in two indictments which I have abstracted below. The only distinction between this case and that of Rex *v.* Ehrman (31 N.Z. L.R. 136) is that which may arise upon the circumstances shown in the abstract. If the prisoner was not liable to be treated as an habitual criminal it is for the Court of Appeal to deal with the sentence under section 445, subsection 1, paragraph (*c*), of the Crimes Act, 1908.

First indictment: First count—Breaking and entering and theft (warehouse of Gollin & Co.). Second count—Receiving stolen property (same property as above). Third count—Breaking and entering and theft (warehouse of H. Morris & Co.). Fourth count—Breaking and entering and theft (warehouse of John Keir). Fifth count—Breaking and entering and theft (shop of V. R. Simpkiss).

The prisoner was, on the 13th of May, 1910, convicted under a general verdict of "Guilty," and was on the 16th of May, 1910, sentenced to two years' imprisonment with hard labour.

Second indictment: First count—Breaking and entering and theft (shop of J. E. Lindberg). Second count—Breaking and entering with intent to commit theft (same property as above). Third count—Breaking and entering and theft (shop of E. Pearce & Co.). Fourth count—Receiving stolen property (same property as above).

The prisoner, on the 13th of May, 1910, pleaded guilty, and was on the 16th of May, 1910, sentenced to two years' imprisonment with hard labour, concurrent with the sentence on the first indictment.

O'Leary for the prisoner:—

The declaration was made under section 29 of the Crimes Act, 1908. The question is whether the prisoner had been convicted on four occasions. The two indictments contained nine charges in respect of six independent acts. The section has been construed in Rex *v.* Steele (29 N.Z. L.R. 1039), and Rex *v.* Ehrman (31 N.Z. L.R. 136). In Steele's case there were separate indictments for each offence, and separate informations in respect of the pleas of "Guilty" before the Magistrate—not, as here, only two indictments. So in Ehrman's case there were sufficient convictions on separate indictments to bring him within the section. Each indictment and the proceedings thereon is one occasion only, and the Court cannot split the indictments into counts and treat the conviction on each count as a separate occasion. The verdict is one verdict upon the whole indictment.

[Edwards, J.—Surely there is a separate verdict on each count. If the conviction as to one count could be quashed, would not the conviction stand as to the others?]

One indictment might contain several counts in respect of the same act, and a prisoner might, if the conviction on each count is held to be a separate occasion, be declared an habitual criminal for one act only. This is a result which was not intended, and the Court will guard against a construction which would entail such a result.

The Solicitor-General, for the Crown:—

The decision in Rex *v.* Steele (29 N.Z. L.R. 1039) applies equally to separate counts as well as separate indictments. A distinction must be drawn, however, between cumulative counts and alternative counts. For alternative counts the principle in Rex *v.* Steele (29 N.Z. L.R. 1039) does not apply, as there are not distinct acts but only alternative counts in respect of the same criminal act. If there is only one indictment with five counts, each in respect of a separate act, there, possibly, if there is a conviction on all counts, the four would not be previous occasions, but four contemporaneous occasions, and the prisoner could not be declared an habitual criminal. But, following the decision in Rex *v.* Steele (29 N.Z. L.R. 1039) to its logical conclusion, there is no distinction between separate counts and separate indictments. The nature of separate counts is discussed in Latham *v.* Reg. (5 B. & S. 635), and to all intents and purposes two counts are two indictments. See also Stephens' Digest of Law of Criminal Procedure (p. 151) and sections 388 and 397 of the Crimes Act, 1908. A verdict of an indictment containing three cumulative counts is a distributive verdict on each count, and there is a conviction on each count.

O'Leary, in reply, cited Castro *v.* The Queen (6 A.C. 229, at p. 235).

Cur. adv. vult.

Stout, C.J.:—

In this case the prisoner had been convicted on the 13th of May, 1910, under a general verdict of "Guilty" on an indictment in which there were five counts. The first and second counts were alternative counts, but four of the counts were for four different and unallied crimes—viz., 1, Breaking and entering and theft in a warehouse of Gollin & Co.; 2, breaking and entering and theft in a warehouse of H. Morris & Co.; 3, breaking and entering and theft in a warehouse of John Kier; 4, breaking and entering and theft in the shop of V. R. Simpkiss. On the same day he pleaded guilty to another indictment in which there were four counts, but two of them were alternative. The two main counts were for distinct crimes—1, Breaking and entering and theft in a shop of J. E. Lindberg; and 2, breaking and entering and theft in a shop of E. Pearce & Co. On the 9th of August, 1912, he was found guilty of breaking and entering a shop belonging to Hill & Sons, and sentenced to five years' imprisonment with hard labour and declared to be an habitual criminal. The question is whether that declaration is valid.

This Court has dealt in several cases with the construction of section 29 of the Crimes Act, 1908, which makes provision for a declaration that a prisoner is an habitual criminal. The leading case is Rex *v.* Steele (29 N.Z. L.R. 1039). In that case the prisoner had many convictions against him, and there stood against him convictions on four separate indictments. These convictions were, however, on only two separate days, and the question was raised whether there could be different occasions on one day. The words of the section are, "Where such conviction in respect of an offence included in Class II . . . and such person has been previously convicted on at least four occasions of any offence," &c. Subsection 2 says, "This section shall apply whether such previous convictions took place within or out of New Zealand, and either before or after the coming into operation of this Act." It will be noticed that what is given prominence, if not dominance, is the "previous convictions," not the "occasions." There is no doubt that the prisoner has been previously convicted of six offences. Were the convictions on at least four occasions?

In Steele's case there were at least four separate indictments, four separate pleas, four separate offences, and the judgment in that case is not, therefore, conclusive of this case. It is not conclusive of this case solely on the ground that here, instead of having separate indictments for the separate and distinct offences, there were two indictments only. He pleaded to the one indictment "Not guilty," and that meant and must be construed as having the meaning of "not guilty" to all and to every one of the charges. So with the verdict and the plea of "Guilty" to the second indictment.

Can, then, each count and each plea to the indictment be treated as a separate occasion? If it cannot, then it is a question of form overriding a matter of substance. I confess the matter is one of difficulty. If a wide meaning is given to the word "occasion," then I am of opinion that the case would come within the statute. Our Interpretation Act, as their Lordships of the Privy Council have informed us, declares that our statutes ought to "receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning, and