

**Criminal Law. Sodomy. Buggery. Infamous Crime.**

The infamous crime against nature may be committed by insèrtion in any opening of the body except sexual parts.

Helena, Montana, April 29, 1908.

Hon. James E. Murray,  
County Attorney,  
Butte Montana.

Dear Sir:—

I am in receipt of your letter of the 25th inst., submitting a proposition substantially as follows:

“A. carnally abuses a boy by taking his private parts in his mouth; is A. guilty of ‘the infamous crime against nature?’”

This is a question that has not been discussed at any great length for the reason, as stated by the supreme court of Wisconsin, courts refuse “to soil the pages of our reports with lengthened discussion of the loathsome subject.”

Section 496 of the Montana Penal Code provides:

“Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable,” etc.

No attempt is made by this statute to define “infamous crime against nature.” The statute studiously avoids the use of the terms “sodomy” or “buggery,” both of which terms had well defined meanings at common law. The statute is therefore broader in its meaning than either of these terms, and by using only general terms the legislature has left the courts free to determine what is included within the meaning of the phrase “infamous crime against nature.”

Section 47 of the Penal Code of Illinois provides:

“The infamous crime against nature, either with man or beast, shall subject the offender to be punished,” etc.

Under this statute the supreme court of Illinois has repeatedly sustained convictions under facts similar to those above stated, and while the court makes reference to Section 336 of the Illinois Penal

Code, which provides: "Every person convicted of the crime of sodomy or other crime against nature," yet the decision of the court is based upon the provisions of said Section 47 and this latter section is only referred to in an explanatory manner.

Houseman vs. People (Ill.), 48 N. E. 304.

Kelly vs. People 61 N. E. 323 (Ill.), 425; 85 Am. State Reps. 323.

In the state of Wisconsin the legislature by the provisions of Sections 4591 and 4591a, Revised Statutes of 1898, gives to the phrase "infamous crime against nature," the same construction as the Illinois supreme court, and the supreme court of Wisconsin sustained a conviction under a state of facts similar to that above stated.

Means vs. State (Wis.) 104 N. W. 815.

In the state of Iowa the legislature has amended the common law meaning of sodomy to include acts similar to those above stated. Chapter 148, 29th general assembly of Iowa, 1902, provides:

"Whoever shall have carnal copulation in any opening of the body except sexual parts with another human being, or shall have carnal copulation with a beast, shall be deemed guilty of sodomy."

Under this statute the supreme court of Iowa sustained a conviction on a state of facts similar to that we are here considering.

State vs. McGunder, 101 N. W. (Iowa) 646.

The Massachusetts statute provides:

"Whoever commits an unnatural and lascivious act with another person shall be punished," etc.

Chap. 436, Acts of Mass., 1887.

Under this statute the supreme court sustained a conviction on a similar state of facts.

Commonwealth vs. Dill, 36 N. E. 472.

In State vs. McGunder, supra the supreme court quotes with approval from this Massachusetts case and from the Illinois cases above cited.

In Prindle vs. State (Tex. Crim. App.) 21 S. W. 360, the supreme court appears to hold to a contrary view, but on examination of the statute of that state we find that the legislature has given to the phrase, "infamous crime against nature," the same meaning as is given at common law to sodomy.

In People vs. Boyle (Cal.) 48 Pac. 800, the California supreme court appears to have followed the Texas decision, but without any discussion and without any attempt to distinguish between the statutes although they are widely different.

While our own supreme court has never passed upon a similar question, we believe the weight of reasoning is that of the Illinois line of decisions, and that our supreme court will give to the statute the construction placed upon a similar statute by the supreme court of Illinois and will sustain a conviction.

If in your opinion you have sufficient evidence to establish the facts beyond a reasonable doubt, we believe it advisable to prosecute

this case so that in the event that such statute is not broad enough to cover this subject, it can be amended at the next session of the legislature, unless you believe the accused is insane or that the public welfare will be best subserved by adopting some other course.

Yours very truly,

ALBERT J. GALEN,

Attorney General.