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Criminal Law—Recidivist Statutes: Single Trial for Multiple Offenses Construed as Single Conviction

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prejudiced by the jury charge, which allowed the panel to consider both wholesale and retail prices.

This being the case, the Court apparently felt the need to fill the gap left by *People v. Rupoli*,[26] involving similar facts, in which the larceny conviction was sustained and the precise question as to market value was left unanswered by the Court.

It is also pointed out that in jurisdictions having a penal provision similar to that of New York the term market value is construed in a like manner.[27]

RECIDIVIST STATUTES: SINGLE TRIAL FOR MULTIPLE OFFENSES CONSTRUED AS SINGLE CONVICTION

Section 1942 of the New York Penal Law, dealing with fourth felony offenders, provides *inter alia* that:

> For purposes of this section, conviction of two or more crimes charged in separate counts of one indictment or information, or in two or more indictments or informations consolidated for trial, shall be deemed to be only one conviction.

The consolidation for trial, to which this section refers, is that permitted by the New York Code of Criminal Procedure, Section 279, where provision is made for the charging of crimes of the same or similar character in separate counts of one indictment, and if two or more indictments are found in such cases, the court may order them to be consolidated.

In *People v. Fay*[28] the relator had been convicted of three crimes in the State of Pennsylvania. The second and third convictions were for robbery and attempted robbery respectively, both committed on the same day against different victims. The crimes were charged on separate indictments, but were tried simultaneously. The jury returned a verdict of guilty on both offenses, and sentences were imposed to be served consecutively. Subsequently, he was convicted in New York of a felony and sentenced as a fourth felony offender to an indefinite term of 15 years to life.

Habeas corpus proceedings were commenced by the relator on the ground that he was improperly sentenced. He contended that, for purposes of Section 1942 of the Penal Law, the second and third indictments were consolidated for trial and constitute only one conviction. The Supreme Court dismissed the writ on the theory that:

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26. 503 N.Y. 595, 105 N.E.2d 485 (1952). Defendant was convicted of the crime of receiving stolen goods, which under Section 1308 of the New York Penal Law, makes the crime a felony if the goods have a market value in excess of one-hundred dollars. The property involved had a wholesale value of $120, and a retail value of $201. The Court unanimously sustained a felony conviction, regardless of the fact that the trial judge had allowed the jury to consider retail price only. The correctness of this charge was not considered, since defendant's counsel had not excepted to the same, and in any case, the felony conviction could have been sustained on wholesale value alone being in excess of $100.

27. See, People v. Irrizardi, *supra* note 21, at 146, 182 N.Y.S.2d 364 (1959).

28. People v. Fay, 6 N.Y.2d 88, 188 N.Y.S.2d 477 (1959).

> The record does not show the existence in the Pennsylvania criminal action of an order, written or oral, expressly directing or using the words consolidation of the two indictments for trial. Since the term joint trials is unknown in our criminal practice the two must be distinguished.

The Appellate Division affirmed without opinion.[29] On appeal the decision below was reversed.[30] The Court of Appeals held that where multiple criminal charges have been decided at one trial, in New York or elsewhere, and the crimes have sufficient characteristics in common so as to have permitted consolidation under Section 279 of the Code of Criminal Procedure, the trial shall be deemed a consolidated trial, resulting in but one conviction for purpose of the recidivists statutes.

The problem before the Court of Appeals was to resolve the meaning of the phrase "consolidated for trial" as used in the provision in question. In order to do this it was first necessary to determine what the Legislature was endeavoring to accomplish. This purpose was clearly illustrated in *Bravatta v. Morhaus*.[31] There, the Court, speaking about Section 1942 said:

> It is harsh in its impact upon the individual, and in many instances we feel that it is unduly harsh . . . The Legislature has indicated an intent, in specified cases, to mitigate the harshness of the statutory rule, by the words contained in the last sentence of the section.

If the purpose illustrated by the quotation is to be accomplished the statute ought to be construed in favor of the individual. Construing it in this manner would also be in accordance with the recognized policy in interpreting penal statutes. As the trial court observed, the Penal Code is not helpful in arriving at a useful definition of "consolidated for trial," nor is it helpful to compare it with "consolidation" as it is used in civil trials.[32] In the latter case any comparison which could be made would very likely be unrelated to the legislative purpose. The interpretation desired is one which is logically defensible but is also consistent with the legislative intent. In this case this can be achieved by looking to the other provisions of Section 1942 and noting how the problem of out-of-state convictions is resolved. In dealing with the classification of crimes into misdemeanors or felonies, for the purpose of the recidivist statutes, the New York courts look at the criminal acts in the light of the applicable New York law. Notwithstanding the fact that the crime may have been a felony in the foreign jurisdiction, if under New York law the crime would have been a misdemeanor, it will be so treated for the purposes of the recidivist statutes.[33] This is in substance the result of the Court of Appeals decision in the instant case. This result is justified in that it mitigates

29. People v. Fay, 7 A.D.2d 640, 179 N.Y.S.2d 851 (2d Dep't 1958).
30. *Supra* note 28.
31. Bravatta v. Morhaus, 186 Misc. 893, 63 N.Y.S.2d 451 (Sup. Ct. 1946).
32. Kennedy v. Empire State Underwriters of Watertown N.Y., 202 S.C. 38, 24 S.E.2d 78 (1950).
33. Newman v. Foster, 297 N.Y. 27, 74 N.E.2d 224 (1947).

the harshness of the statute in accordance with the legislative purpose, and is consistent with the accepted method of treating out of state convictions for purposes of the recidivist statutes in general.

EFFECT OF OUT OF STATE CONVICTION UPON RECIDIVIST STATUTES

Sections 1941 and 1942 of the New York Penal Law require a sentencing judge, in applying the recidivist statutes, to consider defendant's out-of-state convictions. When the crime is a felony where committed, but only a misdemeanor if committed in New York, the statutes require that the foreign felony conviction be treated as only a misdemeanor.[34]

Since the foreign indictment usually alleges more than the bare statutory crime, do the New York courts consider only the statute, the indictment, or both, in determining whether the foreign felony conviction is to be treated as a misdemeanor in New York?

The New York rule, set out in *People v. Olah*,[35] is that if the crime as defined by the foreign statute could under any set of facts be only a misdemeanor if committed in New York, the New York courts will treat the crime as a misdemeanor, even though the indictment charges an act which would be a felony if committed in New York.[36]

In *People v. Jackson*[37] defendant contended that since one of the two acts defined by the foreign statute under which he was convicted was only a misdemeanor under New York law,[38] the indictment should be disregarded, and the foreign felony conviction must be treated as a misdemeanor in New York.

The Court of Appeals rejected this contention, holding that the indictment must be considered when it plainly charges only that crime which would be a felony under New York law.[39]

The Court noted, that the purpose of the *Olah* rule is to eliminate discrimination in New York courts against defendants because they have been convicted of foreign felonies which might not be felonies if committed in New York. This decision limits the effect of the *Olah* rule, but preserves its intent, for it denies discrimination in favor of such defendants.

DOUBLE JEOPARDY—NEW YORK "WAIVER" DOCTRINE SURVIVES IMPACT OF GREEN CASE

Defendant's failure to except to an erroneous jury charge precludes his raising that exception on appeal.[40] In *People v. Cipolla*,[41] the trial judge erroneously charged that sodomy second degree is included in or is a lesser

34. N.Y. PEN. LAW §§ 1941-1942.
35. 300 N.Y. 96, 89 N.E.2d 329 (1949).
36. People v. Martin, 308 N.Y. 823, 125 N.E.2d 873 (1955); People v. Kronich, 308 N.Y. 866, 126 N.E.2d 307 (1955).
37. 5 N.Y.2d 243, 183 N.Y.S.2d 343 (1959).
38. N.Y. PEN. LAW § 405.
39. N.Y. PEN. LAW § 404.
40. N.Y. CODE CRIM. PROC. § 420-a; People v. Cohen, 5 N.Y.2d 282, 184 N.Y.S.2d 340 (1959).
41. 6 N.Y.2d 922, 190 N.Y.S.2d 996 (1959).