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Criminal Law—Effect of State Conviction Upon Recidivist Statutes

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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).