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acts which violate the spirit as well as the letter of this law. In so doing it declares that false advertising is no less criminal because it is artful.

DEROGATORY REMARKS OF JUDGE IN IMPOSING INDETERMINATE SENTENCE

In *People v. Gross* the Court held that a defendant can not be sentenced to an indeterminate term if the sentencing judge has clearly stated that the defendant is incapable of reform.²¹

After his conviction the defendant filed notice of appeal. Instead of prosecuting it, he instituted a *habeas corpus* proceeding. The Appellate Division (1st Dep't) dismissed the writ, stating that the imposition of the indeterminate term raised an irrebuttable presumption that the trial court had found the defendant capable of being corrected.²² The Court of Appeals affirmed on the ground that the habeas corpus writ did not lie to review the sentence.²³

The defendant then prosecuted his appeal. The Appellate Division (2nd Dep't) reversed the conviction, and held that since the judge had affirmatively stated that the defendant could not be reformed,²⁴ the imposition of the indeterminate term was erroneous.²⁵ The Court of Appeals affirmed the reversal, and resolved the conflict between the First and Second Departments as to whether the sentence is conclusive or whether the derogatory remarks of the sentencing judge are dispositive.

If the sentencing judge specifically states that he believes a defendant can not be rehabilitated, an indeterminate term can not be imposed.²⁶ However, if the judge does not comment on the defendant's character,²⁷ or if his remarks are ambiguous,²⁸ the indeterminate sentence is conclusive.

This decision restricts the use of the indeterminate sentence as a punitive device, and effectively recognizes that it is a rehabilitative instrument. No longer will a trial judge be permitted to characterize a defendant as incorrigible and at the same time invoke a corrective sentence in order to impose what is actually a longer sentence than would otherwise be meted out.²⁹

21. 5 N.Y.2d 131, 181 N.Y.S.2d 499 (1959). N.Y. CORRECTION LAW, Art. 7-A, provides for an indeterminate term of not more than three years. Section 203(e)3 states that the Article shall not apply to any person who is insane or physically or mentally incapable of being substantially benefited by being committed to a correctional institution.

22. *People v. Silbergliitt*, 3 A.D.2d 996, 163 N.Y.S.2d 435 (1st Dep't 1957).

23. *People v. Silbergliitt*, 4 N.Y.2d 59, 172 N.Y.S.2d 145 (1958), noted 8 BUFFALO L. REV. 108 (1958).

24. The sentencing judge said:

You can no more change him the longest day he lives tha(n) you will take the spots off a leopard. He will never be any different. He cannot be . . . I do not think he will ever change.

5 A.D.2d 878, 172 N.Y.S.2d 432 (2d Dep't 1958).

25. *People v. Gross*, 5 A.D.2d 878, 172 N.Y.S.2d 432 (2d Dep't 1958).

26. *People v. McDonnell*, 198 Misc. 738, 99 N.Y.S.2d 501 (Sup. Ct. 1950).

27. *People v. Tower*, 308 N.Y. 123, 123 N.E.2d 805 (1954); *People v. Warden of N.Y. City Penitentiary*, 171 Misc. 533, 13 N.Y.S.2d 837 (Sup. Ct. 1939).

28. *People v. Thompson*, 251 N.Y. 528, 168 N.E. 415 (1929).

29. In the instant case the maximum punitive sentence could not exceed one year, while under an indeterminate sentence the defendant could be imprisoned for a period of up to three years.