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Criminal Law—Demurrer to a Single Count of an Indictment: People's Right to Appeal from Allowance Thereof

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serve the minimum determinate sentence before he can be released.[41] In *People v. Martin*[42] defendant contended that Section 212 could not by implication apply to earlier penal statutes determining the place of imprisonment, because the provisions of the Penal Law are not altered by subsequent inconsistent statutes which do not explicitly refer to earlier law, and therefore he should be set free.

Section 2500 of the Penal Law declares that no prior penal statute "shall be deemed repealed, altered or amended by the passage of any subsequent legislation inconsistent therewith, unless such statute shall explicitly refer thereto and directly repeal, alter or amend this chapter accordingly." Although Section 2500 was originally literally construed,[43] there was an early recognition that a legislature cannot declare in advance the intent of subsequent legislatures.[44] Consequently, the courts have limited the prohibition of Section 2500 to mean that the courts will not construe a subsequent statute as repealing, altering or amending a prior statute unless the intent to do so is clear and unmistakable.[45]

The Court in the present case held that the clear and unmistakable intent of Section 212 of the Correction Law was to enable the courts to sentence a defendant to a State prison for an indeterminate term, since a contrary decision would render Section 212 meaningless. While it appears that the intent of Section 212 was to declare the powers of the Parole Commission, and the reference to the serving of an indeterminate term in a State prison is incidental to that intent, the practical necessity to arrive at this result requires a determination that Section 212 was enacted to apply to this situation. While the defendant's contentions are ingenious, they cannot prevail at the expense of allowing convicted felons to go free.

DEMURRER TO A SINGLE COUNT OF AN INDICTMENT: PEOPLE'S RIGHT TO APPEAL FROM ALLOWANCE THEREOF

The defendant, a physician, was indicted on nineteen counts of allegedly defrauding an insurance company of $612 on nine different occasions. On each occasion the same type of medical service was fraudulently claimed to have been rendered by the defendant to persons insured by the company, and the value of these services was less than $100 in each case. The indictment con-

41. N.Y. CORRECTION LAW § 212 in part provides:
Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole.

42. 6 N.Y.2d 371, 189 N.Y.S.2d 884 (1959).

43. People v. Gallagher, 58 Misc. 512, 111 N.Y. Supp. 473 (County Ct. 1908); People v. Jensen, 99 App. Div. 355, 90 N.Y. Supp. 1062 (1st Dep't), *aff'd* 181 N.Y. 571, 74 N.E. 1122 (1905); American Soc. v. Gloversville, 78 Hun 40, 29 N.Y. Supp. 257 (1894); People v. Hatter, 22 N.Y. Supp. 688 (County Ct. 1893).

44. Mongeon v. People, 55 N.Y. 613 (1874).

45. People v. Dwyer, 215 N.Y. 46, 109 N.E. 103 (1915); People v. Cleary, 13 Misc. 546, 35 N.Y. Supp. 588 (County Ct. 1895), and cases cited therein.

tained nine counts of petit larceny, nine counts of filing false insurance claims, and one count of first degree grand larceny.[46] From an allowance in the County Court of the defendant's demurrer to the grand larceny count, the People appealed to the Appellate Division. That Court denied the defendant's motion to dismiss the appeal and reversed the allowance of the demurrer in the County Court. The defendant then appealed, raising two questions never brought before the Court of Appeals: In New York, is the allowance of a demurrer to only one count of an indictment appealable by the People? If so, should this demurrer be allowed? The Court in *People v. Rossi*,[47] unanimously answered the first question affirmatively, the second negatively.

In 1945, Section 323 of the New York Code of Criminal Procedure was amended to read, "The defendant may demur to the indictment, or any count thereof, . . ." Thus, the right to demur to individual counts of an indictment cannot now be debated. Prior to 1945, however, the prevailing law of New York was expressed in the case of *People v. Rosenheimer*,[48] which stated that, "A demurrer must lie, if at all, to the whole of an indictment."[49]

While the Legislature effectively amended Section 323 to overrule the *Rosenheimer* case, it made no alteration of Section 518 of the Code, which continues to read, in subdivision one, as follows: the People may appeal "From a judgment for the defendant, on a demurrer to the indictment,"[50] the words "or any count thereof," being absent. Thus, in this case, the defendant argued, that while the right to demur to any count of an indictment was clear, the legislature's failure to also amend Section 518 of the Code indicated an intention to allow the People a right of appeal only when a demurrer had been entered against the whole of an indictment.

The Court succinctly answered this argument by saying that while a right of appeal in criminal cases is solely controlled by statutes, which must be strictly interpreted, the construction sought by the defendant was too strict. For under Section 279 of the Code, which allows a joinder of counts, the result advocated by the defendant would be illogical. While the result reached is just, the validity of this argument by the Court is to be questioned. For even prior to 1945, when the holding of the *Rosenheimer* case prevailed, the defendant could demur to a single count of an indictment which joined several counts.[51] Thus, it appears that prior to 1945, Section 518 of the Code was not applicable when the indictment arose under Section 279 of the Code. The question of

46. N.Y. PEN. LAW § 1202.
47. 5 N.Y.2d 396, 185 N.Y.S.2d 5 (1959).
48. 209 N.Y. 115, 102 N.E. 530 (1913). The principal issue in this case was whether a certain portion of the New York Highway Law was constitutional, not the right of a defendant to demur to individual counts of an indictment, this being a secondary point only. Furthermore, the court made no reference to any statute which it purported to be interpreting. Therefore, it is debatable whether the above statement of the court is a holding or merely a dictum.
49. People v. Rosenheimer, *ibid.*, at 118, 102 N.E. 531 (1913).
50. N.Y. CODE CRIM. PROC. § 518(I).
51. People v. Hines, 168 Misc. 453, 6 N.Y.S.2d 2 (Sup. Ct. 1938).

first instance in this case concerns the effect of the 1945 amendments to Section 323 of the Code upon Section 518, not the relationship between Sections 279 and 518 of the Code, which had always been fairly clear.

The second method used by the Court, in dismissing the defendant's argument, was to say that the Legislature did not intend to create the awkward situation which would arise if the defendant's argument were allowed to prevail.[52] Whether the Court here cloaked judicial policy with legislative intent is an interesting question.

The second question of first instance to be decided by the Court was whether the demurrer should be allowed, *i.e.*, was the first degree grand larceny count sufficiently pleaded? That count alleged that all nine takings were a part of one overall plan. The People sought to apply the rationale of *People v. Cox*.[53] Simply expressed, this case stated that if successive thefts were part of one integrated scheme, then successive thefts would constitute a single theft regardless of the amount of time which had elapsed between them. The defendant argued that the *Cox* holding did not apply here because the People alleged that Rossi's thefts were false pretense takings, and that under Section 1290[54] of the Code, this allegation requires a separate intent and a new venture in each instance. The court replied by saying that the grand larceny count alleged one taking and one intent. The Court also stated that whether this unity of intent did exist was a question for the jury.

HABEAS CORPUS FOR IRREGULARITY IN PROCEEDINGS: PRESUMPTION OF REGULARITY

Section 480 of the New York Code of Criminal Procedure requires that when a defendant appears for judgment, he must be asked by the clerk whether he has any legal cause to show why judgment should not be pronounced against him. Relators Sheehan and Williams applied for *habeas corpus* on the ground that this section was not complied with. Their applications were granted by Special Term, and resentencing was ordered. The Appellate Division affirmed.[55]

The Court of Appeals held that the presumption of regularity of official proceedings would require the denial of the writs unless evidence was introduced to show an irregularity.[56] Evidence that Section 480 was not complied with, must be found in the stenographic minutes of the testimony and in the Clerk's minutes of what occurred when sentence was imposed.[57] In affirming the order in the instance of Sheehan, the Court felt that the stenographic

52. The "awkward situation" which would result would be that while individual counts of an indictment can be demurred to, these demurrers could not be appealed from until a judgment concerning the whole of the indictment had been reached.
53. 286 N.Y. 137, 36 N.E.2d 84 (1941).
54. N.Y. PEN. LAW § 1290.
55. People v. Murphy, 7 A.D.2d 889, 181 N.Y.S.2d 451 (4th Dep't 1959); People v. Murphy, 7 A.D.2d 893, 181 N.Y.S.2d 633 (4th Dep't 1959).
56. People v. Smyth, 3 N.Y.2d 184, 164 N.Y.S.2d 737 (1957).
57. People v. Murphy, 6 N.Y.2d 234, 236, 189 N.Y.S.2d 182, 184 (1959).