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Criminal Law—Waiver of Jury Trial

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result in revocation of parole and of the permission to start the new (second) sentence at that time. The prisoner was paroled under the second sentence in 1946 while still on parole from the first sentence and in 1947 was arrested and convicted of a misdemeanor,[17] thereby breaking his parole.[18] In 1948, he again started to serve his sentences.

Pursuant to section 218 of the Correction Law, the Parole Board ordered that the balance of the maximum sentences be served—consecutively, not concurrently. When the longer of the two remaining periods had been served, this habeas corpus action was begun on the theory that the Parole Board had no power once the sentences had been started concurrently to suspend one until the other had been served.

But in this case the Court of Appeals *held* (4-3): "By the provisions of section 218 of that law [Correction Law] the board was empowered to require the prisoner 'to serve out in prison the balance of the maximum term for which he was originally sentenced.' Nothing more than that was done here." The Court felt that the *Rainone* case concerned a different question and that the decision did not bind them to restrict the power of the Parole Board in a case such as this.

However, the dissent felt that the reasoning of the *Rainone* case compelled the Court to take a consistent view on the facts of the instant case. The construction of the statutes leading to the divisions of authority outlined in *Rainone* and resulting in the Court's declarations (outlined above), the dissent argued, should deny any board power to make the remaining sentences consecutive. By making the sentences consecutive, the board is in effect suspending the running of the sentence.

The majority seems willing to allow the power of suspension to the board when the prisoner's own culpable conduct has been the motivating cause as opposed to voluntary action on the part of the board as in the *Rainone* case. Although this may be a reasonable distinction, the result would seem to conflict with the division of authority and reasoning outlined in *Rainone.*

Waiver of Jury Trial

Article I, section 2 of the New York State Constitution states in part:

> A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death,

17. Incarceration as a misdemeanant suspends the running of sentences. Spearling v. Moran, 277 App.Div. 778, 97 N.Y.S.2d 380 (2d Dep't 1950); see also note 14, *supra.*

18. CORRECTION LAW §218.

> by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

In *People v. Carroll,*[19] the defendant, brought to trial on an indictment charging him with grand larceny in the second degree, waived jury trial. A written stipulation signed by defendant and his counsel, citing the constitutional provision and stating defendant's name, indictment number, the waiver, and a recital of full knowledge was entered into. The district attorney objected to the waiver on the ground that no legislative enactment had been made pursuant to the constitutional provision. The case proceeded without a jury, however, over his objection.

To test the court's power to accept the waiver, the charge was re-presented to the Grand Jury which handed down a second indictment upon the same facts and for the same crime. Upon arraignment the defendant pleaded not guilty and moved to dismiss the second indictment on the grounds of former jeopardy. The motion was granted and was subsequently unanimously affirmed by the Appellate Division from which decision appeal was taken.

The Court of Appeals, speaking of the rule of construction to be applied to constitutional provisions, stated: "When this language is clear and leads to no absurd conclusion there is no occasion, and indeed, it would be improper to search beyond the instrument for an assumed intent."[20] Since the form of the waiver was indicated for criminal cases and the grant of authority to the legislature phrased permissively, the section logically would seem self-executing. Further, in construing constitutional provisions as between being self-executing or merely general directions for subsequent legislation the rule is now in favor of self-executing provisions.[21] Reviewing the history of the amendment the Court found substantial evidence that the amendment was intended to be self-executing. Accordingly, the Court found the procedural detail sufficient without supplemental legislation and thus affirmed the lower courts.

Form of Remedy from Illegal Sentence; Use of Indeterminate Term

Habeas corpus is ordinarily an appropriate remedy, with respect to the judgment or sentence where and only where the court was without jurisdiction in

19. 3 N.Y.2d 686, 171 N.Y.S.2d 812 (1958).

20. Citing: Latting v. Cordell, 197 Okl. 369, 172 P.2d 397 (1946); State ex rel. Trent v. Sims, 138 W.Va. 244, 77 S.E.2d 122 (1953); McKinney, CONST. RULES OF INTERPRETATION, part 1, p. 5.

21. State ex rel Russell v. Bliss, 156 Ohio St. 147, 101 N.E.2d 289 (1951); Morgan v. Board of Supervisors, 67 Ariz. 133, 192 P.2d 236 (1948); State ex rel Noe v. Knop, La.App., 190 So. 135 (1939).