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Criminal Law—Sentence—Habitual Criminal

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He would be barred from answering questions as to the punishment for various degrees of a crime with which a defendant is charged. This would directly violate the statutory prohibition thereof.[66]

In the instant case answering the question as to parole was likewise improper. Here, life imprisonment must be taken at its face value. If the question of parole is interjected, it once again calls for consideration of matters extraneous to the jury's consideration. From the fact that the jury must agree unanimously upon a recommendation or non-recommendation of life imprisonment,[67] it is apparent that this constitutes an integral part of the verdict. The considerations in determining whether such a recommendation should be made turn primarily upon comparative moral blameworthiness.[68] In no event, however, should the jury be allowed to consider the working of the parole system any more than it should consider the possibility of pardon or commutation of sentence in determining whether the death sentence should be applied. The conviction in this case should have been reversed.

Sentence—Habitual Criminal

New York's habitual criminal statutes[69] have not been looked upon with favor by its judiciary.[70] In a case decided in 1930, the Court of Appeals observed: "If the sentence under review stands, the relator who is twenty-five years of age, because he had previously stolen chickens, certain automobile parts, and a motor cycle, must spend the remainder of his days in a State's prison".[71] Of course, the sentence did not stand.

Although the mandatory life sentence of the Baumes Law[72] has given way

66. N. Y. CODE CRIM. PROC. §420.
67. *People v. Hicks,* 287 N. Y. 165, 169, 38 N. E. 2d 482 (1941).
68. See note 67 *supra.*
69. N. Y. PENAL LAW § 1941. Punishment for second or third offense of felony. 1. (A) person, who after having been once or twice convicted . . . of a felony . . . commits any felony . . . is punishable upon conviction . . . as follows: If the second or third felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for an indeterminate term, the minimum of which shall not be less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall not be longer than twice such longest term. N. Y. PENAL LAW §1942. Punishment for fourth conviction of felony. A person who, after having been three times convicted within this state, of felonies . . . commits any felony other than murder . . . shall be sentenced upon conviction . . . to imprisonment . . . for an indeterminate term the minimum of which shall be not less than the maximum term provided for first offenders . . . but, in any event, . . . not less than fifteen years, and the maximum thereof shall be his natural life. . . .
70. Note, *Court Treatment of General Recidivist Statutes,* 48 COLUM. L. R. 238 (1948).
71. *People ex rel Marclay v. Lawes,* 254, N. Y. 249, 172 N. E. 487 (1930).
72. N. Y. Laws 1926, c. 457.

to a more discretionary sentencing provision, the attitude of the courts has not softened. A recent example of this aversion can be observed in *People v. Shaw*.[73] Here, the defendant was appealing from a conviction as a third offender. His argument was that since one of his two prior convictions had resulted in a suspended sentence, he was entitled to be sentenced as a second offender. His main reliance was on the *Marclay* case. There the Court of Appeals had held that the word "conviction", in a criminal statute which provided that forfeitures are to follow upon a conviction, must be construed to mean conviction evidenced by judgment and sentence. This led the court in that case to decide that two prior suspended sentences could not be used as a basis for sentencing the defendant as a fourth offender under section 1942.

The prosecution argued that the *Marclay* rationale was inapplicable to a proceeding under section 1941 because of section 470-b Code of Criminal Procedure.[74] The majority of the Court held that since, by its terms, that statute is limited to second offenses it was not in point where the prisoner was remanded to be sentenced as a second offender.

Three dissenters could not be satisfied by this appraisal of section 470-b. The legislative history shows that section 1941 as first written referred only to "second offenders" and section 470-b was passed to define "conviction" as used in section 1941. Since, at that time, there was no provision for special treatment of the fourth offender all repeated offenses were grouped under the term "second offense" and sections 1941 and 470-b were also applicable to third and fourth offenses. In 1907, the fourth offender was removed from the scope of section 1941, but, until 1936, section 1941 still referred only to "second offenses" though it was clearly still aplicable to third offenses as well.

In 1936, section 1941 was amended to refer expressly to "second *or third* offense" but section 470-b was not changed. It is upon the interpretation of this fact that the two opinions diverge. To the majority, the failure to change the wording of section 470-b to include third offenses was a significant gesture. To the dissenters, it was a mere oversight.

That the Legislature intended to change the meaning of one statute by changing the wording (but not the meaning) of another seems improbable but what the majority terms the "modern trend in the science of penology" persuades them to indulge in this subtlety. The clash of opinion illustrates the narrow line between strict construction and misconstruction in the area of criminal law.

73. 1 N. Y. 2d 30, 133 N. E. 2d 681 (1956).

74. N. Y. CODE CRIM. PROC. § 470-b. . . . For the purpose of indictment and conviction of a second offense, the . . . suspension of sentence . . . shall be regarded as a conviction. . . .