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## PROVISIONS FOR FOREIGN CONVICTIONS IN HABITUAL CRIMINAL LEGISLATION

One of the most difficult problems arising in those states which have multiple offense statutes is to determine the effect to be given convictions obtained in foreign states. Obviously some criterion is necessary in determining which foreign convictions are acceptable as a basis for multiple offense convictions. In some states, foreign convictions have been accorded exactly the same effect as local convictions.<sup>1</sup> This attempt at the solution of the problem will be termed for convenience the *external* view. On the other hand, in a number of states, it is not sufficient that the offense has been declared by a foreign jurisdiction to be of the degree of seriousness cognizable under the local multiple offense law.<sup>2</sup> The gravity of the offense must be weighed in the light of local policy. This approach may be termed the *limited internal* view.<sup>3</sup>

### THE EXTERNAL VIEW

A majority of the states base their habitual criminal legislation on the *external* view.<sup>4</sup> However, the legislatures differ with

1. Ala. Code Ann. (Michie, 1928) § 5281; Cal. Stat. (1935) 1699, c. 602; Conn. Gen. Stat. (1930) § 6501; Ga. Code (1933) § 27-2511; Idaho Code Ann. (1932) § 19-2414; Ill. Rev. Stat. Ann. (Smith-Hurd, 1935) c. 38, § 602; Ind. Stat. Ann. (Burns, 1933) § 9-2207; Iowa Code (1935) §§ 13396, 13397, 13400; Kan. Rev. Stat. Ann. (Corrick, Supp. 1933) c. 21-107a; Ky. Stat. Ann. (Carroll, 1930) § 1130; Mass. Ann. Laws (1933) c. 279, § 25; Mo. Stat. Ann. (1932) § 4462; Neb. Comp. Stat. (1929) § 29-2217; N.H. Pub. Laws (1926) c. 396, § 1; N.C. Code Ann. (Michie, 1935) § 4202; N.D. Sess. Laws (1927) c. 126, § 1, as cited in *State v. Malusky*, 59 N.D. 501, 230 N.W. 735 (1930); Ohio Crim. Code (Patterson, 1924) § 13741; Tex. Ann. Pen. Code (Vernon, 1925) arts. 61-64; Utah Rev. Stat. Ann. (1933) § 103-1-18; Va. Code Ann. (Michie, 1930) § 5054; Wash. Rev. Stat. Ann. (Remington, 1932) § 2286; W.Va. Code Ann. (Michie, 1932) § 6130.

2. Arts. 709-713, La. Code Crim. Proc. of 1928; Ariz. Rev. Code Ann. (Struckmeyer, 1928) § 4899; Mich. Comp. Laws (1929) §§ 17338-17340; Minn. Stat. (Mason, 1927) § 10157; Mont. Rev. Codes (1921) § 11595; N.Y. Penal Law (1938) §§ 1941-1943; Okla. Stat. Ann. (1936) tit. 21, § 54.

Under the New York Act, a prior conviction in a federal court of transporting a stolen automobile in interstate commerce (which could not be a felony under state law) was clearly insufficient to punish as a second offender a defendant who was later convicted in New York of another crime. *People v. Sassone*, 12 N.Y.S. (2d) 473 (1939). The attitude of the New York courts toward their Habitual Criminal Act was adequately expressed in *People v. Gutterson*, 244 N.Y. 243, 250, 155 N.E. 113, 115 (1926), where the court in refusing to allow a federal conviction of using the mails to defraud as the basis for a conviction as a second offender, stated: "The Legislature has fixed a standard which can reasonably include only crimes which are punishable under the laws of this state. Doubtless other reasonable standards might be used which would include the crime of using the mails to defraud. The Legislature has not seen fit to apply such standards."

3. A strict internal view would exclude all foreign convictions. Obviously no effect would be given foreign convictions.

4. See note 1, *supra*.

respect to the offenses which shall be embraced within these statutes. In some jurisdictions the scope of such laws is very restricted. For example, in North Carolina<sup>5</sup> additional punishment is prescribed only for the second offense of manslaughter. The Alabama<sup>6</sup> and Texas<sup>7</sup> statutes are also narrow in scope. In the former state, it is requisite that both convictions be for two identical crimes. In Texas the offense must be at least of the same nature.

In other jurisdictions, the statutes may be regarded as comprehensive with respect to the offenses included. The Indiana habitual criminal statute provides that the person must have been ". . . *twice convicted, sentenced and imprisoned* in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere within the limits of the United States of America. . . ."<sup>8</sup> The Kansas<sup>9</sup> and Kentucky<sup>10</sup> statutes make no mention of *sentence* or *imprisonment*, it being sufficient in those states that there shall have been a previous felony conviction "the punishment of which is confinement in the penitentiary."<sup>11</sup> The North Dakota law provides that "if a person commits a felony, within this State, after having been convicted of two felonies, whether in this State or any other State of the United States,"<sup>12</sup> he shall be punished as a multiple offender. However, this statute by its terms does not apply to "offenses made felonies by statute not involving moral turpitude." It is very doubtful that this latter provision is of any consequence. In interpreting it, the Supreme Court of North Dakota held that violations of liquor laws are felonies involving moral turpitude.<sup>13</sup> In this connection the following statement in the concurring opinion of Burr, J., is significant:

"Hence, it is clear from these holdings that where a man has been sentenced upon a conviction for a felony . . . he is

5. N.C. Code Ann. (Michie, 1935) § 4202.

6. Ala. Code Ann. (Michie, 1928) § 5281.

7. Tex. Ann. Pen. Code (Vernon, 1925) arts. 61-62.

8. Ind. Stat. Ann. (Burns, 1933) § 9-2207. (Italics supplied.) In *Kelly v. State*, 204 Ind. 612, 624, 185 N.E. 453, 458 (1933), the court said: "We construe the statute to mean that, when the charge is based upon crimes committed in other jurisdictions, it is sufficient to prove that the conviction was for an offense 'which may be punished with death or imprisonment in the state prison' in the jurisdiction where the conviction was had."

9. Kan. Rev. Stat. Ann. (Corrick, Supp. 1933) § 21-107a.

10. Ky. Stat. Ann. (Carroll, 1930) § 1130.

11. See notes 9 and 10, *supra*. Idaho requires only a *conviction* of a previous felony. Idaho Code Ann. (1932) § 19-2414.

12. N.D. Sess. Laws (1927) c. 126, § 1, as cited in *State v. Malusky*, 59 N.D. 501, 503-504, 230 N.W. 735, 736 (1930).

13. *State v. Malusky*, 59 N.D. 501, 230 N.W. 735 (1930).

by that very fact shown to have committed a crime involving moral turpitude."<sup>14</sup>

In determining which crimes are sufficiently serious to warrant recognition under multiple offense laws, most states adopting the *external* view have not been satisfied to proceed on the vague distinction between felony and misdemeanor.<sup>15</sup> They have preferred to test the crime in terms of the type of punishment involved.<sup>16</sup>

#### THE LIMITED INTERNAL VIEW

It has been indicated previously that some states in administering their multiple offense laws are not willing to accept without reservation convictions of offenses denounced by other jurisdictions.<sup>17</sup> This *limited internal* view presents its own peculiar problems. The difficulty arises in determining the basis of

14. 59 N.D. at 521, 230 N.W. at 744.

15. See Hall, *Theft, Law and Society* (1935) 300-301, for a discussion of the difficulty of classifying crimes into felonies and misdemeanors.

Wash. Rev. Stat. Ann. (Remington, 1932) § 2286, is a hybrid statute. It retains the term "felony" but also lists petit larceny and any other crimes "of which fraud or intent to defraud is an element."

A number of other states have "enumerative" statutes and avoid the distinction between felony and misdemeanors. Cal. Stat. (1935) 1699, c. 602; Minn. Stat. (Mason, 1927) § 10157; N.C. Code Ann. (Michie, 1935) § 4202.

Ill. Rev. Stat. Ann. (Smith-Hurd, 1935) c. 38, § 602, provides: "That whenever any person having been convicted of either of the crimes of burglary, grand larceny, horse-stealing, robbery, forgery, or counterfeiting, shall thereafter be convicted of any one of such crimes, committed after such first conviction, the punishment shall be imprisonment in the penitentiary. . . ." This statute is unique in that it was passed in 1883 (Ill. Laws 1883, p. 76, § 1) and has not been amended though constantly applied by the courts.

16. Kan. Rev. Stat. Ann. (Corrick, Supp. 1933) c. 21-107a, Ky. Stat. Ann. (Carroll, 1930) § 1130, and Mo. Stat. Ann. (1932) § 4462 are applicable to any person convicted of an offense *punishable* by imprisonment in the penitentiary. Ga. Code (1933) § 27-2511, Va. Code Ann. (Michie, 1930) § 5054, and W.Va. Code Ann. (Michie, 1932) § 6130 determine whether the defendant has been previously *sentenced* to the penitentiary for any offense. Conn. Gen. Stat. (1930) § 6501 is closely analogous in that it requires actual *commitment* in a state prison. A number of states require *commitment to prison for a certain length of time*: Iowa Code (1935) §§ 13396, 13397, 13400 (three years); Mass. Ann. Laws (1933) c. 279, § 25 (three years); Neb. Comp. Stat. (1929) § 29-2217 (one year); N.H. Pub. Laws (1926) c. 396, § 1 (three years); Utah Rev. Stat. Ann. (1933) § 103-1-18 (three years).

The term of punishment under the Wisconsin Habitual Criminal Act varies, depending upon whether the previous offense was punished by fine, sentence to imprisonment in the county jail, or sentence to imprisonment in the state penitentiary. Wis. Stat. (1935) §§ 359.12, 359.13, 359.14.

Although the trend has not been as pronounced among the states adhering to the *limited internal* view, a number of jurisdictions have avoided basing their multiple offense statutes on the distinction between felony and misdemeanor. Ariz. Rev. Code Ann. (Struckmeyer, 1928) § 4899; Mont. Rev. Codes (1921) § 11595; Okla. Stat. Ann. (1936) tit. 21, § 54.

17. See note 2, *supra*.

elimination. The offense must be one which is regarded as a felony in the local forum. Illustrative of this is Article 709 of the Louisiana Code of Criminal Procedure<sup>18</sup> which provides:

"Any persons who, after having been convicted, within this State, of a felony or of an attempt to commit a felony, or who, after having been convicted under the laws of any other state, government, or country, of a crime which, if committed within this State, would be a felony, commits any felony, within this State, upon conviction of such second offense, shall be punished. . . ."<sup>19</sup>

When the statutes denouncing the offenses are couched in identical language in both the state of conviction and the local forum, the legislative provision above is relatively simple to apply. However, this is not always the case. Statutes tend to vary increasingly both in language and scope as the classification of crimes becomes more and more complex. Offenses which previously were condemned singly are often combined and denounced under comprehensive statutes which ignore old distinctions and technicalities. For example, the crime of theft as defined in the Dominion Criminal Code includes *inter alia* the common law crimes of larceny, attempts to commit larceny, and embezzlement.<sup>20</sup> Thus an indictment under this statute may or may not be for a felony (as that term is commonly employed), depending on the facts under which the conviction was based. It follows that a court of another jurisdiction when presented with a conviction of "theft" as a basis for invoking the multiple offense statute faces a difficult task. The certificate of conviction throws little light on the existence or non-existence of felony. Three alternatives are available. The court could refuse to recognize the offense because the certificate does not show on its face a prior conviction of felony. No jurisdiction has adopted this extreme view. It remains for the court to determine whether or not the certificate should be accorded the effect of showing *prima*

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18. See also Arts. 710-711, La. Code Crim. Proc. of 1928.

19. Prior to the enactment of Arts. 709-711, La. Code Crim. Proc. of 1928 [La. Act 15 of 1928], the Louisiana Supreme Court interpreted Section 974 of the Revised Statutes of 1870, which provided for a severe penalty upon conviction for second or third offense, to mean second or third violation of the same statutes. *State v. Bailey*, 165 La. 341, 115 So. 613 (1928).

In interpreting Act 15 of 1928, the court in *State v. Brown*, 185 La. 855, 171 So. 55 (1936), held that the name of the foreign offense is unimportant as long as the elements of that offense constitute a Louisiana felony.

20. Art. 347, Dominion Criminal Code, as cited in *State v. O'Day*, 191 La. 380, 185 So. 290 (1938). Cf. *Tex. Ann. Pen. Code* (Vernon, 1925) art. 1410.

*facie* a previous conviction of felony. In such situations the allocation of the burden to State or defendant is extremely important. Particularly is this true where defendant has pleaded guilty to the offense in question. The Louisiana and New York courts appear to be in conflict on the procedure to be adopted. In Louisiana the view prevails that the State must satisfy the court that a felony by local law was committed.<sup>21</sup> Since the hearing on the information is in the nature of a criminal proceeding it is incumbent on the State to present positive proof of every essential without resort to presumption. In New York the contrary view prevails, at least where the foreign conviction is based on a plea of guilty.<sup>22</sup> The attitude of the New York courts is that the plea of guilty to a composite offense amounts to pleas of guilty to each of the several offenses contained therein.

It may be desirable that no definite rule be established for the allocation of the burden of proof. Each case seems to present a separate problem, the solution of which requires a careful consideration of the particular statutes involved. A difference in degree may very well result in a different conclusion. If the scopes of the foreign and local statutes are almost identical, it would seem unfair to place on the State the burden of disproving the bare possibility that the foreign conviction was not for an offense which could be considered a felony under local law. On the other hand, if there is considerable divergence between the statutes, it should be incumbent on the State to show that a local felony has been committed; otherwise, the State does not satisfactorily prove its case. However, the complications resulting from such an unorthodox approach to the problem may outweigh

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21. In *State v. O'Day*, 191 La. 380, 185 So. 290 (1938), the court held that the defendant who had previously been convicted in Canada of "stealing an automobile" was improperly convicted as a third offender in absence of any proof of asportation (which was not essential to the crime under Canadian law), since that proof was necessary to establish that the act committed by defendant in Canada would have amounted to a felony if committed in Louisiana. The Louisiana Supreme Court pointed out that, as the Canadian record revealed only a plea of guilty to an indictment for "stealing an automobile," the state could not satisfy its burden of proof.

22. In *People v. Dacey*, 166 Misc. 827, 3 N.Y.S. (2d) 156 (1938), a defendant on trial as a second offender set up as a defense that there was a possibility that a previous Massachusetts conviction for larceny was not based on an offense which would have been a felony in New York. The court laid down as a test: "Was he [defendant] convicted of a crime, which, if committed in this state, would be a felony, not what it could have been by any possibility." (3 N.Y.S. (2d) at 163). The Massachusetts larceny statute combined several offenses and included one which was not a felony in New York, namely, obtaining property by falsely representing a future fact. The burden was placed on defendant to prove that the conduct for which he was convicted in Massachusetts did not constitute a New York felony.

the doubtful advantage of giving full effect to local policy. An attempt to administer statutes of the *limited internal* type leads inevitably to such problems.<sup>23</sup> The only solution is the adoption of a statute of the *external* type.

#### CONCLUSION

The purpose of habitual criminal legislation is to remove from society for extended periods those individuals who, because of their past record, are deemed likely to commit additional crimes in the future. An analysis of the *external* and *limited internal* views in the light of this purpose serves to show that it is far more effectively accomplished by the former approach. This is apparent, for any person who consistently breaks the laws of a foreign jurisdiction is likely to show a similar disregard for the local laws.

It is submitted that the Louisiana habitual criminal act contains two undesirable features. First, the vague distinction between felony and misdemeanor is an unsatisfactory basis for determining the offenses to be included within the scope of the statute. This difficulty would be avoided if the applicability of the habitual criminal act were determined by the punishment which the former conviction carries. Second, the problems inherent in legislation of the *limited internal* type must be faced by Louisiana courts. Legislation based on the *external* view would remedy this situation. Such differences as may exist between local and foreign policy can adequately be adjusted through the exercise of the discretion vested in the court to determine the severity of the sentence to be imposed on the habitual criminal.<sup>24</sup>

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23. For example, in Tennessee grand larceny is the taking and felonious carrying away of property valued in excess of \$60. Tenn. Code Ann. (Williams, 1934) § 10921. Louisiana, however, requires that the value of the property taken be \$100 or over. Art. 1053, La. Code Crim. Proc. of 1928. In an attempt by Louisiana to punish as a multiple offender a person who previously plead guilty to grand larceny in Tennessee, would the burden of proving that the amount involved was less than \$100 be placed on the defendant?

24. Provisions for indeterminate sentences are contained in most habitual criminal legislation. See the comparatively wide latitude allowed the court by the Louisiana Act. Arts. 709-711, La. Code Crim. Proc. of 1928.