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Habitual Criminal Act-Constitutionality-Evidence

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HABITUAL CRIMINAL ACT—CONSTITUTIONALITY—EVIDENCE—Defendant was charged by a grand jury indictment with assault and battery with intent to kill and with being an habitual criminal, as provided by the Indiana Statutes. There was a verdict of guilty of the crime of assault and battery with intent to kill as charged and a finding that the defendant had been convicted of a felony, on two previous occasions, and imprisoned for the offenses committed. The court sentenced the defendant to the state prison for life as an habitual criminal. Defendant appealed, assigning as error the introduction of evidence in proof of the prior convictions as prejudicial, and attacking the constitutionality of the Habitual Criminal Act, claiming it to be a denial of the equal protection of the law. The verdict of the trial court was affirmed.¹

The Indiana Habitual Criminal Act² is in accordance with the general legislative thought throughout the country, practically every state having a similar statute.³ Although the Act has been in effect in Indiana since 1907, yet its punishment has seldom been invoked, the convictions under it averaging one a year.⁴ The writer thinks this is not due to the amount of data available for identification but to the failure of the public officials to use that which is available;⁵ Indiana⁶ and the Federal Department of Justice⁷ both maintaining bureaus of identification. And further, the present undeveloped status of our criminal identification constitutes a

¹ Pacific-Southwest Trust and Savings Bank v. Valley Finance Corporation (1929), 99 Cal. App. 728, 279 Pac. 222; Weiser National Bank v. Peters (1927), 174 Ark. 984, 298 S. W. 878; Bartels v. Suther (1928), 130 Okla. 7, 266 Pac. 753; Wilhoit v. Seavall (1926), 121 Kan. 239, 246 Pac. 1013; (1924) 24 Col. Law Rev. 791.

² Barr v. State (1933), 187 N. E. 259 (Ind.).

³ Burns' Ann. Stat. (1926), 2339, 2340.

⁴ Oregon Laws (1921), c. 70; Wash. Comp. Stat. (Remington 1922), § 2286; W. Va. Code Ann. (Barnes 1923), c. 152, § 24; N. Y. Ann. Cons. Laws (Supp. 1926), c. 41, §§ 1942-3; Cal. St. 1927, p. 1066 (amending sec. 644 Penal Code); Iowa Section 1964 (1) of Code of 1924; Conn. Indeterminate Sentence Act (Gen. St. 1918, § 6660); Ohio Laws 82, 237; Minn. section 4772, R. L. 1905; Ill. Laws 1883, p. 76; Okla. Laws 1911, c. 70; Mass. St. 1887, c. 435; Missouri Rev. St. 1909, c. 4913.

⁵ Report of Indiana Committee on Observance and Enforcement of Law, January 5, 1931.

⁶ Frank O. Lowden, Criminal Statistics and Identification of Criminals, 19 Journal of Criminal Law 36.

⁷ Burns' Ann. Stat. 1929, Supp. 2409, 1-2409.12.

⁸ United States Code Ann. 5:300.

serious obstacle to police efficiency.⁸ This problem can be partially solved by the contribution, by local officials, of the data which they have at hand to the centralized bureaus and the use by local officials of the data collected by such bureaus.

The constitutionality of statutes enhancing the punishment for a second or subsequent offense has been repeatedly attacked but in all instances, the courts have upheld them.

First, it is contended that such statutes deny the equal protection of the law. This constitutional provision has been interpreted to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes under like circumstances.⁹ Thus, a state may undoubtedly provide that persons who have been before convicted of a crime suffer severer punishment for such subsequent offenses than for a first offense, provided, it is dealt out to all alike, who are similarly situated.¹⁰

Secondly, it is contended that such statutes are unconstitutional as putting the accused twice in jeopardy of life or liberty. But the increased severity of the punishment is not a punishment for a prior offense a second time, but is a severer punishment for the present offense, due to the incorrigible and dangerous character of the accused, as evidenced by the prior convictions. And it has been deemed advisable by the legislatures that one who has such criminal traits should be more severely punished than the first offender.¹¹

Third, it is said that such statutes are unconstitutional as providing an unusual and cruel punishment. But this too is fallacious, as the word "cruel," as used in the amendatory article of the Constitution, was intended to prohibit a resort to punishment by torture, such as burning and mutilation of the body, and was not intended to abridge the selection,

⁸ John Edgar Hoover, *Criminal Identification*, June 21, 1933. Mr. Hoover says: "Criminal identification is indispensable in combating crime. It is the most potent factor in obtaining the apprehension of the fugitive who might otherwise escape arrest and continue his criminal activities indefinitely. * * * Generally, the first offender can be distinguished from the recidivist or habitual criminal only through the medium of scientific criminal identification." Mr. Hoover, who is the director of the United States Bureau of Investigation, further states in his article, "All peace officers are invited to avail themselves of the information contained in the files of the United States Bureau of Investigation. Its service is rendered to all legally constituted law enforcement agencies free of cost."

⁹ *Missouri v. Lewis* (1879), 101 U. S. 22.

¹⁰ *McDonald v. Massachusetts* (1901), 180 U. S. 311, 21 Sup. Ct. Rep. 389; *Moore v. Missouri* (1895), 159 U. S. 673, 16 Sup. Ct. Rep. 179; *McDonald v. Commonwealth* (1899), 173 Mass. 322, 53 N. E. 874; *Commonwealth v. Graves* (1892), 155 Mass. 163; *State v. Hodgson* (1893), 66 Vt. 134, 28 Atl. 1089; *Sturtenant v. Commonwealth* (1893), 158 Mass. 598; *Graham v. West Virginia* (1912), 224 U. S. 616, 32 Sup. Ct. Rep. 583.

¹¹ *State v. Moore* (1894), 121 Mo. 514, 26 S. W. 345; *State v. Findling* (1913), 123 Minn. 413, 144 N. W. 142; *McDonald v. Massachusetts* (1901), 180 U. S. 311, 21 Sup. Ct. Rep. 389; *Kelly v. People* (1886), 115 Ill. 583, 4 N. E. 644; *Ingalls v. State* (1880), 48 Wis. 647, 4 N. W. 735; *People v. McCarthy* (N. Y. 1873), 45 How. Fr. 97; *People v. Coleman* (1904), 145 Cal. 609, 79 Pac. 283; *Carlesi v. New York* (1914), 233 U. S. 51, 34 Sup. Ct. Rep. 567; *State v. La Pitre* (1909), 54 Wash. 166, 103 Pac. 27; *People v. Sickles* (1898), 156 N. Y. 541, 51 N. E. 288; *Goeller v. State* (1912), 119 Md. 61, 85 Atl. 954.

by the legislature, of the duration of time that a convicted criminal is to spend in penitentiary confinement.¹²

Fourth, the accused contends that the statute can only be applied to cases, in which the former convictions on which punishment is imposed, are subsequent to the passage of the act, and that if the prior offenses occurred before the statute was enacted, the statute is an *ex post facto* law and therefore unconstitutional. But the prior convictions are in no sense an element of the present offense. They are simply facts which must be taken into consideration in fixing punishment for the present offense, which is committed after the passage of the act. In other words, the statute imposes one punishment for ordinary offenders and a more severe punishment for incorrigible offenders, evidenced by the previous criminal conduct.¹³

Lastly, it is said that a statute, which enhances the punishment for an offense where there have been prior convictions, no matter whether such prior convictions have been in the state of the forum or not, is unconstitutional as imposing a penalty for crimes committed outside of the jurisdiction. But this contention is unfounded as neither the trial nor the punishment are for the prior offenses, but for the principal offense charged and the punishment is merely made more severe because of the previous criminal conduct of the accused.¹⁴

To authorize a conviction under the Indiana statutes, it is necessary that the affidavit shall allege that the defendant has been previously convicted, sentenced, and imprisoned in some penal institution for felonies, describing each separately.¹⁵ This is necessary in order to give the defendant an opportunity to plead his defense thereto. And if there is no such allegation in the indictment, a judgment, imposing a punishment greater than imposed for a first offense, is erroneous.¹⁶

It seems, however, that the procedure, affirmed by the court in this case, is not desirable and consonant with justice to the defendant. As was said by Burpee J. in a Connecticut case,¹⁷ "Two separate issues are presented: first, was the defendant guilty of the crime charged? This relates to the crime only. Second, if guilty, had the defendant twice been

¹² *People v. Stankey* (1873), 47 Cal. 113; *State v. Dowden* (1908), 137 Iowa 573, 115 N. W. 211; *Gibson v. Commonwealth* (1924), 204 Ky. 748, 265 S. W. 339; *McDonald v. Commonwealth* (1899), 173 Mass. 322, 52 N. E. 874; *Kelly v. People* (1886), 115 Ill. 583, 4 N. E. 644; *State ex rel. Larabee v. Barnes* (1893), 3 N. D. 319, 55 N. W. 883; *People v. Morris* (1890), 80 Mich. 634; *State v. La Pitre* (1909), 54 Wash. 166, 103 Pac. 27.

¹³ *Jones v. State* (1913), 9 Okla. Cr. 646, 133 Pac. 249; *Commonwealth v. Graves* (1891), 185 Mass. 163, 29 N. E. 579; *State v. Collins* (1915), 266 Mo. 93, 180 S. W. 866; *State v. Zywicki* (1928), 175 Minn. 508, 221 N. W. 900; *State v. Norris* (1926), 203 Iowa 464, 210 N. W. 922; *State v. Adams* (1913), 89 Kans. 674, 132 Pac. 171; *Blackburn v. State* (1873), 50 Ohio St. 428, 36 N. E. 18; *Iowa ex rel. Gregory v. Jones* (1904), D. C. 128 Fed. 626.

¹⁴ *McDonald v. Commonwealth* (1899), 173 Mass. 322, 53 N. E. 874, affirmed in (1901) 180 U. S. 311, 21 Sup. Ct. Rep. 339; *State v. La Pitre* (1909), 54 Wash. 166, 103 Pac. 27.

¹⁵ *Burns' Ann. Stat.* 1926, Sec. 2340.

¹⁶ *Dalrymple v. State*, 5 Ohio C. C. N. S. 185; *State v. Davidson* (1899), 124 N. C. 839, 32 S. E. 957; *Brandy v. Hehn* (1902), 10 Wyo. 167, 67 Pac. 979.

¹⁷ *State v. Ferrone* (1921), 96 Conn. 160, 113 Atl. 452.

convicted, sentenced and imprisoned? This relates to the penalty only and does not involve or state any other or different crime from the first stated. The jury must by their verdict answer each of these issues. This plainly indicates that the first issue should be taken up and tried by the jury first and separately; and, if the accused be found guilty on this issue, then the second issue should be tried; and if the accused be found guilty on this issue, also, then the maximum punishment prescribed by the statute must be the sentence of the court. It cannot be believed that an accused man would ever have a fair trial, resulting in a verdict not affected by prejudice or by considerations by which the jury should not be influenced, if during the trial, allegations, that he has twice before been convicted of state prison crimes, have been read to the jury, and evidence of his former convictions have been placed before them. The purpose of a criminal trial in this state is not more to punish the guilty than to discharge the innocent, and a man is not to be convicted of one crime by proof that he is guilty of another."

The following procedure to be followed by the trial courts seems applicable to bring about a fairer result. The indictment should be divided into two parts. In the first, the particular offense with which the accused is charged should be set forth, and in the second, the former convictions should be alleged. The entire indictment should be read to the defendant and his plea taken in the absence of the jurors. When the jury has been impaneled and sworn, the clerk should read to them only that part of the indictment which sets forth the crime, for which the accused is to be tried. And during the trial, no reference should be made to the jury as to the former convictions, unless the defendant has taken the stand and thereby led to the introduction of such evidence. When the jury retires to consider their verdict, only the first part of the indictment should be given to them. If they return a verdict of guilty, the second part of the indictment, in which the former convictions are alleged, should be read to them without reswearing them. Evidence of such former convictions then should be given to the jury and at the conclusion of this evidence, the jury can retire and find on this issue. Such a procedure is so desirable that it has been adopted by statute in two jurisdictions.¹⁸ But there is no reason why such a result could not be reached without a statute.¹⁹

The Indiana Court says, however, "Such evidence may be prejudicial to a defendant as to a second or subsequent offense, and a case might occur of a conviction upon too slight evidence, through the influence which a previous conviction might exert upon the minds of the jury; but there is no legal presumption that such a result will ever be produced."²⁰ How can the court in this specific instance say that the evidence of former

¹⁸ England: 6 and 7 Wm. IV, Chap. 11; Wash. Rem. and Bal. Code 1903, Ch. 2174.

¹⁹ State v. Ferrone (1921), 96 Conn. 160, 113 Atl. 452; Reg v. Woodfield (Eng. 1887), 16 Cox C. C. 314 (not covered by the statute); Graham v. West Virginia (1912), 68 W. Va. 248, 69 S. E. 1010; McWhorter v. State (1903), 118 Ga. 55, 44 S. E. 873; McDonald v. Massachusetts (1901), 180 U. S. 311, 21 Sup. Ct. Rep. 389 (here by mistake).

²⁰ Barr v. State (1933), 187 N. E. 259 at page 262.

convictions is not presumed to be prejudicial when for over a hundred years, this same court in all other criminal cases has held such evidence to be prejudicial and its introduction reversible error,²¹ unless it shows intent or motive or is used to impeach the credibility of the defendant, when he takes the witness stand?²¹

Also, there is some feeling that statutes enhancing the punishment for a second or subsequent offense impose a too severe punishment upon the accused, and due to the fear of locked juries, many prosecutors are apt to refrain from bringing indictments under such a statute. With the procedure herein set out, there is less likelihood of a disagreement among the jurymen for that reason as they will have no knowledge of the indictment under the Habitual Criminal Act until they have returned a verdict as to the crime charged in the instant case.

In conclusion, it seems that the present status of criminal activity demands the more frequent application of the Habitual Criminal Act, in order to protect society from the continuous depredations of confirmed criminals. Also, in order to give protection to a reformed criminal, the procedure set forth herein seems more in line with such an objective.

S. E. M.

PARTY WALLS—WHAT CONSTITUTES A USE—USE BY LESSEE OF NON-BUILDER—Plaintiff and defendant were adjoining landowners, and they entered into an agreement whereby the defendant permitted the plaintiff to "extend" a party wall eight inches in width on the defendant's side of the property line, and whereby the defendant promised to pay the plaintiff one-half of the value of said wall whenever the defendant, his successors or assigns, desired to use the same. The agreement stipulated that the defendant acquired "the right to use said wall—as a party wall." Plaintiff erected the wall, and at the time of erection and continuously thereafter, defendant's adjoining premises were in the possession of a tenant. This tenant built a frame garage about twenty-four feet wide and twenty-four feet long, supported by posts which rested on brick piers built on the ground. The party wall formed one of the walls of the garage, and the paper roofing of the garage was attached to the wall, this being, however, the only point of connection between the garage and the wall. Plaintiff contended that this was such a use as to make the defendant liable to contribute one-half the value of the party wall. Trial was had by the court, without a jury, resulting in a judgment for the defendant. Motion for a new trial was filed and overruled. Plaintiff appealed. Held, that construction of a garage so that a party wall formed one of its walls attached to remainder of garage only by roofing paper is not such a use as to render adjoining landowner liable for contribution under a party wall agreement; and that the tenant's unauthorized use of a party wall could

²¹ *Dunn v. State* (1903), 162 Ind. 174, 70 N. E. 521; *Rock v. State* (1915), 185 Ind. 51, 110 N. E. 212; *Redman v. State* (1820), 1 Blackf. 96; *Lovell v. State* (1859), 12 Ind. 18; *Hahn v. State* (1914), 182 Ind. 1, 105 N. E. 385.

²² *Cross v. State* (1894), 138 Ind. 254, 37 N. E. 790; *Spears v. State* (1897), 147 Ind. 51, 46 N. E. 301; *Thompson v. State* (1919), 189 Ind. 182, 125 N. E. 641; *Zimmerman v. State* (1920), 190 Ind. 537, 130 N. E. 235.