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the Orient through the southwestern part of the United States would go through Denver.

Mr. Acker also was asked how air transportation would affect freight transportation and he replied that mass production of the airplane and mass consumption of air transportation will reduce costs. The time will come when heavy freight can be shipped by air economically. The greatest possibilities are in the shipment of tropical fruit from South America. It can be shipped in here and consumed within a few hours, thereby reducing costs of packing and loss of spoilage.

Recent Judicial Modification of Habitual Criminal Act

BY WILLIAM E. DOYLE*

A few weeks ago the Colorado Supreme Court had occasion to reverse a case in which the defendant had been charged and convicted of violating the habitual criminal statute. Although the act has been changed[1] since the conviction of the defendant in that case, it is believed that the decision is of sufficient interest to warrant brief comment in view of the substantial similarity between the old law and the new one and in view of some of the other implications of this recent Supreme Court pronouncement. The decision referred to is *O'Day v. People,* No. 15638, Public Ledger, Jan. 19, 1946.

The information charged the defendant, William O'Day, with the offense of aggravated robbery. The second and third counts of the information charged prior convictions under the burglary statutes of California and Missouri. Upon being arraigned, the defendant admitted that he was the identical person who had been convicted of burglary in California and Missouri. Such an admission is equivalent to a plea of guilty under the habitual criminal statute.[2] The remaining issue, i. e., whether the defendant was guilty of the immediate offense, was submitted to a jury. The verdict of the jury was guilty of the offense of aggravated robbery. Pursuant to this verdict and the previous pleas of guilty, the trial court sentenced the defendant to life imprisonment.

A cursory examination of the history of the habitual criminal statute indicates that cases which have been filed under this act have not

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[1]Chapter 114, Session Laws of Colo.. 1945.

[2]Section 554, Chapter 48, 1935 C. S. A. provides in part as follows:

"Whereupon the court in which such last conviction was had shall cause the said person, * * * to be brought before it and shall inform him of the allegations contained in such information and of his rights to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such information or not. If he says he is not the same person or remains silent, the court shall enter a plea of not guilty."

fared too well in our Supreme Court. The act, which was passed in 1929,[3] provides generally for aggravated punishment for second and subsequent offenders. In the case of a second offense, the term is not less than one-third the longest term prescribed upon a first conviction. For a third conviction, the term of imprisonment is not less than the longest term nor more than three times the longest term prescribed upon a first conviction.[4] One who has been three times convicted previously must be sentenced to life imprisonment.

In the case of *Smalley v. People*, 96 Colo. 361, 43 P. (2d) 385, the court in construing this act laid down the requirement that where the district attorney at the time of filing the information knows of prior convictions, he must allege them or waive his right to proceed thereafter under the habitual criminal statute.

More recently the court had occasion to reverse another case in which the defendant had been charged with being an habitual criminal. This was *Wolf v. People*, 111 Colo. 46, 137 P. (2d) 693, 695. Here the trial court had ordered two separate trials, one on the immediate substantive offense and the second to determine whether the defendant had committed previous felonies. The ruling on appeal was that no legal basis existed for the separate trials—that the trial court should have proceeded to try the entire case as one.[5]

The original act and the one under consideration have now been changed in an important particular. Formerly, it took into account only a limited number of more serious felonies. The present act is much broader. It declares that persons previously convicted of *any* felony shall be tried and prosecuted under the habitual criminal statute.[6]

In the principal case the court expressed doubt as to whether the trial judge had sentenced the defendant pursuant to the provisions of the aggravated robbery statute or in accordance with the habitual criminal statute.

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[3]L. '29, p. 309, Secs. 1-5, Secs. 551-555, Ch. 48, 1935 C. S. A.

[4]In the principal case, although the Supreme Court expressed doubt as to whether the accused had been sentenced under the robbery statute or under the habitual criminal statute, it would appear that the trial court proceeded under the latter act. Undoubtedly, the trial court felt that it was required to sentence the accused to life in prison, since that is the maximum sentence for the offense of aggravated robbery.

[5]It would seem that the statute does in fact contemplate separate trials. It reads in pertinent part as follows (Sec. 554, Ch. 48, 1935 C. S. A.):

> "If at any time *after* conviction and either before or after sentence it shall appear that a person convicted of a felony has previously been convicted of a crime or crimes as set forth in any of the three foregoing sections, it shall be the duty of the district attorney * * * to file an information in such case accusing the said person of such previous conviction or convictions." (Emphasis supplied.)

Thus it would appear that the legislature had intended that action under the habitual criminal statute should be taken only after conviction of the immediate substantive offense.

[6]Sec. 1, Ch. 114, L. '45.

"We have examined the sentence and there is nothing therein which indicates whether the sentence imposed was pronounced under the provisions of section 551, 552, and 554, supra, or whether under the provisions of section 84, Chapter 48, '35 C. S. A."

If the sentence was pronounced under Section 84, Ch. 48, 1935 C. S. A., i. e., the robbery statute, it was held to be defective because it did not include both a minimum and a maximum sentence. The court construed the words "not less than two years, or for life," which words are contained in the aggravated robbery statute to mean not less than two years nor more than life and thus to be subject to Section 545, Ch. 48, 1935 C. S. A., which provision requires that the court pronounce both a minimum and a maximum sentence.[7]

"It is a general rule of construction that criminal statutes shall be strictly construed, and in accordance therewith, we hold that the penalty authorized under section 84, supra, is for a term of two years to life. The section does not authorize the imposition of a specific life sentence and if the trial court construed it as authorizing the imposition of such a sentence, it committed error."[8]

The second and final phase of the decision involves a construction of the so-called habitual criminal statute. It was held that if the court sentenced the defendant pursuant to Section 552, i. e., the habitual criminal statute, it erred in not ascertaining whether the prior convictions were offenses of the grade of felony. It was said:

"If the court was of the opinion that it might impose a life sentence under section 552, supra, there likewise was error committed for there is no such proof of former convictions as would authorize this action. It should be noted that the defendant here admitted his identity. We believe it was the positive duty of the court to make inquiry as to the offenses for which defendant had theretofore been convicted. We do not take judicial notice of the laws or statutes of other states; they must be proved in the same manner as other facts in the case."

The sum and substance of the decision is found in the above language. In other words, it will no longer be possible for the trial court simply to ascertain whether the accused is the same person who was tried and convicted of the prior offenses. In the future the district attorney will have to prove that the prior convictions were in fact felonies

[7]By its terms this section does not apply to a life sentence. It provides in part: "When a convict is sentenced to the state penitentiary, *otherwise than for life*, for an offense or crime committed after the passage of this subdivision * * *" (Emphasis supplied.)

[8]From a reading of the entire case, it would seem to be amply clear that the trial court sentenced the defendant under the habitual criminal statute and not the robbery statute. It is suggested, therefore, that this phase of the decision is *obiter*.

regardless of whether the accused has attempted to plead guilty. This, it is believed, is a fair requirement because crimes vary from state to state even though their designations are the same. Furthermore, the accused is not always in a position to know whether his act constitutes a felony under the laws of the state in which he is presently being tried. In support of this assertion it is pointed out that even when an accused pleads guilty, it is customary for the court to require the district attorney to produce evidence establishing the elements of the offense charged. In fact, there is a statute in Colorado which requires the court to examine witnesses as to the aggravation and mitigation of the offense.[9] A consequence of this phase of the decision will be hesitancy on the part of trial courts to proceed under the habitual criminal act unless the proof of former convictions is clear and convincing.

One other result of this decision is that in the future a straight life sentence may not be imposed. It will be necessary in every case to pronounce a minimum and maximum limitation on the term. Presumably a sentence of ninety years to life would satisfy this requirement. It would seem that this aspect of the decision might be of consequence to those persons who are now serving life sentences for aggravated robbery, forcible rape or second degree murder. For these convicts, the decision could provide a key to the door of the penitentiary. It is not possible to forecast a decision on the question of whether such a sentence is void or voidable, and whether such a person can be re-sentenced or whether the trial court will have lost jurisdiction to correct a defective sentence. In any event, these are questions which will certainly be posed to courts in the near future, and until the matter is settled, an epidemic of petitions and motions is anticipated.

Perhaps more noteworthy than either of the above comments is the policy of our Supreme Court which is to be inferred from this and the prior decisions cited hereinabove, to scrutinize carefully all prosecutions under the habitual criminal statute. This, it is suggested, is a praiseworthy approach to the problem for the reason that the statute is a harsh one. It robs the trial judge of all discretion in imposing sentence. The legislature usurps the sentencing function, and it does so not on the basis of the particular facts, but purely on the record of former convictions. Granted that there ought to be statutory provision for increased punishment for habitual offenders, the power to declare the minimum and maximum sentences should remain in the trial judge. It is he and not the legislature who is in a position to evaluate the facts and to reach a just conclusion.

A further defect in the law is apparent. As now written it makes no distinction between a vicious gangster and a casual offender, a so-called constitutional psychopath. Therefore, it is now possible for a

[9]Sec. 482, Ch. 48, 1935 C. S. A.

district attorney to adopt the attitude that all third and fourth offenders should be prosecuted as habitual criminals. Such a practice could result in great injustice where, as we have demonstrated, the legislature has previously pronounced sentence, leaving the trial judge powerless in the matter.

How can these conditions be remedied? First, it is suggested that the act be amended so that the trial judge will have a broad discretion in pronouncing sentence. Secondly, the law should not include all felonies, but should be limited to particular selected ones, such as kidnapping, robbery, rape, mayhem, etc.

It has been suggested above that the harshness of this statute moves the court to consider strictly cases arising under it. If the trial judge were allowed more discretion, perhaps there would be fewer reversals.

Newly Admitted Members of the Bar

William V. Webb, admitted Feb. 1946 on motion. A.B. Univ. of Denver, LL.B. Univ. of Texas 1933, member Beta Theta Pi and Phi Delta Phi. Was engaged in general practice of law in Dallas, Texas, 1933-1940. Was in army 1940-1946, leaving it as lt. col. in the Inspector General's Dept. Was last with headquarters of Tenth Army in Okinawa. Mr. Webb is officing at 828 Symes Bldg., Denver, and is particularly interested in the fields of oil and gas and corporations.

James F. Price, admitted Feb. 1946 on motion. B.S. Kansas State College 1927, LL.B. Stanford 1930, LL.M. Stanford 1937. Member Delta Theta Phi. Has had experience as trust officer, member of security and brokerage firm and New York Stock Exchange. Is now dean of the schools of Law and Commerce, University of Denver, 211 15th St., Denver. Is particularly interested in the field of public law, particularly labor law.

Gordon A. Nicholson, admitted Jan. 1946 on motion. Studied at University of Utah, LL.B. George Washington University 1935. Member of Sigma Pi. Was on the law review staff, and has the Order of the Coif. Served as ten years as special agent and special agent in charge, FBI. He is with the D. & R. G. W., 1531 Stout St., Denver. He is particularly interested in the fields of transportation, personal injury, criminal and taxation law.

Harold Edward Hafer, admitted Feb. 1946 on motion. Studied at Colorado Univ. 1929-1932, B.S. Univ. of Oklahoma 1933, LL.B. Univ. of Oklahoma 1936. Member of Sigma Pi. Admitted to Oklahoma bar in 1936. General practice in Chickasha, Oklahoma, 1936-1942. Asst. Prosecuting Attorney, Grady County, 1939-1942. FBI