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A Criticism of Wyoming's Habitual Criminal Act

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RECENT CASES

A CRITICISM OF WYOMING'S HABITUAL CRIMINAL ACT

In *Waxler v. State*[1] the Wyoming Supreme Court held that there was no error in the conviction of the defendant on an information containing counts under the Wyoming Habitual Criminal Act.[2] One of the defendant's specifications of error was that it was prejudicial to the defendant, in the eyes of the jury, for the court to allow evidence of his prior felony convictions to be admitted during the same time he was being tried for the principal offense. Justice Blume, in a concurring opinion, stated that the fairness of this procedure may well be questioned, citing a former opinion written by him in which he said, "There can be no question of doubt, nor is it of trivial moment, that an accused is prejudiced in the minds of the jury, when evidence appears against him which would indicate habitual criminality."[3] It would seem that the sentence imposed in the *Waxler* case was unduly harsh, because the defendant was given the serious punishment of a life sentence in the state penitentiary for the offense of cashing a forty dollar bad check; but the fact that the jury found that he had been previously convicted of similar offenses in other states placed him within the scope of the Wyoming Habitual Criminal Act, and the court had no alternative but to sentence him for life as mandatorily prescribed by the Act.

Wyoming, in the *Waxler* case, followed the majority[4] of the courts in holding that it was not error to admit evidence of prior convictions along with evidence of the principal crime in a proceeding under a habitual criminal statute. However, there seems to be an inconsistency in American law on this point, because the majority of American courts also hold that in cases other than proceedings under habitual criminal statutes, it is reversible error to allow evidence of defendant's prior convictions to go before a jury or even comment to be made in reference thereto except to show motive or to impeach the defendant's credibility.[5] The courts rationalize this exception to a long followed rule of evidence by saying that habitual criminality is a status, not a crime, and that the admission of prior convictions is not prejudicial because this does not constitute a distinct charge of crime, but only goes to the punishment of the criminal.[6] Also they say that the allegation of prior convictions should appear in the indictment or information so that the defendant will have notice that this will be used against him on the trial.[7] The prejudice which would result when

1. 67 Wyo. 396, 224 P.2d 514 (1950).
2. Wyo. Comp. Stat. 1945 secs. 9-109, 9-110, 9-111.
3. Perue v. State, 43 Wyo. 322, 2 P.2d 1072 (1931).
4. 58 A.L.R. 20 et. seq. Excepted are Arkansas, Delaware, Maryland, Mississippi, North Carolina and South Carolina.
5. 20 Am. Jur. 287 sec. 309 and cases cited therein.
6. 25 Am. Jur. 270 sec. 23 and cases cited therein.
7. 42 C.J.S. 1057 sec. 145 and cases cited therein.

this indictment is read is obvious, but Wyoming's Habitual Criminal Act and an earlier decision make this notice requirement mandatory.[8]

In 1929, when the first Habitual Criminal Act in the United States was passed in New York,[9] it was thought that this law would serve the purposes of thwarting the rise of repeated crime after World War I, and of protecting the public from the repeated offender. Practically all the states have followed New York's lead and have passed Habitual Criminal Acts to help solve the problem.[10] However, as noted, the prejudicial procedural and mandatory sentencing aspects of typical acts have given rise to new problems.

It cannot be doubted that the evidence of prior convictions is actually prejudicial in the eyes of the jury and that the evidence of previous criminality actually does tend to prove the defendant guilty of the principal crime in the procedure followed under the typical Habitual Criminal Act, such as Wyoming's. Several jurisdictions have recognized the unfairness resulting from such a procedure, and have authorized, either by decision[11] or statute,[12] a separate procedure to be followed in habitual criminal proceedings. This procedure is to divide the indictment or information into two parts, the first part alleging the principal crime, and the latter part alleging the former convictions. The entire indictment is then read to the defendant and his plea is taken in the jury's absence. The jury is then impanelled and sworn, and the trial goes forth for the principal crime, there being no reference made to the prior convictions. When the jury retires, they have before them only the first part of the indictment. If they return a verdict of guiltly, the second part of the indictment is then read to them, and evidence of the prior convictions is brought forth. At the conclusion of this evidence, the jury retires and finds on this issue. If the defendant is found guilty as charged in the second part of the indictment, he is sentenced according to the habitual criminal statute. This procedure is obviously much fairer to the defendant in that it insures that the defendant's previous record of criminality does not influence the finding of his guilt of the principal crime. Nonetheless, it preserves the desirable feature of giving the defendant requisite notice that he is being charged with being an habitual criminal.

Under the provisions of what we have called a typical Habitual Criminal Act, the mandatory life sentence imposed on a guilty defendant has served partially to defeat one of the purposes of the original law, i.e. the protection of the public from repeated offenders. Juries often hesitate to bring in a guilty verdict because they reason that the principal crime is not in itself serious enough to warrant such a punishment, and that by

8. Wyo. Comp. Stat. 1945, sec. 9-111; Bandy v. Hehn, 10 Wyo. 167, 67 P. 979 (1902).
9. N.Y. Laws 1926, c. 457.
10. Op. cit. note 4 supra.
11. State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921); State v. Stewart, 110 Utah 203, 171 P.2d 383 (1946); State v. Kelch, 114 Wash. 601, 195 Pac. 1023 (1921).
12. England: 6 and 7 Wm. IV, Chap. 11; W. Va. Code Ann. sec. 6131 (1943); Wash. Rem. and Bal. Code 1903, Ch. 2174.

convicting the accused of the principal crime they will be, in effect, imposing a sentence of life imprisonment on him. Prosecutors often refrain from framing indictments and informations under these statutes because of this difficulty of getting convictions.[13] These practical difficulties could be largely avoided by the adoption of the procedural reform just advocated. In the alternative, it has been suggested that the mandatory provisions for punishment be stricken from the habitual criminal statutes, and that they be replaced by more flexible provisions taking full advantage of indeterminate sentencing, or permitting the courts, prisons, or certain administrative bodies wide discretion in deciding the length of the sentence which should be imposed.[14]

Since society and the courts are slowly coming around to the conclusion that the punishment should not only fit the crime but also the criminal, and that in framing a penal code one should consider the aspects of rehabilitation and correction in addition to punishment, it might be questioned that prior conviction is a sufficient criterion to establish that a man is a habitual criminal. In England it is necessary to establish that the defendant was at the time the principal offense was committed "leading a persistently dishonest and criminal life."[15] This may be shown in various ways, prior convictions being persuasive but not conclusive evidence of it.

In conclusion, it is submitted that the Wyoming Habitual Criminal Act, in its present form, is prejudicial to the defendant, and may defeat the main purpose for which it was originally intended; further, that it is not in harmony with present day society's concept of punishment tempered with rehabilitation because of its inflexible punishment provision and its arbitrary standard for ascertaining the status of habitual criminality. The Legislature might well consider amending the act along one or more of the lines suggested.

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COMMISSION OF A SINGLE TORT AS GIVING JURISDICTION OVER A FOREIGN CORPORATION

In a recent Vermont case the plaintiff sued the defendant, a foreign corporation, to recover for damages to the planitiff's house allegedly caused by the negligence of the defendant in re-roofing the dwelling. The action was brought under a statute giving state courts jurisdiction over a foreign

13 Report of Indiana Committee of Observance and Enforcement of Law, Jan. 5, 1931.
14. Metcalf, Recidivism in the Courts, 26 J. Crim. L. and Criminology 367 (1936).
15. Rex v. Baggot, 4 Crim. App. 67 C.C.A. (1910).