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Criminal Law--Habitual Criminal Statute--Instructions to Juries

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Conclusion

There is a very practical solution to this problem, which does not offend the principles of joint tenancy, permits joint tenants to mortgage their interests with assurance to their creditors that the lien will not be defeated by the right of survivorship, and does not destroy the right of survivorship through severance. This solution is based on the temporary suspension of the joint tenancy which has been recognized by the courts.

If the mortgage were conceived to merely suspend the joint tenancy at the time of the execution of the mortgage, it would be revived by the redemption of the mortgage and there would be no destruction of the unities of joint tenancy. The right of survivorship could not defeat the mortgage lien because it would be inoperative to pass the interest of the deceased to the survivor until the mortgage had been redeemed, to the extent of the interest of the joint tenant mortgagor. This solution permits the non-mortgaging joint tenant, if he is the survivor, to obtain the complete interest, if he so desires, by satisfying the mortgage to the extent of the deceased's interest, but does not deprive him completely of his right of survivorship as would a complete severance. The mortgaging joint tenant would not be deprived of his right of survivorship, if he is the survivor, and the deceased cotenant has chosen not to defeat that right by severance of the joint tenancy. Neither of the joint tenants are deprived of the right of survivorship as they would be by complete severance, in the event the mortgage is satisfied during both of their lifetimes, since upon redemption of the mortgage the joint tenancy is revived exactly as it was prior to the execution of the mortgage. The greatest advantage of such a solution would be that joint tenants would be able to freely exercise a valuable property right, that of mortgaging their respective interests to secure their debts.

William A. Logan

CRIMINAL LAW—HABITUAL CRIMINAL STATUTE—INSTRUCTIONS TO JURIES. Defendant was convicted of storehouse breaking and his punishment fixed at imprisonment for life under the Habitual Criminal Statute.[1]

[1] Ky. Rev. Stat. § 431.190 (1959).

> Conviction of felony; punishment on second and third offenses . . . if convicted a third time of felony, he *shall* be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state. (Emphasis added.)

Defendant appealed on the ground that certain instructions given the jury were prejudicially erroneous. Instruction No. 1 submitted the question of defendant's guilt of storehouse breaking in the usual form and provided a penalty of not less than one nor more than five years imprisonment if the jury found defendant guilty of this charge. In substance, Instruction No. 5 provided that if the jury found the defendant guilty under Instruction No. 1, and should further believe from the evidence beyond a reasonable doubt that he had been convicted of felonies on two previous consecutive occasions, the jury "will" fix his punishment at confinement for life. The basis of defendant's objection was that Instruction No. 5 deprived the jury of its discretionary right to fix defendant's punishment for the single offense of storehouse breaking as prescribed by Instruction No. 1. *Held:* Affirmed. The instructions were not prejudicially erroneous. *Hamm* v. *Commonwealth*, 300 S.W. 2d 562 (Ky. 1957).

The court reasoned to the following effect: The instructions correctly stated the law under the Habitual Criminal Statute because the statute mandatorily directs that "any person convicted . . . a third time of felony . . . *shall* be confined in the penitentiary during his life."[2] (Emphasis added.) Further, the jury was not deprived of the discretion to fix defendant's punishment as that prescribed for storehouse breaking since a term of punishment for that offense was set out in Instruction No. 1.

The point for comment in the principal case is as follows: Considered in the context of previous decisions in point, what is the existing state of the law in Kentucky regarding the "discretion" which a jury has in imposing, or declining to impose, upon a defendant the provisions of the Habitual Criminal Statute?

In order to reach some conclusion as to the state of the law in this regard, let us first look at the case background underlying the principal case. In 1939 the Kentucky Court of Appeals decided two cases in point, and these cases were relied on by appellant in the principal case. In *Coleman v. Commonwealth*,[3] the lower court gave instruction which failed to provide a penalty for the principal offense charged but provided that if the jury found the defendant guilty of the principal offense and further found that he had been twice previously convicted of felonies, they should give him life. On appeal, the court said this constituted reversible error since the jury was provided no opportunity to convict for the single offense alone. The court could have simply said that in the event the jury did not find from the evidence the fact of two previous convictions of felonies the jury had

[2] Ky. Rev. Stat. § 431.190 (1959).
[3] 276 Ky. 802, 125 S.W. 2d 728 (1939).

no instruction under which they could convict for the principal offense. But instead the court said, in substance, that even if the jury had found the defendant guilty of the principal offense and that he had been twice previously convicted of felonies the jury still had discretion to prescribe only the penalty for the principal offense. The court pointed out that the jury might disregard the former convictions because they deemed the principal crime not to merit the severe punishment provided by the Habitual Criminal Statute, or that the character of the defendant himself did not justify it.

In *Allen v. Commonwealth*,[4] the court below also failed to provide, in its instruction to the jury, a penalty for the single offense for which the defendant was charged. On appeal, the court likewise reversed for this omission and reaffirmed the language of the *Coleman* case.

In 1955, the court, in *Green v. Commonwealth*,[5] apparently limited the broad language of the *Coleman* and *Allen* cases. The instructions given the jury in the *Green* case were essentially like those of the principal case in that one paragraph set out the punishment for the single offense and a later paragraph directed the jury to punish under the Habitual Criminal Statute if they found the defendant guilty of the single offense and also found the fact of a former conviction.[6] The court said that in the *Coleman* and *Allen* cases the jury could only find the defendant guilty under the Habitual Criminal Statute or acquit, but in the *Green* case the jury was at liberty to convict under either the Habitual Criminal Statute or under the instruction for the single offense.

The court in the principal case used *Green v. Commonwealth* to distinguish the principal case from the *Coleman* and *Allen* cases. The conclusion which appears to follow from the above decisions is that the court feels the instructions must be worded in accordance with the mandatory language of the Habitual Criminal Statute, but at the same time tactily recognizes that the jury still has "discretion" under these instructions to convict for the single offense or to impose a life sentence, so long as a penalty for the single offense was provided along with the penalty under the Habitual Criminal Statute. This "discretion" is apparently predicated on the idea that the jury could ignore the mandatory language of the instructions and only convict under the instructions relating to the single offense.

One may feel that a statute which is directory rather than mandatory, i.e., provides that jury "may" instead of "shall" give life, is

[4] 277 Ky. 168, 125 S.W. 2d 1013 (1939).
[5] 281 S.W. 2d 637 (Ky. 1955).
[6] In this case the defendant was being tried under that portion of Ky. Rev. Stat. § 431.190 which provides for an increased punishment on conviction for a second felony.

more in keeping with fundamental justice,[7] as expressed in the *Coleman* case. But the court in the principal case was faced with the practical fact that the Kentucky Habitual Criminal Statute is mandatorily worded. The court conceded the wording of the statute, but apparently has recognized that under the Kentucky system of pronouncing sentence in criminal cases[8] the jury could, as a matter of fact, ignore the instructions in relation to the Habitual Criminal Statute and convict and sentence for the single offense only. Since the Commonwealth cannot appeal from such a verdict,[9] the jury has, in effect, exercised some discretion as to the amount of punishment assessed.

It is submitted that this situation leaves something to be desired. Many juries will not be strong-willed enough to ignore the instructions given them by the court and will return a verdict for a life sentence in an instance where they would have given a lesser sentence under directory instructions because of the special circumstances surrounding the case.

Arthur L. Brooks, Jr.

DOMESTIC RELATIONS—RESTORATION OF PROPERTY VERSUS LUMP SUM ALIMONY—Appellee (husband) was granted a divorce in 1956 in an action in which appellant (wife) counterclaimed for divorce, award of alimony, and restoration of property. Property acquired during the marriage included substantial interests in two successful businesses with an estimated value of almost $200,000, a residence which with improvements had cost $18,000, an automobile, household effects, and other miscellaneous personal property. Appellant had been gainfully employed for 13 of the 16 years of marriage and had deposited her earnings in a joint bank account. The interest in the first of the two businesses was purchased with a $5,000 down payment and deferred payments which were made out of earnings of the business. Of the $5,000 down payment $1,000 was borrowed from appellant's family and repaid out of business earnings. The $4,000 of the parties' own funds was made up from $3,497.04 of appellant's

[7] That is, the principal offense might not be of such magnitude to merit the severe punishment of the statute; or the particular circumstances surrounding the case, or the character of the defendant may be mitigating factors. Also see Hall v. Commonwealth, 106 Ky. 894, 51 S.W. 814 (1899), for further argument along this line.

[8] Under Ky. Rev. Stat. § 431.130 (1959), the jury "shall fix by its verdict a punishment to be inflicted within the periods or amounts prescribed by law. . . ." But compare the system of allowing the jury to only find the fact, and the court to set the punishment in light of the jury's finding.

[9] The Commonwealth may not appeal to affect the defendant but only for the purpose of settling the law on a point. See, e.g., Commonwealth v. Tam Tuyl, 58 Ky. (1 Met.) 1 (1858).