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## The Application of the Parole Commission Law as Affected By People v. Thompson

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THE APPLICATION OF THE PAROLE COMMISSION LAW AS AFFECTED  
BY PEOPLE V. THOMPSON.

In the recent interesting case of the People v. Robert Thompson<sup>1</sup> decided in July of this year, we find a construction of Section 4 of the Parole Commission Law<sup>2</sup> which arrests attention.<sup>3</sup> The defendant therein had been convicted, upon sufficient evidence, of the crime of illegally practicing medicine as defined by the Education Law<sup>4</sup> and sentenced to imprisonment for one year in the New York County Penitentiary. Three days later, the Trial Court, having reconsidered the sentence and apparently arriving at the conclusion that it was erroneous, on its own motion recalled the defendant. They then re-committed him to the penitentiary for an indeterminate time, over his objection, in accordance with the provisions of Section 4 of the Parole Commission Law. The basis of the defendant's objection was the practical effect of the second sentence, which might cause his confinement to continue for three years, instead of the one year prescribed by the statute defining the crime.

The salient clauses of Section 4<sup>5</sup> first exclude those: (1) who have been committed in default of payment of a fine imposed, (2) who have been committed for failure to furnish sureties upon a conviction of disorderly conduct, or abandonment, and (3) who are not insane or mentally or physically incapable of reformation and provide that certain classes of offenders, except those enumerated above, "shall if sentenced to any institution under the jurisdiction of the department of correction in said city (*of the first class*) be committed \* \* \* under the jurisdiction of said department of correction." It then provides for the method of determination of sentence, and the maximum period of incarceration, which is three years. Undoubtedly Section 4 includes within its scope those not insane, and who are

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<sup>1</sup>251 N. Y. 428, 167 N. E. 575 (1929).

<sup>2</sup>Laws of 1915, c. 579.

<sup>3</sup>Although the Parole Commission Law has been in force since May 10, 1925, it is interesting that no cases under Section 4 have come up for review by the Court of Appeals before this.

<sup>4</sup>Laws of 1927, c. 85.

<sup>5</sup>*Supra* Note 2, Sec. 4 (as amended by Laws of 1916, c. 287): "After the creation of a parole commission in any of the said cities as hereinbefore provided, any person convicted of any crime or offense for which the court may sentence to a penitentiary, workhouse, city prison, county jail or other institution under the jurisdiction of the department of correction of said city, who shall not be committed in default of payment of a fine imposed, or for failure to furnish surety or sureties upon a conviction of disorderly conduct tending to a breach of the peace or of abandonment, and who is not insane or mentally or physically incapable of being substantially benefited by the correctional and reformatory purposes of any such institution under the jurisdiction of the department of correction in said city, be sentenced and committed to a penitentiary or a workhouse or a reformatory under the jurisdiction of the said department of correction. \* \* \* The term of imprisonment of any person sentenced to any such penitentiary shall not be fixed or limited by the court in imposing sentence. The term of imprisonment \* \* \* shall not exceed three years. \* \* \*"

capable of reformation, as the Court in the case of *People ex rel. Kipnis v. McCann* points out:

"The plain purpose of the Parole Commission Act is to give every person who has been convicted of a crime in the cities of the first class, punishable by imprisonment in the places specified in the act, an opportunity to benefit by the disciplinary, correctional and reformatory purposes of the institutions under the jurisdiction of the department of correction, *unless the Trial Court deems the offender mentally or physically incapable of being substantially benefited thereby.*"<sup>6</sup>

Whether the defendant is insane or mentally or physically incapable of reformation is a question for the Court to decide before it imposes sentence.<sup>7</sup> The statute does not require the decision to be expressly stated and, evidently, it is to be implied from the nature of the sentence. In the absence of a finding that he is so incapable it is "bound to apply the provisions relating to parole as embodied in the later statute."<sup>8</sup>

This the Court concedes:

"Indeed, we are unanimous that the provisions of that law are *mandatory* in the cities in which the Parole Commission Law applies, whenever the defendant 'is not insane or mentally or physically incapable of being substantially benefited by the correctional and reformatory purposes' of the institution to which he is committed."<sup>9</sup>

Admitting this, it is striking that the Court holds the first sentence to be valid. It bases its decision ostensibly on the theory that the finding regarding the prisoner's capacity is implicit in the sentence—if the sentence is for a fixed term, a finding that he is incapable of benefit therefrom. But it holds further, and this is its real reason, that

"To require the Court to state expressly that it has determined the question which must be the basis of the sentence imposed would \* \* \* result in the creation of new technicalities in the administration of the criminal law."<sup>10</sup>

By "technicalities" the Court evidently means the imposition of new duties upon the Trial Court, not embodied in the statute. This is perhaps true. But is not the Court indulging in a greater technicality?

<sup>6</sup> 199 App. Div. 30, 38, 191 N. Y. Supp. 574, 579 (1922), *aff'd* 234 N. Y. 502, no opinion (italics ours).

<sup>7</sup> *Supra* Note 1 at 431.

<sup>8</sup> *Ibid.* 433 (O'Brien, J., in his dissenting opinion).

<sup>9</sup> *Ibid.* 430 (prevailing opinion) (italics ours).

<sup>10</sup> *Ibid.* 432.

To conclude that the Trial Court impliedly found this defendant incapable of reformation by its first sentence, in the very face of its second sentence, passed three days later, is an obvious fiction, in itself a technicality of the highest order.

Although even then the Trial Court made no express finding, certainly from its action it can be inferred that it found this defendant capable of the reformation which the Legislature hoped to effect. Surely it rebuts any presumption that the Court has duly performed its judicial duty to pass upon the question of the defendant's capacity for benefit<sup>11</sup> and has found him incapable. As Judge O'Brien says in his dissenting opinion, referring to the members of the Trial Court who resented the defendant:

"Never did one of them, never did counsel, reveal any indication of an indulgence in the impossible presumption that defendant was insane or was beyond the hope of correction. All took for granted that he was not abnormal and, upon that assumption, they directed their attention solely to a consideration of the statute applicable to his case."

The Court saw its error and hastened to correct it. By so doing, it proclaimed its finding in regard thereto more plainly than in words. The Court of Appeals must have had cognizance of this, and yet it chooses to treat this defendant as if he were incapable of reformation in fact. If this statute affected only those in the first category—the insane—what would be the effect of this decision? A sane man, committed to an asylum on a technicality, by a court professedly seeking to avoid technicalities.

That the Legislature intended to extend the reformatory and correctional functions of penal institutions is clearly expressed in the enacting clause<sup>12</sup> of the Parole Commission Law. What seems to have been the very first attempt to apply the principle of indeterminate sentence was in 1824, when a law of this state provided for a New York House of Refuge for juveniles alone. Not until 1910, however, was there any widespread agitation to apply the principle to adult offenders. Since then almost half of the states of the Union have enacted laws embodying the principles of parole and indeterminate sentence, which go hand in hand.<sup>13</sup> But other reformatory measures had been passed, in some slight recognition of the theories of criminologists and penologists in Europe and America. These men and

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<sup>11</sup> *Ibid.* 434 (dissenting opinion).

<sup>12</sup> *Supra* Note 2: "An act *extending and developing the reformatory and correctional functions* of workhouses, penitentiaries and reformatories under the jurisdiction of departments of correction in cities of the first class, providing for the sentence, commitment, parole, conditional discharge and reaprehension of persons committed to such institutions and for the establishment of a parole commission in such cities." (Italics ours.)

<sup>13</sup> Barnes, *The Repression of Crime*, pp. 220-221 *et seq.*

women were striving to educate the public away from regarding criminals as "perverse moral free agents,"<sup>14</sup> only to be punished and avenged by society, and urging intelligent treatment leading to reform as well. Before 1915 some efforts in this direction had been made, notably in the reformatory legislation for women, beginning in 1881.<sup>15</sup> Not only the Legislature but the Judiciary were beginning to recognize the merit of such procedure. Judge Burr, writing of one such reformatory measure<sup>16</sup> in the People *ex rel.* St. Clair v. Davis,<sup>17</sup> says:

"The tendency of modern legislation is, so long as there is hope of reformation, to reform as well as to punish offenders. \* \* \* Legislation which has for its object \* \* \* moral reformation, is wholesome in its character, and the courts should be reluctant to thwart or impede its efficiency."<sup>18</sup>

This tendency has been extended to include other classes of offenders as well, in the Parole Commission Law. The adoption of this law has been a far stride forward in the long, slow process of directing the trend of ideas of the public, with resulting action by the Legislature, into the channels leading to the scientific treatment of criminals. In writing of this law, Mr. Justice Greenbaum<sup>19</sup> says:

"The Parole Commission is the result of a progressive and humanitarian movement designed to benefit the prisoner and society. \* \* \* It aims by humane and sympathetic treatment to elevate the standards of the criminal, giving due heed to his mental and moral deficiencies and thereby to lessen criminality<sup>20</sup> in the community."

Whether or not this is the wisest method of effecting the object of the Legislature is not the question before us. Although furthering its purpose and faithfully carrying out its provision, the Court may not be convinced of its wisdom. Mr. Justice Greenbaum goes on to say:

<sup>14</sup> *Ibid.* 155.

<sup>15</sup> Laws of 1881, c. 187; Laws of 1887, c. 17; Laws of 1890, c. 238; Laws of 1892, c. 704; Laws of 1896, c. 54 (Gen. Laws, c. 26); Laws of 1909, c. 57 (N. Y. Ann. Cons. Laws, c. 55 Sec. 226).

<sup>16</sup> Laws of 1905, c. 610 Sec. 707-a, which provides that: "Whenever a woman between the ages of sixteen and thirty is convicted in the City of New York of habitual drunkenness, of being a common prostitute \* \* \* she may be committed to the State Reformatory for Women at Bedford, pursuant to the provisions of Sec. 146 of the State Charities Law, to be there confined subject to the provisions of such laws and of any other statutes relating to such reformatory."

<sup>17</sup> 143 App. Div. 579, 584, 127 N. Y. Supp. 1072, 1075 (1911).

<sup>18</sup> *Ibid.* 587, 127 N. Y. Supp. 1077.

<sup>19</sup> People *ex rel.* Hendrick v. Kernochan, N. Y. L. J., Dec. 28, 1916, *aff'd* 177 App. Div. 922, 164 N. Y. Supp. 1107 (1917), no opinion.

<sup>20</sup> Author's correction, original "criminology."

“It may be that the human agencies engaged in such beneficent work will at times fall short of what would be expected of men and women intrusted with a most serious and delicate task, but that is a matter that concerns the due administration of the laws, and may well be left to the vigilance of the people and the conscience of officials.”

Nevertheless, this is the method adopted by the Legislature, and sanctioned as far as it goes by the leading criminologists of the day.<sup>21</sup> It is the function of courts to interpret and apply the laws of the state. The lower courts have been singularly free from technicalities. They have been quick to grasp the intention of the Legislature, and have striven to apply it. In *People v. Thompson* the Court of Appeals construed the Parole Commission Law, but did it apply it? It found the provisions of the law mandatory in those cities in which it applies, and yet its decision indicates a policy which deviates from that finding. The likely effect of this decision is to influence trial courts in future applications of this statute towards an exercise of a discretion in their pronouncement of sentence, which the Court of Appeals admits was not in the contemplation of the Legislature. Yet this might well be deemed to be authorized, from the fact that the Court of Appeals itself, in this case, held the defendant incapable of reformation in the face of the finding of the Trial Court in its second determination that he was to be considered a proper subject for the reforming agencies with which the Parole Commission Law is concerned. It is difficult to reconcile its policy, as we must interpret it from this case, with its dicta as to the mandatory functions of the law. It is still more difficult to understand why the Court of Appeals, even indirectly, should produce a reactionary effect on the legislative measures passed for the advancement and benefit of society as a whole.

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#### FELONY MURDER AND THE JONES LAW.

The recent enactment of Congress, popularly known as the Jones Law,<sup>1</sup> which has assumed much prominence in the press and public

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<sup>21</sup> See Barnes, *The Repression of Crime*; Tannenbaum Frank, *Wall Shadows*.

<sup>1</sup> Public No. 899—70th Congress (S. 2901). An act to amend the National Prohibition Act, as amended and supplemented: “Be it enacted by the Senate and House of Representatives of the United States of America in Congress, assembled, That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of