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Prejudicial Evidence in Prosecutions under Habitual Criminal Acts

CRIMINAL LAW CASE NOTES AND COMMENTS

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PREJUDICIAL EVIDENCE IN PROSECUTIONS UNDER HABITUAL CRIMINAL ACTS

ONE of the most difficult problems confronting criminal authorities and the courts is the method of dealing with the habitual criminal. The original view was that the solution lay in special legislation imposing aggravated penalties for subsequent convictions of criminal offenses. Consequently, in the past seventy years the federal government[1] and all but five states have adopted habitual criminal acts.[2] These statutes vary considerably regarding the penalties imposed, the nature of the crimes necessary to invoke them, and the number of offenses required for them to be applicable.[3] By increasing the punishment imposed for second or subsequent convictions, these statutes serve a dual purpose. Not only do they operate as a warning to first and second offenders, but they also prevent the further commission of crimes by the incorrigible criminal by confining him for extended periods of time.

Although these statutes have repeatedly been subjected to constitutional attack, they have been sustained on the ground that the aggravated punishment is imposed only for the second offense, and that a court may properly consider the defendant's past convictions in determining the punishment to be inflicted.[4] Accordingly the prevailing view in jurisdictions with habitual criminal statutes is that prior offenses constitute an essential element[5] of the instant crime. As a result, the usual practice under these statutes is to allege both the instant crime and the habitual counts in the same

1. 65 STAT. 767, 26 U.S.C. §2557 (Supp. 1952). The federal provision applies only to subsequent narcotics offenders.
2. See text *infra*.
3. There are several types of habitual criminal statutes which increase punishment for crimes on the basis of prior convictions. First, there are those which impose a life sentence or other long term imprisonment upon the third or fourth conviction of a felony. Next are the "second offense" statutes which provide for an increased penalty for the second conviction of certain enumerated crimes. A third type of statute imposes increasing periods of incarceration for second and third offenses. Finally, there are statutes which provide for imprisonment for stipulated periods of time for repeated convictions of petty crimes. See Note, 51 HARV. L. REV. 345 (1937).
4. McDonald v. Massachusetts, 180 U.S. 311 (1901). Habitual criminality is a status rather than an offense. People v. Jeffries, 47 Cal. App. 2d 801, 119 P.2d 190 (1941); People v. Langford, 392 Ill. 584, 65 N.E.2d 440 (1946); Sammons v. State, 210 Ind. 40, 199 N.E. 555 (1936); State v. Bohannon, 361 Mo. 380, 234 S.W.2d 793 (1950).
5. People v. Madden, 384 Ill. 313, 51 N.E.2d 527 (1943).

pleading, with the jury, or the court if a jury is waived, trying both issues simultaneously.[6]

The widespread adoption of habitual criminal legislation has proved to be an effective tool for dealing with the second offender. Yet this very legislation has created a new problem—that of providing fair procedural safeguards in its application.

Practice Under the Illinois Habitual Criminal Statute

The Illinois act[7] specifically requires that the fact of prior convictions and imprisonment in the penitentiary be pleaded in the same indictment as the instant crime.[8] The act further provides that an authenticated copy of the records showing prior convictions may be introduced and will be prima facie evidence of such former convictions.[9] These provisions have, in effect, established a rule of evidence which enables the prosecution to present evidence of a defendant's prior convictions to the jury before he has been convicted of the subsequent offense. There is a conflict between this rule and recognized procedural safeguards. The fair rule of evidence is that when a defendant chooses to remain silent, evidence of prior crimes, unrelated to the one charged in the indictment, cannot be introduced merely to show his inclination to commit the crime charged[10] or to impeach his character and reputation.[11] The Illinois rule, however, permits the defendant's character to be impeached in every instance, even though it is not properly in issue, a practice which is prohibited in all but habitual offender prosecutions.[12] Furthermore, by permitting the introduction of irrelevant

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6. See note 18 *infra.*

7. ILL. REV. STAT. c. 38, §602 (1953). "Whenever any person who has been convicted of burglary, grand larceny, [etc.] . . . shall thereafter be convicted of any such crimes, . . . the punishment shall be imprisonment in the penitentiary for the full term provided by law for such crimes at the time of the last conviction therefor; and whenever any such person having been so convicted of any of said crimes, committed after second conviction, the punishment shall be imprisonment in the penitentiary for a period not less than fifteen years: *provided that such former conviction, or convictions, . . . shall be set forth in apt words in the indictment.*" (Emphasis added.)

8. Imprisonment in the *penitentiary* was made a requirement by the 1941 amendment to the act. Commitment to the reformatory is insufficient to invoke the statute. People v. Perkins, 395 Ill. 553, 70 N.E.2d 622 (1946).

9. ILL. REV. STAT. c. 38, §603 (1953).

10. People v. Wilson, 400 Ill. 461, 81 N.E.2d 211 (1948); People v. Buford, 396 Ill. 158, 71 N.E.2d 340 (1947).

11. 1 WIGMORE, EVIDENCE §57 (2d ed. 1923). If a defendant takes the stand and testifies in his own behalf his credibility then becomes subject to attack and to the same tests as are legally applied to other witnesses. People v. Hicks, 362 Ill. 238, 199 N.E. 368 (1935); People v. Johnson, 333 Ill. 469, 165 N.E. 235 (1929). The only exception to this rule is when he offers, by other witnesses, evidence of his good character, in which event the state may counter with evidence of bad character. People v. Holt, 398 Ill. 606, 76 N.E.2d 474 (1948); People v. Willy, 301 Ill. 307, 133 N.E. 859 (1922).

12. People v. Perkins, 395 Ill. 553, 70 N.E.2d 622 (1946). See also People v.

evidence of prior misconduct before the jury's determination of the immediate offense, the Illinois practice is contrary to the rule that a defendant shall be tried solely on the merits of the principal offense charged. Finally, the introduction of this evidence has a tendency to rebut the presumption of innocence which the law guarantees a defendant.[13]

These objectionable features of the Illinois practice may have two very prejudicial consequences. On the one hand, the jury or the court may be so influenced by knowledge of defendant's criminal record that all doubts regarding guilt in the instant case will be resolved against the accused.[14] On the other hand, a benevolent jury, somehow apprised of the aggravated penalty required by a finding of guilty on both counts, may refuse to return a verdict because they are not in sympathy with the severity of such penalty.[15]

Although Illinois courts have zealously guarded the rights of second offenders who have not been charged under the habitual criminal statute, the courts apparently disregard his rights when the statute is invoked. Despite this patent injustice the Illinois habitual criminal statute has withstood a barrage of constitutional attacks since its inception in 1883.[16] In light of the problems arising under present Illinois procedure, the necessary inquiry is what measures can be taken to afford a defendant more protection. Since there seems to be no possibility of construing the present

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Derrico, 409 Ill. 453, 100 N.E.2d 607 (1951); People v. Byrnes, 405 Ill. 103, 90 N.E.2d 217 (1950).

13. A defendant, charged under the habitual criminal statute is clothed with a presumption of innocence, and this presumption also applies to the fact of his former conviction. Mere proof of a record indicating identity of defendant is insufficient to overcome this presumption, for the identity of the accused must be proved beyond a reasonable doubt. People v. Casey, 399 Ill. 374, 77 N.E.2d 812 (1948).

14. A further danger is present under the rule in Illinois. The prosecution may build its case upon the previous conviction of a defendant when its substantive evidence is weak. A record of a previous narcotics violation and conviction would be especially efficacious in a jury's determination of present guilt for a similar charge. Also, under threat of invoking the statute, a prosecutor may force a defendant to plead guilty to the present offense.

15. Illinois has solved this problem by the following practice: The jury is given three possible verdicts—(1) Not guilty, (2) Guilty of the instant crime, (3) Guilty of the instant crime and guilty on the habitual criminal count. By permitting this lattitude the possibility of an acquittal is greatly diminished when the jury feels that the aggravated penalty may be unjust in the circumstances.

16. The statute was held not to deny due process of law even though proof of prior convictions prejudiced the accused in the eyes of the jury. People v. Manning, 397 Ill. 358, 74 N.E.2d 494 (1947), *cert denied,* 337 U.S. 949 (1949). Nor was the Illinois statute held to violate due process of law because it gives the State's Attorney discretion whether to allege prior convictions in the indictment. People v. Johnson, 412 Ill. 109, 105 N.E.2d 766, *cert. denied,* 344 U.S. 858 (1952). The basic constitutionality of the act was upheld in People v. Lawrence, 390 Ill. 499, 61 N.E.2d 361, *cert. denied,* 326 U.S. 731, *rehearing denied,* 327 U.S. 818 (1945). *Accord,* People v. Johnson, 412 Ill. 109, 105 N.E.2d 766 (1952); People v. Pitts, 401 Ill. 154, 81 N.E.2d 442 (1948).

statute to eliminate its objectionable aspects,[17] it is suggested that the Illinois legislature adopt a procedure which, by prohibiting the introduction of damaging evidence, would protect a defendant's rights. With this goal in mind the practices employed in other jurisdictions will be examined and evaluated.

The Law in the Other American Jurisdictions

It is apparently permissible in all jurisdictions having habitual criminal provisions to allege both the past convictions and the instant offense in the same indictment or information. In a majority of states the prior convictions *must* be alleged in the same pleading if the habitual statute is to be invoked.[18] The remaining jurisdictions provide some alternative method.[19]

17. "It is sufficient to state, in answer to defendant's contention that what seems to be a fair rule is practiced in the Federal courts, concerning the fact of prior convictions being omitted from the indictment and the jury's consideration, that such rule is founded on a specific statute governing such practice. This court is without power to adopt such practice without the prior sanction of the legislature." People v. Hightower, 414 Ill. 537, 545, 112 N.E.2d 126, 130 (1953).

18. This is specifically required by statute or case law in the following states: ARIZ. CODE §43-6111 (1939); CAL. PENAL CODE §§969, 969a, 969b (Deering 1949); COLO. STAT. c. 48, §551 (1935); CONN. GEN. STAT. §8785 (1949); DEL. CODE c. 11, §3101 (1949); GA.—Berry v. State, 51 Ga. App. 442, 180 S.E. 635 (1935), Reid v. State, 49 Ga. App. 429, 176 S.E. 100 (1934); IDAHO—*In re* Bates, 63 Idaho 748, 125 P.2d 1017 (1942), State v. Lovejoy, 60 Idaho 632, 95 P.2d 132 (1939); IND. STAT. ANN. §9-2208 (Burns 1942); IOWA CODE ANN. §747.1 (1950); LA.—State v. Gani, 157 La. 235, 102 So. 319 (1924), State v. Compagno, 125 La. 669, 51 So. 681 (1910); MASS.—Comm. v. Walker, 163 Mass. 226, 39 N.E. 1014 (1895); MO.—State v. Harrison, 359 Mo. 793, 223 S.W.2d 476 (1949); NEB. REV. STAT. §29-2221(2) (1948); N.C. GEN. STAT. §15-147 (1953), State v. Clark, 183 N.C. 733, 110 S.E. 641 (1922); OKLA.—*Ex Parte* Bailey, 60 Okla. Cr. 278 64 P.2d 278 (1936); S.D.—State v. Schaller, 49 S.D. 398, 207 N.W. 161 (1926); TEXAS—Lang v. State, 36 Texas 6 (1872); UTAH CODE ANN. §76-1-19 (1953); W. VA. CODE c. 61, §6131-19 (1949); WYO. COMP. STAT. §9-111 (1945), Waxler v. State, 67 Wyo. 396, 224 P.2d 514 (1950). In other states there is no specific requirement, but it is proper and no alternative is provided. They are therefore included here: FLA. STAT. §775.11 (1941), Blitch v. Buchanan, 100 Fla. 1242, 132 So. 474 (1931), Cross v. State, 96 Fla. 768, 119 So. 380 (1928); KY. REV. STAT. §431.190 (1953), Calhoun v. Comm., 301 Ky. 789, 193 S.W.2d 420 (1946); MONT.—State v. O'Neil, 76 Mont. 526, 248 Pac. 215 (1926); NEV.—State v. Bardmess, 54 Nev. 84, 7 P.2d 817 (1932).

19. KAN. GEN. STAT. §21-107a (Corrick 1949) (making prior convictions determinable by the court), Rutledge v. Hudspeth, 169 Kan. 243, 218 P.2d 241 (1950), Pyle v. Hudspeth, 168 Kan. 705, 215 P.2d 157 (1950); MICH. STAT. ANN. §§28.1082-28.1085 (1943), *In re* Brazel, 293 Mich. 632, 292 N.W. 664 (1940); MINN. STAT. §§610.30, 610.31 (1949); N.J.—State v. Lutz, 135 N.J.L. 603, 52 A.2d 773 (1947); N.M. STAT. ANN. c. 42, §§42-1603, 42-1604 (1941); N.Y.—People *ex rel.* Shepard v. Martin, 267 App. Div. 1041, 48 N.Y.S.2d 697 (4th Dep't. 1944), but see People v. Rosen, 208 N.Y. 169, 101 N.E. 855 (1913); N.D. REV. CODE c. 12, §5319 (1943); OHIO REV. CODE §2961.13 (Baldwin 1953), but see §2949.34; ORE. COMP. LAWS ANN. §§26-2801-2804 (1939), State v. Smith, 128 Ore. 515, 273 Pac. 323 (1929); PA. STAT. ANN. §5108 (Purdon 1945); TENN. CODE ANN. c. 20, §11863.5 (Williams 1951), McCummings v. State, 175 Tenn. 309, 134 S.W.2d 151 (1939); VA. CODE §53-296 (1950), McCallister v. Comm., 157 Va. 844, 161 S.E. 67 (1931), but see §19-268 *re* subsequent offenses of petty larceny; WASH. REV. CODE §9.92.090 (1952), State v. Delano, 189 Wash. 230, 64 P.2d 511 (1937); WIS. STAT. §359.12(2) (1951); 65 STAT. 769, 26 U.S.C. §2557 (Supp. 1951). Some states included here provide that prior offenses *may* be alleged in the same pleading, but provide no alternative. Compare the states listed above with those in notes 20 and 21 *infra*.

However, the method by which the habitual charge is made does not necessarily determine whether evidence of a defendant's past convictions will be admitted under prejudicial circumstances. It is therefore necessary to examine three protective devices employed in the various jurisdictions.

Several states *permit* the habitual count to be raised in a second or supplemental indictment or information as an alternative method of invoking the habitual provisions.[20] Since the habitual charge is not heard until after the defendant has been convicted of the instant crime, this method can obviate the problem of prejudicial evidence. However, it does not eliminate the prejudice unless it is actually used. If this procedure is merely a permissible alternative, a prosecutor with a weak case on the instant offense will probably bring both counts in a single pleading.

In some states a supplemental pleading is also employed when a defendant's habituality is not discovered until after conviction of a present crime.[21] Similarly, a few states provide for amending the original indictment or information to include an habitual count when prior convictions are discovered during the course of the trial.[22] Neither of these practices entirely eliminates the prejudice which results from permitting the jury to learn of the defendant's prior convictions before they have determined the primary issue. They both work entirely in favor of the prosecution, enabling it to invoke the statute whenever the defendant's record is discovered, but not preventing it from alleging and proving the habitual and the primary charges concurrently. Amending the original pleading is even less desirable since after the amendment the new court must always be proved to the jury. In addition, the sudden introduction of a new charge during the trial may jeopardize the whole

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20. MICH. STAT. ANN. §§28.1084, 28.1085 (1943); MINN. STAT. §§610.30, 610.31 (1949); N.M. STAT. ANN. c. 42, §§42-1603, 42-1604 (1941). A 1944 decision of the Appellate Division indicates that this procedure may be followed in New York also. People *ex rel.* Shepard v. Martin, 267 App. Div. 1041, 48 N.Y.S.2d 697 (4th Dep't. 1944). However, the general practice in New York appears to be to allege the prior convictions in the same pleading as the instant offense. People v. Rosen, 208 N.Y. 169, 101 N.E. 853 (1913); People v. Cuchiara, 209 App. Div. 326, 204 N.Y. Supp. 581 (3d Dep't. 1924).

21. ARIZ. CODE §44-2227 (1939); FLA. STAT. §775.11 (1941); LA. CODE OF CRIM. LAW AND PROC. §709.3 (Dart 1943); MICH. STAT. ANN. §28.1085 (1943); MINN. STAT. §610.31 (1949); N.M. STAT. ANN. c. 42, §42-1604 (1941); N.Y. PENAL LAW §1943 (McKinney 1944); OHIO REV. CODE §2961.13 (Baldwin 1953); ORE. COMP. LAWS ANN. §26-2804 (1940); PA. STAT. ANN. §5108(d) (Purdon 1945); VA. CODE §53-296 (1950). In those states where the supplemental pleading is available it may apparently be used upon discovering prior convictions after the instant conviction. There are several states where it is clear that it may be so used, but it is not clear whether it may also be used when the defendant's record was known at the time the trial began. *E.g.*, ARIZ. CODE §44-2227 (1939); FLA.—Blitch v. Buchanan, 100 Fla. 1242, 132 So. 474 (1931); and, OHIO REV. CODE §2961.13 (Baldwin 1953).

22. *E.g.*, CAL. PENAL CODE §969a (Deering 1949).

defense, which might well have been quite different had the habitual charge been made at the beginning.

Three states, in order to protect the defendant from prejudice, do not permit the jury to be informed of his record until he has been found guilty of the instant crime.[23] The jury then hears the habitual charge. A few other states withhold the habitual count from the jury only if the defendant pleads guilty to it,[24] in which case the count may neither be read to the jury nor referred to during the trial. Both of these procedures are more desirable than the usual one of permitting the jury to learn of a defendant's record during his trial, but the latter affords no protection unless he admits the previous convictions. This might well have the effect of compelling a plea of guilty to an habitual count. But since proof of this charge is seldom difficult under modern methods of criminal identification, a defendant appears to have much to gain and little to lose by pleading guilty and removing this issue completely from a jury's consideration.

In several states the habitual issue, whether the defendant has been previously convicted as alleged, is a matter for determination by the court alone.[25] This practice prevents a defendant's record from being used to prejudice the jury, since it is unnecessary to bring the allegation or its proof to the jury's attention.[26] Furthermore, this practice may be commended from both a legal and a practical standpoint. Habituality goes only to the severity of the sentence to be imposed. In most states this is a matter for the court, and the habitual issue would, therefore, appear to be properly

23. CONN.—State v. Ferrone, 96 Conn. 160, 113 Atl. 452 (1921); State v. Reilly, 94 Conn. 698, 110 Atl. 550 (1920); UTAH CODE ANN. §76-1-19 (1953); WASH. REV. CODE §9.92.090 (1952), State v. Delano, 189 Wash. 230, 64 P.2d 511 (1937).

24. ARIZ. CODE §44-1004 (1939); CAL. PENAL CODE §1025 (Deering 1949); WIS.—State v. Meyer, 258 Wis. 326, 46 N.W.2d 341 (1951).

25. ARIZ. CODE §44-2227 (1939) (upon filing of criminal record with court at any time after conviction); IOWA CODE ANN. §747.4 (1950) (if plea of guilty to instant crime); KAN. GEN. STAT. ANN. §21-107a (Corrick 1949), Rutledge v. Hudspeth, 169 Kan. 243, 218 P.2d 241 (1950), Pyle v. Hudspeth, 168 Kan. 705, 215 P.2d 157 (1950); LA. CODE OF CRIM. LAW AND PROC. §709.3 (Dart 1943), State v. Guidry, 169 La. 215, 124 So. 832 (1929); NEB. REV. STAT. c. 29, §29-2221(2) (1948). This procedure may also be possible in Oregon and West Virginia. See State v. Smith, 128 Ore. 515, 273 Pac. 323 (1929); W. VA. CODE c. 61, §6131-19 (1949), State v. Criss, 125 W. Va. 225, 23 S.E.2d 613 (1942).

In some states, however, a jury is specially impaneled for the purpose. *E.g.*, ARIZ. CODE §44-1004 (1939) (special jury if plea of guilty to instant crime); CAL. PENAL CODE §1025 (Deering 1949) (same as Arizona); FLA. STAT. §775.11 (1941) (special jury on supplemental information after conviction); MICH. STAT. ANN. §28.1085 (1943) (special jury on alternative supplemental information); MINN. STAT. §610.31 (1949) (same as Michigan); N.Y. PENAL LAW §1943 (McKinney 1944) (special jury on information after conviction); ORE COMP. LAWS ANN. §26-2804 (1940) (special jury on supplemental information); W. VA. CODE c. 61, §6131-19 (1949) (special jury after conviction); 65 STAT. 767, 26 U.S.C. §2557 (Supp. 1952) (special jury after conviction).

26. Under this practice the defendant must be put on adequate notice that prior convictions will be relied upon to aggravate his penalty, and he must be given a hearing on this matter.

left to the judge's determination. In addition, the issue of identity is today solely one of written records which does not require a jury determination. Such a procedure expedites the disposition of the criminal calendar and it prevents a purely arbitrary finding of non-identity by a jury unsympathetic with the increased penalties prescribed for habituals.

There are apparently only five American jurisdictions that do not have an habitual criminal provision—Arkansas, Maine, Maryland, Mississippi, and the District of Columbia. It seems unlikely that antipathy to aggravated penalties for subsequent offenders is the reason, for it is generally recognized that such penalties are necessary and proper sanctions against repeated criminality. Rather the reason may be that in these jurisdictions the court is given fairly broad leeway in determining the length of the sentence to be imposed.

Suggested Procedures

The choice of a new method of invoking habitual sanctions is a difficult one, involving consideration of the several factors discussed above. There are a number of procedures from which a choice can be made, all of which, it is believed, are preferable to the present provision in Illinois.

I. Employ a two part indictment, one part setting forth the present crime, the other the habitual count. The jury would first hear evidence and determine guilt on the present crime. Then, and only then, would it hear and determine the habitual charge. No knowledge of the prior convictions would be brought to the jury's attention until the first step was completed. The major objection to this procedure would seem to be the possibility of an arbitrary verdict on the second count. It might also have the effect of delaying the disposition of a crowded calendar.

II. The court, rather than the jury, could decide the habitual issue after a verdict of guilty on the first count. Under this method there would be no reason for the jury to be informed of the defendant's record. It has the advantage of avoiding arbitrary verdicts on the second count and would also accelerate the disposition of the case. However, it may be just as hard for a judge to avoid prejudice from past crimes as it would be for a jury. It might be contended that this practice deprives the defendant of his right to a jury trial, but since the habitual issue goes only to the severity of the penalty to be imposed, the issue being his conviction of previous crimes but not his guilt thereof, there is no jury question.

III. The defendant could be tried as a first offender. Upon conviction, but before sentence, the prosecution would file a supple-

mental indictment or information charging prior convictions. The defendant would then be given an opportunity to plead to this charge, and if he should plead not guilty, the question of identity would be tried by a jury specially impaneled for the purpose. This device would take the habitual issue from the hands of the original jury, thereby eliminating a source of prejudice. The most weighty objection to it is that it increases the time and expense necessary for the final disposition of such cases, but the advantages would seem clearly to outweigh this objection.

IV. After convicting the defendant of the latest offense, the prosecution could introduce and authenticate a record of the defendant's prior convictions. The defendant would be brought before the court and ordered to show cause why he should not be sentenced as required by the statute. If he could not show cause the prescribed sentence would be imposed. Except in the very few cases where a real question of identity is presented, this procedure would result in a speedy disposition of the case, and the question would be determined, if necessary, by a judge. Since habituality goes only to the penalty, there would be no deprivation of trial by jury.

V. The habitual criminal statute could be abolished. In Illinois it is very seldom used. Furthermore, the Illinois criminal statutes provide for indeterminate sentences whereby a judge is permitted to assess minimum-maximum periods of imprisonment within prescribed limits[27] for every offense set forth in the habitual criminal statute except kidnapping and rape.[28] This fact, plus the recent decision of the Illinois Supreme Court in *People v. King*[29] where a sentence of one hundred and ninety-nine years to life was upheld, suggest that an habitual provision is not the only way of aggravating penalties for subsequent offenders. Therefore, it appears that the habitual statute could be repealed and proportional severity imposed by indeterminate sentencing.

Conclusion

The defendant who is charged with a second crime has a right to a fair and impartial trial according to the rules of law requiring the exclusion of incompetent and prejudicial evidence. In Illinois this is not possible, for he is openly indicted as an habitual criminal

27. The Illinois provisions for indeterminate sentence differ from the usual ones under which the minimum-maximum is prescribed by statute. Under the Illinois provision a judge is given discretion within the statutory limits prescribed. The Illinois practice has the effect of delaying parole, thus avoiding the danger of manipulations within a parole board. In determining the limits to set an Illinois judge may consider both mitigating and aggravating circumstances.

28. ILL. REV. STAT. c. 38, §801 (1953).

29. 1 Ill.2d 496, 116 N.E.2d 623 (1953).