LLOYD BRUSCH .... APPELLANT; 1953

AND *Mar. 6 *April 15

THE QUEEN .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal Law—Habitual Criminal—Whether an offence within meaning of the Criminal Code—Whether right of election extends to such an allegation—Criminal Code ss. 575B, 575C, Part X (A).

An accused charged with breaking and entering elected for speedy trial under Part XVIII of the *Criminal Code*. Thereafter the Crown served notice under s. 575C (4) (*b*) that at the trial he would "be charged with being a habitual criminal." Following his conviction on the 1st charge the trial judge without giving him a further opportunity to elect, proceeded to inquire and found him to be a habitual criminal and sentenced him to a term of five years on the 1st charge, and directed that as a habitual criminal he be detained in prison, as provided by s. 575B, for an indefinite period. The accused appealed from the sentence imposed on the charge of being a habitual criminal,

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PRESENT: Rinfret C.J. and Estey, Locke, Cartwright and Fauteux JJ.

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on the ground that it was a charge of a criminal offence on which he had a right of election which had not been granted him and in the alternative, that if such a charge was not a charge of a criminal offence it so materially affected the punishment which might be imposed that he was entitled to notice of the habitual criminal proceedings before being called upon to elect as to the mode of trial on the substantive offence. The appeal was dismissed by the Court of Appeal, O'Halloran J.A. dissenting.

Held: 1. By the majority of the Court (Locke and Cartwright JJ. expressing no opinion) that the allegation of being a habitual criminal is not an offence within the meaning of the *Criminal Code*. *Rex* v. *Hunter* [1921] 1 K.B. 555, followed.

2. (Cartwright J. dissenting): That the right of election restricted by Part XVIII to certain indictable offences, does not extend to such an allegation.

Per: Estey J. Part XVIII restricts the right to an election to certain indictable offences. The addition of a charge of being a habitual criminal, after the required notice, does not become a part of the offence or crime charged in the indictment. There is, therefore, no right within the meaning of the provisions of the said Part, to a further election upon the crime as charged, when a charge of being a habitual criminal is added to the indictment. *Rex* v. *Robinson* [1951] S.C.R. 522, distinguished.

Per: Locke J.—Whether the charge laid under Part X(A) is of a criminal offence or merely the first step in an enquiry as to the accused's status or condition, as suggested in *Hunter's* case, no question of right of election arises. The very terms of Part X(A) exclude the provisions relating to election contained in Part XVIII.

Per: Fauteux J.—*Rex* v. *Robinson* has no application. The whole matter being one of sentence, as was decided in *Hunter's* case, is one beyond the field of election which is strictly related to the trial of an indictable offence as to which the right of election is given and has nothing to do with sentence.

Per: Cartwright J., dissenting—It is not necessary to determine whether a charge of being a habitual criminal under Part X(A) is a charge of a criminal offence. On the hypothesis that it is not, its addition to the charge sheet had the effect of changing the charge upon which the accused made his election to one different in substance, with the result that the appellant never elected to be tried on the charge on which he was tried. *Rex* v. *Armitage* [1939] O.R. 417, applied. No notice was conveyed to the appellant that if he elected trial by a judge on the first charge he would at the same time be giving up his right to have a jury determine the question whether or not he was a habitual criminal.

APPEAL from a judgment of the Court of Appeal of British Columbia (O'Halloran J.A. dissenting) (1), which dismissed an appeal from a conviction on a speedy trial by Grimmett J., County Court Judge, on a charge of being a habitual criminal.

(1) (1953) W.W.R. (N.S.) 587.

J. L. Farris, Q.C. for the appellant.

L. H. Jackson for the respondent.

THE CHIEF JUSTICE:—It is submitted on behalf of the appellant that the Court of Appeal erred in failing to quash the conviction, because the accused should have been given an opportunity of electing as to how he wished to be tried on the charge of being an habitual criminal.

On February 5, 1952, the appellant was tried in County Court Judge's Criminal Court, New Westminster, B.C., on the original charge of breaking and entering and convicted and sentenced to five years imprisonment. Immediately thereafter the appellant was proceeded against as an habitual criminal and witnesses were heard, whereupon the learned trial judge found the accused to be an habitual criminal and ordered that he be detained for an indeterminate period in prison.

The wording of the various sub-sections of s. 575 of *The Criminal Code* of Canada are copied almost verbatim from the English Statute (*Prevention of Crime Act, 1908,* c. 59) whereunder proceedings against habitual criminals have been in effect for a number of years in England. The Court of Appeal followed the English decision in *Rex* v. *Hunter* (1), wherein the matter raised by the present appellant is fully discussed. In that case the judgment of the Court was delivered by the Earl of Reading C.J. and at p. 559 he said, *inter alia*:—

> In my judgment the whole question depends upon whether the charge against the appellant was a charge of an offence or crime or whether it merely asserted a status or condition in him which would enable the court if it were established to deal with him in a certain manner. We are of opinion that Mr. Oliver's argument on his behalf is sound, and that there is nothing in the Act which would justify us in saying that the charge of being a habitual criminal is a charge of a crime or offence.

And again at p. 560:—

> If one turns to s. 10, the object of the Legislature is shown by reference to sub-s. 1—namely, to enable the court to pass a further sentence if the accused is found to be a habitual criminal. That seems to me to be the key to the question, and to show that the Act intended to empower the Court, not to convict of another offence, but to pass a further sentence. That shows that Parliament was not creating a new offence.

(1) [1921] 1 K.B. 555.

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The majority of the Court appealed from relied on that decision, O'Halloran J.A. dissenting.

The wording of the sections in question (575 (*a*) to 575 (*g*)) are all indicative of their meaning. Section 575 (*b*) is as follows:—

> Where a person is convicted of an indictable offence committed after the commencement of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

There can be no question that an enactment of that kind was within the competency of the Canadian Parliament, since the criminal law in its widest sense is reserved for its exclusive authority (*A.G. for Ontario* v. *Hamilton Street Ry.* (1); *Proprietary Articles Trade Association* v. *A.G. for Canada* (2).

Adopting the language of the Earl of Reading, the sections of *The Criminal Code* referred to were "not creating a new offence", but just enabling the court to pass a further sentence if the accused was found to be a habitual criminal.

The appeal should be dismissed.

ESTEY, J.:—The appellant contends that an accused who, following his election, has been tried and found guilty of an indictable offence before a judge presiding under Part XVIII (Speedy Trials of Indictable Offences) of *The Criminal Code* has the right, before being charged as a habitual criminal under Part X(A), to make an election as to whether he will be tried upon that charge before a judge or a judge with a jury.

The appellant and two others were committed for trial upon a charge that they jointly did break, enter and steal (hereinafter referred to as the crime). They elected for a speedy trial before a judge under Part XVIII. Thereafter on December 19, 1951, the Crown served a notice under s. 575C(4) (*b*) that at the trial the appellant would "be charged with being a habitual criminal." The learned

(1) [1903] A.C. 524. (2) [1931] A.C. 310.

trial judge, on February 5, 1952, found all three guilty of the crime and forthwith, without giving appellant a further opportunity to elect, proceeded to inquire and find him to be a habitual criminal. He accordingly directed that the appellant be detained in prison for an indeterminate period as provided under s. 575B.

If being a habitual criminal is an indictable offence it would seem that the provisions of s. 834 would be applicable and, though the charge of an offence other than that upon which the accused had been committed may be included in the indictment under the proviso of that section (834), the prisoner should not be tried thereon without his consent or, in other words, without an election to be so tried.

The question, therefore, arises is being a habitual criminal an offence? The provisions with respect to habitual criminals were first enacted and made a part of our Criminal Code in 1947. Parliament then enacted, as part X(A) of the Criminal Code, provisions respecting habitual criminals and in doing so adopted the principle underlying and much of the language of Part II of the English *Prevention of Crime Act, 1908* (8 Edw. VII, c. 59). Section 575B reads as follows:

575B. Where a person is convicted of an indictable offence committed after the commencement of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

Section 575C reads as follows:

575C. (1) A person shall not be found to be a habitual criminal unless the judge or jury as the case may be, finds on evidence,

(*a*) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part, and that he is leading persistently a criminal life; or

(*b*) that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

(2) In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal.

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Parliament does not in these which may be referred to as the substantive sections of Part X(A) describe being a habitual criminal as an offence. This in itself is most significant and, with respect, I think the other language used supports the view that Parliament did not intend being a habitual criminal should be an offence.

It will be observed that under s. 575B one who is found to be a habitual criminal will be detained as such only when the court "is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public" that he should be detained. If Parliament had intended that being a habitual criminal was an offence it would, in all probability, have treated it the same as all other offences and directed that sentence be passed and detention ordered or suspended as the court might determine upon the offence being established.

Then again under s. 575C an accused must first be found guilty of an indictable offence. If, then, he admits, or evidence is adduced, that he has been three times previously convicted of indictable offences for which a penalty of at least five years might have been imposed and he is "leading persistently a criminal life," he may be found to be a habitual criminal and a further sentence may then be passed if, as provided in s. 575B, the court is of the opinion that for the protection of the public an indeterminate period of preventive detention should be directed. It is not penal servitude that Parliament has in mind, but rather, as expressed, preventive detention. Penal servitude has for its object both punishment and example. Punishment, so far as the habitual criminal is concerned, has failed. Parliament now provides for his preventive detention.

The significance of the phrase "preventive detention," as used in s. 575B, is further emphasized by s. 575G (2) under which he may be confined in a prison or that part of a prison set apart for the purpose. The intent and purpose of Parliament in passing Part X(A) was to protect the public by placing in preventive detention one who was found to be a habitual criminal and, while so detained, that he be subject "to such disciplinary and reformative treatment as may be prescribed by prison regulations"

(575G(3)). Parliament, during the period of his detention, places upon the Minister of Justice the responsibility, once at least in every three years, to review his condition, history and circumstances with a view to determining whether he should be placed out on licence and, if so, in what conditions (575H).

It was necessary that Parliament should provide a procedure whereby a person may be found a habitual criminal and it was but to be expected that in the circumstances it would be substantially the same as that in respect of indictable offences. It directs that one accused of being a habitual criminal shall be tried on a charge (575C(4)). The indictment shall first set forth the crime and it will be sufficient if there be added thereto a statement that the offender is a habitual criminal (575C(2)). He will first be "arraigned only on so much of the indictment as charges the crime" (575C(3)). If he be found not guilty of the crime that is an end to the proceeding. If he be found guilty of the crime then the court will direct its attention to determining whether he is a habitual criminal. This finding shall be upon evidence (575C(1)). If he be convicted of being a habitual criminal and sentenced to preventive detention he may appeal. If being a habitual criminal was an indictable offence the following words of s. 575E "the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto" would be unnecessary. It is true that throughout Part X(A) the words "charge," "arraignment," "sentence" and "conviction" are used, but it will be noted that these are all in relation to the procedure and are not, therefore, indicative of a conclusion leading to the designation of being a habitual criminal as an offence.

Counsel for the appellant seeks to draw some analogy between the position of a habitual criminal and one charged with vagrancy. Vagrancy is described as an offence and is in all respects treated as other offences. There does, however, appear to be some analogy between the treatment in the court of a habitual criminal and one who, charged with an offence, has been found to be insane either at the time the offence was committed or at the time of his trial. In both cases the provisions are to the effect that such person is not permitted at large, but is detained in a mental

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hospital or other institution to await the pleasure of the Lieutenant-Governor. It would be contrary to public interest to permit such a person to be at large until at least that is deemed safe by competent authority. In like manner it is deemed unsafe, from the point of view of the public, that one who is a habitual criminal should be at large and, therefore, he should be detained subject to the direction of the Minister of Justice.

In *Rex* v. *Hunter* (1), a decision under the English statute, it was held that being a habitual criminal is not an offence. Counsel for the appellant submitted that decision was either distinguishable or ought not to be applied to the provisions of Part X(A) because of the difference in our legislation. He points out that in England the inquiry can only be before a jury and, therefore, no election ever takes place. That, however, is a matter of procedure or mode of trial and does not affect the substantive provisions. Parliament, in defining the term "judge" in Part X(A), expressly contemplated that the inquiry as to whether a person is a habitual criminal would be made both by a judge presiding under Part XVIII and any judge having criminal jurisdiction in the province.

Counsel also emphasized the difference in language between s. 11 of the English Act and the corresponding s. 575E of the Canadian Act dealing with the matter of an appeal. In the former the language is "a person sentenced to preventive detention may . . ." while in the Canadian Act it reads "a person convicted and sentenced to preventive detention may . . ." The word "convicted" in s. 575E does not add anything and is, as already stated, in relation to procedure and in any event it does not override the general intention of Parliament.

Section 13 of the English Act and s. 575G of the Canadian Act are different in this sense that under the English Act the sentence of preventive detention takes effect immediately on the termination of the sentence of penal servitude, while under the Canadian Act it takes effect immediately on the conviction of a person on a charge that he is a habitual criminal. Here again this does not assist in determining whether being a habitual criminal is an offence within the meaning of the *Criminal Code.*

(1) [1921] 1 K.B. 555.

Counsel for the Crown adopts the language of Mr. Justice O'Halloran that even if being a habitual criminal is not an offence "nevertheless Parliament has mandatorily stipulated it shall be dealt with by the courts in the same manner (with one or two exceptions) as if it were an indictable offence." The learned judge, therefore, concludes that "Whether being a habitual criminal is a criminal offence or not the right to elect for trial still remains an essential statutory requirement."

It must be conceded that, as already stated, the words "charge," "arraignment," "sentence" and "conviction" appear throughout the part and under s. 575E, if an appeal is taken, the procedure therein will be that applicable to an indictable offence. These are all relative to procedure and as such do not affect or indicate the substantive nature of being a habitual criminal as an offence. In fact, as already pointed out, the provision relative to an appeal would be unnecessry if it were an indictable offence.

What is more significant is that even in the indictment it is sufficient "to state that the offender is a habitual criminal" (575C(2)) and this statement can be added only after "not less than seven days' notice" (575C(4)(*b*)). Parliament, in the same Part X(A), in s. 575A, provides that the word "judge" means a judge acting under Part XVIII of this Act and any judge having criminal jurisdiction in the province. It is, therefore, clear that Parliament had in mind an election and the procedure in reference thereto and it must follow that, in providing for seven days' notice, had it intended being a habitual criminal was an additional offence, it would, not having so described it, have directed that s. 834 would apply.

Moreover, ss. 825, 826 and 834 make it clear that Parliament intended the provisions for an election should only apply in certain indictable offences. Being a habitual criminal is not an offence. A charge that an accused is a habitual criminal is added to an indictment for an offence. Though Parliament in this sense contemplated that it should be a part of the indictment, it does not thereby become a part of the offence charged in the indictment. This is made clear by the provisions which require that the accused shall first be arraigned and tried for the offence. Then only if he be guilty of that offence will the court

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direct its attention to the issue as to his being a habitual criminal and, if so, should there be directed an indeterminate period of preventive detention. Throughout the proceeding the offence or crime charged is treated in every respect, even as to punishment, as separate and distinct from being a habitual criminal. With great respect to those who entertain a contrary opinion, Part XVIII restricts the right to an election to certain indictable offences. The addition of a charge of being a habitual criminal, after the required notice, does not become a part of the offence or crime charged in the indictment. There is, therefore, no right, within the meaning of the provisions of Part XVIII, to a further election upon the crime as charged, when a charge of being a habitual criminal is added to the indictment.

Counsel for the appellant referred particularly to the word "offence" as used in two of the reasons for judgment in *Rex* v. *Robinson* (1). In that case this Court had to construe the words "at least" where they appear in s. 575C (1) (*a*) and, therefore, quite a different issue from that here to be considered, and the word there used must be read and construed in relation to that issue. When so read it does not assist counsel for the appellant in his contention.

Section 575B of our Act is based upon and adopts much of the language of s. 10(1) of the English Act, in respect of which the Earl of Reading C.J., in *Rex* v. *Hunter, supra,* stated:

> If one turns to s. 10, the object of the Legislature is shown by reference to sub-s. 1—namely, to enable the Court to pass a further sentence if the accused is found to be a habitual criminal. That seems to me to be the key to the question, and to show that the Act intended to empower the Court, not to convict of another offence, but to pass a further sentence. That shows that Parliament was not creating a new offence.

These are the substantive sections and it would seem that the learned Earl has appropriately described the intent and purpose of the Parliament both of Great Britain and Canada.

The appeal should be dismissed.

(1) [1951] S.C.R. 522.

LOCKE J.:—The appellant Brusch was arrested on February 26, 1951, with two persons by name Paton and Abbott, on a charge of having broken and entered certain store premises in Haney, B.C. on that date, and on this charge the accused persons were committed for trial by a magistrate. On March 19, 1951, the appellant appeared before His Honour Judge Sullivan in the County Court Judges' Criminal Court for the County of Westminster and elected to be tried by a judge, without the intervention of a jury, on such charge. While the record is silent on the point, apparently Paton and Abbott also elected to be so tried.

On December 19, 1951, something more than a month before the date fixed for the trial of these three persons by a judge of the County Court of New Westminster, the Crown caused to be served a notice on the present appellant, informing him that at the trial then fixed for January 23, 1952, and on any adjournment thereof he would, if convicted on the said charge,

"be charged with being a habitual criminal and be tried upon such charge"

on the grounds that on three previous occasions since attaining the age of eighteen years he had been convicted of criminal offences on each of which he was liable to be sentenced to at least five years' imprisonment, and further:

that since the year 1940 you have been leading a persistently criminal life in that you have been an associate of criminals, prostitutes, drug addicts and have had no regular employment or occupation.

On the charge of breaking and entering, the appellant, together with Paton and Abbott, was tried before His Honour Judge Grimmett in the County Court Judges' Criminal Court at New Westminster on February 7, 1952 and was found guilty.

Upon the charge sheet, following that portion which charged the three accused persons of the offence of breaking and entering, there appeared the following:

Regina v. *Lloyd Brusch.* In that the said Lloyd Brusch having been convicted of the offence mentioned of breaking, entering and theft at Haney in the County of Westminster and Province of British Columbia, on the 26th day of February, A.D. 1951, is a habitual criminal.

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Clerk of the Peace

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The transcript of the proceeding shows that at the conclusion of the trial on the charge of breaking and entering the further charge was read by the Registrar to the accused, who was represented by counsel, that he pleaded not guilty and that the trial proceeded forthwith. At its conclusion the learned County Court Judge reserved his judgment. On February 13, 1952 he found the appellant guilty on what was referred to as "the habitual criminal charge." On the charge of breaking and entering, he sentenced the appellant to a term of five years and, finding him to be a habitual criminal, further directed that he be detained for an indefinite period in prison.

The appellant moved before the Court of Appeal for leave to appeal from his conviction and on the same date gave notice of his intention to appeal and both applications were dismissed by the Court of Appeal, O'Halloran J.A. dissenting, and it is from this judgment that the present appeal is taken.

Section 575B of the *Criminal Code* provides that where a person is convicted of an indictable offence committed after the commencement of Part X(A) and subsequently:—

> the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period . . . and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

Section 575C provides that a person shall not be found to be a habitual criminal unless the judge or jury, as the case may be, finds on evidence that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, and *that he is leading persistently a criminal life*, or that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention. The language of s-s. 3 of this section is of importance in determining the present matter. It reads:—

> In the proceedings on the indictment the offender shall in the first instance be arraigned only on so much of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the

judge or jury, as the case may be, unless he thereafter pleads guilty to being a habitual criminal, the judge or jury shall be charged to enquiry whether or not he is a habitual criminal and in that case it shall not be necessary to swear the jury again.

Of the three grounds upon which Mr. Justice O'Halloran dissented, two only were argued before us, these being that the charge of being a habitual criminal being a charge of a criminal offence the accused had a right of election, which was not granted to him, and, alternatively, if such a charge was not a charge of a criminal offence, it so materially affects the punishment that might be imposed that the accused was entitled to notice of the habitual criminal proceedings before being called upon to decide as to the mode of trial on the substantive offence.

The sections of the *Criminal Code* dealing with habitual criminals were introduced into the statute in 1947 and form Part X(A) of the *Code*. While not identical in terms, sections 575B and 575C follow very closely the language of s. 10 of *The Prevention of Crime Act, 1908* (Imp.).

Since under the English statute the question as to whether an accused person is a habitual criminal must be determined by the jury which tries him upon what may be called the substantive offence, no question can arise there as to a right of election.

The decision of the Court of Criminal Appeal in *Rex* v. *Hunter* (1), however, deals with the question as to the nature of the proceedings. The Earl of Reading C.J. there said that the charge under s. 10 of being a habitual criminal was not a charge of an offence or crime, but rather, merely the first step in ascertaining "a status or condition in him" which would enable the Court, if it were established, to deal with him in a certain manner. This question was considered by the Court of Appeal in British Columbia in *R.* v. *Robinson* (2), in proceedings under Part X(A) and Robertson J.A., who delivered the judgment of the Court, followed what had been said by the Earl of Reading in *Hunter's* case on the question as to whether the charge of being a habitual criminal was of a substantive offence and said that:—

The question was not one of guilt but whether under the circumstances a further sentence should be imposed.

(1) [1921] 1 K.B. 555. (2) (1952) 102 Can. C.C. 333.

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It may, however, be noted that the exact point to be decided in *Robinson's* case was as to whether the trial judge who presided at the hearing had the right to take judicial notice of the conviction of the prisoner for an offence against the *Opium and Narcotic Drug Act, 1929*, which was the substantive offence charged and of which he had pleaded guilty, and to tell the jury that was empanelled to hear the habitual criminal charge that he had been so convicted. In the present appeal, the learned Chief Justice of British Columbia, in delivering the judgment of the majority of the Court, expressed the view that the sections related to sentence only and that the Court's decision in *Robinson's* case should be followed.

There is much to be said for the contrary view, in my opinion. Sub-s. 4 of s. 575C refers to the statement on the indictment that the offender is a habitual criminal as a charge upon which no person shall be tried, unless the Attorney-General of the Province consents and not less than seven days' notice has been given to the offender specifying the grounds upon which it is intended to found the charge. Sub-s. (*a*) provides that a person shall not be found to be a habitual criminal unless the judge or jury, as the case may be, finds on evidence that, in addition to having been three times previously, since attaining the age of eighteen years, convicted of an indictable offence for which he was liable to at least five years' imprisonment, he is leading persistently a criminal life. This was the charge that the learned County Court Judge was required to consider in the present matter. Upon evidence which he considered to be sufficient, he found Brusch to be a habitual criminal and so, if he considered it to be expedient for the protection of the public, liable to be detained in prison for an indeterminate period. O'Halloran J.A. points out in his dissenting judgment that s. 238 of *The Criminal Code* defines a course of conduct rendering a person liable to conviction and sentence for the offence of vagrancy. Part X(A) defines the course of conduct which renders a person liable to conviction as a habitual criminal. If one is properly described as a criminal offence, why not the other?

I have, however, come to the conclusion that whether the charge laid under Part X(A) is of a criminal offence or merely the first step in an enquiry as to the accused person's status or condition, as suggested in *Hunter's* case, no question of a right of election arises and that this appeal should fail.

In my opinion, Part X(A) defines in its entirety the procedure to be followed in disposing of charges of this nature. Under s. 575(3) the offender is first arraigned on so much of the indictment as charges the crime, in this case that of breaking and entering. If he is tried on that offence by a judge alone, as in the present case, it is the judge who, having found the accused guilty and passed sentence upon him, is "charged to enquire" whether or not he was a habitual criminal. Had he been tried on the offence of breaking and entering by a jury and found guilty, that jury would have been charged with the duty of determining the habitual criminal charge. In the present case, since Part X(A) named the tribunal which was to hear and determine the habitual criminal charge, there was no option to offer the prisoner as to the manner in which he would be tried. The very terms of Part X(A) exclude, in my opinion, the provisions relating to election contained in Part XVIII of the *Code*.

It has been said during the argument of the present matter that it is a hardship upon an accused person to be deprived of the right to elect the tribunal before which a charge of this grave nature is to be heard, on which he may be found liable to be imprisoned for life. That, however, is a matter for Parliament and not for the courts. The question, moreover, as to whether this works a hardship upon such an accused person is debatable. At the time the present appellant elected to take a speedy trial on the charge of breaking and entering, he must be held to have been aware that since he had been convicted three times since he was eighteen years of age of offences of the character described in Part X(A) and had been leading persistently a criminal life, he might be charged under the provisions of that Part with being a habitual criminal and to have considered this in electing for a speedy trial.

I would dismiss the appeal.

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CARTWRIGHT J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for British Columbia pronounced on December 19, 1952, whereby according to the formal order of that Court, "the appeal . . . of the above-named Appellant from the finding of His Honour Judge J. K. Grimmett, a judge of the County Court Judge's Criminal Court for the County of Westminster, holden at New Westminster, B.C., in the said County of Westminster, on the 13th day of February, A.D. 1952, that he, the said Lloyd Brusch, is an habitual criminal" was dismissed.

The appeal is based, pursuant to section 1023(1) of *The Criminal Code,* on the following questions of law, upon which O'Halloran J.A. dissented:—

(1) the charge of being an habitual criminal is a charge of a criminal offence on which the accused has a right of election which was not granted to the Appellant herein;

(2) alternatively the charge of being an habitual criminal, if it is not a charge of a criminal offence, so materially affects the punishment that may be imposed that the accused is entitled to notice of the habitual criminal proceedings before being called upon to elect as to the mode of trial on the substantive offence;

(3) in the further alternative if the charge of being an habitual criminal is not a charge of a criminal offence but a matter in respect of status, then it is legislation in respect to a non-criminal matter and the Parliament of Canada has no jurisdiction to legislate with respect thereto.

No argument was addressed to us in regard to the third ground of dissent, and I therefore propose to deal only with the first two questions above set out.

The facts are as follows. The appellant was arrested on February 26, 1951 and was charged jointly with two others with breaking and entering a store with intent to steal. The three were committed for trial. On March 19, 1951, the three accused elected a speedy trial pursuant to the provisions of Part XVIII of the *Criminal Code* and the trial was set for the 28th of May. On that date and on several subsequent dates the three accused appeared and the trial was further adjourned and finally commenced on February 5, 1952.

No objection is taken to the form of the statement in writing, prepared pursuant to section 827(3) of the *Code,* insofar as it relates to the charge of breaking and entering.

This statement is signed "R. G. Kell", Clerk of the Peace. Below this signature appears the following:—

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For that the said Lloyd Brusch, having been convicted of the above mentioned offence of breaking, entering and theft at Haney in the County of Westminster and Province of British Columbia, on the 26th day of February A.D. 1951, is a habitual criminal.

R. G. KELL,
Clerk of the Peace

Code Sec. 575 C (2)

The record is silent as to when the last mentioned addition was placed on the charge sheet but it is clear that it was not mentioned or in any way brought to the notice of the accused or his counsel at the time he elected to be tried before a judge without the intervention of a jury. On December 19, 1951 an undated notice addressed to the appellant was served upon him, stating that if convicted on the breaking and entering charge he would "be charged with being an habitual criminal and be tried upon such charge on the following grounds, namely . . .". The notice sufficiently sets out the grounds upon which it was intended to found the charge.

The trial on the charge of breaking and entering was held on the 5th and 7th days of February 1952. At the conclusion of the trial the appellant and the other two accused were found guilty and immediately thereafter counsel for the Crown asked the Clerk of the Court to read the charge against the appellant of being a habitual criminal. The Clerk of the Court read the charge. The appellant, who was represented by counsel, was called upon to plead. He pleaded "not guilty" and the hearing proceeded. At the conclusion of the hearing the learned trial judge reserved his judgment until February 13 to which date he remanded the accused. On February 13 he delivered judgment orally, saying in part:—"On the habitual criminal trial charge I have come to the conclusion that you are guilty as charged . . . therefore I sentence you to be detained for an indeterminate period in prison." On the charge of breaking and entering the learned trial judge sentenced the appellant to five years imprisonment. No appeal was taken from the last mentioned conviction and sentence.

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From the above recital of facts it is clear that the appellant was given no opportunity of electing as to how the question whether he was a habitual criminal should be determined, that is to say, whether it should be by a judge under Part XVIII of *The Criminal Code* or by a jury. The contention of counsel for the respondent is that in any case in which an accused has been charged with an indictable offence falling with section 825(1) of the Code and has properly elected to be tried on such charge by a judge under Part XVIII, it is open to the prosecuting officer to make an addition to the charge sheet stating, pursuant to section 575C(2), that the accused is a habitual criminal, and that, without any further election by the accused, the judge trying the indictable offence has jurisdiction to try the further question whether or not the accused is a habitual criminal.

The Crown relies on the case of *Rex* v. *Hunter* (1), a decision of the Court of Criminal Appeal. In that case the appellant "was indicted at the London Sessions for office breaking and larceny and also for being a habitual criminal." The jury convicted him on the charge of office breaking and larceny. Before the charge of being a habitual criminal, which the appellant denied, was gone into he asked for an adjournment to enable him to call a witness who was not present. After discussion the Deputy Chairman adjourned the trial of the question whether the accused was a habitual criminal to the following sessions and in the meanwhile sentenced the accused to three years penal servitude on the charge of office breaking. The sole ground of appeal appears to have been that on a proper interpretation of *The Prevention of Crime Act, 1908* 8 Edw. VII, c. 59, which is in its wording similar to, although by no means identical with, Part X(A) of the *Criminal Code,* where in addition to a substantive charge a charge is made that the accused is a habitual criminal the last mentioned charge must be tried by the same jury that tries the substantive charge.

That point had already been dealt with by the Court of Criminal Appeal in *Rex* v. *Jennings* (2) and in delivering the judgment of the Court in *Rex* v. *Hunter* (*supra*) the Earl of Reading C.J. said, in part:—"The only ques-

(1) [1921] 1 K.B. 555. (2) (1910) 4 Cr. App. R. 120.

tion remaining is whether Parliament has altered the law since the decision in *Rex* v. *Jennings*." I do not read *Rex* v. *Jennings* as necessarily deciding that the charge of being a habitual criminal is not a charge of a crime or offence but there is no doubt that in *Rex* v. *Hunter* the Court did so decide, and, while it was not necessary to the decision, a court of thirteen judges, presided over by Hewart L.C.J. in *Rex* v. *Norman* (1), appears to approve the decision in *Hunter's* case. It would seem, therefore, that it must be taken to be established in England that the charge of being a habitual criminal is not a charge of an offence or crime but is merely an assertion of the existence of a status or condition in the accused which would enable the Court, if it were established, to deal with him in a certain manner.

I am much impressed by the reasons given by O'Halloran J.A. in his dissenting judgment in the case at bar for reaching a result on the construction of Part X(A) of the *Code* different from that which was reached on the construction of the Act under consideration in the *Hunter* case but I do not think it is necessary, in this appeal, to finally determine whether a charge of being a habitual criminal under Part X(A) of the *Code* is a charge of a crime or of an offence. If it is, as O'Halloran J.A. considers it to be, then clearly the learned trial judge had no jurisdiction to deal with the charge as the appellant had not elected to be tried by him. If, however, the alternative view is accepted, i.e. that the statement added to the indictment or charge sheet, pursuant to s. 575C(2), is not a charge of an offence, then I respectfully agree with O'Halloran J.A. that an election by the appellant was nonetheless an essential condition precedent to the judge acquiring jurisdiction to determine, without the intervention of a jury, the question, whether the accused was or was not a habitual criminal.

On the hypothesis that the statement added to the charge sheet stating the appellant to be a habitual criminal was not the charge of an offence, in my opinion that addition had the effect of changing the charge upon which the appellant had made his election to one different in substance, with the result that the appellant never elected to be tried by the learned judge on the charge on which he

(1) (1924) 18 Cr. App. R. 81.

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was tried. In *Rex* v. *Armitage* (1), the circumstances dealt with were different from those in the case at bar but I think that case rightly decides that a change in an indictment which makes it possible to impose a longer term of imprisonment in the event of conviction cannot be regarded as an amendment in matter of form only. When, pursuant to s. 827 of the *Code,* the judge stated to the appellant that he was charged with an offence, he described only the offence of breaking and entering and no notice of any sort was conveyed to the appellant that if he elected trial by a judge on that charge he would at the same time be giving up his right to have a jury determine the question whether or not he was a habitual criminal.

It is obvious that an accused might be moved to elect trial by a judge on a substantive charge by considerations different from those which would weigh with him in deciding what tribunal should decide whether he was a habitual criminal. He might know that he was guilty of the substantive charge but be convinced, in his own mind, that he was not a habitual criminal. He might be willing to be tried without a jury for an offence as to which he knew the maximum penalty, but desire a jury to pass upon a question the adverse determination of which could result in his being deprived of his liberty for the rest of his life.

I can find no provision in the *Code* giving jurisdiction to a judge to determine without the intervention of a jury whether an accused is a habitual criminal, without the accused's consent, given after being informed that the question, or one of the questions, to be determined is whether he is a habitual criminal.

I can derive little assistance from the sections of the *Code* dealing with the method of specifying in an indictment or charge sheet that an accused who is charged with a substantive offence has been previously convicted. The only questions in such a case, in regard to the previous conviction, are those of historical fact and identity. The question whether or not a person is a habitual criminal involves an inquiry going much further afield, the nature of which is fully discussed in the judgment of the Lord Chief Justice in *Rex* v. *Norman* (*supra*).

(1) [1939] O.R. 417.

In my view the charge or statement that a person is a habitual criminal must be regarded as either (i) a substantive charge of an offence, or (ii) the allegation of the existence of a condition in a person accused of an indictable offence (conveniently referred to as a substantive offence) by reason of which such person if found guilty of the substantive offence may suffer detention for an indeterminate period in addition to any punishment imposed for the substantive offence, and therefore a substantial ingredient of the indictment charging the substantive offence. If the former is the right view, the question raised in this appeal presents no difficulty; but if the latter view is preferred then for the reasons given above I am of opinion that there was no proper election by the accused to be tried under Part XVIII.

If the construction of the relevant sections of the *Code* were difficult or doubtful the Court should adopt that construction which does not deprive an accused of the right to have tried by a jury a question which may involve his losing his liberty for the rest of his life. The power of Parliament to take away the right to trial by jury is not questioned but the intention to do so should not lightly be assumed.

It remains to consider the question, raised during the argument before us that the appellant can not now be heard to allege lack of jurisdiction because he pleaded to the charge before the learned trial judge without objection and did not raise the question of jurisdiction at the trial. On this point reference was made to *Sayers* v. *The King* (1). In my opinion that case is distinguishable from the case at bar. In *Sayers'* case the appellants were convicted after trial by a jury. It was held that their right to elect trial and to be tried without a jury under Part XVIII of the *Code,* if it existed, was a privilege which could be waived and which was waived by pleading, without objection, to the arraignment before the jury. In the case at bar, in my respectful view, the consent of the accused obtained pursuant to the provisions of s. 827 of the *Code* was a condition precedent to the existence of jurisdiction in the learned trial judge and such consent was not obtained.

(1) [1941] S.C.R. 362.

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For the above reasons I would allow the appeal and quash the finding that the appellant is a habitual criminal and the sentence passed upon that finding.

FAUTEUX J.:—This is an appeal under s. 1023 of the *Criminal Code.* Of the three grounds of law, upon which there was a dissent, only the first two have to be considered, for the third one—related to the constitutionality of Part XA—has been abandoned by the appellant and the Attorney General for Canada was not represented at the hearing.

In brief, the whole matter raises a question of procedure but, as will be seen, one of substance, i.e. one of jurisdiction.

Originally charged with the offence of "breaking and entering a store with intent to steal," the appellant, after being committed to trial for this offence, elected to be tried on the same, by a judge alone, under Part XVIII of the *Criminal Code.* A plea of not guilty was entered and several adjournments of the case ensued. Some two months before trial, i.e. on the 19th of December 1951, the appellant received notice that the Crown intended to proceed with a charge of being a habitual criminal and at some time before the trial, an addition, implementing this intention, was made to the formal statement in writing provided under s. 827 s-s. 3. Without a new election nor any objection being made in the matter, the trial proceeded; the appellant was found guilty of the substantive offence as to which he had elected; immediately thereafter, the secondary issue was inquired into and he was found to be a habitual criminal and sentenced as such.

As formulated, the first ground of law is:—

> The charge of being a habitual criminal is a charge of a criminal offence on which the accused has a right of election which was not granted to the appellant.

This point rests on two legal assumptions:—(*a*) That to be a habitual criminal is a criminal offence; (*b*) That this offence is indictable and one for the trial of which a right to elect for a speedy trial is given.

Dealing with (*a*):—This point never came before this Court. Our decision in *Rex* v. *Robinson* (1), relied on by counsel for the appellant, has no application. It is true

(1) [1951] S.C.R. 522.

that some of the members of the Court, incidentally, said that by the enactment of Part X(A), Parliament created a new offence. But besides the fact that such a dictum was not expressed by a majority of the Court, it was foreign to the issue and its determination. The question, however, came squarely before the English Criminal Court of Appeal in *Hunter* (1) where, having to determine the object of the *Prevention of Crime Act, 1908*—from which Part X(A) of the *Criminal Code* is inspired—Reading L.C.J., rendering the judgment for the Court, said at page 74:—

. . . that to be a habitual criminal within the meaning of the statute is not a substantive offence, but is a state of circumstances affecting the prisoner which enables the court to pass a further or additional sentence to that which has been already imposed; . . .

At page 73, the Lord Chief Justice says:—

Turning to s. 10 we think that the object of the legislature is clearly shown by reference to sub-s. (1). It empowers the Court to pass a further sentence if the prisoner is found to be a habitual criminal. That seems really the key of the question so much discussed today, and indicates that the Act was not intended to enable the Court to convict of another offence, but was intended to enable the Court, when the prisoner has been convicted of the substantive offence for which he is indicted and has been sentenced to at least three years' penal servitude, to pass "a further sentence, ordering that on the determination of the sentence of penal servitude," he be detained for a further period.

It is plain, looking at the language of this statute, that the intention of Parliament was, that if the man is found to be a habitual criminal, then, in addition to the sentence of three years' penal servitude for the substantive offence, he may be sentenced to preventive detention.

The object of our own legislation is manifested in the provisions of s. 575(*b*) which, and so far as the object of Part X(A) is concerned, are couched in terms similar to those of s. 10 s-s. 1 of the English Act. If anything, I think that the provisions of the former are more apt than those of the latter to support, with respect to Part X(A), a conclusion similar to the one reached by the English Criminal Court of Appeal for, at the end of s. 10, s-s. 1, it is said:—

. . . and *a person* on whom such a sentence is passed *shall,* whilst undergoing both the sentence of penal servitude and the sentence of preventive detention, *be deemed* for the purposes of the Forfeiture Act, 1870, and *for all other purposes,* to be a person *convicted of felony.*

(1) [1921] 1 K.B. 555; 15 Cr. App. R. 69.

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The corresponding wording of s. 575(*b*) is:—

. . . and *the person* on whom such a sentence is passed *shall be deemed* for the purpose of this Part *to be a habitual criminal.*

Nowhere in enacting Part X(A) did Parliament use the word "offence" to characterize the conditions which must be met before one may be deemed to be a habitual criminal. Part X(A) does not define a habitual criminal but it does give in s. 575(*b*) and s. 575(*c*), the circumstances which must co-exist before a person may be deemed for the purpose of this new part, to be a habitual criminal. These circumstances are:—

1. A fresh, precedent and contemporaneous conviction of an indictable offence after the commencement of the part;

2. An admission of the convicted offender or a finding by a jury or a Judge that he is a habitual criminal within the meaning of either (*a*) or (*b*) of s. 575 (*c*);

3. A formed opinion of the Judge, before whom the conviction for the substantive offence took place, that, by reason of the criminal habits and mode of life of the convicted offender, it is expedient for the protection of the public that a further sentence, ordering his detention in a prison for an indeterminate period be passed;

4. An actual passing of such an additional sentence.

As it appears, a mere admission or finding under s. 575(*c*), though a condition precedent, is not sufficient for, under s. 575(*b*), the judge must also be of opinion that, for reasons therein stated, it is expedient for the protection of the public to pass, in addition to the one given as to the substantive offence, a sentence for an indeterminate period, and must actually pronounce such additional sentence.

Part X(A) does not authorize a charge for being a habitual criminal to obtain independently. And, moreover, the Part has no effective application unless the substantive charge for the criminal offence is prosecuted and found.

In brief, the object of the Part is not to *create a new crime* but, to use the relevant terms of the title of the English Act, "To make better provision for the *prevention of crime* and for that purpose to provide for . . . the prolonged detention of habitual criminals . . ."

Dealing with (*b*):—As indicated by the title "Speedy trials of *Indictable Offences*", as well as clearly stated in s. 825 and s. 582, the provisions of Part XVIII—including the right to elect to have an offence tried before a judge alone—have no application except in the case of certain indictable offences. And as speedy trials are a marked departure from the common law, and as the provisions related thereto establish a special statutory jurisdiction which cannot be extended beyond the terms of the statute, not only would it be necessary for the appellant to show successfully that to be a habitual criminal is a criminal offence, but that this criminal offence is indictable. In the general pattern followed by Parliament, when a new offence is created, the nature of the offence is always and must of necessity be given, for it is the ascribed nature of the offence that determines the course of proceedings for its prosecution. This Parliament does—for an indictable offence—in stating either that the offence is indictable or that the offender may be prosecuted by indictment and—in the case of an offence which is not indictable—by describing it purely and simply as an "offence" or by stating that the offender is punishable on summary conviction. In this respect, and for the obvious reason that Parliament did not purport to create an offence, Part X(A) is denuded of any indication. It is true that s. 575(*c*) s-s. 2 provides:

In any indictment under this section it shall be sufficient, after changing the crime, to state that the offender is a habitual criminal.

But the indictment to which this sub-section refers is manifestly the one reciting the substantive offence; and while a conviction on such indictment is a condition precedent to the substantial operation of Part X(A), an acquittal on the same brings the whole matter to an end.

If, as the appellant must contend to succeed, to be a habitual criminal is effectively an indictable offence, there was no need for Parliament to enact, in positive language, the provisions of the opening section of Part X(A), i.e., s. 575(*a*), to empower a judge acting under Part XVIII to apply the provisions of Part X(A), for such jurisdiction was already given to him by s. 825 and s. 582. But, and because Parliament did not mean to create an indictable offence coming within the jurisdiction *ratione materiae* of a judge acting under Part XVIII, it was necessary to enact s. 575(*a*) to enable him to apply the provisions of Part X(A).

In my respectful view, this first ground cannot be entertained.

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The second point of dissent is:—

Alternatively the charge of being a habitual criminal, if it is not a charge of a criminal offence, so materially affects the punishment that may be imposed that the accused is entitled to notice of the habitual criminal proceedings before being called upon to elect as to the mode of trial on the substantive offence.

If, as above concluded, to be a habitual criminal is not an offence and there is no jurisdiction *ratione materiae* under Part XVIII but simply a power given by s. 575(*a*) of the new part to a judge acting under Part XVIII to apply the provisions of Part X(A), then there is no text of law to justify this second contention. To accept it would effectively be tantamount to amend the speedy trial provisions, in making them applicable to the charge of being a habitual criminal, and in conditioning the election of the substantive charge for an indictable offence to the addition of a formality unprovided for in s. 827 to cover a case never contemplated when Part XVIII was first enacted, i.e. at a time when neither Part X(A) nor even the Prevention of Crime Act were law.

Furthermore, the reason underlying this second proposition is not consonant but inconsistent with the economy of the *Criminal Code*. It is said that the charge of being a habitual criminal so materially affects the punishment that may be imposed, that the accused is entitled to notice of the habitual criminal proceedings before being called upon to elect as to the mode of trial on the substantive charge; and in support of this proposition, reference is made to *Rex* v. *Armitage* (1). At the time of this decision, there were in Canada, as to the advisability to refer to previous conviction or convictions in a charge for an offence for which a greater punishment may be inflicted by reason of such previous conviction or convictions, two schools of thought amongst the members of the judiciary. One view was that it was unfair to the accused to have, at the very outset of the procedure, no notice of the intention of the Crown to ask for the greater punishment provided in such cases. The other view was that a reference, on the charge, to such previous convictions was unfair because prejudicing the case as to the offence charged. These two views led to conflicting jurisprudence and, in 1943, by 7 George VI

(1) [1939] O.R. 417.

c. 23, the *Code* was amended and Parliament, adopting the latter view, prohibited any reference to such previous conviction or convictions in all proceedings under Parts XV, XVI and XVIII before conviction on the substantive offence. It was then clearly enacted that no information or no charge for an offence for which greater punishment may be inflicted by reason of previous conviction or convicitions, shall contain any reference to such previous conviction or convictions. The *Armitage* case, consistent with the first view, was decided before such amendment.

Furthermore, the whole matter, being one of sentence—as was decided in the *Hunter* case—is one beyond the field of election which is strictly related to the trial of the offence as to which the right of election is given and has nothing to do with the sentence.

With deference for those who entertain on the whole matter a contrary opinion, I must, for the above reasons, conclude that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Farris, Stultz, Bull & Farris.*

Solicitor for the respondent: *L. H. Jackson.*