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# Criminal Law - Criminal Procedure

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> We mean distinctly to assert that where money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of indebitatus assumpsit whether such mistake be one of fact or law; and this we insist may be done both upon principle of Christian morals and the common law.[25]

Even though the result reached by the court is in accord with the majority of jurisdictions today, its adoption of the *conduit theory* and its interpretation of section 5(3) to allocate capital gains dividends to principal has created more problems than it has solved. It is apparent that the only solution rests with the legislature. A bill[26] providing for the allocation of capital gains dividends to income was introduced in 1961; the bill died in committee. But the confusion in this area today indicates it is time for the legislature to act to resolve the problems which have arisen out of mutual fund distributions.

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CRIMINAL LAW—Criminal Procedure—Accused's loss of memory surrounding events of alleged criminal act held not to entitle him to a discharge from the indictment or stay of proceedings.

*Commonwealth ex rel. Cummins v. Price,* 421 Pa. 396, 218 A.2d 758(1966).

Relator was indicted for first degree murder. The only evidence presented of the alleged murder was circumstantial and, at best, inconclusive.[1] A pretrial petition for a writ of habeas corpus was filed requesting that (1) the murder indictment be dismissed and relator be discharged from custody, or (2) the trial on the indictment be postponed. The petition averred that while the relator was at no time insane or incompetent, he was suffering from a permanent loss of memory of the events and circumstances implicating him in the alleged murder. In dismissing the petition the lower court found that relator was not feigning the amnesia but did not determine its expected duration. On appeal the supreme court held, with two Justices dissenting, ". . . that defendant is not entitled at this time (1) to a discharge from the indictment, or (2) to a stay of proceedings. . . ."[2]

25. Union Trust Company of N.Y. v. Gilpin, 235 Pa. 524, 530 (1912).
26. House Bill 592, Session of 1961.

1. The ballistics report stated only that the bullets taken from the victim were of the same general class characteristics as bullets test-fired from the revolver which police had found in relator's car. A more positive identification was not made.
2. Commonwealth *ex rel.* Cummins v. Price, 421 Pa. 396, 406, 218 A.2d 758, 763 (1966).

Initially, the court recognized that three prior Pennsylvania cases had treated amnesia as an "affirmative defense,"[3] but it rejected this reasoning. Since the relator's amnesia admittedly occurred only *after* the alleged criminal act, it was held that there was no ground for sustaining his first position, namely, that he was immune from criminal prosecution.[4]

The court next turned to a consideration of the question of the relator's mental ability to stand trial. Counsel for the accused argued that he was, under the Mental Health Act of 1951[5] or the common law test,[6] unable to stand trial. The Mental Health Act standard[7] was recognized by the court as being more inclusive than the test of "legal insanity" applied in Pennsylvania. But the court went on to reject the relator's contention that under the Act he was unable to stand trial, since by his own admission he was presently sane and competent and not "in need of care in a mental hospital."[8] In these situations the common law test (*i.e.*, that the accused be able to comprehend his position *and* assist his counsel in making a rational defense)[9] is actually broader than the Mental Health Act standard, since the relator, whose condition

3. In Commonwealth v. Morrison, 266 Pa. 223, 229, 109 Atl. 878, 880 (1920), Justice Kephart, writing the majority opinion, stated that "aphasia" is one of the affirmative defenses which defendant must establish by fairly preponderating evidence. Later, in Commonwealth v. Myma, 278 Pa. 505, 512, 123 Atl. 486, 490 (1924), Justice Kephart corrected his use of the word "aphasia" to mean ". . . that form of insanity called amnesia . . . ." Again in Commonwealth v. Iacobino, 319 Pa. 65, 178 Atl. 823 (1935), amnesia was recognized as an affirmative defense. However, in each of these cases the defense argued insanity at the time of the criminal act. In *Price* there is no indication that the loss of memory is related to an independently operative mental defect at the time of the crime.

4. The analysis of the court is sound since amnesia is directly relevant to the issue of relator's criminal responsibility only to the extent that the evidence of amnesia corroborates other evidence of an actual mental defect operative at the time of the alleged criminal act. Relator offered no such evidence. See Note, 71 YALE L.J. 109, 111-15 & nn.16, 19, & 27 (1960).

5. PA. STAT. ANN. tit. 50, §§ 1071-1622 (1954).

6. In Commonwealth v. Novak, 395 Pa. 199, 205, 150 A.2d 102, 105 (1959), the common law test used to determine the mental capacity of a defendant to stand trial was distinguished from the "right-wrong" test. The crucial question is twofold—whether the defendant is able to comprehend his position and assist his counsel in making a rational defense. See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE, 428-30 (1954).

7. Section 102(11) of the Mental Health Act of 1951 defines mental illness as ". . . an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care." PA. STAT. ANN. tit. 50, § 1072(11) (1954).

8. The controlling factor in determining whether one is within the purview of this Act was stated in Commonwealth v. Moon, 383 Pa. 18, 28, 117 A.2d 96, 102 (1955), as being ". . . the degree or extent to which the mind is affected by the mental disorder and not the bare existence of symptoms which would induce a psychiatrist to diagnose a mental illness."

9. Mr. Chief Justice Bell, in his dissenting and concurring opinion in Commonwealth v. Moon, 383 Pa. 18, 31, 117 A.2d 96, 103 (1955), stated ". . . the test applicable for a continuance because of alleged insanity or mental incapacity is . . . the ability of the accused . . . to make or aid his counsel in making a proper defense."

is otherwise one that does not require commitment under the Act, may be nevertheless incapable of assisting counsel in presenting his defense.[10]

Relator was admittedly outside the first criterion of the common law test since he admitted that he was completely sane and able to comprehend that he was accused of the crime of murder. The majority further concluded that he was as able to cooperate with counsel as is one who claims to have been intoxicated at the time of the incident in question. Consequently, the court affirmed the lower court's order dismissing relator's pretrial petition and relator was held for trial.

One cannot readily differ with the court's reasoning regarding the inapplicability of the Mental Health Act standards to the facts. A more difficult problem, however, is raised regarding the correct application of the common law test, or in the alternative, the validity of the test itself. The question of the amnesic defendant's ability to cooperate with counsel in making a rational defense is one not easily answered. To further complicate a resolution of the issue, it must be recognized that recent decisions of the United States Supreme Court designed to protect the fundamental right of the accused to be *effectively* represented by counsel[11] should have been considered by this court in reaching its conclusions.[12]

As recently as 1959, in the case of *Regina v. Podola*,[13] the defendant argued that hysterical amnesia which caused a total loss of memory of the period surrounding the crime ". . . rendered him unable to properly instruct his advisers, with the consequence that he could not make 'a proper defence' " although there was no suggestion that his mind in other respects was not completely normal.[14] The English court, in rejecting this reasoning, stated that the accused was physically and mentally capable of instructing counsel as to what defense to make even though that defense had the peculiarity of including in it features which the accused had entirely forgotten.[15]

10. Mr. Chief Justice Bell stated in *Price* that ". . . *it is possible there may be reasons for a stay of proceedings*, other than that of statutory mental illness." Commonwealth *ex rel.* Cummins v. Price, 421 Pa. 396, 406, 218 A.2d 758, 763 (1966). See Slough & Wilson, *Mental Capacity to Stand Trial*, 21 U. PITT. L. REV. 593, 597 (1960).

11. Mr. Justice Douglas, concurring in Spano v. New York, 360 U.S. 315, 325 (1958), implied that the criminal defendant has this fundamental right to the ". . . *effective* representation of counsel." (Emphasis added.) While the decision in *Spano* turned on facts unrelated to *Price*, it is judicial recognition of the petitioner's right to effective representation of counsel. The relevant question is whether counsel is able to effectively represent the petitioner when the latter is incapable of assisting counsel because of a total loss of memory.

12. Justice Cohen, dissenting in *Price*, stated ". . . that the constitutional right to counsel would be a sham if defense counsel were not able to prepare a proper defense." Commonwealth *ex rel.* Cummins v. Price, 421 Pa. 396, 408, 218 A.2d 758, 764 (1966).

13. [1959] 3 All. E.R. 418.

14. *Id.* at 430.

15. *Id.* at 432.

The result of a strict application of the *Podola* rule may be inconsistent with the policy factors underlying the recent "right to counsel" cases as well as those which led the courts to establish a test of the accused's mental ability to stand trial.[16] Consequently, a functional approach to an application of the common law test has been suggested.[17] Under this view the emphasis is placed on the defendant's *actual mental ability to assist in his own defense*, rather than on the presence or absence of a narrowly defined mental disorder.[18] Notwithstanding these factors, the *Podola* rule is the view adopted by the majority of the jurisdictions which have considered the question.

On the other hand, as the court in *Price* notes, it would be unrealistic for the law to permanently release a defendant, against whom a prima facie case of murder has been established without acquittal unless the defendant is "legally insane."[19] The disadvantages to an amnesic defendant of a denial of his pretrial request for a stay in the proceedings,[20] *vis-à-vis* the undesirable effects of a delegation of judicial and legislative functions to experts in psychiatry[21] presents an equally difficult question for judicial determination. Moreover, the necessity for a prompt and orderly administration of criminal justice suggests that amnesic defendants resort to less dilatory methods than a stay in the proceedings. Some remedies that have been suggested include opening to the accused discovery procedures not normally available to criminal defendants and restricting the admission of certain evidence by the prosecution.[22]

Looking to the present state of the law with its increasing emphasis on safe-guarding the constitutional rights of the accused, especially the right to counsel, the court would do well to heed the warning expressed by Justice Cohen in his dissent and arrive at some solution which would primarily emphasize protection of all the constitutional rights of the amnesic defendant and only secondarily concern itself with those procedural pre-trial remedies[23] which are presumably less radical than those sought by the relator in the present action.

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16. Note, 71 YALE L.J. 109, 116 (1960).

17. *Id.* at 116-18.

18. Note, 71 YALE L.J. 109, 117 & nn.43 & 44 (1960). See generally, Oliver, *Judicial Hearings to Determine Mental Competency to Stand Trial*, 39 F.R.D. 523, 537-52 (1965).

19. Commonwealth *ex rel.* Cummins v. Price, 421 Pa. 396, 407, 218 A.2d 758, 763 (1966).

20. Slough & Wilson, *supra* note 11, at 601.

21. Note, 71 YALE L.J. 109, 129-30 (1960).

22. Note, 71 YALE L.J. 109, 132-36 & n.110 (1960).

23. See Note, 71 YALE L.J. 109 n.59 for authority to support granting reasonable continuances "when it is shown by competent medical testimony that amnesia is no more than temporary."