Minutes of Meeting

Date of Meeting: December 18-19, 1959

Date of Memo: December 11, 1959

Memorandum No. 12

Subject: Study No. 23 - Rescission of Contracts

Our consultant submitted a study pointing out that there are three methods of rescinding a contract: (1) the parties may agree to rescind; (2) for certain reasons, a party may give notice and return the consideration and thereby effect a rescission; and (3) an action may be brought to have a contract rescinded.

For historical reasons, an action to enforce an out-of-court rescission is regarded as a legal action; an action to obtain a rescission is equitable. Unfortunately, the grounds for out of court rescission are not identical with the grounds for judicial rescission. A jury trial is available only in an action to enforce an out of court rescission; and, under the California cases, a plaintiff can, at his whim, cast his action as a jury or non-jury case. A plaintiff can under certain circumstances set his own statute of limitations by giving notice and bringing action to enforce the out-of-court rescission. Laches is a defense to a court rescission, but not to an action to enforce out-of-court rescission. Attachment is available in an action to enforce out-of-court rescission, but cannot be used in an action to obtain rescission.

The foregoing are some of the major problems revealed by the

consultant. There are more. To solve them, the consultant recommended the abolition of unilateral out-of-court rescission and modification of the law relating to actions to obtain rescission. With considerable disagreement, the Commission rejected the consultant's proposed statutes and, at the meeting in June, 1958, approved the retention of unilateral out-of-court rescission. Certain statutes, proposed by Mr. Levit, were approved, and the executive secretary was asked to prepare draft statutes to carry out the principle that both unilateral out-of-court and judicial rescission would be retained. No action was taken on the problem of rescission of a release, one of the problems revealed by the consultant's study.

At the meeting of July, 1958, the executive secretary submitted all of the statutes relating to rescission as they would be if the Commission's recommendations were approved. Certain deficiencies and ambiguities in the statutory scheme were pointed out. The Chairman, too, submitted some proposed changes together with an argument in support of the Commission's decision to retain unilateral out-of-court rescission. After considerable discussion it was agreed that agreement was unlikely in the near future; accordingly the Commission unanimously approved a motion (by Mr. Gustafson) to postpone further consideration of the study until work on the 1959 legislative program was completed.

Now before the Commission is the question of how to proceed. One way would be to begin with the consultant's recommendations again and treat the entire matter de novo. Another way would be to accept the decisions made so far and to consider the proposed changes.

In view of the personnel changes that have occurred since the study

was last considered, and in view of the impasse reached at that time, it is the recommendation of the staff that the Commission consider the study de novo, considering the basic policy decisions involved first, and then working out a statute.

December 1, 1959

A STUDY TO DETERMINE WHETHER THE LAW RESPECTING POST-CONVICTION SANITY HEARINGS SHOULD BE REVISED*

*This study was made at the direction of the California Law Revision Commission by Professor David W. Louisell of the School of Law (Boalt Hall), University of California at Berkeley.

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A STUDY TO DETERMINE WHETHER THE LAW RESPECTING POST-CONVICTION SANITY HEARINGS SHOULD BE REVISED.*

California law, like the law of other common law jurisdictions, provides that a person who is insane cannot be punished. This rule is well established, and its soundness in logic and policy are beyond the scope of the inquiry here. But the procedure for determining whether a prisoner is indeed insane presents troublesome problems. The purpose of this study is to review the present procedure by which this determination is made and to explore the necessity for its change.

The Scope and Purpose of the Rule Exempting the Insane from Punishment

It is familiar that mental illness in certain circumstances relieves an accused from responsibility.[1] Speaking very generally, the theory underlying this rule is that imposition of criminal sanctions is not justified if the person against whom they are applied was incapable of responsible action. It is also familiar that if a defendant becomes disabled by mental illness during the proceedings against him, the proceedings are abated.[2] The theory underlying this rule is that a defendant should not be put to trial when his mental condition prevents him from making an effective defense. The law, however, recognizes mental condition or "insanity" as affecting criminal liability in a third way, namely, by providing that a defendant who is insane

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may not be punished. As will be seen presently, the theory underlying this rule is far from clear.

The second and third rules regarding insanity are stated in Penal Code Section 1367, which provides as follows:

> A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane.

The statute appears to be broader than the common law rule. At common law no person could be executed who was insane; but the common law rule made no mention of prison sentences.[3] In point of fact, the statutory broadening of the exemption rule seems to have little practical effect because the claim of insanity is almost always asserted by defendants who have been sentenced to death. Apparently the terrors of bedlam exceed those of prison, though not those of hell. Indeed, so uniform is this experience that for practical purposes we can think of the rule in its common law form as an exemption from capital punishment.

Both the common law and the statute provide an exemption which lasts only as long as the convict remains insane. Once he regains his sanity he again becomes subject to punishment and normal routine calls for setting a new execution date.[4] In the determination both of post-conviction insanity and restoration to sanity, therefore, there is at stake the ultimate issue of life and death. The pressure imposed on the procedural structure is accordingly at extremity.

Such, then, is the scope of the rule exempting an insane prisoner from punishment. When we seek the purpose of the rule we are met with diverse explanations of varying persuasiveness. The very multiplicity of explanations suggests that the rule may have been devised to meet an earlier

theoretical or practical need and has survived the obsolescence of the originating cause.[5] It is, nevertheless, necessary to explore the purpose of the exemption, for only when its importance is correctly gauged can we decide what degree of procedural thoroughness should accompany application of the rule.

The traditional explanations of the rule are found in the writings of the old common law commentators. These sources are conveniently collected in Mr. Justice Frankfurter's opinion in Solesbee v. Balkcom.[6] No other explanations seem to have been offered by criminal law writers.

Blackstone and Hale explained the rule by saying that if the defendant is sane he might urge some reason why the sentence should not be carried out. While there is perhaps some substance to this suggestion, it is not very weighty. In the first place, the same reasoning would be sufficient to postpone indefinitely the execution of a sane man, for if it be assumed that sober reflection will disclose reasons for stay, then time for reflection should be allowed the sane as well. It must be remembered that, by hypothesis, the defendant has been sane throughout the proceedings against him up to and including the pronouncement of sentence. The only justification for allowing a postponement of execution because insanity then supervenes is to suppose that a reason not previously considered will suddenly come to mind. This possibility seems so small as to be more argumentative then persuasive. While it is perhaps impossible to characterize any factor as de minimis when set against human life, the reality of this explanation for the rule is dubious.[7]

Blackstone offered an additional reason for the rule, namely that the prisoner's insanity is itself sufficient punishment.[8] This is a completely

untenable basis for the exemption rule. By the rule's own terms, when the insanity is cured the prisoner, far from having served out his punishment, is forthwith taken to the execution chamber.

Coke offered a different explanation for the rule. He states that the rule is one of humanity, a refusal to take the life of the unfortunate prisoner. Coke's theory may be interpreted as stopping at this point and going no further. A similar notion seems to underlie all modern defenses of the exemption rule. Taken in this form, however, the explanation will not survive analysis. On the contrary, it is nothing less than an oblique attack on the death penalty itself, for all the objections to executing an insane man are the same as, but less persuasive than, the objections to executing a sane man. As Mr. Justice Traynor put it:

> Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment of sane men, a curious reasoning that would free a man from capital punishment only if he is not in full possession of his senses?[9]

But Coke's theory seems to have a further implication than merely the objection to taking human life. Coke has it that taking the human life of an insane person does not serve as an example to others.[10] Just what Coke meant by this is not completely clear, but one cogent explanation is suggested by Sir Hawles when he says that the King is not benefited by the death of one of his subjects unless that death serves to deter others from committing the same crime.[11] In other words, Coke can be taken as suggesting that there is no deterrent value in executing the insane person and hence we may spare his life without weakening the deterrent effect of the death penalty.

This explanation closely resembles the rationale underlying the im-

position of lesser penalties on attempts than on offenses successfully executed.[12] First, the public, though angered by the prisoner's crime, takes pity on his present insane condition and hence probably will not tolerate executing him.[13] Since penal sanctions cannot far outrun public opinion, this is a major consideration underlying the rule. Secondly, the offender cannot, at the time he is about to commit the crime, foresee that after capture, conviction and sentence, he will become insane. On the contrary, he either supposes he will not be caught or is indifferent to the consequences if he is. Hence, it does not materially dilute the deterrent effect of the death penalty to withhold it if the prisoner becomes insane. And since there is no deterrent effect in executing him, we take life unnecessarily if we do so.

This basis for the rule is satisfactory as long as we suppose that the defendant becomes permanently insane. But such is not always the case and, indeed, is probably unusual. Rather, there remains the possibility that recovery will follow. And when it does, execution follows too. Doubtless the only sound reason for imposing death at this point is to assure that insanity will not be feigned in the first place. But the fact that most who become insane will recover and all who recover will be executed means that the rule has only a limited effect to avoid unnecessary deaths. Viewed in this light, the rule exempting the insane from capital punishment does not rest on any claim which the prisoner puts forward, such as a right to a fair trial. It is a claim put forward by society, a claim to minimize the occasions on which it undergoes the distress of exacting the death penalty. So considered, the rule does not necessarily carry with it a demand that it be accurately and fully applied to every prisoner claiming

its benefit. The purpose of the inquiry is not to make sure that a defendant's right is vindicated, for no right of his is involved. The inquiry need only satisfy society that it is not missing an opportunity to withhold the death penalty.[14]

There is one other basis on which the exemption rule is traditionally explained, and that assumes retribution to be one objective of punishment. In this connection, "retribution" does not mean vengeance. Although the desire for vengeance doubtless explains why the death penalty exists, it is immaterial for vengeance whether the defendant is sane or not: the important thing is to exterminate the wrongdoer. But "retribution" is frequently used in a sense different from vengeance, and if so used it is relevant to the exemption rule. This is the theory that each wrong must be offset by a punitive act of the same quality. Presumably killing an insane person does not have the same moral quality as killing a sane one, and hence it might be concluded that it is improper to exact the death sentence when the prisoner is insane, for then a punishment of lesser value is being imposed. The retributive theory is also stated in another way, namely that the prisoner's death is an expiation for his crime. Put into modern psychological terms, this theory justifies the death penalty as a vicarious punishment for crimes committed vicariously; punishment gives the law-abiding a release. For the psychological explanation to have basis, however, the public must be able to identify with the prisoner, and this they cannot do if he is insane. But the rationale based on the retributive theory, in its several variations, lasts only so long as the prisoner remains insane. Once he recovers his sanity, the reason for the rule disappears.

Another possible reason for the rule of exemption is essentially

theological, namely, that a person should not be put to death while insane because in that condition he is unable to make his peace with God.[15] This thinking seems at least implicit in the writings of St. Thomas Aquinas.[16] It is memorably put by Shakespeare where he has Hamlet overtake his uncle while at prayer, and decide not to work his vengeance then and send his uncle to heaven, whereas his father had been murdered "with all his crimes broad blown":

> Now might I do it pat, now he is praying;
> And now I'll do't: and so he goes to heaven:
> And so am I revenged. That would be scann'd:
> A villain kills my father; and for that,
> I, his sole son, do this same villain send
> To heaven.
> O, this is hire and salary, not revenge.
> He took my father grossly, full of bread,
> With all his crimes broad blown, as flush as May;
> And how his audit stands who knows save heaven?
> But in our circumstance and course of thought,
> 'Tis heavy with him: and am I then revenged,
> To take him in the purging of his soul,
> When he is fit and season'd for his passage?
> No.
> Up, sword, and know thou a more horrid hent:
> When he is drunk asleep, or in his rage,
> Or in the incestuous pleasure of his bed;
> At game, a-swearing, or about some act
> That has no relish of salvation in 't;
> Then trip him, that his heels may kick at heaven
> And that his soul may be as damn'd and black
> As hell, whereto it goes. My mother stays;
> This physic but prolongs thy sickly days.[17]

This ground of exemption was much debated in England when capital punishment was being reconsidered there, and no clear-cut answer was forthcoming. On the one hand, it was argued that the insane must be restored to sanity in order to make his peace; on the other, it was urged by Archbishop William Temple that "It is quite impossible to believe that eternal destiny depends in any degree on the frame of mind you were in at the particular

moment [of death] rather than on the general tenor of the life."[18] This accentuates the difficulty, in a society as theologically pluralistic as ours, of appraising the significance of this ground as a reason for the rule of exemption. Moreover, granting the validity of the ground, its relationship to the procedural problem is perhaps so complex as to be unmanageable. A human determination of sanity or insanity, even after the most searching inquiry with modern psychiatric techniques available, hardly rises to the level of moral certainty--many would call it only a guess. And whether capacity is such as to permit true repentance is a question that ultimately is for God alone.

There seem to be no other tenable explanations for the exemption rule.[19] The most acceptable explanation for the rule is simply that it is unnecessary to put the insane prisoner to death. The reason for putting him to death when he recovers is to prevent feigned insanity as a means of escape from the death penalty which society has felt it necessary to impose. Inquiries beyond this point, to reiterate, involve attacks upon capital punishment itself. It seems evident that the uneasiness manifested in applying the insanity exemption is uneasiness over the death penalty, which is so plainly put on the line in these insanity proceedings. To the proceedings themselves we now turn.

The Procedure for Trying the Claim of Exemption

The common law had no established procedure for trying a claim that the defendant had become insane after conviction. The issue was raised by a suggestion to the court, presumably by simple motion. If the court thought the suggestion had enough merit to warrant further inquiry, it could hold a preliminary hearing to determine whether a prima facie case of

insanity was made out. The judge could then impanel a jury to try the issue. On the other hand, it was apparently within his discretion to try the issue himself. As summed up in Nobles v. Georgia:[20]

> By the common law, if, after conviction and sentence, a suggestion of insanity was made, not that the judge to whom it was made should, as a matter of right, proceed to summon a jury and have another trial, but that he should take such action as, in his discretion, he deemed best.[21]

The common law rule is still in effect in some states,[22] but in many others it has been supplemented or superseded by a statutory procedure of various sorts.[23] The statutory procedures vary in their provisions.[24] The variations occur in respect of both of the principal procedural issues involved, namely who may raise the issue of the prisoner's insanity and who shall decide the issue after it has been raised. The first of these two issues is by far the more significant, and involves two steps of inquiry: who is a proper party to raise the issue and, if such a party raises the issue, is he entitled as a matter of right to a hearing on his contention.

At common law, as we have seen, any person could raise the issue by suggesting to the court that the prisoner had become insane. Such is the rule by statute in many states. In some states, defendant's counsel or his next friend could raise the question. In practice, all these devices seem to be the same, for the only person who will approach the court with a suggestion of defendant's insanity is his attorney, some member of his family or a friend. For convenience, we may say that in these jurisdictions the defendant has the right to raise the issue.

In the majority of states, the issue may be raised only by the sheriff or warden having custody of the prisoner. In most states it appears to be unsettled whether mandamus will lie against a warden who is alleged to have

wrongfully refused to initiate the inquiry. In one state, it was held that mandamus would lie for this purpose, but the showing required was such that, for practical purposes, the applicant for mandamus can compel a hearing only by making a prima facie case in his application papers.[25]

The second step is to inquire whether the person raising the issue is entitled as a matter of right to a full hearing on the merits of the issue. Under the statutes providing that the warden is the proper person to raise the issue, the trial is held, of course. However, under the statutes providing that defendant can raise the issue, it appears that nowhere is there a right to a trial as a matter of course. On the contrary, in these jurisdictions a trial is held only if the defendant accompanies his suggestion of insanity with prima facie evidence of that fact. In practical effect, therefore, the issue is tried only if the judge has reason to believe that the prisoner is insane.[26]

The second aspect of the hearing procedure is the mode of trial. In the jurisdictions where the inquiry is initiated by the warden, the trial is frequently conducted to a specially summoned jury in an inquest at which the warden presides. In other jurisdictions, the warden merely applies to the appropriate trial court, and the court conducts the hearing. In jurisdictions where the inquiry is initiated by suggestion to the court, the judge presides. The issue may be tried to a jury or to the court; some states require jury trial, some permit it, others are silent on the subject. Even in states where a jury trial is not required, it appears to be the practice to have the issue tried to a jury.[27]

It is evident from the foregoing that no state confers a right on the prisoner to have a trial of the issue of his present sanity. Rather, the decision whether there will be a trial is vested either in the warden

or in the trial judge.

In California, the procedure for determining a prisoner's present insanity is set forth in Penal Code Sections 3700 to 3704. Section 3700 provides that the procedure contained in the ensuing sections is exclusive.[28] Section 3701 provides that if the warden has "good reason to believe"[29] that the prisoner is insane, he shall cause a proceeding of inquiry to be commenced. The court then summons a jury and conducts the trial. A verdict by three-fourths of the jury is sufficient to determine the issue.[30] If the jury finds that defendant is insane, he is taken to the appropriate mental hospital; if found sane, he is given over to the warden for execution.[31]

California Penal Code Section 3702 has a provision which has caused some difficulties. This section requires the district attorney of the county where the prison is located (Marin County) to attend the proceedings. It then goes on to provide that the district attorney can subpoena witnesses "in the same manner as for witnesses to attend before a grand jury." The meaning and purpose of this language are not clear. The California Supreme Court has taken it as implying that the proceeding is ex parte, rather like the kind of inquest made by a grand jury. As it said in People v. Riley:[32]

> The prescribed inquiry does not purport to be a true adversary proceeding surrounded by all the safeguards and requirements of a common-law jury. . . . No provision is made for the assignment of counsel or notice of hearing to the defendant, but only the district attorney is required to attend the hearing. (Pen. Code, sec. 3702.) Likewise, it is the district attorney who may produce witnesses . . . Such provisions--wherein no reference is made to any right of the defendant to be represented by counsel, to cross-examine witnesses, or to offer evidence--indicate a. . . procedure . . . akin to an ex parte inquiry.[33]

With all due respect to the Supreme Court, this seems a great deal to read into Section 3702. All that section says is that the district attorney

must attend and that he may subpoena witnesses. To be sure, this manner of issuing subpoenas is like that in grand jury proceedings, but it doesn't follow at all that other aspects of the proceeding also resemble a grand jury proceeding. Bearing in mind that we are dealing with a problem of statutory interpretation, it would seem that there is little in the statutory language and apparently no legislative history to support the court's interpretation.

An interpretation at least equally plausible is that the hearing is a special proceeding[34] and as such affords the prisoner all the rights he has in an ordinary civil case. Among these are the right to reasonable notice, the right to counsel (though not the right to publicly compensated counsel, as in a criminal case), the right to produce witnesses, by subpoena if necessary, and the right to examine and cross-examine witnesses. Of course, the structure of our civil procedure statutes is such that the foregoing procedural rights are inseparably connected with the right of appeal. It may be suggested that the real reason for the language in the Riley case was not a desire to deprive the prisoner of an effective hearing but to forestall time-consuming appeals. This is quite another problem, which could well be remedied by legislation.

Apart from the understandable desire to foreclose dilatory appeals, the court's approach in People v. Riley seems poor statutory interpretation and poor public policy. We may agree that the warden should be given the only key to the courthouse. But if he uses the key, there is no reason at all why the ensuing trial should not be a full and fair one.[35] At any rate, the present interpretation of Penal Code Sections 3700-3704 is that the hearing is ex parte only. As indicated, no appeal lies.

On the issue of restoration to sanity the procedural protections afforded the prisoner are substantially greater. Whether a prisoner, found insane in the manner described above, has been restored to sanity is determined by the procedure set forth in Penal Code Section 3704.[36] In this hearing, defendant is required to be given written notice of the hearing and counsel must be appointed for him. The issue of restoration to sanity is tried to the court without a jury. If restoration is found, the prisoner is delivered up for execution; otherwise, he is returned to the mental hospital.

This, in brief, is the California procedure for trying the claim of exemption. One anomaly is that the statutory procedure seems to apply only to cases where the defendant is sentenced to death, for Section 3701 of the Penal Code refers only to that situation. It has been noted above that the claim of insanity by prisoners under sentences of less than death is largely or entirely academic, because in point of fact they never seem to raise the issue. It seems clear that the prisoner should be released from prison in such circumstances and transferred to the mental hospital.[37] Should the problem arise as to the appropriate procedure to be followed, no doubt the proper thing to do would be to follow the common law procedure.[38]

The Test of Insanity Used in the Exemption Claim

It will be noticed that there has been no discussion of the test of insanity used in connection with the exemption claim. On this subject the common law was exceedingly vague and the California statute is silent. Both have referred to the problem as simply one of determining "insanity" without serious concern about definitions. The sensitivity to the definitional

problem developed in the recurring debate over M'Naughton rule's soundness makes it appropriate that attention be paid to the definition used for purposes of the exemption claim.

The meager authority indicates that the common law test of insanity is whether the defendant is aware of the fact that he has been convicted and that he is to be executed.[39] Sometimes this is stated as whether he is "aware of the proceedings against him." This is strikingly similar to the test used in connection with the claim of insanity at the time of trial, and it is difficult not to suspect that the test for the latter was simply carried over into the exemption context.[40] In any event, it is not at all clear that this is an appropriate test.

The only considered discussion of the test that should be used appears in a comment in the Southern California Law Review,[41] which reads as follows:

> If . . . punishment is an act of vengeance, then the prisoner's ability to appreciate his impending fate would seem to be the standard . . . . If the policy [underlying the exemption] is based on the right of the defendant to make his peace with God, then a realization of his original guilt should be added to the test. If the reason is that he should have an opportunity to suggest items in extenuation or make arguments for executive clemency, then the standard should probably involve intelligence factors as well as moral awareness.[42]

Implicit in this analysis is that the test of insanity to be used should depend on the purpose of punishment. The purpose of the exemption and its relation to the objectives of punishment have already been explored above. It will be recalled that the conclusion reached there was that the exemption could not be successfully linked to any of the bases of punishment, but is explainable only as a means of avoiding the unnecessary taking of life. If this is true, then the appropriate test of insanity to be used is one

which is broad enough to allow maximum exemptions and yet narrow enough to prevent feigning of insanity. Such a test, it would appear, would be simply whether the defendant's condition is such that, by ordinary standards, he would be committable to an institution. This standard can hardly be thought too broad, for it is the basis we presently use for involuntary treatment of mental illness. Its familiarity to the courts and psychiatrists should reduce to a minimum the opportunities for deception. Finally, since it stays within the realm of medical discourse, it does not involve the conceptual and practical problems which arise when, as in M'Naughton, an attempt is made to define insanity in a way that is significant legally but discordant with prevailing medical thought.[43]

There seem to be no serious difficulties arising from application of such a test. The matter appears to be wholly within the legislature's discretion, for, as we shall see, such constitutional problems as there are have been procedural and not substantive. To those problems we now give consideration.

Constitutional Requirements in Hearings on Exemption Claims

The constitutional problem involved in the exemption rule is whether the Due Process Clause imposes any obligation on the states to grant a hearing on a prisoner's claim of insanity, and, if so, what kind of hearing. The question was posed for the first time a half century ago in Nobles v. Georgia.[44] There, the defendant had been convicted of murder and sentenced to death. The Georgia statute provided that the insanity issue was determined by a jury inquest conducted by and on the initiative of the warden or

sheriff having custody of the defendant. Defendant asserted a right to have her claim heard by a jury. The Supreme Court upheld the state court's dismissal of defendant's petition for a hearing.

The court said that a jury trial was unnecessary. Whether its decision is any broader than this has been disputed. The reasoning used makes it clear that the state need do no more than impose responsibility on some appropriate official to conduct an inquiry into defendant's sanity when it seems to be necessary or appropriate. This result appears to be the necessary implication of the reductio argument used by the court, as follows:

> If it were true that at common law a suggestion of insanity after sentence, created on the part of the convict an absolute right to a trial of this issue by a judge and jury, then (as a finding that insanity did not exist at one time would not be the thing adjudged as to its non-existence at another) it would be wholly at the will of a convict to suffer any punishment whatsoever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.[45]

It will be seen that the force of this argument is quite unaffected by the nature of the hearing conducted, whether it be jury trial, trial to the court alone or administrative determination. The argument is directed against the right to a hearing of any kind, and it is not unduly latitudinarian to read the Nobles case as deciding that there is indeed no such right.

Whatever the scope of the Nobles decision, it apparently stifled constitutional objections to exemption procedures for fifty years. In the meantime, California adopted its present procedure for trying the issue. It is worthy of note that from the statute's adoption in 1905 to 1947, the warden's discretion had gone unchallenged.[46] In 1947, the Phyle litigation got under way. For procedural reasons Phyle was never able to get the United

States Supreme Court to decide his claim that he had a right to a hearing on the issue of his present sanity.[47] The decisive test of the constitutional issue came up shortly afterward, however, in the case of Solesbee v. Balkcom.[48]

The Solesbee case was a habeas corpus proceeding in behalf of a convicted Georgia murderer claiming present insanity. Under the then prevailing Georgia procedure, that issue was determined ex parte by the governor. It was contended that the prisoner had a right to have his sanity determined by a "judicial or administrative tribunal after notice and hearings at which he could be represented by counsel, cross-examine witnesses and offer evidence."[49] With only Mr. Justice Frankfurter dissenting, the Supreme Court rejected this contention, stating that the exemption for insanity was a matter of grace, not of right, and that accordingly the state was under no obligation to provide a hearing. The court said that the Nobles case stands for the proposition that "the tribunal charged with responsibility must be vested with broad discretion in deciding whether evidence shall be heard."[50]

The Solesbee case seemed to have been dispositive of any objections to the California procedure. The next challenge to that procedure came in Caritativo v. Teets.[51] In that case, the California Supreme Court held that, in the light of Penal Code Section 3700, the courts had no jurisdiction to inquire into the prisoner's insanity except in a proceeding initiated by the warden pursuant to Penal Code Sections 3701-3704. It expressly disapproved suggestions to the contrary in Phyle v. Duffy.[52] In a per curiam opinion, the United States Supreme Court affirmed, citing the Solesbee case.[53] This time, three judges dissented. Mr. Justice Harlan concurred in an opinion in which he treated the California statute as imposing on the warden "a mandatory duty to make a continuing check on the mental condition of condemned prisoners

and to notify the district attorney whenever he finds grounds for belief that a prisoner has become insane."[54] The exercise of this duty, said Mr. Justice Harlan, had to be "responsible and in good faith."[55]

In dissent, Mr. Justice Frankfurter urged that the warden's good faith was impugned by the fact that he had refused to allow an outside psychiatrist to examine the prisoner and had refused to allow counsel to inspect the prison's psychiatric records. Mr. Justice Frankfurter did not urge that a judicial hearing should be required nor that the warden was necessarily an inappropriate officer to make the preliminary determination of whether a plenary hearing should be held. But he said:

> I do insist on the mandatory requirement that some procedure be established for assuring that the warden give ear to a claim that the circumstances warrant his submission of the issue of sanity to a determination in accordance with the procedure set forth in the California statutes.[56]

He went on to reiterate his point, that the due process gave the prisoner a right to be heard by the warden on the issue whether there is "good cause" to believe him to be insane.

The foregoing is the present posture of the constitutional law on the problem. In view of divisions in the Supreme Court and the charged character of the issue involved, it cannot be said with assurance that the constitutional issue has been put to rest. But taking due account of the difficulties of forecasting constitutional decisions, it would appear that California's present procedure will survive any foreseeable challenge. Of course, any procedure involving greater procedural protection to the prisoner would also satisfy the requirements of due process.[57] It is, however, very difficult to know what procedure would satisfy Mr. Justice Frankfurter, and yet also avoid interminable delay. This, as the Supreme

Court recognized in the Nobles case, is the real objection to broadening the procedural remedies available to a prisoner claiming the insanity exemption. This practical problem deserves a little elaboration.

The Practical Dilemma Involved in Liberalizing the Procedure

The recent broadening of the constitutional protections afforded criminal defendants is well known. Equally well known is the almost limitless resourcefulness of prisoners in resurrecting (and sometimes simply erecting) new reasons why their imprisonment is a deprivation of due process.[58] Because the courts, and especially the United States Supreme Court, are reluctant to close the door to a prisoner claiming his rights have been violated, the prosecution is rarely able to say that all possible objections to a conviction have been put to rest. So the recent habeas corpus cases demonstrate that the fear of interminable litigation in insanity claims is not an idle one.

But the case of the claimed insanity exemption is more difficult than the habeas corpus cases. However long the habeas corpus struggle may last, it always turns on the issues presented by the original conviction. With perhaps a rare exception, no new events occur to create new issues. And so there is the theoretical and real possibility that some day the litigation will come to an end. This is not true, however, in the case of the insanity exemption. By definition, the exemption applies at the time of execution. Obviously, the determination of sanity has to be made before execution. Therefore, the determination of sanity can never be made as of the time that it becomes legally relevant. Hence, the legal issue required to be

decided--insanity at the time of execution--literally can never be determined.

The practical problem thus posed cannot be avoided; it is inherent in the statement of the legal rule. Yet no revision of the legal rule is feasible, for a rule that said "No person shall be executed who is insane 10 days before the date of his execution" is probably meaningless and certainly purposeless. This practical difficulty has been repeatedly recognized by the courts and is neatly summed up thusly:

> Some unreviewable discretion must ultimately be permitted the executing officer.[59]

None of the judges who have held out for a right to some sort of hearing on the claim of insanity seem to have faced up to this difficulty. Mr. Justice Frankfurter has said that "claims obviously frivolous need of course not be heard,"[60] yet he also tells us that without a hearing it cannot be said that a claim is frivolous.[61] Perhaps Mr. Justice Frankfurter would concede that no new hearing need be given to a prisoner whose claim has just been rejected. But "just" rejected means, with appellate review, six months to two years before, and it surely cannot be said that insanity could not supervene in that interval.[62] Hence, we are left with the choice of allowing one hearing, knowing it will be inconclusive, or falling back on administrative discretion. The only alternative is an infinite procedural regression.

The practical dilemma does not necessarily mean that one plenary hearing would be senseless, nor that we might not spell out in some detail the care which the warden should take in exercising his discretion. But these are relatively minor matters which fall into place rather quickly, once the real nature of the choice is recognized.

There seems no practical reason for conferring on a prisoner the right to have one plenary hearing. As indicated, the hearing would be indecisive at best. Rather, the heart of the problem is reached only by trying to make sure that the warden or other official vested with the necessary discretion exercises that discretion reasonably and carefully. The warden seems to be the proper person to make the decision.[63] But the warden would be less than human if he did not lose patience with prisoners making claims of insanity of the type which have been made in the past. It is understandable that the warden, if he suspected the claim to be spurious, might slough off evidence of dubious value but value nonetheless. Hence, it may be advisable to make mandatory routine by which the warden should exercise his discretion. Thus, he might be required to permit one examination of the prisoner by a limited number of outside psychiatrists of the prisoner's choice, to receive and review reports by the outside psychiatrists and to receive affidavits or other documentary evidence submitted to him. Delay could be avoided by requiring the warden to fix the date of execution no less than 30 days in advance and to provide that all material desired to be submitted must be given the warden no less than 15 days prior to the execution date. Needless to say, the details might be varied. In principle, however, this seems to be the only feasible solution.

Finally, it would seem advisable to provide that if the warden does initiate a proceeding, the prisoner should have reasonable notice, the right to counsel, the right to compulsory process for witnesses and the other procedural rights associated with a civil trial. Because the issues are relatively simple, the possibility of error is limited. Since the right of appeal is the procedural device perhaps most frequently used for delay,

it would appear wise, all things considered, to curtail the right--perhaps by making appeal discretionary.

Summary and Conclusions

1. The purpose of the rule exempting insane prisoners from punishment is to avoid imposing unnecessary punishment.

2. The nature of the rule makes it impossible to confer on the prisoner a right to a hearing on the claim of insanity without also inviting interminable delay.

(a) Some executive officer must ultimately have discretion to decide whether a hearing should be held.

(b) The warden is an appropriate officer to exercise this discretion, but the way in which he is to proceed in exercising should probably be outlined by statute.

(c) If the warden decides a hearing should be held, it should be plenary and follow the procedure in ordinary civil proceedings.

(d) There should be no appeal of right from a determination in such a proceeding.

3. The test of insanity to be used in applying the exemption rule is whether the prisoner is committable to a mental hospital.

4. The procedure should be made applicable to nondeath penalty cases as well as capital cases.

5. Such a procedure and such a test would be constitutional.

FOOTNOTES

1. See Cal. Pen. Code §§ 26, 1016, 1026. See generally, Comment, Restatement of the Law of Insanity as a Defense in the Criminal Law of California, 27 So. Cal. L. Rev. 181 (1954).

2. This rule applies whether the defendant was insane at the time of the offense and remained insane up to the time when he was brought to trial, or was sane at the time of the offense but became insane prior to his trial.

   The test of insanity applied in determining whether defendant is criminally responsible for his act is the M'Naughton rule, see, e.g., People v. Nash 52 A.C. 35, 338 P.2d 416 (1959). The test applied to determine whether the defendant should stand trial is whether "he is incapable of understanding the nature and object of the proceeding against him and of conducting his defense in a rational manner." People v. Field, 108 Cal. App.2d 496, 238 P.2d 1052 (1951).

3. See Weihofen, Mental Disorder as a Criminal Defense 464 (1954).

4. See In re Phyle, 30 Cal.2d 838, 186 P.2d 134 (1947); Weihofen, op.cit. supra note 3, at 468-69.

5. Compare Holmes, The Common Law 5 (1881):

> A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule is forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.

6. 339 U.S. 9, 17-19 (1950) (dissenting opinion). This is the leading case on the constitutional requirements for the procedure by which the exemption rule is applied. It is discussed below in that connection.

7. See Traynor, J., in Phyle v. Duffy, 34 Cal.2d 144, 158, 208 P.2d 668, 674 (1949) (concurring opinion).

8. The notion is frequently expressed in the Latin, "furiosus solo furore punitur." The same maxim appears in Coke's work.

9. Phyle v. Duffy, 34 Cal.2d 144, 159, 208 P.2d 668, 676-677 (1949) (concurring opinion). It seems worth noting that Mr. Justice Frankfurter, who has been an insistent advocate of a right to hearing on the claim of insanity, is opposed to capital punishment itself. See Frankfurter, Of Laws and Men, 77, 81 (1956).

10. Coke expresses it in the Latin, "ut poena ad paucos, metus ad omnes perveniat."

11. Sir John Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 State Trials 474, 478 (1816), portions of which have been set forth in Mr. Justice Frankfurter's opinion, supra note 6.

12. See Michael and Wechsler, A Rationale of the Law of Homicide, 37 Colum. L. Rev. 701, 1261 (1937):

> In the first place, popular indignation is inevitably aroused by the actual occurrence of a wrong, with the result that death and other very severe penalties are more likely to be tolerated when homicidal behavior has resulted fatally than when it has not. In the second place, the deterrent efficacy of a body of criminal law is not greatly lessened by making the discrimination. Men who may act in order to kill will hope for and contemplate success rather than failure. Consequently, if the prospect of being punished severely if they succeed will not deter them from acting, the prospect of being punished just as

severely if they fail is unlikely to do so. Id. at 1295.

* * *

However, . . . discriminations of this sort . . . make for inequality in the treatment of offenders . . . . [but this] inequality may . . . be preferable to an unnecessary sacrifice of actual offenders for the sake of deterrence. Id. at 1297.

13. This may well be an "inverted" humanitarianism, as Justice Traynor says, but it still seems to be a correct statement of public sentiment.

14. The conclusion stated in the text, that the claim to avoidance of the death penalty is really the public's and not the prisoner's, while perhaps startling, is easier to accept in view of the paucity of reasons offered in support of the prisoner's case. Despite his intense interest in the problem and his enormous acuity, Mr. Justice Frankfurter could come up with no more forceful argument than those of the old commentators and the historical argument that the rule had always been so. He sought recourse in an unsubstantiated and rather unconvincing contention the the Due Process Clause prohibits a state from taking the life of an insane person. See 339 U.S. 9, 19-21 (1950).

15. See Sir John Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 State Trials 474, 477 (Howell ed. 1816).

16. See Secunda Secundae, Question 64, Art. 2, Reply to Second Objection; Summa Contra Gentiles, Book 3, ch. 146.

17. Shakespeare, Hamlet, Prince of Denmark, Act III, Sc. iii, lines 72-96.

18. The story is told in Gowers, A Life for a Life? 44 et seq., 113 et seq. (1956).

19. Recognized purposes of punishment, other than those mentioned in the text, include reformation and incapacitation. Reformation is irrelevant in the present context, because when sane the prisoner will

be executed and when insane he is being cured, not so that he can go out into the community, but so that he can go to the gas chamber. This hardly seems a meaningful basis for reformation. Incapacitation is likewise irrelevant. Incapacitation means safe-keeping, and the prisoner is for all practical purposes as fully incapacitated in a mental hospital as he is in death.

20. 168 U.S. 398 (1897).

21. Id. at 407. For other statements of the common law rule, see Annot. 49 A.L.R. 804 (1927); Weihofen, op. cit. supra note 3, at 465.

22. 339 U.S. at 27 (dissenting opinion); Weihofen, op. cit. supra note 3, at 465.

23. See Weihofen, op. cit. supra note 3, at 465-66.

24. See Weihofen, op. cit. supra note 3, at 465 et seq. for the English procedure, which involves an inquiry on the initiative of the Home Secretary, see Royal Commission on Capital Punishment (1949-1953) pp. 124 et seq. (1953).

25. See Shank v. Todhunter, 189 Ark. 881, 75 S.W.2d 382 (1934).

26. This result has been reached even where the statutory language rather plainly attempted to give the prisoner a right to a trial. See Berger v. People, 123 Colo. 403, 231 P.2d 799 (1951). For cases applying statutes which grant a plenary hearing only if the trial judge is satisfied that there is good cause to make the inquiry, see, e.g., Jackson v. United States, 25 F.2d 549 (D.C. App. 1928); cf. State v. Allen, 204 La. 513, 15 So.2d 870 (1943), applying the statutory procedure for determining sanity at the time of trial to the case

where insanity was claimed after conviction.

27. The reason judges prefer not to try the issue seems to have little to do with a belief that the jury is more competent to decide the question. The reason seems to be that the judges prefer, understandably, to shift responsibility for the decision to the collective shoulders of the jury.

28. Whether the exclusion of other procedures is constitutionally valid has been much mooted in the courts. This problem is considered below in the discussion of the constitutional problems involved.

29. Cal. Pen. Code § 3701 reads as follows:

> If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file . . . a petition . . . asking that the question of his sanity be inquired into . . . .

On its face, this provision suggests that the relation between the warden's custody and the appearance of "good reason" is one of time, i.e., that the warden must act because the "good reason" arises at the time the prisoner is in his custody. Hence, the statute literally seems to mean that "good reason" is not what the warden thinks is good reason, but what a court would think is good reason, at the time the prisoner is in the warden's hands. This is perhaps a theoretical quibble, but in a close case it might make a difference whether the question was, Does the warden think there is good reason?, rather than, Do I, the judge, think there is good reason?

Whatever the apparent meaning of the statute, however, it seems fairly clear that McCracken v. Teets, 41 Cal.2d 648, 262 P.2d 561 (1953), and Caritativo v. Teets, 47 Cal.2d 304, 303 P.2d 339

(1956) interpreted it as meaning that the warden must have good cause to believe defendant to be insane. In effect, therefore, the test is one of the warden's good faith, not the objective significance of the facts claimed to constitute the "good reason."

30. See People v. Riley, 37 Cal.2d 510, 235 P.2d 381 (1951).

31. Cal. Pen. Code §§ 3703, 3704.

32. 37 Cal.2d 510, 235 P.2d 381 (1951).

33. Id. at 515, 235 P.2d at 384.

34. People v. Lawson, 178 Cal. 722, 174 Pac. 885 (1918), had stated generally that the insanity proceeding was a special proceeding. From this it could be easily contended that the prisoner has the usual incidents of a civil trial, viz., right to counsel, right to reasonable notice, right to cross-examine, etc. However, in the Riley case, supra note 32, the court apparently overruled all these possibilities. Apparently this was done to buttress the court's rejection of the prisoner's claim of a right to a trial on his sanity. But, as suggested in the text, it is one thing to say that prisoner has no right to have a trial; it is something else again to say that, if he is to have a trial, it will nevertheless be merely an ex parte hearing. This is to confuse the showing needed to get a trial with the trial itself.

35. One may speculate on what the Legislature intended in providing that the district attorney may subpoena witnesses. It is possible that they reasoned this way: The State is not a party; only parties may subpoena witnesses; therefore, without special provision the State's interest cannot be protected by compulsory process for

witnesses; therefore, we should make such special provision. The most accessible, though perhaps not the most suitable, model for such a provision is to be found in the grand jury practice.

36. Prior to 1949, the statute provided that the fact of restoration is established merely by the certificate of the superintendent of the mental hospital in which the defendant is confined. It was under this prior procedure that the prolonged Phyle litigation arose. After conviction Phyle had been found insane by a jury and committed to a state mental hospital. There, he confessed that he had feigned his insanity. The superintendent promptly certified him to be sane. Phyle and his family fought this determination for the next several years. See Ex parte Phyle, 30 Cal.2d 838, 186 P.2d 134 (1947), cert. dismissed, 334 U.S. 431 (1948); Phyle v. Duffy, 34 Cal.2d 144, 208 P.2d 668 (1949), cert. denied, 338 U.S. 895 (1949); Application of Phyle, 95 F. Supp. 555 (N.D. Cal. 1951). See, generally, Comment, Execution of Insane Persons, 23 So. Cal. L. Rev. 246 (1950).

37. Cal. Pen. Code § 1367.

38. Civil Code Section 22.2 provides that the common law shall be the rule of decision "so far as it is not repugnant to . . . the . . . laws of this State." The common law remedy in the death penalty case seems an apt analogy on which to invoke Section 22.2. There also is authority that a court has inherent power in inquiry into insanity in the death penalty case, a power which would seem available in the non-capital cases as well. See, e.g., Dotson v. State, 6 Wash.2d 696, 108 P.2d 641 (1940).

39. See Commonwealth v. Moon, 383 Pa. 18, 117 A.2d 96 (1955); cf.

People v. Field, 108 Cal. App.2d 496, 238 P.2d 1052 (1951); Weihofen, op. cit. supra note 3, at 464. Compare the different definition offered in Bingham v. State, 82 Okla. Cr.305, 169 P.2d 311, 314 (1946):

> Under the common law the insanity that will preclude the execution means a state of general insanity, the mental powers being wholly obliterated, and a being in that deplorable condition can make no defense whatsoever and has no understanding of the nature of the punishment about to be imposed.

40. Note that Penal Code Section 1367 runs the two together without any indication that a separate test of insanity has been either intended or considered. See also Weihofen, op. cit. supra note 3, at 430-31, where the author equates the problem of insanity at time of trial with that of insanity at time of execution.

41. Comment, Execution of the Insane, 23 So. Cal. L. Rev. 246 (1950).

42. Id. at 256.

43. It is difficult to know how a psychiatrist would go about applying the test stated by the Oklahoma court, supra note 40. It is also difficult to know how a psychiatrist would have any less trouble with the common law test, "understanding the proceedings against him," than he now does with the M'Naughton rule. The law would probably be well advised to avoid the M'Naughton sort of thicket, if at all possible.

The test used in England is the one suggested in the text, namely whether the defendant is certifiable as insane. See Royal Commission on Capital Punishment (1949-1953) 101, 124 et seq. (1953).

Compare Commonwealth v. Moon, 383 Pa. 18, 117 A.2d 96 (1955): The test is whether defendant's "capacity to use his customary self-

control, judgment and discretion had . . . been so lessened that it was necessary or advisable for him to be under care." Id. at 29, 117 A.2d at 102.

44. 168 U.S. 398 (1897).

45. Id. at 405-06 (1897).

46. See Note, Post-Conviction Remedies in California Death Penalty Cases, 11 Stan. L. Rev. 94, 131 (1958). See also People v. Sloper, 198 Cal. 601, 246 Pac. 802 (1926), stating that the courts have no jurisdiction to pass on the insanity issue except in a proceeding initiated by the warden pursuant to Penal Code Sections 3700-3704. For the statutory history prior to 1905, see In re Phyle, 30 Cal.2d 838, 846, 186 P.2d 134 (1947).

47. See note 36 supra. After Phyle had been returned from the mental hospital to prison, he brought habeas corpus claiming that he had a right to a hearing on his restoration to sanity, that returning him to prison without such a hearing was a denial of due process and therefore that his detention in prison was invalid. The California Supreme Court rejected this claim on the ground that the courts had no authority to inquire into the prisoner's sanity except in a proceeding initiated by the warden. It accordingly dismissed the petition. In re Phyle, 30 Cal.2d 838, 186 P.2d 134 (1947).

Phyle appealed to the Supreme Court of the United States, but that court dismissed because it was advised that Phyle should have presented his claim by means of mandamus rather than habeas corpus. Phyle v. Duffy, 334 U.S. 431 (1948). Mandamus was thereupon brought on Phyle's behalf. The California Supreme Court treated the question

as properly presented in this manner and, on the merits, affirmed the trial judge's determination that there was no "good reason" to suppose Phyle to be insane and hence there should be no plenary trial of the issue. Phyle v. Duffy, 34 Cal.2d 144, 208 P.2d 668 (1949). The United States Supreme Court denied certiorari. 338 U.S. 895 (1949).

The disposition by the Supreme Court was such, however, as clearly to imply that the prisoner had a constitutional right to a hearing on his claim. See 47 Mich. L. Rev. 707 (1949).

48. 339 U.S. 9 (1950).

49. Id. at 10.

50. Id. at 13.

51. 47 Cal.2d 304, 303 P.2d 339 (1956).

52. 34 Cal.2d 144, 208 P.2d 668 (1949). See notes 36 and 47 supra.

53. Caritativo v. Teets, 47 Cal.2d 304, 303 P.2d 668 (1949), Sub. nom., Caritativo v. Dickinson, 357 U.S. 549 (1950).

54. 357 U.S. at 550.

55. Id. at 551.

56. Id. at 557.

57. In the California Supreme Court's decision in the Caritativo case, Mr. Justice Schauer concurred in the judgment, but stated that he believed the prisoner could raise the issue of his insanity by means of habeas corpus. The import of Mr. Justice Schauer's opinion is that the legislature has no right to foreclose such an inquiry because California Constitution provides that the privilege of the writ may not be suspended. But this assumes that the constitutional

guarantee of the writ is as broad as the practice under it. Put another way, this assumes that our constitution guarantees a hearing of all the various types of issues which have been heard under habeas corpus. But it has been demonstrated that at common law habeas corpus did not lie to question the imprisonment of a man convicted by a court of record. And it has been forcefully urged that this historical content of the writ is all that the constitution guarantees. See Collings, Habeas Corpus for Convicts -- Constitutional Right or Legislative Grace, 40 Calif. L. Rev. 335 (1952). See also In re Bell, 19 Cal.2d 488, 122 P.2d 22 (1942). As a matter of policy, of course, it may be wise generally to permit a broad scope of inquiry under habeas corpus, but this is another problem. See Sunal v. Large, 332 U.S. 174, 184 (1947) (Frankfurter, J., dissenting).

58. See generally Note, Post-Conviction Remedies in California Death Penalty Cases, 11 Stan. L. Rev. 94 (1958).

59. Comment, Execution of Insane Persons, 23 So. Cal. L. Rev. 246, 252 (1950).

60. Solesbee v. Balkom, 339 U.S. 9, 25 (1950) (dissenting opinion).

61. Caratativo v. Dickinson, 357 U.S. 549, 558 (1958) (dissenting opinion). Mr. Justice Frankfurter treats the problem as though it were one of undue delay, apparently without recognizing that the problem is not undue delay but infinite delay. He also says that "The protection of a constitutional right to life ought not to be subordinated to the fear that some lawyers will be wanting in the observance of their professional responsibilities." Ibid. But

But the prisoner can act as his own attorney and, as has been so fully demonstrated, do very nicely at it. And if the prisoner has a right to counsel, he has a right to counsel willing to serve.

62. Strictly speaking, of course, the insanity can supervene if there is, as there must be, any interval at all between determination of sanity and execution. The point thus holds theoretically no matter how speedy the procedure. It is not clear how short the interval must be to be treated as de minimis.

63. See Note, Post-Conviction Remedies in California Death Penalty Cases, 11 Stan. L. Rev. 94, 132 (1958).