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Criminal Law And Procedure—Opinion Of Defendant's Sanity Based On Direct Observation Should Have Been Allowed Although Preceded By Hypothetical Question

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have stated the true basis for its decision, namely, the policy considerations, and should not have clouded the area with illogical semantics. The problems caused by such a decision can easily be discerned in the instant case. Here, *Olah* was not overruled but in fact was relied on by the majority. The Court declared that the crimes were identical in both states and only the defenses to that crime differed. If *Olah* is to be followed, this distinction is invalid. As the dissent stated, "these differences support [defendant's] . . . conclusion that he *could have been convicted* in North Carolina of acts which would not support a conviction in this state."[10] That principle was apparently vital in the *Olah* decision. The Court of Appeals in *Olah* and in the instant case has used questionable reasoning in arriving at its decision. The former case appears to be diametrically opposed to the legislative intent of section 1941; the latter case, an exception to *Olah,* is in accord with the legislative intent of this habitual criminal statute.

Bd.

OPINION OF DEFENDANT'S SANITY BASED ON DIRECT OBSERVATION SHOULD HAVE BEEN ALLOWED ALTHOUGH PRECEDED BY HYPOTHETICAL QUESTION

Defendant was indicted for murder in the first degree; his sole defense was predicated on the theory of insanity. In support of defendant's contentions, his expert witness testified that psychiatric examinations on three occasions before trial revealed that defendant had a syphillitic condition resulting in brain damage and had a medical record of two head injuries resulting in unconsciousness at the time of each injury. Following this testimony, the doctor was asked the hypothetical of whether a person having a similar history, who on the night of the killing consumed a considerable quantity of liquor, would be laboring under such a defect of reason as not to know the nature and quality of his act or that such act was wrong. The doctor characterized such a person as one "suffering with pathological intoxication" and "insane." Defense counsel then asked him if it was his testimony that the defendant was insane at the time of commission of the act. The answer, however, was precluded by an objection which was sustained, but the court later asked this question of a medical expert for the prosecution, who had made an examination of defendant before trial to determine defendant's capability of understanding the charge, and he answered that the defendant was not insane *at the time of his act.* The district attorney, in his closing argument, implied to the jury that since the prosecution witness testified to actual experience and defense counsel merely to insanity based on the hypothetical, the prosecution witness' testimony was entitled to more weight. Defendant appealed from his conviction, and the Court of Appeals, two judges dissenting, reversed and ordered a new trial. *Held*: failure to allow the defense witness to testify as to his opinion based on

10. People v. Perkins, 11 N.Y.2d 195, 197, 182 N.E.2d 274, 276, 227 N.Y.S.2d 663, 665 (1962).

direct knowledge was reversible error which was aggravated by allowing the prosecution witness so to testify and by allowing the district attorney to use this situation in his remarks to the jury. *People v. Jackson,* 10 N.Y.2d 510, 180 N.E.2d 561, 225 N.Y.S.2d 200 (1962).

New York has traditionally followed the M'Naghten rule in excusing a person from criminal liability if at the time of the alleged criminal act, he was laboring under such a defect of reason as not to know the nature and quality of the act, or knowing the nature and quality, he did not know the act was wrong.[1] Experts called to testify as to legal sanity are limited to opinions based upon proper hypothetical questions grounded on facts in evidence and to opinions derived from their personal observation and examination of the defendant.[2] A medical witness with personal knowledge is permitted to state his opinion as to the defendant's condition before stating his premises, but the court in its discretion may require the witness to state the facts before he expresses his opinion; opposing counsel may also elicit these facts on cross-examination.[3] Aside from legal insanity as a defense to the crime, no person is compelled to stand trial while insane, and upon request to the court, a psychiatrist will be ordered to examine the defendant prior to trial, to determine his capability of understanding the charge.[4] The introduction of such a report is specifically prohibited by statute but may be waived, in which case it may be a question of fact whether the defendant introduced such evidence as his own.[5] The Court, in the instant case, reversed plainly because the defendant's psychiatrist, who had personally examined the defendant, was refused the opportunity to testify directly as to defendant's mental condition at the time of the crime, a refusal grounded on the fact that his opinion was elicited directly after a hypothetical question was posed to him, which contained an assumed fact in evidence but not within the direct experience and knowledge of the expert. This was aggravated by the disadvantage the defendant was put to by the allowance of the prosecution's witness to do so and further aggravated by the district attorney's critical distinctions concerning the weight these testimonies should be given by the jury. It further held that it was reversible error to allow the prosecution's witness to testify concerning defendant's ability to understand the charge. Such testimony, it concluded, was expressly forbidden by section 662 of the Code of Criminal Procedure and was also "irrelevant." The dissent agreed that the psychiatrist for the prosecution should not have been allowed to testify concerning defendant's ability to understand the charge, but it believed that this and the denial of the opinion based on direct testimony was not so prejudicial. It believed that the trial

1. N.Y. Penal Law § 1120.
2. See People v. Keough, 276 N.Y. 141, 145, 11 N.E.2d 570, 572 (1937).
3. See People v. Faber, 199 N.Y. 256, 266, 92 N.E. 674, 678 (1910).
4. N.Y. Code Crim. Proc. § 658.
5. People v. Roth, 11 N.Y.2d 80, 181 N.E.2d 440, 226 N.Y.S.2d 421 (1962).

court properly acted within its discretion in regulating the admission of opinion based on direct knowledge and the premises underlying this opinion.

Although defense counsel was attempting to convey to the jury the impression that its expert had actual knowledge of defendant's alleged intoxication by his question after the hypothetical problem, there appears no valid reason for the Court to hold as a matter of law that the question should have been answered and that no objection should have been made. The position of the question immediately following the hypothetical, although misleading, could have been posed in another form, alerting the jury to the fact that the question was being asked with regard to the expert's personal observation. Indeed, since the court has discretion in regulating whether a medical expert should prefix his opinion with reasons, perhaps it should also instruct the person posing the question on the desired procedure, so as not to confuse the jury. Reversal, nonetheless, was warranted, since the immaterial testimony of the prosecution's witness tended to cloud the question of insanity. Testimony elicited by a psychiatrist, appointed by the court to determine defendant's ability to understand the charge, is a humanitarian gesture at most. Reports by such psychiatrists are not admissible by statute,[6] and testimony, by the same token, should not be introduced. Information obtained by such an investigation may amount to testimonial compulsion.[7] Moreover, capacity to understand the charge and to defend it at the time of trial involve different norms than insanity at the time of the commission of the act.[8] Although a person may be deemed guilty beyond a reasonable doubt, our society has recognized that a criminal act may be excused if the defendant was legally insane. Since the defendant in the instant case predicated his entire defense on the ground of insanity, he should be allowed to present this defense without being hampered by evidence which is not in issue.

L. H. S.

READING OF INFLAMMATORY ARTICLES BY JURORS HELD NOT ENOUGH TO WARRANT MISTRIAL

In *People v. Genovese*[1] the Court of Appeals affirmed defendant's conviction on the charge that he acted as a fight manager without having procured the required license.[2] The Court was concerned with the question of whether the defendant had been denied federal as well as state due process. After the jurors had been sworn but prior to the introduction of evidence, four articles appeared in three New York newspapers which reflected unfavorably on the defendant's character.[3] Defendant's motion for a mistrial based on the publica-

6. N.Y. Code Crim. Proc. § 662.
7. People v. Roth, supra note 5, at 83, 181 N.E.2d at 441, 226 N.Y.S.2d at 422.
8. Ibid.

1. 10 N.Y.S.2d 478, 180 N.E.2d 419, 225 N.Y.S.2d 26 (1962).
2. N.Y. Unconsol. Laws § 8907, 8933 (McKinney 1961).
3. One of the articles referred to the defendant as a convicted narcotics boss. The