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Criminal Law and Procedure

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sides. Thus, the prosecution, upon whom the burden of proof rests, will not be able to sustain that burden, and some prisoners who should remain incarcerated will be freed.

On the other hand, the convict innocent of a succeeding conviction would be in the unenviable position of helpless inaction while watching witnesses and other evidence which might free him pass out of his grasp. Perhaps this is one of the reasons for the seriousness of the crimes in which habeas corpus has been granted, and the almost total absence of lesser offenses from habeas corpus reports.[26] Justice Cohen feels that the majority decision merely shifts the burden to already overloaded prosecutors. This, however, is a small price to pay for a determination which will have to be made anyway, and which, if made presently, will protect the interests of both the state and the individual.

A consideration of the basis of the decision leads to the conclusion that the holding of the court is a wise one. Historically, conditions have changed radically, so that the common law writ of habeas corpus must fulfill a different, expanded function from that which it served at earlier common law. The impact of the recent constitutional decisions was the final drastic change which urgently called out for some procedural vehicle by which a convict could assert alleged violations of his rights. And the prejudice which results from disappearance of evidence under the prematurity concept is a pressing consideration. In short, the decision of the court is the necessary and logical outgrowth of historical development and the present relationship which exists between the state and the federal courts.

John L. Gedid

CRIMINAL LAW AND PROCEDURE—Pennsylvania statute that authorizes a jury to impose costs on an acquitted misdemeanor defendant and subjects him to imprisonment for failure to pay such costs is invalid under the due process clause of the fourteenth amendment.

Giaccio v. State of Pennsylvania, 86 Sup. Ct. 518 (1966).

In the recent case of *Giaccio v. Pennsylvania*,[1] the United States Supreme Court outlawed the "Scotch verdict" practice in Pennsylvania criminal proceedings. This practice permitted a jury to impose the costs of prosecution on a defendant found not guilty of the substantive charge against him.

26. Reitz, *Federal Habeas Corpus*, 108 U. PA. L. REV. 461, 484 (1960). Prof. Reitz feels that this is very probably the reason. In his study of thirty-five federal cases in which habeas corpus was granted, the median sentence was twenty-five years.

1. 86 Sup. Ct. 518 (1966).

Prior to *Giaccio*, Pennsylvania stood alone among the states as the exactor of tribute from unfortunate acquitted defendants.[2]

Petitioner Giaccio was charged with the misdemeanor of wantonly pointing and discharging a firearm.[3] At trial the petitioner's defense was that the firearm he had discharged was a starter pistol that fired only blanks. A jury acquitted the petitioner, but imposed the costs of his prosecution on him pursuant to a Pennsylvania statute of 1860.[4] The petitioner objected to the imposition of such costs, claiming that the Act of 1860 was unconstitutionally vague and lacking in standards in violation of the due process clause of the fourteenth amendment.[5] The trial court agreed, holding the Act void for vagueness, and vacated the petitioner's sentence.[6] The Superior Court of Pennsylvania reversed and reinstated the sentence.[7] The Supreme Court of Pennsylvania affirmed the judgment of the Superior Court.[8] On appeal, the United States Supreme Court reversed and remanded the judgment against the petitioner, holding the Act of 1860 unconstitutional under the due process clause of the fourteenth amendment.[9] The majority, speaking through Mr. Justice Black, declared that "the 1860 Act is invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs."[10] Mr. Justice Stewart, concurring, argued that "it is enough for me that Pennsylvania allows a jury to punish a defendant

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2. The trial court summarized: "Apparently the practice never existed at the English common law, and, so far as we can determine, it does not exist in any other State of the United States. It is specifically condemned in the Constitutions of Florida, North Carolina and Mississippi, ... The courts of four other States have indicated the costs should not be imposed on acquitted defendants. *Cf.* Arnold v. State, 76 Wyo. 445, 306 P.2d 368; Childers v. Commonwealth, 171 Va. 456; State v. Brooks, 33 Kan. 708; Biester v. State, 65 Neb. 276, 91 N.W. 416." Commonwealth v. Giaccio, 30 D. & C.2d 463, 470 (1963).

3. Act of June 24, 1939, P.L. 872, § 716; PA. STAT. ANN. tit. 18, § 4716.

4. Act of March 31, 1860, P.L. 427, § 62; PA. STAT. ANN. tit. 19, § 1222. The Act of 1860 provides in pertinent part:

> . . . in all cases of acquittals by the petit jury on indictments for [offenses other than felonies], the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs . . . and whenever the jury shall determine as aforesaid, that the . . . defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days.

5. U.S. CONST. amend. XIV. Petitioner's challenge that the Act of 1860 violated the equal protection clause of the fourteenth amendment was not reached or decided by the Court. Giaccio v. State of Pennsylvania, *supra* note 1, at 520 n.3.

6. Commonwealth v. Giaccio, 30 D. & C.2d 463 (1963).

7. Commonwealth v. Giaccio, 202 Pa. Super. 294, 196 A.2d 189 (1963).

8. Commonwealth v. Giaccio, 415 Pa. 139, 202 A.2d 55 (1964).

9. Commonwealth v. Giaccio, *supra* note 1.

10. *Id.* at 520.

after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law."[11]

The Court began its opinion with a discussion of the state court interpretations of the Act of 1860. These decisions relied on the premise that the Act was "not a penal statute" but one of a "civil character."[12] The Court reasoned, however, that regardless of label, the Act of 1860 operated to deprive an acquitted defendant of his liberty and property. Thus the Court found that the Act must stand the test of the petitioner's challenge that it was unconstitutionally vague.[13] Considering the issue of vagueness, the Court, citing *Lanzetta v. State of New Jersey*[14] and *Baggett v. Bullitt*,[15] said:

> . . . a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. . . .[16]

The Court continued:

> *The 1860 Pennsylvania Act contains no standards at all,* nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him. (Emphasis added.)[17]

The Commonwealth's contention that even if the Act of 1860, as originally written, had been void for vagueness, subsequent state court interpretations have cured its former constitutional deficiencies, was rejected. The Court noted that in the instant case, although the trial court's charge[18] provided the court and jury with some standards to follow, it nonetheless failed to conform to the demands of due process. The Court further emphasized the difficulties a defendant would find himself in when subjected to such undefinable charges as "misconduct" or "reprehensible conduct."[19]

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11. *Id.* at 522. Mr. Justice Fortas concurred on the same ground.

12. *Id.* at 518.

13. *Ibid.*

14. 306 U.S. 451 (1939).

15. 377 U.S. 360 (1964).

16. Commonwealth v. Giaccio, *supra* note 1, at 518-19.

17. *Id.* at 519.

18. The trial judge charged the jury that it might place the costs of prosecution on the petitioner though not found guilty of the crime charged, if the jury found that "he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction [and] . . . his misconduct has given rise to the prosecution."

19. These terms appear in a number of state court cases. See *e.g.*, Baldwin v. Common-

The Supreme Court's decision in *Giaccio* offers a deserved reprimand to a practice of criminal practice conceived in obscurity. The imputation of criminal conduct where none has been found to exist, only serves to promote judicial hypocrisy. Thus the decision by the Supreme Court marks the demise of a legislative and court created "quasi-crime."[20] It is no longer possible for a Pennsylvania jury to impose costs on an acquitted defendant "as a deserved rebuke, admonition or penalty for conduct not sufficient to warrant a conviction."[21] Yet the *Giaccio* decision does raise a question of future jury reaction in cases involving first offenders. A verdict of "not guilty and pay the costs" plus the silent admonition, "but don't do it again"[22] has in the past permitted first offenders to avoid the stain of a criminal record. But, whether jurors will continue to allow a first offender a second chance, absent the silent admonition, remains to be seen. In this regard, the problems of the administration of criminal justice in a system limited by the requirements of due process illustrate the need for a pragmatic approach to the first offender issue. The aims of the criminal law must be redirected from within the legal system to accommodate both the demands of punishment and those of fundamental fairness as correctional devices.

John F. Naughton

CONTRACTS—Signature on Instrument—The traditional view that one is bound by his signature may be in jeopardy in Pennsylvania.

Herman v. Stern, 419 Pa. 272, 213 A.2d 594 (1965).

In a recent decision,[1] the Pennsylvania Supreme Court, after discussing at great length many unnecessary and irrelevant factors, with one Justice concurring and three Justices dissenting, adhered to a basic principle of contract law. It appears, from *this* case, that only a plurality of the court is willing to hold that one is bound by what he signs. Others on the court, without even mentioning this rule, seemed to be calling for a principle which would in fact destroy this traditional view.

Richard B. Herman, a real estate broker, brought this action for a commission allegedly earned through the sale of some real estate owned by the defendant, James L. Stern. John J. Shaw, Jr., then lessee of the premises in question, engaged the plaintiff, Herman, late in 1959 to find a subtenant for the unexpired term of his lease.[2] Herman found a sub-

wealth, 26 Pa. 171 (1856); Commonwealth v. Tilghman, 4 S. & R. 127 (Pa. 1818); Commonwealth v. Giaccio, *supra* note 7.

20. See Commonwealth v. Donovan, 119 Pa. Super. 544, 181 Atl. 606 (1935).

21. Commonwealth v. Meany, 8 Pa. Super. 224, 226 (1898).

22. Commonwealth v. Giaccio, *supra* note 7, at 147, 202 A.2d at 60.

1. Herman v. Stern, 419 Pa. 272, 213 A.2d 594 (1965).

2. The term was not to expire until August 31, 1960.