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# A Critique of the Test of Insanity in Criminal Cases in Kentucky

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The third basis for the admissibility of uncommunicated threats is to confirm and corroborate evidence that certain communicated threats were made against the defendant<sup>10</sup> and to counteract any presumption of fabrication by the witnesses who gave the testimony.

The law on these subjects is well settled in this jurisdiction and appears to the writer to conform with logic and justice.

HENRY H. BRAMBLET

### A CRITIQUE OF THE TEST OF INSANITY IN CRIMINAL CASES IN KENTUCKY

Until 1843, the date of *M'Naughten's Case*,<sup>1</sup> no attempt had been made to state an all inclusive test for insanity. If one consults the six or seven more important historical cases arising before 1843,<sup>2</sup> it will be seen that instead of the court tendering to the jury a test for the degree of insanity necessary to render the defendant incapable of formulating the intent required for the particular crime, it has, in each case, given examples or illustrations from or by which the jury might be enabled to arrive at the proper verdict in that particular case.

The *M'Naughten Case*, however, proposed a concise, inclusive test for criminal irresponsibility by reason of insanity. The tests or rules connected with this case were propounded by the judges of England at the request of the House of Lords and presumably were the law of England at that time as they have proved to be since.

The tests were actually in regard to two main topics, delusional insanity and ordinary insanity. The test proposed for ordinary insanity was as follows: "to establish a defense on the ground of insanity, it must be clearly proved, that at the time of the act, the accused was laboring under such a defect of reasoning as not to know the nature and quality of his act, or, if he did, that he did not know that what he was doing was wrong." In explaining what was meant by "wrong," it was said that if the accused was conscious that the act was one that he ought not to do, and if it was at the same time contrary to the law of the land, it would be punishable. Therefore it would seem that the tendency to place the greater significance upon the legal rather than the moral wrong, as was done in the two previous cases, was overruled.<sup>3</sup>

<sup>10</sup> *Kramer v. Commonwealth*, 8 Ky Op. 428 (1875)

<sup>1</sup> 10 Clark and Fin. 200, 8 Eng. Rep., 718 (1843)

<sup>2</sup> *Rex v. Arnold*, 16 How. St. Tr. 695, 764 (1724), *Earl Ferrer's Case*, 19 How. St. Tr. 886, 948 (1760), *Hadfield's Case*, 27 How. St. Tr. 1282 (1800), *Bellingham's Case*, *Collinson's Cases on Lunacy* 636, as cited by GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) at 149 (about 1812), *Offord's Case*, 5 Car. and P 168, 172 Eng. Rep. 924 (1831), *Regina v. Oxford*, 9 Car. and P 525, 546, 173 Eng. Rep. 941 (1840).

<sup>3</sup> *Regina v. Oxford*, 9 Car. and P 525, 173 Eng. Rep. 941 (1840), *Offord's Case*, 5 Car. and P 168, 172 Eng. Rep. 924 (1831)

As to delusions, the judges said that, if a man were laboring under "partial delusions only" and were in other respects sane, he would be punishable according to the nature of the crime committed, if he knew at the time that he was acting contrary to law. That is, if the circumstances, if true, were such as to create a legal excuse for the act, then he would not be punished, but if not, the delusion would be no excuse.

Within the next few years following the *M'Naughten Case*, there was an attempt to establish the "irresistible impulse" rule as an excuse for crime, but this attempt met with defeat in England.<sup>4</sup>

In the United States, the early tendency was to follow the law as laid down in the English cases. Wharton, in his *Criminal Law*, Ray, *Medical Jurisprudence of Insanity*, and other early text book writers cite few American cases and are in most part concerned with English law.<sup>5</sup>

The first prominent case on insanity in the United States was that of *Commonwealth v. Rogers*,<sup>6</sup> in 1844, in which the judge, in his instructions, practically repeated the rule of *M'Naughten's Case* word for word, but *added* that its requirements might be fulfilled if the accused acted because of an "irresistible impulse" and therefore was not a free agent. The next case of importance is that of *State v. Spencer*,<sup>7</sup> in 1846, which is representative of the first tendency to accept only the rule of *M'Naughten's Case* and omit the "irresistible impulse" rule.

In the fifty years following these first two cases the courts of the various states proceeded to adopt either the rule of *Commonwealth v. Rogers*, which was the rule in *M'Naughten's Case* plus the irresistible impulse rule, or the rule of *State v. Spencer* which was that rule alone. The majority of the states are now aligned upon the side of the latter while the minority follow the former.<sup>8</sup>

Although the above classification is generally accurate, there are some jurisdictions which do not fall within it. In *Boardman v. Woodman*,<sup>9</sup> a New Hampshire case, Mr. Justice Doe, in his dissenting opinion, said: "The whole difficulty is that the courts have undertaken to declare that to be the law which is a matter of fact." This was the beginning of the present day rule in this state which consists of the following contention: there is no legal test for irresponsibility by reason of insanity. It is a question of fact for the jury in each case whether the accused had a mental disease

<sup>4</sup> *R. v. Barton*, 3 Cox, C.C. 275, 14 Eng. Dig. 58 (1848), *R. v. Holt*, 15 Cr. App. Rep. 10, 14 Eng. Dig. 59 (1920), *R. v. Flavell*, 19 Cr. App. Rep. 141 (1926).

<sup>5</sup> Crotty, *History of Insanity in Criminal Law* (1924) 12 Calif. L. Rev. 121.

<sup>6</sup> 7 Metc. 500 (Mass. 1844).

<sup>7</sup> 1 Zabriskie 196, 21 N.J. Law Rep. 196 (1846).

<sup>8</sup> WEHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* (1933) 14-17.

<sup>9</sup> 47 N. H. 120 (1866).

and if so, whether it was of such character or degree as to take away the capacity to form or entertain a criminal intent."<sup>10</sup>

It has been said that New Hampshire is the only state which does not accept the "knowledge of right and wrong" rule for criminal responsibility, but there are other states that do not completely accept the rule laid down in the *M'Naughten Case*. For example, California refuses to accept the rule as laid down on delusional insanity,<sup>11</sup> and Rhode Island has never passed upon a test for legal insanity as a defense to crime.<sup>12</sup>

The federal courts accept the "right and wrong" test, however, and seem to place the greater emphasis upon the moral rather than the legal meaning of the word "wrong."<sup>13</sup>

It is difficult to rationalize accurately the law on this subject in the various jurisdictions or even in a single jurisdiction, due to the tendency of the judges to use their own discretion as to just what words are best fitted to carry to the jury the meaning of the tests to be applied. Fundamentally, however, the meaning is left unaltered in practically all cases. It is, nevertheless, this variation in expression which adds to the confusion already attached to the law of insanity.

The test for criminal responsibility in Kentucky appears to be well crystallized, although it is true that the discretion of the judges in the wording of their instructions has tended to create an aura of confusion.

The first Kentucky case bearing upon this subject which has come to the writer's attention is that of *Graham v. Commonwealth*.<sup>14</sup> In this case the true test of responsibility was said to be whether the accused had sufficient reason to know right from wrong, and whether or not he had a sufficient power of control to govern his actions. This case marked the beginning of a rule that has continued down to the present day. There have been few cases in which the exact phraseology has been used, but the fundamental meaning almost invariably has been preserved.

The "irresistible impulse" test received immediate and favorable attention in Kentucky, as is shown by the cases following *Graham v. Commonwealth*. In 1864 the court, trying the appealed case of *Smith v. Commonwealth*,<sup>15</sup> reversed the lower court because of its failure to include the irresistible impulse test in its instructions to the jury

<sup>10</sup> *State v. Pike*, 49 N. H. 399 (1870), *State v. Jones*, 50 N. H. 369 (1871).

<sup>11</sup> *People v. French*, 12 Cal. (2d) 720, 87 P. (2d) 1014 (1939), *People v. Tröche*, 206 Cal. 35, 273 Pac. 767 (1928)

<sup>12</sup> *Weihofen*, *op. cit. supra* note 6, at 15.

<sup>13</sup> *Guiteau's Case*, 10 Fed. 161 (1882), *Davis v. U.S.*, 160 U.S. 469 (1895).

<sup>14</sup> 55 Ky. 468 (1855).

<sup>15</sup> 62 Ky. 224 (1864).

It appears, however, that the Kentucky courts have not been consistent in their wording of the irresistible impulse test. In *Graham v. Commonwealth* the requirement that the impulse be the result of a diseased mind was completely overlooked, as it was in *Brown v. Commonwealth*,<sup>15</sup> and in *Miller v. Commonwealth*.<sup>17</sup> Too many judges have brought out the requirement in the hazy and indirect manner exemplified by the instructions ruled upon in *Southers v. Commonwealth*.<sup>18</sup> It is hardly conceivable that the law should permit a defendant to take advantage of any other impulse than one resulting from a diseased condition of his mind; in fact, in several cases in this state it is pointed out that the law does not excuse because of an unusual temper, that extreme rage does not amount to insanity, and other such expressions of limitation. It evidently is not the intention of the court then that the jury should find the accused was insane unless he was afflicted with such a condition of the mind that because of the disease he was unable to resist certain impulses. The courts are not to be released from criticism, however, for their good intentions. If any state accepts the irresistible impulse doctrine, a doctrine highly dangerous unless carefully administered, the least the courts can do is to instruct the jury properly as to its constituents. The more recent cases of *Cline v. Commonwealth*<sup>19</sup> and *Gulley v. Commonwealth*<sup>20</sup> have brought this requirement to the attention of the jury sufficiently so that it may be hoped that the tendency has now been dissipated.

The most prominent weakness of the tests used in all jurisdictions of the United States on irresponsibility for crime because of insanity is the incompetence of laymen to find a fact involving highly technical medical knowledge. Are the courts not being equally as stubborn and conservative as was the Lord Chancellor in his address to the House of Lords in 1862,<sup>21</sup> in which he scathingly referred to the tendency of the time to consider insanity as a disease? We now claim to have a great deal more knowledge upon the subject than was had a century ago. We now recognize insanity as an illness and not as a visitation of the devil to be driven out by persecution. Since this is true, are we now to stop and say "The only proper way to find upon the question of insanity is to leave it to a jury with proper instructions"? If one of us were ill, is it likely that he would call in twelve of his neighbors and take a vote upon just what the illness was and what the proper treatment should be?

By way of remedy to the above criticism the following suggestions are offered. Let the national organization of psychiatrists

<sup>15</sup> 77 Ky. 398 (1878).

<sup>17</sup> 236 Ky. 448, 33 S.W. (2d) 590 (1930).

<sup>18</sup> 209 Ky. 70, 272 S.W. 2d 26 (1925).

<sup>19</sup> 248 Ky. 609, 59 S.W. (2d) 577 (1933).

<sup>20</sup> 284 Ky. 98, 143 S.W. (2d) 1059 (1940).

<sup>21</sup> As cited in *State v. Pike*, 49 N. H. 399 at 437 (1870).

issue to the courts of each jurisdiction a list of the qualified and competent psychiatrists in that jurisdiction. Let the court choose from that list, let us say three psychiatrists, to study the accused and submit to the jury their findings as to just what his mental condition was at the time of the crime, such specialists to be paid by the county. Then have the court instruct the jury as to the basic requirement that the accused be capable of formulating the intent necessary to commit the crime in order to be guilty of that crime, and at the same time instruct them that the findings of the committee are to be taken as impartial evidence upon the question of whether or not the accused was capable of formulating that intent at the time of the crime, to be considered in arriving at their verdict. This solution preserves the jury system with its advantages (and disadvantages), but gives this body the benefit of unbiased expert opinion on what may be a highly difficult question—was this defendant insane?

Although the above suggestion may not be the best solution to the problem, it is the author's contention that in view of the present circumstances, if adopted they would accomplish a great deal toward improving a bad situation.

CARLETON M. DAVIS

### EVIDENCE: EFFECT OF CONVICTION IN SUBSEQUENT CIVIL SUIT

The great weight of authority, both ancient<sup>1</sup> and modern,<sup>2</sup> supports the rule that a judgment of conviction or acquittal is inadmissible in a civil suit to establish the truth of the facts on which it was rendered.<sup>3</sup> As an exception to this rule it is well settled that a prior conviction rendered upon a plea of guilty is admissible.<sup>4</sup> Where the judgment in the criminal court is the foundation of the civil suit or where the subsequent action, although civil in form, is quasi-criminal, as in actions for penalties, the courts have readily admitted the judgment.<sup>5</sup>

<sup>1</sup>The source of the rule dates back to *The King v The Warden of the Fleet*, 12 Mod. 337, 88 Eng. Rep. 1363 (1721).

<sup>2</sup>See note 3 *infra*.

<sup>3</sup>Notes (1924) 31 A.L.R. 261; (1928) 57 A.L.R. 504; (1932) 80 A.L.R. 1145; (1941) 130 A.L.R. 690.

<sup>4</sup>*Duerr v. Ky. & Ind. Bridge & R. R. Co.*, 132 Ky. 228, 116 S.W. 325 (1909); *Stewart v. Stewart*, 93 N.J. Eq. 1, 114 Atl. 851 (1921); *Russ v. Good*, 92 Vt. 202, 102 Atl. 481 (1917). In this class of cases, however, the judgment is not considered as conclusive evidence of the truth of the facts on which it is rendered. *Anders v. Clover*, 198 Mich. 763, 165 N.W. 640 (1917); *Burgess v. Burgess*, 47 N.H. 395 (1867); *Spain v. Oregon Was. R. and Nav. Co.*, 78 Ore. 355, 153 Pac. 470 (1917).

<sup>5</sup>*United States v. One Ford*, 21 F. (2d) 628 (1927); *United States v. Rosenthal*, 174 Fed. 652 (1909); *Coffey v. United States*, 116 U.S. 436, 6 Sup. Ct. 436 (1886).