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# Homicide--Burden of Proof When Defense Is Insanity

James D. Allen  
*University of Kentucky*

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and involves no fraud or mistake then the law should give the agreement legal effect. Consideration for a promise is valuable evidence<sup>11</sup> that the parties intended to make an agreement to which the law should give effect, but it is only one sort of evidence and is not always proof of the real intent of the parties. From time to time cases will arise, such as this voluntary old age pension contract, where one who made a promise, intending to be legally bound by it, is able to escape from it at will by operation of the consideration rule.

The desirability and utility of the consideration rule in contracts has been questioned frequently in the writings of legal theorists. This criticism has been given a limited effect by the adoption of the Uniform Written Obligations Act by the legislatures of several states.<sup>12</sup> As yet, however, the judicial feeling against the doctrine expresses itself only in making additional exceptions to the general rule that there can be no binding contract without consideration.

PAUL OBERST.

#### HOMICIDE—BURDEN OF PROOF WHEN DEFENSE IS INSANITY.

Defendant was charged with murder in the first degree for killing his wife and child. The defense was insanity. *Held*: where the defendant pleads insanity and introduces evidence on the matter, the burden is on the state to prove beyond a reasonable doubt that the defendant is sane. *Noelke v. State*, ..... Ind. ...., 15 N. E. (2d) 950 (1938).

In the past few years there has been an increased use of the defense of insanity in criminal cases and out of these cases at least three rules have arisen.<sup>1</sup>

The principal case represents the view taken by several courts.<sup>2</sup> Such a rule places the entire burden of proving that the defendant is sane upon the state. The Massachusetts's courts, while subscribing to the rule that the state must prove the defendant sane, relieve part of the burden of the rule by saying that the presumption that all men

<sup>11</sup> "I take it that the ancient notion about want of consideration was for the sake of evidence only." Lord Mansfield in *Pillans v. VanMierop*, 3 Burr. 1663 (1765) (Discredited as historically inaccurate by Holdsworth in *Modern History of Consideration* (1922), 2 B. U. L. Rev. 174, 190; but approved as a principle at 208.) "It can only properly be treated, not as a test, but as an indication; an indication, but an indication only, amongst many others, that the parties entering into a transaction had in contemplation their legal relations to each other." Markby, *Elements of Law* (6th ed., 1905), 315. "There can be little doubt however, that our law has shown itself too scrupulous in this matter (danger of giving legal effect to unconsidered promises and levities of speech); in other legal systems no such precaution is known, and its absence seems to lead to no ill results." Salmond, *Jurisprudence* (7th ed., 1924), 374.

<sup>12</sup> Adopted by Pennsylvania in 1927, and Utah in 1929.

<sup>1</sup> 5 Wigmore, *Evidence* (2d ed., 1923), Section 2051.

<sup>2</sup> *Blume v. State*, 154 Ind. 343, 56 N. E. 771 (1900); *Fritz v. State*,

are sane remains throughout the trial and must go to the jury for its consideration with the rest of the evidence.<sup>3</sup> The usual reason given for placing the burden of proof on the state to prove sanity is that once the question of sanity is put in issue it becomes a material part of the state's case and must be proved beyond a reasonable doubt.<sup>4</sup> The theory behind this reason is that without a criminal intent there can be no crime, and without mental capacity for it there can be no intent. Therefore, to establish its case the state must prove the sanity of the defendant.<sup>5</sup> A second reason given for requiring the state to prove the defendant sane is that it is as much the duty of the state to protect an insane man from conviction, as it is to prevent a sane man from escaping that result.<sup>6</sup>

A second rule applied by several courts is that where the defendant pleads insanity as a defense to the prosecution the duty is on him to come forward with enough evidence to rebut the legal presumption that all men are sane. In introducing this evidence the defendant must raise a reasonable doubt in the mind of the jury as to his sanity; when this doubt has been raised the legal presumption of sanity ceases to exist and the state must prove the defendant sane beyond a reasonable doubt.<sup>7</sup> *Hotema v. U. S.*,<sup>8</sup> states the rule in the following words: "There is a presumption of sanity in all criminal cases which warrants a conviction if no evidence to the contrary is offered, but if the defendant introduces enough evidence to create a reasonable doubt as to his sanity an acquittal is necessary unless the state can rebut this doubt." It is submitted that this rule only makes an already involved legal process more complicated.

The third rule is that the plea of insanity is an affirmative defense and the burden is on the defendant to prove his insanity.<sup>9</sup> The rule represents the great weight of authority<sup>10</sup> and is based on the theory that the law presumes every adult to be of sound mind and capable of

178 Ind. 463, 99 N. E. 727 (1912); *Walters v. State*, 183 Ind. 178, 108 N. E. 583 (1920); *State v. Warren*, 91 Vt. 391, 101 Atl. 149 (1919); *Commonwealth v. Soaris*, 275 Mass. 291, 175 N. E. 491 (1931); *Commonwealth v. Spencer*, 212 Mass. 438, 99 N. E. 266 (1912); *Commonwealth v. Clark*, 198 N. E. 641 (1935).

<sup>3</sup> *Commonwealth v. Spencer*, 212 Mass. 438, 99 N. E. 266 (1912); *Commonwealth v. Clark*, 198 N. E. 641 (1935).

<sup>4</sup> *Fritz v. State*, 178 Ind. 463, 99 N. E. 727 (1912).

<sup>5</sup> *Id.*, at 465, 99 N. E., at 729.

<sup>6</sup> *State v. Warren*, 91 Vt. 391, 101 Atl. 149 (1919).

<sup>7</sup> *Hotema v. U. S.*, 186 U. S. 413 (1902); *Thompson v. State*, 78 Fla. 400, 83 So. 291 (1919); *Smith v. State*, 12 Okla. C. R. 307, 155 Pac. 699 (1916); 40 Okla. C. R. 266, 266 Pac. 790 (1928); *Lemke v. State*, 56 Okla. C. R. 1, 32 P. (2d) 331 (1934).

<sup>8</sup> 186 U. S. 413 (1902).

<sup>9</sup> *Young v. Commonwealth*, 258 Ky. 766, 81 S. W. (2d) 595 (1935).

<sup>10</sup> *State v. Cooper*, 195 Iowa 258, 191 N. W. 891 (1923); *State v. Schilling*, 95 N. J. Law 145, 112 Atl. 400 (1920); *State v. Jones*, 191 N. C. 753, 133 S. E. 81 (1926); *Commonwealth v. Wheeler*, 246 Pa. 528, 86 Atl. 472 (1914); *Roberts v. State*, 67 Tex. C. R. 580, 150 S. W. 627 (1912); *Snow v. State*, 106 Tex. C. R. 222, 291 S. W. 558 (1927); *Dobbins v. State*, 127 Tex. C. R. 380, 76 S. W. (2d) 1057 (1934).

committing a crime, and such person, when charged with the commission of a crime, must rebut such presumption by evidence which reasonably satisfies the jury that he was insane at the time the act was committed.<sup>11</sup> This is the more logical rule because it places the burden on the person best fitted to prove it; this rule also follows the general rule that where affirmative matter is pleaded it must be proven by the pleader.<sup>12</sup> It would seem that where the state clearly establishes an intentional killing by the use of a deadly weapon, an illegal homicide is presumed, and if the defense is insanity, the burden of sustaining it is upon the person having charge of the defense.

JAMES D. ALLEN.

**RUH'S EXECUTORS v. RUH—ACCELERATION OF THE REMAINDERS BY WIDOW'S REFUSAL TO TAKE UNDER THE WILL.**

Testator provided for a trust fund for his grandson, surplus personalty and a life estate in all realty to his widow, with remainder over to his children. The realty was to be sold and the proceeds distributed among his children upon the death of the widow. Exercising her statutory right, the widow renounced the will and took a third of the decedent's real property for life and half of the surplus personalty. *Held*, that immediately upon the election of the widow to take against the will, the remainders to the children were accelerated, and the remaindermen took as if the contingency, the death of the widow, had in fact happened. *Ruh's Executors v. Ruh*, 270 Ky. 792 (1937).

"Ordinarily the election of the widow to take against the will has the effect of accelerating any remainder limited to take effect after her life estate. The election of a widow to take against her husband's will is equivalent to her death, as respects payment of legacies, and the distribution of that part of the estate which is to be distributed under the will upon the happening of that event."<sup>13</sup> This is the majority rule.<sup>14</sup> The Kentucky court has followed the majority on this question, holding in *Trustees v. Morris*,<sup>15</sup> that the general rule is that legacies which were to be paid at the death of the death of the widow become immediately due upon the widow's renunciation of the will. It is to be noted that this rule makes no distinction between contingent and vested remainders. The courts merely hold that the estate is distributable as if the widow were dead<sup>16</sup> and let it go at that.

<sup>11</sup> *State v. Corrington*, ..... Mo. ...., 116 S. W. (2d) 87 (1938).

<sup>12</sup> See 22 C. J. 71, note 66 and cases cited therein.

<sup>13</sup> 28 R. C. L., Wills, Sec. 323.

<sup>14</sup> *Will of Reynolds*, 151 Wis. 375, 138 N. W. 1019 (1912); *Stevens v. Stevens*, 121 Ohio St. 490, 169 N. E. 570 (1929); *Swan v. Austell*, 261 Fed. 465 (C. C. A., 5th, 1919); *Rose v. Rose*, 126 Miss. 114, 88 So. 513 (1929).

<sup>15</sup> 99 Ky. 317, 36 S. W. 2 (1896).

<sup>16</sup> *Re Kerns Estate*, 296 Pa. 348, 145 Atl. 824 (1929). See also *O'Rear v. Bogie*, 157 Ky. 666, 163 S. W. 1107 (1914) (held that the theory of acceleration applies to both vested and contingent remainders).