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CRIMINAL LAW—THE TEST OF INSANITY IN CRIMINAL CASES
IN KENTUCKY

An insane person is not responsible for his criminal acts. This statement in itself represents the recognized law, but it gives rise to many difficulties and perplexing questions in the criminal law. One of the most difficult of these questions is a determination of what test shall be given to the jury by which they may judge the defendant's sanity or insanity. The purpose of this note is to review the Kentucky cases on this point.

*Graham v. Com.*¹ was one of the first Kentucky cases which considered the nature of the instruction to be given to the jury in testing the sanity of the defendant. In that case the accused brutally killed his wife with a knife. His sole defense to the charge was that he was insane when he did the act. The court, relying on the famous *McNaughton Case*,² sanctioned the following instruction, "The true test of responsibility is whether the accused had sufficient reason to know right from wrong, and whether or not he had sufficient power of control to govern his actions." Next in line of the early cases was *Scott v. Com.*³ in which the defendant killed his son-in-law. The defense was moral insanity as a result of irresistible impulse. The court held that this type of insanity had to be received with caution as it was easily manufactured, but that if it could be proved it was a defense to the crime. The court further held that for moral insanity to be a defense to the crime, it must be shown to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings.⁴

Next in point of time came *Smith v. Com.*⁵ There defendant was charged with murder and his defense was insanity. In the first part of the opinion the court passed on the question of drunkenness in crime in which they held that a person might become so drunk that he would not be responsible for his crime.⁶ Then with the two previous cases as a background the court went into a lengthy discussion of insanity in

review the evidence presented by the respondent, analyze and dispose of his arguments, give convincing reasons for his decision, and distinguish or reconcile the precedents, he is much more likely to reach a just and well-considered conclusion than if he is permitted to state in legal phraseology his ultimate findings of fact and law."

¹ 55 Ky. (16 B. Mon.) 587 (1855).

² 10 Clark and F. 200 (1843). This case laid down the original so-called "right and wrong" test.

³ 61 Ky. (4 Met.) 227, 83 Am. St. Rep. 461 (1863).

⁴ This is the "irresistible impulse" test for determining criminal responsibility. Glueck, *Mental Disorder and the Criminal Mind* (1925) 232. But for Ky. see *McCarty v. Com.*, 114 Ky. 620, 71 S. W. 656 (1903).

⁵ 62 Ky. (1 Duv.) 224 (1864).

⁶ This part of the decision was expressly overruled in *Shannahan v. Com.*, 71 Ky. (8 Bush) 463, 8 Am. Rep. 465 (1871). The general rule is that drunkenness is not defense to crime although it may be introduced to show the lack of malice or intent in crimes where those elements are essential. *Tripplet v. Com.*, 272 Ky. 714, 114 S. W. (2d) 108 (1938).

which they divided it into two types. "Intellectual (mental) insanity, says the court, is a delusion arising from a partial eclipse of the reason, or from a morbid perversion of the percipient faculties, which presents to the abnormal mind, as accredited realities, images of objects that have no actual existence, or a false and distorted aspect of existing objects. Although he may have reasoned logically yet he reasons from false premises."⁷ This is the type of insanity in which a person is insane when he does not know the nature of his acts or does not know right from wrong.

Whether or not the defendant had sufficient power of control to govern his actions refers to that type of insanity recognized as moral insanity or irresistible impulse. The court recognized this type of insanity by saying at page 231, "Man's moral mentality is the light of reason which guides him in his pathway of duty and gives him a free and rational presiding will to enable him, if he so chooses, to keep that way in defiance of all passion and temptation. In this he is superior over animals. But man may lack something in his moral mentality which will not permit him from wandering from the pathway in a particular direction, as the Homicidal or Kleptomania, in which case man becomes like an animal and although he may know an act is wrong yet he can not keep himself from doing it. To that extent he is insane and is so recognized by the courts." As a result of the foregoing discussion the court devised the following test of insanity: "The true test of insanity is whether the accused had sufficient reason to know right from wrong, and whether or not he had sufficient power of control to govern his actions."⁸ This test was later sanctioned in *Kriel v. Com.*,⁹ and was later followed in several cases.¹⁰

But the majority of later cases came to differ from the Smith case in regard to the kind of moral or irresistible impulse insanity which would relieve the defendant from responsibility, and in this respect the court took a step backwards in the progress of the criminal law.¹¹ In *McCarty v. Com.*,¹² where the defense to the charge of murder was that the defendant was prompted to do the act by reason of an irresistible impulse, the court said on page 626, "The irresistible impulse recognized by the law is that only resulting from mental disease—from the derangement of the mind *caused by a disease of the mind*. A person acts under an insane, irresistible impulse when, by reason of the duress of mental disease, he has lost the power to choose between right and wrong, to avoid doing the act in question, his free agency being at the time destroyed." The court further says that if this were not true then

⁷ 62 Ky. (1 Duv.) 224, 230 (1864).

⁸ *id.*, at 231.

⁹ 68 Ky. (5 Bush) 263 (1869).

¹⁰ *Montgomery v. Com.*, 88 Ky. 509, 11 S. W. 475 (1889); *Jolloy v. Com.*, 110 Ky. 190, 61 S. W. 49 (1901); *Feree v. Com.*, 193 Ky. 347, 236 S. W. 246 (1922).

¹¹ *Glueck, Mental Disorder and the Criminal Mind* (1925) 239 *et seq.*

¹² 114 Ky. 620, 71 S. W. 656 (1903).

ungovernable temper, or violent, brutish passion, or frenzy caused by indignation or anger would excuse crime. In *Banks v. Com.*¹³ the defense was insanity of the type called "paranoia".¹⁴ The court held that, "altho medical writers are generally agreed that there is a well defined disease called moral insanity, as distinguished from mental insanity . . ., the doctrine of moral insanity as a protection against punishment has been repudiated by all courts as dangerous to the safety of society."

As a result of the change in position of the courts from the type of moral insanity recognized in the Smith case, a different test as to that type of insanity has been created. The instruction now adopted as to that part is, ". . . or that, as a result of mental unsoundness, he had not then sufficient will power to govern or control his actions, by reason of some insane impulse which he could not control."¹⁵

The complete instruction as to the test of insanity most generally used in the later cases is taken from *Abbott v. Com.*¹⁶ "Before the defendant can be excused on the grounds of insanity the jury must believe from the evidence that the defendant was at the time of the crime without sufficient reason to know right from wrong, or that, as a result of mental unsoundness, he had not then sufficient will power to control his actions, by reason of some insane impulse which he could not resist."¹⁷ The instruction is sometimes differently worded¹⁸ but it is substantially the same.

Kentucky follows twenty-two other states¹⁹ in adopting the test of insanity as set out above. The test is a combination of the right and wrong test of *McNaughton's Case* plus a consideration of the irresistible impulse test which arises as a result of mental unsoundness.²⁰ Twenty-

¹³ 145 Ky. 800, 141 S. W. 380 (1911).

¹⁴ 1 Warton and Stitles, Medical Jurisprudence (5th ed. 1905) sec. 1020.

¹⁵ Mathley v. Com., 120 Ky. 389, 86 S. W. 988 (1905); Cline v. Com., 248 Ky. 609, 59 S. W. (2d) 577 (1933).

¹⁶ 107 Ky. 624, 55 S. W. 196 (1900).

¹⁷ Farris v. Com. 1 S. W. 729 (1886); McCarty v. Com., 14 Ky. L. R. 285, 20 S. W. 229 (1892); Hays v. Com., 17 Ky. L. R. 1147, 33 S. W. 1104 (1896); Jolly v. Com., 110 Ky. 190, 61 S. W. 49 (1901); Hall v. Com., 155 Ky. 544, 159 S. W. 1155 (1913); Thompson v. Com., 155 Ky. 333, 159 S. W. 829 (1913); Mitra v. Com., 224 Ky. 13, 5 S. W. (2d) 275 (1923); Miller v. Com., 236 Ky. 448, 33 S. W. (2d) 590 (1930); Cline v. Com., 248 Ky. 609, 59 S. W. (2d) 577 (1933).

¹⁸ Montgomery v. Com., 88 Ky. 509, 11 S. W. 475 (1889); Mangum v. Com., 19 Ky. L. R. 94, 39 S. W. 703 (1897); Portwood v. Com., 104 Ky. 496, 47 S. W. 339 (1898); Feree v. Com., 193 Ky. 347, 236 S. W. 246 (1922); Souther v. Com., 209 Ky. 70, 272 S. W. 26 (1925); Berry v. Com., 227 Ky. 528, 13 S. W. (2d) 521 (1929); Lindsey v. Com., 230 Ky. 718, 20 S. W. (2d) 979 (1929).

¹⁹ Glueck, Mental Disorder and the Criminal Mind (1925) 267.

²⁰ Glueck in his classification lists Ky. as one of the states which considers irresistible impulse in determining insanity. In this he is wrong because the case cited by him sustains the view that irresistible impulse as recognized by the Kentucky court must be based on mental unsoundness, and Glueck agrees that this type of irresistible impulse

four states²¹ still follow the strict right and wrong test, and one, New Hampshire,²² follows a rule of its own where no involved test of insanity is used.

For several years judges and lawyers have been dissatisfied as to the test for determining responsibility on the grounds of insanity as used by the courts.²³ The test as used by the Kentucky court has been subject to very severe criticism and it is now generally agreed that this test is inadequate for use in our modern law. This test for determining insanity was adopted when the law believed everyone to be either sane or insane and therefore the judges felt that the layman could properly decide this question.²⁴ Psychiatry has proven that everyone is not sane or insane; now the medical world recognizes many degrees and types of insanity so that now it is impossible to classify a person as sane or insane.²⁵ As a result, those judges who continue to advocate the right and wrong test are thereby resisting any attempt made to keep legal thought abreast of medical and psychological advances.²⁶

Glueck shows that the test for determining insanity as adopted in Kentucky and elsewhere is based on the conception that lack of knowledge of right and wrong is the sole or important symptom of insanity, and that this knowledge, or the lack of it, is the only difference between a sane and insane person. He then goes on to show that this conception is itself erroneous in the light of present day knowledge on the subject.²⁷ Another well founded objection to the tests of insanity now in use by the courts is that they are merely a statement of a few symptoms leading to a belief that a person might be insane.²⁸

In stating these few of the many objections to the right and wrong and irresistible impulse tests, the writer has merely intended to indicate the unrest in respect to them. In the light of the above criticism it is

is not the kind recognized by psychiatrists but is only a step toward it from the stricter right and wrong test. Glueck, *op. cit. supra* note 19, at 239.

²¹ Glueck, *op. cit. supra* note 19, at 227.

²² Glueck, *op. cit. supra* note 19, at 254, for a discussion of the New Hampshire rule.

²³ Report of the Committee of the American Bar Association on Psychiatric Jurisprudence for the year 1928-1929, 1.

²⁴ Tulin, L. A., *The Problem of Mental Disorder in Crime* (1932) 32 Col. L. Rev. 933.

²⁵ Tulin, *op. cit. supra* note 24, at 933. See also *Banks v. Com.*, 145 Ky. 300, 141 S. W. 380 (1911) where the court admitted that the medical world was agreed that there was a well defined disease called moral insanity (paranoia in the particular case), yet they refused to accept it as a legal fact on the doubtful ground that to recognize such insanity as a protection against punishment might be dangerous to society.

²⁶ (1931) 22 J. Crim. L. 438.

²⁷ Glueck, *Crime and Justice* (1936) 100 *et. seq.* This objection is apparent in the discussion of the court in *Smith v. Com.*, 62 Ky. (1 Duv.) 224 (1864); and *Abbott v. Com.*, 107 Ky. 624, 55 S. W. 196 (1900).

²⁸ Keedy, *Criminal Responsibility of the Insane* (1921) 12 J. Crim. L. 14 at 15.

apparent that a new method of testing the sanity of persons accused of crime is needed. What that method or test should be is a question this writer does not propose to answer. As has been said, "They (the psychiatrists and psychologists) inform us that an exact definition, exact enough for law, that is, for use in trial is impossible. The present definition is unscientific but science is not yet ready to frame a new one."²

JAMES D. ALLEN

WILLS—ATTESTATION IN THE PRESENCE OF THE TESTATOR

I

OBJECT AND RESULT OF THE STATUTORY REQUIREMENT

"Attestation and subscription in the presence of the testator is a common requirement of both the Statute of Frauds¹ and of the Statute of Wills² and, accordingly, of most American statutes."³ Superficially, it has been said that "the design of the legislature in making this requisition evidently was that the testator might have *ocular* evidence of the identity of the instrument subscribed by the witnesses."⁴ Such a narrow view of the purpose of the statute has been reflected in the cases, as will be presently shown. Professor Page has suggested that it is unlikely that the statute, in its common form, prevents forgery, perjury, or fraud.⁵ Perhaps the primary object of the statute is to make it sure that the genuine will executed by the testator is the same one that is attested and subscribed, and that some other writing is not substituted in place of it.⁶ A strict interpretation of the statute has, in many instances, resulted in the failure of wills which undoubtedly expressed the testator's desires.⁷ The statement of the

² Report of the Committee of the American Bar Association on Psychiatric Jurisprudence for the year 1928-1929, 5.

¹ 29 Car. 11, c. 3, sec. V (1677).

² Wm. IV & I Vict. c. 26 (1837).

³ Percy Bordwell, *The Statute Law of Wills*, (1928) 14 Ia. L. Rev. 1, 15.

⁴ 1 Jarman on Wills 107 (7th. ed., 1930).

⁵ 1 Page on Wills, Sec. 334 (2nd ed., 1926).

⁶ Calkins v. Calkins, 216 Ill. 458, 75 N. E. 182 (1905), noted (1905) 4 Mich. L. Rev. 246; Dubach v. Jolly, 279 Ill. 530, 117 N. E. 77 (1917).

⁷ Gordon v. Gilmer, 141 Ga. 347, 80 S. E. 1007 (1914) (will invalid because testator's vision obstructed by curtain or footboard of his bed); Drury v. Connell, 177 Ill. 43, 52 N. E. 368 (1898) (testator must be able to see witnesses sign, though they are in same room); Snyder v. Steele, 287 Ill. 159, 122 N. E. 520 (1919) (it was error to instruct that it was enough for testatrix to be able to see witnesses and enough of act to know that they were signing); Walker v. Walker, 174 N. E. 541 (Ill. 1931) (testatrix thirty-five feet away could see witnesses through window—will held improperly executed), noted (1931) 16 Ia. L. Rev. 560; Burney v. Allen, 125 N. C. 314, 34 S. E. 500 (1899) (testator must be in position to see paper as well as witnesses), noted (1900) 13 Harv. L. Rev. 530; In re Jones' Estate, 101 Wash. 123, 172 Pac. 206 (1918) (subscription by witnesses must be within scope of testator's vision