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Criminal Procedure - Insanity at the Time of the Crime - Manner in Which the Plea is Raised and Disposed Of

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CRIMINAL PROCEDURE—INSANITY AT THE TIME OF THE CRIME—MANNER IN WHICH THE PLEA IS RAISED AND DISPOSED OF

Prior to the adoption of the 1928 Code of Criminal Procedure insanity at the time of the crime was a defense which like any other defense going to the issue of criminal liability could be raised under the general plea of not guilty. Article 261 of the Code of Criminal Procedure, however, expressly stated, "There are four kinds of pleas to an indictment: 1. Guilty 2. Not Guilty 3. Former Jeopardy 4. Insanity."

In *State v. Toon*[1] the Louisiana Supreme Court declared that the effect of this article was to make a change in procedure, by which the question of insanity was withdrawn from the plea of not guilty and required to be raised by a direct plea. That language was further supported by the language of Article 267 which then read as follows:

> ". . . Whenever insanity shall be relied upon either as a defense or as a reason for defendant's not being presently tried, such insanity shall be set up as a separate and special plea and shall be filed, tried and disposed of prior to any trial of the plea of not guilty, and no evidence of insanity shall be admissible upon the trial of the plea of not guilty."

Article 267 was amended by Act 136 of 1932 and Act 261 of 1944[2] to read as it does today, with no mention being made regard-

1. 172 La. 631, 135 So. 7 (1931).

2. ". . . Whenever, on a prosecution by indictment or information, the existence of insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one or more disinterested physicians not exceeding three, to examine the defendant. Should the court make such appointment the coroner of the parish shall be one of the physicians so appointed. Should it appear, however, that the said coroner is disqualified by reason of interest, or is unable to serve for any other reason, then, the court may appoint some disinterested physician to serve in his place. The physician so appointed shall have been duly licensed in this state or another state and shall have been graduated from a legally chartered medical school or college and shall have been in the actual practice of medicine for three years since graduation and for three years last preceding the acceptance of appointment for examination. The accused shall be kept under observation by said physicians, and they shall proceed with an investigation into the sanity of the accused; and they shall have the right of free access to the accused at all reasonable times and shall have full power and authority to summon witnesses and to enforce their attendance. They shall within thirty days make their reports in writing to the said presiding judge. Their findings shall constitute the report of the examination and the report shall be accessible to the district attorney and to the attorney for the accused. If the court does so make such appointments, the clerk shall notify the prosecuting

ing the manner in which the plea of insanity at the time of the crime is raised nor of the manner in which it is handled. No change has been made in Article 261.

The question therefore arises as to whether the amendment of Article 267 had the effect of reverting to the pre-code procedure of permitting evidence of insanity at the time of the crime under a general plea of not guilty. It is a fundamental rule of statutory construction that when a statute has been amended and reenacted, any part of the amended act that is omitted from the amending and reenacting statute is thereby repealed.[3] From this it would appear that the amendment of Article 267 had the effect mentioned above, except that the amendment made no reference to Article 261. If Act 136 of 1932 was intended to have such effect, it would seem that Article 261 should have been amended to state that there were three pleas: guilty, not guilty and former jeopardy. If evidence of insanity should be admissible under the general plea of not guilty, no special plea would be required. However, Article 261 has not been amended and the case of *State v. Toon*[4] has not been overruled.

In the two most important cases on this subject since the 1932 amendment, *State v. Eisenhardt*[5] and *State v. Gunter*,[6] the supreme court rejected the reasoning that the amendment had changed the procedure for raising the insanity plea back to the method prevailing before the Code of Criminal Procedure. In the *Eisenhardt* case the defendant was on trial for murder and one of the issues in the case was whether Article 267, as amended by Act 136 of 1932, required a special written plea as to insanity at the time of the crime, that is, whether an accused must enter his special plea of insanity in advance, or otherwise be barred from raising the issue unexpectedly and

attorney and counsel for the defendant of such appointment and shall give the names and addresses of the physicians so appointed. If the defendant is at large on bail, the court in its discretion may commit him to custody pending the examination by such coroner and physician. Such appointment by the court shall not preclude the state or defendant from calling expert witnesses to testify at the trial, and in the case the defendant is committed to custody by the court, they shall be permitted to have free access to the defendant for purposes of examination or observation. The physicians appointed by the court shall be summoned to testify at the trial and shall be examined by the court, and may be examined by counsel for the state and the defendant . . ." Art. 267, par. 3, La. Code of Crim. Proc. of 1928, as amended by Act 136 of 1932 and Act 261 of 1944.

3. State ex rel. Brittain, Sheriff v. Hayes, 143 La. 39, 78 So. 143 (1918); Wood v. Bateman, 149 La. 290, 88 So. 824 (1921).

4. See note 1, supra.

5. 185 La. 308, 169 So. 417 (1936).

6. 208 La. 694, 23 So. (2d) 305 (1945).

without previous notice to the state on the trial. The court, after analyzing the act, stated:

> "The above provisions so clearly contemplate a hearing contradictorily with the state, and after notice to the prosecuting officer, that extended argument is not necessary. It is patent that 'the existence of insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause', only when raised by motion or plea."[7]

Counsel for the defendant applied for a rehearing and Mr. Eugene Stanley, author of Act 136 of 1932, submitted a brief as amicus curiae. Mr. Stanley argued that the statute merely sought to restore the old common law rule as stated in the former jurisprudence and that the question of insanity at the time of the commission of the crime was to be determined on the trial of the plea of not guilty, either with or without the aid of experts appointed by the court. The application for rehearing was denied.

The *Gunter* case held that if an accused person pleaded not guilty, evidence of insanity at the time of the crime was not admissible; but that insanity at the time of the crime must be raised by special plea under Article 261.

Thus it is seen that as the jurisprudence now stands, the four pleas listed in Article 261 are separate and distinct.

State v. Watts[8] held that the plea of insanity in a criminal prosecution is a matter of right and not of grace and that defendant's plea of insanity must be entertained notwithstanding the fact that the plea was not filed until the defendant was called for trial. The *Watts* case relied upon the express language of Article 267 before the 1932 amendment to the effect that such plea is required to be filed, tried and disposed of prior to any trial of the plea of not guilty.

Has the deletion of this language by the 1932 amendment had the effect of impliedly repealing that holding? Looking at the matter from the standpoint of the defendant, it may be argued that the absolute right to plead insanity at any time is essential for his full protection. It has been pointed out that although an accused person might actually have been insane at the time of the crime, he could be prejudiced by failure of his attorney to raise the plea

7. State v. Eisenhardt, 185 La. 308, 347, 169 So. 417, 430 (1936).
8. 171 La. 618, 131 So. 729 (1930).

timely. From a practical point of view such a possibility is very remote and may well be the lesser of two evils, otherwise the defendant in a criminal case would always wait until the last stages of the trial to raise the plea of insanity at the time of the crime. Then the procedure outlined in Article 267 would have to be followed. This would result in long delay, added expense, surprise to the state and confusion in the minds of the jury. Ample protection is afforded the accused by providing that a change of plea must be allowed if a logical explanation therefor is presented.[9]

II

An examination of the Louisiana jurisprudence has yielded very little material dealing with the actual procedure presently followed in our courts in handling the special plea of insanity at the time of the crime, and Articles 255, 260, 261, 265, 266 and 267 of the Code of Criminal Procedure do not set forth any clear cut procedure for the presentation and disposal of this plea. In view of this lack of direct authority, the writer sent a letter of inquiry to every district judge in the state requesting him to furnish a brief statement as to how the plea is handled in his court. Unfortunately, insufficient replies were received to furnish the basis for a state-wide summary.[10] It is significant, however, that all but one of the replies stated that the special plea of insanity at the time of the crime is tried and disposed of along with the general plea of not guilty. This was to be expected in view of the 1932 amendment to Article 267.

Whether this procedure is practical and sound is an altogether different question. The most serious objection to this procedure is the fact that the same jury hears all the evidence. Thus the evidence relating to insanity at the time of the crime, while not establishing insanity may serve to confuse the jury and enable the defense counsel to establish reasonable doubt in the minds of the jurors. Even though the defense attorney realizes that there is little probability that the accused will be found insane, he raises the plea and is thereby able to introduce evidence which would not be admissible under the plea of not guilty but which may be used in appealing to the sympathy of the jury.

Article 267 of the Code of Criminal Procedure, as it read in 1928, was leveled at this evil and required the plea of insanity to

9. Art. 265, La. Code of Crim. Proc. of 1928.

10. Ten replies were received, 3 stating that no case had arisen in that court where the problem here discussed was presented.

be raised as a special plea and to be filed, tried and disposed of prior to any trial of the plea of not guilty. It further provided that no evidence of insanity should be admissible upon the trial of the plea of not guilty. As pointed out above, the 1932 amendment to Article 267 abolished this procedure and the two pleas are now tried together.

California has adopted a procedure that goes further toward solving the problem than Article 267 in its original form. The California statute provides:

> "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law."[11]

This procedure eliminates the confusion that may exist in jurors' minds under the present method of handling the insanity plea in Louisiana.

Another serious objection to the procedures in effect in many states is the determination of the question of sanity by the so-called "battle of experts" where both sides call in numerous persons to testify before the jury on the question of the sanity or insanity of the accused. Many times the witnesses who are least qualified make the strongest impression on the jury.[12]

Louisiana recognized this evil and attempted to remedy it by the passage of Act 17 of 1928 (E. S.), which undertook to make the findings of a lunacy commission final. However, the supreme court, in the case of *State v. Lange*,[13] declared that act unconstitu-

11. Cal. Pen. Code (Deering, 1937) § 1016.
12. 2 Law and Contemporary Problems 419-422.

tional. The court held that if the case be triable by a jury, a jury must try the plea of insanity at the time of the crime since it is an issue of fact relating to guilt or innocence. Next, the legislature sought to devise a plan whereby the jury would determine the insanity issue, but would be protected from its own ineptitude by unbiased medical advice. In this respect, the 1932 amendment to Article 267 set forth a procedure[14] requiring examination by qualified mental experts similar to statutes of Maine,[15] Colorado,[16] Ohio[17] was hard to follow as a result of the scarcity of qualified mental experts, Article 267 was amended by Act 261 of 1944 to provide for disinterested physicians rather than disinterested qualified experts in mental diseases.[19] The sanity of a person is a difficult matter to determine, even for specialists in the field of mental diseases; and it is no reflection on the medical profession to state that the average general practitioner is not qualified to determine the sanity of accused persons. A system is needed whereby defendants who plead insanity at the time of the crime will be examined by specialists in the field of mental diseases. At the same time a practical difficulty arises because of the non-availability of qualified mental experts in many judicial districts. A Massachusetts statute[20] goes a long way toward the solution of this problem. It provides for mental examination by the State Department of Mental Diseases in advance of trial of all persons indicted for a capital offense and certain others. This pre-trial examination by a specially qualified board appears to be sound. It avoids delay, insures qualified and unbiased testimony; and from the defense standpoint, it helps to avoid a possible failure to raise the plea in a proper case.

Conclusion

The plea of insanity at the time of the crime is already a separate plea in Louisiana, and the most urgent need is that a procedure be

13. 168 La. 958, 123 So. 639 (1929).

14. ". . . . Whenever, on a prosecution by indictment or information, the existence of insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one or more disinterested qualified experts in mental diseases, not exceeding three, to examine the defendant. . . ." Art. 267, La. Code of Crim. Proc. of 1928 as amended by Act 136 of 1932.

The article then proceeded to set forth who was to be considered a qualified expert. See note 2, supra, for the present provision.

15. Me. Rev. Stat. (1944) c. 23, § 119.

16. Colo. Stat. Ann. (Michie, 1935) c. 102.

17. Ohio Gen. Code Ann. (Page, 1937) §§ 13440-2, 13441-1.

and Vermont.[18] Apparently due to the fact that such a procedure

18. Laws of Vermont, 1939, No. 52, amending Vt. Pub. Laws (1946) § 2429.

19. See notes 2 and 14, supra.

20. Mass. Gen. Laws (1932) c. 123, § 100 A.

adopted which will provide for separate trials of the general plea of not guilty and the plea of not guilty by reason of insanity at the time of the crime. Perhaps the California procedure affords the best solution; perhaps an even better solution can be found. Another improvement would be to have a special sanity board, similar to that of Massachusetts, to examine into the sanity of accused persons who raise or may be expected to raise the plea of insanity.

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JURIDICAL BASIS OF PRINCIPAL — THIRD PARTY LIABILITY IN LOUISIANA UNDISCLOSED AGENCY CASES

The recent case of *Sentell v. Richardson*[1] presented our supreme court with an excellent opportunity to clarify the Louisiana approach to that situation where one person performs a juridical act for another. Under the terms of the contract in that case, plaintiff advanced to defendant the purchase price of certain stock which the latter was to have reissued in his own name without revealing the fact that he was acting for plaintiff. Defendant was then obliged to endorse and deliver the stock to plaintiff. After completing negotiations to purchase it from the owners, however, defendant notified plaintiff of his withdrawal from the contract and sold the stock for himself to a third person. One of the questions in the case was whether or not the contract was one of agency. Plaintiff claimed that defendant was his agent when negotiating for the stock, and as such was legally unable to purchase it for himself. Defendant countered with the proposition that this was no contract of agency since it did not come within the definition of *Mandate* in Article 2985 of the Civil Code,[2] which required that the mandatary act in his principal's name. Conceding that there was no representation, the court nevertheless found that the relation was one of mandate, stating that representation was not essential to mandate: "Our opinion is that the words 'and in his name' are not essential to the definition of a procuration or power of attorney, as defined in Article 2985 of the Civil Code. If those words were essential to the definition there

1. 211 La. 288, 29 So. (2d) 852 (1947).

2. "A mandate, procuration or letter of attorney is an act by which one person gives power to another to transact for him and in his name, one or several affairs."