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Criminal Law - Larceny - Kleptomania as a Defense

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with the Code of Hammurabi. *Id.* p. 410. But gradually the power of the father began to diminish and children were given some rights. Though the common law did not recognize the right of a child to support from a putative father, *In re Zimmer*, 64 N. D. 410, 253 N. W. 749 (1934), this right has been recognized in all states by statute, and many states regard all children as legitimate. See Ariz. Code (1939) § 27-401.

It would appear, therefore, that an *infant nullius* is adequately protected under statutory law, and that there is no reason why he should be permitted to bring a suit in his own name against the putative father.

From a legal standpoint, the holding in *Albanese v. Richter, supra,* is logical and just. From a moral viewpoint it precludes unfairness.

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CRIMINAL LAW—LARCENY—KLEPTOMANIA AS A DEFENSE. Judicial efforts to keep abreast of other fields of science, particularly medical science, have presented an interesting problem in jurisprudence in connection with the use of kleptomania as a defense to larceny. The defense has been interposed based upon the theory that kleptomania is a form of insanity.

The courts of the United States are divided as to the proper test which is applicable in general to the defense of insanity. The so called "right and wrong" test, as enunciated in *M'Naghten's Case*, 10 Clark & Finelly 200 (1843), has found favor in a number of American jurisdictions, including North Dakota, and is used by them as the sole test of insanity. *State v. Shippey*, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70 (1865); *State v. Throndson*, 49 N. D. 348, 191 N. W. 628 (1922). However, in certain other jurisdictions an additional test known as the "irresistible impulse" is applied. *Smith v. U. S.*, 36 F. (2d) 548, 59 App. D.C. 144, 70 A.L.R. 654 (1929); *Parsons v. State*, 81 Ala. 577, 2 SO. 854 (1886); 44 C.J.S. 20, sec. 2; *Vish. Crim. Law* (8th ed.) sec. 383b; 1 *Burdick, Law of Crimes*, sec. 213 (1946); 1 *Whart. Crim. Law* (10th ed.) sec. 44.

In *State v. McCullough*, 114 Iowa 532, 87 N. W. 503, 55 L.R.A. 378, 89 Am. St. Rep. 382 (1901), the accused was charged with larceny and defended on the ground that he was a kleptomaniac. The trial court gave instructions to the jury on insanity stating that if the acts were the result and offspring of insanity, the accused should be acquitted; if of avarice or greed, the accused should be convicted. This instruction was held to be erroneous on the ground that kleptomania is an irresistible desire to steal. The court, in discussing kleptomania, said: "It is a weakening of the will power to such an extent as to leave the afflicted one powerless to control his impulse to appropriate the personal property of others, without regard to whether such impulse is inspired by avarice, greed or idle fancy."

In other jurisdictions, where a similar problem has been presented, the courts have refused to apply the "irresistible impulse" test to kleptomania and continue to apply the "right and wrong" test. *Lowe v. State*, 44 Tex. Cr. 224, 70 S.W. 206 (1902); *State v. Riddle*, 245 Mo. 451, 150 S.W. 1044 (1912); 22 C.J.S. 129, sec. 61, note 95-96; (1936) 34 *Mich. L. Rev.* 569. The Texas court held that kleptomania is a defense to larceny only where it deprives the defendant of his sense of right and wrong; but if he is able to comprehend that the act is wrong, the mere irresistible impulse is insufficient. Hence, if it is shown that the defendant did have sufficient mental capacity at the time the act was committed to distinguish between right and wrong, kleptomania will not operate as a defense.

While an irresistible impulse must be more than mere absence of resistance or a theoretical rejection of free will, high medical authority states that an impulse may be truly irresistible, although the actor is

able to comprehend that his act is wrong. *Waite, Irresistible Impulse and Criminal Liability* (1925) 23 Mich. L. Rev. 443; *Keedy, Insanity and Criminal Responsibility* (1917) 30 *Harv. L. Rev.* 535. Adequate safeguards are afforded, since the jury has the authority to weigh the opinions of the experts and accept or reject them. *Berry v. Chaplin*, 169 p. (2d) 442 (1946).

It is a fundamental principle of criminal law that felonious intent is an essential element of larceny. I *Wigmore, Evidence*, sec. 242 (1923). Kleptomania is a recognized symptom of insanity, consisting of an irresistible impulse to steal. 32 C. J. 616, sec. 99; 1 *Whart. & S. Med. Jur.* (4th ed.) sec. 603. However, a person suffering from kleptomania knows the difference between right and wrong, but is unable to control his action. *State v. McCullough*, supra; *State v. Reidell*, 14 Del. 470, 14 A. 550 (1880). Consequently, if a kleptomaniac is unable to govern his acts or control his actions, but acts under an irresistible impulse, he is not acting with the requisite felonious intent.

On the basis of the above authorities and upon the marked developments in medical science, it appears that the adoption of the irresistible impulse test as applied to kleptomania is a logical development; and that, therefore, kleptomania, if in fact an irresistible impulse to steal, may be a valid defense to larceny.

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