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Criminal Law - Insanity - Presumption and Burden of Proof - Instructions

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incidental to the trip.[18] In these cases the provocation for the offer of transportation is the joint pleasure of the parties and the sharing of expenses is simply an exchange of social amenities and courtesies among close friends.

It should be kept in mind that whatever degree of benefit is required by the jurisdiction to take the case out of the operation of the guest statute, it is basic that such a result can be reached only if the benefit is the chief moving influence for the furnishing of the transportation.[19] Thus it must appear clear that to a great degree each case presents a factual problem as to the existence or non-existence of a benefit to the host. The court in the instant California case,[20] for example, appears to be influenced in its decision by the comparatively large sum contributed by the plaintiff's to the defendant. In the Ohio case,[21] on the other hand, the court, reaching an opposite result, relies heavily upon the close relationship of the plaintiff and defendant in failing to find a "compensation".

The California case represents the liberal trend and it is hoped that North Dakota, whose guest statute [22] appears untested in this respect,[23] will see fit to follow this late trend, thus contributing some measure of security to the regrettable position of the guest who must otherwise bear the brunt of a situation not of his own making.

JAMES L. TAYLOR

CRIMINAL LAW — INSANITY — PRESUMTION AND BURDEN OF PROOF — INSTRUCTIONS. —The defendant was convicted of the crime of rape. Upon a plea of not guilty, the entire defense was based on the defendant's insistence that he could not remember what had occurred at the time the offense was committed. No evidence was offered by the defendant to raise the issue of insanity, nor was there a request by him to submit such issue to the jury under the guidance of instructions. Witnesses for the prosecution testified that the defendant had appeared to be "in a trance" and "abnormal." However, two psychiatrists testified, apparently in rebuttal to what was conceived to have been a defense of insanity, that the defendant was of sound mind. On appeal, it *held* that the complete absence of instructions by the trial court on the issue of the defendant's insanity required that the case be reversed and remanded for a new trial. *Tatum v. United States,* 190 F.2d 612 (D.C. Cir. 1951).

Persons who are insane cannot be held criminally responsible for their

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18. Fiske v. Wilkie, 67 Cal. App.2d 440, 154 P.2d 725 (1945); Eubank v. Kielsmeier, 171 Wash. 484, 18 P.2d 48 (1933). *Compare* McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909 (1937) *with* Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 1914 (1927).

19. Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704 (1943); McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909 (1937); Rogers v. Vreeland, 16 Cal. App.2d 364, 60 P.2d 585 (1936) (sharing expenses of short drive to mountains to see flowers did not constitute compensation); Dorn v. Village of North Olmstead, 133 Ohio St. 375, 14 N.E.2d 11 (1938); Syverson v. Berg, 194 Wash. 86, 77 P.2d 382 (1938) (mother's chaperoning of daughter who had dance date with defendant did not bestow sufficient benefit upon defendant to take mother out of guest statute).

20. Whitmore v. French, 235 P.2d 3 (Calif. 1951).

21. Ames v. Seifert, 99 N.E.2d 905 (Ohio 1951).

22. N.D. Rev. Code c. 39-15 (1943).

23. *Cf* Bentley v. Oldetyme Distillers Co., 71 N.D. 52, 298 N.W. 417 (1941) (where court discussed problem of compensation but main issue adjudicated was question of existence of agency).

acts.[1] In the absence of anything to the contrary, however, there is a rebuttable presumption that the defendant in a criminal case, if a person of the age of discretion, is sane.[2] The factual basis of the presumption of sanity lies in judicial knowledge,[3] but beyond this initial point the courts entertain a wide divergence of views in regard to the burden of proving the sanity or insanity of a defendant.[4]

There are two distinct views on the question of whether the prosecution bears the burden of proving sanity, or whether the defendant has the burden of establishing insanity. The first view, known as the English rule,[5] places the burden of proving insanity upon the defendant who must plead and prove it as a matter of defense [6] by a preponderance of evidence.[7] The courts supporting this rule base their decisions upon the theory that insanity is an affirmative defense and also upon the ground of public policy, in that insanity can easily be resorted to as a sham defense. The United States Supreme Court, however, has rejected the latter reason.[8]

The second view, sometimes referred to as the American rule,[9] holds that the prosecution must prove beyond a reasonable doubt that the defendant was sane and criminally responsible,[10] just as it must prove any other material fact.[11] However, until the issue of sanity is raised, by either the defendant's evidence or by the prosecution,[12] the burden of proof, in the sense of the risk of nonpursuation, is satisfied by the presumption of sanity.[13] Thus, althought the ultimate burden remains with the prosecution, the burden of going forward with the evidence is immediately upon the defendant, and it is generally agreed that to overcome the presumption, sufficient evi-

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1. See Halloway v. United States, 148 F.2d 665 (D.C. Cir. 1945) "Our collective conscience does not allow punishment where it cannot impose blame."; State v. Brown, 36 Utah 46, 102 Pac. 641 (1909) "To convict a sane man who is innocent is deplorable but to sentence an insane man to the penitentiary for a crime that he did not have mental capacity to commit would be intolerable. To concede that the law is impotent, and the courts powerless to avoid such a result, is a concession that we are not prepared to make."

2. Established by Daniel M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843); State v. James, 96 N.J.L. 132, 114 Atl. 553 (1921) "It is not the law that a defendant's mental condition must be such as to enable him to realize the fullest extent of his acts. The test of responsibility would be the capacity of the defendant at the time of the doing of the act complained of, to distinguish between right and wrong, with respect to the act."

3. See, Morgan, *Some Observations Concerning Presumptions*, 44 Harv. L. Rev. 906, 907 (1931).

4. See Weihofen, Insanity As A Defense In Criminal Law, 148-51 (1933).

5. See State v. Quigley, 26 R.I. 263, 58 Atl. 905 (1904).

6. State v. Buck, 205 Iowa 1028, 219 N.W. 17 (1928).

7. State v. DeHaan, 88 Mont. 407, 292 Pac. 1109 (1930); *accord*, State v. Grear, 29 Minn. 221, 13 N.W. 140 (1882) ("fair preponderance" is unobjectionable). *But cf.* State v. Wallace, 170 Ore. 60, 131 P.2d 222 (1942) (beyond a reasonable doubt); State v. Cole, 2 Pen. 344, 45 Atl. 391 (Del. 1899) (to the satisfaction of the jury).

8. Davis v. United States, 160 U.S. 469 (1895).

9. See State v. Quigley, 26 R.I. 263, 58 Atl. 905 (1904).

10. Davis v. United States, 160 U.S. 469 (1895); State v. Shuff, 9 Idaho 115, 72 Pac. 664 (1903) (the burden is on the government to make out the whole case).

11. Knights v. State, 58 Neb. 225, 78 N.W. 508 (1899).

12. Duthey v. State, 131 Wis. 178, 111 N.W. 222 (1907) "If after considering all the evidence, there remains in the minds of the jury any reasonable doubt of accused's sanity, regardless of the source of such evidence, accused must be acquitted."

13. Davis v. United States 160 U.S. 469 (1895).

dence must be introduced to raise a reasonable doubt of the defendant's sanity.[14]

Although the courts differ in opinion toward one or the other of the rules, and the writers are not in agreement,[15] the modern trend seems to require a lesser degree of proof to uphold a defense of insanity. Nevertheless, it is at least doubtful in the instant case, under either rule set out above, that the defendant's mere assertion of loss of memory has sufficiently challenged the presumption of sanity.[16]

The precise question, however, was not whether the defendant had neutralized the presumption of sanity by evidence sufficient to create a reasonable doubt, but whether the same "reasonable doubt" test should govern in determining if the defendant's evidence merited an instruction on the issue of insanity. The court decided that the test should not apply because it would tend unduly to strengthen the procedural effect of the presumption of sanity. Thus, although the defendant failed to request instructions and waived objection to those given by the trial court,[17] the conviction was reversed, in the light of Rule 52(b) of the Federal Rules of Criminal Procedure,[18] because of complete absence of instructions on the issue of insanity. This ground was termed in the dissenting opinion as "a technicality so flimsy and unsound that it had to be evolved out of the inner consciousness of a member of the majority."

In a criminal case, if there is no competent evidence reasonably tending to support the fact of insanity urged by the defendant as a defensive issue in the case, there is no duty on the part of the court to instruct on the question of insanity.[19] To raise the issue of insanity, it is not necessary that testimony be conclusive [20]; to justify an instruction on an issue raised by the evidence, it is sufficient if the fact may reasonably be inferred from the circumstances proved.[21] But, courts are required to submit theories of cases only when the theories are supported by some testimony of sufficient substance so that it appears, at least with some degree of likelihood, that there

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14. Lilly v. People, 148 Ill. 467, 36 N.E. 95 (1894); *accord*, People v. Hickman, 204 Cal. 470, 268 Pac. 909 (1928) (the rule does not shift the burden of proof, but only the burden of producing evidence and declares the quantum which must be produced to overcome the presumption).

15. 9 Wigmore, Evidence §2501 (3d ed. 1940). *Contra:* 2 Jones, Commentaries on the Law of Evidence §535 (2d ed. 1926).

16. Battle v. United States, 209 U.S. 36 (1908) (merest shadow of evidence that defendant was not of sound mind; court refused instruction concerning sanity requested by defendant, and instructed that the burden of proof was on the government to prove sanity beyond a reasonable doubt, but that the burden is satisfied by the presumption of sanity until evidence is given on the other side. No error); Halloway v. United States, 148 F.2d 665 (D.C. Cir. 1945) "For the purpose of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane."

17. Fed. R. Crim. P. 30: ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

18. Fed. R. Crim. P. 52 (b): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

19. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936) (whether sufficient evidence has been adduced is for the trial court to determine).

20. Jordan v. State, 130 Tex. Cr.R. 363, 94 S.W.2d 741 (1936) (medical witness testified he treated defendant for syphilitic insanity).

21. State v. Silverman, 148 Ore. 296, 36 P.2d 342 (1934).

could be a finding by the jury in response to such suggested issue.[22] Where loss of memory constitutes the whole defense under a plea of not guilty, it would seem to follow that error prejudicial to the defendant could not be claimed as a result of failure of the trial court to volunteer instructions upon an illusive issue of insanity.[23]

The considerable difficulties that arise in criminal cases where insanity is an issue have not been eased to any great extent by legislative action. Several notable exceptions, however, have been established. Perhaps the most practical and sensible treatment of the problem occurs under the "Briggs Law" [24] in Massachusets where certain classes of offenders are subjected to a mandatory pre-trial mental examination by a neutral agency. Although the act exemplifies a stride in the right direction, its limitations necessarily confine the scope of its effectiveness.[25] A procedural improvement has been enacted in Oregon where the defendant must file a pre-trial notice of his intention to resort to the defense of insanity.[26] Such required notice would serve to eliminate some technical decisions which tend to confuse and compound the issue of insanity.

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LABOR LAW — PROTECTED CONCERTED ACTIVITY—FREE SPEECH. — At a conference convened to consider a petition for certification of the Longshoreman's Union as exclusive bargaining agent, Respondent stated that its volume of business during 1948 exceeded $500,000. On the following day the employee who had served as the employee representative at the conference reported back to the shop committee. Subsequently a rumor was circulated throughout the plant that Respondent had made a $500,000 profit the preceding year. Respondent confronted the employee and demanded to know if he had started this report. The employee was discharged for the alleged reason that he had deliberately and maliciously lied in stating that the Respondent had made "fantastic earnings." The National Labor Relations Board found that the employee had not made these statements and that the discharge was violative of Section 8 (a) (1) and Section 8 (a) (3) of the National Labor Relations Act as the employee's conduct was within the scope of protected concerted activity. Alternatively it was held, even if the employee had made an inaccurate statement, it was not made deliberately or

22. Nickens v. State, 131 Tex. Cr. R. 510, 100 S.W.2d 363 (1936). *See* Todorow v. United States, 173 F.2d 439 (9th Cir. 1949) (general rule in criminal cases that court must instruct jury on all applicable law involved, whether or not he is requested to do so, does not go beyond the requirements that the court instruct on the principles of law which the jury should have in order to decide the *factual* issues presented).

23. Walls v. State, 142 Neb. 748, 7 N.W.2d 709 (1943) (where defendant's evidence was that his mind was a complete blank during the period when the crime was committed, refusal of instruction to acquit him if the jury had reasonable doubt as to his mental capacity was not prejudicial error). However, in this case capital punishment was not involved. Courts usually go to far greater lengths to protect the defendant where the death penalty is involved.

24. Mass. G.L. (Ter. Ed.) c. 123, Sec. 100A.

25. See, Weihofen, Insanity As A Defense In Criminal Law, 405-6 (1933).

26. Ore. Code Ann. §26-846 (1930) ". . . Where the defendant . . . purposes to show . . . that he was insane . . . he shall . . . file a written notice of his purpose . . . If the defendant fails to file any such notice he shall not be entitled to introduce evidence. . . ."