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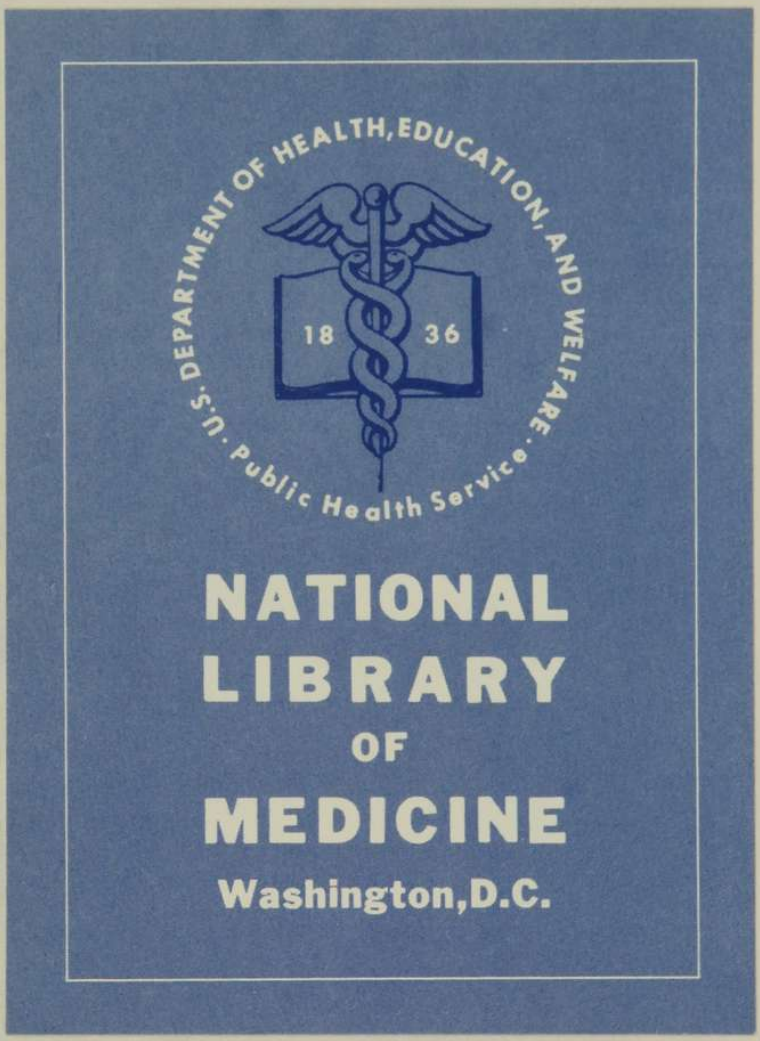

THE ADJUDGED CASES

ON

INSANITY

AS A

DEFENCE TO CRIME,

WITH NOTES.

BY

JOHN D. LAWSON,

Author of "The Law of Expert and Opinion Evidence," "A Concordance of Words, Phrases and Definitions," "Usages and Customs," "Leading Cases Simplified," "The Contracts of Common Carriers," Etc., Etc.

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"*There is, perhaps, no subject connected with common law upon which the authorities are more hopelessly in conflict than this.*"—Cunningham v. State, 56 Miss. 269.

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PREFACE.

The design of this work is to present in a single volume all the reported cases where insanity has been set up in defence of a criminal charge and has been passed upon by a court of justice in America or Great Britain. I have endeavored to give *every reported case* of this kind. If the case turned wholly on the topic of Insanity then the case is given in full; if there were other questions involved then only that part relating to insanity is given, But in one way or another all that the reports contain on the subject will, I think, be found in this volume. This book, therefore, will enable the judge or criminal lawyer to have, in the trial of any cause where this defence is urged, all the authorities in the court-room at one time. Without this collection such a result could only be obtained by procuring at great labor and expense some five hundred volumes of reports.

In the notes I have tried to set out a careful and thorough statement of the law relating to the defence of Insanity in Criminal Cases.

J. D. L.

St. Louis, March, 1884.

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THE ADJUDGED CASES

ON

INSANITY AS A DEFENCE TO CRIME.

WITH NOTES.

CHAPTER I.

THE LEGAL TEST OF INSANITY.

TEST OF INSANITY — DEMENTIA — RESPONSIBILITY.

STATE *v.* RICHARDS.

[39 Conn. 591.]

In the Superior Court of Windham County, Connecticut, August Term, 1873.

Before Hon. ORIGEN STORRS SEYMOUR.

Dementia. — Test of Responsibility for Crime. — An imbecile ought not to be held responsible criminally unless of capacity of ordinary children under fourteen years of age — *i.e.*, children of humble life and of only ordinary training.

Information for burning a barn; brought to the Superior Court for Windham County and tried by a jury, at its August term, 1873, on the plea of not guilty, before SEYMOUR, J. The defence was that the prisoner had not sufficient mental capacity to be criminally responsible for the act. The charge of the judge, which sufficiently states the facts of the case, was as follows: —

JUDGE SEYMOUR'S CHARGE.

The evidence seems ample to warrant you in finding that the burning complained of was caused by the prisoner. Your attention has been turned mainly to the question whether the act was done with the felonious intent charged, and this question depends mainly upon another,

whether the accused has sufficient mental capacity to warrant us in imputing to him a felonious intent.

That he is considerably below par in intellect is apparent to us all. This is indicated by his countenance and general appearance. The same thing is indicated by his extraordinary conduct at the fire, as the flames were bursting out he was seen on all fours crawling back from under the burning barn, with no clothing upon him except his shirt and trowsers. The day was excessively cold. He remained some half hour thus scantily clothed, gazing stolidly at the blaze, until ordered into the house. All this took place in broad daylight, in plain view of Mr. Gallup's house.

But it is undoubtedly true, as the attorney for the State contends, that mere inferiority of intellect is no answer to the prosecution. We are, therefore, called upon in this case to decide an interesting and difficult question, to-wit, whether the accused has sufficient mind to be held responsible as a criminal.

He is not a mere idiot, nor does he appear to be a lunatic. He suffers from want of mind rather than from derangement or delusion, and the question is whether the want of mind is such as to entitle him to acquittal on the ground of what in law is termed *dementia.*

This inquiry is attended with inherent difficulties. Our knowledge of our own minds is imperfect; our knowledge of the precise mental condition of another is necessarily still more imperfect. We, as triers, are obliged to rely upon the evidence furnished us by witnesses whose means of knowledge are limited and who find great difficulty in communicating to us, on a subject of this nature, what they do know.

Our principal embarrassment arises, however, from the want of a definite measure of mental capacity. Eminent judges and learned commentators have attempted to furnish rules and tests for the guidance of triers of cases of this kind; but upon examination these rules and tests turn out to be imperfect and unsatisfactory.

It was formerly thought that the jury might properly convict if the accused had any sense of right and wrong, or if he was aware that punishment would follow the commission of an offence. But children of very tender years have some sense of right and wrong, and fully understand that punishment will follow transgression. Such children are subjected by their parents to discipline, and are by gentle punishments restrained from wrong-doing; but our sense of humanity would be greatly shocked at the thought of subjecting children to the penalties of statute law because some sense of right and wrong and fear of punishment had been developed in them. So, again, it is often said in the

Lord Hale's Test.

books that a person is to be deemed responsible for crime if he understands the consequences and effects of the act laid to his charge. This is undoubtedly and obviously true if he has such understanding and appreciation of consequences as pertain to other men. But if he has less of it than is common to men in general, how much less must it be to escape responsibility?

I think the accused had some knowledge of the consequences of his acts. He probably knew that by igniting a match and throwing it into a hay mow a fire would be kindled, and that the barn would thereby be consumed. He, perhaps, also had some appreciation of the loss and destruction of property which would ensue.

But I am not willing to say that some knowledge of consequences, however faint and imperfect, is sufficient to warrant you in convicting the prisoner. I can give you no precise rule; but I think it clear that if the prisoner's perception of consequences and effects was only such as is common to children of tender years he ought to be acquitted. And this leads me to refer to the rule adopted by an eminent English judge, Lord Hale. He reasoned that, inasmuch as children under fourteen years of age are *prima facie* incapable of crime, imbeciles ought not to be held responsible criminally unless of capacity equal to that of ordinary children of that age. If this test be adopted the prisoner will, upon the testimony, be entitled to an acquittal. The principal witnesses for the prosecution say that he is inferior in intellect to children of ten years of age, and several very intelligent witnesses for the defence testify that they are acquainted with many children of six years who are his superiors in mental capacity.

I am inclined to recommend Lord Hale's rule to your adoption, not, however, without qualifications which I think it important to observe. And first, this test, like all others which I know of, is imperfect. Probably no two of us have the same idea of the capacity of children of fourteen years of age, and then there is this further difficulty, that there can be no accurate comparison in detail between the healthy and properly balanced, though immature, mind of a child, and the unhealthy, abnormal and shrivelled intellect of an imbecile. The comparison therefore is only of the general result in their respective appreciation of right and wrong and of consequences and effects.

This further consideration ought also to be borne in mind, that though in modern times persons under fourteen are seldom subjected to the penalties of the criminal code, yet in law children between seven and fourteen may be subjects of punishment if they are shown to be of sufficient capacity to commit crimes. In applying Lord Hale's rule, therefore, the child to be taken as a standard, ought not to be one who

has had superior advantages of education, but should rather be one in humble life, with only ordinary training. And after all, gentlemen, you see that I can furnish you with no definite measure of mental capacity to apply to the prisoner. The whole matter must be submitted to your sound judgment. You will say whether the prisoner has such knowledge of right and wrong, and such appreciation of the consequence and effects of his acts, as to be a proper subject of punishment. Opinions on this subject have been expressed by most of the witnesses who have testified. These opinions depend for their value mainly upon the facts with which they are connected. You have the advantage of being able to compare with each other all the facts which have been brought to your notice bearing upon the prisoner's mental condition. You will look carefully at all these facts. The history of the prisoner's life is somewhat significant. From early childhood it has been spent in almshouses, subjected to constant constraint. In the most ordinary acts of his life he has been governed by the superior will of others to whose care he has been committed. He has, it appears, been seldom left to the free guidance of his own judgment. When so left, he seems to have acted without forecast, under the pressure of immediate wants and impulses.

If you acquit the prisoner on the ground of want of mental capacity you will so say in your verdict, in order that the prisoner may in that event have the benefit under our statute of a home where he will be kindly cared for, but kept under such restraints as to prevent his doing injury to the persons or property of others.

[The jury acquitted the prisoner, stating in their verdict that the acquittal was on the ground of want of mental capacity.]

TEST OF INSANITY. — ACT MUST BE RESULT OF INSANITY TO BE EXCUSABLE — BARBARITY OF ACT NO PRESUMPTION OF INSANITY.

Bovard *v.* State.

[30 Miss. 600.]

In the High Court of Errors and Appeals of Mississippi, April Term, 1856.

Hon. Cotesworth P. Smith, *Chief Justice.*
" Ephraim S. Fisher, } *Associate Justices.*
" Alexander H. Handy, }

1. **The Law Presumes Every Man to be Sane,** until the contrary is proven.
2. **Particular Right and Wrong Test.** — If the jury believe, from the evidence that the accused killed the deceased with malice, and not in necessary self-defence,

Statement of Case.

he is guilty of murder, notwithstanding they may believe he was, at the time of committing the deed, laboring under partial insanity, unless he was, from such insanity incapable of understanding the nature and consequence of his act, and of knowing that it was wrong, and that he would be punished for it.

3. **Same.** — Insanity, however produced, constitutes no excuse for crime, unless it be so great as to deprive the party of his power to understand the nature of his act, or of his ability to distinguish between right and wrong, and of his ability to understand that he will be liable to punishment if he commits it.

4. **Act Must be the Result of Insanity.** — Though a party be partially insane, yet he is responsible for his criminal acts, unless it appear that he was prompted or instigated by his madness to perpetrate such act.

5. **Barbarity of Act no Presumption of Insanity.** — If the homicide charged is proven in the opinion of the jury, the barbarity of the act affords no legal presumption of insanity in the accused.

Error to Yazoo Circuit Court, Henry, J. Young C. Bovard, the plaintiff in error, was indicted in the Circuit Court of Yazoo County for the murder of his wife, on the 20th day November, 1855, and was convicted. The defence relied on was, that the act of homicide was committed whilst the prisoner was insane.

The opinion of the court contains the facts of the case.

John M. Moore, for plaintiff in error, cited and commented on *Com.* v. *Rogers*,[1] *State* v. *Gardiner*,[2] *State* v. *Spencer*.[3]

D. C. Glenn, Attorney-General, argued the cause orally.

Smith, C. J., delivered the opinion of the court.

The plaintiff in error was indicted and tried in the Circuit Court of Yazoo for the murder of his wife. No question, whatever was raised as to the fact of homicide, or the agency of the accused in the commission of the deed. The defence was placed solely on the ground of insanity, and the jury found the prisoner guilty of the charge. A motion was made to set aside the verdict, and for a new trial. The grounds upon which the motion was based were, first, misdirection in the charges to the jury; and, second, that the verdict was contrary to law and evidence. The same reasons are now urged as a ground for reversing the judgment.

In support of the first ground it is insisted that the third, fourth, and fifth instructions for the State are erroneous, inasmuch as they "do not properly and fully explain the legal consequences of insanity, and lay down rules for the guidance of the jury, under which the accused might be convicted, although proved by the evidence to have been insane at the time the alleged offence was committed."

The only questions which could properly arise upon the evidence be-

1 7 Metc. 500.
2 Wright (Ohio R.) 302.
3 21 N. J. (L.) 424; 1 Greenl. Ev., Par. 42; Ray, Med. Juris. 413; 1 Copeland, Dictionary of Medicine, 572; 1 Cyclopædia of Practical Medicine, 587.

fore the jury were, first, whether the accused labored under a mental derangement of his moral and intellectual faculties; second, whether he was affected with partial mania, accompanied with a delusion which was connected with, or embraced in, the circle of its operation, the act with which he was charged; and, third, if, by the proof, he was shown to have been either generally or partially insane, whether the insanity was of such a character as to absolve him from responsibility as a moral agent.

A person, in the estimation of the law, to be capable of the commission of a crime, must have intelligence enough to have a criminal intent and purpose; and if his mental capacity is either so deficient that he has no conscience, nor will, nor controlling mental power over his actions; or if, through the access of mental disease, his intellectual power is, for the time, completely suspended, he is not to be regarded either as a moral agent, or punishable by the law for his acts.

Cases of insanity of such extreme character as these are not easily mistaken. And it is not to be controverted that the prisoner, as shown by the evidence, was not so totally deprived of conscience, will, or mental control over his actions, or that his intellect and capacity were not so utterly deficient as to be incapable of entertaining a criminal purpose. But, in cases of partial insanity, where the mind, though capable of memory, of reasoning, and of judgment, is clouded and weakened, or so perverted and influenced by insane delusions as to be compelled, as it were, to act under false impressions and influences, the rule of law, as it is now generally understood, is laid down by Chief Justice Shaw as follows: "A man is not to be excused from responsibility if he has reason and capacity sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing, a knowledge and consciousness that the act he was doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, and injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts."[1]

[1] Com. *v.* Rogers, 7 Metc. 500.

Acts of Prisoner Showing Insanity.

Without quoting the instructions to which exception is taken, or noticing them in a more special manner, it is sufficient to state that they contain, in very distinct and intelligible terms, the rules laid down by the learned judge in the charge from which we have quoted above. In our opinion, therefore, there was no error committed in giving the instructions which were requested in behalf of the prosecution. Nor do we think there was error in withholding either of the instructions which were requested by the prisoner and refused by the court.

The remaining ground upon which reversal of the judgment is claimed is, that a motion for a new trial was improperly ruled. The question thus presented must, of course, be determined by the evidence submitted to the jury, and we will proceed to notice such of the facts established by the testimony which tend to prove or disprove the insanity of the accused.

The homicide was committed on the night of the 20th of November, 1855; the prisoner was for several years previous to that date a man of intemperate habits; some eight or ten days before the deed was committed he was very much intoxicated, but it was supposed that he had abstained entirely from drink for the five or six days immediately preceding the 20th of November. On the 19th he had been at Benton, which was four miles distant from his place of residence; and on his return he was met by Dr. Woods, who had previously been his physician; he complained of being unwell; he said his right arm was dead, and he could not use it; he complained of soreness about the shoulders and neck. Dr. Woods, from a slight examination, thought it might be paralysis arising from intemperance. He was rational, and the doctor observed no symptoms of delirium tremens or any indication of mental derangement of any description about him. On the same day he was at Mr. Quini's, dined there and ate more heartily than usual; Mrs. Quini observed no wildness in his appearance at dinner; he frequently changed the subject of conversation, acted strangely, and walked more rapidly than usual. He went away and returned some time after dark; he then appeared to be under some delusion connected with the subject of religion; he said he had got religion, that his wife had got religion, and was the happiest woman in the world; he had come back to tell Quini and wife of it; he wished them to get religion, also; and insisted upon their getting "down and going through the religious performance;" he prayed, preached, and said he had turned a preacher. He frequently ran out into the piazza and seemed to be watching for something; said that they would get religion in a few minutes; that he saw it coming down from heaven.

These acts and declarations, and many others of a similar character, and quite as frantic and absurd, if they were not simulated, undoubtedly show that he was afflicted with partial insanity, attended with delusion, on the subject of religion. He left Quini's and returned again the same night; the weather was cold, and he went back in his shirt and drawers, without hat or shoes; and behaved in the same way. He was persuaded to go to bed, and was supposed to sleep; he remained quiet for two hours; he then got up and went away. On the following day, the 20th of November, at eight o'clock, he returned to Quini's and deported himself much in the same manner that he had on the previous night. He asked for breakfast; said that he had eaten nothing that morning; that breakfast was ready when he left home, but that he could not wait. He sat down to the table and ate as usual. On the 19th or 20th he spoke of his "lame arm," and said that it had got well. From Quini's, after having remained an hour, he went to the graveyard and assisted in putting down a post; a person being then engaged in paling it in. He was rational, and, while there, evinced no indication of mental alienation. At home, in the evening of the 20th, his conversation and conduct indicated that he was under the same delusion under which he appeared to labor in the morning and on the preceding night. He was kind and affectionate to his wife, and manifested great solicitude on her account. He showed no dislike or hostility to any one; did not appear to be suspicious of any one; and although he said they would all be dead in a short time, he did not appear to be alarmed on that account.

On the 21st, the day following the commission of the deed, he appeared to be in full possession of his intellectual faculties; he confessed his crime, described its atrocity in the strongest terms, expressed great remorse at having committed the deed, but declined to state his motive for its commission. Late in the evening of that day he was visited by Dr. Holmes. The doctor was under the impression that he was asleep when he first went in; his pulse was natural and he thought that the accused was not laboring under any disease whatever. He had known the accused for many years, and had never seen him with the symptoms of *mania a potu* upon him. On the occasion of this visit, he saw nothing about the accused which indicated insanity.

In reviewing the evidence in the case before us, it is impossible to come to the conclusion that the plaintiff in error, at the time he perpetrated the crime, was affected with a mental malady which involved his entire intellectual faculties; and there are very cogent reasons for rejecting the hypothesis, that his affection was that of delirium tremens.

According to an approved writer on the medical jurisprudence of insanity, this disease — delirium tremens — at its approach is generally

Symptoms of the Disease.

attended, amongst other symptoms, with disturbed sleep and impaired appetite; after the symptoms have continued for two or three days, they increase in severity, the patient ceases to sleep altogether, and soon becomes delirious. At first the delirium is not constant — the mind wandering during the night — but during the day when its attention is fixed, capable of rational discourse. It is not long, however, before it becomes constant, and constitutes the most prominent feature of the disease. This state of watchfulness and delirium continues three or four days, when, if the patient recover, it is succeeded by sleep, which at first appears in uneasy an irregular naps, and lastly in long, sound and refreshing slumbers.[1]

"Almost invariably," says the same author, "the patient manifests more or less feelings of suspicion and fear, laboring under continual apprehension of being made the victim of sinister designs and practices." "One of the most common hallucinations is to be constantly seeing devils, snakes, vermin, and all manner of unclean things about him, and peopling every nook and corner of his apartment with these loathsome objects. The extreme terror which these delusions often inspire, produce in the countenance an unutterable expression of anguish, and frequently impels the patient to the commission of suicide."

Assuming this to be a correct description of the course, and constantly attendant symptoms of *mania a potu*, it is difficult, if not impossible, to believe that the accused labored under that disease.

The disease, if it ever existed at all, did not manifest itself until the afternoon of the 19th of November; for on that day, at dinner, none of its peculiar and marked symptoms were observable; on the contrary, he was neither irrational nor delirious, and ate more heartily than usual. On the following morning, although, if we judge from the evidence in relation to his conduct during the night, his malady had made most rapid progress, he ate his breakfast with unimpaired appetite, and went, in compliance with his promise, to assist in putting an inclosure around the graveyard; and whilst there disclosed no indication of irrationality or symptoms of delirium tremens. These facts are irreconcilable with the idea that, if he labored under any mental affection, it was that of delirium tremens.

The total absence of almost every marked peculiarity usually attendant upon this disease, and particularly the short continuance of the attack, and the complete restoration of the accused to his natural sound and healthy state, within less than thirty hours after its commencement, render this conclusion unavoidable.

[1] Ray, Med. Juris. 417.

There are several facts and circumstances connected with this transaction, as they appear from the evidence, which might well have authorized the jury to doubt whether the accused was at all affected with any form of mental malady. But conceding that there was no attempt at simulated mania on the part of the accused, and that he in fact did labor under some disease of the mind, which amounted to partial, but very temporary, insanity, according to the rule of law which must govern in the case, he is clearly to be held responsible for his act.

There was no proof that the accused had not capacity and reason sufficient to distinguish between right and wrong in relation to the act which he committed; or that he had not a knowledge and consciousness that it was wrong and criminal, and that punishment would be inflicted upon him in consequence of its commission; on the contrary, he was perfectly rational, except in reference to a single class of subjects, about which he seemed to entertain very wild, ridiculous and absurd notions. But there was no proof before the jury, which, either directly or by inference, showed that the fancy or delusion under which he labored had any connection as the antecedent or cause with the commission of the offence. It is not sufficient, to absolve from the penalties of the law, that the party charged was partially insane, and that such insanity was attended with delusion. In all such cases it is essential that it be clearly shown, in order to excuse, that the act was committed under the direct or necessary influence of such delusion.

Judgment affirmed.

PARTICULAR RIGHT AND WRONG TEST—BURDEN OF PROOF—OPINIONS OF NON-EXPERTS.

STATE *v.* ERB.

[74 Mo. 199.]

In the Supreme Court of Missouri, October Term, 1881.

Hon. THOMAS A. SHERWOOD, *Chief Justice.*
" WARWICK HOUGH,
" ELIJAH H. NORTON,
" JOHN W. HENRY, } *Judges.*
" ROBERT D. RAY,

1. **Particular Right and Wrong Test.**—To entitle a person charged with homicide to an acquittal on the ground of insanity, it must appear that his mental faculties were, at the time the act was committed, so perverted and deranged as to render him incapable of distinguishing between right and wrong, with respect to that particular act.

Facts of the case Reviewed.

2. **Burden of Proof.** — Such evidence must appear to the reasonable satisfaction of the jury.

3. **Evidence of Non-Expert.** — A witness not an expert may give his opinion of a person's insanity, if accompanied with the facts on which it is based.

APPEAL from St. Louis Court of Appeals.

D. H. McIntyre, attorney-general, for the State; *Allen & Coste*, for respondent.

NORTON, J. — The defendant, William Henry Erb, was indicted in the St. Louis Criminal Court, on the 2d of July, 1879, for murder in the first degree, for the homicide of his divorced wife, Rose Mion, *alias* Aglae Rosalie Erb, on the nineteenth day of June, 1879. He was arraigned at the same term, and pleaded guilty, which the court refused to accept, and ordered the plea of "not guilty" to be entered. After several continuances, the cause came on for trial at the March term, 1880, and defendant was convicted of murder in the first degree, as charged in the indictment. After an unsuccessful motion for a new trial, he made an application for an appeal to the St. Louis Court of Appeals, which was granted. That court reversed the judgment of the Criminal Court; whereupon the circuit attorney for the State appealed the case to this court.

The principal objections made by defendant's counsel in their motion for a new trial, are to the action of the court giving certain instructions on its own motion, and refusing others asked by defendant; in admitting improper and illegal testimony for the State, and excluding competent and legal testimony for the defendant; and the action of the court, in refusing to instruct the jury to disregard certain alleged improper statements made by the circuit attorney in his address to the jury.

The facts disclosed by the evidence on the part of the State to establish the *corpus delicti* are that the defendant, having heard that the deceased, who had been divorced from him for some years, was about to marry again, went to his home, procured a knife and proceeded to to the house of deceased, where she was engaged in washing, and asked her "if that was true," to which deceased made no response, whereupon defendant stabbed her twice in the back, the knife penetrating the left ventricle of the heart, and inflicting a wound of which she immediately died; that defendant, after committing the homicide, threw the knife, with which he inflicted the wound, into the vault of a water-closet, and walked away up Spruce Street, and upon being arrested said he did not cut any woman; that about three hours after his arrest, upon being asked why he killed his wife, he answered: "Who said I killed her?"

and upon being told "your little daughter said so," replied that: "She can't say so; I have not seen my wife for over a year; I never had such a knife." On the morning after the homicide, defendant said there was no use in denying the killing; that his wife had not treated him well; had once put him in the work-house; that he had been told, the afternoon of the homicide, that she was going to marry somebody, and he made up his mind, while sitting on the stone, to get his knife; that he then went home and got it; that he then went to his wife's house and entered the front door and met his little girl and asked her where her mother was, and upon being told that she was in the yard, he went into the yard and saw his wife at the wash-tub, and asked her if that was true, meaning if she intended to marry, and upon receiving no reply, defendant said he "then gave it to her" and "threw it away," meaning the knife, and then went up Spruce Street to Fourth Street. These facts sufficiently characterize the brutal nature of the act, and viewing the homicide in the light of them alone, they unquestionably establish the crime of murder in the first degree.

The only defence relied upon at the trial was that of insanity. This defence was sought to be established by showing that defendant had been addicted to strong drink for a number of years; that previous to 1865, he lived in Paducah, Kentucky, and while there had drunk to such excess as to produce, on several occasions, delirium tremens; that he had attempted, while in Kentucky, on one occasion, to jump out of a two-story window, on another occasion to poison himself, and on another attempted to kill a man with a knife, which he was trying to take from him; that when sober he was peaceable and quiet; when drunk, dangerous and quarrelsome; that he removed to St. Louis in 1865, where he continued his habit of drinking. As to the extent to which he indulged in his habit after his removal to St. Louis, the evidence is conflicting, some of the witnesses stating that he indulged in it in 1876 to such an extent that he became very much depraved and on the verge of delirium tremens, on which occasion he cut his wrist and said he was going to kill himself; that in 1878 he was prostrated from the heat; that about that time and afterwards, he would not rest well of a night, would often be restless and complain of headache and burning sensation in his stomach, and request not to be left alone at night. All the witnesses concur in saying that during his residence in St. Louis, he was never unwell except as above stated, and never unable to attend to business, though during the time he was often drunk. As to the condition of defendant at the time the homicide was committed, all the witnesses who saw him immediately after the occurrence concur in say-

Instructions as to, Approved.

ing that he was not drunk, but appeared to be sober, his own admission being that he had drank twice on the day of the homicide. Upon the close of the evidence, defendant's counsel put a hypothetical case to a physician who was an admitted expert on the question of insanity, to which the physician answered "that he would call it simply a case of alcholism; that he could not define it as a case of insanity; that the case put was one where the responsibility of the individual is modified by the condition of his mind. This modified responsibility is all I could predicate of this case. It would come under the head of nervous cases, where an individual, though sane, would be less responsible than many who are insane." The State also put a hypothetical case to another physician, also an expert, embodying substantially the same facts, who answered "that he saw no insanity in the case."

The defendant asked nine instructions, of which the court gave numbers one and seven, and refused the others, and in so doing it is insisted by counsel that the court committed error. Instruction number two, which was refused, asked the court to direct the jury in substance if they believed defendant, at the time of committing the homicide, was incapable of distinguishing right from wrong, or of exercising control or will power over his actions, or was unconscious at times of the nature of the crime he was about to commit, they would find the defendant not guilty. In an instruction given by the court, of its own motion, the jury were told that if, at the time the stabbing occurred, defendant was so insane that he could not, and did not know or comprehend the nature or character of the act, although he may have committed it, he is not guilty; that to entitle defendant to an acquittal on the plea of insanity, his mental faculties must have been at the time the homicide was committed, so perverted and deranged as to render him incapable of distinguishing between right and wrong, and of knowing the right from the wrong of that particular act. The instruction given by the trial judge is in strict conformity to the ruling of this court in the cases of the *Baldwin* v. *State*,[1] *Huting* v. *State*,[2] and *State* v. *Redemeier*.[3] This instruction covered the ground as to insanity, and no error was committed in refusing instruction number two. Besides this, I cannot see anything in the facts of this case, transpiring at the time the act was committed, upon which to predicate an instruction telling the jury that if they believed defendant was unable to exercise control or will power over his actions when he committed the act, they would acquit.

Instructions numbers three and six were properly overruled, for the same reasons which apply to the second instruction. In all cases where insanity

[1] 12 Mo. 223. [2] 21 Mo. 464. [3] 71 Mo. 175.

is interposed as a defence, whether such insanity be denominated alcoholism in its chronic form, or in its acute form of delirium tremens, or dypsomania, affective or emotional, ideational, or whether it be designated by any other of the various technical terms denoting peculiar forms of insanity, the question, according to the uniform course of decisions in this State, is, whether such insanity rendered the person laboring under it incapable of distinguishing between right and wrong, in respect to the act he was about to commit.

The fourth and fifth of defendant's instructions were properly refused, as they asked the court to tell the jury that if they had a reasonable doubt as to the insanity of the accused, they would acquit. Instructions containing the above principle have been repeatedly condemned by this court. *State* v. *Redemeier*, and cases there cited.

The eighth instruction is as follows: "The court instructs the jury that if they believe at the time of the killing charged in the indictment, the mental and moral faculties of the defendant were so perverted from their normal condition, by the habitual use of alcoholic liquors, as to prevent him from understanding the nature and consequences of the act he was about to commit, and such perverted and diseased condition of his mental and moral faculties, was inconsistent with deliberation and premeditation as charged in the indictment, so that he could not have acted with deliberation and premeditation, the jury must find the defendant guilty of murder in the second degree, and assess the punishishment at a term in the penitentiary for not less than ten years. But such diseased condition of the mental and moral faculties must be the result of an habitual use of liquor, and not merely the disturbance incident to a fit of intoxication." The facts in this case, if defendant was not insane, show it to be murder in the first degree, and nothing else, and the instruction might well have been refused on that ground; but it was fatally defective on another ground in this, that it authorized the jury to find defendant guilty of murder in the second degree without finding that the act was done with premeditation.[1]

The ninth instruction refused, asked the court to instruct the jury to disregard the evidence of Sergt. Frank Watkins. This witness was called in rebuttal, and was asked the question, "What was defendant's appearance and conduct as to sanity or insanity?" This question was objected to on the ground that Watkins was not an expert, and could not, therefore, give an opinion. This objection was properly overruled under the authority of *State* v. *Klinger*,[2] where it was held that, "wit-

[1] State v. Curtis, 70 Mo. 594.

[2] 46 Mo. 229.

nesses who are not experts may be permitted to state whether they deem the prisoner to be insane, but it can only be done in connection with their statements of the particular conduct and expressions which form the basis of the judgment."

It is also urged, as a reason for reversing the judgment of the trial court, that after the argument of the case before the jury had been closed, the court was asked to instruct the jury to disregard the following language used by the prosecuting attorney in his closing speech. The circuit attorney, in his closing argument, said: "Where a man is really insane, from whatever cause, he shall be protected by the State, whose representative I am. For instance, take the case of Heuman, which startled the community the other day, and which, doubtless, you have all read about. He had fits and delirium tremens, and while so suffering, he killed his little infant, whom he loved, and his wife by his bedside, in his insane delusion that his little infant and his wife meant to kill him. Now, that is alcoholism, or insanity resulting from it, which the law recognizes wherever it exists. There is nothing of this kind in Erb, the case before you. He had no delusion or insanity of any kind, and none that any person swears to. * * * That there was no murder in the second degree in the case; that the testimony proved murder in the first degree, and this was not denied, as insanity was the defence; that if this was so, the jury ought not to convict of murder in the second degree, as this would be virtually pardoning the accused, and the pardoning power belonged to the Governor and not to juries; that they should do their duty, and if they thought there were any mitigating circumstances, they could write to the Governor." We cannot say that these utterances were not fully warranted by the facts disclosed in the evidence. It is true that the court had given an instruction for murder in the second degree, doubtless under the belief that sect. 1234 of Revised Statutes directed trial courts, in every case of indictment for murder in the first degree, to give an instruction not only as to murder in the first degree, but also to murder in the second degree. This was a misconception of the statute, this court having held in the case of *State* v. *Hopper*,[1] that said section is not to be understood as requiring the trial court to instruct the jury as to murder in the second degree, where there is no evidence upon which to predicate it.

The remark of the prosecuting attorney, "that there was no murder in the second degree; that the testimony proved murder in the first degree, and that this was not denied, as insanity was the defence," could

[1] 71 Mo. 425.

have been understood by the jury in no other sense, than if they did not believe that the defendant was insane at the time he committed the act, they were bound under the evidence and the law to find him guilty of murder in the first degree. The principle thus announced in the remarks of the prosecuting attorney, was directly sanctioned by this court in the case of *Baldwin* v. *State*.[1] There was no mistake of law or fact, and the case does not come within the principle announced in the case of *State* v. *Lee*.[2]

Nor do we think the appeal made to the jury to do their duty would warrant an interference with the judgment. It amounted to nothing more than an assertion of what every juror in the box, if intelligent enough to sit on a jury, knew to be a fact, viz.: that their function was not to bestow mercy, but to do justice between the State and the accused.

Perceiving no error, the judgment of the St. Louis Court of Appeals is reversed, and that of the Criminal Court is affirmed, in which all the judges concur, Judge HOUGH concurring in the result.

TEST OF INSANITY — HYPOCONDRIA.

HAWE *v.* STATE.

[11 Neb. 537; 38 Am. Rep. 375.]

In the Supreme Court of Nebraska, January Term, 1881.

Hon. SAMUEL MAXWELL, *Chief Justice.*
" GEORGE B. LAKE, } *Judges.*
" AMASA COBB, }

Occasional oddity or hypocondria does not amount to insanity excusing the commission of a criminal offence. Nothing short of the inability to distinguish right from wrong can do so.

CONVICTION of malicious shooting. The opinion states the case.

Phelps & Thomas, for plaintiff in error; *C. J. Dilworth*, attorney-general, for State.

MAXWELL, C. J. — The plaintiff was convicted at the November, 1880, term of the District Court of Colfax County, of maliciously shooting one August Hirn, and was sentenced to imprisonment in the

[1] *Supra.*

[2] 66 Mo. 167.

Definition of "Insane"—Test.

penitentiary for five years. He now prosecutes a writ of error to this court.

The only error relied upon is the following instruction, given on behalf of the State: "The law requires something more than occasional oddity or hypocondria to exempt the perpetrator of an offence from its punishment. If the defendant was in the possession of reason, thought, intent, a faculty to distinguish the nature of actions, to discern the differences between moral good and evil, then the fact of the offence and the condition of mind above described, proved beyond a reasonable doubt, your verdict should be guilty."

The court, prior to giving the above, had instructed the jury fully upon all the questions raised by the indictment, and also upon the question of insanity, and the instructions so given are certainly favorable to the accused. The instruction complained of in effect says to the jury that mere oddity or hypocondria is not insanity, and if the accused, at the time of committing the offence was in possession of reason, and was able to discern right from wrong, he would be responsible for his actions.

Webster defines the word "insane" as "exhibiting unsoundness of mind; mad; deranged in mind; delirious; distracted."

The question here involved was before this court in *Wright* v. *People*.[1] The court say: "It is a familiar rule of the common law that to constitute a crime there must, in almost all cases, be first, a vicious will, and secondly, an unlawful act consequent upon such vicious will.[2] And where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible. *Flanagan* v. *People*,[3] *State* v. *Lawrence*,[4] *Com.* v. *Heath*.[5] This mental incapacity may result from various causes, such as nonage, lunacy or idiocy, and whenever interposed as a defence, the inquiry is necessarily to the single question of the ability of the accused to distinguish between right and wrong at the time of committing the act complained of.[6] But even where insanity is shown to exist, and whether it be general or partial, the rule seems to be substantially as charged by the court below, that if there remains a degree of reason sufficient to discern the difference between good and evil, at the time the offence was committed, then the accused is responsible for his acts."[7]

[1] 4 Neb. 407.
[2] Broom & Hadley Com. (Am. ed.) 399.
[3] 52 N. Y. 467; *s. c.* 11 Am. Rep. 731.
[4] 57 Me. 574.
[5] 11 Gray, 303.
[6] Freeman *v.* People, 4 Denio, 28.
[7] Hopps *v.* People, 31 Ill. 385.

We adhere to the rule laid down in the above opinion as being sound in principle. There is, therefore, no error in the instruction, and the judgment of the court below must be affirmed.

Judgment affirmed.

TEST OF INSANITY — IRRELEVANT QUESTIONS — BURDEN OF PROOF.

DEJARNETTE *v.* COMMONWEALTH.

[75 Va. 867.]

In the Court of Appeals of Virginia, January Term, 1881.

Hon. R. C. L. MONCURE, *President.*
" JOSEPH CHRISTIAN,
" FRANCIS T. ANDERSON,
" WALTER R. STAPLES,
" EDWARD C. BURKS, } *Judges.*

1. **Test of Insanity — Instructions.** — The prisoner was indicted for murder, the defence being insanity. The judge charged the jury as follows: "In every case, although the accused may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, and has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge and to know that if he does the act he will do wrong and receive punishment, and possess withal a will sufficient to restrain the impulse that may arise from a diseased mind, such partial insanity is not sufficient to exempt him from responsibility to the law for the crime." *Held*, correct.
2. **Irrelevant, Confusing, and Misleading** questions based on the defence of insanity should not be permitted.
3. **Burden of Proof.** — Insanity as a defence to crime must be proved to the satisfaction of the jury; it is not necessary that the jury shall be satisfied of the insanity of the prisoner beyond a reasonable doubt.

At the August term of the Hastings Court of the town of Danville, James T. Dejarnette was found guilty of the murder of his sister Mollie, committed in a house of ill-fame in said town, where she was living as an inmate. The only ground of defence was insanity.

Cabell & Peatross and *Withers & Barksdale*, for the prisoner.

The *Attorney-General*, for the Commonwealth.

STAPLES, J., delivered the opinion of the court.

(Omitting other rulings.)

The fifth bill of exceptions states that whilst Dr. T. W. Keene, a medical witness for the accused, was explaining to the jury the difference between moral and intellectual insanity, and giving the opinions of writers thereon, the presiding judge stopped the witness, and in the

Questions to Experts.

presence of the jury, said to the Commonwealth's attorney: "Is it possible, sir, that you sit there and permit such testimony as that without objection?" To which the Commonwealth's attorney replied, "Yes, sir, I am willing to hear it all." When the court replied, "I will not stop it unless you object." To which question and interference of the court and the manner in which it was done, the accused excepted.

In view of the fact that a new trial is to be had on other grounds, and inasmuch as the same matter is not at all likely to arise again, it is not deemed necessary now to decide whether or not the interference and remark of the presiding judge constitute error sufficient for the reversal of the judgment, more especially as a decision of that point involves the necessity of passing upon the relevancy of the testimony of the witness. But to prevent any possible misapprehension in the future, it is proper to say that, in the administration of justice, it is of great importance that the court should leave to the jury exclusively the consideration of the facts.

In this State, all expression of opinion, or comments, or remarks upon the evidence which have a tendency to intimate the bias of the court, with respect to the character or weight of the testimony, particularly in criminal cases, are watched with extreme jealousy and generally considered as invasions of the province of the jury. Nothing of the kind was, of course, intended by the learned judge of the court below. His remark was, no doubt, prompted by a feeling of some warmth at what he considered improper testimony given to the jury, without objection from the prosecuting attorney.

The 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th bills of exception may be considered together. In one of them Dr. Thomas W. Keene, a witness for the accused, is asked the following question: "Is it not recognized by the highest authority in the medical profession, that a person may commit an act, under the influence of a delusion, because he believes it to be right and his duty?" In another the witness is asked, "How intellectual insanity affects a man?" and, "How moral insanity affects him?" In another, "What is the difference between intellectual and moral insanity?" In another, "What is latent or concealed insanity, and how does it affect a man?" In another, "What is transitory insanity?" In another, "What is insane impulse?" In another, "What do medical men mean by insane temperament?" In another, "What circumstances would be likely to develop latent inherent insanity?" In another the witness is asked to give the symptoms of moral insanity. In another he is asked, "What is insanity?" All of these questions were excluded by the court.

Neither of these bills of exceptions set forth any of the testimony adduced on the trial to show the relevancy of these questions to the matters in issue. They extend over an almost unlimited field of inquiry, involving a discussion of the laws of insanity in all its complicated and mysterious phases. Their only effect was to consume the time and attention of the court, and to mislead and confuse the mind of the jury with perplexing discussions upon the symptoms of the various forms of derangement as developed in the human mind. We are, therefore, of the opinion that the Corporation Court did not commit any error in excluding the questions and answers thereto from the jury.

At the same time, we are not to be understood as saying that neither of the questions set forth in these bills of exception would be proper under any state of circumstances. In the progress of a trial facts may be, and often are, developed which render it proper for the medical witness to describe the symptoms of a particular disease, mental or physical, which may be the subject of investigation.

It is utterly impossible for an appellate court to lay down any rule on this subject, or to say, as an abstract proposition, what questions may, or may not, be propounded to the medical witness. In all inquiries relating to insanity, every reasonable latitude should be allowed in the examination of witnesses, however false or unfounded the court may consider the defence. It is always required, however, that parties complaining of the exclusion of proper testimony shall state in the bill of exceptions so much of the evidence as to show the pertinency and relevancy of that which is excluded. Without this, as a general rule, it is impossible for the appellate court to say that any error has been committed to the prejudice of the party complaining. But to prevent any misapprehension upon a future trial, it is proper to state that the question set out in the thirteenth bill of exceptions may be properly asked a medical witness qualified to testify on such a subject. That question is as follows: "Suppose a man had inherited a predisposition to insanity, would great mental anxiety, loss of property, or the honor of one's family, and losses of other kinds, be likely to develop the disease?" It has been often held that a medical witness, although he has never seen the patient, after hearing the evidence of others, may be called to prove the general effect of the disease described by them, and its probable consequences in the particular instance.

In *Wright's Case*[1] it was held, by all the judges, that a witness of medical skill might be asked whether, in his judgment, such and such

[1] R. & R. 456.

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appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that description.[1]

We are thus more particular in considering the question set out in the thirteenth bill of exceptions, because, by reference to another bill of exceptions, it appears that evidence was adduced on the trial tending to show the existence of insanity in the ancestors of the accused, and it is almost certain that the same question will be propounded on a future trial.

We come now to the seventeenth bill of exceptions, from which it appears that, after the conclusion of the argument, the court, of its own motion, proceeded to instruct the jury upon the principles of law by which insanity is to be tested.

To this action of the court, in so instructing the jury of its own motion, as well as to the doctrines therein laid down, the accused excepted.

In the first place, although it is not the practice in Virginia for the court, unasked, to charge the jury upon the law of the case, yet the mere fact that it does so cannot, of itself, be assigned as error. *Womack* v. *Circle*.[2] The accused has certainly no just cause of complaint if the law is properly expounded.

There are cases, indeed, in which it would be not only proper, but the duty of the court, even though unasked, to instruct the jury upon the principles of law by which they should be governed in rendering their verdicts. We think, however, that the practice in Virginia is a wise one in general, for it is extremely difficult to deliver charges to the jury without conveying to them some intimation of the opinion of the judges upon the evidence, or using some phrase or expression which may constitute a ground of just exception.

In the case before us, the charge of the learned judge sets forth, at great length, and with much minuteness of detail, the principles of law by which the jury were to be guided, and the tests to be applied in cases of insanity. It is but just to say that the charge evinces much elaboration and research, creditable alike to the industry and the learning of the learned judge. No just exception can be taken certainly to the following exposition of the law: —

"But in every case, although the accused may be laboring under partial insanity, if he still understands the nature and character of his

[1] See also 1 Philips on Evidence, 654; Rex. v. Searle, 1 M. & Rob. 75; United States v. McGlue, 1 Curt. 1.

[2] 29 Gratt. 192.

act and its consequences, and has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and receive punishment, and possesses, withal, a will sufficient to restrain the impulse that may arise from a diseased mind, such partial insanity is not sufficient to exempt him from responsibility to the law for his crimes."

We think the rule here laid down is in accordance with the best authorities, as well as the dictates of reason and justice. The learned judge also tells the jury: "The character of the mental disease principally relied upon to excuse the prisoner is that he did the killing under an irresistible impulse, which was the result of a diseased mind." He then proceeds to define "an irresistible impulse," as a moral or homicidal insanity, consisting of an irresistible inclination to kill or commit some other offence, some unseen pressure on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, it is incapable of resisting. The learned judge then declares it was for the jury to say whether the prisoner was forced to do the killing by such a controlling disease against his will, or whether he did it voluntarily, with intention to destroy the life of the deceased. Certainly, no sound exception could be taken to this definition of homicidal mania, or irresistible impulse, as it is sometimes termed; a diseased state of the mind, the tendency of which is to break out in a sudden paroxysm of violence, venting itself in homicide and violent acts upon friend and foe indiscriminately.

The real objection to the instructions is, that the jury are told that this species of insanity is the principal defence of the prisoner. Indeed, this idea of homicidal mania pervades the whole charge, and the jury might justly have inferred the only question they need to consider was, whether or not the accused was laboring under this species of insanity at the time of the commission of the offence. We must, of course, accept it as true that the defence of homicidal mania was relied upon in the court below. The record does not, however, show the fact. Neither in the testimony of the witness, nor in the instructions asked for by prisoner's counsel, is there any special reference to this species of partial derangement. The effort of the defence seems to have been rather to establish the existence of latent hereditary insanity in the accused, developed into active exertion by the shock he had received; but what form of mental aberration, whether homicidal mania merely,

Instructions.

or temporary derangement, or general hallucination or delusion, were relied upon, this record does not inform us.

The court might very properly have said to the jury, if such was the fact, that irresistible impulse was relied upon as a defence, and stated the principles of law applicable to the case. In so doing, however, the instructions should have been so framed as not to create the impression upon the mind of the jury that this form of insanity was the sole object of their inquiry.

With respect to the three instructions given by the court as a substitute for those asked for by the prisoner's counsel, we think they correctly state the law. The third instruction, especially, is as favorable to the accused as is consistent with the established rules of criminal law. The instructions asked for on the part of the defence were properly refused.

The first of the series affirms that in order to convict the prisoner of murder in the first degree, the jury must believe the killing was wilful, malicious, deliberate, and premeditated. Malice is, of course, a necessary ingredient in the crime of murder, and the law infers it, where the killing is deliberate and premeditated. The statute, however, in defining the offence of murder in the first degree, does not use the word malicious, for the simple reason that malice aforethought is, in such cases, a conclusion of law. To have instructed the jury, therefore, they must be satisfied the killing was malicious, was to add to the statutory definition of the offence, and to beget the confusion in their minds of supposing they must find the existence of malice, as a fact, where it was necessarily implied by law.

The second and third instructions are as follows: —

2. The court further instructs the jury that in weighing the evidence, as to the malice, deliberation, and premeditation of the prisoner, they should take into consideration the condition of the prisoner's mind at the time of the receipt of the intelligence which led to the homicide, and the effect which the sudden intelligence of great calamity or overwhelming shame would have upon his mind.

3. If the jury believe, from the evidence, that at the time of the killing, the prisoner, by reason of a predisposition to insanity, inherited from his ancestors, developed by the information of his sister's living in a house of ill-fame, was not in a frame of mind to deliberate and premeditate, then the killing would not be murder.

Both these instructions are of so vague and ambiguous a character, it is very difficult to determine what precise proposition they were designed to assert, or what tests they were intended to prescribe as a

measure of criminal responsibility. They were calculated to mislead the jury, and were properly refused. At the same time there are, doubtless, cases in which, whilst the prisoner may not be insane, in the sense which exempts from punishment, yet he may be in that condition from partial aberration or enfeeblement of intellect, which renders him incapable of the sedate, deliberate, and specific intent necessary to constitute murder in the first degree. These are questions for the jury, and not for the court.

As has already been stated, it is not possible, in the nature of things, that the court can lay down any abstract rules with which to measure the minds of men or to determine the extent of their criminal responsibility in cases of alleged insanity.[1]

The fourth instruction declares that the prisoner is to be acquitted on the ground of insanity, unless the jury are satisfied beyond a reasonable doubt that the killing was not produced by mental disease.

The proposition asserted in this instruction is, manifestly, based on the idea that the jury must be satisfied beyond all reasonable doubt of the sanity of the accused, precisely as the prosecution is required to prove the guilt of the defendant to warrant a conviction. It is in direct conflict with the decisions of this court in *Boswell v. Commonwealth*,[2] and *Baccigalupo v. The Commonwealth*.[3]

In these cases it was unanimously held that the Commonwealth, having established the *corpus delecti*, and that the act was done by the accused, has made out her case. If he relies on the defence of insanity, he must prove it to the satisfaction of the jury. If, upon the whole evidence, they believe he was insane when he committed the act, they will acquit him on that ground; but not upon any fanciful idea, that they believe he was then sane, yet as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal. Insanity is easily feigned and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence.

These rules were laid down by this court after a careful examination of all the authorities, and we are not disposed to depart from them, or even to qualify them in the minutest particular.

We come, then, to the eighteenth bill of exceptions, which states, after the conclusion of the opening speech of the Commonwealth's attorney, one of the counsel for the prisoner announced to the court, before beginning his argument, that in the course of his argument, if not

[1] See Whart. on Hom., sect. 584, and notes; Stephen's Crim. Law, 92; 1 Whar. & Stille's Med. Jour., sect. 770.

[2] 20 Gratt. 860, 876.

[3] 33 Gratt. 807.

Rights of Counsel.

stopped by the court, he would argue to the jury, that if, upon the whole testimony, the jury had a reasonable doubt of the prisoner's sanity at the time of the killing, the prisoner was entitled to an acquittal; and the court stated to the counsel, that he could proceed until he came to that point in his argument, and then the court would say whether it was proper or not.

And when the counsel came to that point he attempted to argue to the jury the above proposition of law, and the court interrupted him, and stated that such was not a correct conclusion of law, and could not be argued to the jury as law.

It will be perceived that the counsel proposed to argue before the jury a proposition of law, the very reverse of that laid down by this court, in the cases already adverted to.

His attempt was, however, accompanied with the declaration that he would maintain the proposition unless stopped by the court. This could only be construed as an invitation to the judge to express his approval or disapproval of the line of argument to be pursued. Had the latter, under such circumstances, remained silent, the counsel might justly have inferred, and the jury might have been warranted in supposing, that the argument was made under the sanction of the court. Counsel having thus appealed directly to the court, could not be permitted to argue before the jury in opposition to an opinion which he himself had called for. Whatever may be the right of counsel in criminal cases to maintain, by argument, any proposition of law, untramelled by the court, where no instructions have already been given, as to which we express no opinion in this case, there is less ground for complaint because, as already intimated, the law had been finally settled by two solemn decisions of this court, and was no longer open for discussion.[1] If decisions so made may be reviewed and reversed at the mere caprice and pleasure of juries, it is vain to say that we have any established rules and principles of criminal law.

This disposes of all the questions arising upon the record, except the motion to set aside the verdict because it was not sustained by the evidence. In view of the fact, however, that a new trial is to be had on the grounds already mentioned, it is unnecessary, and, indeed, would be improper for this court to pass upon that question.

In considering the various errors assigned in the petition for an appeal, we have carefully refrained from any expression, or even intimation, of an opinion with respect to the character and nature of the

[1] Whart. on Crim. Law, sect. 327; Garth's Case, 3 Leigh, 761.

defence made for the accused. That is a matter for the jury exclusively. Our duty is performed in seeing to it, so far as within us lies, that the prisoner obtains a fair trial by an impartial jury, according to the established principles and rules of the criminal law, recognized by the courts, and enforced by the Constitution and laws of the country. The judgment of this court is, that the verdict of the jury be set aside, and a new trial awarded the accused, in conformity with the views herein expressed.

TEST OF INSANITY — INSANITY AT TRIAL — PRACTICE — FORM OF OATH — EXPERTS.

People *v.* Kleim.

[Edm. Sel. Cas. 13.]

In the New York Court of Oyer and Terminer, March, 1845.

Before Hon. John W. Edmonds, Circuit Judge.

1. **Test of Insanity — Ability to Distinguish Between Right and Wrong of Act.** — The test of insanity as a defence to crime is whether or not the prisoner was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know, that he did not know he was doing what was wrong.
2. **Insanity at Trial — Practice.** — The mode of trying present insanity at trial stated.
3. —— **Same.** — The form of oath administered to the jury in such cases.
4. —— **Same.** — On such inquiry the prisoner holds the affirmative of the issue.
5. **Medical Experts.** — The proper form of questions to be put to medical experts stated.

The prisoner was arraigned on an indictment charging him with the wilful murder of Catherine Hanlin, on the 23d of December, 1844. On being called upon to plead, his appearance and deportment were such as to excite doubts in the mind of the court as to his sanity. In reply to questions from the circuit judge, the prisoner stated he had been sixteen years in this country; that he had no relatives or friends here; that he did not know why he was brought into court, and that he had no counsel to speak for him, and did not wish any.

The court thereupon assigned *A. Benedict*, *L. B. Sheppard* and *E. J. Porter*, counsel to defend the prisoner.

The *Counsel for the Prisoner*, after consultation, objected to the prisoner being called on to plead, or submit to a trial, on the ground of his

Construction of Statute.

present insanity,[1] and moved that inquiry should be made into that fact, in such manner as the court might direct. It was insisted by them that the question of present insanity might be raised by the court upon inspection of the prisoner, as in the cases of the *Commonwealth* v. *Hathaway*,[2] and *Commonwealth* v. *Braley*,[3] or by the counsel for the prisoner; and that the question might be determined by the court with the aid of a medical commission, as was done in France in the case of Henriette Cornier, and other cases, or impanel a jury for the purpose. That the latter was the common law practice as laid down in 1 Hale's P. C.,[4] which was followed in the case of Hathaway, cited above, and approved in Barbour's Cr. Law,[5] and that the statute, being in affirmance of the common law, and designating no method of procedure, the common law mode must be that intended to be pursued.

The *District Attorney*, *contra*, contended that the proper course would be that the prisoner's plea should be recorded, and a jury impanelled to inquire into the question of present insanity, and try the issue on the indictment at the same time.

The Circuit Judge: The statute on this subject merely says that an insane person shall not be tried, but is entirely silent as to the manner in which the insanity is to be ascertained. That is, therefore, necessarily left to the discretion of the court in which the suggestion of insanity shall be made.

In some instances this has been inquired into by the same jury who tried the main question of guilt or innocence, and at the same time. But this was objectionable, because it mingled together questions which ought to be kept distinct, and he had witnessed a recent case of the kind in the Second Circuit, in which the learned judge of that circuit had expressed his regret that the suggestion of present insanity had been made at so late a stage of the trial as to compel this course.

The inquiry might, doubtless, also be made by the aid of a *quasi*-commission, in the nature of one *de lunatico inquirendo*, and thus, as had been suggested by the prisoner's counsel, the aid of experts might be invoked by the court.

But the court held it proper to adhere to the common-law mode of trial, and, therefore, directed a jury to be impanelled to try the issue of present insanity.

April, 1845.

The prisoner was again brought into court, and the jury sworn "diligently to inquire, and a true verdict return, on behalf of the Peo-

[1] 2 R. S. 698, sect. 2.
[2] 13 Mass. 299.
[3] 1 *Id.* 103.
[4] pp. 34, 35.
[5] p. 300.

ple of the State of New York, whether Andrew Kleim, the prisoner at the bar, who now stands indicted for murder, be of sound mind and understanding, or not, and a true verdict give according to the best of their understanding."

Benedict, for the prisoner, claimed to hold the affirmative.

PER CURIAM: That is right. You are to make out affirmatively that the prisoner is now insane.

Several witnesses were then examined in relation to the condition of his mind.

The *Prisoner's Counsel* contended that a state of mind which would warrant a commission *de lunatico* out of chancery, would be sufficient to justify a verdict for the prisoner on the present issue.

The *District Attorney* insisted that such a verdict would be warranted only by a state of insanity which would exempt him from legal responsibility.

THE CIRCUIT JUDGE charged the jury that there were two degrees of mental disease known to, or recognized by, our laws. One described as "idiots, lunatics, persons of unsound mind," and the other as "insane persons," either of which would warrant the Court of Chancery to interfere, by appointing a committee to take care of the estate of the person so afflicted, because his mind was so diseased or infirm as to render him incapable of managing his own affairs. And, as the question in this case seemed to be whether the prisoner was now in such a condition of sanity as to permit him to prepare for and manage his defence on the charge in the indictment, it might be supposed that it would be enough for him, on this inquiry, to establish the lesser degree of unsoundness, namely: that which went so far only as to render him incapable of managing his affairs. But the statute had established a different rule, and had, in reference to this inquiry, required the higher degree of unsoundness of mind, that which the law allowed to exempt from legal responsibility. The provision of the statute [1] was that no act done by a person in a state of insanity can be punished as an offence; and no insane person can be tried or sentenced to any punishment, or be punished for any crime or offence, while he continues in that state. In order, therefore, for the jury to be warranted in finding the affirmative of the issue now presented, they must be satisfied that the prisoner's mind was now in such a state of unsoundness or disease as to exempt him from responsibility; and not merely that he was so infirm as to render him incapable of managing his own affairs.

The jury found that the prisoner was not now insane.

[1] 2 R. S. 697, sect. 2.

Facts of the Case.

MAY 21, 1845.

The prisoner was now arraigned on the main issue, and by his counsel pleaded *not guilty.*

The indictment charged the prisoner with the wilful murder of Catherine Hanlin, at the city of New York, on the 23d of December, 1844, by setting fire to the dwelling in which she resided, and forcibly detaining her therein; also, inflicting on her wounds by a sharp instrument; by means whereof she was so suffocated and injured as to cause her death.

The *District Attorney* offered in evidence a deposition of the deceased, taken and sworn to on the 22d of December, 1844, before the committing magistrate, and which deposition was again sworn to by her before the coroner on the following day, in the presence of the prisoner and his counsel, having been previously read over to her by the coroner. It was proved that she was dangerously ill at the time, and in imminent peril of death; that upon being asked by the coroner if she considered herself in a dying situation, she answered several times, she "hoped to God she might get well," and that she "hoped God would have mercy on her." She was then in the hospital, where she remained until her death, which took place on the third day following.

The *Prisoner's Counsel* objected to the deposition being received in evidence as a declaration made *in extremis*, contending it had not been shown that the deceased was fully conscious of her hopeless situation; and that her declaration had not been made under such a realizing sense of impending death as was essential to impart to it the sanctity of an oath.

The COURT was of opinion that the consciousness of her actual situation was sufficiently apparent, and, therefore, overruled the objection and admitted the evidence.

It was proved, on behalf of the prosecution, that the deceased, with her husband and children, resided in a wooden shanty or dwelling, the only door of which was in the front, and that it was distant about five yards from the prisoner's residence. On the 21st of December the prisoner had thrown stones at the deceased, who expressed the intention of taking out a warrant against him. On the morning of the following day, between six and seven o'clock, the prisoner came out of his house and piled wood-shavings and straw at the door of the deceased's residence, to which he then set fire. The deceased attempted to escape through the door, but was forcibly thrust back by the prisoner, who stabbed her in the thigh with a sharp instrument attached to a stick. She went to the window with her son, a boy of about thirteen years of age, when the prisoner threatened to cut her throat · she then swooned

away and became senseless. The prisoner retired to his own house, and the neighbors, to rescue the inmates of the shanty, broke open a window and took out the boy and an infant unhurt. They found the deceased lying insensible on a bed. The prisoner fastened his own house, which was shortly afterward broken open by the officers who arrested him.

The defence was insanity, and several witnesses testified to the general deportment, and to particular acts of the prisoner, for a long time prior and down to the time of the commission of the offence, for the purpose of proving his insanity at that time, and for a considerable period previous thereto.

The following medical witnesses were then examined on behalf of the prisoner: Dr. Tellkampff testified that he had given a good deal of attention to cases of insanity. He had seen the prisoner several times since his arrest, and at each interview had conversed with him both in the English and German languages. From this investigation witness concluded he had been suffering from monomania or melancholia, and that he was insane; he appeared quite insensible as to the fate that awaited him, and did not seem conscious of the offence he had committed. The witness had heard the previous testimony on the trial. He did not consider the prisoner to have been imbecile from birth. Dr. Pliny Earle, Superintendent of the Bloomingdale Lunatic Asylum, had been specially engaged in the treatment of insane persons for more than three years. At the request of the circuit judge the witness visited the prisoner several times since his arrest. He had heard the previous evidence on the trial. The witness was then asked by prisoner's counsel, if, from the evidence of the witnesses he had heard testify, as well as from his own experience and observation, he was of opinion that the prisoner was insane?

The *District Attorney* objected, and

The Circuit Judge decided that the question, if admissible at all, could not be put until after all the testimony relative to the question of sanity had been given, and even then, not in the form now proposed.

The witness then testified, that from his personal examination of the prisoner, and without regard to any of the testimony given, he believed the prisoner to be insane; that his stolid expression of countenance, and his apparent apathy for, and unconsciousness of, his situation, had tended to the formation of witness' opinion.

The *Prisoner's Counsel* then asked: "From the testimony you have heard in this case, in relation to the conduct and previous life of the

prisoner, what is your opinion of the state of his mind at the time of the commission of the act for which he stands charged?"

The *District Attorney* objected that the question was based on the assumption of the truth of the facts, and involved an expression of the witness' opinion as to their truth, which was a point to be decided by the jury.

The COURT disallowed the question, observing that it sought to substitute the opinion of the witness for the decision of the jury; that the question should not be limited or confined to any particular period, for by so doing the medical witnesses would be made to usurp the province of the jury. It was true that the issue to be tried was the prisoner's state of mind at the time of committing the offence, — that point was to be determined by the jury.

On the cross-examination of the witness, the district attorney, after stating several of the facts relating to the prisoner's conduct, which has been proved, asked if such facts would affect or alter the witness' opinion as to his sanity.

The *Prisoner's Counsel* objected that the case put by the question did not include all the facts which had been proved, all of which should be included as the basis of the opinion of the witness.

The COURT agreed with the prisoner's counsel that, in view of the main question, the proper course was to ask the opinion of the witness on all facts given in evidence, as the selection of particular parts, or classes of actions, as the foundation of opinions, would lead to a great prolixity, and tend to no satisfactory result. Viewing it, however, as a means of testing the accuracy of the witness' observation, and the value of his opinion, the question was relevant and must be allowed.

On re-examination, the witness was asked: "Whether the conviction he had formed from his own examination of the prisoner had been confirmed by the testimony he had heard in court?" which question was objected to.

The COURT overruled the question as involving an expression of opinion as to the truth of the facts testified to.

Dr. J. H. Schmidt testified that he had examined the prisoner with regard to his state of mind, and that from his observation, and the general appearance of the prisoner, he thought him to be insane. He was of opinion that the prisoner was laboring under the mental disease termed *dementia*, which included imbecility, monomania, and according to some writers, though not in the opinion of the witness, idiocy.

The *District Attorney* pressed the witness to state what division of *dementia*, as defined above, the prisoner was laboring under, but —

The COURT restrained further inquiry upon this point, the circuit judge observing that the witness had already stated the distinguishing features of the generic term *dementia;* that it would be useless to pursue the subject through all the divisions and classifications of writers on the subject, as, when he should charge the jury, he should instruct them that the question for their determination was the prisoner's capacity to distinguish between right and wrong; whether he was laboring under such alienation of mind, dementia, monomania, or whatever else it might be called as amounted, in their judgment, to such a deprivation of reason as to exempt him from legal responsibility for crime; and that, in forming their conclusion, they were not to be governed by the refinements or distinctions found in the books on insanity, and introduced into those treatises, merely as helps to an orderly and logical mode of treating the subject.

The *Prisoner's Counsel* here rested, and the district attorney called witnesses to rebut the defence. The police officer who conveyed the prisoner to gaol was asked: "If at the time of the prisoner's arrest, and during his way to prison, the witness saw any fact, or observed any action which he thought so incoherent as to make him believe the prisoner was disordered in his mind?"

This was objected to as involving an expression of opinion upon the facts or actions.

The COURT allowed the question, on the ground that it was only asking if the witness had observed anything strange or unusual. Regarding the facts, it was a proper question, and it was difficult to separate the opinion from the fact.

The *District Attorney* asked of one of the medical witnesses called for the prosecution: "Whether, if the prisoner had committed homicide, he had, in the opinion of witness, sufficient capacity to know he was violating the moral law?"

The COURT overruled the question, inasmuch as that was precisely the issue which was submitted to the jury, and it would be usurping their province to allow it to be put to the witness.

The CIRCUIT JUDGE, during the progress of the examination of the medical witnesses, said that the court, yielding to the authority of the *Case of Abner Rogers*,[1] in which the same defence was set up, would adopt the form of question there allowed, which was: "Assuming the facts to be true which you have heard testified to, what is your opinion as to the prisoner's sanity, or otherwise?" and would confine the counsel for the defence to that form of question.

[1] Com. *v.* Rogers, 7 Metc. 500.

Prejudice against Defense of Insanity.

The *District Attorney* then offered to prove by the records of the court, the proceedings on the inquiry as to the prisoner's sanity at the time of his being first arraigned on this indictment, and which are above set forth. He contended that the verdict on that inquiry was competent evidence to go before the jury on the present issue.

The *Prisoner's Counsel* objected.

The Court: It does not appear from the case cited by the prosecuting counsel whether the proof was admitted after objection, or introduced by consent. To admit the verdict on the previous inquiry, would involve the necessity of going into the testimony on which it was predicated; and thus cause the present jury to sit in review of that verdict while trying the issue now presented to them. The evidence is, therefore, inadmissible.

The Circuit Judge charged the jury as follows: —

He told them that there seemed to be no doubt that Kleim had been guilty of the killing imputed to him, and that under circumstances of atrocity and deliberation which were calculated to excite in their minds strong feelings of indignation against him. But they must beware how they permitted such feelings to influence their judgment. They must bear in mind that the object of punishment was not vengeance, but reformation; not to extort from man an atonement for the life which he cannot give; but by the terror of the example to deter others from the like offences; and that nothing was so likely to destroy the public confidence in the administration of criminal justice as the infliction of its pains upon one whom heaven had already afflicted with the awful malady of insanity.

It was true that insanity was sometimes feigned; but in the present advanced stage of the knowledge of the disease, it was almost, if not quite, impossible that such simulation could escape detection and exposure when subjected to a careful and skilful examination. So it was true that the plea of insanity was sometimes adopted as a cloak for crime, and a shield against the consequences of its perpetration, and cases had occurred — that of Amelia Norman, and a recent occurrence at Philadelphia, were familiar instances — where popular feeling ran so strong in favor of the criminal on trial as to induce juries to seize with avidity upon this as an excuse for indulging their predilections for the prisoners. These things had worked in the public mind a prejudice against the defence of insanity, and had produced in courts and juries a disposition to receive it with extreme jealousy, and scrutinize it with praiseworthy caution. Yet, under all these disadvantages, it was, unfortunately equally true that many more persons were unjustly con-

victed, and caused to suffer the punishment for crime, to whom their unquestioned insanity ought to have been an unfailing protection.

After mentioning two or three cases of the kind, of a remarkable character, he alluded to the examination he had then lately made among the insane convicts at the State prison at Sing Sing, where he found that, of thirty such persons, twenty-two were, beyond all question, in a state of mental aberration at the time of their committal. He told the jury that he referred to these matters in order to impress upon their minds the necessity of calm deliberation, with an entire freedom from prejudice.

He instructed them, also, that it was by no means an easy matter to discover or define the line of demarcation where sanity ended and insanity began, and it very frequently occurred that a mental condition of aberration shaded off from a sound state of mind so gradually and imperceptibly that it was difficult for those most "expert" in the disease to detect or explain its beginning, extent or duration. And in this, as in other diseases of the human system, there was an infinite variety, so great, indeed, as almost to justify the remark that no two cases were ever precisely alike. Hence it was necessary for him to remark to the jury, in regard to the different kinds of insanity, which writers on the subject had described, and to which their attention had been so earnestly directed by the prosecution, that it would be proper for them to pay attention to such classifications only so far as to enable them to understand the positions of these writers; and those classifications were, in a great measure, arbitrary, and had been adopted mainly for the purpose of obtaining a clear and lucid manner of treating the subject; and the jury were not obliged to bring the case of the prisoner within any one of the classes or kinds of insanity thus defined, in order to acquit him of legal responsibility, for it was a well established fact that the diagnostics of the different kinds were continually running into, and mingling with, each other.

So, too, it was important that the jury should be made precisely to understand how much weight was to be given to the opinions of medical witnesses. The discoveries in the nature of the disease, and the improvements in the mode of its treatment, had been so great in modern times that it had become almost a distinct department of medical science, to which some practitioners devoted themselves exclusively. The opinions of such persons, especially when to their knowledge they added the experience of personal care of the insane, could never be disregarded with safety by courts and juries. And, on the other hand, the opinions of physicians who devoted their particular attention to the dis-

Test and Burden of Proof.

ease, were not of any more value than the opinions of persons in other callings, nor, indeed, of so much value as the opinions of many not educated to the profession, but who had been so situated as to have given particular attention to the disease, and to patients suffering under it.

There were two kinds of unsoundness of mind recognized in the statutes. One described as "lunatics, persons of unsound mind and incapable of conducting their own affairs," and the other comprehended under the general appellation of "insane persons." It is with the latter class only that we have to do in the administration of criminal justice, and the inquiry for the jury, therefore, was whether the prisoner was an "insane person." What is meant by an "insane person" is now, and long has been, a matter of great difficulty. At one time it was held by courts to be only such an overthrow of the intellect that the afflicted person must "know no more than brutes" to be exempt from responsibility. At another time, he must be "unable to count twenty." As science and the knowledge of the disease progressed, it was found that very many were excluded by this very contracted rule from the protection to which they were justly entitled, and the rule has been extended in modern times until it begins to comprehend within its saving influences most of those who, by the visitation of disease, are deprived of the power of self-government. Yet the law, in its slow and cautious progress, still lags far behind the advance of true knowledge.

The inquiry to be made under the rule of law, as now established, was as to the prisoner's knowledge of right and wrong at the time of committing the offence. Every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to the satisfaction of the jury; and to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. And the question whether the accused knew the difference between right and wrong is not to be put generally, but in reference to the very act with which he is charged, and the inquiry, therefore, is, had the accused a sufficient degree of reason to know that he was doing an act that was wrong, or was he laboring under the species of mental aberration which satisfied the jury that he was quite unaware of the nature, character, and consequences of the act he was committing.

If some controlling disease was, in truth, the acting power within

him, which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible; but we must be sure not to be misled by a mere impulse of passion, an idle, frantic humor, or unaccountable mode of action, but inquire whether it is an absolute dispossession of the free and natural agency of the human mind. In the language of Erskine, "It is not necessary that reason should be hurled from her seat; it is enough that distraction sits down beside her, holds her trembling in her place, and frightens her from her propriety."

And it must be borne in mind that the moral, as well as the intellectual faculties, may be so disordered by the disease as to deprive the mind of its controlling and directing power.

In order, then, to constitute a crime, a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand that if he commits the act he will be subject to punishment; and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he have not intelligence and capacity enough to have a criminal intent and purpose, and if his moral or intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

Guided by these rules, the jury were instructed by the court to inquire whether the accused was justly responsible for the act he had committed, and they were to consider, as aids to a just conclusion, the extraordinary and unaccountable alteration in his whole mode of life; the inadequacy between the slightness of the cause and the magnitude of the offence; the recluse and ascetic life which he had led; his invincible repugnance to all intercourse with his fellow-creatures; his behavior and conduct at the time the act was done, and subsequently during his confinement in prison, and the stolid indifference which he alone had manifested during the whole progress of the trial, upon whose result his life or death was dependent. And they must continually bear in mind that the punishments of the law, and especially its severest penalties, would be shorn of their salutary influence upon the public when inflicted upon one already suffering under one of the most severe and inflicting maladies to which human nature was subject.

The jury returned a verdict of *not guilty*, on the ground of insanity.

Argument of Counsel.

[The prisoner remained a few years in the asylum, and died there, his disease steadily growing worse until he became a mere drivelling idiot.]

TEST OF INSANITY—ABILITY TO DISTINGUISH AS TO RIGHT OR WRONG OF ACT.

FLANAGAN *v.* PEOPLE.

[52 N. Y. 467; 11 Am. Rep. 731.]

In the Court of Appeals of New York, January, 1873.

HON. SANFORD E. CHURCH, *Chief Justice.*
" WILLIAM T. ALLEN,
" RUFUS W. PECKHAM,
" MARTIN GROVER,
" CHARLES J. FOLGER, } *Judges.*
" CHARLES A. RAPALLO,
" CHARLES ANDREWS,

The test of responsibility for a criminal act when unsoundness of mind is set up for a defence is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry.

ERROR to the Supreme Court to review a judgment of the general term, in the first department, affirming a judgment of the Court of General Sessions of New York, entered upon a conviction of the plaintiff in error, of the crime of murder in the second degree.

The plaintiff was indicted for murder in the first degree, in killing his wife. The defence was insanity.

William F. Kintzing, for plaintiff in error. Although one has understanding, yet if he has no will, he cannot commit a crime.[1] The "right and wrong" test as to the contemplated act is not favored.[2] The power of choosing right from wrong is as essential to legal responsibility as the mere capacity of distinguishing right from wrong.[3]

B. K. Phelps, district attorney, for defendants in error. One who is conscious that an act is wrong at the time he is committing it, and that it is in violation of law, cannot properly be said to be insane.[4]

[1] 1 Hale's P. C. 14; 4 Bla. Com. 21.

[2] Ray on Insanity; Whart. & Stille's Med. Jur.; Beck, Dean, Taylor, Med. Jur.; Brown's Med. Jur. of Insanity; Rex *v.* Hadfield, 27 How. St. Tr. 1282.

[3] Reg. *v.* Bleasdale, 2 Car. & Kir. 765; State *v.* Windsor, 5 Harr. 512; People *v.* Pine, 2 Barb. 566; Scott *v.* Com. 4 Metc. (Ky.) 227; Hopps *v.* People, 31 Ill. 385; Fouts *v.* State, 4 G. Greene (Iowa), 500; Bilman's Case, Whart. Crim. Law, 30; Com. *v.* Sherlock, 14 Leg. Int. 33; Smith *v.* Com. 1 Duv. 224; Com. *v.* Freth, 3 Phila. 105.

[4] Willis *v.* The People, 32 N. Y. 715.

Flanagan *v.* People.

ANDREWS, J. The judge, among other things, charged the jury that, "to establish a defence on the ground of insanity, it must be clearly proven that at the time of committing the act (the subject of the indictment), the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; and, if he did know it, that he did not know he was doing wrong;" and to this part of the charge, the prisoner, by his counsel excepted.

The part of the charge excepted to was in the language employed by TINDAL, C. J., in *McNaghten's Case*,[1] in the response of the English judges to the questions put to them by the House of Lords as to what instructions should be given to the jury, on a trial of a prisoner charged with crime, when the insane delusion of the prisoner, at the time of the commission of the alleged act, was interposed as a defence. All the judges except one, concurred in the opinion of TINDAL, C. J., and the case is of the highest authority; and the rule declared in it has been adhered to by the English courts. MAULE, J., gave a separate opinion, in which he declared that, to render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has been understood and held, be such as to render him incapable of knowing right from wrong.

In the case of *Freeman* v. *People*,[2] the language of TINDAL, C. J., in the *McNaghten Case*, was quoted and approved; and BEARDSLEY, J., said: "Where insanity is interposed as a defence to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time the act was done."

The rule was reaffirmed in the case of *Willis* v. *People*,[3] and it must be regarded as the settled law of this State, that the test of responsibility for criminal acts, where unsoundness of mind is interposed as a defence, is the capacity of the defendant to distinguish between right and wrong, at the time of, and with respect to, the act which is the subject of the inquiry.

We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them; and that the absence of the former is consistent with the presence of the latter.

The argument proceeds upon the theory that there is a form of in-

[1] 10 Cl. & Fin. 210. [2] 4 Denio, 28. [3] 32 N. Y. 717.

Evils of the Doctrine.

sanity in which the facilities are so disordered and deranged that a man, though he perceive the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates, but cannot avoid.

Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law.

The vagueness and uncertainty of the inquiry which would be opened and the manifest danger of introducing the limitation claimed into the rule of responsibility, in cases of crime, may well cause courts to pause before assenting to it.

Indulgence in evil passions weakens the restraining power of the will and conscience; and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. ROLFE, B., in *Reg.* v. *Allunt*, where, on the trial of an indictment for poisoning, the defendant was alleged to have acted under some moral influence which he could not resist, said: "Every crime was committed under an influence of such a description; and the object of the law was to compel these people to control these influences."

The judge intended, by the proposition excepted to, as is apparent from the other part of the charge, merely to instruct the jury as to the character and extent of mental unsoundness which, if proved, would shield from criminal responsibility; and it must have been so understood by the jury and counsel; and to the rule thus propounded by the judge, the exception was pointed. What was said as to the measure of proof of insanity was incidental and collateral to the main proposition; and if an inadvertent error in phraseology crept in, it did not mislead, and was not excepted to.

In *People* v. *McCann*,[1] it was held that it was error to charge the jury in a criminal case that the insanity of the prisoner must be proved beyond a reasonable doubt, to entitle him to an acquittal. This was the extent of the decision. The question was not in the case, whether the prisoner would be entitled to the benefit of a doubt upon the evidence introduced by him to establish the defence. What is said by the learned judges upon that subject is entitled to such weight as their character and learning, and their arguments entitle it to.[2] It is not necessary for us to consider the question in this case; but we prefer to leave it pre-

[1] 16 N. Y. 58.

[2] See People *v.* Schryver, 42 N. Y. 1.

cisely where the cases cited leave it, an open question, so far as judicial authority in this State is concerned.

The exception considered is the only one presented or argued by counsel, and we are of the opinion that the judgment should be affirmed.

All concur; Rapallo, J., in result.

Judgment affirmed.

TEST OF RESPONSIBILITY — BURDEN OF PROOF.

Walker *v.* People.

[26 Hun, 67: 1 N. Y. Crim. Rep. 7.]

In the Supreme Court of New York (First Department), October, 1881.

1. **Test of Responsibility.** — Where the defence of insanity is interposed to an indictment, the true test of criminal responsibility is, whether the accused had sufficient reason to know right from wrong. If he had sufficient intelligence to know it, whether he had sufficient power to control or govern his actions is a matter of no moment whatever.
2. **Burden of Proof.** — The burden of proving sanity does not fall upon the prosecution The presumption is that every one is sane, and the prisoner must overcome this presumption by satisfactory evidence. If, however, there is reasonable doubt as to the prisoner's sanity, arising upon the evidence in the case, and upon nothing else, the jury should give the accused the benefit of that doubt and acquit him.
3. **Same — Instructions.** — Where the recorder's charge, accompanied the foregoing propositions with the instruction that the insanity must be *clearly proven; held*, that the charge was correct.

Writ of Error to the Court of General Sessions for the city and county of New York to review the conviction of George Walker, the plaintiff in error, upon an indictment charging him with the crime of abduction.

George Walker was tried and convicted at the August term, 1881, of the General Sessions, for the crime of the abduction of a little girl named Katie Hennessy, and was sentenced to the State prison for the term of ten years. The defence interposed to the indictment was insanity.

It was proved that the prisoner had enticed a little girl, aged about eight years, from the street in front of her parents' house, in the city of New York, and had taken her into the upper part of the city. The attention of a passer-by having been attracted to Walker and the girl, he questioned the child, who said the man was not her father, that he was taking her away, and that she wanted to go home. The prisoner was arrested, and the child returned to her parents.

Evidence and Instructions.

Katie Hennessy, the abducted child, testified, that while she and the prisoner were together on the street railroad, on their way up town, he had put his hands under her clothes.

Two doctors, Hardy and Jackson, physicians to the city prison, where the prisoner was confined after his arrest, testified that they believed, from examinations of, and conversations with the prisoner, that he was insane; that the prisoner did not recognize the gravity of his offence, was afraid of the people in the prison, was wandering and disconnected in his conversation, was subject to delusions as to an imaginary conspiracy of chemists against him, on account of valuable discoveries which he had made; his manner was nervous and uneasy. He was suffering from chronic mania.

It was proved that the prisoner had been sentenced to a term of ten years in the State prison at Trenton, N. J. (where he feigned insanity), for rape, and had also been confined in the (New York) City Prison on a charge of assault on a young woman.

Dr. Spitzka testified that he had examined the prisoner at the instance of the Society for the Prevention of Cruelty to Children, that the prisoner was perfectly sane, that he was shamming insanity, and shamming very clumsily.

At the close of the trial the following requests to charge were made on behalf of the prisoner.

Counsel. — I ask your honor to charge the jury as the law in this case: —

I. The true test of criminal responsibility, where the defence of insanity is interposed to an indictment, 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.

The Recorder. — I will charge the first part of that proposition, viz.: "The true test of criminal responsibility, where the defence of insanity is interposed to an indictment, is, whether the accused had sufficient reason to know right from wrong." I decline to charge the latter part, viz.: "And whether or not he had sufficient power of control to govern his actions."

Counsel for prisoner excepted to the refusal of the recorder to charge as requested. Exception.

II. Where a person acts under the influence of mental disease, he is not criminally accountable.

The Recorder. — That I decline to charge, except as I intend to charge.

Counsel for prisoner excepted to the refusal of the recorder to charge as requested. Exception.

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III. The defendant in a criminal case is not required to prove his insanity in order to avail himself of that defence, but merely to create a reasonable doubt upon this point, whereupon the burden of proving his sanity falls upon the people.

The Recorder. — I decline to charge that. Refused.

Counsel for prisoner excepted to the refusal of the court to charge as requested. Exception.

The Recorder, in the charge to the jury said: That to establish a defence on the ground of insanity, it must be "*clearly proven*" that, at the time of committing the act, the subject of the indictment, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, and if he did know it, that he did not know he was doing wrong.

Counsel for prisoner excepted specifically to the words "*clearly proven*" as charged. Exception.

William F. Kintzing, for plaintiff in error.

John McKeon, district-attorney for the people.

Brady, J. — The plaintiff in error was indicted and tried for the crime of abduction, and was convicted and sentenced to the State prison for the term of ten years. The response made to the charge was insanity; upon the trial, the counsel for the plaintiff in error requested the court to charge, *first*, that the true test of criminal responsibility, where the defence of insanity is interposed to an indictment, 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. The learned recorder, in answer to this request, said: —

"I will charge the first part of that proposition, namely, 'the true test of criminal responsibility, where the defence of insanity is interposed to an indictment, is, whether the accused had sufficient reason to know right from wrong.'" But he further said: "I decline to charge the latter part, namely, 'and whether or not he had sufficient power to govern and control his actions.'"

The prisoner, by his counsel, excepted to the refusal to charge as requested.

The counsel for the prisoner also requested the recorder to charge that the defendant, in a criminal case, was not required to prove his insanity in order to avail himself of that defence, but merely to create a reasonable doubt upon that point, "whereupon the burden of proving sanity falls upon the People."

The learned recorder declined to charge as requested, and the counsel for the plaintiff in error duly excepted.

Power of Control.

The recorder in his charge to the jury, said that to establish a defence on the ground of insanity, it must be clearly proven that at the time of committing the act, which is the subject of the indictment, the party accused was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing, and, if he did know it, that he did not know that he was doing wrong.

Counsel for the plaintiff in error excepted to the words "clearly proven," as used in this extract from the charge, and the exception was duly noted.

It will be perceived, in reference to the first request, that, in addition to the proposition as to the capacity of the plaintiff in error to know right from wrong, it was designed by his counsel to create another test or condition, namely, as to whether the plaintiff in error had sufficient power to govern and control his actions, which is to say, in effect, if he had sufficient reason to know right from wrong, and knowing it, had not sufficient power to control and govern his actions, and did the act charged, with a knowledge, therefore, that it was wrong, the act was to be regarded as that of an insane person, and one irresponsible for his deed.

It is enough to say that there is no precedent for such a combination of elements, as is presented in this request. The true test, upon the authorities, is that announced by the learned recorder, namely, whether the accused had sufficient reason to know right from wrong, and if he had sufficient intelligence to know it, whether he had sufficient power to control or govern his actions, was a matter of no moment whatever. Assuming that he had reason enough to know that he was doing wrong when he committed the act of which he stood accused, it was his duty to control himself, a duty which he owed to God and man, and one, for the omission of which, under the law of the land, he was to be punished. The courts have gone quite far enough in declaring that if the accused is laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he is doing, and if he did know it, that he did not know that he was doing wrong, he should be regarded as irresponsible for the act charged against him.

There are some *obiter dicta* which would seem to evidence an intention to shroud this doctrine in doubt, or to hamper it with conditions subversive of its clearness and efficiency; but they have not been adopted in any adjudicated case as expressive of the law of this State. If, when a person is put upon trial, it is urged on his behalf that he was insane at the time of the commission of the crime of which he is accused, he is

not entitled to the benefit of the rule governing that averment to any greater extent than that expressed by the recorder in this case; and it is to be given to the jury, as a rule, without conditions and without qualifications. If the testimony submitted for the consideration of the jury established such mental infirmity as the rule itself suggests, then the prisoner is entitled to his discharge upon the ground of his irresponsibility. But if the testimony does not fully respond to these requirements, then he must suffer as a person presumed to be sane, and on whose behalf sufficient evidence had not been given to overcome this presumption.[1] This is all that it is deemed necessary to say with regard to the first request.

The second request herein stated is subtle in its character; it is that the defendant in a criminal case is not required to prove his insanity, in order to avail himself of that defence, but merely to create a reasonable doubt upon this point, whereupon the burden of proving insanity falls upon the People. It would be sufficient, in answer to the exception which was taken to the refusal of the recorder to charge this request, that the burden of proving sanity does not fall upon the People in any case. The prisoner is arraigned, and the jury are impannelled with two legal presumptions existing — one that he is innocent, and the other that he is sane. If the prisoner is to be relieved from the consequences of his offence, by reason of a mental infirmity existing at the time of his transgression, amounting to insanity, it becomes his duty, or the duty of some person on his behalf, to overcome the presumption of sanity by satisfactory evidence, and the People may rest upon the presumption of sanity without resorting to any proof. This point has been expressly decided in *Walter* v. *People*,[2] which was a case of homicide. The court was requested to charge, as a proposition of law, that in a case where the defence consists of the insanity of the prisoner, it becomes incumbent upon the prosecution to prove him sane. The court said that, as an abstract proposition, the request was manifestly unsound; that sanity was presumed to be the normal state of the human mind, and that it was never incumbent upon the prosecution to give affirmative evidence that such a state exists in a particular case. And this doctrine was reaffirmed in the case of *Ferris* v. *People*,[3] and again reasserted in the case of *Brotherton* v. *People*,[4] in which Church, J., delivering the opinion of the court, said: "Sanity being the normal and usual condition of mankind, the law presumes that every individual is

[1] Freeman *v.* People, 4 Denio, 9; Willis *v.* People, 32 N. Y. 717; Flanagan *v.* People, 52 *Id.* 467.

[2] 32 N. Y. 147.

[3] 35 N. Y 125.

[4] 75 N. Y. 162.

in that state; hence, a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proof *prima facie*."

Inasmuch as the request contained more, therefore, than the prisoner was entitled to, the recorder was not obliged to charge it, under well settled rules. In addition, however to this response, it must be further said, that the request, aside from the objectionable portion which has been referred to, from its phraseology called upon him to declare that the defendant, in a criminal case was not required to prove his insanity, in order to avail himself of that defence, but merely to create a reasonable doubt upon this point, namely, upon the point of insanity. The learned counsel for the plaintiff in error, no doubt, designed to state that it was sufficient for his client to create a reasonable doubt upon his sanity, but the request does not contain that proposition. If there were nothing else to be said upon this particular element of the case, this view might be regarded as hypercritical; but the learned recorder substantially charged upon the rule which the prisoner's counsel doubtless intended to invoke by the request itself, for he said, after referring to the evidence of insanity: —

"It is for you to determine, upon all this evidence, whether or not on June 15, 1881, when it is alleged that this man perpetrated the offence of abducting this child, he was sane or insane; in other words, whether his mind was in such a condition that he was perfectly able to comprehend and understand the difference between right and wrong, and that he did know that he was doing a wrong act, if he had sufficient mind to form that intent which the law requires must be proved to exist; and it is for you to determine those questions; they are purely questions of fact. If you come to the conclusion that the prisoner was insane at the time it is charged he perpetrated this crime, you will find him not guilty on the ground of insanity. If you come to the conclusion, beyond all reasonable doubt, that he committed the crime of abduction as I have defined it; if the testimony satisfies you beyond a reasonable doubt of his guilt, and that he was not insane, it will be your duty to convict; and further, if there is any reasonable doubt arising upon the evidence in the case, and upon nothing else, it will be your duty to give the prisoner the benefit of that doubt and acquit him."

It must be further said in regard to this request, that in the case of *Brotherton* v. *People*,[1] it appeared that the judge in charging the jury used this expression: "The allegation of insanity is an affirmative issue, which the defendant is bound to prove, and you must be satisfied from the testimony introduced by him that he was insane." And

[1] *Supra.*

he further charged that if there was a well founded doubt whether the man was insane at the time he fired the pistol, the jury were to acquit him. It was held, that in these two paragraphs of the charge, taken together, there was no error, and the court in reviewing the trial said that the prisoner was bound to prove that he was not sane, and whether insanity was called an affirmative issue, or it is stated that the burden of proof of insanity is on the prisoner in order to overcome the presumption of sanity, is not very material if the jury are told, as they were, that a reasonable doubt upon that question entitled the prisoner to an acquittal.

The jury in this case were told that if they came to the conclusion that the prisoner was insane at the time it was charged he perpetrated the crime, they were to find him not guilty on the ground of insanity, and further, that if they came to the conclusion beyond all reasonable doubt that he committed the crime, and that he was not insane, it was their duty to convict him; and further, that if there was any reasonable doubt arising from the evidence in the case, he was entitled to the benefit of that doubt, and it was their duty to acquit him. They were substantially charged, therefore, that if there was a doubt about the guilt of the plaintiff in error, arising either from his innocence of the crime itself, or from a doubt as to his sanity, that he was entitled to a verdict of acquittal.

It will have been perceived that in the case of *Brotherton*, to which reference has been made, the charge was directly to the effect that the insanity urged on behalf of the prisoner was an affirmative issue, which he was bound to prove, and that the jury must be satisfied on the testimony introduced by him that he was insane, which was not done in this case. The learned recorder charged that to establish the defence of insanity it must be clearly proven that at the time of committing the act which was the subject of the indictment, the party accused was under a defect of reason from a disease of the mind; so that the case of *Brotherton* and this one are, in the respects in which they have been compared, in harmony.

From what has been said, the view entertained of the exception to the charge in which the learned recorder used the words "clearly proven" may be foreshadowed. The exception in this respect is regarded as valueless. As already suggested, taken in connection with another paragraph, to which reference has been made herein, it is no broader than the charge sustained in the case of *Brotherton* v. *People*.[1] In that case it was charged that the prisoner's insanity was an affirma-

[1] *Supra.*

tive issue which he was bound to prove, and in this case it was declared to be a defence, which must be clearly proven. The cases are analogous and parallel. The precise question presented by the exception, although it has not been definitely decided in this State, and although it may seem to be in doubt,[1] appears to have been answered in the *Case of McNaghten*,[2] in which Lord Chief Justice Tindal said, that the jury should be told that "to establish a defence on the ground of insanity, it must be clearly proven that at the time of committing the act the party accused was laboring under such a defect of reason from a disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong." This case is regarded, therefore, as an express authority for the proposition that the defence of insanity must be clearly proven in order to overcome the presumption of sanity, which the prisoner encounters at the commencement of his trial.

The question of insanity, in its legal phases, may be a very interesting subject to discuss. It certainly presents a very broad field when contemplated with the numerous adjudications, both in this country and in England, affecting it, and the number of elementary writers who have considered it; but it is not necessarily the duty of an appellate court to write a review of these cases. It is enough to express the conclusion arrived at in regard to it when presented for examination upon consideration of the controlling decisions in this State bearing upon it. This has been done in this opinion, and it follows that the judgment must be affirmed.

Daniels, J. — The law of this case seems to have been carefully observed at the trial. Upon both the important points presented, the instructions given the jury were in strict accord with the authorities which have long been regarded as correct expositions of the law. In *McNaghten's Case*, the proper course to be followed in the disposition of the defence of insanity was considered and determined by the House of Lords, the highest English judicial authority. And it was then held that "every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved." And "to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not

[1] See People *v.* McCann, 16 N. Y. 58; Flanagan *v.* People, 52 *Id.* 467.

[2] 10 Cl. & Fin. 210.

know he was doing what was wrong." "If the accused was conscious that the act was one which he ought not to do, and if that was, at the same time, contrary to the law of the land, he is punishable." [1] The same subject received the consideration of the Court of Appeals in *Flanagan* v. *People*.[2] And the same criterion was sanction for the disposition of the defence of insanity, as that which was adopted by the preceding case in England. And in the latter case it was further held that the accused was not entitled to an acquittal, simply because the criminal act might have been committed in subordination to some irresistible impulse or inclination. This point was urged in behalf of the prisoner in that case, by the same learned counsel now representing the present plaintiff in error, and it was answered by the court, in very plain language, as follows: "Indulgence in evil passions weakens the restraining power of the will and conscience, and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law." And the remark of an able English justice, that "every crime was committed under an influence of such a description, and the object of the law was to compel people to control these influences," was repeated with approval.[3] In *Reg.* v. *Haynes*,[4] this subject was further considered, and it was there observed that "if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence: the restraint of religion, the restraint of conscience, and the restraint of the law. But if the influence itself be held to be a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint, that forbidding and punishing its perpetration. We must, therefore, return to the simple question: 'Did the prisoner know the nature of the act he was doing, and did he know he was doing what was wrong?'" [5] These principles present the gist and substance of the law upon these subjects. They have been discussed in very many other instances, and concurring in the same conclusions. For that reason, particular reference to them is at the present time not necessary. To a great extent, they are considered in the charge of Mr. Justice Brady,

[1] 10 Cl. & Fin. 200, 210.
[2] 52 N. Y. 467.
[3] *Id.* 470.
[4] 1 F. & F. 666.
[5] *Id.* 667.

to which concurrence and approval may very properly be given. For the reasons assigned by him, and those suggested by Presiding Justice Davis, and maintained in such plain language as to preclude the possibility of misapprehension on the occasions just referred to, this conviction should be affirmed.

Davis, P. J. — On the question, what constitutes the insanity which, in law, exonerates from the punishment of crime, on the ground of *irresponsibility*, I concur fully in the views and conclusions of my brother Brady. On the question of the burden of proof after evidence has been given by the accused tending to show insanity, the learned recorder had given to the jury, in his charge, the true rule applicable to a case of the kind when it comes upon all the evidence to be submitted to the jury, and having done this, it was no error to refuse to submit upon the part of the prisoner a proposition which, if correct in itself, was only calculated to confuse the jury by distracting their attention from the real question, which, upon the whole evidence, had already been correctly submitted to them. The recorder committed no legal error in refusing to charge as requested, in the form presented by the counsel for the prisoner. I concur, therefore, in the affirmance.

Conviction affirmed

Same Case.

In the New York Court of Appeals, February, 1882.

1. **Test of Criminal Responsibility.** — The true test of criminal responsibility where the defence of insanity is interposed to an indictment is, whether the accused had sufficient reason to know the nature and quality of his act, and whether he had sufficient reason to know right from wrong.

2. **Power to Control Action.** — In his charge the recorder refused to add to this proposition the further one, "and whether or no he (the accused) had sufficient power of control to govern his actions." *Held*, that the refusal was proper, as the recorder had charged that the accused must have sufficient control of his mental faculties to form a criminal intent before he can be held responsible for a criminal act, which was as far as the court should go on the subject of control.

3. **Burden of Proof.** — If no evidence is given on the subject of the mental condition of the accused, the presumption is that he is sane. Where evidence on the subject is offered by the defence the prosecutor may produce answering testimony, but he must satisfy the jury on the whole evidence that the prisoner was responsible; for the affirmative of the issue tendered by the indictment remains with the prosecution to the end of the trial.

4. **The Defence of Insanity** should not be sustained on vague and shadowy testimony, or mere conjecture. There should be clear and substantial evidence of insanity; but if there is, upon the whole evidence in the case, any reasonable doubt, the accused is entitled to the benefit of that doubt, and to an acquittal.

Walker *v.* People.

Error to the Supreme Court, General Term in the First Department, to review the judgment of affirmance in this case, just reported.

Rapallo, J. — The prisoner was indicted and tried in the Court of General Sessions of the city of New York for abducting one Katie Hennessy, a child between seven and eight years of age. The evidence tended to show that the purpose of the abductor was to take indecent liberties with her. The defence was insanity, and evidence was adduced on the part of the prisoner in support of that defence.

The only errors alleged in the case are the refusal of the recorder to charge certain propositions submitted by the counsel for the prisoner, and the charge of the recorder on the subject of the proof of insanity required of the prisoner. The exceptions to these rulings will be examined *seriatim*. The first request was to charge "that the test of criminal responsibility, where the defence of insanity is interposed to an indictment, 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."

The recorder charged the first part of this proposition, but declined to charge the latter part, "whether or not he had sufficient power of control to govern his actions."

The doctrine of irresponsibility for a crime committed by a person who had sufficient mental capacity to comprehend the nature and quality of his act, and to know that it was wrong, on the ground that he had not the power to control his actions, has not met with favor in the adjudications in this State.[1] But, without entering upon a discussion of the question on its general merits, we are of opinion, that in the present case, it would have been clearly improper to submit to the jury any such vague test as that requested, when considered with reference to the character of the crime for which the prisoner was on trial, and the testimony which was before the jury as to his previous similar offences.

The jury, upon the evidence, might have found that the prisoner had an uncontrollable propensity to abduct young girls, or that his appetites were so depraved and overpowering that he was unable to resist them, and if they so found, the charge, as requested, would have led them to suppose that it was their duty to acquit, even though they were satisfied that he was possessed of sufficient reason to know that the act was wrong and criminal.

The court did charge that a man must have sufficient control of his mental faculties to form a criminal intent, before he can be held respon-

[1] Flanagan *v.* People, 52 N. Y. 467.

sible for a criminal act. This, we think, was as far as the court could go on the subject of control, under the circumstances of this case.

The second proposition requested to be charged was: "Where a person acts under the influence of mental disease he is not criminally accountable."

This the recorder declined to charge, except as he intended to charge, and he did charge in the words of the statute, that "no act done by a person in a state of insanity can be punished as an offence." This was a much more accurate statement of the law than that requested, and it was not error for the recorder to give it the preference, and decline to adopt the phraseology of counsel.

The third request to charge was that "the defendant in a criminal case is not required to prove his insanity in order to avail himself of that defence, but merely to create a reasonable doubt upon this point, whereupon the burden of proving his sanity falls upon the People." This request was refused, and an exception taken.

The recorder, in his charge, instructed the jury on the subject of the burden of proof as to the sanity of the prisoner, in entire accordance with the decisions of this court. After having instructed them, in a manner not excepted to, as to what constituted sanity and insanity, he said to them: "It is for you to determine those questions; they are purely questions of fact. If you come to the conclusion that the prisoner was insane at the time it is charged that he perpetrated this crime, you will find him not guilty on the ground of insanity. If you come to the conclusion beyond all reasonable doubt, that he committed the crime of abduction, as I have defined it; if the testimony satisfies you, beyond a reasonable doubt, of his guilt, and that he was not insane, it will be your duty to convict. If there is any reasonable doubt arising on the evidence in the case, and upon nothing else, it will be your duty to give the prisoner the benefit of that doubt and acquit him."

The burden of establishing, beyond a reasonable doubt, as one of the elements of guilt, that the prisoner was not insane, was by this charge cast upon the prosecution.

Indeed, on examining the whole case it appears that the sanity of the prisoner was the only controverted point, the sole defence being his insanity, and it was the only serious question presented for the consideration of the jury.

The most recent expression of this court, in respect to the burden of proof in cases where the defence of insanity is interposed, is contained in the opinion of DANFORTH, J., in the recent case of *O'Connell* v.

People.[1] It was there said, in substance, that the guilt of the prisoner depended upon two questions, viz.: whether he committed the act charged, and whether he was in such condition of mind as to be responsible; that the burden of proof as to both was upon the prosecution; that the legal presumption that every man is sane, was sufficient to establish his sanity until repelled by proof; that if the prisoner gave no evidence, the fact stood. If he gave evidence tending to overthrow it, the prosecutor might produce answering testimony; but he must satisfy the jury, upon the whole evidence, that the prisoner was responsible; for the affirmative of the issue tendered by the indictment remained with the prosecution to the end of the trial.[2]

In the case of *O'Connell* v. *People*, above cited, a specific request was made and the court refused to charge that "if from the evidence in the case a reasonable doubt arose in the minds of the jury as to the sanity or insanity of the defendant, that he was entitled to the benefit of that doubt." This proposition, was in the abstract, entirely sound, and in accordance with the views expressed by this court, but the refusal to charge it was sustained here, on the ground that the same point was covered by the general charge, in which, after submitting to the jury the question of the sanity or insanity of the prisoner, with the instruction that if insane he was not responsible, the judge charged that if they had a reasonable doubt, from the evidence, that the prisoner was guilty of the crime, they should give him the benefit of that doubt.

This court held, in substance, that where the judge properly submits to the jury a proposition covering the whole issue, and instructs them that they must find it beyond a reasonable doubt, he cannot be required to subdivide it and charge separately as to each of the elements necessary to constitute the crime; that it must be established beyond a reasonable doubt. In this holding we confirmed the conclusion reached in the present case by the presiding judge at general term, that when the judge gives to the jury in his charge the true rule applicable to the case, when it comes to be considered on all the evidence, it is not error to refuse to submit a separate proposition, which, even though correct in itself, is only calculated to confuse the jury by distracting their attention from the test question, which is to be determined on the whole evidence. These remarks apply specially to the case at bar, for the request to charge is by no means as accurate as that in the case of O'Connell. It involved two propositions; first, that the defendant is not bound to prove his insanity to avail himself of that defence. This is inaccurate, for he must, be-

[1] 87 N. Y. 377.

[2] See also Brotherton v. People, 75 N. Y. 159.

yond cavil, give proof of it, or the presumption of sanity prevails, and the request was not confined to conclusive proof or proof beyond a reasonable doubt. Secondly, that he is only required to create a reasonable doub as to his sanity. This is extremely vague, and well calculated to mist lead, especially as connected with the first branch of the request. It is not even confined to a doubt arising upon the evidence. But even had the request been framed accurately, our recent decision, above referred to holds, that it was not error to refuse it, where the point was fully covered by the charge as given.

The remaining exception relates to the charge that "to establish a defence of insanity it must be clearly proved," etc., the exception being to the expression "clearly proved."

This was not the language of the recorder, but was read from an opinion which he adopted, and is a quotation from the opinion of Ch. J. TINDAL given in the celebrated *McNaghten Case*.[1] If, by this expression, the jury were given to understand that the insanity must be proved beyond a reasonable doubt, it of course was at variance with the law of this State.[2] But if it meant that there should be clear and substantial evidence of insanity to justify an acquittal on that ground, it was unobjectionable.[3]

The adoption of the language used in the *McNaghten Case*, that the defence of insanity should be clearly proved, having been accompanied in the present case with the instruction that if the testimony satisfied the jury beyond a reasonable doubt of the guilt of the prisoner, and that he was not insane, it would be their duty to convict; but that if there was any reasonable doubt arising upon the evidence in the case, it would be their duty to give the prisoner the benefit of that doubt and acquit him, the jury could not have been misled as to the burden of proof, or the degree of proof required of the prisoner to overcome the presumption of sanity, and the charge was quite as favorable to him as he was entitled to.

Whatever may have been the idea which the language of Ch. J. TINDAL was intended to convey in the *McNaghten Case*, we think that it was so qualified in the present case, by the connection in which it was used, and the explanation which accompanied it, that, taking the whole charge together, it amounted to nothing more than that there should be substantial and clear evidence of insanity to justify an acquittal on that ground, and that the defence should not be sustained on vague and shadowy testimony, or mere speculation and conjecture. In *Brotherton* v. *People*,[4] the judge charged the jury as follows: "The allegation of

[1] 10 Cl. & Fin. 200.
[2] People *v.* McCann, 16 N. Y. 58.
[3] People *v.* Schryver, 42 N. Y. 1.
[4] 75 N. Y. 162.

insanity is an affirmative issue which the defendant is bound to prove, and you must be satisfied from the testimony introduced by him that he was insane;" but he also charged: "If there is a reasonable doubt, a well founded doubt, whether the man was insane at the time he fired the pistol, you will acquit him." This court held, that taking the two paragraphs together, there was no error.

The opinion in that case was written by our late brother, Ch. J. CHURCH, than whom no judge approached the consideration of criminal cases in a more humane spirit, or was more careful that all the legal rights of accused persons should be properly guarded; but the natural force and directness of his mind led him to regard the substance of what was said to the jury, rather than nice distinctions in forms of expression, and drew from him the remark that "the prisoner was bound to prove that he was not sane, and whether insanity is called an affirmative issue, or it is stated that the burden of proof of insanity is upon the prisoner, is not very material, if the jury are told, as they were in this case, that a reasonable doubt upon that question entitled the prisoner to an acquittal."

We think there was no error in the refusals to charge as requested, or in the charge as given, when taken as a whole, and consequently the judgment should be affirmed.

All the judges concurred, except TRACY, J., absent.

TEST OF INSANITY — EXPERTS — DELIRIUM TREMENS — INTOXICATION NO DEFENCE — BURDEN OF PROOF.

UNITED STATES *v.* MCGLUE.

[1 Curt. 1.]

In the United States Circuit Court, District of Massachusetts, October Term, 1851.

Hon. BENJAMIN R. CURTIS, } *Judges.*
" PELEG SPRAGUE, }

1. **The Accused Must be Presumed** to be sane till his insanity is proved.

2. **Test of Insanity.** — It is not every kind or degree of insanity which exempts from punishment. If the accused understood the nature of his act; if he knew it was wrong and deserved punishment, he is responsible.

3. **Experts are not Allowed to Give** their opinions on the case, where its facts are controverted; but counsel may put to them a state of facts, and ask their opinions thereon.

Syllabus and Facts.

4. **Delirium Tremens.** — If a person suffering under *delirium tremens*, is so far insane a not to know the nature of his act, etc., he is not punishable.

5. **Intoxication no Defence, When.** — If a person, while sane and responsible, makes himself intoxicated, and while intoxicated, commits murder by reason of insanity, which was one of the consequences of intoxication, and one of the attendants on that state, he is responsible.

6. **Burden of Proof.** — The law does not presume insanity arose from any particular cause; and if the government asserts that the prisoner was guilty, though insane, because his insanity was drunken madness, this allegation must be proved.

This was an indictment for the murder of Charles A. Johnson, first officer of the bark Lewis, of Salem, by the second officer of the bark. One count alleged the offence to have been committed on the high seas, and another in a bay within the dominions of the Imaum of Muscat, a foreign prince or sovereign. The facts, so far as they are necessary to raise the questions of law, appear in the charge to the jury.

Lunt, district attorney, for the United States; *R. Choate* and *North-end* for the prisoner.

Curtis, J. — The prisoner is indicted for the murder of Charles A. Johnson. It is incumbent on the government to prove, beyond reasonable doubt, the truth of every fact in the indictment, necessary, in point of law, to constitute the offence. These facts need not be proved beyond all possible doubt; but a moral conviction must be produced in your minds, so as to enable you to say that, on your consciences, you do verily believe their truth. These facts are, in part, controverted, and in part, as I understand the course of the trial, not controverted; and it will be useful to separate the one from the other. That there was an unlawful killing of Mr. Johnson, the person mentioned in the indictment, by means substantially the same as are therein described; that the mortal wound immediately producing death, was inflicted by the prisoner at the bar; that this wound was given, and the death took place on board of the bark Lewis, a registered vessel of the United States, belonging to citizens of the United States; that Johnson was the first, and the prisoner the second officer of that vessel, at the time of the occurrence; that the vessel at that time was either on the high seas, as it is charged in one count, or upon waters within the dominion of the sultan of Muscat, a foreign sovereign, as is charged in another count; and that the prisoner was first brought into this district after the commission of the alleged offence, — do not appear to be denied, and the evidence is certainly sufficient to warrant you in finding all these facts. They are testified to by all the witnesses. It is not upon a denial of either of these facts that the defence is rested; but upon the allegation by the defendant, that, at the time the act was done, he was

so far insane as to be criminally irresponsible for his act. And this brings you to consider the remaining allegation in the indictment which involves this defence. It is essential to the crime of murder that the killing should be, from what the law denominates malice aforethought; and the government must prove this allegation. But it is not necessary to offer evidence of previous threats, or preparation to kill, or that there was a previously premeditated design to kill.

These things, if proved, would be evidence of malice, and proof of this kind is one of the means of sustaining the allegation of malice. But, besides this direct evidence, of what is called in the law express malice, malice may be also inferred, or implied, from the nature of the act of the accused. If a person, without such provocation as the law deems sufficient to reduce the crime to manslaughter, intentionally inflicts, with a dangerous weapon, a blow calculated to produce and actually producing death, the law deems the act malicious, and the offence is murder. The law considers that the party meant to effect what was the natural consequence of his act; that if the natural consequence of his act was death, he meant to kill; and if he so intended, in the absence of such provocation as the law considers sufficient to account for that intent, from the infirmity of human passion, then it is to be inferred that malice existed, and that from that feeling the act was done. In other words, an intention to kill unlawfully, without sufficient provocation, is a malicious intention, and if the intent is executed, the killing is, in law, from malice aforethought, and is murder.

Keeping these principles in view, you will proceed to inquire what the evidence is of a premeditated design to kill; and secondly, whether the act of killing, and the circumstances attending it, were such that malice is to be inferred therefrom. The only evidence at all tending to show premeditated design, is given by the master of the vessel, and by Saunders, the cabin-boy. The master states that, in a previous part of the voyage, four or five weeks before the time in question, while the vessel was in port, and he himself was absent on shore, some difficulty occurred between the first and second officer, in consequence of which the latter applied to him for his discharge. The witness does not know of the nature or extent of the difficulty, nor of the feeling to which it gave rise in the breast of either party to it, saving that it produced in the prisoner a reluctance to continue under the command of the first officer. His discharge was refused; and there is no evidence of any further quarrel between them. It is also sworn by the master and the cabin-boy, that when Mr. Johnson fell, after being stabbed by the prisoner, some of the crew raised him up, and the prisoner said: "It is of

no use; I meant to kill him, and I have done it." These expressions are not testified to by any of the crew. In such a scene, it is in accordance with experience that some witnesses may observe and remember what other witnesses either did not hear or attend to, or have forgotten; and, therefore, when these two witnesses swear to this expression, if you consider they are fair witnesses, and intend to tell the truth, they should be believed in this particular, although others present do not confirm their statement. But, at the same time, upon this question of malice, it does not seem to me the expressions, if used, are important, because they only declare in words what the act of the defendant, in its nature and circumstances, evinces with equal clearness. It is testified, by all the witnesses present at the time, that the vessel being at anchor about three miles from the shore of the island of Zanzibar, orders were given by the master to get under way; that the first officer was forward, on the house over the forecastle, attending to his duty; that the crew were variously employed in preparations to make sail; and that the prisoner, being aft, ran forward, jumped on to the house, seized Mr. Johnson by the collar with his left hand, and with his sheath knife, which he held in his right hand, stabbed him in the breast, and he dropped dead. When the prisoner seized him, Mr. Johnson said, "What do you mean?" and the prisoner, at the instant he struck the blow, replied, "I mean what I am doing."

Now, gentlemen, if you believe this statement, and there is certainly no evidence in the case to contradict or vary it, every witness concurring with the rest in the substance of it, there can be no question that the killing was malicious, provided the prisoner was, at the time, in such a condition as to be capable, in law, of malice. If you are satisfied the prisoner designedly stabbed Mr. Johnson with a knife, in such a manner as was likely to cause, and did cause, death, no provocation whatsoever being given at the time, then, in point of law, the killing was from malice aforethought, unless you should also find that the prisoner, when he did the act, was so far insane as to be incapable in law of entertaining malice; for the rules of law concerning malice are all based upon the assumption that the person who struck the blow was, at the time, in such a state of mind as to be responsible, criminally, for his act. If he was then so insane that the law holds him irresponsible, it deems him incapable of entertaining legal malice; and, therefore, no malice is, in that case, to be inferred from his act, however atrocious it may have been. And, undoubtedly, one main inquiry in this case is, whether the prisoner, when he struck the blow, was so

far insane as to be held by the law irresponsible for intentionally killing Mr. Johnson.

Some observations have been made, by the counsel on each side, respecting the character of this defence. On the one side, it is urged upon you that the defence of insanity has become of alarming frequency, and that there is reason to believe it is resorted to by great criminals, to shield them from the just consequences of their crimes, when all other defences are found desperate; that there exist in the community certain theories concerning what is called moral insanity, held by ingenious and zealous persons, and brought forward on trials of this kind, tending to subvert the criminal law, and render crimes not likely to be punished somewhat in proportion to their atrocity. On the other hand, the inhumanity, and the intrinsic injustice of holding him guilty of murder, who was not, at the time of the act, a reasonable being, have been brought before you in the most striking forms.

These observations of the counsel, on both sides, are worthy of your attention, and their just effect should be to cause you to follow, steadily, and carefully, and exactly, the rules of law upon this subject. The general question, whether the prisoner's state of mind, when he struck the blow, was such as to exempt him from legal responsibility, is a question of fact for your decision; the responsibility of deciding which rightly rests upon you alone. But there are certain rules of law which you are bound to apply, and the court, upon its responsibility, is to lay down; and these rules, when applied, will conduct you to the only safe decision; because these rules will enable you to do what you are sworn to do, that is, to render a verdict according to the law and the evidence given you.

You will observe, then, that this defence of insanity is to be tested and governed by the principles of law, and is to be made out in accordance with legal rules. No defendant can be rightly acquitted of a crime, by reason of insanity, upon any loose, general notions which may be afloat in the community, or even upon the speculations of men of science. In a court of justice these must all yield to the known and fixed rules which the law prescribes. And I now proceed to state to you such of them as are applicable to this case: —

The first is, that this defendant must be presumed to be sane till his insanity is proved. Men, in general, are sufficiently sane to be responsible for their criminal acts. To be irresponsible, because of insanity, is an exception to that general rule. And before any man can claim the benefit of such an exception, he must prove that he is within it. You will, therefore, take it to be the law, that the prisoner is not to be

The Legal Test.

acquitted, upon the ground of insanity, unless, upon the whole evidence, you are satisfied that he was insane when he struck the blow.

The next inquiry is, what is meant by insanity — what is it which exempts from punishment, because its existence is inconsistent with a criminal intent? Clearly, it is not every kind and degree of insanity which is sufficient. There have been, and probably always are, in the world, instances of men of great general ability, filling, with credit and usefulness, eminent positions, and sustaining through life, with high honor, the most important civil and social relations, who were, upon some one topic or subject, unquestionably insane. There have been, and undoubtedly always are, in the world, many men whose minds are such, that the conclusions of their reason and the results of their judgment, tested by those of men in general, would be very far astray from right. There are many more, whose passions are so strong, and whose conscience and reason and judgment are so weak, or so perverted, that not only particular acts, but the whole course of their lives, may, in some sense, be denominated insane. And there are combinations of these, or some of these deficiencies or disorders, or perversions, or weaknesses, or diseases. They are an important, as well as a deeply interesting study; and they find their place in that science which ministers to diseases of the mind, and which, in recent times, has done so much to alleviate and remove some of the deepest distresses of humanity. But the law is not a medical or metaphysical science. Its search is after those practical rules which may be administered, without inhumanity, for the security of civil society, by protecting it from crime. And, therefore, it inquires, not only to the peculiar constitution of mind of the accused, or what weaknesses, or even disorders, he was afflicted with, but solely whether he was capable of having, and did have, a criminal intent. If he had, it punishes him; if not, it holds him dispunishable. And it supplies a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is, the capacity to distinguish between right and wrong, as to the particular act with which the accused is charged. If he understands the nature of his act; if he knows his act is criminal, and that if he does it, he will do wrong and deserve punishment, then, in the judgment of the law, he has a criminal intent, and is not so far insane as to be exempt from responsibility. On the other hand, if he is under such delusion as not to understand the nature of his act, or if he has not sufficient memory and reason and judgment to know that he is doing wrong, or not sufficient conscience to discern that his acts criminal and deserving punishment, then he is not responsible.

This is the test which the law prescribes, and these are the inquiries which you are to make on this part of the case: Did the prisoner understand the nature of his act when he stabbed Mr. Johnson? Did he know he was doing wrong, and would deserve punishment? Or, to apply them more nearly to this case: Did the prisoner know that he was killing Mr. Johnson; that so to do was criminal and deserving punishment? If so, he had the criminal intent necessary to convict him of the crime of murder, and he cannot be acquitted on the ground of insanity. It is not necessary here to consider a case of a person killing another under a delusive idea, which, if true, would either mitigate or excuse the offence, for there is no evidence pointing to any such delusion.

It is asserted by the prisoner, that when he struck the blow he was suffering under a disease known as *delirium tremens*. He has introduced evidence tending to prove his intemperate drinking of ardent spirits during several days before the time in question, and also certain effects of this intemperance. Physicians of great eminence, and particularly experienced in the observation of this disease, have been examined on both sides. They were not, as you observed, allowed to give their opinions upon the case; because the case, in point of fact, on which any one might give his opinion, might not be the case which you, upon the evidence, would find; and there would be no certain means of knowing whether it was so or not. It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts; and, therefore, the counsel on each side have put to the physicians such states of fact as they deem warranted by the evidence, and have taken their opinions thereon. If you consider that any of these states of fact put to the physicians are proved, then the opinions thereon are admissible evidence, to be weighed by you. Otherwise, their opinions are not applicable to this case. And here, I may remark, gentlemen, that, although in general, witnesses are held to state only facts, and are not allowed to give their opinions in a court of law, yet this rule does not exclude the opinions of those whose professions and studies, or occupations, are supposed to have rendered them peculiarly skilful concerning questions which arise in trials, and which belong to some particular calling or profession. We take the opinions of physicians in this case for the same reason we resort to them in our own cases out of court, because they are believed to be better able to form a correct opinion, upon a subject within the scope of their studies and practice, than men in general, and, therefore, better than those who compose your panel. But these opinions, though proper for your respectful consideration,

Delirium Tremens.

and entitled to have, in your hands, all that weight which reasonably and justly belong to them, are nevertheless not binding on you, against your own judgment, but should be weighed, and, especially where they differ, compared by you, and such effect allowed to them as you think right; not forgetting, that on you alone rests the responsibility of a correct verdict. Besides these opinions, upon cases assumed by the counsel, which you may find to correspond more or less nearly with the actual case on trial, the physicians have also described to you the symptoms of the disease of *delirium tremens*. They all agree that it is a disease of a very distinct and strongly marked character, and as little liable to be mistaken as any known in medicine. All the physicians have described it substantially in the same way. I will read to you from my notes that given by Dr. Bell. He says the symptoms are: —

1. Delirium, taking the form of apprehensiveness on the part of the patient. He is fearful of something, — fears pursuit by officers or foes. Sometimes demons and snakes are about him. In the earlier stages, in attempting to escape from his imaginary pursuers, he will attack others as well as injure himself. But he is much more apprehensive of receiving injury, than desirous of inflicting it, except to escape. He is generally timid and irresolute, and easily pacified and controlled.

2. Sleeplessness. I believe *delirium tremens* cannot exist without this.

3. Tremulousness, especially of the hands, but showing itself in the limbs and the tongue.

4. After a time sleep occurs, and reason thus returns. I do not recall any instance in which sleep came on in less than three days, dating from the last sleep. At first it was rather broken, not giving full relief; and this is followed by very profound sleep, lasting six or eight hours, from which the patient wakes sane.

Dr. Stedman, who, from his care of the Marine Hospital, at Chelsea, and of the City Hospital, at South Boston, has had great experience in the treatment of this disease, after describing its symptoms substantially as Dr. Bell did, says its access may be very sudden, and he has often known it first manifest itself by the patients attacking those about them, regarding them as enemies; that it is in accordance with his experience, that a case may terminate within two days of the time when the delirium first manifests itself, and that it rarely lasts more than four days; that he has arrested the disease in forty-eight hours by the use of sulphuric ether.

Taking along with you these accounts of the symptoms and course and termination of this disease, you will inquire whether the evidence

proves these symptoms existed in this case; and whether the previous habits and the intemperate use of ardent spirits, from which this disease springs, are shown; and whether the recovery of the prisoner corresponded with the course and termination of the disease of *delirium tremens*, as described by the physicians.

In respect to the previous intemperance of the prisoner, and the symptoms, course, and termination of the disease, you are to look to the accounts of the conduct and acts of the prisoner given by his shipmates. Their testimony will be fresh in your recollection, and it is not necessary for me to detail it. How recently before the homicide had he slept? Was his demeanor, for two or three days previous, natural, or was he restless? Was any tremor of the hands or limbs visible, and if so, was it very marked or not? Did he utter any exclamations manifesting apprehensiveness before or immediately after the act? When, and under what circumstances did he recover his reason, if he was delirious, and especially did he recover it without sleep? These are all important inquiries to be made by you, and answered, as a careful consideration of the evidence may convince you they should be answered.

It is not denied, on the part of the government, that the prisoner had drank intemperately of the ardent spirits of the country during some days before the occurrence. But the district attorney insists, that he had continued so to drink down to a short time before the homicide; and that when he struck the blow it was in a fit of drunken madness. And this renders it necessary for me to instruct you concerning the law upon the state of facts, which the prosecutor asserts existed.

Although *delirium tremens* is the product of intemperance, and therefore in some sense is voluntarily brought on, yet it is distinguishable, and by the law is distinguished, from that madness which sometimes accompanies drunkenness.

If a person suffering under *delirium tremens* is so far insane as I have described to be necessary to render him irresponsible, the law does not punish him for any crime he may commit.

But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been. It is no excuse, but rather an aggravation of his offence, that he first deprived himself of his reason before he did the act. You will easily see that there would be no security for life or property if men were allowed to commit crimes with impunity, provided they would first make themselves drunk enough to cease to be reasonable beings. And, therefore, it it is an inquiry of great importance in this case, and, in the actual state of the evidence, I think, one of no small

Delirium Tremens.

difficulty, whether this homicide was committed while the prisoner was suffering under that marked and settled disease of *delirium tremens*, or in a fit of drunken madness. My instruction to you is, that if the prisoner, while sane and responsible, made himself intoxicated, and while intoxicated committed a murder by reason of insanity, which was one of the consequences of that intoxication, and one of the attendants on that state, then he is responsible in point of law, and must be punished. This is as clearly the law of the land as the other rule, which exempts from punishment acts done under *delirium tremens*. It may sometimes be difficult to determine under which rule, in point of fact, the accused comes. Perhaps you will think it not easy to determine it in this case. But it is the duty of the jury to ascertain from the evidence on which side of the line this case falls, and to decide accordingly. It may be very material for you to know on which party is the burden of proof in this part of the case. I have already told you, that it is incumbent on the prisoner to satisfy you he was insane when he struck the blow; for the reason that, as men in general are sane, the law presumes each man to be so till the contrary is proved. But if the contrary has been proved, if you are satisfied the prisoner was insane, the law does not presnme his insanity arose from any particular cause; and it is incumbent on the party which asserts that it did arise from a particular cause, and that the prisoner is guilty, by law, because it arose from that cause, to make out this necessary element in the charge to the same extent as every other element in it. For the charge then assumes this form, — that the prisoner committed a murder, for which, though insane, he is responsible, because his insanity was produced by, and accompanied, a state of intoxication. In my judgment, the government must satisfy you of these facts, which are necessary to the guilt of the prisoner in point of law, provided you are convinced he was insane. You will look carefully at all the evidence bearing on this question, and if you are convinced that the prisoner was insane, to that extent which I have described as necessary to render him irresponsible, you will acquit him; unless you are also convinced his insanity was produced by intoxication, and accompanied that state; in which case you will find him guilty,

The prisoner was acquitted.

State *v.* Jones.

NO LEGAL TEST OF INSANITY.

STATE *v.* JONES.

[50 N. H. 369; 9 Am. Rep. 242.]

In the Supreme Court of New Hampshire, June, 1871.

HON. HENRY A. BELLOWS, *Chief Justice.*
" JONATHAN E. SARGENT,
" CHARLES DOE,
" JEREMIAH SMITH,
" WILLIAM L. FOSTER,
" WILLIAM S. LADD,
} *Judges.*

1. **There is no Legal Test of Insanity** in a criminal case.

Question is, Was Crime the Result of Mental Disease? — On the trial of an indictment for murder, the jury were instructed that if the prisoner committed the act in a manner that would be criminal and unlawful if he was sane, the verdict should be " not guilty by reason of insanity," if the killing were the offspring or product of mental disease in the prisoner. *Held*, correct.

The defendant was found guilty of murder in the first degree, upon an indictment charging him with having murdered his wife. Defence, insanity. There was evidence tending to show that defendant believed his wife guilty of adultery with one French, and that he killed her for that reason. This belief was alleged, on the part of the defendant, to have been an insane delusion.

The defendant excepted, to the several refusals of the court to give the jury each of the following instructions: —

1. Under the indictment the defendant cannot be convicted of murder in the first degree.

2. If the defendant was diseased in mind to any extent whatever, and the mental disease, under which he labored, had any influence whatever in leading him to kill his wife, he was not responsible.

3. Any degree of insanity or delusion, and especially such insanity or delusion as would render the defendant incompetent to make a will, makes him also incapable of crime, and not responsible, though the jury may be unable to trace any connection between the partial insanity and the act complained of.

4. Delusion is the legal test of insanity.

5. If the defendant was under the influence of any insane delusion whatever, or any insane delusion connected with the killing of his wife, he was not responsible.

6. Knowledge of right and wrong in respect to the act in question, is the legal test of insanity.

Charge of the Court.

7. If the defendant killed his wife under the control of an irresistible impulse, he is not legally responsible.

The defendant excepted to the following instructions given to the jury: —

"If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant.

"Neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing, and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or transact business, or to manage affairs, is, as a matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury. Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are questions of fact for the jury.

"Insanity is mental disease, disease of the mind. An act produced by mental disease is not a crime. If the defendant had a mental disease which irresistibly impelled him to kill his wife, if the killing was the product of mental disease in him, he is not guilty; he is innocent — as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance. Insanity is not innocence unless it produced the killing of his wife.

"If the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible. Whether every insane impulse is always irresistible is a question of fact. Whether, in this case, the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact.

"Whether an act may be produced by partial insanity, when no connection can be discovered between the act and the disease, is a question of fact.

"The defendant is to be acquitted on the ground of insanity, unless the jury are satisfied, beyond a reasonable doubt that the killing was not produced by mental disease."

The defendant was sentenced, and filed this bill of exceptions.

Wm. C. Clarke, attorney-general, for the State; *Hatch & Wiggin*, for defendant.

Ladd, J. (after deciding some minor questions). — The remaining and most important questions in the case arise upon the instructions given by the court to the jury, and the refusal to give instructions requested by defendant's counsel.

State *v.* Jones.

When, as in this case, a person charged with crime. admits the act, but sets up the defence of insanity, the real ultimate question to be determined seems to be, whether at the time of the act, he had the mental capacity to entertain a criminal intent; whether, in point of fact, he did entertain such intent. In solving that problem, as in all other cases, it is for the court to find the law, and for the jury to find the fact. The main question for our consideration here is, what part of this difficult inquiry is law, and what part fact?

It will be readily agreed, as said by SHAW, C. J., in *Com.* v. *Rogers*,[1] that if the reason and mental power of the accused are either so deficienl that he has no will, no conscience, or controlling mental power, or ift through the overwhelming violence of mental disease, his intellectua, power is, for the time, obliterated, he is not a responsible agent and, of course, is not punishable for acts which otherwise would be criminal. But experience and observation show that in most of the cases which come before the courts, where it is sufficiently apparent that disease has attacked the mind in some form and to some extent, it has not thus wholly obliterated the will, the conscience, and the mental power, but has left its victim still in possession of some degree of ability in some or all these qualities. It may destroy, or it may only impair and becloud the whole mind; or it may destroy or only impair the functions of one or more faculties of the mind. There seem to be cases where, as ERSKINE said in *Hadfield's Case*, reason is not driven from her seat, but where distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety.

The term, "partial insanity," has been applied to such cases by writers and judges, from Lord HALE to Chief Justice SHAW, where, as has been said: "The mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging;" and it is here that the difficulty of the subject begins, and that confusion, and contradiction in the authorities make their appearance. "No one can say where twilight ends or begins, but there is ample distinction between night and day." We are to inquire whether a universal test has been found wherewith to determine, in all cases, the line betweeen criminal accountability and non-accountability — between the region of crime and innocence — in those cases which lie neither wholly in the darkness of night nor the light of day. If such a test exists, or if one can be found, it is of the utmost importance that it be clearly defined and broadly laid down, so that, when it is given to a jury, it may aid rather than confuse them.

[1] 7 Metc. 500.

The Early Cases Reviewed.

To ascertain whether a rule has hitherto been found, we must look to the authorities; and so far as we have been able to examine them, the leading and familiar English cases and authorities are substantially as follows: —

Lord HALE said the mental capacity ordinarily possessed by a child fourteen years old was the test. Mr. Justice TRACY, in *Arnold's Case* (1723), said: "A man must be totally deprived of his understanding and memory, so as not to know what he is doing, no more than an infant, a brute, or a wild beast;" [1] and the same doctrine, substantially seems to have been acted on in *Ferrer's Case*.[2] The next prominent case in the books is *Hadfield's Case* (1800); and all I desire to say of that case, in this connection is, that it seems to stand by itself. It was clear that Hadfield knew right from wrong; it was clear that he knew the nature of the act he was about to commit; it was clear he manifested design, foresight, and cunning in planning and executing it; and it was clear he knew it would subject him to punishment, which was, indeed, his motive in committing it. The most that can be said of it is, that everybody saw he was insane, and that his insanity produced the act.

Next come three cases tried in the year 1812, *Parker's Case*,[3] *Bowler's Case*,[4] and *Bellingham's Case;* in each of which a more humane rule than that of Mr. Justice TRACY was adopted, namely, that knowledge of right and wrong, considered as abstract qualities, was the test; although in *Bowler's Case*, Mr. Justice LE BLANC added a further test, clearly suggested by, and growing out of, the facts of that particular case, and designed to furnish the rule by which the jury should be guided in deciding it, rather than by the formula in respect to right and wrong, namely, that it was for the jury to determine whether the prisoner was under any illusion in respect to the prosecutor, which rendered his mind, at the moment, insensible of the nature of the act he was about to commit. And in *Bellingham's Case*, Sir JAMES MANFIELD, C. J., took the extraordinary liberty of changing the whole scope and meaning of the rule, by telling the jury, in addition, that "It must be proved beyond all doubt, that at the time he committed the atrocious act, he did not consider that murder was a crime against the laws of God and nature."

It can hardly be contended that these three cases go far toward establishing a *rule;* for there is not much reason in calling that a rule, which the judge at the trial may feel at liberty to change, for the pur-

[1] 16 How. St. Tr. 764.
[2] 19 How. St. Tr. 947.
[3] Reported in Collinson on Lun. 477.
[4] Id. 673.

pose of bringing about a conviction or acquittal, according to his individual view of the facts appearing in the case before him.

But these remarks of MANSFIELD, C. J. were approved by Lord LYNDHURST, in *Rex* v. *Offord*,[1] although he, in the same breath, or at least in the same charge to the jury, laid down another and a new test, which seems to be entirely inconsistent with the rule in *Bellingham's Case*, namely, that the jury must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be with reference to the crime of murder. This is not so clear as might be desired, but I should suppose it would strike the average apprehension of a jury as about equivalent to telling them that he must know that the killing would be murder; which is a qualification of the rule as much in favor of life as Sir JAMES MANSFIELD'S was in favor of death.

In *Reg.* v. *Oxford*,[2] Lord DENMAN charged the jury: "If some controlling disease was, in truth, the acting power within him, which he could not resist, then he will not be responsible. It is not more important than difficult to lay down a rule by which you are to be governed. * * * On the part of the defence, it is contended that the prisoner was *non compos mentis*, that is (as it has been said) unable to distinguish right from wrong; or, in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong. * * * Upon the whole, the question will be, whether all that has been proved about the prisoner at the bar shows that he was insane at the time when the act was done; whether the evidence given proves a disease in the mind, as of a person quite incapable of distinguishing right from wrong. Something has been said about the power to contract, and to make a will. But I think those things do not supply any test. The question is whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was wholly unconscious at the time he was committing the act that it was a crime."

But three years afterward, in *Reg.* v. *Higginson*,[3] Mr. Justice MAULE, apparently in utter disregard to the elaborate charge of Lord DENMAN in *Reg.* v. *Oxford*, said to the jury: "If you are satisfied that the prisoner committed this offence, but you are also satisfied by the evidence that at the time of the committing of the offence the

[1] 5 C. & P. 168 (1831). [2] 9 C. & P. 525 (1840). [3] 1 Car. & Kir. 129.

prisoner was so insane that he did not know right from wrong, he should be acquitted on that ground; but if you think that at the time of the offence he did know right from wrong, he is responsible for his acts, although he is of weak intellect." And again, in 1848, in *Reg.* v. *Stokes*, the same test, knowledge of right and wrong in the abstract, was applied by Baron ROLFE, who said: "Every man is held responsible for his acts by the laws of his country, if he can discern right from wrong."

The numerical preponderance of authority in England, as gathered from the cases thus far, would seem to be decidedly in favor of the rule that knowledge of right and wrong, without reference to the particular act, is the test; although their force is much shaken, if not wholly overthrown, by the qualifications which judges have seemed to feel at liberty to introduce, to meet their individual views, or the exigencies of particular cases; and especially by the charge of Lord DENMAN in *Reg.* v. *Oxford*.

The memorable effort of the House of Lords, in 1843, to have the confusion and conflict of opinion which had arisen on this perplexing question all cleared away by one distinct and full avowal by the judges of what the law was and should be in relation to it, is too conspicuous in the history of the subject to be passed without notice. It may be safely said that the character of the judges, and the circumstances under which the questions in *McNaghten's Case*[1] were propounded to them by the House of Lords, make it morally certain that if, in the nature of things, clear, categorical and consistent answers were possible, such answers would have been given. In other words, that if a safe, practical, legal test exists, it would have been found by those very learned men, and declared to the world. Such a result would have brought order out of chaos, and saved future generations of lawyers and judges a vast amount of trouble in trying this kind of cases. But an examination of the answers given shows that they failed utterly to do any such thing; and it is not too much to say that, if they did not make the path to be pursued absolutely more uncertain and more dark, they at best shed but little light upon its windings, and furnish no plain or safe clue to the labyrinth.

In answer to the first question, all the judges, except MAULE, say that "notwithstanding the party accused did the act complained of with a view, under the influences of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is, nevertheless, punishable, according to the nature of the

[1] See Note to Reg. v. Higginson, 1 Car. & Kir. 130.

crime committed, if he knew, at the time of committing such crime that he was acting contrary to law, by which is meant the law of the land." Here is an entirely new element — knowledge that he was acting contrary to the law of the land; and hereupon the inquiry arises: Is a man acting under a delusion of this sort, presumed to know the law of the land? The answer must be, yes; for the judges say, further on: "The law is administered upon the principle that *every one* must be taken conclusively to know the law of the land, without proof that he does know it."

Let this proposition be examined a moment. Knowledge that the act was contrary to the law of the land is here given as a test; that is, such knowledge is assumed to be the measure of mental capacity sufficient to entertain a criminal intent. By what possible means, it may be asked, can that test or measure be applied, without first finding out whether the prisoner, in fact, knew what the law of the land was? How could a jury say whether a man knew, or did not know, that an act was contrary to the law of the land, without first ascertaining whether he knew what that law was?

It was like saying that knowledge of some fact in science — as for example, that a certain quantity of arsenic taken into the stomach will produce death — shall be the test, and at the same time saying that it makes no difference whether the prisoner ever heard of arsenic, or knows anything of its properties or not. Knowledge that the act is contrary to law might be taken as a measure of capacity to commit crime, and so might knowledge of any other specific thing that should be settled upon for that purpose; and such a test would be consistent and comprehensible, whether it were right or not; but when it is said that knowledge of a certain thing is the test, and then we are told in the next paragraph that it makes no difference whether the man ever heard of the thing or not, I confess that I am not able to see any opening for escape out of the maze into which we are led. Whether a jury would be more successful, must depend, I suppose, on their comparative intelligence.

In connection with this rule, it is useful to bear in mind that *Hadfield* knew he was doing an illegal act, and did it for the avowed purpose of bringing upon himself the punishment which he knew was the legal consequence of the act.

Maule, J., holds that the general test of capacity to know right from wrong, in the abstract, is to be applied in the case supposed by the first question, the same as in any other phase of mental unsoundness.

In answer to the second and third questions, which relate to the terms in which the matter should be left to the jury, the judges say, that "to

establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, he did not know he was doing what was wrong."

Suppose, now, an insane man does an act which he knows to be contrary to law because, from an insane delusion (if that term amounts to anything more than the single term insanity), he believes it to be right, notwithstanding the law; that the law is wrong, or that the peculiar circumstances of the case make it right for him to disregard it in this instance; how are these two rules to be reconciled? It would seem to be plain that they are in hopeless conflict, and cannot both stand.

MAULE, J., says: "The questions necessarily to be submitted to the jury are those questions of fact which are raised on the record. In a criminal trial the question commonly is, whether the accused be guilty or not guilty; but in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made convenient to direct their attention to. What these questions are, and the manner of submitting them, is matter of discretion for the judge, a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty it is sometimes necessary or convenient to inform the jury as to the law," which, he repeats, is knowledge of right and wrong. He also says there are no terms which the judge is, by law, required to use, only they must not be inconsistent with the law that knowledge of right and wrong is the test.

The answer to the fourth question introduces a doctrine which seems to me very remarkable, to say the least. The question was: "If a person, under an insane delusion as to existing facts, commits an offence, is he thereby excused?" To which the answer was as follows: "On the assumption that he labors under partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real. For example: If, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character or fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

The doctrine thus promulgated as law has found its way into text books, and has, doubtless, been largely received as the enunciation of a sound legal principle since that day. Yet it is probable that no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It, practically, holds a man, confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power that is required of a man in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. He killed a man because, under an insane delusion, he falsely believed the man had done him a great wrong, which was giving rein to a motive of revenge, and the act is murder. If he had killed a man only because, under an insane delusion, he falsely believed the man would kill him if he did not do so, that would have been giving rein to an instinct of self-preservation, and would not be crime. It is true, in words, the judges attempt to guard against a consequence so shocking as that a man may be punished for an act which is purely the offspring and product of insanity, by introducing the qualifying phrase, "and is not in other respects insane." That is, if insanity produces the false belief, which is the prime cause of the act, but goes no further, then the accused is to be judged according to the character of motives which are presumed to spring up out of that part of the mind which has not been reached or affected by the delusion or disease. This is very refined. It may be that mental disease sometimes takes a shape to meet the provisions of this ingenious formula; or, if no such case has ever yet existed, it is, doubtless, within the scope of omnipotent power hereafter to strike with disease some human mind in such peculiar manner that the conditions will be fulfilled; and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease. That is, when we can certainly know that, although the false belief on which the prisoner acted was the product of mental disease, still, that the mind was in no other way impaired or affected, and that the *motive* to the act did certainly take its rise in some portion of the mind that was yet in perfect health, the rule may be applied without any apparent wrong; but it is a rule which can be safely applied in practice that we are seeking, and to say that an act which grows wholly out of an insane belief that some great wrong has been inflicted, is at the same time produced by a spirit of revenge springing from some portion or corner of the mind that has not been reached by the disease, is laying down a pathological and psychological fact which no human intelligence can ever know to be true, and which,

if it were true, would not be law, but pure matter of fact. No such distinction ever can, or will, be drawn in practice; and the absurdity, as well as inhumanity, of the rule seems to me sufficiently apparent without further comment.

To form a correct estimate of the value of these answers, we have only to suppose that, at the end of a criminal trial, where the defence is insanity, they be read to the jury for their guidance in determining the question with which they are charged. Tried by this practical test, it seems to me they utterly fail; and the reason of the failure, as I think, is, that it was an attempt to lay down as law that which, from its very nature, is essentially matter of fact. It is a question of fact whether any universal test exists, and it is also a question of fact what the test is, if any there be.

The efforts of text writers to extract a rule from the cases have not, in my judgment, been more successful.[1] It is worthy of notice, however, that Mr. CHITTY lays down a rule from which is excluded all reference to knowledge of right or wrong or moral good and evil, thus: "When there is only such partial derangement as leaves the party free to act or to forbear in the particular case in question, or where he is guilty of the crime during a lucid interval, he will be equally liable to punishment with those who are perfectly sane. Where, however, the mind labors under such a delusion that though it discerns some objects clearly, it is totally deranged as to the objects of its attacks, the party will be entitled to be acquitted."[2] To my mind this is but another form of saying that where the act is the product of mental disease it is no crime, which was the instruction given in this case.

If we leave the English rule, where it seems to be left by these authorities, I think an examination of the American cases will not lead to any more satisfactory result.

In *Commonwealth* v. *Rogers*,[3] SHAW, C. J. instructed the jury that "a person is not responsible for any criminal act he may commit, if, by reason of mental infirmity, he is incapable of distinguishing between right and wrong in regard to the particular act, and of knowing that the act itself will subject him to punishment; or has no will, no conscience or controlling mental power; or has not sufficient power of memory to recollect the relations in which he stands to others, and in which they stand to him; or has his reason, conscience and judgment so overwhelmed by the violence of disease as to act from an uncontrolable impulse."

[1] See 1 Russ. Cr. 13; Roscoe's Cr. Ev. 944.

[2] 1 Chitty's Cr. Law, 725.

[3] 7 Metc. 500 (1844).

Here seem to be four distinct tests. The first is substantially that given by Lord DENMAN in *Reg.* v. *Oxford*, but with one most important qualification added, namely, knowledge that the act will subject him to punishment. But how can it be said that such knowledge constitutes one of the links in a chain of conclusive evidence, that it is one fact in a chain of facts from which that degree of insanity which will excuse a person from crime is to be conclusively found?

If that be so, then certainly a legal quality, effect, or signifigance is given to it by its position in the chain, which no one would ever think it possessed when standing alone. The desire for revenge may be so strong as to outweigh the fear of a punishment which a man without any mental disease knows must follow his act. But the rule is, that, in addition to the knowledge of right and wrong in respect to the particular act, the accused must have been capable of knowing that the act itself would subject him to punishment. It is, doubtless, true that ability to know that a certain act will be followed by punishment, furnishes evidence of the mental condition. So would knowledge of any other fact in law or science. But I can see no more reason for holding that such knowledge is any part of a *legal test* of capacity to commit crime, than for holding that knowledge of the cause of an eclipse is entitled to the same effect.

The second rule relates to a case where there can be no doubt, where the will, the conscience and the controlling mental power are all gone; and the fourth is substantially the same, where the reason, conscience and judgment are so overwhelmed by the violence of disease, that he acts from uncontrollable impulse. There can be no very appreciable legal distinction between a person who has no will, no conscience, or controlling mental power, and one whose reason, conscience, and judgment are so overwhelmed by the violence of disease as to act from an uncontrollable impulse. In both cases it is an act in which reason, conscience, judgment and will do not participate; in a word, it is the product of mental disease.

Power of memory sufficient to recollect the relations in which he stands to others and in which others stand to him, which is given as the third test, seems to me no more a legal criterion than power of memory to recollect any other fact which a healthy mind would be expected to remember; and such power of memory or its lack would be a fact, like other facts, for the jury to weigh in judging whether he had the mental capacity to entertain a criminal intent.

There is no doubt but these instructions of the learned and eminent chief justice of Massachusetts have been largely followed in cases since

tried in this country; but the course has been by no means uniform, as we shall see.

In New York and Pennsylvania in the two leading cases of *Freeman* v. *People*,[1] and *Commonwealth* v. *Mosler*,[2] capacity to distinguish right from wrong was given as the naked test. But in neither of those States has the rule thus laid down been followed with uniformity. In the trial of Huntington for forgery, in New York City, in 1856, Judge Capron said to the jury: "To constitute a complete defence, insanity, if partial, as monomania, must be such in degree as to wholly deprive the accused of the guide of reason *in regard to the act with which he is charged*, and of the knowledge that he is doing wrong in committing it." And the remarks of Edmonds, J., in the earlier case of *The People* v. *Kleim*,[3] are wholly at war with any such rule as that promulgated in *Freeman* v. *People*. He says: "The moral as well as the intellectual faculties may be so disordered by the disease as to deprive the mind of its controlling and directing power; that he must know the act to be wrong and punishable, and be able to compare and choose between doing it and not doing it."

In Pennsylvania, in *Commonwealth* v. *Knepley* (1850), knowledge of right and wrong in regard to the particular act was given as the test; and in *Commonwealth* v. *Haskell*, the judge charged that "the true test lies in the word *power*. Has the defendant, in a criminal case, the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?"

It would probably not be far out of the way to say that the number of American cases where knowledge of right and wrong in the abstract, and knowledge of the nature and quality of the act — that it was wrong — have been given as the test, is about equal, with a tendency of late years to the latter form; while it will appear that, in almost every case where any rule has been given on the subject, it has been modified and explained to meet the facts of the particular case, or to carry out the personal views of the judge on the matter of insanity. But there are not wanting cases where all tests have been discarded. In *State* v. *Felter*,[4] Dillon, C. J., says: "The jury, in substance, should be told that if the defendant's act in taking the life of his wife was caused by mental disease or unsoundness, which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequences of that act, and which, overpowering his will, irresistibly forced him to its commission, then he is not amenable

[1] 4 Denio, 9.
[2] 4 Barr. 267.
[3] 1 Edm. Sel. Cas. 13.
[4] 25 Iowa, 67.

to legal punishment. But if the jury believed, from all the evidence and circumstances, that the defendant was in possession of a rational intellect and sound mind, and allowed his passion to escape control, then, though passion, may for the time being, have driven reason from her seat and usurped it, and have urged the defendant, with a force at the moment irresistible, to desperate acts, he cannot claim for such acts the protection of insanity." And in *Stevens* v. *State of Indiana*,[1] which was an indictment for murder, and the defence insanity, an instruction to the jury that, if they believed the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such act was one which he ought not to do, he was responsible, was held erronous. In the course of his opinion in that case, GREGORY, J., speaking of the charge in *Commonwealth* v. *Rogers*, said: "It is by no means clear, and we think it is not entitled to the weight usually awarded it."

Very much to the same effect was *State* v. *Spencer*.[2] HORNBLOWER, C. J., said: "In my judgment, the true question to be put to the jury is, whether the prisoner was insane at the time of committing the act; and in answer to that question there is little danger of a jury's giving a negative answer, and convicting a prisoner who is proved to be insane on the subject-matter relating to or connected with the criminal act, or proved to be so far or so generally deranged as to render it difficult or almost impossible to discriminate between his sane and insane acts." And also a case said to have been tried in York County, Maine, in 1636, where the court charged the jury that if they were satisfied the prisoner was not of a sound memory and discretion at the time of committing the act, they were bound to return a verdict of acquittal.[3] To the same effect also is our own cases of *Prescott* and *Corey*, referred to by the attorney-general in his brief.

Professor Greenleaf adopts the charge of Chief Justice SHAW, in *Roger's Case*, without any attempt at modification or explanation, as covering the whole subject, so far as criminal responsibllity is concerned.[4] Mr. Bishop undertakes to give the forms in which courts have put the question of insanity to the jury in most of the modern cases.[5] But I have not been able to find a case, ancient or modern, where the judge did actually give the question of insanity to the jury in just the terms of Mr. Bishop's form; and he says, speaking of his rule: "This

[1] 31 Ind. 485.
[2] 1 Zabr. 196.
[3] Ray. Med. Jur. MS., sect. 42.
[4] 2 Greenl. on Ev., sect. 372
[5] 1 Bish. Cr. Law, 475.

The Difficulty of the Subject.

form of stating the question of insanity to the jury is well in cases where it is admitted that the mental disease or imperfection extends only to the intellectual powers, and the party has full control of his actions. How numerous, comparatively, these cases are is matter of science and fact nowhere to be discussed." [1]

In regard to the difficulties of the subject, the same author says: "The labors of writers on insanity have been exhausted in attempts to find some test of ready application to determine when a person is to be deemed insane, and when not, in reference to his responsibility for crime. And judges, less informed on this subject than on most other subjects of legal science, have struggled under the inherent embarrassments of the question itself, under the influence of erroneous notions in the community, and under the failures of counsel and witnesses in particular cases to present the real points of inquiry. The result has been, that instructions given in reference to particular facts appearing in the cases before them have seemed, to casual observers, to be very discordant, while to scientific inquirers after the facts of insanity, they have seemed very absurd" [2] And in a note, "It seems to me there has been too much attempt to do what in its nature is impossible, and too little attempt to do what is possible regarding the matter. It is not, I submit, possible, in the nature of things, that the court should find an exact and literal rule, which may be put into the hand of a juryman, wherewith to measure the mind, and determine whether it is criminally responsible or not, for its act."

It is to be remarked that the same thing, in substance, was admitted by the judges in *McNaghten's Case*, TINDAL, C. J., giving the opinion of the majority, said: "We have foreborne entering into any particular discussions upon the questions, from the extreme difficulty of applying those answers to cases in which the facts are not brought judicially before us. The facts of each particular case must, of necessity, present themselves with endless variety and with every shade of difference in each case; and we deem it at once impracticable, and dangerous if it were practicable, to attempt to make minute applications of the principles involved in the answers to your lordships' questions." MAULE, J., speaking for himself, observed: "I feel great difficulty in answering the questions put by your lordships on this occasion. First, because they do not appear to rise out of, and are not put in reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be

[1] 1 Bish. Cr. Law, sect. 478. [2] 1 Bish. Cr. Law, sect. 474.

applicable to every possible state of facts not inconsistent with those assumed in the questions."

It is entirely obvious that a court of law undertaking to lay down an abstract general proposition, which may be given to the jury in all cases, by which they are to determine whether the prisoner had capacity to entertain a criminal intent, stands in exactly the same position as that occupied by the English judges in attempting to answer the questions propounded to them by the House of Lords in this case; and whenever such an attempt is made, I think it must always be attended with failure, because it is an attempt to find what does not exist, namely, a rule of law wherewith to solve a question of fact.

This is the only conclusion I desire to draw from the cases and text-writers referred to. It is clear to me that judges have adapted their language to the facts of the particular case before them, and that when anything is said about knowledge of right and wrong, or knowledge of the quality of the act, or any other legal test, it has been, and will inevitably continue to be, qualified and explained in such a way, to meet the evidence upon which the jury are to pass, that its character, as a rule, entirely disappears.

No one but the Creator of all things can look in upon the chaos of a disordered mind, and determine with certainty whether its powers are so much prostrated, enfeebled, or deranged, that the unhappy sufferer has ceased to be an accountable being. Still, the court and jury must determine that question, approximately, as best they can in each individual case; and it makes no difference, so far as I can see, with the difficulty of the subject, whether Lord Brougham's view, that a distinction is to be made between the moral accountability of a man to his Maker, and his accountability to human tribunals, be accepted or not. With this duty to perform, and this responsibility upon them, courts naturally and properly turn to men of science, such as have had large experience in the care and treatment of the insane, for aid; and the questions allowed to be put to experts and answered by them, both in England and this country, show, that what is laid down as *law* in theory, is almost universally treated as *fact* in practice.

At the trial where insanity is set up as a defence, two questions are presented: *First.* Had the prisoner a mental disease? *Second.* If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the power of the mind, as to take away the capacity to form or entertain a criminal intent? The first is so purely a question of fact, that no one would think of disputing it any sooner than he would dispute that it was a question of fact, whether a man has

consumption or not. It is in settling the second that all the difficulty arises.

The instructions asked for in this case go upon the ground that this is a mixed question of law and fact; that where there is delusion, there can be no criminal intent; and that where there is capacity to know right from wrong in reference to the particular act, there is capacity to commit crime. It is true, the sixth request does not present the matter in just this form; but if knowledge of right and wrong, as to the act, is to be considered a legal test of criminal accountability, it must follow that those who have such knowledge are accountable, as well as that those who have it not are not accountable. And this court is now called on, as a court of law, to decide whether either of these tests shall be adopted in this State, and if so, which.

It would doubtless be convenient to adopt some such test. It would, to some extent, save the trouble of trying each case, as it arises on its own special and peculiar facts; at any rate it would narrow the range of investigation to a search for the facts constituting the test adopted. But, in cases of this sort, the argument of convenience is not to be admitted. No formal rule can be applied in settling questions which have relation to liberty and life, merely because it will lessen the labor of the court or jury. Nor ought such a rule to be adopted upon the authority of cases, unless those cases show, beyond a doubt, not only its existence, but that it is founded in reason and fundamental truth. Expressions of even the most eminent judges must not be mistaken for the enunciation of a universal principle of law, when it appears that they were used in charging the jury upon the facts arising in a particular case.

The instructions given also imply that this is a mixed question of law and fact; that the only element of law which enters into it is, that no man shall be held accountable, criminally, for an act which was the offspring and product of mental disease. Of the soundness of this proposition there can be no doubt. Thus far all are agreed; and the doctrine rests upon principles of reason, humanity and justice, too firm and too deeply rooted to be shaken by any narrow rule that might be adopted on the subject. No argument is needed to show that, to hold that a man may be punished for what is the offspring of disease, would be to hold that he may be punished for disease. Any rule which makes that possible, cannot be law.

It will hardly be contended, I suppose, that delusion or knowledge of right and wrong, with reference to the act or any other thing, can, with any degree of propriety, be called a *legal* test of the mental capacity

to commit crime, unless that capacity is determined absolutely in all cases by the presence or absence of the fact which is assumed to constitute the test.

If we speak of *delusion*, for instance, before that can be adopted as the test, in the sense intended by the request in this case, it must appear that it makes no difference whether the delusion has any reference to, or connection with, the act or not. If we say, as ERSKINE said in *Hadfield's Case*, that delusion is the test when it appears to have produced the act, but not when it does not appear to have produced the act, that the delusion and the act should be connected, we admit that delusion cannot be a legal test, because it is not a universal test. And, even if it were established that, in all cases where there is delusion, there is not capacity to commit crime with as much certainty as that a heavy body left free in the air will fall to the earth, it still remains a *fact*. That a heavy body will fall is a *fact*, although it is at the same time a law of nature; that delusion attends incapacity for crime would be a fact still, although, were the fact ascertained to be certain and universal, it might be called a law of mental disease, and might, therefore, be given to the jury as a criterion, without any positive or practical wrong.

Yet, in that view, it would be the law of the land in no other sense than the laws of nature and physics may be considered laws of the land. Now, this court, sitting for the decision of questions of law, is not at liberty to receive and consider evidence, or weigh and determine matters of fact.

But the very first step in the inquiry to ascertain if there be any test or criterion that may be safely given to the jury on this subject, whether as a fact universally true, or as a principle of law, involves the examination of an immense mass of evidence, as complicated and difficult to understand as can well be conceived. Moreover, it would require a degree of skill and scientific attainment which could only be reached by years of special study and intelligent observation. Not only ought all the facts bearing on the question to be collected from every asylum for the insane throughout the world, but, as an inflexible *rule* to be established, the facts of all other cases, where the patient has never received scientific treatment, ought to be added to the stock. Then, after collecting the facts in this way, it would be necessary to compare cases and classes of cases, one with the other, to weigh facts against facts, to balance theories and opinions, and finally, to deduce a result which might, itself, turn out to be nothing more than a theory or opinion after all. At any rate, it would be a deduction of fact.

It need not be said that this is not the business of a court of law. It is a work which can only be reasonably well done by men who devote their lives exclusively to its accomplishment. Such a work has doubtless been done, with extraordinary patience and ability, by our distinguished countryman, Dr. Ray; and the result of his laborious investigation is, that no test can be found. He says: "To persons practically acquainted with the insane mind, it is well known that in every hospital for the insane, are patients capable of distinguishing between right and wrong, knowing well enough how to appreciate the nature and legal consequences of their acts, acknowledging the sanctions of religion, and never acting from irresistible impulse, but deliberately and shrewdly." [1]

If we were at liberty to weigh and consider *evidence* upon the question, it is clear that such testimony must outweigh all the convenient formulas and arbitrary dogmas laid down by the lawyers and judges from the time of Lord HALE to the present, simply for the reason that Dr. Ray is qualified by study and observation to give an opinion, while lawyers and judges are not. But we do not consider evidence upon this point at all. Whether there is any universal test is as clearly a pure matter of fact, as is the question what that test may be.

A strong argument in favor of the instructions given in this case, and of consequence against proceeding further to give the specific instructions requested, is found, both upon principle and authority, in the course of decisions where testamentary capacity has been before the courts.

In the well known leading case of *Dew* v. *Clarke*,[2] decided in 1826, Sir JOHN NICHOLL gave his opinion thus: "The true criterion, the true test, of the absence or presence of insanity I take to be the absence or presence of what, used in a *certain* sense of it, is comprehended in a single term, namely, delusion. Whenever the patient once conceives something extravagant to exist, which has still no existence but in his own heated imagination; and whenever, at the same time, having once so conceived, he is incapable of being, or at least of being *permanently*, reasoned out of that conception, such patient is said to be under a *delusion*, in a peculiar, half-technical sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity, to be almost, if not altogether, convertible terms; so that a patient, under a

[1] Ray's Med. Jur., Ins. sect. 43.

[2] 3 Addams, 79.

delusion, so understood, on any subject or subjects, in any degree, is, for that reason, essentially mad or insane on such subject or subjects, in that degree." After a very extended review of the evidence in the case, he draws this conclusion: "The will propounded in this cause, a will virtually disinheriting the daughter, being the direct, unqualified offspring of that morbid delusion — proved, I may now say without any qualification or restriction, to have been *ever* present to the mind of the deceased as to the character and conduct of his daughter — being, if I may so term it, the very creature of that morbid delusion, put into act and energy, — I, at least, can arrive at no other conclusion than that the deceased was insane at the time of his making the will propounded in this cause; and consequently that the will is null and void in law."

In view of this explicit avowal, it may be considered somewhat remarkable that this case should have been regarded as an authority for anything more than this — that delusion is the test of testamentary capacity, so far that a disposition of property by a will, which is shown to have been the direct, unqualified offspring of morbid delusion cannot be upheld. If a morbid delusion produced the act, then the act is not valid. But, whether through a misconception of this case, or by adopting the theory of some writers, who maintain that the mind, though it has varied faculties, is one and indivisible, so that if it be disordered in any one of these faculties, it cannot be said to be sound, though its other faculties and functions remain undisturbed, a doctrine appears to have gained some currency in England to the effect that delusion on any matter, however remote from the subject of the will, and however disconnected from it, is conclusive evidence of unsoundness of mind, and, therefore, altogether destroys testamentary capacity.[1]

This idea was attacked and completely overthrown in the case of *Banks* v. *Goodfellow*,[2] decided in July, 1870. In that case it appeared that a testator labored under two fixed delusions: one, that he was pursued by spirits; the other, that a man, long since dead, came to molest him, neither delusion influencing or calculated to influence the particular testamentary disposition made by him. Brett, J., who tried the case, left it to the jury to say whether, at the time of making the will, the testator was capable of such knowledge and appreciation of facts, and was so far master of his intentions and free from delusions as would enable him to have a will of his own in the disposition of his property, and act upon it.

[1] Waring *v.* Waring, 6 Moore P. C. Cas. 341; and see also Smith *v.* Tebbitt, L. R. 1 P. & D. 398.

[2] L. R. 5 Q. B. 549.

Cockburn, C. J., in Banks *v.* Goodfellow.

It will be observed, that if delusion were to be regarded as a universal legal test, there was no question here to be submitted to the jury; a verdict should have been ordered against the will for the existence of delusions was not disputed. But the instructions were held correct, and Lord Chief Justice COCKBURN, in the course of his elaborate opinion, says: "Every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of the physical organizations. The instincts, the affections, the passions, the moral sense, perceptions, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease, and the experience of insanity in its various forms teach us that, while on the one hand all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of a raving manaic, one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed, that while the mind may be overpowered by delusions which utterly demoralize and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which, though the offspring of mental disease, leave the individual in all other respects rational, and capable of transacting the ordinary affairs, and fulfilling the duties and obligations incidental to the various relations of life."

The exact question presented to the court in this case, namely, whether unsoundness, not operating on the mind of the testator in regard to the particular testamentary disposition, will be sufficient to deprive him of the power of disposing of his property by will, was said to be a new question, not before presented for judicial decision in England.

But in *Boardman* v. *Woodman*,[1] decided four years earlier in this State, the court below, BARTLETT, J., charged the jury "that the mere fact of the possession of a delusion may not be sufficient to render a person utterly incapable of making a valid will; that a person of sufficient mental capacity, though under a delusion, may make a valid will; if the will is in no way the offspring of the delusion, it is unaffected by it." This instruction was sustained; and I am unable to find anything in the opinion of the court that conflicts with the doctrine of *Banks* v. *Goodfellow*. SARGENT, J., in the course of his opinion says: "Delusion, in the technical sense, as explained by Sir JOHN NICHOLL, is the legal test of the presence of active insanity; *and if the will is the offspring of this delusion, it should be set aside.*" It is sufficiently obvious that neither Sir JOHN NICHOLL nor Judge SARGENT would hold that a

[1] 47 N. H. 120.

man who labors under a delusion that his legs are made of glass, or that he is charged with controlling the motions of the planetary system, but is in other respects sane, would, therefore, be incapable of making a valid will.

It is not necessary here to express any assent to or dissent from the *manner* in which the subject is treated in *Dew* v. *Clark* and *Boardman* v. *Woodman*. Whether the inquiry is advanced by saying that the act to be invalid, must be the offspring of *delusion*, instead of saying that it must be the offspring of mental disease, is a matter which does not concern this argument.[1] If the doctrines of *Banks* v. *Goodfellow* and *Boardman* v. *Woodman* be applied in the case under consideration, it would clearly have been error to give the instruction as to delusion requested by defendant's counsel; because delusion cannot be a *legal* test, if while delusions exist in the mind, an act no way connected with such delusions, nor produced by them, is to be held valid.

How far the analogy holds between testamentary capacity and capacity to commit crime, it is not necessary to inquire, because *delusion* has never, so far as I can find, been regarded as a test in criminal cases, unless *Hadfield's Case* is to be excepted; and all the argument requires is, to show that the rule, which it has been thought may be drawn from the authorities in civil cases, has no existence even there, in the broad and universal terms in which the court was requested to apply it on the trial of this case.

Fortunately, we are not embarrassed by any decisions, or, so far as I know, any *dicta* or expressions of single judges in this State at variance with the broad philosophical doctrine laid down by the judges who tried this case. Indeed, there seems to have been a strong leaning heretofore in the same general direction, as is shown by the quotations from charges of two of our late chief justices, Richardson and Bell, in the brief of the attorney-general for the State.

In view of these considerations, we are led to the conclusion that the instruction given to the jury in this case, that "if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant," was right; that it fully covers the only general, universal element of law involved in the inquiry; and, therefore, that any further step in the direction indicated by the requests would have been an interference with the province of the jury, and the enunciation of a proposition which, in its essence, is not law, and which could not in any view

[1] See remarks of Lord Penzance in Smith *v.* Tebbitt, L. R. 5 Q. B. 549.

A Question of Fact.

safely be given to the jury as a rule for their guidance, because, for aught we can know, it might have been false in fact.

This would seem to dispose of the whole case. All the other instructions given are only the direct logical consequence of this principle.

Whether the defendant had a mental disease, as before remarked, seems to be as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease, was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of fever. That it is a difficult question does not change the matter at all. The difficulty is intrinsic, and must be met from whatever direction it may be approached. Enough has already been said as to the use of symptoms, phases, or manifestations of the disease as legal tests of capacity to entertain a criminal intent. They are all clearly matters of evidence, to be weighed by the jury upon the question whether the act was the offspring of insanity; if it was, a criminal intent did not produce it; if it was not, a criminal intent did produce it, and it was a crime.

The instructions as to insane impulse seem to be quite correct, and entirely within the same principle. If the defendant had an insane impulse to kill his wife, which he could not control, then mental disease produced the act. If he could have controlled it, then his will must have assented to the act, and it was not caused by disease, but by the concurrence of his will, and was therefore crime.

These instructions have now been twice given to the jury in capital cases in this State, first by Chief Justice PERLEY, in *State* v. *Pike*, and now again by Judge DOE in the case before us. In *State* v. *Pike* no exceptions were taken to this part of the charge, and the questions here raised were not before the whole court for judicial determination, although they were printed in the case as transferred, and no objection to their form is understood to have been made.

But a question was passed upon in that case, which, carried to its logical results, goes far toward settling most of the questions raised upon the instructions here. It was claimed that the defendant was irresponsible by reason of a species of insanity called dipsomania. The court instructed the jury that "whether there is such a mental disease as dipsomania, and whether the defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury." These instructions were specially excepted to by the defendant, and were held correct. This would seem to be entirely inconsistent with the idea that either delusion or knowledge of right and wrong is, as matter of law, a test of criminal capacity; and

would also seem to be about equivalent to holding, in general terms, that it was for the jury to say whether the killing was the product of mental disease, and return their verdict of "guilty" or "not guilty by reason of insanity," as they found that fact to be.

We should be slow to establish any doctrine on this important subject which we could see would be likely to result in the escape of malefactors from punishment, or afford encouragement to a fictitious defence of insanity; and no considerations of convenience or ease in the administration of the law, as before observed, should be allowed to weigh at all against adhering to any doctrine or any course of practice that rests upon sound reason, or that appears to be necessary for the attainment of right results, whether such doctrine or practices is supported by uniform authority or not. Still it is no objection to the course of the judges who tried this case, and who tried *Pike's Case*, that it relieves the subject of some of its most formidable difficulties so far as the court is concerned, and at the same time furnishes at least one clear and explicit direction which the jury can understand.

No untried or doubtful theory is adopted. The instruction given was always law, and always must be law, while justice is administered upon principles at all consonant with the calls of civilization and humanity. The only objection is, that the court did not go further, and undertake to explore a region where all is doubt, uncertainty and confusion upon the authorities, and where, upon principle, they had no right to go at all; that they did not undertake to lay down a rule where, if we could allow ourselves to investigate the fact, we should probably find there is and can be no rule, nor to enunciate as law a pure matter of fact which can only be absolutely known to the Almighty.

I may add that it confirms me in the belief that we are right, or at least have taken a step in the right direction, to know that the view embodied in this charge meets the approval of men who, from great experience in the treatment of the insane, as well as careful and long study of the phenomena of mental disease, are infinitely better qualified to judge in the matter than any court or lawyer can be.[1]

The satisfaction with which the charge to the jury in *State* v. *Pike* is understood to have been received by the most enlightened members of the medical profession, proves to my mind not that we have thrown down old landmarks to adopt any theory based on a partial, imperfect or visionary view of the subject, but that, in a matter where we must inevitably rely to a great extent upon the facts of science, we have consented to receive those facts as developed and ascertained by the re-

[1] See Ray's Med. Jur. Ins. (5th ed.) sect. 44.

searches and observations of our own day, instead of adhering blindly to dogmas which were accepted as facts of science and erroneously promulgated as principles of law fifty or a hundred years ago.

The last instruction, that the defendant was to be acquitted on the ground of insanity, unless the jury were satisfied, beyond a reasonable doubt, that the killing was not produced by mental disease, was in accordance with *State* v. *Bartlett*,[1] and was correct.

Exceptions overruled.

NO TEST — BURDEN OF PROOF.

STEVENS *v.* STATE.

[31 Ind. 485.]

In the Supreme Court of Indiana, November Term, 1869.

Hon. JOHN T. ELLIOTT,
" JAMES S. FRAZER,
" ROBERT C. GREGORY,
" CHARLES A. RAY,
} *Judges.*

1. **No Test — Insane Impulse.** — If an insane impulse leads to the commission of a crime, the actor is not responsible. An instruction that "if the jury believe that the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that such act was one which he ought not to do," he was responsible for his act, is erroneous.

2. **Burden of Proof.** — Upon an indictment for murder where the defence is insanity, the jury should acquit if they entertain a reasonable doubt as to the soundness of mind of the prisoner at the time of the homicide, although they believe he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life He is as much entitled to the benefit of a doubt on that as any other material fact in the case.

This was an appeal from the Vigo Criminal Court. The appellant was indicted for murder in the first degree, and convicted. The defence was insanity. At the instance of the prosecuting attorney, the court instructed the jury that "in order to excuse a man from killing another, on the ground of insanity, it must appear to the satisfaction of the jury that he was either absolutely insane at the time of the act, so that he did not know the difference between right or wrong, or that he was laboring under some form of monomania by which he was irresistibly

impelled by an uncontrollable will to the perpetration of the act; *but such monomania must be in relation to the act of killing, for if it is monomania upon some other subject, it does not excuse a killing.* If a man becomes a monomaniac on account of the morbid state of his domestic affections, or if he becomes so on account of the morbid state of his religious feelings, in either case his moral sense is only affected by the cause of his disease; that is he is only excused from the commission of crime so far as he acts under the irresistible influence of the particular monomania under which he is laboring; *and if, although laboring under either of said forms of monomania, he shall kill a man with premeditation, malice and purpose, he would be without excuse, and would be guilty of murder in the first degree.*"

"In order to excuse a man for the commission of a crime on the ground of monomania, *it must appear that the monomania had relation to the particular crime committed, and if it was monomania upon any other subject, it would be no excuse.*"

"Where a man kills another *without having given any previous indications of insanity*, and afterwards so acts as to appear to be insane, the jury should consider this fact to determine whether insanity is not simulated or pretended; and if they find it was pretended, it should not weigh anything in their decision of the question of guilt or innocence."

At the request of the defendant, the jury were instructed that "if they believed from the evidence that when the prisoner committed the act charged in the indictment, he was laboring under any irresistible and uncontrollable mental delusion, impelling him to do said act — that he was at the time of the perpetration of said killing in such a state of mind as to be unable to control his will and his actions in regard to the act so committed — then in judgment of law he was insane, and could not be guilty of the offence of murder charged in the indictment, and he is consequently entitled to a verdict of not guilty."

"If the jury believe from the evidence that at the time of committing the act charged in the indictment, the prisoner was moved thereto by an insane impulse controlling his will and his judgment — an impulse too powerful for him to resist — and said insane impulse arose from causes physical or moral, or from both combined, not voluntarily induced by himself, under such circumstances the jury cannot find the defendant guilty as charged."

The defendant asked the following instructions: that "if the jury entertain a reasonable doubt as to the soundness of the mind of the prisoner at the time of the commission of the homicide charged, he is entitled to the benefit of that doubt, as he would be to the benefit of a doubt as to any other material fact in the case — it being,

under the statute of this State, a necessary ingredient of the offence that the person charged shall, at the time of the commission of the offence, be of sound mind, and if the evidence shows that the prisoner, at the time of the commission of the act, was not of such sound mind, although the jury may believe he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life even at the time of the commission of the offence, they cannot find him guilty." The court refused to give the instruction, as asked, but, over the objection of the defendant, gave it with this qualification: "If the jury, believe from the evidence, that the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that such act was one which he ought not to do; and if that act, at the same time, was contrary to the law of the State, then he is responsible for his act."

There was a motion for a new trial on the ground that the parts of charge in italics were erroneous, and that the qualification of the instructions asked by the defendant was incorrect. The new trial was refused, and defendant appealed to this court.

J. C. Baird, *C. Cruft*, *W. E. McLean*, and *J. N. Pierce*, for appellant; *R. W. Thompson*, and *D. E. Williamson*, attorney-general for the State.

The opinion of the court was delivered by

Gregory, J.— It is undoubtedly the law as charged by the court below, that if the defendant was moved to the act by an insane impulse controlling his will and his judgment, then he was not guilty of the crime charged. And if the defendant was a monomaniac on any subject, it was wholly immaterial upon what subject, so that the insane impulse led to the commission of the act.

It is claimed that the instructions as to this point given by the court, at the instance of the State's attorney, were calculated to mislead the jury; and two members of this court are of that opinion. It is clear that the instructions might have been put in a better form, but I have no doubt that they are correct law, as they were intended by the court to be understood, and particularly as explained by the court in the instructions asked by the defendant. But if this case turned upon that question, I should hesitate to determine that a jury might not have been mislead by instructions, about the meaning of which there is a difference of opinion among the members of this court.

It is claimed that the court erred in the instruction in reference to simulating insanity after the commission of the act, in assuming tha the defendant had given no previous indication of insanity. There was some evidence of previous indication of insanity, but we do not under-

stand the instruction as making any such assumption. The instruction may not have been applicable to the case made, and may have misled the jury.

But we are clear that the court below erred in giving the *qualification* to the instruction asked by the defendant.

The statute provides that "if any *person of sound mind* shall purposely and with premeditated malice kill any human being, such person shall be deemed guilty of murder in the first degree." [1]

The Legislature have defined the meaning of the expression "person of unsound mind." It is provided that this phrase "shall be taken to mean any idiot *non compos*, lunatic, monomaniac, or distracted person." [2]

The great difficulty has been, in cases of partial insanity, to fix the standard of criminal responsibility. The leading case in this country is *Commonwealth* v. *Rogers*.[3] Chief Justice SHAW, in his charge to the jury in that case, said: "The difficulty lies between these extremes in the case of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusions as to act under false impressions and influences. In these cases, the rule of the law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing; a knowledge and consciousness that the act he is then doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of right and justice, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, *and a mental power sufficient to apply that knowledge to his own case*, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts."

As we understand this charge, it does not go the length of fixing the test "of a knowledge of right and wrong." It recognizes the necessity of a mental power sufficient to apply that knowledge, and act accordingly. The charge is by no means clear, and we think that it is not entitled to the weight usually awarded to it.

[1] 2 G. & H., p. 435, sect. 2. [2] 2 G. & H., pp. 573, 574, sect. 1. [3] 7 Metc. 500.

Burden of Proof.

The law was much better put in *Commonwealth* v. *Haskell*,[1] thus: "That the true test lies in the word power. Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? Has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate?"

Indeed, there are very strong reasons for holding that the charge of Chief Justice PERLEY, in *State* v. *Pike*,[2] is the true law on the subject. He instructed the jury "that the verdict should be not guilty, by reason of insanity, if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or transact business or manage affairs, is, as a matter of law, a test of mental disease but are purely matters of fact to be determined by the jury." The argument that leads strongly to this conclusion is found in the able dissenting opinion of Judge DOE, in *Boardman* v. *Woodman*.[3] It is not necessary for us to go this length in the case in judgment.

In a criminal case the jury must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged. This is but an application of the general principle that the criminal intent must be proved as well as the act; that without a capable mind such intent cannot exist, the very element of crime being wanting. Such terms as "criminal intent," "vicious will," and "use of reason," are used in a very broad and general sense, including the idea that the mind must be in such a reasonable condition as to be capable of giving a guilty character to the act. The will does not join with the act, and there is no guilt when the act is directed or performed by a defective or vitiated understanding. So far as a person acts under the influence of mental disease he is not accountable.

We wish in this case to be understood as simply holding that the qualification of the instruction asked by the defendant was not law, and for this reason the court below ought to have granted a new trial.

Judgment reversed, cause remanded, with directions to grant a new trial, and for further proceedings.

ELLIOTT, J., was absent.

[1] Philadelphia Legal Intelligencer for Dec. 4, 1868; 4 Am. L. R. 240.

[2] 49 N. 399. See American Law Review for January, 1870, pp. 245, 246.

[3] 47 N. H., 120.

State *v.* Felter.

INSANE IMPULSE — PRIOR INSANITY — INSANITY OF FATHER — EVIDENCE OF EXPERTS.

State *v.* Felter.

[25 Iowa, 67.]

In the Supreme Court of Iowa, June Term, 1868.

Hon. John F. Dillon, *Chief Justice.*
" Chester C. Cole, } *Judges.*
" George S. Wright, }
" Joseph M. Beck, }

1. **Test of Insanity — Insane Impulse.** — If a person commit a homicide, knowing it to be wrong, but driven to it by an uncontrollable and irresistible impulse arising not from natural passion, but from an insane condition of the mind, he is not criminally responsible.
2. **Evidence — Prior Insanity.** — Evidence that the prisoner had been insane at a period prior to the date of the commission of the act is admissible.
3. —— **Insanity of Prisoner's Father.** — On the defence of insanity in the prisoner, evidence that his father was subject to fits of insanity, is admissible.
4. —— **Medical Experts.** — Medical witnesses who have no personal knowledge of the prisoner cannot be allowed to give an opinion formed from the testimony in the case and his conduct on the trial, as to his sanity at the time of the act.

Appeal from Benton District Court.

The defendant was indicted for the murder of his wife; pleaded not guilty, was tried, found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for life. From this judgment he appealed.

J. H. Murphy & Brother, I. M. Preston & Son, for appellant.

Henry O'Connor, Attorney-General for the State.

Dillon, C. J.

(Omitttng rulings on other matter.)

The next error assigned relates to the action of the court in excluding from the jury certain portions of the affidavit made by the defendant for a continuance. Upon the affidavit being made, the district attorney, according to the record, "to avoid a continuance admitted that the witnesses named in said affidavit would swear to the facts therein stated as facts expected to be proven by them; but, by agreement of parties, the defendant being present and assenting thereto, the State, on the trial, or before, was to have the right to object to the whole or any part of the affidavit for insufficiency, irrelevancy or incompetency." On the trial the court, on the objection of the State,

made pursuant to the above stipulation, excluded certain portions of the affidavit, to which the defendant excepted, and assigns its action as error.

It is first urged that the court excluded the testimony of the defendant's brothers, who were acquainted with him in former years and who would testify to facts showing the defendant to have been at times insane at that period of his life, about sixteen years ago. This portion of the affidavit, though underscored in red ink, is not marked on the margin as having been stricken out by the court, and it is not entirely certain that it was excluded from the jury.

We fully agree with defendant's counsel that on a question of insanity it is competent to show that the defendant had been insane at a prior period of his life. The testimony of Dr. Hale is not marked excluded on the margin. It is true a portion of it is underscored in red ink, but although the question is left in some doubt, we cannot infer from thence that this portion was rejected by the court. Another objection consists in the rejection of that portion of the affidavit relating to the proposed testimony of Dr. Hughes, of the Keokuk Medical College, Dr. Ranney, of the Insane Asylum, and Dr. Staples, of the United States Army, each of whom is stated to have had large experience in the treatment of insanity. The affidavit then states that from the foregoing facts and circumstances respecting the mental derangement of the defendant, viz.: those expected to be proved by other witnesses, — and from the circumstances connected with the alleged homicide and defendant's acts and conduct on the trial, in their opinion the defendant, at the time of the alleged homicide, was in a deranged state that would render him unconscious of what transpired.

At first it seemed to us that in excluding this portion of the affidavit from the jury, the court erred. But upon a closer examination, we are of opinion that its action may, under the statute, and the peculiar character of the affidavit, be sustained. The statute requires "particular facts, as distinguished from legal conclusion," to be stated.[1] If the "court finds the statement of facts sufficient, the cause shall be continued unless the opposite party will admit that the witness, if present, would swear to the facts thus stated; in which event, the cause shall not be continued; but the party moving, therefore, shall read, as the evidence of such witness, the facts held by the court to be sufficiently stated."[2] The party stipulated that all proper objections to the sufficiency of the affidavit might be made on the trial.

[1] Sects. 3010, 3011, 4750.

[2] Sect. 3013.

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It will be seen that it was proposed to prove by the three medical gentlemen named, that in their opinion the defendant was insane at the time the homicide was committed. The affidavit undertakes to give the *data* upon which this opinion is based. If the *data* thus given will not, in law, entitle the medical gentlemen to give to the jury an opinion as to the defendant's sanity, then, strictly, there was no error in excluding such opinion from the jury. If those medical men had been present upon the witness-stand, and had been asked, "from the facts and circumstances stated by previous witnesses, and from those testified by still other witnesses, relating to the homicide, and from defendant's conduct on the trial, is it your opinion that the defendant was sane or insane when he committed the act?" Such a question would have been incompetent for it practically puts the medical witnesses in the place of the jury.[1]

Viewing the question arising on this portion of the affidavit as one of law purely, we are not prepared to hold that we would, for the reason alone that this part of the affidavit was excluded, reverse the judgment.

But the action of the court in striking out another portion of the affidavit, and in excluding the same from the jury, was manifestly erroneous. We referred to that part relating to the testimony of Dr. Fay. This was as follows: "Affiant expects to prove by Dr. Z. Fay, who resides in Albany County, New York, that he was the family physician of defendant's father while the defendant lived at home; that he has visited the defendant while defendant was laboring under the mental disability above set forth; that said Fay is a practising physician, and that in his opinion the defendant was, while laboring under the mental disability above set forth, viz.: that specified in previous portions of the affidavit, — mentally deranged, and unconscious of what transpired around him, and, from his knowledge of the defendant, and of his father's family, he believes that the defendant is subject to mental derangement and temporary insanity."

If the defendant has been insane at former periods of his life, it is undeniable that this is a fact proper to be shown to the jury trying the question of his criminal capacity.

And it is equally undeniable, that, if a physician visits a person, and from actual examination or observation, becomes acquainted with his mental condition, he may give an opinion respecting such mental condition at that time; that is, he may, under such circumstances, state to

[1] Pelamourges *v.* Clark, 9 Iowa, 116; 3 Greenl. on Ev., sect. 5.

Prisoner Entitled to Fair Trial.

the jury his opinion as to the sanity or insanity of the person at the time when he thus observed or examined him.[1]

There is no more reason why he may not do this, than why he might not testify that he saw a certain person at a certain time, and that he was then laboring under an epileptic fit, or under an attack of typhus fever, or had been stricken down and rendered unconscious by an apoplectic stroke.

We have found it impossible to sustain the ruling of the court in rejecting this portion of the affidavit. Of its materiality it is needless to speak. The point decided is, that a medical witness may, from personal knowledge and examination, give an opinion based thereon, as to the mental condition of such person. He might, of course, be required on cross-examination, to describe the condition of the person, and to give the date and facts upon which his opinion is based. For this error, the judgment must be reversed. This result we regret the less, because there is much in the record to show (though not sufficient on this account alone to justify a reversal), that all that portion of the affidavit before referred to as being underscored with red ink, and which stated that defendant's father and the defendant himself were subject to insanity, were stricken out by the court before the affidavit was read to the jury; and because, also, we are not satisfied that there was that full, thorough, and deliberate examination of the defendant's alleged insanity to which he was, under the law, entitled.

We cannot resist the conclusion, that the defendant, by the rulings of the court below, was practically deprived of showing to the jury the truth of the alleged insanity of his father, and of himself at former periods of his life; facts competent, material, and highly important as bearing upon the question of defendant's alleged insanity.[2]

In the debate of the House of Lords on *McNaghten's Case*, Lord Brougham very justly criticised the needless haste of the court in *Bellingham's Case*, in proceeding to trial without allowing the prisoner the opportunity of showing that his family had been tainted with insanity, and that he himself had been previously insane.[3]

Finally, it is insisted that the court erred in its instructions to the jury, and in its refusal to give certain instructions prayed by the defendant relative to the defence of insanity. Before noticing the assign-

[1] In re Carmichael, 36 Ala. 514; 1 Bishop's Cr. Proc., sect. 541; Commonwealth *v.* Rogers, 7 Metc. 500; Clark *v.* State, 12 Ohio, 483; Baxter *v.* Abbott, 7 Gray, 71; McAllister *v.* State, 17 Ala. 434; In re Vanauken, 2 Stock. 186; 1 Greenl. on Ev., sect. 440; Heald *v.* Thing, 45 Me. 392.

[2] Baxter *v.* Abbott, 7 Gray, 71.

[3] Hansard, 67, 714.

ment of error, it is proper, briefly to refer to the circumstance of the homicide. That the defendant took the life of his wife, was not disputed, and the only defence made or relied on was that species of mental unsoundness, which has received the name of homicidal mania.

The testimony tends to show that the defendant was about forty-two years of age, and resided with his wife and a child (who was a witness on the trial), in Tama County, on a farm, about one mile distant from the neighbors. He had resided in that county for over two years, and had served in the army during the war. He had, during the forenoon of the day on which the homicide was committed, been at work in the usual manner. Shortly after dinner the neighbors, from seeing the fire, or some other reason, visited the premises of the defendant, and found the house in ashes and the defendant's wife within a few feet of it, dead, without clothing upon her person, one of her feet burned off, her features so destroyed by fire that they could not be recognized, and her skull badly fractured, evidently in consequence of heavy blows with a club or other deadly instrument. The defendant himself, was found (although he had been seen walking around by persons when approaching the premises) lying near some stacks a few rods from the dwelling-house, with his throat cut from ear to ear, and very weak from the loss of blood. His hair and whiskers were singed, and there was a blister on his nose, but no evidence of fire on any other part of his person, and his clothes were not burned.

There was but one eye-witness to the terrible occurrence, — a very young daughter of the defendant, whose age is not stated in the record; and she saw only the first portion of it. The testimony in the case is very imperfectly reported, having been taken down by an unskilled person. The daughter testified in substance, thus: —

"My mother is dead — my father killed her; he struck her — I don't know with what; he was mad at her before I left; it was because she poured the butter-milk out; I left because he was going to kill me; I knew this by the way he acted; mother told me to go to Mr. P.'s, — a neighbor's house, — it was in front of the house that father struck her, about a rod from the house; he shot the gun off by her head; my father was cross to her and did everything mean that he could." She then narrates a quarrel occurring some months before between the defendant and his wife about a dog, and a threat of the defendant to her, that if she did not let him alone he would stop her breath or the dog's. "Mother said nothing to me when I left, as to what the defendant was going to do; when I went to Mr. P.'s, she said she was afraid

The Evidence Stated.

he (defendant) would kill us; my father, at this time, was breaking things in the house; when I started to Mr. P.'s they were out between the house and fence; we had all eaten dinner — all sat down together, nothing was said; I started to Mr. P.'s because his actions were such, that I thought he was going to kill me; I went into the house and he was breaking things; he said nothing; he threw the lamp out of doors, and broke the clock; said nothing when he did this; papa and I were in the house and ma out, when I started to Mr. P.'s; I saw father strike mother; I was then two or three rods off; I do not know with what, or how many times he struck her; after he went out he had the gun; the end of the gun was past mother when he fired it off; my mother said she was going to tell Uncle Jacqua what he had done; he broke the clock and threw water on her; it made him madder than he was; this was after the clock and lamp were broken; he shot the gun off first, and then struck her, and they both fell, and mother was trying to get away from him; she did not halloo."

There was other evidence showing that they did not at times live happily together, and that the defendant was fault-finding and cross toward her. The physician who examined the deceased, gave it as his opinion that the blow upon her skull would produce instant death. When Dr. Daniels afterwards dressed the defendant's wound in his throat he had a conversation with him in respect to the homicide. The defendant said, "that the reason he shot at her was that he wanted to scare her. He said he wanted to destroy everything, so that she would not get anything, and this was the reason why he burned the house. I asked him why he struck his wife. He said he did not strike her; that the last he saw of her she was going toward Buckingham's." The doctor asked the defendant if he was not sorry that things were not as they were in the morning; to which he replied, "I do not know as I am." On the next day after the fatal occurrence he told another witness the difficulty about the butter-milk, and said his wife "struck him in the face with a plate; that she went on throwing things out of the house; he told her to stop; she threatened to report him to the trustees; he then, he said, took down his gun and shot at her; did not intend to kill her; that he was so mad that his passion got the better of him, and about what happened after that he had nothing to say. I asked him if he intended to kill the little girl if he caught her. He replied he did not intend to hurt her." This conversation took place at the instance of the defendant, who asked a person present to go out of the room so that he could talk with the witness.

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A great number of witnesses who had known the defendant for many years, testified that they never saw anything strange in his conduct, or anything to lead them to suspect that he was of unsound mind.

The defendant stated that he cut his throat with a razor, and told where it could be found. There was testimony tending to show, or from which it might be inferred, that the defendant had tried to rescue his wife from the flames. That is, it was testified by the physicians that the blow upon her head would kill her instantly, and it would seem that after the blow was dealt she was removed by the defendant from the house, after she had been burned in the manner before described. There was also testimony from which it might be inferred that the defendant cut his own throat before he left the burning dwelling. It was admitted by the State that the defendant intended to take his own life when he cut his own throat. There were no witnesses upon the stand who knew of or testified respecting the alleged insanity of the defendant when at home, or the alleged insanity of his father.

The medical witnesses examined on the trial, as not unfrequently happens, differed in opinion as to the defendant's sanity. Most of these witnesses, however, had given to the subject of insanity no special attention.

The court charged the jury that "if the defendant at the time of the commission of the act — if he did commit it — was laboring under such a degree of insanity as irresistibly and uncontrollably forced him to commit the act, and if he did not, at the time of the act, have reason sufficient to discriminate between right and wrong in reference to the act about to be committed by him, it is your duty to acquit wholly. In other words, if you believe from the evidence that the defendant's mind, at the time of committing the act — if he did commit it — was so insane that he did not know the nature of the crime, and did not know that *he was doing wrong in doing the act*, it is your duty to acquit him altogether."

The defendant's counsel complain of this instruction, and in their written argument make to it this objection: "The court did not state the law; only a part of it. It told the jury that if the defendant had sufficient mind to discriminate between right and wrong he was responsible. This is not sufficient. He must have mind enough to know that he will be held responsible for his act."

The specified objection to this instruction does not call upon us to enter at length on an examination of the subject of insanity as a defence to alleged criminal acts. The instructions as given are substantially as the defendant's counsel in their argument claim they should have been,

Views of the Court.

and are not, as we find upon comparison, essentially different on this point from those asked to be given on the part of the defendant.

With reference to the right and wrong test referred to in the instructions given it will be seen that the court does not adopt this criterion as a general one, that is the court does not say if the defendant has capacity to distinguish between right and wrong generally, he is criminally responsible.

But it held that if at the time and with respect to the *act* about to be committed, the defendant had not reason enough to discriminate between right and wrong with reference to that act, had not reason enough to know the nature of the crime, and did not *know that he was doing wrong in committing it*, he is not criminally punishable. The court in substance held that if the defendant's reason was so far gone or overwhelmed that his perception of right or wrong with respect to the contemplated act was destroyed, if he did not rationally comprehend the character of the act he was about to commit, he should be acquitted.

The instruction as given finds a full support in the judgments of courts the most respectable.[1]

On the other hand, the right and wrong test, even when guarded as carefully as in the court's instruction, has been very vehemently opposed as incorrect and delusive,[2] especially as a criterion of responsibility in cases of moral insanity.

As applied to the facts of this case, a preferable mode of instructing the jury will be briefly indicated below.

In my opinion the right and wrong test is not to be applied too strictly, and belongs more properly to intellectual than to moral insanity. Intelligent medical observers who have made insanity a special study, insist that it not unfrequently happens that persons undoubtedly insane, and who are confined on that account in asylums, are able to distinguish right from wrong, and to know the moral qualities of acts.

Perhaps the profession of law has not fully kept pace with that of medicine on the subject of insanity. And yet medical theorists have propounded doctrines respecting insanity as an excuse for criminal acts, which a due regard for the safety of the community and an enlightened public policy must prevent jurists from adopting as part of the law of the land. If, as the court charged, the defendant committed the act

[1] Freeman *v.* People, 4 Denio. 27; and approved and followed in the recent case of Willis *v.* People, 32 N. Y. 715; State *v.* Brandon, 8 Jones N. C. (L.), 463; Commonwealth *v.* Mosler, 4 Pa. St. 266; McNaghten's Case, 10 Cl. & F. 210; Oxford's Case, 9 C. & P. 525.

[2] Ray, sects. 16, 17, 18, 16, *et. seq.*; Wharton & Stille (2d Ed.) sect. 59; and see Smith *v.* Commonwealth, 1 Duv. (Ky.) 224.

from an irresistible and uncontrollable insane impulse, not knowing it was wrong, it is clear that he is not criminally responsible. But suppose he knew it was wrong, but yet was driven to it by an uncontrollable and irresistible impulse, arising, not from natural passion, but from an insane condition of the mind, would he then be criminally responsible?

Most of the cases before cited have recognized the doctrine, that there is a responsibility for the criminal act if the accused knew at the time it was wrong; or, as it would be better expressed, if he rationally comprehended the character and consequences of the act. But, if, from the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true, that there is an unsound condition of the mind, that is, a diseased condition of the mind in which, though a person abstractly knows that a given act is wrong, he is yet, by an *insane impulse*, that is, an impulse proceeding from a diseased intellect, irresistibly driven to commit it—the law must modify its ancient doctrines and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect. It is not too much to say, that both medicine and law recognize now the existence of such a mental disease as homicidal insanity; the remaining question in jurisprudence being what must be shown to make it available as a defence to a charge of murder.[1]

In a recent case in Kentucky, it is said that moral insanity is recognized by medical jurists, and that "the true test of responsiblilty 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."[2]

If this want of power of control arose from the *insane* condition of the mind of the accused, he should not be held responsible. But if want of power to control his actions arose from violent and ungovernable passions, in a mind not diseased or unsound, he would and ought to be criminally punishable for his acts.

Of all medical-legal questions, those connected with insanity are the most difficult and perplexing.

Without further discussion, we conclude by stating what, under the facts of this case, would be safe and proper directions to be given to the jury respecting the point under consideration. The jury, in substance, should be told that if the defendant's act in taking the life of

[1] See Wharton & Stille's Med. Jur., sects. 61, 178.

[2] Smith *v.* Commonwealth, 1 Duv. 224. See also Scott *v.* Commonwealth, 4 Metc. (Ky.) 227; compare State *v.* Brandon, *supra*.

Jury may be Cautioned as to the Defence.

his wife — if he did take it — was caused by mental disease or unsoundness, which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequences of that act, and which, overpowering his will, irresistibly forced him to its commission, then he is not amenable to legal punishment. But if the jury believe from all the evidence and circumstances, that the defendant was in the possession of a rational intellect or sound mind, and allowed his passions to escape control, then, though *passion* may for the time being have driven *reason* from her seat and usurped it, and have urged the defendant with a force at the moment irresistible to desperate acts, he cannot claim for such acts the protection of insanity.

Whether *passion* or *insanity* was the ruling force and controlling agency which led to the homicide — in other words, whether the defendant's act was the insane act of an unsound mind, or the outburst of violent, reckless, and uncontrolled passion in a mind not diseased, — is the practical question which the jury should be told to determine according to their best judgment from the evidence before them. If they believe that the homicide was the direct result or offspring of *insanity*, they should acquit; if of *passion*, unless it be an insane passion, they should convict. This is a much more practical inquiry than to direct their attention solely to the defendant's capacity at the time to distinguish right from wrong — an inquiry which must often be speculative and difficult of determination from the *data* possible to be laid before the jury, and which, as a test or criterion of responsibility, rather belongs, when applicable, to what is known as *intellectual*, as distinguished from *moral* insanity.

As the case will have to be retried, we have briefly indicated our general views as to the instructions proper to be given to the jury on the subject of criminal capacity and responsibility. Where homicidal insanity is relied on, the court may very properly say to the jury that they should indulge in no prejudice against the defence, but give it thoughtful, thorough, dispassionate consideration; yet that the interest of society requires that it ought not to be regarded as sufficient to exculpate unless the jury believe from the evidence that the propensity to commit the act existed in such violence as to subjugate the intellect, control the will, and render it impossible for the accused to do otherwise than to yield to the insane impulse. In other words, it should appear not only that the mind of the accused was insane, but that the act for which he is indicted was the direct offspring of such insanity; this being shown, responsibility is annulled, but not otherwise.

Because of the error of the court in excluding material portions of the affidavit for a continuance, the judgment is reversed and the cause remanded for a new trial.

Reversed.

UNCONTROLLABLE IMPULSE—INSANE DELUSION—TEST OF INSANITY—EVIDENCE OF APPEARANCE AND CONDUCT.

STATE *v.* MEWHERTER.

[46 Iowa, 88.]

In the Supreme Court of Iowa, June Term, 1877.

HON. JAMES H. ROTHROCK, *Chief Justice.*
" JOSEPH M. BECK,
" AUSTIN ADAMS,
" WILLIAM H. SEEVERS, } *Judges.*
" JAMES G. DAY.

1. **Uncontrollable Impulse — When a Defence.** — The uncontrollable impulse which will relieve a person from the consequences of the commission of a crime, must have its origin alone in a diseased mind.
2. **Test of Insanity.** — To excuse, the mental disease must be such as to destroy the power to comprehend the nature and consequences of the act, and to overpower the will.
3. **Insane Delusion — When an Excuse.** — One who commits a crime under the influence of an insane delusion is punishable, if he knew at the time that he was acting contrary to law.
4. **Appea ance and Conduct of Prisoner.** — In considering the question of the sanity of a prisoner, the jury may properly be directed to consider his appearance, conduct, and language prior to the time of the commission of the alleged crime.

APPEAL from Pottawattamie District Court.

The defendant was indicted for murder in the first degree, in killing Joseph W. Hatton in Pottawattamie County, and upon conviction for the crime was sentenced to imprisonment in the penitentiary for life. He now appeals to this court.

Montgomery & Scott, for appellants.

J. F. McJunkin, Attorney-General, *John H. Keatley*, and *C. E. Richards*, for the State.

BECK, J. —

(Omitting rulings on other points.)

Testimony, tending to prove the insanity of the defendant at the time of the homicide was introduced in his behalf. It was claimed that this condition of mind had existed for some time. A witness for the

The Facts of the Case.

State testified that during the time of the alleged insanity he had two conversations with the defendant, and saw him often, but observed nothing unusual in his actions, and that, in the language of the witness, "so far at I could see, he was as regular and sane as the first day I saw him." Upon the cross-examination, the counsel for defendant asked the witness if he thought himself competent to give an opinion as to defendant's sanity. An objection to the question was sustained on the ground that it was not proper in cross-examination. The ruling is complained of as erroneous. We think it was correct. The witness had stated facts, and not his opinion of defendant's sanity. The question, therefore, did not relate to matters brought out upon the direct examination.

Other objections to the proceedings and judgment are based upon the rulings of the court in giving and refusing instructions, and in overruling a motion for a new trial on the ground that the verdict is in conflict with the evidence and the law as given to the jury by the court. The consideration of the objections demands attention to the testimony given upon the trial. We will proceed to state briefly, the purport of the evidence, so far as it is necessary for the proper understanding of the questions we are called upon to discuss and determine.

The defendant, at the time of the homicide, was a farmer, and about fifty-two years of age. He had sons and daughters of mature years, and others yet in childhood. About one year prior to this event he had employed Dr. Joseph W. Hatton, for the killing of whom he was convicted in the court below, to attend upon his wife in child-birth. The evidence tends to show that defendant charged Dr. Hatton with malpractice in his professional treatment of the case, and with improper exposure of the person of his wife, and other cruel aud unprofessional conduct, whereby the health of the patient was permanently impaired, and her womanly feelings outraged and wounded. To recover for these injuries to the health of his wife, defendant brought and prosecuted an action against Dr. Hatton, which resulted favorably for the physician. After the confinement of his wife, and up to the killing of Dr. Hatton, defendant exhibited violent excitement upon the subject of the alleged injuries to his wife and himself. They were the subject of his conversation to many persons, and he rehearsed the incidents connected therewith in public places, in the hearing of all who would give heed thereto. In these conversations he indulged in violent denunciations of the physician, accompanying it with great profanity, and declared he lacked skill and ability in his profession, and was destitute of qualities necessary to fit him therefor. He made threats against the person and

life of Dr. Hatton, declaring that it was his purpose to drive the physician from the country by the suit, and if it failed in such object, he would shoot the doctor. These threats were frequent, and those made after the suit was terminated against defendant were unaccompanied by qualification or condition. They were communicated to Dr. Hatton, who armed himself for protection against defendant, to whom this fact was soon made known. On Sunday, the 18th of July, 1875, Dr. Hatton was called to visit, professionally, a patient living about a mile and a half from defendant's place of residence. The father of the physician, a man of seventy-two years of age, accompanied him in his buggy, and they passed within a quarter of a mile of defendant's house. They also drove near the house of a neighbor where defendant was at the time. He was informed of the fact of their passing the house and immediately left, after expressing his want of confidence in the physician's skill, and went in the direction of his own house. He had come but a short time before to this neighbor's from the house of the patient, who had informed him of the fact that Dr. Hatton was expected, and would soon arrive. Upon receiving this information he expressed, angrily, his want of confidence in the skill of the physician. In returning from the visit to the patient the road travelled by Dr. Hatton and his father took them again near defendant's house. They reached this place not long after defendant had left his neighbor's house as above stated. The incidents immediately connected with the act of defendant, which resulted in the killing are related by the father of Dr. Hatton in the following language: "After we got around the willows, we saw defendant going through the fence with his gun in his hand, east of us, — might have been eighty or a hundred yards, — defendant came through his fence across first track of road to second road; came in front of doctor when pretty near his gate; we were driving on a trot; he came down the road with his gun; thumb looked like on the cock; he raised up and the doctor said 'stop.' This is all the doctor said, when gun went off; gun about three feet long; don't think it was a second after he raised up until he shot; don't know whether he took aim or not; we had a two-stepped buggy; my left foot was on the upper step; when the gun went off the doctor fell over my right thigh, and it scared the team; they went on; I went out near Mewherter's gate; looked back and saw defendant behind, standing in the path, about half bent, with gun presented like he was going to shoot again, but he did not; looked back again; defendant said, 'Oh, God damn you, I have killed you;' that was all defendant said." The shot took effect in the abdomen, and the doctor lived about two weeks.

Evidence in the Case.

The fact of killing was not contested at the trial; the defence wholly relied upon was the alleged insanity of defendant. The testimony tended to establish that after the confinement of defendant's wife, when she was treated by Dr. Hatton, defendant's disposition, temper and deportment, whenever that subject was spoken of by him, or his mind was directed toward the physician, were unlike, in their manifestations, anything before exhibited by him. He was violent, unreasonable and extremely denunciatory and bitter in his expressions. His appearance, too, on such occasions was changed, exhibiting great excitement and nervousness. His wife and children testified that he was wakeful and restless at night, would arise from his bed and arm himself, and, as an explanation of his actions, would declare he was guarding his wife. He would often declare that his troubles were more than he could bear, and when the name of Dr. Hatton was mentioned he would become pale, wild, and nervous. His appetite was poor, aud he became thin. They state that his actions were unusual and strange; but neither they nor other witnesses testify to any change in his mind or manner upon any other subject than that of his troubles with Dr. Hatton. There is no evidence tending to prove that upon all other subjects he was not reasonable; and, indeed, it is not so claimed on the part of the defence.

Upon evidence of the character indicated above, the cause was submitted to the jury upon numerous instructions upon the law of the case given by the court. After we have considered the correctness of the ruling in excluding certain instructions asked by defendant those given will claim our attention.

Counsel for the defendant presented seven separate instructions which they requested to be given to the jury. They all related to the subject of insanity, which was, as before stated, the sole ground of defence relied upon. These instructions present rules to guide the jury in determining defendant's accountability. The nature, character, and extent of mental disease which renders the subject irresponsible for acts otherwise criminal are stated therein. The substance of these instructions, except the fifth, is fully and fairly embraced in the ninth, tenth, eleventh, and twelfth, given upon the court's own motion. These will be hereafter considered. The refusal to repeat rules announced in instructions, by giving them in another form as asked by either party, has often been held not to be error.

The fifth instruction just referred to is in the following language so far as it treats of the question of insanity: "If * * * the propensity in the defendant, from whatever cause it may have originated, to commit the act, existed in such violence as to subject the intellect,

control the will, and render it impossible for the accused to do otherwise than yield to the insane impulse by which he was controlled and the act was the offspring of such insanity," in such case "neither the State nor the interest of society demanded such conviction." A glance will suffice to discover the error of the rule here presented. The *propensity* — the disposition to commit the crime, is not, as it should be, limited to the effect of a diseased or insane mind. Under the instruction it may have had its origin in anger, revenge, or other passion not springing from an insane mind, or may have been the result of drunkenness. It cannot be claimed that an uncontrollable *propensity*, which is the offspring of an evil passion, will shield the perpetrator of crime from punishment. The subject demands no further attention. The instruction was properly refused.

The seventh instruction is in the following language:—

"If the jury believe, from the evidence, that, at the time of the commission of the alleged homicide, the defendant was laboring under a diseased condition of the mind, that he was insane on the subject of the manner in which the deceased had treated his wife, and on the subject of deceased, with others, having formed a conspiracy to take his, defendant's life, then the jury should acquit the defendant."

It will be at once observed that this instruction fails to present the condition that the mental disease must have destroyed the power of defendant to comprehend, rationally, the nature and consequence of his act, and overpowered his will, which must exist in order to render him free from accountability for his acts.[1]

We will here depart from the order pursued by defendant's counsel in considering their objections to the record, and take up the instructions given by the court upon the subject of insanity. The rulings of the court upon the law governing this defence will thus be considered consecutively.

After defining, in the ninth instruction, total insanity or madness, and informing the jury that one afflicted with such mental disease is not criminally responsible, the court proceeds, in the tenth instruction, to announce the rule of law applicable to partial insanity, which, it was claimed in the defence, was the character of the alleged disorder of the mind of defendant. The jury were informed that if defendant, on account of his mental disease, was not able to distinguish right and wrong, and had not knowledge and understanding of the character and consequences of his act, and power of will to abstain from it, he was not legally a responsible being. This is the certain meaning of this instruc-

[1] State v. Felter, 25 Iowa, 68.

Insane Delusion.

tion, expressed with sufficient clearness. It is in harmony with the rule on the subject recognized by this court in *State* v. *Felter*.[1]

The eleventh and twelfth instructions given to the jury present substantially the doctrines announced in the answer of the judges to the first and fourth questions propounded to them by the House of Lords in *McNaghten's Case*.[2] They may be briefly stated as follows: 1. In case of partial insanity, or delusion, as to certain facts and matters, and the accused, as to other facts and matters, is sane, if the act with which he is charged was done under the influence of insane delusion, with the view of redressing or avenging some supposed injury, or of accomplishing some supposed good, he is punishable, if he knew at the time of the commission of the crime that he was acting contrary to law. 4. In case of partial delusion, when the subject is not in other respects insane, the law considers him as to his responsibility, in the same condition as if the facts, in regard to which his delusion exists, were real. Therefore, if in his delusion he supposes another is about to take his life, he would be exempt from punishment if he kills the person in, as he believes, self-defence. But if the delusion was to the effect that he had suffered a serious injury from another man, and, in revenge therefor, the accused kills that man, the crime will be punished by the law, notwithstanding the perpetrator of the deed was affected with a disease of the mind.

These doctrines, it is believed, have the support of the adjudged cases of this country and England.[3] They are not, we are aware, fully approved by others entitled to respect.[4]

They have been assailed with great force by another able writer upon the medico-legal science.[5]

Counsel for defendant raise many objections to the instructions given by the court, which are based upon criticisms of the language rather than upon the very substance of the principles announced therein. We will notice one or two which will present fairly the character of all of these objections.

The second instruction defines correctly the different degrees of homicide. Murder, the jury are informed, is the killing of a human being with malice aforethought, either expressed or implied. The crime, they are then told possesses two elements: *First*, the killing of a human being; *second*, the malice. The court proceeds clearly enough to ex-

[1] 25 Iowa, 67.

[2] 10 Cl. & Fin. 200.

[3] See 1 Whar. & S. Med. Jur., sects. 125, 126, *et seq.*, and cases cited.

[4] See sect. 130 of the book just cited, and Balfour Browne's Med. Jur. of Insan. 18, 19.

[5] Ray's Med. Jur. of Insan., sects. 29, 39, 306.

plain the term malice and points out when it will be presumed to be of the degree or character which constitutes murder. But, in using the term malice in these explanations, the adjective *aforethought* is not used in connection with it. This is the ground of counsel's criticisms. They are not well founded. The court in the language complained of explained to the jury what facts authorized the conclusion that malice had the quality of being aforethought. It was not necessary in doing so to couple the adjective, the meaning of which the court was explaining, with the word malice whenever it was used.

Another instruction directed the jury to consider all the facts connected with defendant's language, appearance, etc., preceding the alleged homicide upon the question of defendant's insanity. They were informed that these facts were to be considered to enable them to test the value of the opinions expressed by witnesses upon that subject, and also to determine the fact whether the insanity was established independently of such opinions. The purport of the instruction is obvious. If witnesses had testified that defendant was sane, and his actions, as shown by the testimony, were unmistakably those of an insane man, surely this should, in the minds of the jury, destroy the force of the opinions and lead them to the conclusion, upon the evidence of his actions alone, to find the existence of insanity. The like rule would be applicable did his acts establish sanity when the opinions of the witnesses were the other way. The objection to the instruction is without force. Others of the same character need not be noticed.

Affirmed.

MORAL INSANITY — INSANITY MUST DIRECTLY CAUSE CRIME TO EXCUSE IT — OPINIONS OF WITNESSES.

STATE *v.* STICKLEY.

[41 Iowa, 232.]

In the Supreme Court of Iowa, December Term, 1875.

1. **Moral Insanity no Excuse for Crime.** — A person who is possessed of a sound mind is liable for a criminal act, though committed under the impulse of passion or revenge which may temporarily dethrone reason and control the will.
2. **Insanity is only an Excuse for Crime** where it is the direct cause of it.
3. **Opinions of Witnesses,** when admissible.

APPEAL from Benton District Court.

At the April term, 1873, of the Blackhawk District Court, the defend-

Facts in the Case.

ants, Mary Stickley and Elmira Stickley, were jointly indicted with Richard George, for an assault with intent to murder one Byron Wright. Mary Stickley is the mother of Elmira, who, at the time of the commission of the offence charged, was about sixteen years old. Richard George was in the employment of Mary Stickley, and boarded and lodged at her house. There is some evidence that whilst he was there an engagement of marriage was made between him and Elmira. Wright took charge of a school very near to Mrs. Stickley's, and at the solicitation of Mrs. Stickley and Elmira, came to board with them. It would seem, from the evidence, that Elmira became very much enamored of him, and that the mother was quite willing to promote and encourage an intimacy between them. On the Thursday before the commission of the assault, Wright made arrangements to board with Kingsley, one of the directors, and remained there Thursday night. On Friday, Mrs. Stickley and her daughter interrogated him about boarding at Kingsley's, and he informed them he thought of going. On Saturday he told them positively he intended to go, and both urged him to stay. The testimony of Wright on this branch of the case is as follows: "Both fell to abusing me; asked why I wanted to change my boarding place; Mrs. Stickley said that if I would stay, she would give me what I owed her. I said that would be no object. Then she said she would give me what would be due her if I stayed to the end of my school. I said that would be no object. She then said, 'if you will stay and marry Elmira, I will give you the farm,' and neither of us should want while she lived. I told her that would be no object. They ended their pleadings by Mrs. Stickley saying: 'Then, damn you, go;' repeated that several times; got very angry; said they rather see me shot than to go to Kingsley's. This was Saturday morning." Saturday evening both again urged him to stay: Wright testifies: "Elmira came to me Saturday night, and said 'Mr. Wright, I will give you another chance. Won't you give up going to Kingsley's, and stay here?' I told her no, and, further, I wished she would not ask me that again; that it was my privilege to go where I pleased; and she said: 'Look out, maybe you will not go yet.' On Sunday morning Elmira renewed her expostulations, and when informed that he would not stay, she said: 'I had a notion to blow your brains out while you was in bed, but I will give you another chance.' When he went to church Elmira was weeping, and when he returned her mother said: 'She has been crying ever since you have been gone.'" On Monday morning Wright dressed himself and went out, saying he would go over to school. Elmira, her mother and

George, all asked him to eat. He said he would return at recess. At recess he came in and took his place at the table. Elmira came behind him and shot him in the back of the head. He took hold of the table, rose to his feet, and turned toward the outside kitchen door, and then fell to the floor on his face. He again rose and started to the door. When he reached the outside door George was standing with his back against it, and when he tried to get out, he pushed him away. This was repeated a half dozen times. Wright then went to a broken glass in the window to get air, and George shot him in the left side of the head in front of the ear. Mrs. Stickley was present, and the evidence tends to show that she encouraged and abetted the act. Mrs. Stickley testifies that after they retired Sunday night Elmira told her Wright had insulted her on Friday night in the school-house, but that she paid no attention to it, because she knew Elmira had told things before that were not true, and that she had imagined things.

There was evidence tending to show that the father of Elmira was subject to fits of insanity, and that Elmira had insane spells; that there were peculiarities in her conduct at her monthly periods, and that the transaction in question occurred about that period. Upon the other hand, there was evidence tending to show that there was nothing peculiar about the father of Elmira, except that he was a very passionate man, and that nothing unusual was discernible in the conduct of Elmira previous to this event.

The jury found both defendants guilty, as charged. The court sentenced Mary Stickley to the penitentiary for nine years, and Elmira Stickley, who, at the time of the sentence, was nearly seventeen years old, to the reform school until she should attain her majority. The defendants appeal.

Boies, *Allen & Couch* for appellants.

Cutts, Attorney-General for the State.

Day, J. — I. Immediately after the shooting George and Elmira got into a sleigh, and she drove, at a rapid rate, to Cedar Falls, a distance of about a mile. A witness, Packard, describes how she was dressed, her appearance, and manner of driving, and says he saw her a few minutes afterward in Taggart's store, and heard her talking, but paid little attention to what she was saying. That she was very much excited, and was relating something in regard to the occurrence. He was then asked the following question: "Will you state from your knowledge before, and your acquaintance with her, from her conversation at that time, and her looks at that time, whether, in your judgment, she was then in her right mind?"

Must be Based on Stated Facts.

The question was objected to, as incompetent and inadmissible, and the objection was sustained. In *Pelamourges* v. *Clark*,[1] respecting the admission of opinion of witnesses, not experts, it is said: "The extent to which any of the authorities have carried the rule, even in the Ecclesiastical Courts of England, is, that after the witness has stated the facts and circumstances, then his conclusion or opinion derived from and resting upon them may be given."[2] Tested by this rule, which has received the sanction of this court, and is abundantly sustained by authority, it seems quite clear that there was no error in excluding the question asked. The witness had described the appearance and manner of Elmira, but paid little attention to, and does not undertake to detail what she said. He was asked to give his opinion whether she was in her sound mind, from her conversation which he had not detailed, and her looks, and from his knowledge before and acquaintance with her. Now, however proper it might have been for him to express an opinion based upon her conversation and looks, if he had described her looks and detailed her conversation, so that the jury might have been put in possession of the facts upon which he based his opinion, and been enabled to estimate properly the value of his opinion, it is clear that he could not express an opinion from his former knowledge and acquaintance.

Such evidence would be a mere substitution of the opinion of a non-professional witness for facts.[3]

II. The defendant introduced testimony tending to show the defendant (Elmira) had been temporarily insane at different times prior to the alleged offence. In rebuttal, the State called Lyman Davidson, who stated he knew Stickley, and was then asked the following question: "Did you know the treatment he received from his wife?" The defendants objected to evidence of her treatment at other times than those in which it was claimed he was deranged. The objection was overruled, and defendants excepted.

The witness answered: "They were a very peculiar family. They were very rough, and would swear like pirates; knew of their having family quarrels; the boys could not live at home; know the general character of Mrs. Stickley; it is very bad." This answer, it will be observed, is not all responsive to the question. It does not appear that any effort was made to exclude it from the jury. The mere asking of

[1] 9 Iowa 1.

[2] See also Dunham's Appeal, 27 Conn. 193.

[3] See the following authorities cited by appellee: Clapp *v.* Fullerton, 34 N. Y. 190; O'Brien *v.* People, 36 *Id.* 576; Real *v.* People, 42 *Id.* 270; Hewlett *v.* Wood, 55 *Id.* 634. See also the following cases in which the rule of exclusion is carried to still greater extent: Commonwealth *v.* Wilson, 1 Gray, 337; Commonwealth *v.* Fairbanks, 2 Allen, 511 Wyman *v.* Gould, 47 Maine, 159.

the question, if erroneous, worked no prejudice to defendants. The answer was permitted to remain without objection, and even if it should be conceded that it contains improper evidence, it constitutes no ground for reversing the case. Where improper evidence is permitted to remain in a criminal case, without objection, the error in its admission is waived.[1]

III. The court instructed the jury as follows: "8. The nature, character, and degree of insanity which exonerates a party from criminal responsibility is not easily explained or understood. It is not necessary that it should be shown by the evidence that the defendant at the time of the commission of the act did not know right from wrong, as to her acts in general. The inquiry must be directed to the act charged. If you believe from the evidence that the defendant's act in shooting Wright (if she did shoot him), was caused by mental disease or unsoundness, which dethroned her reason and judgment with respect to that act, which destroyed her power rationally to comprehend the nature and consequences of the act, and which, overpowering her will, inevitably forced her to its commission, then she is not in law guilty of any crime, and your verdict as to her should be not guilty. *But if you believe from all the evidences and circumstances in the case, that she was in the possession of a rational intellect or sound mind, or from some real or fancied injury she allowed her passion to escape control, then, though passion or revenge, may for the time, have driven reason from its seat, and usurped it, and urged the defendant with a force, at the moment irresistible, to desperate acts, she cannot claim for such acts the protection of insanity, and she is guilty.* The practical question for you to determine from all the evidence is, whether passion and revenge or insanity, was the ruling force and controlling agency which led to the commission of this act. If you believe that the shooting was the direct result or offspring of insanity you should acquit; if of passion or revenge you should convict. You should indulge in no prejudice against the defence, but give it thoughtful, thorough and dispassionate consideration, and yet the interests of society and the welfare of the State demand that this defence ought not to be regarded as sufficient to exculpate, unless you believe from the evidence that the propensity to commit the act, existed in such violence as to subjugate the intellect, control the will, aud render it impossible for the defendant to do otherwise than to yield to the insane impulse. *In other words, it should appear not only that the mind of the accused was insane, but that the*

[1] State v. Polson, 29 Iowa, 133.

act for which she is indicted was the direct offspring of such insanity. This being shown, responsibility is annulled, but not otherwise." To this instruction defendants excepted, the parts objected to are in italics. It is conceded that the first paragraph objected to was borrowed from the rule suggested by this court in *State* v. *Felter*,[1] and that it is almost a literal copy thereof, with the addition of the words, "or revenge" after the word passion.

Whilst no objection is made to this rule in a proper case, it is claimed that the facts in the case of *State* v. *Felter* and in this case are so essentially different as to render a rule, which would be entirely safe and proper in one case, equally unsafe and improper in the other. It is urged that the rule has no application to any theory of either the prosecution or the defence. It is insisted that the State claims that the assault was the consummation of a deliberate plan formed by three rational beings, to take the life of Wright. Whilst the defence claims that it was the outgrowth of an insane delusion on the part of Elmira, that he had locked her in a school-house and attempted her ruin.

We are unable to see wherein the instruction is not pertinent to the case. The defence claimed that Elmira, at the time of the commission of the act, was laboring under such insane delusion, impelling her to the act, and overcoming her will, that she is not responsible for her conduct. It was incumbent upon the court to distinguish between insanity and mere passion or revenge, and to instruct the jury that the latter, though it may for a time have driven reason from its seat, would furnish no excuse. This portion of the instruction must be taken in connection with that which immediately follows, in which the court says: "The practical question for you to determine from all the evidence, is whether passion and revenge or insanity was the ruling force and controlling agency which led to the commission of this act."

From all the circumstances disclosed the jury were warranted in finding that Elmira was actuated by a spirit of revenge, or was thrown into a violent passion, because Wright would not listen to her expostulations, and was determined to change his boarding place, and if she allowed this feeling of passion or revenge to so take possession of her mind as to impel her to an act of violence, she is still responsible therefor, if her act was the outgrowth of her passion or revenge and not of her insanity.

The next paragraph objected to is a literal quotation from *State* v. *Felter*,[2] But it is claimed that the question of its correctness was not

[1] 25 Iowa, 67. [2] p. 85.

before the court, and that the language can only be considered as *dicta*. We think the paragraph cannot be regarded as mere *dicta*, and further, that it is not fairly vulnerable to the criticism made upon it. It is claimed that the rule here recognized casts upon the defendant the burden of proving by substantive testimony, not only that she was insane, but that the act for which she was indicted was the direct offspring of such insanity. This is not, we think, the fair construction to be placed upon this paragraph, when taken in connection with the whole instruction. It means only that, from all the facts and circumstances of the act, as disclosed by the testimony, if defendant would claim exculpation on the ground of insanity, it must be made to appear that she was insane, and that the offence was the offspring of such insanity. Instances are numerous in the works upon medical jurisprudence, in which the mind respecting some particular matter rests under a peculiar delusion, and with respect to all matters having no connection therewith, appears perfectly sane. Whilst such a person could not be regarded as sane, yet he would be criminally responsible for his acts, unless they could be attributed to his particular delusion.

IV. The evidence as to the sanity of Elmira was conflicting, and it does not warrant us in disturbing the verdict which found her sane. The jury was fully warranted in finding that Mary Stickley was present, and that she aided, abetted, and encouraged the assault.

No error is apparent in the record.

Affirmed.

TEST OF INSANITY — UNDERSTANDING AND WILL — BURDEN OF PROOF — REASONABLE DOUBT — DRUNKENNESS — HEREDITARY INSANITY — BOOKS OF SCIENCE — EXPERT — COMPENSATION.

BRADLEY *v.* STATE.

[31 Ind. 492.]

In the Supreme Court of Indiana, November Term, 1869.

Hon. JAMES S. FRAZER, *Chief Justice.*

" ROBERT C. GREGORY, } *Judges.*
" JOHN T. ELLIOTT, }
" CHARLES A. RAY, }

1. **Test of Insanity — Understanding and Will.** — Insanity may destroy either the understanding or the will. An instruction, therefore, which limits the inquiry of the jury to the condition of the power to apprehend by the understanding, is erroneous.

Syllabus and Facts.

2. **Burden of Proof.** — Where there is a reasonable doubt of the prisoner's insanity adduced by him, the burden of proving his sanity falls on the State.

3. **Reasonable Doubt** defined.

4. **Voluntary Drunkenness** is no excuse for crime; but insanity produced by continued intoxication is.

5. **Evidence — Hereditary Insanity.** — Where there is no evidence of the prisoner's insanity, evidence of the insanity of his relatives is irrelevant.

6. **Books of Science** are not admissible in evidence.

7. **Expert — Compensation.** — The evidence of an expert should not be discredited merely because he expects to have his expenses paid by the party calling him.

APPEAL from the Switzerland Circuit Court.

J. W. Gorden, *W. W. O'Brien*, *S. Carter*, *H. A. Downey*, and *J. A. Works*, for appellant.

D. E. Williamson, Attorney-General, for the State.

RAY, J. — Cincinnatus Bradley, the appellant, was indicted for murder in the first degree. He changed the venue from before the judge on account of alleged bias and prejudice. A judge of another circuit was called by Judge BERKSHIRE to try the cause. A jury found the defendant guilty of murder in the second degree, and that he be sentenced to the penitentiary during life. Motion for a new trial overruled, motion in arrest of judgment overruled; judgment on the verdict.

The evidence shows that the defendant and the deceased were, on the 20th day of September, 1868, living with their families in different parts of the same house, which was owned by the defendant; that no serious quarrel or ill feeling had ever existed between; that deceased was sitting in the yard, smoking and reading, while the defendant was engaged in driving hogs out of the yard, in doing which he became greatly enraged; and, after knocking one of the hogs down with a boulder, and throwing it over the river bank, he went into the house, declaring his intention to get his pistol and shoot the deceased; that he came out with his pistol, and deceased was seen with his stool in his hand, coming towards the house; and that when deceased was from fifteen to thirty yards from the porch, the defendant fired from where he stood on the porch, the ball hitting deceased in the right side of the chest, penetrating the lungs, and inflicting a severe and dangerous wound. The deceased fell when the shot was fired. The evidence is conflicting as to whether his lower extremities were paralyzed by the wound or not — some witnesses say that they were, and others that they were not. After the shot the defendant offered to assist the wife of the wounded man to carry him into the house, saying that he had shot him, and was sorry for it. But the wife refusing to let him assist, he said he

had shot him, and was glad of it. The defendant and his wife then started with their child to the river, and endeavored to get across, first on the ferryboat, and, on being refused a passage, then by taking a skiff that was lying on the shore; and after putting his wife and child into it and trying to push off, he was prevented by those present, and said that he had done what he had to the deceased in self-defence; and that he did not want to be arrested on Sunday; and if they would let him go to Kentucky he would return the next day and answer for what he had done. Upon returning to his house, he was arrested, and the pistol — one of Sharpe's patent, four-barrelled pistols — taken from him, three barrels being loaded, one empty, and a bottle of whiskey about half full. After his arrest he made an effort to get away, caught the sheriff by the beard, and struggled with him. When at the magistrate's office, he asked the officer who had charge of the pistol for it, for the avowed purpose of getting the barrel from the stock and throwing it away. Afterwards he spoke of being admitted to bail in some small amount, and of his ability to give it; and while in jail he made an offer of eight thousand dollars to the sheriff, if he would not lock him up. This offer was in writing. He employed a physician to attend upon the deceased, and paid five hundred dollars; he employed and broke with several attorneys, to each of whom he agreed to pay not less than five hundred dollars.

In the meantime, the deceased, being wounded severely, was carried first into his own house, where he remained several days; then he was carried to the house of Mr. Jennings, were he again remained some weeks, and seemed to be improving, when he was a second time removed, this time to the house of Mrs. Salinda Plew, from which time he grew worse until he died, about ten weeks after he was shot. Before his last removal his appetite was good, his wound closed, his limbs recovered their motion, and he seemed likely to recover. After his removal he grew worse, acute inflammation of the lungs setting in, resulting in suppuration, and finally in death. There was testimony tending to show that his death was caused by this inflammation, and not by the wound; and whether the shot or other causes produced his death, was a question fiercely debated upon the trial. The shot was inflicted, and the deceased died in Switzerland County.

If the death should be found to have been caused by the wound inflicted upon the deceased by the defendant with the pistol, then the defence relied upon was, that he was insane at the time the fatal shot was fired, and consequently, *incapax doli*.

Evidences of Insanity.

The evidence adduced by defendant upon this point, stated in a very general way, tended to establish the following facts: 1. That his mother became and was insane for twenty years before her death, being at first wild and maniacal, but as she grew older becoming more quiet, and finally settling into a state approaching dementia, in which condition she died. The defendant was about ten years old when she became insane, and was thenceforth, until he was over twenty, in the almost exclusive company of his mother, who, in her fondness for him, was in the habit of taking him out on the banks of the river and spending whole days building houses for him of sticks. 2. That William Gray, the twin brother of defendant's mother, became insane, and for a long time sought opportunities to destroy his own life, in which, though often prevented by the vigilance of his relatives, he finally succeeded, by shooting himself to death. His insanity is traced to no known cause so far as the evidence discloses. 3. That defendant's sister — half-sister by his father — was also insane, and when last heard from, confined in a lunatic asylum in Connecticut. Her insanity is not well defined, or rather is not characterized by the witnesses; but it was total and undoubted. 4. That Hugh Maupel, a cousin of defendant, had become insane in consequence of an injury inflicted by a horse tramping upon his head; but he subsequently, partially or wholly recovered. 5. That defendant himself, when a mere child, had been seized by some disease in the legs, which confined him for five or six years to his room and bed; and when he partially recovered the use of his limbs, he was seized with a disease of the spine, which resulted in a great and permanent curvature of the spinal column, and confined him to the house and bed until he was nearly or quite sixteen years of age; that his sickness had up to that time precluded all attempts to educate him, and, although upon recovery so far as to be able to go about, his father made great efforts to educate him, his mind was so weak and imbecile as to render them utterly unavailing; that his mind remained that of a mere child until after he was twenty years old; and that being now over thirty, he never has acquired any facilty in reading or writing.

The evidence tends to show that for the last seven or eight years, and according to some of the witnesses, for ten, he had been a constant, habitual, and excessive drinker of alcoholic stimulants; and had been, in fact, during the seven or eight years immediately before the shooting, constantly drunk — an habitual drunkard. On this point there is almost no contrariety in the evidence. There is evidence tending to show that the small amount of mind he originally had, was, by this in-

veterate habit of drunkenness still further weakened and impaired, until his memory was almost entirely destroyed; one of his attorneys testifying that he could not remember what might occur in relation to his business between them from one consultation to another, although such consultations occurred within a day or two of each other, and sometimes even on the same day; and that when he would have some one writing a letter for him he could not remember what he desired to have written in the letter, after he had begun it. The evidence also showed that, being poor, he had recently before the shooting was done, become the heir or legatee of a wealthy relative, and was in consequence raised from poverty to opulence in a day. Succeeding this change in his circumstances, his habit of drunkenness and its injurious effect on his mind, seem, according to the testimony of some of the witnesses, to have become, if possible, more deeply marked.

He was, just before and during the trial, examined by at least four physicians, who also heard the evidence touching the insanity of his mother, her brother, defendant's sister and cousin, as well as that unfolding his own previous life, habits, and condition, all of whom concurred in the opinion, which they delivered as experts, that the facts proved in relation to defendant's mother, uncle, sister and cousin, tended strongly to prove that insanity was hereditary in the family of the defendant; and that the defendant himself was insane at the time he shot the deceased. They also testified, upon a hypothetical case, involving substantially the facts proved, and of which there was evidence to go to the jury, that the defendant was insane at the moment of the fatal act; and that his appearance in court, and at the jail, strengthened rather than weakened, their conclusion as to his insanity.

There was little if any evidence tending to show any cause why the defendant shot Evans. Indeed, so far as the evidence disclosed the relations of defendant and deceased, they had always been friendly, and the act went to the jury apparently without a motive.

The State introduced proof tending to show that defendant's mother did not become insane until he was about ten years old; and that the immediate cause of her insanity was the death of two children who both died at the same time.

The State also introduced evidence of eight or ten, or it may be more, of the defendant's acquaintances and neighbors, who testified that up to the time of the shooting, they had severally known the defendant for a longer or shorter period, had noticed nothing unusual in his manner or appearance, and that they did not regard him as insane.

Instructions.

We proceed to the consideration of the charges given by the court, in relation to insanity, and those that on general principles must be held to apply to and give point to the same. They are as follows: —

"2. The law presumes all persons to be of sound mind, and in a charge of murder it is not necessary for the State to prove, to make out the offence, that the accused was not insane. If it is claimed that he was, the defendant must prove the fact in his defence.

"4. The act must be done intentionally; and I instruct you that a sane man is conclusively presumed to intend the natural and probable consequences of his own acts, and the intent to murder is conclusively inferred from the deliberate use of a deadly weapon.

"6. The rule of law is that if from the evidence in the case the jury have a reasonable doubt as to any material fact going to the defence, or necessary to make the cause, the prisoner is entitled to the benefit of the doubt. But you cannot go out of the evidence to hunt for doubts; but the doubts, if any exist, must arise out of the evidence in the case. By a reasonable doubt in law, is intended this: when the evidence is not sufficient to satisfy the judgment of the truth of a proposition with such certainty that a prudent man would feel safe in acting upon it in his own important affairs. And, if the evidence in the case, upon any material point for the State and defence considered, does not satisfy your judgment of the truth of all material propositions in the case, and of the criminal liability of the defendant, with such certainty that a prudent man would feel safe in acting upon said matters in his own important affairs, then, in such case, there would be a reasonable doubt in the case, within the meaning of the law as to reasonable doubts in criminal cases.

"9. To constitute the defence of insanity so as to excuse the defendant from the punishment imposed by law for the offence charged, it is not sufficient to show a weakness of mind only; but it is necessary to prove such a deprivation of the reasoning and mental powers, at the time of the killing, as shows that the defendant did not know the consequences of his act, and that it was a wrong, and that it was illegal.

"10. If the defendant at the time he did the act charged, knew what he was doing, and that it was wrong, and a violation of law, then he is liable to punishment for it like any other person. They will not weigh or consider the different grades of intellect, but will punish the weak as well as the strong in mind — if there exists sufficient mind to know and understand the nature and consequences of the act.

"11. Whether the defendant knew what he was doing at the time

he fired, depends upon all the evidence in the case; and in this connection you may consider any attempt, if proved, to flee from the State soon after the doing of the act.

"12. Voluntary drunkenness is no excuse for the commission of a crime, and cannot be set up as a defence.

"13. Continued drunkenness producing insanity, may be proved; and if the insanity exists to such an extent that the party's mind cannot well determine to do the act, or does not know the consequences of his act, and that it is wrong, then, in such a case, he would not be liable. But a mere voluntary drunkenness, no matter how much it may excite the accused or arouse his passions, is no excuse — if he has mind enough to predetermine the act and to know its consequences.

"14. The fact, if proved, that the mother and uncle of the defendant were insane, is no evidence of the insanity of the defendant; and without other proof tending to prove that defendant was insane at the time he did the act, it must be disregarded by the jury.

"15. The law does not presume the son insane because the mother was, nor because other relatives were; and from such facts alone you cannot find insanity in defendant.

"16. The defendant has been permitted to give evidence of his drinking habits before the homicide; yet the evidence will be of no avail unless you find him insane at the time of committing the homicide, that is of firing the fatal shot. * * *

"22. If the defendant wilfully, and with premeditated malice, shot Alexander Evans, as charged in the indictment, and inflicted on said Evan's person a wound, and if said wound was ultimately the cause of said Evan's death, the defendant is guilty of murder in the first degree — if he was not at the time insane within the rules laid down herein. * * *

"25. The opinions of medical witnesses are admissible in evidence for the consideration of the jury. The opinions of such witness are not to be admitted for the purpose of controlling the judgment of the jury, but to be considered for what they are worth in your opinion when considered with the other evidence in the case.

"26. If you think from all the evidence in the case that you ought to reject the testimony of the medical witnesses or any of them you have the right to do so.

"28. If the evidence satisfies you, that any medical witness in the case has voluntarily come from the State of Illinois, to testify in behalf of the defendant with the expectation that his expenses would be paid by the defendant or others for him; and if it further satisfies you, that

the defendant was a stranger to such witness; you may consider these matters in connection with his evidence upon the stand, and all the other evidence in the case in determining what credit you give to his evidence; and if you believe from his manner of testifying, and the matter of his testimony, and from the evidence in the case, that you ought to disregard his evidence, you have the right to do so.

"29. If you find from the evidence that the defendant was not insane at the time of the shooting, but knew right from wrong, and understood the consequences of the act, and had the capacity to predetermine to do the act, and did inflict the wound with premeditated malice, and wilfully, and intentionally, then he is guilty of murder, no matter whether at a prior time he was sane or insane.

"30. If you find that the defendant was of sound mind for thirty-two years next preceding the act, and has been of sound mind ever since the commission of the act, you may consider this evidence in determining whether he was sane at the time of the shooting.

"32. Mere weakness of mind, when the party knows right from wrong, and knows and intends the effect of his act, will not excuse a homicide; for the law will not weigh degrees of strength of intellect, but only inquire whether the accused knew right from wrong — whether he was capable of wilfully, premeditating, and maliciously doing the act.

"33. Questions have been asked medical witnesses calling for their opinions upon a hypothetical case, a state of facts supposed by counsel to exist; and opinions have been given to such questions; but because the facts have been supposed to exist by counsel, it is no evidence that they do exist; and you are to find what if any of the supposed facts have been established, and if any one is not proved to your satisfaction, then the opinions upon such as are not proved can have no application to the case, and ought as to them, to be disregarded.

"34. If after considering all the evidence on the subject of insanity, and facts and opinions of witnesses not of the medical profession, as well as of that profession, you are satisfied (with the rule as to reasonable doubt as given you) that the defendant was not insane at the time of doing the act charged, then the defence of insanity has failed, and can not avail the defendant."

The following charges were given by the court on its own motion: —

"13. I have already said to you, in charges asked by counsel for the State, that if the defendant committed the act, as charged, and knew what he was doing, and that it was wrong and a violation of law, he is

liable under this indictment. While this is the law applicable to the question of sanity generally, it seems that in some cases a broader principle should be applied. The best exposition I can give you upon this subject perhaps will be to give you what is said by a standard author. I quote from 1 Bishop's Criminal Law: —

'§ 478. Yet the form of the question of insanity for the jury, stated above, is well in cases where it is admitted that the mental disease or imperfection extends only to the intellectual powers, and the party has full control over his own actions. How numerous comparatively, these cases are, is a matter of science and fact not here to be discussed. But it is both understood in science, and sometimes recognized in the law, though judges are slow to yield on this point, that the mental and physical machine may slip the control of its owner; and so a man may be conscious of what he is doing, and of its criminal character and consequences, while yet he is impelled onward by a power irresistible. In such cases, in the language of Lord Denman, "if some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible.' And the question for the jury, under such a state of the proofs should be so framed as to comprehend this view.

"§ 479. Let it be remembered, likewise, that this irresistible impulse is not always general, but sometimes has reference to a particular class of actions, as for example in 'homicidal insanity.' 'There is,' says Gibson, C. J., 'a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania, is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance.' Even this doctrine, as thus qualifiedly and guardedly stated is discarded by many judges, as the reader who consults the various cases cited in this chapter will see. This matter, however, is evidently one of evidence, as mentioned in a note to the last section. If really a person is impelled by an unseen power which he cannot resist, no court and jury who believe this fact will hold him guilty of a crime.

"14. If it has been proved that the mother of the defendant was insane, and that insanity in the mother raises a strong presumption that it is transmitted to the offspring, yet it rests upon the defendant to

prove that he was insane at the time the act was committed. The facts that the mother was insane, that the twin brother of the mother was also insane, and that a cousin was insane, if proved, would not be sufficient of themselves to show insanity in the defendant, but are facts strongly tending to show hereditary insanity in the family, and proper for you to consider with the other testimony in the case, to aid you in determining whether the defendant was insane or not when the act was committed. But if the proof shows that the defendant's mother became insane after his birth, and her insanity was the result of the loss of two children, and was not in any way the result of a hereditary tendency to insanity, then the insanity of the mother is entitled to no consideration in determining the question of the defendant's sanity or insanity; and, so, if the proof shows that the insanity of defendant's cousin, Hugh Manfred, was the result alone of an injury received on the head from the kick of a horse, and not in any way the result of hereditary insanity, in that event Manfred's insanity can throw no light upon the defendant's insanity."

Before entering upon a critical examination of each special charge to which an exception was reserved, it may be well to remark that an erroneous instruction cannot be corrected by another instruction which may state the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury. The effect of the conflicting instructions can only be to confuse the jury; and as they must follow one or the other, it is impossible to determine whether the influence of the court in such a case has been exerted for good or evil. The defendant is entitled to a plain, accurate, and unquestioned statement of the law from the court. Nothing less than this will satisfy the requirements of the statute.[1]

The sixth instruction given at the request of the State is in such language as, by necessary inference, affirms the proposition that if the evidence satisfies the jury of the guilt of the defendant, with such certainty that a prudent man would feel safe in acting upon such conviction in his own important affairs, then, in such case, there would be no reasonable doubt of the defendant's guilt.

Mr. Starkie states it as the law that "a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he is so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own in-

[1] Clem *v.* State, 31 Ind. 480.

terest." [1] This rule is stated in discussing the effect produced on the mind by circumstantial evidence; but it matters nothing by what class of evidence this result is attained. There must be this certainty of conviction before a reasonable doubt can be excluded. And, we may add to Mr. Starkie's definition, this qualification, that it must be such a conviction of the truth of the proposition that a prudent man would feel safe to act upon the conviction under circumstances where there was no compulsion upon him to act at all. In other words, a prudent man, compelled to do one of two things affecting matters of the utmost moment to himself, might, and doubtless would, do that thing which a mere preponderance of evidence satisfied him was for the best; and yet such a conviction would fall far short of that required to satisfy the mind of a juror in a criminal case. It must induce such faith in the truth of the facts which the evidence tends to establish that a prudent man might, without distrust, voluntarily act upon their assumed existence in matters of highest import to himself.

The test stated by the court that the conviction must be such as would induce one to act in regard to his own "important affairs" is too narrow. It must be such a certainty as would justify to the mind action not only in matters of importance, but those of the highest import, involving the dearest interests. Nothing short of this can serve as an example of that moral certainty which should alone authorize a verdict of guilty. "Moral certainty," says Mr. Burrill, "is a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it; the conclusion presented being one which cannot, morally speaking, be avoided consistently with adherence to truth." [2]

This certainty alone excludes all reasonable doubts. One may act in important matters without having reached this degree of rest from doubt; and nothing, therefore, short of the highest personal interests involved should be placed before the juror as a test, when upon his action may depend the life of another. The highest interests of the prisoner being involved in the decision, the juror's supposed action on no matter of mere importance to himself will serve as his guide. Nor would it be proper for the juror to apply the test to matters personal to himself, which are only important considered in comparison with his other affairs. One may, perhaps, lead a life so near on the level that nothing of import disturbs the even tenor of his way. The test must be uniform; and though, in a special case, the conviction of the de-

[1] Stark Ev. (Sharswood), 865.

[2] Burrill Cir. Ev. 199.

fendant may involve only a short imprisonment or fine, still, as the rule may be also applied to cases involving the life of an accused person, the illustration employed should always refer to the highest interest.

In this case from a reference by the judge who tried the cause to the decision of *Arnold* v. *State*,[1] we must suppose that what was there given as a simple illustration of a case where a reasonable doubt would exist has been accepted as a test by which to determine all doubts. The opinion was not intended to be thus understood.

In regard to the second charge, it was plainly erroneous, as it required of the prisoner, if he sought to avail himself of the plea of insanity, that he "must prove the fact in his defence." So, also, of the fourteenth charge.

If the evidence introduced by the defendant on this subject created a reasonable doubt in the mind of the jury as to the sanity of the defendant, he should have gone acquit. He was not required to prove his insanity. The legal presumption of sanity simply dispenses with proof on that subject in the first instance on the part of the State. When, however, the defendant's evidence has created a doubt on this point, the burden falls upon the State of proving his sanity. The instruction, indeed, would be erroneous by reason of the error in the sixth charge in regard to the extent of proof required to remove all reasonable doubts.

The ninth charge is objectionable, also, for the same reason. It requires the defendant "to prove such a deprivation of the reasoning and mental powers at the time of the killing as shows that the defendant did not know the consequences of his act, and that it was a wrong, and that it was illegal." How prove this fact? By a preponderance of evidence? Or beyond a reasonable doubt? And, again, we must turn to the sixth instruction to determine what is such a doubt.

But the instruction is erroneous for another reason. It assumes either that the mind possesses but one faculty, the cognitive, or power to apprehend by the understanding, or that this faculty alone is liable to disease which may relieve the sufferer from responsibility. Neither hypothesis is true. The scientific world, both of the metaphysical and physiological schools of mental philosophers, have accepted the division of powers announced by Kant, the cognitive or comprehending power; the feelings or capacity for pain or pleasure, and the creative or will power, without which latter there is nothing upon which to rest the doctrine of free agency and moral and legal responsibility to the law for an

[1] 23 Ind. 170.

act done or omitted. That disease may successfully assail this triune organization is not denied; and that its assaults are limited to the understanding can no longer be contended in the light of experience, which exhibits the victims of a lost will in every insane hospital in the civilized world. Man, under the influence of disease, may know the right, and yet be powerless to resist the wrong. The well-known exhibitions of cunning by persons admitted to be insane, in the perpetration of an illegal act, would seem to indicate comprehension of its evil nature and legal consequences, and yet the power of self-control being lost by disease, there can be no legal responsibility. Repeated instances are given where persons subject to temporary paroxysms of insanity have, during a lucid interval, and when under apprehension of a renewed attack, besought their friends to restrain them by force, that they might not yield to some uncontrollable impulse to do wrong.

A charge, therefore, which limits the inquiry of the jury to the condition of the cognitive faculty, is erroneous, because mental disease may as well involve the will as the understanding. That it does also extend to the affections is equally well established; and perhaps no peculiarity of the insane is more marked than the unreasonable aversion exhibited by them towards those who in health occupied the citadel of their affections. This species of insanity, which would in law avoid the disposition of a man's property by will, of which repeated instances are given in the books, acts directly upon the will, and often assumes complete control over that power; and when this result is reached moral and legal responsibility are at an end.

In determining the sanity or insanity of a testator, undue influence, prejudice, or a morbid affection which controls his will are well known tests. That degree of influence, either external or internal, which deprives the testator of his free agency avoids the will. "Hence, anything in the character of the will which renders it contrary to natural affection, or what the civil law writers denominate an undutiful testament, as where children, or others entitled to the estate in case of intestacy, are wholly disinherited, or if not wholly deprived of a share, it is given in such unequal portions as to indicate that it is done without any just cause, and wholly dependent upon caprice, or over persuasion, or deception, it must always excite apprehension of undue influence at the very least." [1] "So, where the will is unreasonable in its provisions, and inconsistent with the duties of the testator with reference to his property and family, this will impose upon those claiming under the

[1] Redf. on Wills, 521.

Insanity may Affect Both.

instrument the necessity of showing that its character is not the offspring of mental defect, obliquity, or perversion." [1]

This is a full recognition of the position that the power of volition may be so far impaired by disease that it may be under the control of the perverted affections; and in such a case the act of the testator is declared not his voluntary deed. Why should the influence of disease upon this power of the mind be recognized by the courts in civil cases, and denied when applied to criminal cases? If in the one case the act be declared involuntary because the will is so prostrated by disease as to render it incapable of following the understanding, why should the law exact a criminal responsibility under the same conditions? No one would insist upon limiting the test in the contest of a will to the question whether the testator knew the act he was doing was right or wrong; and yet under this test, enforced in criminal cases alone, a man might be executed for a homicide whose testament would be avoided on the ground of his insanity.

The doctrine that insanity may affect not only the understanding, but control also the power of volition, was fairly recognized by Chief Justice SHAW in the case of *Commonwealth* v. *Rogers*;[2] although an apparent reluctance to be the first to announce a doctrine then regarded as radical has rendered the entire opinion more unsatisfactory and confused than any other pronounced by that learned judge and distinguished jurist. This was again declared by Judge BREWSTER in *Commonwealth* v. *Haskell*,[3] by Chief Justice PERLEY, in *State* v. *Pike*,[4] and by this court, in the case of *Stevens* v. *State*.[5]

We will not attempt to discuss the different announced classifications of insanity, — with them we have nothing to do. Their technical names and nice theoretical distinctions have long enough confused courts and cast contempt upon the verdict of juries. Insanity is a disease. The effect it has produced upon the faculties of the reason and will are all we are concerned with. It is no more the province of a court to instruct the jury as to the effect this disease will produce in a special subject, than as to an attack of cholera or fever. The effect which has been produced is a question of fact, and to be proved in like manner. Insanity must be recognized as a disease which may impair or totally destroy either the understanding or the will, or indeed, both; and all the symptoms of such disease and its effect upon these faculties should go to the jury, and as a matter of fact, they must determine the mental

[1] *Id.* 615.
[2] 7 Metc. 500.
[3] 4 Am. Law Rev. 240.
[4] 49 N. H. 399.
[5] 31 Ind. 485.

condition of the defendant. We are well aware that the doctrine of insanity has been the shield employed by counsel to cover the most execrable crimes, and that juries have disgraced themselves and degraded their office in applying it to the sanest of criminals. In special cases they will not distinguish between insanity and moral depravity. If there ever were a time when truth might be withheld, the temptation would be strong upon us now. But there is no such time in the history of courts. It is our duty to declare the law as we understand it, fully and plainly, and any responsibility for its misapplication must rest upon those who abuse a plain truth. We are satisfied that it is always safer that the law should be well understood, than that it should seem clothed in mystery.

Indeed, it must be evident that the cases where the shield of insanity protects the guilty, are those alone where the circumstances attending the act appeal so strongly to the sympathy of the jury that they would acquit without even a pretext; where the feelings control the judgment and the moral obligation of their oath, and fit the triers, if not the tried, for an inquest of insanity.

The tenth, eleventh, twenty-ninth, and thirty-second instructions are objectionable, also, as limiting the question of insanity to the understanding.

The instructions in regard to intoxication are correct in the abstract, and cannot be criticised in the absence of more special instructions presented by the defendant, with the exception of the thirteenth charge, which limits the question of insanity to the understanding. Nor do we see any valid objection to the charge in regard to hereditary insanity.

The thirteenth charge given by the court on its own motion contains an extract from Bishop's Criminal Law, which we will not review, except to remark that the requirement of Gibson, C. J., therein contained, that homicidal mania, to be recognized, must be habitual, would find very few cases where it could be favorably applied. Before the defence could be available the victim of the mania would doubtless have been confined for life, or executed, in the effort to acquire the habit. The entire sections quoted were not proper for the consideration of a jury. The law that goes to the jury from the court should be given as law, unquestioned by the opinions of other judges.

In regard to the twenty-eighth charge, wherein the court casts discredit upon a medical witness, because he may have attended the trial from an adjoining State with the expectation that his expenses would be paid, it must receive our unqualified disapprobation. The motive prompting him may have been, and doubtless was, one in the interest of

humanity and science, and merited no implied censure from the court, a forum where truth should be sought from all sources. The twenty-second charge is also objectionable, as resting upon the sixth charge.

The fourth charge contains the same extract from Greenleaf on Evidence that was declared erroneous in the case of *Clem* v. *State*.[1]

There is also a point made upon the introduction of evidence, but as this forms only a reason for the granting of a new trial, and the question may not be again presented, we will not extend this opinion to examine the ruling of the court thereon.

We desire to acknowledge our obligation to counsel for the labor and learning displayed in the preparation of the argument for the appellant.

Judgment reversed and the cause remanded for a new trial.

Elliott, J., without assenting to all the reasoning in the foregoing opinion, concurs in the decision on the points ruled.

MORAL INSANITY — NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE — DEGREES OF CRIME.

ANDERSON *v.* STATE.

[43 Conn. 514; 21 Am. Rep. 669].

In the Supreme Court of Errors of Connecticut, April Term, 1876.

Hon. John Duane Park, *Chief Justice.*

" Elisha Carpenter,
" Lafayette S. Foster,
" Dwight W. Pardee,
" Dwight Loomis, } *Judges.*

1. **Moral mania**, *i.e.*, the derangement of the moral faculties, where it is proved to exist should be considered by the jury in determining the degree of a crime.
2. **New Trial — Newly Discovered Evidence.** — A. was indicted for murder in the first degree, and was convicted after offering some evidence of his insanity. A new trial was afterwards asked for on the ground of newly discovered evidence of his insanity. *Held*, that it should be granted.
3. **Degrees of Crime.** — Though a total want of responsibility on account of insanity be not shown, yet if the prisoner's mind was so far impaired as to render him incapable of a deliberate, premeditated murder, he should be convicted only of murder in the second degree.

Petition for a new trial upon a conviction of murder in the first degree, upon the ground, among others, of newly discovered evidence.

[1] 31 Ind. 480.

Anderson *v.* State.

The facts are sufficiently stated in the opinion of the court. Those portions of the opinion devoted to a consideration of the question of the power of the court to grant new trials are omitted.

L. N. Blydenburgh, *R. S. Pickett*, and *J. Bishop*, for petitioner

T. E. Doolittle and *L. M. Hubbard*, for the State.

Carpenter, J. The charge was murder in the first degree. The homicide was admitted; the vital question being whether the prisoner was in a condition of mind to form a deliberate purpose to take life. The defence claimed that he was not, for the reason that he was insane; indeed it was claimed that he was not criminally responsible at all. The inquiry therefore was not merely whether he was irresponsible, but assuming his responsibility the question still remained, was his mind so far impaired, as to raise the presumption that he could not form a wilful, deliberate, and premeditated purpose to take life.

The burden was on the State to show not only that the prisoner was capable of committing a crime, but that he was in a condition to plan and execute a cool, deliberate murder. The degree of malice essential to murder in the first degree, like the act of killing or any other material fact, must be proved beyond a reasonable doubt or the jury ought not to convict of the greater offence. Upon that point the jury might have entertained a reasonable doubt and at the same time may have been satisfied that the act was a crime and that it was their duty to convict of murder in the second degree.

[The court here considered the question of the petitioner's negligence in discovering the new evidence and the objection that such evidence was cumulative.]

We do not care to state at length the testimony in the case. It seems that the prisoner notified his employers that he should give up his work and they employed others to take his place. He then objected, saying he had not given it up, and insisted that Mr. Norton and Mr. Nettleton, who had been employed in his place, should not go to work. Being a poor man and having a family to support, he became very much excited and caused some trouble in the shop, for which he was arrested. This was on Thursday. His trial was to take place on Saturday. Saturday morning he armed himself with two revolvers, went to the shop, and commenced firing — some of the time with a revolver in each hand — and in a few moments he had shot at no less than four different persons. One of the men who took his job, Mr. Norton, was shot at and wounded; the other, Mr. Nettleton, although close by the prisoner, was not molested. Some ten or twelve persons were present, and the affair occurred in broad day light. Of course there was no attempt at

concealment and hardly a possibility of escape. If the prisoner reflected at all he must have known that detection and punishment were certain.

The motive for the crime seems to be wholly inadequate. His employers had only accepted his resignation, and the men employed in his stead had only offended in consenting to be employed. How a rational man could coolly and deliberately plan a murder of these parties or of any one of them, as a remedy for an existing evil, is difficult to conceive. Revenge, the only other possible motive, rests upon a slight provocation.

The indiscriminate nature of the attack makes the whole matter still more mysterious and incomprehensible. The only man killed was one with whom he had had no trouble, and the testimony does not show that he owed him any grudge. This indicates not so much a deliberate intention to take the life of some one who had injured him, as a disposition to destroy life generally, it mattering little to him who the unfortunate one might be. "In a case of homicide the relations existing between the parties are worthy of much consideration. If the person slain were a parent, a child, a wife, or some near friend or relative, and no particular reason for the act was assigned, it might raise a fair presumption that it was due to insane impulse. If the individual slain be an object merely of indifference, toward whom no particular feelings either of friendship or enmity can be presumed to be entertained, the presumption, although much less strong, is still in favor of its being an insane act. The mere motiveless destruction of life can, with difficulty, be regarded as the act of a sane mind. If, on the contrary, a motive exist, or if feelings of enmity, originating in no delusion, be entertained toward the person slain, the presumption will be that it is a sane act." [1] We look in vain for any motive for taking Hall's life, and it is by no means clear that his death was caused by inadvertence, while attempting to take the lives of others.

As a fitting close to such a tragedy, the prisoner made two unsuccessful attempts to take his own life. It is strange that a professed Christian, as the prisoner was — one who believes in future rewards and punishments — should deliberately imbrue his hands in the blood of his fellow-man, and then rush unbidden into the presence of his Maker aud Judge, to receive the punishment due to his crimes. In this age of the world, suicide is regarded by many as conclusive evidence of insanity. Esquirol, a celebrated French physician, who founded a lunatic asylum in 1799, which became a model for all similar institutions afterwards

[1] Dean's Medical Jurisprudence, 577.

founded in France, and who published a work on mental maladies, thinks that in all cases the suicidal act is the deed of a monomaniac, and results from a pathological change in the brain or some part of it. However this may be, it is probably true that homicidal mania manifests itself in self-destruction more frequently than in any other form.

'In civil causes the act which is the occasion of investigating the mental condition of the actor is carefully considered. If it is a rational act, rationally done, it is strong evidence of a sound mind; if it is an irrational act, or done in an irrational manner, it is regarded as evidence of insanity. Making due allowance for temper and passion we see no good reason why the same rule should not prevail in criminal jurisprudence. If so there is certainly to be gathered from this transaction some evidence of an unsound mind.

The testimony shows that the prisoner, to use the words of an expert who heard the trial, was a man of "irritable temperament, little self-control, a strange man, disappointed in business, out of work, with an increasing family and fear of poverty, and added to all that, dyspepsia and fever and ague." It also appears that he was subject to great nervous excitement, and at times to a corresponding despondency, was easily vexed and annoyed by his fellow-workmen, at one time imagining that they had poisoned the water that he drank and that they had conspired against him for the reason that he was a superior workman, and were endeavoring to deprive him of employment. In the events which immediately preceded the homicide he spoke of them as trying to kill him and told his wife that he intended to use the pistols which she saw only in self-defence. His arrest also, about that time, and being held for trial, for a breach of the peace, further excited him. It also appears that during the latter part of the year 1873, and the first part of the year 1874, he was greatly changed from what he formerly was, so much so that it was apparent from those who knew him and came in contact with him, being a subject of conversation with them. One man refused to employ him, although wanting a man in his line, because he regarded him as half crazy. Several others, observing his singular conduct and noticing the change that had come over him, also pronounced him crazy. It is also manifest that he was naturally of a quarrelsome disposition, and had a violent temper, which at times was ungovernable.

The State denied that there was in all this any indication of insanity; but accounted for it all by attributing it to bad temper and peculiarity of temperament and disposition. Upon all the facts which were placed before the jury, giving a large part of his personal history for the last

Moral Mania: Partial or General.

few years, Dr. Butler, the eminent physician who was for thirty years at the head the Retreat for the Insane, at Hartford, pronounced him insane. Drs. Jewett and Bacon, of New Haven, two eminent physicians of large experience, pronounced him sane.

(The court then considered the new evidence offered, and continued.)

It is not our purpose, nor is it our duty, to apply this evidence to any one of the numerous phases of insanity recognized by courts of justice. Indeed, it is not necessary for us to assume that it does or may, in the opinion of the jury, establish the fact that the prisoner is not criminally responsible for his acts. The evidence may fall far short of this, and still satisfy a jury that he ought not to suffer the penalty of the crime of which he was convicted.

Perhaps the most usual form of insanity which comes under the cognizance of courts of justice is derangement, total or partial, of the intellectual faculties. There is some evidence in this case indicating delusion, which is the usual and perhaps an essential manifestation of this form of insanity. Should the jury be satisfied of its existence they would probably acquit the prisoner on that ground. As to the sufficiency or insufficiency of the evidence for that purpose we express no opinion.

Another form of insanity is a derangement of the moral faculties. In this there is usually, though not always, an entire absence of delusion. Moral mania, like intellectual, is of two kinds, partial and general. Instances of the former are *kleptomania* or propensity to steal, *pyromania* or propensity to destroy by fire, and *homicidal mania*. General moral mania "consists in a general exaltation, perversion, or derangement of function, of all the affective or moral powers. Those who have observed and written upon this form of mental alienation, unite in describing those who labor under it as persons of singular, wayward, and eccentric character. Their antipathies are violent and suddenly taken; their suspicions unjust and severe; and their propensities strong and eagerly indulged. They are generally proud, conceited, ostentatious, easily excited, and obstinate in the maintaining of absurd opinions." [1] On page 497 is a quotation from Hoffbauer, in which it is described as "a state in which the reason has lost its empire over the passions, and the actions by which they are manifested, to such a degree that the individual can neither repress the former nor abstain from the latter. It does not follow that he may not be in possession of his senses, and even his usual intelligence; since, in order to resist the impulses of the pas-

[1] Dean's Med. Juris. 496.

sions, it is not sufficient that the reason should impart its counsels; we must have the necessary power to obey them. The maniac may judge correctly of his actions without being in a condition to repress his passions, and to abstain from the acts of violence to which they impel him."

The subject of moral mania will generally be found to have experienced a great change in temper, disposition and moral qualities, either sudden and dating from some reverse of fortune or loss of dear friends or relatives, or gradual and imperceptible, consisting in an exaltation or increase of peculiarities which were always natural or habitual. The moral maniac will rarely exhibit any signs of derangement in his conversation. He will often be regular, systematic, and methodical in all his business transactions, and, to all appearance, regular in the use of his intellect. One man sees him in business transactions only, or converses with him when he is free from excitement, and he does not hesitate to pronounce him perfectly sane; another has an opportunity to witness some strange and unaccountable eccentricity of conduct, totally irreconcilable with the possession and exercise of a sound mind. The facts to which these two witnesses would testify are apparently contradictory, and yet they are perfectly consistent when the form of the malady is known. The *conversation* discloses intellectual mania, and the *conduct* moral mania. We will not undertake to say that the conduct above referred to, as characterizing one who is afflicted with moral mania, is exactly the conduct of the prisoner; but the description is certainly applicable to some extent, and when we consider that the manifestations of insanity are as various as characters and temperaments, that the insane man is not careful to walk in the footsteps of those who have gone before him, but wanders through moral or intellectual darkness, or both, and makes his own path, we are by no means clear that a jury might not with perfect propriety find that the prisoner is morally insane. Upon this point the newly discovered evidence bears with peculiar force, and materially strengthens the evidence given upon the trial. It is true that courts have hitherto been slow to recognize this form of insanity as an excuse for crime; nevertheless, that it exists is well understood, and, in some cases, is clearly defined by medical and scientific men, cannot be denied.

It is not our purpose either to ignore or recognize this form of insanity as an excuse for crime. The question is not whether an act committed under its influence is criminal; whether the actor should be punished or be exempt from punishment; but whether he is a proper subject of capital punishment. If it be conceded that one afflicted

Relevant on Degree of Crime.

with it never loses the power to distinguish between right and wrong, and is at all times master of himself, and may control his actions, still his mind may be enfeebled and the power of his will weakened, so that he will readily yield to the influence of temptation or provocation without that wilful, deliberate, and premeditated malice which is essential to constitute murder in the first degree. The jury, therefore, ought to consider moral mania, if satisfied of its existence, in determining the degree of crime, and give it such weight as it is fairly entitled to under the circumstances.

There is another view which may, and, we think, should, be taken of this case. It cannot be denied that the prisoner is a man of an excitable temperament, a quarrelsome disposition, morbidly jealous and suspicious, imagining evils where none exist, or, at least, magnifying those which do exist, and when dyspepsia, or fever and ague is upon him, or there is any other exciting cause like business troubles, disappointments, etc., all these propensities are intensified and brought into greater activity. Such traits are the seeds which are likely to germinate and ultimately to result in confirmed insanity. Now, assuming that the disease had not yet reached that stage, but, on the contrary, that the prisoner could not only distinguish between right and wrong, but had also the power of self-control which would enable him to do the right, and refrain from doing the wrong, is it not quite probable from this evidence that the prisoner was laboring under an unusual and unnatural excitement, brought upon him by the circumstances in which he was placed, and the atmosphere which surrounded him, and that, by reason thereof, his mind was in such a state and condition that he was incapable of committing murder in the first degree? May it not be possible that the man's unfortunate temper, excited by what he regarded as repeated and successive provocations, held all his faculties, moral and intellectual, in subjection to some extent, so that he was incapable of reasoning correctly, or rightly apprehending his relations to others? And that, too, not only while he was under the direct and immediate influence of the exciting causes, but also after he had had time and opportunity for reflection, continuing even until after the commission of the homicide? The common law is considerate of those who take life in the heat of passion, but makes it a capital offence to take life after time enough has elapsed for the passion to cool, making no allowance for differences in temper and disposition. Under our statute, which divides murder in two degrees there is ample opportunity to make some allowance for those cases where, from any cause, excitement and passion continue beyond the limits allowed by the common law, and impel to

the commission of crimes which would not be committed in cooler moments. Reason and humanity require that this should be done. This may be, and we are inclined to think that it is, a case in which the jury would be justified in regarding the distinction just adverted to.

Upon a careful consideration of all the evidence in the case, including the new evidence, it seems to us very doubtful whether the prisoner is a proper subject of capital punishment.

We, therefore, advise the Superior Court to grant a new trial.

In this opinion Foster and Pardee, J.J., concurred; Park, C. J., and Loomis, J., dissented as to the propriety of granting a new trial for newly discovered evidence.

MORAL INSANITY.

Scott *v.* Commonwealth.

[4 Metc. (Ky.) 227.]

In the Court of Appeals of Kentucky, Summer Term, 1863.

Hon. Alvin Duvall, *Chief Justice.*
" Joshua F. Bullitt, }
" B. J. Peters, } *Judges.*
" R. K. Williams }

1. **Moral Insanity — When an Excuse for Crime.** — Moral insanity existing in such violence as to render it impossible for the party to resist its promptings is an excuse for crime.

2. **Instructions.** — The court instructed the jury that they should not acquit on the ground of moral insanity "unless it had manifested itself in former acts of similar character or like nature to the offence charged." *Held*, error.

Appeal from Mercer Circuit Court.

Harlan & Harlan and *Hardin & Kyle*, for appellant.

A. J. James, Attorney-General, for the Commonwealth.

Chief Justice Duvall, delivered the opinion of the court.

This is an appeal from a judgment of conviction rendered by the Mercer Circuit Court, at its April term, 1863, against Edward D. Scott, who was indicted for the murder of his stepson, James Tilford.

The defence set up on behalf of the prisoner was that he was insane at the time of the commission of the homicide.

Erroneous Instructions.

The grounds mainly relied upon for reversal are, first, that the court erred in instructing the jury; and, secondly, in admitting improper evidence.

1. The evidence relating to the question of insanity, as set out in the bill of exceptions, is quite voluminous, and need not be stated or referred to here, further than to say that it conduced to sustain the ground of defence relied on, sufficiently so at least to authorize the court to instruct the jury in regard to it.

At the close of the evidence, the court, having instructed the jury in substance, that although they might believe that the accused was unsound in mind, yet such unsoundness did not justify an acquittal on the ground of insanity, unless they believe that the accused, at the time of the commission of the act, did not know right from wrong in reference to the killing of the deceased, or if he did not know that such killing was wrong, that his mind was so disordered that he had not the mental power to control his actions, — gave the following instruction, marked No. 4: —

"The court further instructs the jury that, although they believe that the accused was laboring under what is termed moral insanity, yet moral insanity is no excuse in law for the commission of crime, unless the moral insanity overwhelmed and destroyed the faculties of the mind to such an extent as to render the accused incapable of governing his actions, at the time of the commission of the act, and the jury ought not to acquit upon such moral insanity, unless it had manifested itself in former acts of a similar character, or like nature of the offence charged."

To this instruction two objections are urged by counsel for the appellant, the first and most obvious of which is that it requires the jury to find, as an indispensable condition of acquittal on the ground of moral insanity, that the insanity had manifested itself in former acts of homicide.

Such is undoubtedly the effect and meaning of the instruction according to the fair and natural construction of the language used. And it hardly needs an argument to prove that in this respect, if no other, the instruction was misleading and erroneous and prejudicial to the appellant. It is true that one witness, a physician, in a very brief statement of his professional opinion, touching the characteristics of this disease, stated that "moral insanity never springs first fully developed, but is of gradual growth." His view is sustained as well by adjudged cases of the highest authority, as by the most approved elementary writers on this subject. In a case decided by the Supreme Court of Pennsylvania,

it was said by Chief Justice Gibson, that the doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. "It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. * * * If juries were to allow it, as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a jusification in any particular case, it is necessary, either to show, by clear proof, its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency, developed in previous cases, becoming in itself a second nature." [1]

Although, therefore, this ground of defence is so peculiarly liable to abuse, to guard against which the utmost care and circumspection are required, on the part of the court, in prescribing to the jury the legal principles relating to it, yet no authority has been found for the principle embodied in the instruction under consideration, which requires that moral insanity, before it can be made available as a legal excuse for crime must have manifested itself "in former acts of similar character, or like nature, of the offence charged." And, in our opinion, the instruction was to this extent erroneous.

The other objection to the instruction is, that it requires the jury to believe from the evidence, that the moral insanity "overwhelmed and destroyed the faculties of the mind to such an extent as to render the accused incapable of governing his actions at the time." We are not prepared to say that this, if properly understood, was too strong a statement of the principle, or that it was practically injurious to the appellant. For in another case cited by Wharton & Stille, it is said by Judge Lewis, that "moral insanity arises from the existence of some of the natural propensities in such violence that it is impossible not to yield to them. It bears a striking resemblance to vice, which is said to consist in an undue excitement of the passions and will, and in their irregular or crooked actions leading to crime. It is, therefore, to be received with the utmost scrutiny. It is not generally admitted in legal tribunals as a species of insanity which relieves from responsibility for crime, and it ought never to be admitted as a defence until it is shown that these propensities exist in such violence as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield. Where its existence is fully established this species of insanity relieves from accountability to human laws. But

[1] Wharton & Stille Med. Jur., sect. 54.

Must Exist to What Extent.

this state of mind is not to be presumed without evidence, nor does it usually occur without some premonitory symptoms indicating its approach." [1] And it is elsewhere laid down in the same treatise, that "it is not to be supposed that a single impulse is diseased while all the other functions of the mind retain their healthy action. While the entire intellect enjoys sound health there is nothing in which a morbid desire of theft, murder, etc., could originate, and such a phenomenon is a psycological impossibility, and the assumption of such requires a psycological contradiction. A *mania sine deliro*, a mania without a morbid participation or disturbance of the perceptive faculties is, therefore, out of the question, as a desire to injure or destroy is impossible without an act of the mind by which this purpose is entertained, and as reason and understanding are alike diseased, whether they insinuate a wrong motive for the morbidly conceived purpose of the act, or whether they entirely omit the suggestion of any reason whatever." [2]

Without going further into the discussion of this abstruse and perplexing subject, it is apparent from what has been said that, before this species of insanity can be admitted to excuse the commission of 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. This is the fundamental fact to be established to the satisfaction of the jury. And whether this impossibility of resistance arises from a subjugation of the intellect by the morbid impulse or propensity, or from an overwhelming and destruction of the faculties of the mind to the extent of rendering the party incapable of governing his actions, is a point, it would seem, of not much practical importance. We think, however, that the form of expression used by Judge Lewis, in the passage before quoted, more aptly conveys the correct idea, and is therefore less calculated to confuse or mislead the jury than that adopted by the court below in the instruction we have been considering. Except in the particulars mentioned the court committed no error in giving or in receiving instructions.

2. Nor do we think the court erred in allowing a witness who had been introduced by the defendant to be recalled and examined with the view of laying a foundation for contradicting her testimony in chief, by showing that she had made statements different therefrom. It is unnecessary to notice this point further, as no such question will probably arise upon a subsequent trial.

[1] Med. Jur., sect. 55, [2] Sect. 177.

For the error mentioned, the judgment is reversed and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

EMOTIONAL INSANITY — BURDEN OF PROOF — REASONABLE DOUBT.

PEOPLE *v.* FINLEY.

[38 Mich. 482.]

In the Supreme Court of Michigan, April Term, 1878.

Hon. JAMES V. CAMPBELL, *Chief Justice.*
" ISAAC MARSTON, } *Associate Justices.*
" BENJAMIN F. GRAVES, }
" THOMAS M. COOLEY, }

1. **Reasonable Doubt.** — What is a " reasonable doubt " defined.
2. **" Emotional Insanity,"** *i.e.*, " that convenient form of insanity which enables a person who does not choose to bridle his passion to allow it to get and keep the upper hand just long enough to enable him to commit an act of violence and then subside" criticised.
3. **Burden of Proof.** — Evidence tending to show the prisoner's insanity does not throw upon the prosecution the burden of overbalancing it, if it does not raise a reasonable doubt.

EXCEPTIONS upon a judgment from Newaygo County

Kirchner, Attorney-General, for the People.

Standish, *Fuller* & *Standish*, for the respondent.

CAMPBELL, C. J. — Respondent was convicted of an assault, with intent to murder his wife. The defence on which the questions before us are raised was temporary insanity. It is claimed the court below deprived him of the benefit of a reasonable doubt. The charge given was in substance that the element of malice was the important element in the case, and must be made out not merely by a preponderance of evidence, but beyond a reasonable doubt. The instruction given as to what was meant by a reasonable doubt [1] was one of the clearest and most sensible definitions

[1] "A reasonable doubt is a fair doubt growing out of the testimony in the case; it is not a mere imaginary, captious, or possible doubt, but a fair doubt based upon reason and common sense; it is such a doubt as may leave your minds after a careful examination of all the evidence in the case, in that condition that you cannot say you have an abiding conviction to a moral certainty of the truth of the charge here made against the respondent."

Emotional Insanity Criticised.

we have ever seen, and such as to be intelligible to any jury — a merit not always possessed by the requests to charge which are sometimes made in such cases. And after such an explanation the jury were told not to convict unless they had an abiding conviction to a moral certainty of the truth of the charge.

It is claimed, however, that this clear and fair charge was nullified because the court when asked to make a separate charge upon the subject of the mental condition of respondent, is supposed to have qualified it injuriously.

The court in regard to insanity, charged that the respondent would be blameless in law: (1) if by reason of insanity he was not capable of knowing he was doing wrong; or, (2.) if he had not power to resist the temptation to violate the law.

This was correctly charged. The law has no theories on the subject of insanity. It holds every one responsible who is *compos mentis*, or a free agent, and every one irresponsible who is *non compos mentis*, or not having control of his mind. Unfortunately for the administration of justice, persons are sometimes found, who with small experience and large conceit, have succeeded in formulating theories under which, if properly applied, there would be hardly enough sane persons found to sit upon juries or attend to business. If the term insanity, — which it may be remarked is not a term of the law at all, — is so far enlarged as to include persons who have not only knowledge of wrong, but also capacity to resist it, then it includes persons whom the law deems capable of crime, and is a phrase entirely inapplicable in civil or criminal law.

There is some reason to suppose, from the frame of this record, that what the respondent relied on as "temporary or emotional insanity" was that convenient form of it which enables a person who does not choose to bridle his passion, to allow it to get and keep the upper hand just long enough to commit an act of violence, and then subside. We had occasion to refer somewhat to this subject in *Welch* v. *Ware*;[1] and we adhere to the views there expressed, that if a person voluntarily allows his passion to be indulged until it gets the temporary control over him, he is responsible for the condition in which he thus falls, as a man who becomes voluntarily intoxicated is liable for his drunken violence. It is certainly a strange and unsafe doctrine to tolerate that anything should be deemed innocent insanity which in no way affects the mind or conduct except on the one occasion when it is kindled by tem-

[1] 32 Mich. 77.

porary anger and subsides with the gratification of that malignant passion. The rules of evidence as administered in this State, while they have opened the door very wide to the testimony of experts, without any overnice scrutiny into their expertness, do not recognize such mental unsoundness as requires legal inquiry, as necessarily involving scientific evidence, or as beyond the domain of common sense. In *Regina* v. *Oxford*,[1] Lord DENMAN, in a very plain and fair charge, made this remark: "It may be that medical men may be more in the habit of observing cases of this kind than other persons, and there may be cases in which medical testimony may be essential; but I cannot agree with the notion that moral insanity can be better judged of by medical men than by others." We entirely concur in this remark, which is more strikingly applicable to such inquiries as seem to have arisen in the case at bar.

We have had some doubt whether any question is really raised on the record, inasmuch as we are not informed upon what sort of facts the defence of insanity was based. But assuming that there was something which might, by possibility, amount to a suspicion of insanity, and that the jury could have found that a "paroxysm of temporary or emotional insanity" was really an insane condition in the case before them (which the judge ruled they might do), it is necessary to see what was complained of.

The charge excepted is this: —

"Whose duty is it to prove that the respondent was in a mental condition, at the time of committing the assault, so as to make him responsible for his acts? I say to you, that the law is, that it is the duty of the defence to first put evidence into the case upon the subject of temporary or emotional insanity, which is the defence here set up; but after such evidence is put into the case by the defendant — that is, evidence which tends to show that the respondent, at the time in question here, was laboring under a paroxysm of temporary or emotional insanity (and such evidence has been put into this case by the defence), then it becomes the duty of the prosecution to prove the sanity of the defendant by at least a fair preponderance of evidence, and unless you find they have done so, the defendant must be acquitted."

In other words, the judge told the jury that upon this particular fact the introduction of any evidence whatever by the defence made it necessary for the prosecution to introduce affirmative proof to more than counterbalance it. Inasmuch as it must be for the jury to deter-

[1] 9 C. & P. 525.

Defence Must Raise a Reasonable Doubt.

mine whether or no the defendant's testimony has been overcome, in their minds, by adequate proof, if they think the testimony of insanity is thus overcome, it is difficult to conceive how they can further regard it, or how they could entertain a reasonable doubt on the case if convinced of the falsehood of the only ground on which the defence rested.

It certainly is not true that the introduction of testimony of such insanity necessarily throws any burden on the prosecution; for the jury may not regard such testimony of any weight whatever, and may not believe the opinions of the witnesses. It is only where the testimony creates a reasonable doubt, that there is any occasion to remove the doubt. We do not understand the charge as at all designed or calculated to qualify what had been before said on the general question of proving malice beyond a reasonable doubt. Nothing but the defence of insanity had any bearing on the question of malice, which without this could not — as we judge from the record — have been open to any controversy. We must take the whole charge together in construing it, and we cannot conceive that there was any likelihood of the jury being led to a wrong conclusion concerning the meaning of the judge. The particular request which it is complained he did not give is not so explained by facts in the record as to show that there would have been any impropriety or necessity for it after what actually was given.

We are not disposed to criticise with any great nicety the omission of courts to give requests which tend to distract the minds of jurors by calling special attention to metaphysical subtleties or to particular testimony. A jury knows without instruction that it has a right to consider any testimony which has been allowed to go before it, and to draw such inferences as naturally are drawn by each one of the body. When a court calls attention to bits of evidence, or to particular witnesses, more than others, there is some danger that undue prominence will be given to what is so designated. It is at least quite as safe to avoid this practice, unless circumstances appear to require it.

While, as before suggested, we might find it difficult — even if the charge appeared to involve doubtful theories of law — to hold it error without a more full showing of its bearing than we can gather from this record, we think that taking the whole charge together there is no reason to believe the jury were misled to the prejudice of the respondent.

We think judgment should be rendered on the verdict.

The other justices concurred.

MORAL INSANITY DISAPPROVED — TEST OF INSANITY.

STATE *v.* BRANDON.

[8 Jones (L.) 463.]

In the Supreme Court of North Carolina, June Term, 1862.

Hon. RICHMOND M. PEARSON, *Chief Justice.*
" WILLIAM H. BATTLE, } *Judges.*
" MATTHIAS E. MANLY, }

1. **Moral Insanity Disapproved.** — The law does not recognize any moral power compelling a man to do what he knows to be wrong.

2. **Particular Right and Wrong Test.** — The insanity which takes away the criminal quality of an act must be such as amounts to a mental disease, and prevents the accused from knowing the nature and quality of the act he was doing.

Indictment for murder tried before BAILEY, J., at Fall Term, 1861, of Caswell Superior Court.

The defendant was indicted for the murder of one William J. Connelly, his father-in-law. His counsel contended that though he knew it was wrong to kill the deceased, yet if he was impelled to the act by a moral power which he could not resist, he was excusable. Verdict guilty, and judgment of death. The prisoner appealed.

The *Attorney-General* and *Winston, Sr.*, for the State. No one appeared for the prisoner.

MANLY, J.

(After passing on other points.)

The third and last question made upon the record arises out of proofs, in respect to the mental condition of the prisoner. The record states the prisoner's counsel insisted that, although the prisoner knew it was wrong to kill the deceased, yet, if he was impelled to the act by a moral power, which he could not resist, he was excusable The words " moral power " may mean threats, duress of imprisonment, or an assault imperilling life, which is the usual sense of the phrase, or it may mean, some supernatural agency. The former construction would make the position of the counsel entirely inapplicable to the case; we therefore adopt the latter. The position thus interpreted, does not fall within any approved definition of a *non compos mentis*. It assumes that the accused knew the nature of his act and that it was wrong. The law does not recognize any moral power compelling one to

Right and Wrong Test.

do what he knows is wrong. "To know the right and still the wrong pursue," proceeds from a perverse will brought about by the seductions of the evil one, but which, nevertheless, with the aids that lie within our reach, as we are taught to believe, may be resisted and overcome, otherwise it would not seem to be consistent with the principles of justice to punish any malefactor. There are many appetites and passions which by long indulgence acquire a mastery over men more or less strong. Some persons indeed deem themselves incapable of exerting strength of will sufficient to arrest their rule, — speak of them as irresistible, and impotently continue under their dominion; but the law is far from excusing criminal acts committed under the impulse of such passions. To excuse one from criminal responsibility the mind must, in the language of the judge below, be insane. The accused should be in such a state from mental disease as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong, and this should be clearly established. This test, a knowledge of right and wrong, has long been resorted to as a general criterion for deciding upon legal accountability, and with a restricted application to the act then about to be committed, is approved by the highest authorities. But we do not undertake to lay down any rule of universal application. It seems to be chimerical to attempt to do so from the very nature of things, for insanity is a disease and, as is the case with all other diseases, the fact of its existence is not established by a single symptom, but by a body of symptoms, no particular one of which is present in every case. Imperfect as the rule may be, it covers a great variety of cases and may aid the tribunals of the country in judging of this most difficult subject. The case put of a criminal act committed under the belief that it was commanded by God, would fall under the rule. The perpetrator in such would not know he was doing what was wrong, but on the contrary, believe he was doing what was right in obeying a power who had a right to command him. This condition of mind would constitute insane delusion in respect to the particular act committed, and if clearly established by proof of pre-existent facts, would excuse from responsibility.

It will thus be seen that instructions, in conformity with the argument of prisoner's counsel, ought not to have been given. If the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it, against all supernatural agencies, and holds him amenable to punishment. There is no error in the instructions actually given upon this subject, and in the absence of any prayer for other specific

instructions, there is no omission of which the prisoner has a legal right to complain.

There being no error found upon the record this must be certified to the superior court of law for Caswell, that the said court may proceed again to pronounce the judgment of the law.

Per Curiam. *Judgment affirmed.*

MORAL INSANITY — BURDEN OF PROOF — SANITY PRESUMED TO CONTINUE.

Lynch *v.* Commonwealth.

[77 Pa. St. 205.]

In the Supreme Court of Pennsylvania, 1874.

Hon. John M. Read, *Chief Justice.*
" George Sharswood,
" Henry W. Williams,
" Ulysses Mercur,
" Daniel Agnew,
} *Judges.*

1. **Anger and Wrath must** not be confounded with actual insanity.
2. **The Burden of Proving Insanity** to the satisfaction of the jury is on the prisoner.
3. **Sanity Presumed to Continue.** — Where a person is sane shortly before and after an act, the presumption is that he was sane at the time.

Error to the Court of Oyer and Terminer of Alleghany County.

Ambrose E. Lynch was indicted for the murder of William Hadfield.

The evidence was that the prisoner lived with his sister, who was a married woman, in Allegheny City; that on the 11th or 12th of June, 1872, about midnight, the deceased was found by George Smithson in a street in Allegheny City, wounded; shortly afterwards the defendant came up with a knife in his hand; said he had killed that man; he had cut him; he said "if he had had a larger knife he would have put him through faster." To an officer of the peace who took him to the mayor's office, the prisoner said whilst going there, "I was only at home a few minutes when I heard a noise, I listened and heard a creaking, took out my knife, and said that they can't fool me on that business." Prisoner said he then took out his knife and opened it; he put his shoulder to the door and shoved it; it did not go in the first time; he put his shoulder to it the second time and it went in; just as the door went open, his

sister was getting out of bed undressed; he struck the deceased twice with the knife whilst on the bed; deceased got up and "went for me on the floor," and prisoner gave him another stroke in the breast. To another witness prisoner said, he had "given it to him twice in the bed and once afterwards;" he said he had found the deceased in his sister's bed.

These statements were all made on the night of the killing. The deceased was taken to the mayor's office, and died about one o'clock of the same night.

The sister, examined by the Commonwealth, testified that her husband had been away about five weeks; that she and the deceased were sitting in the room together, but denied that there was any impropriety between them. Whilst sitting there the prisoner burst into the room and knocked her down; when she came to the deceased was gone. Her brother asked her if she was in bed with a man; her brother was clear crazy; he acted more like a crazy man than a drunken one."

The defendant's points were: —

1. If on the night of the killing the defendant found or supposed he found, the deceased in bed with defendant's married sister, and was thereby so much excited as for the time to overwhelm his reason, conscience and judgment, and cause him to act from an uncontrollable and irresistible impulse, the law will not hold him responsible. The court, Starrett, P. J., answered: "As this point seems to amount to the proposition, that if the prisoner was temporarily insane at the time he did the cutting, he is not guilty of any legal offence, it is affirmed as an abstract proposition of law. If the defendant was actually insane at the time this, of course, relieves him from any criminal responsibility from whatever cause the insanity arose. But the jury must not confound anger or wrath with actual insanity, because however absurdly or unreasonably a man may act when exceedingly angry, either with or without cause, if his reason is not actually dethroned, it is no legal excuse for the violation of law."

2. If the jury have a reasonable doubt as to the condition of the defendant's mind at the time when the act was done, he is entitled to the benefit of such doubt, and they cannot convict. The court answered: "The law presumes sanity when an act is done if no insanity is shown by the evidence; and when it appears that a man was sane shortly preceding the act, and shortly after, the presumption exists of sanity at the time of the act, and no jury has a right to assume otherwise, unless the evidence in connection with the act fairly convinces them that the

defendant was actually insane at the moment the act was committed. This point is refused."

And the judge instructing the jury said: —

"It is said that immediately after the commission of the deed, the prisoner looked like a crazy man. Is there anything remarkable in this? When a man permits his angry passions to become aroused; when he resolves upon deeds of violence and carries them into execution, even to the taking of the life of a fellow-being, it would be singular, indeed, if the vengeance that rankled in his breast would not clearly manifest itself by outward expressions. If such manifestations of a wicked heart, bent upon vengeance and the gratification of malicious passion, are to be seriously considered as sufficient evidence of insanity, how are deeds of violence and bloodshed ever to be punished? A learned author has said that the mind is always greatly troubled when it is agitated by anger, bewildered by jealousy, or corrupted by an unconquerable desire for vengeance. Then, as is commonly said, a man is no longer master of himself; his reason is affected; his ideas are in disorder; he is like a madman. But in all these cases the man does not lose his knowledge of the real state of things; he may exaggerate his misfortune, but this misfortune is, nevertheless, real, and if it carry him to commit a criminal act, this act is perfectly well motived. In such case it will generally be found that revenge, anger, and kindred emotions of the mind constitute the real motive which has occasioned the homicidal act, if such act has been committed." * * *

The court then read and answered the defendant's points, as before stated, and instructed the jury as to the character and effect of "a reasonable doubt."

The jury, July 10, 1872, found the prisoner guilty of murder in the first degree.

After a motion for a new trial, which was overruled, the prisoner was, on the 18th of January, 1873, sentenced to be hung. The prisoner removed the record to the Supreme Court by writ of error.

Ferguson & Murray for plaintiff in error.

T. M. Bayne, District-Attorney, and *W. D Moore*, for the Commonwealth.

Read, C. J.

(After passing on other points.)

The third error assigned is to the answer of the court to the defendant's first point, which was, "that if, on the night of the killing, defendant found, or supposed he found, the deceased in bed with defendant's married sister, and was thereby so much excited as, for the time, to

Continuance of Sanity Presumed.

overwhelm his reason, conscience, and judgment, and cause him to act from an uncontrollable and irresistible impulse, the law will not hold him responsible."

This seems very vague and uncertain, but the court say: "As the point seems to amount to the proposition that if the prisoner was temporarily insane at the time he did the cutting, he is not guilty of any legal offence, it is affirmed as an abstract principle of law. If the defendant was actually insane at the time, this, of course, relieves him from criminal responsibility, from whatever cause the insanity arose. But the jury must not confound anger or wrath with actual insanity; because, however absurd or unreasonable a man may act when exceedingly angry, either with or without cause, if his reason is not actually dethroned, it is no legal excuse for violation of law."

There is no error in this answer.

The fourth error assigned is to the answer to the defendant's second point, which is: "That, if the jury have a reasonable doubt as to the condition of the defendant's mind at the time the act was done, he is entitled to the benefit of such doubt, and they cannot convict."

As to the second point the court said: "The law of the State is, that where the killing is admitted and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such sanity will not justify the jury in acquitting upon that ground. The law presumes sanity when an act is done, if no insanity is shown in the evidence, and when it appears a man was sane shortly preceding the act, and shortly after, the presumption of sanity exists at the time of the act, and no jury have a right to assume otherwise unless evidence in connection with the act convinces them that the defendant was actually insane at the moment the act was committed. This point is refused," and rightly, and it needs no argument to show that the court were entirely correct in their ruling and answer.

The sixth error is not sustained, for it is clear the ingredients necessary to constitute murder in the first degree were proved to exist, and in determining this to be the case, we have reviewed both the law and the evidence.

Sentence affirmed and record remitted.

INSANE DELUSION — RESPONSIBILITY — TEST OF INSANITY — BURDEN OF PROOF — OPINIONS OF MEDICAL MEN.

McNaghten's Case.

[10 Cl. & F. 200.]

Before the English House of Lords, 1843.

1. **Insane Delusion — Criminal Responsibility of Party.** — Notwithstanding a party accused did an act which was in itself criminal, under the influence of insane delusion, with a view of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, if he knew at the time he was acting contrary to law.

2. **Test of Responsibility — Burden of Proof.** — If the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to law, he is punishable. In all cases of this kind the jurors ought to be told that every man is presumed to sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.

3. **A Party Laboring Under a Partial Delusion** must be considered in the same situation, as to responsibility, as if the facts, in respect to which the delusion exists, were real.

4. **Opinions of Medical Men.** — Where an accused person is supposed to be insane, a medical man, who has been present in court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong.

May 26; June 19, 1843.

The prisoner had been indicted, for that he, on the 20th day of January, 1843, at the parish of Saint Martin-in-the-Fields, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, in and upon one Edward Dummond, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Daniel McNaghten, a certain pistol of the value of 20s., loaded and charged with gunpowder and a leaden bullet (which pistol he, in his right hand, had and held), to, against, and upon the said Edward Drummond, feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said Daniel McNaghten, with the leaden bullet aforesaid, out of the pistol aforesaid, by force of the gunpowder, etc., the said Edward Drummond, in and upon the back of him the said Edward Drummond, feloniously, etc., did strike, penetrate, and wound, giving to the said Edward Dummond, in and upon the back of the said Edmund Drummond, one mortal wound, etc., of which mortal wound the said E. Drummond

languished until the 25th of April, and then died; and that by the means aforesaid he, the prisoner, did kill and murder the said Edward Drummond. The prisoner pleaded not guilty.

Evidence having been given of the fact of the shooting of Mr. Drummond, and of his death in consequence thereof, witnesses were called on the part of the prisoner to prove that he was not, at the time of committing the act, in a sound state of mind. The medical evidence was in substance this: That persons of otherwise sound mind might be affected by morbid delusions; that the prisoner was in that condition; that a person so laboring under a morbid delusion might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connection with his delusion; that it was of the nature of the disease with which the prisoner was affected to go on gradually until it had reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under its influence, but would all at once break out with the most extravagant and violent paroxysms. Some of the witnesses who gave this evidence had previously examined the prisoner; others had never seen him until he appeared in court, and they formed their opinions on hearing the evidence given by the other witnesses.

Lord Chief Justice Tindal (in his charge). — The question to be determined is whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.

Verdict "not guilty," on the ground of insanity.

This verdict, and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort, having been made the subject of debate in the House of Lords,[1] it was determined to take the opinion of the judges on the law governing such cases. Accordingly, on the 26th of May, all the judges attended their lordships, but no questions were then put.

[1] The 6th and 13th March, 1843; see Hansard's Debates, vol. 67, pp. 288, 714.

McNaghten's Case.

On the 19th of June the judges again attended the House of Lords, when (no argument having been had), the following questions of law were propounded to them: —

June 19.

1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder for example), and insanity is set up as a defence?

3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

4. If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused.?

5. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any, and what, delusion at the time.

Mr. Justice Maule. — I feel great difficulty in answering the questions put by your lordships on this occasion; first, because they do not appear to arise out of, and are not put with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions; this difficulty is the greater from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases; secondly, because I have heard no argument at your lordship's bar or elsewhere on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; and thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and fre-

The Answer of Maule, J., to the Legal Test.

quent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal trials. For these reasons I should have been glad if my learned brethren would have joined me in praying your lordships to excuse us from answering these questions; but, as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can after the very short time which I have had to consider the questions, and under the difficulties I have mentioned, fearing that my answers may be as little satisfactory to others as they are to myself.

The first question, as I understand it, is, in effect: what is the law respecting the alleged crime when, at the time of the commission of it, the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit. If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for their solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done, and therefore request to be permitted to answer the question only so far as it comprehends the question, whether a person circumstanced as stated in the question, is, for that reason only, to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding? and I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which involves, or is necessarily connected with such an unsoundness, this is not a matter of law, but of physiology, and not of that obvious and familiar kind as to be inferred without proof.

Second, the questions necessarily to be submitted to the jury are those questions of fact, which are raised on the record. In a criminal trial, the question commonly is, whether the accused be guilty or not guilty; but in order to assist the jury in coming to a right conclu-

sion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions, as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the judge; a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject.

Third. There are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as in the discretion of the judge are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

Fourth. The answer which I have given to the first question is applicable to this.

Fifth. Whether a question can be asked depends not merely on the question of fact raised on the record, but on the course of the cause at the time it is proposed to ask it, and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity may be such, that such a question as either of those suggested is proper to be asked and answered though the witness has never seen the person before the trial, and though he has merely been present and heard the witnesses; these circumstances of his never having seen the person before, and of his having merely been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful; though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect.

Supposing there is nothing else in the state of the trial to make the question suggested proper to be asked and answered, except that the witness had been present and heard the evidence; it is to be considered whether that is enough to sustain the question. In principle it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he formed from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and

Answer of C. J. Tindal to the Lords.

has never, that I am aware of, been successfully objected to. Evidence most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, and was received in the case of *The Queen* v. *McNaghten*, tried at the central criminal court, in March last, before the Lord Chief Justice, Mr. Justice WILLIAMS and Mr. Justice COLERIDGE, in which counsel of the highest eminence were engaged on both sides; and I think the course and practice of receiving such evidence confirmed by the very high authority of these judges, who not only received it, but left it, as I understand, to the jury without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavorable to parties accused, and entirely contrary to the most obvious principles of justice and humanity as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament.

Lord Chief Justice TINDAL. — My lords, her Majesty's judges (with the exception of Mr. Justice MAULE, who has stated his opinion to your lordships), in answering the questions proposed to them by your lordship's House, think it right in the first place to state that they have forborne entering into any particular discussion upon these questions from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case, and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordship's questions.

They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your lordships; and as they deem it unnecessary in this particular case to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such, their unanimous opinion, to your lordships.

The first question proposed by your lordships is this: "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect to one or more particular subjects or persons;

as for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of, with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.

Your lordships are pleased to inquire of us secondly, "What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?" And thirdly, "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" And as these two questions appear to us to be more conveniently answered together we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been whether the accused at the time of doing the act knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to

C. J. Tindal's Answer to the Lords.

the law of the land; it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does not know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong, and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your lordships have proposed to us is this: "If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?" To which question the answer must, of course, depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your lordships is: "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime? or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?" In answer thereto we state to your lordships that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But when the facts

are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

INSANE DELUSION — TEST OF INSANITY — BURDEN OF PROOF — OPINIONS OF EXPERTS.

COMMOMWEALTH *v.* ROGERS.

[7 Metc. 500; 1 Bennett & Heard's Lead. Cas. Crim. Law, 95.]

In the Supreme Judicial Court of Massachusetts, March Term, 1844.

Hon. LEMUEL SHAW, *Chief Justice.*
" CHARLES A. DEWEY, } *Judges.*
" SAMUEL HUBBARD. }

1. **Insane Delusion — Responsibility.** — Where the delusion of a person is such that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he does an act which would be justifiable if such fact existed, he is not responsible for such act.

2. **Test of Insanity.** — Capacity and reason sufficient to enable one to distinguish between right and wrong, and understand the nature, character, and consequences of his act, with mental power sufficient to apply that knowledge to his own case, furnish the legal test of sanity.

3. **The Opinions of Medical Men** on the state of mind of the prisoner are admissible, though they have not personally examined him.

4. **Burden of Proof.** — A jury may find a person insane where the preponderance of the evidence is in favor of his insanity.

The defendant, a convict in the State prison at Charlestown, Massachusetts, was indicted for the wilful murder of Charles Lincoln the warden of the prison, on the 15th day of June, A. D. 1843, by stabbing him with a shoe-knife. The fact of killing was clearly proved, and the sole defence was insanity. The homicide took place on Thursday, and the evidence tended to show that, commencing on Monday night previous, and continuing with increasing aggravations up to some period subsequent to the warden's death, the prisoner was laboring under some powerful hallucination; that he was at times in great distress and apprehension; that he declared he heard the voices of his fellow-prisoners confined in distant parts of the prison, and also some of the officers speaking to him and threatening him with danger, telling him that poisonous substances were mingled in his food; that a fatal or dangerous

Facts of the Case.

game was playing upon him, which he could not long survive; that the warden was going to take him up to the old prison, shut him up, and keep him there till he was carried out feet first; that he expressed his fears and apprehensions at various times to different persons, during the three days prior to the homicide, and particularly and frequently stated that the warden was going to shut him up, and that if he did, he should not live three days; he should be carried out feet first; and other statements of a like kind. His predominant fear seemed to be that he was to be shut up by the warden, and the consequence would be that he should suffer instant death. On the afternoon of the homicide the prisoner saw the warden entering the shop where he was at work, and under the influence of his delusion, which then appeared to be at its crisis, and in full possession of his mind, he probably imagined the time had come for his imprisonment in the old prison, and his consequent death; impelled by a fear of his impending danger, he rushed upon the object of his fear, and averted his own death, as he supposed, by taking the life of the warden. Several medical gentlemen and superintendents of insane asylums, some of whom had and others had not, made a personal examination of the prisoner, testified that in their opinion he was unquestionably insane.

The prisoner's counsel (*George Bemis, Esq.* and *George Tyler Bigelow, Esq.*, afterwards chief justice of the Supreme Judicial Court of Massachusetts) claimed upon this and the other evidence of the case, that if the jury were satisfied that the prisoner when he committed the homicide, was laboring under a delusion which overpowered his will, and deprived him of self-control, and the act was connected with that delusion, he was entitled to an acquittal.

How entirely that position was sustained by the facts and the law, the verdict of acquittal and the instruction of the court to the jury furnish sufficient answer. The charge of the court was thus delivered by

Shaw, C. J. — In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

But there are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging, or so pervaded by insane delu-

sion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty.

On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts.

If then it is proved to the satisfaction of the jury, that the mind of accused was in a diseased and unsound state, the question will be whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

The character of the mental disease, relied upon to excuse the accused in this case, is partial insanity, consisting of melancholy, accompanied by delusion. The conduct may be in many respects regular, the mind acute and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion, by which the mind is perverted. The most common of these cases is that of monomania, when the mind broods over one idea and cannot be reasoned out of it. This may operate as an excuse for a criminal act in one of two modes: 1. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief, the insane man kills in supposed self-defence. A common instance is when he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive, but sincere belief that what he is doing is by the command of a superior power,

which supersedes all human laws and the laws of nature. 2. Or this state of delusion indicates to an experienced person, that the mind is in a diseased state; that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence, venting itself in homicide or other violent acts toward friend or foe indiscriminately; so that although there were no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an inexperienced person to say that the outbreak was of such a character, that for the time being it must have overborn memory and reason; that the act was the result of the disease, and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will.

The questions, then, in the present case will be these: 1. Was there such a delusion and hallucination? 2. Did the accused act under a false, but sincere belief that the warden had a design to shut him up, and under that pretext, destroy his life; and did he take this means to prevent it? 3. Are the facts of such a character, taken in connection with the opinions of the professional witnesses, as to induce the jury to believe that the accused had been laboring for several days under monomania, attended with delusion; and did this indicate such a diseased state of the mind, that the act of killing the warden was to be considered as an outbreak or paroxysm of disease, which for the time being, overwhelmed and suppressed reason and judgment, so that the accused was not an accountable agent?

If such was the case, the accused is entitled to an acquittal; otherwise as the evidence proves beyond all doubt the fact of the killing, without provocation, by the use of a deadly weapon, and attended with circumstances of violence, cruelty and barbarity, he must undoubtedly be convicted of wilful murder.

The ordinary presumption is, that a person is of sound mind, until the contrary appears, and in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary, satisfactory to the jury; such proof may arise out of the evidence offered by the prosecutor to establish the case against the accused, or from distinct evidence offered on his part; in either case it must be sufficient to establish the fact of insanity, otherwise the presumption will stand.

The opinions of professional men on a question of this description are competent evidence, and in many cases are entitled to great consideration and respect. The rule of law, on which this proof of the opinions of witnesses, who know nothing of the actual facts of the case,

is founded, is not peculiar to medical testimony, but is a general rule, applicable to all cases, when the question is one depending on skill and science in any particular department. In general, it is the opinion of the jury which is to govern, and that is to be formed upon the proof of facts laid before them. But some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pursuits and profession have brought that class of facts frequently and habitually under their consideration. Shipmasters and seamen have peculiar means of acquiring knowledge and experience in whatever relates to seamanship and nautical skill. When, therefore, a question arises in a court of justice upon that subject, and certain facts are proved by other witnesses, a shipmaster may be asked his opinion as to the character of such facts. The same is true with regard to any question of science, because persons conversant with such science have peculiar means, from a larger and more exact observation, and long experience in such department of science, of drawing correct inferences from certain facts, either observed by themselves or testified to by other witnesses. A familiar instance of the application of this principle occurs very often in cases of homicide, when upon certain facts being testified to by other witnesses, medical persons are asked whether in their opinion a particular wound described would be an adequate cause, or whether such wound was, in their opinion, the actual cause of the death, in the particular case. Such question is commonly asked without objection; and the judicial proof of the fact of killing often depends wholly or mainly upon such testing of opinion. It is upon this ground, that the opinions of witnesses, who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease, at the time of its supposed existence. It is designed to aid the judgment of the jury, in regard to the influence and effect of certain facts, which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and and sobriety of judgment just confidence can be had, are of great weight and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity and impartiality of the witness who gives it.

One caution, in regard to this point, it is proper to give. Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses, as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses or of the truth of the facts testified by others. It is for the jury to decide whether such facts are satisfactorily proved, and the proper question to be put to the professional witness is this: if the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether in their opinion, the party was insane; and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances. [1]

The jury, after being in consultation several hours, came into court and asked instructions upon these two questions: "Must the jury be satisfied, beyond a doubt, of the insanity of the prisoner, to entitle him to an acquittal? And what degree of insanity will amount to a justification of the offence."

In answer to the first of these questions, the chief justice repeated his former remarks on the same point and added, that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane. In answer to the second question the chief justice added nothing to the instructions which he had previously given.

The jury returned a verdict of "not guilty, by reason of insanity."

INSANE DELUSION — DISTINGUISHED FROM ERRONEOUS OPINION — BURDEN OF PROOF — TEST OF INSANITY — EVIDENCE.

United States *v.* Guiteau.

[10 Fed. Rep. 161.]

In the United States District Court for the District of Columbia, 1881.

Before Mr. Justice Cox.

1 **Burden of Proof of Insanity on Prisoner.** — Where the defence of insanity is set up as an excuse for crime, the burden of proving it is on the person alleging it. The presumption is that he is sane.

[1] See 1 M. & R. 75.

United States *v.* Guiteau.

2. **Insanity — Evidence.** — On the trial of the sanity of a person, evidence of his previous and subsequent condition is admissible.

3. **Insanity of Relations.** — And in connection with evidence of his own insanity, testimony showing insanity of his parents or immediate relatives, is relevant.

4. **The Enormity of the Crime,** or the absence of motive, is no evidence of insanity.

5. **The Test of Responsibility** where the defence of insanity is interposed, is whether the accused had sufficient use of his reason to understand the nature of the act, and that it was wrong for him to commit it.

6. **Declarations of Prisoner — Evidence.** — The prisoner's unsworn declarations are not admissible in his favor, though admissible as against him.

7. **Insane Delusion — Defence.** — An insane delusion is an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or impossible under the circumstances of the individual.

8. **Opinions or Beliefs** founded on reasoning and reflection are not insane delusions nor within the law regarding them.

The prisoner, Charles J. Guiteau, was indicted for the murder of James Abram Garfield, President of the United States, on July 2, 1881. The assassination was admitted, and the plea of insanity set up. After a long and tedious trial, Judge Cox on this day (January 25, 1882), charged the jury as follows: —

Gentlemen of the Petit Jury: — The Constitution of the United States provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence." These provisions are deemed the indispensable safeguards of life and liberty. They are intended for the protection of the innocent from injustice and oppression. It is only by their faithful observance that guilt or innocence can be fairly ascertained. Every accused person is presumed innocent until the accusation be proved, and until such proof no court dare to prejudge his cause or withhold from him the protection of this fundamental law. With what difficulty and trial of patience this law has been administered in the present case, you have been daily witnesses. After all, however, it is our consolation that not one of these sacred guarantees has been violated in the person of the accused. If he be guilty, no man deserves their protection less than he does. If he be innocent, no man needs their protection more, and no man's case more clearly proves their beneficence and justice.

At length the long chapter of proof is ended; the task of the advocate is done; and the duty now rests with you of determining, with

such aid as I can afford you, the issue between public justice and the prisoner at the bar. No one can feel more keenly than I do the grave responsibility of my duty; and I feel that I can only discharge it by a close adherence to the law as it has been laid down by its highest authorized expounders.

Before proceeding, I wish to interject a remark here upon an episode in the trial pending the last argument. The prisoner has taken repeated occasions to proclaim that public opinion, as evidenced by the press and by his correspondence, is in his favor. As you well know, these declarations could not have been prevented except by resorting to the process of gagging him. Any suggestion that you could be influenced by this lawless babble of the prisoner, would have seemed to me simply absurd, and I should have felt that I had almost insulted your intelligence if I had warned you not to regard it. The counsel for the prosecution have been rebuked for allowing these declarations to go to you without contradiction, and in the course of the final argument they felt it necessary to interpose a contradiction to these declarations of the prisoner, and the latter's counsel excepted to the form in which the contradiction was made. For the sole purpose of purging this record of any apparently objectionable matter, I would simply say, here, that nothing that has been said in reference to public sentiment or newspaper opinion, on either side, is to be regarded by you, although I really feel that such an admonition from me is totally unnecessary.

This indictment charges the defendant with having murdered James A. Garfield. It becomes my duty, in the first place, to explain to you the nature of the crime charged. With us, murder is committed where a person of sound memory and discretion unlawfully kills a reasonable creature in being, and in the peace of the United States with malice aforethought. It must of course be proved, first, that the death was caused by the act of the accused. It must be further shown that it was caused with malice aforethought; but this does not mean that the government must prove any special ill will, hatred, or grudge, on the part of the prisoner, towards the deceased. Whenever a homicide is shown to have been committed without lawful authority and with deliberate intent, it is sufficiently proved to have been done with malice aforethought. And this evidence is not answered and malice is not disproved by showing that the accused had no personal ill will against the deceased, but killed him from some other motive, as for purpose of robbery, or by mistaking him for another, or, as alleged in this case, to produce a public benefit. If it could be shown that the killing occurred in the heat of passion and on sudden quarrel, and under provocation from the

deceased, then it would appear that there was no premeditated intent, and consequently no malice aforethought; and this would reduce the crime to manslaughter. But it is hardly necessary to say that there is nothing of that kind in the present case. You will probably see that either the defendant is guilty of murder or he is innocent.

But, in order to constitute the crime of murder, the assassin must have a responsibly sane mind. The technical term, "sound memory and discretion," in the old common-law definition of murder, means this. An irresponsibly insane man can no more commit murder than a sane man can do so without killing. His condition of mind cannot be separated from the act. If he is laboring under disease of his mental faculties — if that is a proper expression — to such an extent that he does not know what he is doing, or does not know that it is wrong, then he is wanting in that sound memory and discretion which make a part of the definition of murder. In the next place, I instruct you that every defendant is presumed innocent until the accusation against him is established by proof. In the next place, notwithstanding this presumption of innocence, it is equally true that a defendant is presumed to be sane and to have been so at the time when the crime charged against him was committed; that is to say, the government is not bound, as a part of its proofs, to show, affirmatively, that the defendant was sane. As insanity is the exception, and most men are sane, the law presumes the latter condition of everybody until some reason is shown to believe the contrary. The burden is therefore on the defendant, who sets up insanity as an excuse for crime, to bring forward his proofs, in the first instance, to show that that presumption is a mistake as far as it relates to him.

The crime, then, involves three elements, viz.: The killing, malice, and a responsible mind in the murderer.

But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned, — *i.e.*, that the defendant is innocent till he is proved guilty, and that he is and was sane, unless evidence to the contrary appears, — and considering the whole evidence in the case, still entertain what is called a reasonable doubt, on any ground (either as to the killing, or the responsible condition of mind), whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal. But here it becomes important to explain to you, in the best way that I can, what is a reasonable doubt. I can hardly venture to give you an exact definition of the terms, for I do not know of any successful attempt to do so. As to questions

The Phrase Defined.

relating to human affairs, a knowledge of which is derived from testimony, it is impossible to have the same kind of certainty which is created by scientific demonstration. The only certainty you can have is a moral certainty, which depends upon the confidence you have in the integrity of witnesses, and their capacity to know the truth. If, for example, facts not improbable are attested by numerous witnesses who are credible, consistent, and uncontradicted, and who had every opportunity of knowing the truth, a reasonable or moral certainty would be inspired by their testimony. In such case, a doubt would be unreasonable, or imaginary, or speculative, which the books say it ought not to be. And it is not a doubt whether the party may not *possibly* be innocent in the face of strong proof of his guilt, but a sincere doubt whether he has been proved guilty, that is called reasonable. And even where the testimony is contradictory, so much more credit may be due to one side than the other, that the same result will be produced. On the other hand, the opposing proofs may be so nearly balanced that the jury may justly doubt on which side lies the truth, and, in such case, the accused party is entitled to the benefit of the doubt. As certainty advances, doubt recedes. If one is reasonably certain, he cannot, at the same time, be reasonably doubtful, *i.e.*, have a reasonable doubt, of a fact. All that a jury can be expected to do is to be reasonably or morally certain of the fact which they declare by their verdict. As Chief Justice Shaw says, in *Com.* v. *Webster*:[1] "For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

With regard to the evidence in this case, very little comment is required from the court, except upon one question, the others being hardly matters of dispute. That the defendant fired at and shot the deceased President is abundantly proved, if you believe the testimony. That the wound caused the death has been testified to by the surgeons most competent to speak on that subject, and they are uncontradicted. That the homicide was committed with malice aforethought, if the defendant was capable of criminal intent and malice, can hardly be gainsaid if you will bear in mind what I have already said. It is not necessary to prove that any special and express hatred or malice was

[1] 5 Cush. 320.

entertained by the accused towards the deceased. It is sufficient to prove that the act was done with deliberate intent, as distinct from an act done under the sudden impulse of passion, and in the heat of blood, and without previous malice. Evidence has been exhibited to you tending to show that the defendant, in his own handwriting, admitted that he had conceived the idea of removing the President, as he calls it, some six weeks before the shooting, and had deliberated upon it, and come to a determination to do it, and that about two weeks before he accomplished it, he stationed himself for the purpose, but some relentings delayed the attempt. His preparation for it by the purchase of the pistol has been detailed to you. All these facts, if believed by you, come up to the full measure of proof required to establish what the law denominates *malice aforethought*. And thus, I apprehend, that you will have little difficulty in reaching a conclusion as to all the elements that make up the crime charged in the indictment, unless it be the one of "sound memory and discretion," as it is called, which is only a technical expression for a sound mind. We now approach the difficult question in this case.

I have said that a man who is insane, in a sense that makes him irresponsible, cannot commit a crime. The defence of insanity has been so abused as to be brought into great discredit. It has been the last resort in cases of unquestionable guilt, and has been the excuse to juries for acquittal, when their own and the public sympathy have been with the accused, and especially when the provocation to homicide has excused it according to public sentiment, but not according to law. For these reasons it is viewed with suspicion and disfavor whenever public sentiment is hostile to the accused. Nevertheless, if insanity be established to the degree that has been already, in part, and will hereafter further be explained, it is a perfect defence to an indictment for murder, and must be allowed full weight.

Now, it is first to be observed that we are not troubled in this case with any question about what may be called *total* insanity, such as raving mania, or absolute imbecility, in which all exercise of reason is wanting, and there is no recognition of persons or things, or their relations. But there is a debatable border-line between the sane and the insane, and there is often great difficulty in determining on which side of it a party is to be placed. There are cases in which a man's mental faculties generally seem to be in full vigor, but on some one subject he seems to be deranged. He is possessed, perhaps, with a belief which every one recognizes as absurd, which he has not reasoned himself into, and cannot be reasoned out of, which we call an *insane*

Crime Must be Result of Insanity

delusion, or he has, in addition, some morbid propensity, seemingly in harsh discord with the rest of his intellectual and moral nature. These are cases of what, for a better term, is called partial insanity. Sometimes its existence, and at other times its limits, are doubtful and undefinable. And it is in these cases that the difficulty arises of determining whether the patient has passed the line of moral or legal accountability for his actions.

You must bear in mind that a man does not become irresponsible by the mere fact of being partially insane. Such a man does not take leave of his passions by becoming insane, and may retain as much control over them as in health. He may commit offences, too, with which his infirmity has nothing to do. He may be sane as to his crime, understand its nature, and be governed by the same motives in regard to it as other people; while, on some other subject, having no relation to it whatever, he may be subject to some delusion. In a reported case, a defendant was convicted of cheating by false pretences, but was not saved from punishment by his insane delusion that he was the lawful son of a well known prince. The first thing, therefore, to be impressed upon you is, that wherever this partial insanity is relied on as a defence, it must appear that the crime charged was the product of the delusion, or other morbid condition, and connected with it as effect with cause, and not the result of sane reasoning or natural motives, which the party may be capable of, notwithstanding his circumscribed disorder. The importance of this will be appreciated by you further on.

But, assuming that the infirmity of mind has had a direct influence in the production of crime, the difficulty is to fix the degree and character of the disorder which, in such case, will create irresponsibility in law. The outgivings of the judicial mind on this subject have not always been entirely satisfactory or in harmony with the conclusions of medical science. Courts have, in former times, undertaken to lay down a law of insanity without reference to and in ignorance of the medical aspects of the subject, when it could only be properly dealt with through a concurrent and harmonious treatment by the two sciences of law and medicine. They have, therefore, adopted and again discarded one theory after another in the effort to find some common ground where a due regard for the security of society and humanity for the afflicted may meet. It will be my effort to give you the results most commonly accepted by the courts.

It may be well to say a word as to the evidence by which courts and juries are guided in this difficult and delicate inquiry. That subtle

essence which we call "mind" defies, of course, ocular inspection. It can only be known by its outward manifestations, and they are found in the language and conduct of the man. By these his thoughts and emotions are read, and according as they conform to the practice of people of sound mind, who form the large majority of mankind, or contrast harshly with it, we form our judgment as to his soundness of mind. For this reason evidence is admissible to show conduct and language at different times and on different occasions, which indicate to the general mind some morbid condition of the intellectual powers; and the more extended the view of the person's life the safer is the judgment formed of him. Everything relating to his physical and mental history is relevant, because any conclusion as to his sanity must often rest upon a large number of facts. As a part of the language and conduct, letters spontaneously written afford one of the best indications of mental condition. Evidence as to insanity in the parents and immediate relatives is also pertinent. It is never allowed to infer insanity in the accused from the mere fact of its existence in the ancestors. But when testimony is given directly tending to prove insane conduct on the part of the accused, this kind of proof is admissible as corroborative of the other. And, therefore, it is that the defence have been allowed to introduce evidence to you covering the whole life of the accused, and reaching to his family antecedents.

In a case so full of detail as this I should deem it my duty to you to assist you in weighing the evidence by calling your attention to particular parts of it. But I wish you distinctly to understand that it is your province and not mine, to decide upon the facts, and if I, at any time, seem to express or intimate an opinion on them, which I do not design to do, it will not be binding on you, but you must draw your own conclusions from the evidence.

The instructions that have been given you import, in substance, that the true test of criminal responsibility, where the defence of insanity is interposed, is whether the accused had sufficient use of his reason to understand the nature of the act with which he is charged, and to understand that it was wrong for him to commit it; that if this was the fact he is criminally responsible for it, whatever peculiarities may be shown about him in other respects; whereas, if his reason was so defective, in consequence of mental disorder, generally supposed to be caused by brain disease, that he could not understand what he was doing, or that what he was doing was wrong, he ought to be treated as an irresponsible person.

Now, as the law assumes every one at the outset to be sane and re-

Or Absence of Motive no Presumption of Insanity.

sponsible, the question is, what is there in this case to show the contrary as to this defendant? A jury is not warranted in inferring that a man is insane from the mere fact of his committing a crime, or from the enormity of the crime, or from the *mere apparent* absence of adequate motive for it, for the law assumes that there is a bad motive — that it is prompted by malice — if nothing else appears. Perhaps the easiest way for you to examine into this subject is, *first*, to satisfy yourselves about the condition of the prisoner's mind for a considerable period of time before any conception of the assassination entered it, and at the present time, and then to consider what evidence exists as to a different condition at the time of the act charged. I shall not spend any time on the first question, because to examine it at all would require a review of evidence relating to over twenty years of the defendant's life, and this has been so exhaustively discussed by counsel that anything I could say would be a wearisome repetition. Suffice it to say, that, on one side, this evidence is supposed to show a chronic condition of insanity for many years before the assassination; and, on the other, to show an exceptionally quick intellect and decided power of discrimination. You must draw your conclusions from the evidence. Was his ordinary, permanent, chronic condition of mind such, in consequence of disease, that he was unable to understand the nature of his actions, or to distinguish between right and wrong in his conduct? Was he subject to insane delusions that destroyed his power of so distinguishing? And did this continue down to and embrace the act for which he is tried? If so he was simply an irresponsible lunatic. Or, on the other hand, had he the ordinary intelligence of sane people, so that he could distinguish between right and wrong, as to his own actions? If another person had committed the assassination, would he have appreciated the wickedness of it? If he had had no special access of insanity impelling him to it, as he claims was the case, would he have understood the character of such an act, and its wrongfulness if another person had suggested it to him? If you can answer these questions in your own minds it may aid you towards a conclusion as to the normal or ordinary condition of the prisoner's mind before he thought of this act; and if you are satisfied that his chronic or permanent condition was that of sanity, at least so far that he knew the character of his own actions, and whether they were right or wrong, and was not under any permanent insane delusions which destroyed his power of discriminating between right and wrong, as to them, then the only inquiry remaining is whether there was any special insanity connected with this crime; and what I shall further say will be on the assumption that you find his general condition to have been that of san-

ity to the extent I have mentioned. On this assumption it will be seen that the reliance of the defence is on the existence of an insane delusion in the prisoner's mind, which so perverted his reason as to incapacitate him from perceiving the difference between right and wrong as to this particular act.

As a part of the history of judicial sentiment on this snbject, and by way of illustrating the relation between insane delusions and responsibility, I will refer to a celebrated case in English history already freely commented on in argument. Nearly forty years ago, one McNaghten was tried in England for killing a Mr. Drummond, private secretary of Sir Robert Peel, mistaking him for the premier himself. He was acquitted on the ground of insanity, and his acquittal caused so much excitement that the House of Lords addressed certain questions to the judges of the superior courts of England in regard to the law of insanity in certain cases, and their answers have been since regarded as settling the law on this subject in England, and, with some qualification have been approved in the courts of this country. One of the questions was: —

"If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?"

To which it was answered, that —

"In case he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with regard to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, *in self-defence*, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him *in revenge* for such supposed injury, he would be liable to punishment."

This, you will understand, was because it was excusable to kill in self-defence, but not to kill in revenge for an injury.

This has been in part recognized as law in this country. Thus Chief Justice Shaw, of Massachasetts, in the case of *Commonwealth* v. *Rogers*,[1] says: —

"Monomania may operate as an excuse for a criminal act" when the "delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act: as when the belief is that the party killed had an

[1] 7 Metc. 500.

immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is, where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."

The cases I have referred to furnish an introduction to the subject of insane delusions, which plays an important part in this case, and demands careful consideration. We find it treated, to a limited extent, in judicial decisions, but learn more about it from works on medical jurisprudence and expert testimony. Sane people are said sometimes to have delusions, proceeding from temporary disorder and deception of the senses, and they entertain extreme opinions which are founded upon insufficient evidence, or result from ignorance, or they are speculations on matters beyond the scope of human knowledge; but they are always susceptible of being corrected and removed by evidence and argument.

But the *insane delusion*, according to all testimony, seems to be an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or, at least, impossible under the circumstances of the individual. A man, with no reason for it, believes that another is attempting his life, or that he himself is the owner of untold wealth, or that he has invented something which will revolutionize the world, or that he is President of the United States, or that he is God or Christ, or that he is dead, or that he is immortal, or that he has a glass arm, or that he is pursued by enemies, or that he is inspired by God to do something. In most cases, as I understand it, the fact believed is something affecting the senses. It may also concern the relations of the party with others. But generally the delusion centres around himself, his cares, sufferings, rights, and wrongs. It comes and goes independently of the exercise of will and reason, like the phantasms of dreams. It is, in fact, the waking dream of the insane, in which facts present themselves to the mind as real, just as objects do to the distempered vision in *delirium trèmens*. The important thing is that an insane delusion is never the result of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them. A man may reason himself, and be reasoned by others, into absurd opinions, and may be persuaded into impracticable schemes and vicious resolutions, but he cannot be reasoned or persuaded into insanity or insane delusions. Whenever convictions are founded on evidence, on comparison of facts and opinions and arguments, they are not insane delusions.

The insane delusion does not relate to mere sentiments or theories or abstract questions in law, politics, or religion. All these are the subjects of *opinions*, which are beliefs founded on reasoning and reflection. These opinions are often absurd in the extreme. Men believe in animal magnetism, spiritualism, and other like matters, to a degree that seems unreason itself, to most other people. And there is no absurdity in relation to religious, political, and social questions that has not its sincere supporters. These opinions result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient *data*, ignorance of men and things, credulous dispositions, fraudulent imposture, and often from perverted moral sentiments. But still, they are *opinions*, founded upon some kind of evidence, and liable to be changed by better external evidence or sounder reasoning. But they are not insane delusions.

Let me illustrate further: A man talks to you so strongly about his intercourse with departed spirits that you suspect insanity. You find, however, that he has witnessed singular manifestations, that his senses have been addressed by sights and sounds, which he has investigated, reflected on, and been unable to account for, except as supernatural. You see, at once, that there is no insanity here; that his reason has drawn a conclusion from evidence. The same man, on further investigation of the phenomena that staggered him, discovers that it is all an imposture and surrenders his belief. Another man, whom you know to be an affectionate father, insists that the Almighty has appeared to him and commanded him to sacrifice his child. No reasoning has convinced him of his duty to do it, but the command is as real to him as my voice is now to you. No reasoning or remonstrance can shake his conviction or deter him from his purpose. This is an insane delusion, the coinage of a diseased brain, as seems to be generally supposed, which defies reason and ridicule, which palsies the reason, blindfolds the conscience, and throws into disorder all the springs of human action.

Before asking you to apply these considerations to the facts of this case let me premise one or two things.

The question for you to determine is, what was the condition of the prisoner's mind at the time when this tragedy was enacted? If he was sufficiently sane *then* to be responsible, it matters not what may have been his condition before or after. Still, evidence is properly admitted as to his previous and subsequent conditions, because it throws light, prospectively and restrospectively upon his condition at the time. Inasmuch as these disorders are of gradual growth and indefinite continuance. if he is shown insane shortly before or after the commission of

the crime, it is natural to *conjecture*, at least, that he was so at the time. But all the evidence must centre around the time when the deed was done. You have heard a good deal of evidence respecting the peculiarities of the prisoner through a long period of time before this occurrence, and it is claimed that he was, during all that time, subject to delusions calculated to disturb his reason and throw it from its balance. I only desire to say here that the only materiality of that evidence is in the probability it may afford of the defendant's liability to such disorder of the mind, and the corroboration it may yield to other evidence which may tend directly to show such disorder at the time of the commission of the crime.

A few words may assist you in applying to the evidence what I have thus stated.

You are to determine whether, at the time when the homicide was committed, the defendant was laboring under any insane delusion prompting and impelling him to the deed. Very naturally you look first for any explanation of the act which may have been made by the defendant himself at the time or immediately before and after. You have had laid before you, especially, several papers which were in his possession, and which purport to assign the motives for his deed. In the address to the American people of June 16th, which seems most fully to set forth his views, he says: —

"I conceived the idea of removing the President four weeks ago. Not a soul knew of my purpose. *I conceived the idea myself* and kept it to myself. I read the newspapers *carefully*, *for* and *against* the administration, and *gradually the conviction dawned on me that the President's removal was a political necessity*, because he proved a traitor to the men that made him, and thereby imperilled the life of the Republic."

Again: —

"Ingratitude is the basest of crimes. That the President, under the manipulation of his Secretary of State, has been guilty of the basest ingratitude to the stalwarts, admits of no denial. The expressed purpose of the President has been to crush Gen. Grant and Senator Conkling, and thereby open the way for his renomination in 1884. In the President's madness he has wrecked the once grand old Republican party, *and for this he dies.*" * * *

Again: —

"This is not murder. It is a political necessity. It will make my friend Arthur President, and save the Republic," etc.

The other papers are of similar tenor, as I think you will find.

There is evidence that, when arrested, the prisoner refused to talk,

but said that the papers would explain all. On the night of the assassination, according to the witness James J. Brooks, the prisoner said to him that he had thought over it and prayed over it for weeks, and the more he thought and prayed over it the more satisfied he was that he had to do this thing. He *had made up his mind that he had done it as a matter of duty;* * * * he made up his mind that they (the President and Mr. Blaine) were conspiring against the liberties of the people, and that the President must die. This is all that the evidence shows as to the prisoner's utterances about the time of the shooting. In addition to this you have the very important testimony of the witness, Joseph S. Reynolds, as to the prisoner's statements, oral and written, made about a fortnight after the shooting. If you credit this testimony you find him reiterating the statements contained in the other papers, but, perhaps, with more emphasis and clearness. He is represented as saying *that the situation at Albany suggested the removal of the President*, and as the factional fight became more bitter, he became more decided. He knew that Arthur would become President, and that would help Conkling, etc. *If he had not seen that the President was doing a great wrong to the stalwarts, he would not have assassinated him.*

In the address to the American people, then written, he says: —

"*I now wish to state distinctly why I attempted to remove the President.* I had read the newspapers *for and against* the administration, very carefully, for two months, before I conceived the idea of removing him. *Gradually, as the result of reading the newspapers*, the idea settled on me that if the President was removed it would unite the two factions of the Republican party, and thereby save the government from going into the hands of the ex-rebels and their Northern allies. *It was my own conception*, and, *whether right or wrong, I take the entire responsibility.*"

A second paper, dated July 19th, addressed to the public, reiterates this and concludes, "Whether he lives or dies. I have got the inspiration worked out of me."

We have now before us everything emanating from the prisoner about the time of the shooting and within a little over a fortnight afterwards. We have nothing further from him until over three months afterwards. Let us pause here to consider the import of all this.

You are to consider, first, whether this evidence fairly represents the true feelings and ideas which governed the prisoner at the time of the shooting. If it does, it represents a state of things which I have not seen characterized in any judicial utterance or authoritative work as an

insane delusion. You are to consider whether it is so described in the evidence, or does not, on the contrary, show a deliberate process of reasoning and reflection, upon argument and evidence for and against, resulting in an *opinion* that the President had betrayed his party, and that if he were out of the way it would be a benefit to his party, and save the country from the predominance of their political opponents. So far there was nothing insane in the *conclusion*. It was, doubtless, shared by a great many others. But the difference was that the prisoner, according to his revelations, went a step further, and reached the *conviction* that to put the President out of the way by assassination was a political necessity. When men reason the law requires them to reason correctly, as far as their practical duties are concerned. When they have the *capacity* to distinguish between right and wrong, they are bound to do it. Opinions, properly so called, — *i.e.*, beliefs resulting from reasoning, reflection, or examinatlon of evidence, — afford no protection against the penal consequences of crime. A man may believe a course of action to be right, and the law, which forbids it, to be wrong. Nevertheless, he must obey the law, notwithstanding his convictions. And nothing can save him from the consequences of its violation, except the fact that he is so crazed by disease as to be unable to comprehend the necessity of obedience to it. The Mormon prophets profess to be inspired, and to believe in the duty of plural marriages, although it was forbidden by a law of the United States. One of the sect violated the law, and was indicted for it. The judge who tried him instructed the jury —

"That if the defendant, under the influence of a religious belief that it was right, — under an inspiration, if you please, that it was right, — deliberately married a second time, having a first wife living, the want of consciousness of evil intent, the want of understanding that he was committing a crime, did not excuse him."

And the Supreme Court of the United States, to which the case went, under the title of *Reynolds* v. *U. S.*,[1] in approving this ruling, said: —

"Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interefere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the

[1] 98 U. S. 145.

civil government to prevent her carrying her belief into practice- So, here, as a law of the organization of society, under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed, can a man excuse his practice to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name, under such circumstances."

And so, in like manner, I say, a man may reason himself into a conviction of the expediency and patriotic character of political assasination, but to allow him to find shelter from punishment behind that belief, as an insane delusion, would be simply monstrous.

Between one and two centuries ago there arose a school of moralists who were accused of maintaining the doctrine that whenever an end to be attained is right, any means necessary to attain it would be justifiable. They were accused of practising such a process of reasoning as would justify every sin in the decalogue when occasion required it. They incurred the odium of nearly all Christendom in consequence. But the mode of reasoning attributed to them would seem to be impliedly, if not expressly, reproduced in the papers written by the defendant and shown in evidence: —

"It would be a right and patriotic thing to unite the Republican party and save the republic. Whatever means may be necessary for that object would be justifiable. The death of the President by violence is the only and therefore the necessary means of accomplishing it, and therefore it is justifiable. Being justifiable as a political necessity, it is not murder."

Such seems to be the substance of the ideas which he puts forth to the world as his justification in these papers. If this is the whole of his position, it presents one of those vagaries of opinion for which the law has no toleration, and which furnishes no excuse whatever for crime.

This, however, is not all that the defendant now claims. There is, undoubtedly, a form of *insane delusion*, consisting of a belief by a person that he is inspired by the Almighty to do something, — to kill another, for example, — and this delusion may be so strong as to impel him to the commission of a crime. The defendant, in this case, claims that he labored under such a delusion and impulse, or pressure, as he calls it, at the time of the assassination.

The prisoner's unsworn declarations, since the assassination, on this subject, in his own favor, are, of course, not evidence, and are not to be considered by you. A man's language, when sincere, may be evidence

Sane Belief.

of the condition of his mind when it is uttered, but it is not evidence in his favor of the facts declared by him, or as to his previous acts or condition. He can never manufacture evidence in this way in his own exoneration.

It is true that the law allows a prisoner to *testify* in his own behalf, and thereby makes his sworn testimony on the witness-stand legal evidence, to be received and considered by you, but it leaves the weight of that evidence to be determined by you also. I need hardly say to you that no verdict could safely be rendered upon the evidence of the accused party only, under such circumstances. If it were recognized, by such a verdict, that a man on trial for his life could secure an acquittal by simply testifying, himself, that he had committed the crime charged under a delusion, an inspiration, an irresistible impulse, this would be to proclaim an universal amnesty to criminals in the past, and an unbounded license for the future, and the courts of justice might as well be closed.

It must be perfectly apparent to you that the existence of such a delusion can be best tested by the language and conduct of the party immediately before and at the time of the act. And while the accused party cannot make evidence *for* himself by his subsequent declarations, on the other hand, he may make evidence *against* himself, and when those declarations amount to admissions against himself, they are evidence to be considered by a jury.

Let me here say a word about the characteristics of this form of delusion. It is easy to understand that the conceit of being inspired to do an act may be either a sane belief or an insane delusion. A great many Christians believe, not only that events generally are providentially ordered, but that they themselves receive special providential guidance and illumination in reference to both their inward thoughts and outward actions, and, in an undefined sense, are inspired to pursue a certain course of action; but this is a mere sane belief, whether well or ill founded. On the other hand, if you were satisfied that a man sincerely, though insanely, believed that, like Saul of Tarsus, on his way to Damascus, he had been smitten to the earth, had seen a great light shining around him, and heard a voice from heaven, warning and commanding him, and that thenceforth, in reversal of his whole previous moral bent and mental convictions, he had acted upon this supposed revelation, you would have before you a case of imaginary inspiration amounting to an insane delusion. The question for you to consider is, whether the case of the defendant presents anything analogous to this. The theory of the government is that the defendant

committed the homicide in the full possession of his faculties, and from perfectly sane motives; that he did the act from revenge, or perhaps from a morbid desire for notoriety; that he calculated deliberately upon being protected by those who were politically benefited by the death of the President, and upon some ulterior benefit to himself; that he made no pretence to *inspiration* at the time of the assassination, nor until he discovered that his expectations of help from the so-called stalwart wing of the Republican party were delusive, and that these men were denouncing his deed, and that then, for the first time, when he saw the necessity of making out some defence, he broached this theory of inspiration and irresistible pressure, forcing him to the commission of the act. If this be true, you would have nothing to indicate the real motives of the act except what I have already considered. Whether it is true or not, you must determine from all the evidence.

It is true that the term "inspiration" does not appear in the papers first written by the defendant, nor in those delivered to Gen. Reynolds, except at the close of the one dated July 19th, in which he says that the *inspiration* is worked out of him; though what that means is not clear. It is true, also, that this was after, according to Gen. Reynolds, he had been informed how he was being denounced by the stalwart Republicans. In one of the first papers I have referred to, the President's removal was called an act of God, as were his nomination and election; but whether this meant anything more than that it was an act of God, in the sense in which all great events are said to be ordered by Providence, is not clear. Dr. Noble Young testifies that a few days after defendant's entrance into the prison — a time not definitely fixed — he told him he was inspired to do the act, but qualified it by saying that if the President should die he would be confirmed in his belief that it was an inspiration; but if not, perhaps not.

The emphatic manner in which, in both the papers delivered to Gen. Reynolds, the defendant declared that the assassination was his *own conception* and execution, and *whether right or wrong* he took the entire responsibility, his detailed description of the manner in which the idea occurred to him, and how it was strengthened by his reading, etc., and his omission to state anything about a direct inspiration from the Deity at that time, are all circumstances to be cousidered by you on the question whether he then held that idea. On the other hand, you have the prisoner's testimony in which he *now* asserts that he conceived himself to be under an inspiration at the time. He also advanced this claim in his interviews with the expert witnesses shortly before the trial.

It becomes necessary, then, to examine the case on the assumption

that the prisoner's testimony may be true, and to ascertain from his declaration and testimony what kind of inspiration it is which he thus asserts.

According to the testimony of Dr. Strong, he inquired of the defendant if he claimed to have had any direct revelation from heaven, and the answer was that he *did not believe in any such nonsense.* According to Dr. McDonald, who interviewed the prisoner on the thirteenth of November, he did not then, in terms, speak of his idea of removing the President as an inspiration, but as a conception of his own, and said that, after conceiving the idea, he tried to put it aside; that it was repulsive to him at first; that he waited a week or two, thinking over it and waiting for the Almighty to interfere. He had conceived the idea himself, but he wished the Almighty to have the opportunity of interfering to prevent its execution; and at the end of two weeks, no interference coming from the Almighty, he formed the deliberate purpose of executing the act, etc. According to the testimony of Dr. Gray, the prisoner said that he had received no instructions, heard no voice of God, saw no vision in the night, or at any time; that the idea came into his own mind first, and after thinking over it and reading the papers, when he arrived at the conclusion to do the act, he *believed then* it was a right act, and was justified by the political situation. When asked how he could apply this as an instruction from the Deity, he said it was a *pressure* of the Deity; *that this duty of doing it, as he claimed, had pressed him to it.* Again, he said *he had not connected the Deity with the inception and development of the act; that it was his own.* He did not get the inspiration until the time came for it, and that the inspiration came when he had reached the conclusion and determination to do the act. Perhaps the most remarkable of the prisoner's statements to Dr. Gray was that at the very time when he was planning the assassination, he was also devising a theory of insanity which should be his defence, which theory was to be that he believed the act of killing was an inspired act. Perhaps equally remarkable was the prisoner's theory propounded in this conversation, viz., that he was not *medically* insane, but *legally* so, *i.e.*, *irresponsible*, because the act was done *without malice.*

Finally, on this subject, you have the defendant's own testimony. He does not profess to have had any visions or direct revelation or distorted conception of facts. But he says that while pondering over the political situation the idea suddenly occurred to him that if the President were out of the way the dissensions of his party would be healed; that he read the papers with an eye on the possibility of the President's removal, and the idea kept pressing on him; that he was horrified; kept

throwing it off; did not want to give it attention; tried to shake it off; but it kept growing upon him, so that at the end of two weeks his mind was thoroughly fixed as to the necessity for the President's removal and the divinity of the inspiration. He never had the slightest doubt of the divinity of the inspiration from the first of June. He kept praying about it, and that if it was not the Lord's will that he should remove the President there would be some way by which his providence would intercept the act. He kept reading the newspapers, and his inspiration was *being confirmed every day, and since the* first day of June he has never had a doubt about the divinity of the act. In the cross-examination he said: If the political necessity had not existed the President would not have been removed — there would have been no necessity for the inspiration. About the first of June he made up his mind as to the inspiration of the act, and the necessity for it; from the sixteenth of June to the second of July, he prayed that *if he was wrong*, the Deity would stop him by his Provideuce; in May it was an embryo inspiration — a mere impression that possibly it might have to be done; he was doubting whether it was the Deity that was inspiring him, and was praying that the Deity would not let him make a mistake about it; and that at last it was the Deity, and not he, who killed the President. Again, the confirmation that it was the Deity, and not the devil, who inspired the idea of removing the President, came to him in the fact that the newspapers were all denouncing the President. He saw that the political situation required the removal of the President, and that is the way he knew that his intended act was inspired by the Deity; but for the political situation, he would have thought that it came from the devil. This is the substance of all that appears in the case on the subject of inspiration.

It is proper to call your attention to some variations in the prisoner's statements at different times. In two of the papers of July he says it *was his own conception*, and he took the *entire responsibility*. In the conversation reported by Dr. Gray, in November, he did not connect the Deity with the inception of the act. The conception was his own, and the inspiration came after he made up his mind; but he does not explain what he meant by the inspiration, unless it was that it was a pressure upon him, or, as he expresses it, the duty of doing it was pressing upon him. In his testimony *he disclaims all responsibility*, while he still speaks of the idea of removing the President as an impression which arose in his own mind first. He says that in his reflections about it he debated with himself whether it came from the Deity or the devil; prayed that God would prevent it if it was not His will; and finally

made up his mind, from a consideration of the political situation, that it was inspired by Him.

On all this the question for you is, whether, on the one hand, the idea of killing the President first presented itself to the defendant in the shape of a command or inspiration of the Deity, in the manner in which insane delusions of that kind arise, of which you have heard much in the testimony; or, on the other hand, it was a conception of his own followed out to a resolution to act; and if he thought at all about inspiration, it was simply a speculation or theory, or theoretical conclusion of his own mind, drawn from the expediency or necessity of the act, that his previously conceived ideas were inspired. If the latter is a correct representation of his state of mind, it would show nothing more than one of the same vagaries of reasoning that I have already characterized as furnishing no excuse for crime.

Unquestionably a man may be insanely convinced that he is inspired by the Almighty to do an act, to a degree that will destroy his responsibility for the act. But, on the other hand he cannot escape responsibility by baptizing his own spontaneous conceptions and reflections and deliberate resolves with the name of *inspiration.*

On the direct question whether the prisoner knew that he was doing wrong at the time of the killing, the only direct testimony is his own, to the contrary effect.

One or two circumstances may be suggested as throwing some light on the question. The declaration that, *right or wrong*, he took the responsibility, made shortly afterwards, may afford some indication whether the question of wrong had suggested itself. And his testimony that he was horrified when the idea of assassination first occurred to him, and he tried to put it away, is still more pertinent. His statement, testified to by Dr. Gray, that he was thinking of the defence of inspiration while the *assassination* was being planned, tends to show a knowledge of the *legal* consequences of the killing. His present statement, that no punishment would be too quick or severe for him if he killed the President otherwise than as agent of the Deity, shows a present knowledge of the wrongfulness of the act in itself; but this declaration is of value on this question of knowledge, only in case you should believe that he had the same appreciation of the act at the time of its commission and disbelieve his story about the inspiration.

I have said nearly all that I need say on the subject of insane delusion. The answer of the English judges, that I have referred to, has not been deemed entirely satisfactory, and the courts have settled down upon the question of knowledge of right and wrong as to the particular act, or

rather the capacity to know it as the test of responsibility; and the question of insane delusion is only important as it throws light upon the question of knowledge of, or capacity to know, the right and wrong. If a man is under an insane delusion that another man is attempting his life, and kills him in self-defence, he does not know that he is committing an unnecessary homicide. If a man insanely believes that he has a command from the Almighty to kill, it is difficult to understand how such a man can know that it is wrong for him to do it. A man may have some other insane delusion which would be quite consistent with a knowledge that such an act is wrong, — such as, that he had received an injury, — and he might kill in revenge for it, knowing that it would be wrong.

And I have dwelt upon the question of insane delusion, simply because evidence relating to that is evidence touching the defendant's power, or want of power, from mental disease, to distinguish between right and wrong, as to the act done by him, which is the broad question for you to determine, and because that is the kind of evidence on this question which is relied on by the defence.

It has been argued with great force, on the part of the defendant that there are a great many things in his conduct which could never be expected of a sane man, and which are only explainable on the theory of insanity. The very extravagance of his expectations in connection with this deed — that he would be protected by the men he was to benefit, would be applauded by the whole country when his motives were made known — has been dwelt upon as the strongest evidence of unsoundness. Whether this and other strange things in his career are really indicative of partial insanity, or can be accounted for by ignorance of men, exaggerated egotism, or perverted moral sense, might be a question of difficulty. And difficulties of this kind you might find very perplexing, if you were compelled to determine the question of insanity generally, without any rule for your guidance. But the only safe rule for you is to direct your reflections to the one question which is the test of criminal responsibility, and which has been so often repeated to you, viz., whether, whatever may have been the prisoner's singularities and eccentricities, he posssessed the mental capacity, at the time the act was committed, to know that it was wrong, or was deprived of that capacity by mental disease.

In all this matter there is one important distinction that you must not lose sight of, and you are to decide how far it is applicable to this case. It is the distinction between mental and moral obliquity; between a mental incapacity to understand the distinctions between right

Evidence of Prisoner's Life Relevant.

and wrong, and a moral indifference and insensibility to those distinctions. The latter results from a blunted conscience, a torpid moral sense, or depravity of heart; and sometimes we are not inapt to mistake it for evidence of something wrong in the mental constitution. We have probably all known men of more than the average of mental endowments, whose whole lives have been marked by a kind of moral obliquity and apparent absence of the moral sense. We have known others who have first yielded to temptation with pangs of remorse, but each transgression became easier, until dishonesty became a confirmed habit, and at length all sensitiveness of conscience disappeared. When we see men of seeming intelligence and of better antecedents reduced to this condition, we are prone to wonder whether the balance-wheels of the intellect are not thrown out of gear. But indifference to what is right is not ignorance of it, and depravity is not insanity, and we must be careful not to mistake moral perversion for mental disease.

Whether it is true or not that insanity is a disease of the physical organ, the brain, it is clearly in one sense a disease, when it attacks a man in his maturity. It involves a departure from his normal and natural condition. And this is the reason why an inquiry into the man's previous condition is so pertinent, because it tends to show whether what is called an act of insanity is the natural outgrowth of his disposition or is utterly at war with it, and therefore indicates an unnatural change. A man who is represented as having been always an affectionate parent and husband, suddenly kills wife and child. This is something so unnatural for such a man that a suspicion of his insanity arises at once. On further inquiry we learn that, instead of being as represented, the man was always passionate, violent, and brutal in his family. We then see that the act was the probable result of his bad passions, and not of a disordered mind. Hence the importance of viewing the moral as well as intellectual side of the man, in the effort to solve the question of sanity.

That evidence on this subject is proper was held by the Supreme Judicial Court of New Hampshire in *State* v. *Jones*.[1] Judge Ladd said: —

"The history of the defendant and evidence of his conduct at various times during a period of many years before the act for which he was tried, tending to show his temper, disposition, and character, were admitted against his objection. It was for the jury to say whether the act was the product of insanity, or the naturally malignant and vicious

[1] 50 N. H. 369.

heart. The condition of the man's mind, whether healthy or diseased, was the very matter in issue. This must be determined in some way or other from external manifestations as exhibited in his conduct. To know whether an act is the product of a diseased mind it is important to ascertain, if possible, how the same mind acts in a state of health. The condition of sanity or insanity shown to exist at one time is presumed to continue. For these reasons and others, which I have not thought it necessary to enlarge upon, it would seem that evidence tending to show defendant's mental and moral character and condition for many years before the act, was properly received."

It was upon the principle enunciated in this case that evidence was received in the present case tending to show the moral character of the accused, and offered for the purpose of showing that eccentricities relied on as proof of unsound mind were accounted for by want of moral principle.

From the materials that have been presented to you two pictures nave been drawn by counsel. The one represents a youth of more than the average of mental endowments, surrounded by certain demoralizing influences at a time when his character was being developed; starting in life without resources, but developing a vicious sharpness and cunning; conceiving "enterprises of great pith and moment," that indicated unusual forecast, though beyond his resources; consumed all the while by insatiate vanity and craving for notoriety; violent in temper, selfish in disposition, immoral, and dishonest in every direction; leading a life, for years, of hypocrisy, swindling, and fraud; and finally, as the culmination of a depraved career, working himself into a resolution to startle the country with a crime that would secure him a bad eminence, and, perhaps, a future reward. The other represents a youth born, as it were, under malign influences, the child of a diseased mother, and a father subject to religious delusions; deprived of his mother at an early age; reared in retirement and under the influence of fanatical religious views; subsequently, with his mind filled with fanatical theories, launched upon the world with no guidance save his own impulses; then evincing an incapacity for any continuous occupation; changing from one pursuit to another — now a lawyer, now a religionist, now a politician — unsuccessful in all; full of wild, impracticable schemes, for which he had neither resources nor ability; subject to delusions about his abilities and prospects of success, and his relations with others; his mind incoherent and incapable of reasoning connectedly on any subject; withal, amiable, gentle, and not aggressive, but the victim of surrounding influences, with a mind so weak and a temperament so impressible

that, under the excitement of political controversy, he became frenzied and insanely deluded, and thereby impelled to the commission of a crime, the guilt of which he could not, at the moment, understand.

It is for you to determine which of these is the portrait of the accused.

Before saying a last word my attention has just been called to, and I have been requested by counsel for the defendant to give, certain additional instructions. One is: —

"It is the duty of each juror to consider the evidence, all pertinent remarks of counsel, and all the suggestions of fellow-jurors, but to disregard all statements of counsel and declarations of the prisoner except such as are founded upon the evidence."

Of course, that is a truism, and does not require any particular instruction.

"The testimony of the prisoner they will weigh as to credibility, and judge of by the same rules and considerations applied to that of other witnesses."

That is all true, provided that all the influences that governed the prisoner are duly weighed and considered.

"And after all, each juror should decide for himself upon his oath as to what his verdict should be. No juror should yield his deliberate, conscientious conviction as to what the verdict should be, either at the instance of a fellow-juror or at the instance of a majority. Above all, no juror should yield his honest convictions for the sake of unanimity, or to avert the disaster of a mistrial. Jurors have nothing to do with the consequences of their verdict."

All that, gentlemen, is true. Some of it is substantially embodied, I think, in what I have already said.

"The opinions of experts upon the question of the sanity or insanity of the prisoner on the second day of July last, which is the only date as to which it is necessary for the jury to agree upon, on that question, rests wholly upon the hypothetical questions proposed to them, and the jury must believe, from the evidence, that the supposed facts stated in a hypothetical question are true, to entitle the answer thereto to any weight."

I cannot give that one because I think their opinions may be founded upon other grounds than the assumed truth of the hypothetical question; or, at least, that is a question for the jury.

"The fact of insanity or sanity of the prisoner before or after the second day of July, 1881, is not in issue in this case, except as collateral to the main fact of sanity or insanity at the time of shooting of

President Garfield, on the second day of July, 1881; and the only evidence as to such main fact is in the testimony of the prisoner himself, his words and acts, and the testimony of the experts in answer to the hypothetical question."

That is, I think, one that I cannot give, because the question involved is one of fact for the jury.

And now, to sum up all that I have said in a few words: —

If you find from the whole evidence that, at the time of the commission of the homicide, the prisoner, in consequence of disease of mind, was laboring under such a defect of his reason that he was incapable of understanding what he was doing, or that it was wrong, — as for example, if he was under an insane delusion that the Almighty had commanded him to do the act, and in consequence of that he was incapable of seeing that it was a wrong thing to do, — then he was not in a responsible condition of mind, and was an object of compassion, and not of justice, and ought to be now acquitted. On the other hand if you find that he was under no insane delusion, such as I have described, but had possession of his faculties and the power to know that his act was wrong, and of his own free will, deliberately conceived, planned, and executed this homicide, then, whether his motive was personal vindictiveness or political animosity, or a desire to avenge a supposed political wrong, or a morbid desire for notoriety, or fanciful ideas of patriotism or of the divine will, or you are unable to discover any motive at all, the act is simply *murder*, and it is your duty to find him guilty.

Now, gentlemen, retire to your rooms and consider this matter, and make due deliberation in the case of the United States against Guiteau.

At this point (4 o'clock and 35 minutes P. M.) the jury retired to deliberate.

At 5 o'clock and 40 minutes the jury, accompanied by the marshal and bailiffs, returned to the box and were called, all answering to their names, as follows: —

John P. Hamlin, Frederick W. Brandenburg, Henry J. Bright, Charles T. Stewart, Thomas H. Langley, Michael Sheehan, Samuel F. Hobbs, George W. Gates, Ralph Wormley, William H. Brawner, Thomas Heinline, and Joseph Prather.

The Clerk. Gentlemen of the jury, have you agreed upon a verdict?

Mr. Hamlin (the foreman). We have.

The Clerk. What say you? Is the defendant guilty or not guilty?

Mr. Hamlin (the foreman). Guilty as indicted, sir.

[Great applause, with cries of "Silence?" from the bailiffs.]

Insane Delusion — Burden of Proof.

THE COURT. Gentlemen of the jury, I cannot express too much thanks to you, both in my own name and in the name of the public, for the diligence and fidelity with which you have discharged your duties; for the patience with which you have listened to this long mass of testimony, and the lengthy discussion by counsel; and for the patience with which you have borne with the privations and inconveniences incident to this trial. I am sure that you will take home with you the approval of your own consciences as you will have that of your fellow-citizens. With thanks and good wishes, I discharge you from any further service at this term of the court.

Thereupon (at 5 o'clock and 55 minutes P. M.) the court adjourned.

INSANE DELUSION — INSTRUCTIONS — INTOXICATION — COMMITTED INTENTIONALLY DOES NOT CHANGE GRADE OF CRIME — BURDEN OF PROOF.

STATE *v.* GUT.

[13 Minn. 343.]

In the Supreme Court of Minnesota, July, 1868.

Hon. THOMAS WILSON, *Chief Justice.*
" S. J. R. MCMILLAN, } *Associates.*
" JOHN M. BERRY, }

1. **Insane Delusion — Instructions.** — The court instructed the jury: "If the defendant has an insane delusion upon any one subject, but commits crime upon some other matter not connected with that particular delusion, he is equally guilty as if he had no delusion, and was perfectly sane. *Held*, proper.

2. **Intoxication — Committed Intentionally Does not Change Grade.** — Where a crime is committed intentionally as a matter of revenge, the intoxication of the prisoner does not change its grade.

3. **Burden of Proof.** — The defence of insanity must be made out to the satisfaction of the court.

The defendant was indicted, tried, and convicted of the murder of Charles Campbell. He appealed to this court.

Atwater & Flandrau for appellant.

F. R. E. Cornell, Attorney-General, for the State.

WILSON, C. J.

(Omitting rulings on other matters.)

The third charge is: "If the defendant has an insane delusion upon

any one subject, but commits crime in some other matter not connected with that particular delusion, he is equally as guilty as if he had no insane delusion and was perfectly sane." There is no error in this of which the defendant can complain. If such a state of mind as is supposed by the court may possibly exist, the charge is right; if not, the charge did not prejudice the defendant.

The fourth charge asked, and the comments thereon, are in these words: "That the defendant is not entitled to an acquittal on the ground of insanity, if, at the time of the alleged offence, he had capacity sufficient to enable him to distinguish between right and wrong as to the particular acts charged, and understood the nature and consequences of his acts, and had mental power sufficient to apply that knowledge to his own case." The court, in commenting to the jury upon the meaning and application of this rule, said to them: "That whether the defendant, Gut, at the time of inflicting the blows upon the body of the deceased, knew that the natural or necessary consequences of his acts were to produce the death of the deceased, might be taken into consideration by them in determining whether he knew or understood the nature and consequences of his acts." The charge was correct.[1] The comments were not erroneous. The fact that the defendant knew at the time of inflicting the blows upon the deceased, that the natural and necessary consequences of his acts were to produce death, did not prove his sanity, but, we think, it was evidence, though very weak, to be considered by the jury in determining whether he knew the nature and consequences of his act.

The fifth charge was in these words: "That to reduce the crime of killing a human being from murder in the first degree to manslaughter, the provocation must be such as to excite a man of ordinarily cool, candid, and reasonable disposition to the heat of passion." Whether this is right or wrong we do not consider, for there is nothing in the case to show provocation of any kind. If there was no provocation, this is a mere abstract proposition that cannot possibly have prejudiced the defendant; if there was, it was for the defendant to show it; error will not be presumed. The exception to the sixth charge is abandoned, and any questions involved in the seventh have been before discussed.

The eighth charge is in the following language: "If the jury find from the evidence that the defendant, at the time of the killing of Campbell, was so drunk from the use of intoxicating liquors, not drunk with any view to the commission of said crime, as not to know what he was

[1] State v. Shippey, 10 Minn. 223.

Intoxicat.

doing, the jury cannot rightfully convict him of the charge in the indictment." But in modification or limitation of the foregoing charge the court instructed the jury, "That when the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated, cannot be allowed to affect the legal character of the crime. But where the circumstances are such as to raise the question whether the act was the result of design, or the impulse of sudden passion, the intoxication of the accused is a proper subject of consideration. That drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is in such cases whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication, than when he is sober. With regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man use a stick, you would not infer a malicious intent so strongly against him if drunk when he made an intemperate use of it, as you would if had used a different kind of weapon. But where a dangerous weapon is used, which if used must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent. That he who is in a state of voluntary intoxication should be subject to the same rule of conduct, and the same legal inferences as the sober man; but that where a provocation has been received which, if acted upon instantly, would mitigate the offence of a sober man, and the question in the case of a drunken man is whether the provocation was in truth acted upon, evidence of intoxication may be considered in deciding that question. But that in this case there is no proof of such a provocation."

The charge requested was correct.[1] If some of the modifications or limitations are inconsistent with it, this, according to our view of the case, is not a ground for reversal or new trial. Our statute declares the killing of a human being "when perpetrated with a premeditated design to effect the death of the person killed, or any human being," murder in the first degree; and where *this design is*, *in fact*, wanting, we hold that the crime is not murder of that degree. A party on trial for murder is not to be punished for intoxication. If he did not intend to do the act constituting the crime, he is not to be found guilty of *such intent*, however illegally or immorally he may otherwise have acted. It is recited in the bill of exceptions "that the said John Gut had been drinking, and was to some extent intoxicated on the 25th day of December, 1866, when

[1] State *v.* Garvey, 11 Minn. 154.

said Campbell was killed." And also that when he was reproved for the stabbing of the deceased, he replied: "These half breeds killed my best friend, John Spinner, and I will kill them; let me alone or I will stab you." It is with great hesitancy that we say in a criminal prosecution, and especially in a capital case, that any error did not prejudice the defendant; and where there is the least doubt as to its effect, we feel bound to give him the benefit of the doubt. But it appearing that the defendant was *intentionally* killed, or participated in the killing of the deceased as a matter of revenge, it is immaterial whether he was intoxicated or not. The crime would be the same in either case, there being criminal intent amounting to a premeditated design, and a criminal act. Besides, it does not appear that the defendant was, at the time the crime was committed, in such a state of intoxication as to render him incapable of forming a premeditated design. Hence, we conclude that the error in the charge, if there is error, cannot possibly have prejudiced the defendant, and therefore, that it is not ground for reversal.

The charge of the court "that insanity was a defence, and must be made out, from the evidence, to the satisfaction of the court, as any other defence," is in accordance with the decision in *Bonfanti's Case.*[1]

The charge of the court, and its refusals to charge on this point, were therefore, we think, unobjectionable. The views which we have above expressed cover all the questions raised by the defendant. We have discovered no substantial error. The theory and teachings of our law, as well as the dictates of humanity, require the courts to give to a person accused of a crime the benefit of *every doubt* that may exist, either as to the law or facts. But further than this, justice forbids, and mercy does not require them to go. Where there has been any error or irregularity that could possibly prejudice the defendant, it is ground for a reversal. But an error which is not a violation of any positive rule of law, and which could not possibly prejudice him, cannot, according to any rational rule render invalid the proceedings. The rule on this subject is clearly expressed in sect. 11, chap. 108, Gen. Stats., as follows: "No indictment is insufficient, nor can the trial, judgment, or other proceedings thereon, be affected, by reason of any defect or imperfection in the matter of form, which does not tend to prejudice the substantial rights of the defendant, upon its merits."

Judgment affirmed.

[1] 2 Minn. 131.

Insane Delusion — Test of Insanity.

TEST — INSANE DELUSION.

ROBERTS *v.* STATE.

[3 Ga. 310.]

In the Supreme Court of Georgia, August Term, 1847.

Hon. JOSEPH HENRY LUMPKIN,
" HIRAM WARNER, } *Judges.*
" EUGENIUS A. NISBET.

Particular Right and Wrong Test — Delusion. — If a man has not reason sufficient to enable him to distinguish between right and wrong in relation to the particular act, he is not punishable. Nor is he where, in consequence of some delusion, the will is overmastered and there is no criminal intent.

Indictment for assault with intent to murder one John Knight. The defence was insanity. The prisoner was convicted and sentenced to four years in the penetentiary.

T. P. Stubbs, for the prisoner; *McCune*, Solicitor General, for the State.

NISBET, J., delivered the opinion of the court.

[Omitting a ruling on another point.]

The record furnishes no evidence to rebut the presumption of malice, except what relates to the plea of insanity; it discloses no provocation, but on the contrary, the circumstances attending the killing, show in the language of the statute, an abandoned and malignant heart. The plea of insanity set up in this case, does not affect the question we are now considering. We consider it irrespective of that plea for the reason, that if the prisoner was not sane, he is wholly irresponsible and guiltless, not only of murder but of manslaughter. We have no fault to find with the decision of Judge FLOYD, upon this ground for a new trial, taken in the rule. The fourth and fifth grounds upon which the plaintiff in error relied in his rule for a new trial, and upon which he now relies before this court, relate to insanity, and may be united.

The court below charged the jury as follows: "A person, therefore, in order to be punishable by law, or in order that his punishment by law may operate as an example to deter others from committing criminal acts under like circumstances, must have sufficient memory, intelligence, reason, and will to enable him to distinguish between right and wrong, in regard to the particular act about to be done, to know and

understand that it will be wrong, and that he will deserve punishment by committing it.

"In order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient, that he has no will, no conscience, or contolling mental power, or if through the overwhelming power of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. If, therefore, you believe from the evidence, that at the time of committing the act, the defendant had memory and intelligence, *even a glimmering of reason*, sufficient to enable him to distinguish between right and wrong, in regard to the particular act about to be committed, to know and understand that it would be wrong, and that he would deserve punishment by committing it, you will find him guilty; otherwise you will find him not guilty."

The plaintiff excepts to the general proposition laid down by Judge Floyd, that if a man has sufficient memory, intelligence, reason, and and will, to distinguish between right and wrong as regards the particular act about to be done, he is liable to be punished. And also to the more specific proposition that a man who has even *a glimmering of reason* sufficient to enable him to distinguish between right and wrong in regard to the particular act about to be committed; to know and understand that it would be wrong, and that he would deserve punishment for committing it, is liable to be punished. I do not perceive that there is much difference between the two — I do not perceive, in fact, any difference between a man's having memory, intelligence, reason and will enough to distinguish between right and wrong in regard to a particular act, and a glimmering of reason sufficient for the same purpose. It would certainly be wrong to hold every poor idiot, lunatic or insane person responsible, who has even a glimmering of reason. That proposition would be inhuman, and is unsustained by authority; for almost all these stricken creatures have some faint glimmering of reason, but it may be very different, if the glimmering light of the mind is *sufficient* to enable them to distinguish between the right and the wrong of the act about to be committed. For the purpose of this review I shall consider Judge Floyd as ruling that if a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. He varies the same idea somewhat in the forms of expression used, no doubt for the purpose of being fully understood by the jury. But *that* is, I think, the rule which

he intended to lay down; and the question occurs, is that the true rule? We think that in this case it is.

I shall not attempt a review at large of the cases and learning to be found in the books upon the subject of insanity. I shall undertake only a brief statement of the general principles, which are at this day recognized, and particularly with a view to sustain the position taken in this case by the presiding judge. Any one conversant with the case cannot have failed to see, that this has been for courts and medical men and legal commentators, a difficult and perplexing subject. Whether a man is sane or not, whether partially or totally deranged, and if only in part deranged, where accountability to the laws shall begin, and where end, are questions of great and embarrassing subtlety. The laws of the sane mind are but little understood; much less are the laws, if indeed such phraseology is predicable of it of the unsound mind understood. We can judge of the one, by external developments, and by our own consciousness; of the other, only by external *indicia*. There are few men so balanced in intellect as not at some times and upon some subjects to approximate towards derangement. All men almost, have some train of thought in which the mind delights to run at a comparative abandonment of the ordinary routine of thought. Intellectual enthusiasm not unfrequently approaches the line of insanity. The numerous cases of mania or delusion which leave the mind sound in general, but as to certain things, shattered or wholly obliterated have increased the difficulty of any specific general rule as to the responsibility of those who are generally classed as insane. A crazy or partially deranged person, is a mystery; such a person is so by the visitation of God. The subject of insanity is not responsible — humanity, reason, the law so adjudges. To punish an insane man, would be to rebuke Providence. Hence, in all definitions of murder, of which I have knowledge, the requirement is found, that the slayer must be of sound mind. Our own statutory definition requires him to be "a person of sound memory and discretion." Accountability for crime presupposes a criminal intent, and that requires a power of reasoning upon the character and consequences of the act; a will subject to control. For this reason it is, that a homicide committed under the influence of uncontrollable passion is not murder. The reason is dethroned, the will is not subject to control, and in tenderness to human infirmity, he is considered as not having a malicious, murderous intent. The difficulty is to determine who is "a person of sound memory and discretion," who is incapable of a criminal intent, who is incapable of reasoning upon the character and consequences of the act, and who is without control over

his will. This is the work, that the labor. Men are, upon proof of the criminal act, presumed to be responsible, and, therefore, the burden of proving irresponsibility devolves upon the defendant.

One does not fail to perceive, also, in looking into this subject, that the rules now recognized as governing pleas of insanity are different from what they were in the time of Lord Coke, and indeed long subsequent to his day. The improvements in the science of medical jurisprudence, a more enlarged benevolence, and a clearer sense of Christian obligation, have relaxed the cruel severity of the earlier doctrines. The plea of insanity is now, as it ought to be, as much favored as any other plea resting upon the ground of reason and justice. Courts are not now afraid to trust the juries with the investigation of questions of insanity; nor are all cases now, as they once were, subjected to the application of one rule, unjust because of its sweeping generality. There was a time when the insane were looked upon as victims of Divine vengeance, and, therefore to be cast out of the protection of human laws, and beyond the pale of human sympathies. Not so now. The insane hospitals of our land, founded by provisions of public law, and by private charity, prove that the insane are the peculiar care of the State, as well as of private benevolence.

As late as 1723, it was held in England that for a man to be insane, he must have no more reason than a brute, an infant or wild beast.

It seems then to have been believed that for derangement to protect its subject from criminal responsibility, it must be total in its character; either manifesting itself in wild, ungovernable, and incongruous actions, or in stupid and passive imbecility. It seems not to have been then understood that men might ordinarily act sensibly and yet be insane; and reason acutely or learnedly upon most subjects, whilst they were upon some one or more totally deranged. This inhuman rule cut off from the benefits of this plea, all the partially insane, and admitted to its privileges only the raving maniac or the drivelling idiot.

The rule which I apprehend is now more universal than any other, is in substance the one given in charge by Judge Floyd to the jury. Mr. Chitty says: "In criminal cases the question is whether at the time the act was committed, the person was incapable of judging between right and wrong and did not then know that the act was an offence against the law of God and nature." [1]

Mr. Shelford thus states the rule: "If a person, liable to partial insanity which only relates to particular subjects or notions, upon which

[1] Chitty's Med. Jurisp., 345

he talks and acts like a madman, still has as much reason as enables him to distinguish between right and wrong, he will be liable to that punishment which the law attaches to his crime." [1]

In the case of Rogers, the Supreme Judicial Court of Massachusetts, lay down the rule in the following words: "A person, therefore, in order to be punished by law or in order that his punishment by law may operate as an example to deter others from committing criminal acts under like circumstances, must have sufficient memory, intelligence, reason, and will, to enable him to distinguish between right and wrong in regard to the particular act about to be done, to know and understand that it will be wrong, and that he will deserve punishment by committing it." This rule does not require total insanity like the one previously referred to, — derangement as to all subjects and in all actions, — but if the prisoner is perfectly sane as to all other things, and wants, as to the act about to be committed, reason enough to distingnish between the right and wrong of that act — if he does not know and understand that that act is wrong, and that he will deserve punishment for committing it, he is irresponsible. So, also, on the other hand, according to this rule the person may be deranged as to other things, yet if he has sufficient reason to distinguish as to the right and wrong of the particular act about to be committed, if he knows and understands that for committing that act, he will be liable to be punished, he is a responsible agent and ought to be convicted. Such is the rule adopted by the court below; it is sustained by great weight of authority, and as I shall show, is the only rule which was applicable to the facts of this case. But even this rule has undergone some modification. There are some exceptions to it; one, certainly, which was first established in the leading case of *King* v. *Hadfield*. The great speech of Mr. Erskine in defence of Hadfield, has shed new light upon the law of insanity. So conclusive was that celebrated argument, that it is now looked upon by the profession as authority. In the records of forensic eloquence, ancient and modern, nothing is to be found surpassing Erskine's defence of Hadfield, for condensation, perspicuity, and strength of reasoning, as well as for beauty of illustration and purity of style. In that case he assumed the position that a man might have reason sufficient to distinguish between the right and wrong of the act about to be committed and yet be irresponsible; that the mind might

[1] Shelf. on Lunacy, 4 58; Lord Ferrers' Case, 19 How. St. Tr., 947; Arnold's Case, 16 *Id.* 764; Parker's Case, 1; Collins on Lunacy, 477; Bellinghams's Case, *Ib.* 636; Offord's Case, 5 C. & P. 168; Rogers' Case, Abner Rogers' Trial, 275.

be cognizant of the distinction between right and wrong, as regards the act, and yet, by reason of some delusion, overmastering the will, there might be no criminal intent. To apply this proposition, it was admitted by Mr. Erskine that the act itself must be connected with the peculiar delusion under which the prisoner labors. This doctrine can be best understood by illustration, and it is illustrated by Hadfield's case. He had been a soldier in the British armies, and had received several severe wounds, one of which, on the head, it was thought, had injured the brain; and caused the derangement under which he suffered. He imagined that he had constant intercourse with the Almighty, that the world was coming to a conclusion, and like our blessed Savior, he was to sacrifice himself for its salvation. Unwilling to commit suicide, it was argued by Mr. Erskine, he sought to do an act which would forfeit his life to the law, and thus bring about the sacrifice which in his morbid imagination he held necessary to the salvation of the world. Under the influence of this delusion, he shot at the king in the theatre. Now in this case, it was not pretended that Hadfield was a raving maniac, or an imbecile idiot; nor was it contended that he was incapable of knowing that shooting a pistol at the king, would or might kill him, or that if he should kill the king that he would deserve death for the act (for that was really what he desired); or that he was incapable of distinguishing between the right and wrong of the act; but it was contended that the delusion under which he labored had so shattered his intellect as to control his will, and impel him resistlessly to the commission of the act, and therefore there was no criminal motive, no wicked or mischievous intent, and if these were wanting, he was irresponsible. To use the language of Mr. Erskine, "Reason is not driven from her seat, but distraction sits down upon it, along with her, holds her trembling upon it, and frightens her from propriety." Hadfield was acquitted, and since that day, the exception which his case established has been recognized.[1]

Thus far with safety we may assert that certain principles have been established; yet it is true that these rules do not govern all cases. It is conceded by the courts in England, practically if not in terms, that no rules can be so specific as to embrace the infinite variety of forms in which insanity or derangement may show itself; and that each case must depend very much upon the circumstances, facts and developments which attend it. Thus, Lord HALE says: "It is very difficult to define the invisible line that divides perfect and partial insanity. But it must

[1] See Erskine's speech in appendix to Cooper's Med. Jur., 27 How. St. Tr. 1281.

rest upon circumstances, duly to be weighed and considered by the judge and jury, lest on the one side there be a kind of inhumanity towards the defect of human nature, or on the other, too great indulgence be given to great crimes." So Taylor declares: "There are no certain legal or medical rules whereby homicidal mania may be detected. Each case may be determined by the circumstances which attend it." [1] In the opinion which C. J. DENMAN, gave before the House of Lords in 1843, although adhering to the old rules he says: "It is difficult to lay down any abstract rule on the subject applicable to all cases, and each case must be decided, in great measures upon the facts and circumstances peculiar to it, under the discretion of the court.

In the case at this bar, the evidence shows no particular delusion to control the will "sitting upon reason's seat and holding her trembling, and frightening her from her propriety." It does not come within the exception to the rule laid down by Judge FLOYD, which was established in Hadfield's case. This case is embraced within that rule, and we think the court below correctly gave that rule in charge to the jury. If there was partial insanity in this case, about which we express no opinion, it was the effect of melancholy, growing out of disappointed love; there was no proof of raving madness nor of peculiar mania. The prisoner had addressed Mrs. Julian and been rejected; afterwards he talked occasionally incoherently, looked vacant in the face, sat up late at night, and wrote some silly letters, and all attended with a habit of intemperance. At the time he committed the assault, and previously, he was violent, rude towards Mrs. Julian and her mother, and indecent in his conversation. He seems to have been on that day the very person to whom Mr. Erskine denies the protection of insanity, one "who exhibits only violent passions and malignant resentments, acting upon real circumstances, who is impelled to evil from no morbid delusion, but who proceeds upon the ordinary perceptions of the mind."

Let the judgment of the court below be affirmed.

[1] Taylor Med. Jurisp. 649. See also 5 C. & P. 168; 9 *Id.* 525.

NOTES.

§ 1. **Acts of an Insane Person not Punishable.** — The common law does not punish the acts of an insane man. "In all jurisdictions everywhere, and among all people, civilized or savage, a defect of reason that renders one unaccountable for his acts is viewed with commiseration, and the subject of it shielded from even the least reproach." "It is," as said in a Delaware case, "one of those visitations of the Creator which all humanity respects, and which confers immunity from punishment upon him who is so unfortunate as to be the victim of it, if I may use an expression of seeming irreverence." [1] Reason is the basis of human responsibility; whenever it does not exist the party is not responsible for his acts. The plea of insanity avails the party not as a justification or excuse, but because he is not responsible at all. It may exist from infancy, when it is idiocy, or it may be adventitious, proceeding from various causes, and may be permanent or temporary.[2] Admitting this to be the rule of the common law, the courts have from the first endeavored to discover a test by the application of which to a particular case, a jury may decide whether a particular person is or is not a proper subject of punishment. Various tests have been suggested, adopted, and discarded.

§ 2. **The Child Test.** — The first test which was proposed for the solution of this problem was suggested by Lord HALE.[3] "It is very difficult," said he, "to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes; the best measure that I can think of is this, *such a person as laboring under melancholy distempers hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony.*" This test, as we shall see, comes very near the one now generally adopted by the courts.

§ 3. **The Wild Beast Test.** — But in the next important trial after Lord HALE wrote, Mr. Justice TRACY laid down a more severe test. On the trial of Arnold,[4] in 1724, for shooting at Lord Onslow, Mr. Chief Justice TRACY said to the jury: "This is the evidence on both sides. Now, I have laid it before you; and you must consider of it; and the shooting my Lord Onslow, which is the fact for which this prisoner is indicted, is proved beyond all manner of contradiction; but whether this shooting was malicious, that depends upon the sanity of the man. That he shot, and that wilfully is proved; but whether maliciously, that is the thing; that is the question; whether this man hath the use of his reason and his senses? If he was under the visitation of God and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law what-

[1] Comegys, C. J., in State *v.* Brown, 1 Houst. Cr. Cas. 539 (1878).

[2] Bayard, J., in State *v.* Dillahunt, 3 Harr. (Del.) 551 (1840); Cole's Case, 7 Abb. Pr. (N. S.) 321 (1868).

[3] 1 Hale's Pleas of the Crown, 30.

[4] Arnold's Case, 16 How. St. Tr. 764.

Mr. Justice Tracy in Arnold's Case.

soever; for guilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty; and if that be the case, though he had actually killed my Lord Onslow, he is exempted from punishment; punishment is intended for example and to deter other persons from wicked designs; but the punishment of a madman, a person that hath no design, can have no example. This is one side. On the other side, we must be very cautious; it is not every frantic and idle humor of a man that will exempt him from justice, and the punishment of the law. When a man is guilty of a great offence, it must be very plain and clear, before a man is allowed such an exemption; therefore, it is not every kind of frantic humor or something unaccountable in a man's actions that points him out to be such a madman as is to be exempted from punishment; *it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast,* such a one is never the object of punishment; therefore, I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the other, doth show a man who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did; and it is to be observed, they admit he was a lunatic, and not an idiot. A man that is an idiot, that is born so, never recovers, but a lunatic may, and hath his intervals; and they admit he was a lunatic. You are to consider what he was at this day, when he committed this fact. There you have a great many circumstances about the powder and the shot, his going backward and forward, and if you believe he was sensible, and had the use of his reason and understood what he did, then he is not within the exemptions of the law, but is as subject to punishment as any other person." The prisoner was convicted under this test and sentenced to death, but was afterwards reprieved at the request of Lord Onslow.

§ 4. **Hadfield's Case — Erskine's Argument.** — Erskine's celebrated speech on the trial of Hadfield has been referred to with admiration by many judges in subsequent cases, as containing the first attempt to depart from the barbarity of the ancient test of insanity in criminal cases. The prisoner was indicted in 1800 for high treason in shooting at King George III.[1] Mr. Erskine in opening the defence thus addressed the jury: —

"Gentlemen, the law as it regards this most unfortunate infirmity of the human mind, like the law in all its branches, aims at the utmost degree of precision; but there are some subjects, as I have just observed to you, and the present is one of them, upon which it is extremely difficult to be precise. The general principle is clear, but the application most difficult.

"It is agreed by all jurists, and is established by the law of this and every other country, that it is the reason of man, which makes him accountable for his actions: and that the deprivation of reason acquits him of crime. This principle is indisputable; yet so fearfully and wonderfully are we made, so infinitely subtle is the spiritual part of our being, so difficult is it to trace with accuracy the effect of diseased intellect upon human action, that I may appeal to all these who hear me, whether there are any causes more difficult, or which, indeed, so often con-

[1] R. *v.* Hadfield, 27 How St. Tr. 1282.

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found the learning of the judges themselves, as when insanity, or the effects and consequences of insanity, become the subjects of legal consideration and judgment. I shall pursue the subject as the attorney-general has properly discussed it. I shall consider insanity as it annuls a man's dominion over property; as it dissolves his contracts, and other acts which otherwise would be binding; and as it takes away his responsibility for crimes. If I could draw the line in a moment between these two views of the subject, I am sure the judges would do me the justice to believe, that I would fairly and candidly do so; but great difficulties press upon my mind, which oblige me to take a difficult course.

"I agree with the attorney-general that the law, in neither civil nor criminal cases, will measure the degrees of men's understandings; and that a weak man, however much below the ordinary standard of human intellect, is not only responsible for crimes, but is bound by his contracts, and may exercise dominion over his property. Sir Joseph JEKYL, in the Duchess of Cleveland's Case, took the clear legal distinction, when he said 'the law will not measure the sizes of men's capacities, so as they be *compos mentis*.'

"Lord COKE, in speaking of the expression *non compos mentis*, says: 'Many times, as here, the Latin word expresses the true sense, and calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus*, or the like, for *non compos mentis* is the most sure and legal.' He then says: '*non compos mentis* is of four sorts: First, *ideota*, which is from his nativity by a perpetual infirmity, is *non compos mentis;* secondly, he that by sickness, grief, or other accident, wholly loses his memory and understanding; third, a lunatic, that hath sometimes his understanding and sometisme not; *ali quaddo gaudet lucides intervallis;* and therefore he is called *non compos mentis*, so long as he hath not understanding.'

"But notwithstanding the precision with which this great author points out the different kinds of this unhappy malady, the nature of his work, in this part of it, did not open to any illustration which it can now be useful to consider. In his Fourth Institute he is more particular; but the admirable work of Lord Chief Justice HALE, in which he refers to Lord COKE's Pleas of the Crown, renders all other authorities unnecessary.

"Lord HALE says: 'There is a partial insanity of mind, and a total insanity. The former is either in respect to things, *quoad hoc vel illud insanire:* some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects, or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons that are felons of themselves and others, are under a degree of partial insanity when they commit these offences; it is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered by both judge and jury, lest on the one side, there be a kind of inhumanity towards the defects of human nature; or on the other side too great an indulgence given to great crimes.'

"Nothing, gentlemen, can be more accurately or more humanely expressed; but the application of the rule is often most difficult. I am bound, besides, to admit

that there is a wide distinction between civil and criminal cases. If, in the former, a man appears upon the evidence, to be *non compos mentis*, the law avoids his act, though it cannot be traced or connected with the morbid imagination which constitutes his disease, and which may be extremely partial in its influence upon conduct; but to deliver a man from responsibility for crimes, above all, for crimes of great atrocity and wickedness, I am by no means prepared to apply this rule, however well established when property is only concerned.

"In the very recent instance of Mr. Greenwood (which must be fresh in his lordship's recollection), the rule in civil cases was considered to be settled. That gentleman, whilst insane, took up an idea that a most affectionate brother had administered poison to him. Indeed, it was the prominent feature of his insanity. In a few months he recovered his senses. He returned to his profession as an advocate; was sound and eminent in his practice, and in all respects a most intelligent and useful member of society; but he could never dislodge from his mind the morbid delusion which disturbed it; and under the pressure, no doubt of that diseased possession, he disinherited his brother. The cause to avoid this will was tried here. We are not now upon the evidence but upon the principle adopted as the law. The noble and learned judge, who presides upon this trial, and who presided upon that, told the jury, that if they believed Mr. Greenwood, when he made the will, to have been insane, the will could not be supported, whether it had disinherited his brother or not; that the act no doubt strongly confirmed the existence of the false idea which, if believed by the jury to amount to madness, would equally have affected his testament, if the brother instead of being disinherited, had been in his grave; and that, on the other hand, if the unfounded notion did not amount to madness its influence could not vacate the devise. This principle of law appears to be sound and reasonable as it applies to civil cases, from the extreme difficulty of tracing with precision the secret motions of a mind, deprived by disease of its soundness and strength.

"Whenever, therefore, a person may be considered *non compos mentis*, all his civil acts are void, whether they can be referred, or not, to the morbid impulse of his malady, or even though to all visible appearances, totally separated from it; but I agree with Mr. Justice TRACY, that it is not every man of an idle, frantic appearance and behavior, who is to be considered as a lunatic, either as it regards obligations or crimes; but that he must appear to the jury to be *non compos mentis*, in the legal acceptation of the term; and that not at any anterior period, which can have no bearing upon any case whatsoever, but at the moment when the contract was entered into or the crime committed.

"The attorney-general, standing, undoubtedly, upon the most revered authorities of the law, has laid it down, that to protect a man from criminal responsibility, there must be a total deprivation of memory and understanding. I admit that this is the very expression used by Lord COKE and by Lord HALE; but the true interpretation of it deserves the utmost attention and consideration of the court. If a total deprivation of memory was intended by these great lawyers to be taken in the literal sense of the words; if it was meant, that to protect a man from punishment, he must be in such a state of prostrated intellect, as not to know his name, nor his condition, nor his relation towards others, that if a husband, he should not know he was married; or, if a father, could not remember that he had children; nor know the road to his house, nor his property in it, then no

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such madness ever existed in the world. It is idiocy alone which places a man in this helpless condition; wherefrom an original malorganization, there is the human frame alone, without the human capacity; and which, indeed, meets the very definition of Lord HALE himself, when, referring to Fitzherbert, he says: 'Idiocy or fatuity, *a nativitate, vel dementia naturalis*, is such a one as described by Fitzherbert, who knows not to tell twenty shillings, nor knows his own age, or who was his father.' But in all the cases which have filled Westminster Hall with the most complicated considerations, the lunatics and other insane persons who have been the subjects of them, have not only had memory, in my sense of the expression, they have not only had the most perfect knowledge and recollection of all the relations they stood in towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable, the disease consisting in the delusive sources of thought; all their deductions within the scope of the malady being founded upon the immovable assumption of matters as realities, either without any foundation whatsoever, or so distorted and disfigured by fancy, as to be almost nearly the same thing as their creation. It is true, indeed, that in some, perhaps in many cases, the human mind is stunned in its citadel, and laid prostrate under the stroke of frenzy; these unhappy sufferers, however, are not so much considered by physicians as maniacs, as to be in a state of delirium from fever. There, indeed, all the ideas are overwhelmed — for reason is not merely disturbed, but driven wholly from her seat. Such unhappy patients are unconscious, therefore, except at short intervals, even of external objects; or, at least, are wholly incapable of considering their relations. Such persons, and such persons alone (except idiots) are wholly deprived of their understanding, in the attorney-general's seeming sense of that expression. But these cases are not only extremely rare, but never can become the subjects of judicial difficulty. There can be but one judgment concerning them. *In other cases reason is not driven from her seat, but distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety.* Such patients are victims to delusions of the most alarming description, which so overpower the faculties, and usurp so firmly the place of realities, as not to be dislodged and shaken by the organs of perception and sense; in such cases the images frequently vary, but in the same subject are generally of the same terrific character. Here, too, no judicial difficulties can present themselves; for who could balance upon the judgment to be pronounced in cases of such extreme disease? Another class branching out into almost infinite subdivisions, under which, indeed, the former, and every case of insanity may be classed is, where the delusions are not of that frightful character, but infinitely various, and often extremely circumscribed; yet where imagination (within the bounds of the malady) still holds the most uncontrollable dominion over reality and fact; and these are the cases which frequently mock the wisdom of the wisest in judicial trials; because such persons often reason with a subtlety which puts in the shade the ordinary perceptions of mankind; their conclusions are just, and frequently profound; but the premises from which they reason, when within the range of the malady, are uniformly false, not false from any defect of knowledge or judgment; but because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance because unconscious of attack.

Erskine's Argument in Hadfield's Case.

"Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted; and if courts of law were to be governed by any other principle, every departure from sober, rational conduct, would be an emancipation from criminal justice. I shall place my claim to your verdict upon no such dangerous foundation. I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question, was the immediate, unqualified offspring of the disease. In civil cases, as I have already said, the law avoids every act of the lunatic during the period of the lunacy; although the lunacy may be exceedingly circumscribed; although the mind may be quite sound in all that is not within the shades of the very partial eclipse; and although the act to be avoided can in no way be connected with the influence of insanity; but to deliver a lunatic from responsibility to criminal justice, above all, in a case of such atrocity as the present, the relation between the disease and the act should be apparent. When the connection is doubtful, the judgment should certainly be most indulgent from the great difficulty of diving into the secret sources of a disordered mind; but, still, I think, that as a doctrine of law, the delusion and the act should be connected.

"You perceive, therefore, gentlemen, that the prisoner, in naming me for his counsel, has not obtained the assistance of a person who is disposed to carry the doctrine of insanity in his defence, so far as even the books would warrant me in carrying it. Some of the cases, that of Lord Ferrers, for instance, which I shall consider hereafter, distinguished from the present, would not, in my mind, bear the shadow of an argument, as a defence against an indictment for murder. I cannot allow the protection of insanity to a man who only exhibits violent passions and malignant resentments, acting upon real circumstances: who is impelled to evil from no morbid delusions; but who proceeds upon the ordinary perceptions of the mind. I cannot consider such a man as falling within the protection which the law gives, and is bound to give, to those whom it has pleased God, for mysterious causes to visit with this most afflicting calamity.

"He alone can be so emancipated whose disease (call it what you will) consists, not merely in seeing with a prejudiced eye, or with odd and absurd particularities, differing, in many respects, from the contemplations of sober sense, upon the actual existence of things, but, he only whose whole reasoning and corresponding conduct, though governed by the ordinary dictates of reason, proceed upon something which has no foundation or existence.

"Gentlemen, it has pleased God so to visit the unhappy man before you; to shake his reason in its citadel; to cause to build up as realities, the most impossible phantoms of the mind, and to be impelled by them as motives irresistible; the whole fabric being nothing but the unhappy vision of his disease — existing no where else — having no foundation whatsoever in the very nature of things. Gentlemen, it has been stated by the attorney-general, and established by evidence, which I am in no condition to contradict nor have, indeed, any interest in contradicting, that when the prisoner bought the pistol which he discharged at, or towards his majesty, he was well acquainted with the nature and use of it, — that, as a soldier, he could not but know that in his hands it was a sure instrument of death; that when he bought the gunpowder, he knew it would

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prepare the pistol for its use; that when he went to the play-house, he knew he was going there, and everything connected with the scene, as perfectly as any other person, — I freely admit all this. I admit, also, that every person who listened to his conversation, and observed his deportment upon his apprehension, must have given precisely the evidence delivered by his royal highness the Duke of York; and that nothing like insanity appeared to those who examined him. But what then? I conceive, gentlemen, that I am more in the habit of examination, than either that illustrious person, or the witnesses from whom you have heard this account; yet I well remember (indeed I never can forget it), that since the noble and learned judge has presided in this court, I examined for the greater part of a day, in this very place, an unfortunate gentleman who had indicted a most affectionate brother, together with the keeper of a mad-house at Hoxton, for having imprisoned him as a lunatic; whilst, according to his evidence, he was in his perfect senses. I was unfortunately not instructed in what his lunacy consisted, although my instructions left me no doubt of the fact; bu t not having the clue, he completely foiled me in every attempt to expose his infirmity. You may believe that I left no means unemployed which long experience dictated; but without the smallest effect. The day was wasted, and the prosecutor by the most affecting history of unmerited suffering, appeared to the judge and jury, and to a humane English audience, as the victim of the most wanton and barbarous oppression: at last Dr. Sims came into court, who had been prevented by business, from an earlier attendance; and whose name, by the by, I observe to-day in the list of the witnesses for the crown. From Dr. Sims I soon learned that the very man whom I had been above an hour examining and with every possible effort which counsel are so much in the habit of exerting, believed himself to be the Lord and Savior of mankind; not merely at the time of his confinement, which was alone necessary for my defence; but during the whole time that he had been triumphing over every attempt to surprise him in the concealment of his disease. I then affected to lament the indecency of my ignorant examination, when he expressed his forgiveness, and said, with the utmost gravity and emphasis in the face of the whole court, "I am the Christ," and so the cause ended. Gentlemen, this is not the only instance of the power of concealing this malady. I could consume the day if I were to enumerate them; but there is one so extremely remarkable, that I cannot help stating it.

"Being engaged to attend the assizes at Chester upon a question of lunacy, and having been told that there had been a memorable case tried before Lord MANSFIELD in this place, I was anxious to procure a report of it; and from that great man himself (who within these walls will ever be reverenced), being then retired in his extreme old age, to his seat near London, in my own neighborhood, I obtained the following account of it: 'A man of the name of Wood,' said Lord MANSFIELD, 'had indicted Dr. Monro for keeping him as a prisoner (I believe in the same mad-house at Hoxton) when he was sane. He underwent the most severe examination by the defendant's counsel without exposing his complaint; but Dr. Battye, having come upon the bench by me, and having desired me to ask him what was become of the princess whom he had corresponded with in cherry juice, he showed in a moment what he was. He answered, that there was nothing at all in that, because having been (as every body knew) imprisoned in a high tower, and being debarred the use of ink, he had no other means of corre-

spondence but by writing his letters in cherry juice, and throwing them into the river which surrounded the tower, where the princess received them in a boat. There existed, of course, no tower, no imprisonment, no writing in cherry juice, no river, no boat; but the whole the inveterate phantom of a morbid imagination. I immediately,' continued Lord MANSFIELD, 'directed Dr. Monro to be acquitted; but this man Wood, being a merchant in Philpotlane, and having been carried through the city on his way to the mad-house, he indicted Dr. Monro over again for the trespass and imprisonment in London, knowing that he had lost his cause by speaking of the princess at Westminister: and such,' said Lord MANSFIELD, 'is the extraordinary subtlety and cunning of madmen, that when he was cross-examined on the trial in London, as he had successfully been before, in order to expose his madness, all the ingenuity of the bar, and all the authority of the court could not make him say a single syllable upon that topic which had put an end to the indictment before, although he still had the same indelible impression upon his mind, as he signified to those who were near him; but conscious that the delusion had occasioned his defeat at Westminister, he obstinately persisted in holding it back.'

"Now, gentlemen, let us look to the application of these cases. I am not examining, for the present, whether either of these persons ought to have been acquitted, if they had stood in the place of the prisoner now before you; that is quite a distinct consideration which we shall come to hereafter. The direct application of them is only this: that if I bring before you such evidence of the prisoner's insanity as, if believed to have really existed, shall, in the opinion of the court, as the rule for your verdict in point of law, be sufficient for his deliverance, then that you ought not to be shaken, in giving full credit to such evidence, notwithstanding the report of those who were present at his apprehension, who describe him as discovering no symptom whatever of mental incapacity or disorder; because I have shown you that insane persons frequently appear in the utmost state of ability and composure, even in the highest paroxysms of insanity, except when frenzy is the characteristic of the disease. In this respect, the cases I have cited to you, have the most decided application; because they apply to the overthrow of the whole of the evidence (admitting at the same time the truth of it,) by which the prisoner's case can alone be encountered.

"But it is said that whatever delusions may overshadow the mind, every person ought to be responsible for crimes who has the knowledge of good and evil. I think I can presently convince you that there is something too general in this mode of considering the subject; and you do not, therefore, find any such proposition in the language of the celebrated writer alluded to by the attorney-general in his speech. Let me suppose that the character of an insane delusion consisted in the belief that some given person was any brute animal, or an inanimate being (and such cases have existed), and that, upon the trial of such a lunatic for murder, you firmly, upon your oaths, were convinced, upon the uncontradicted evidence of an hundred persons, that he believed the man he had destroyed to have been a potter's vessel; that it was quite impossible to doubt that fact, although to all other intents and purposes he was sane, conversing, reasoning and acting as men not in any manner tainted with insanity converse and reason and conduct themselves; and suppose, further, that he believed the man whom he destroyed, but whom he destroyed as a potter's

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vessel, to be the property of another; and that he had malice against such supposed person, and that he meant to injure him, knowing the act he was doing to be malicious and injurious; and that, in short, he had full knowledge of all the principles of good and evil; yet would it be possible to convict such a person of murder, if, from the influence of his disease, he was of the relation he stood in to the man he had destroyed, and was utterly unconscious that he had struck at the life of a human being? I only put this case, and many others might be brought as examples, to illustrate that the knowledge of good and evil is too general a description.

"I really think, however, that the attorney-general and myself do not in substance very materially differ; because, from the whole of his most able speech taken together, his meaning may, I think, be thus collected: that when the act which is criminal is done under the dominion of malicious mischief and wicked intention, although such insanity might exist in a corner of the mind as might avoid the acts of the delinquent as a lunatic, in a civil case, yet that he ought not to be protected if malicious mischief, and not insanity, had impelled him to the act for which he was criminally to answer; because, in such a case, the act might be justly ascribed to malignant motives, and not to the dominion of disease. I am not disposed to dispute such a proposition, in a case which would apply to it, and I can well conceive such cases may exist. The question, therefore, which you will have to try is this: Whether, when this unhappy man discharged the pistol in a direction which convinced, and ought to convince, every person that it was pointed at the king, he meditated mischief and violence to his majesty, or whether he came to the theatre (which it is my purpose to establish) under the dominion of the most melancholy insanity that ever degraded and overpowered the faculties of man. I admit that when he bought the pistol, and the gunpowder to load it, and when he loaded it and came with it to the theatre, and lastly, when he discharged it, every one of these acts would be overt acts of compassing the king's death, if at all or any of these periods he was actuated by that mind and intention which would have constituted murder in the case of an individual, if the individual had been actually killed. I admit, also, that the mischievous, and, in this case, the traitorous, intention must be inferred from all these acts, unless I can rebut the inference by proof. If I were to fire a pistol towards you, gentlemen, where you are now siting, the act would undoubtedly infer the malice. The whole proof, therefore, is undoubtedly cast upon me. In every case of treason or murder, which are precisely the same, excepting that the unconsummated intention in the case of the king is the same as the actual murder of a private man, the jury must impute to the person whom they condemn by their verdict the motive which constitutes the crime; and your province to-day will therefore be to decide whether the prisoner, when he did the act, was under the uncontrollable dominion of insanity, and was impelled to do it by a morbid delusion; or whether it was the act of a man who, though occasionally mad, or even at the time not properly collected, was yet not actuated by the disease, but by the suggestion of a wicked and malignant disposition. I admit, therefore, freely, that if after you have heard the evidence which I hasten to lay before you of the state of the prisoner's mind, and close up to the very time of this catastrophe, you shall still not feel yourselves clearly justified in negativing the wicked motives imputed by this indictment, I shall

leave you in the hands of the learned judges to declare to you the law of the land, and shall not seek to place society in a state of uncertainty by any appeal addressed only to your compassion. I am appointed by the court to claim for the prisoner the full protection of the law, but not to misrepresent it in his protection.

"Gentlemen, the facts of this melancholy case lie within a narrow compass.

"The unfortunate person before you was a soldier. He became so, I believe in the year 1793, and is now about twenty-nine years of age. He served in Flanders, under the Duke of York, as appears by his Royal Highness's evidence; and being a most approved soldier, he was one of those singled out as an orderlyman to attend upon the person of the commander-in-chief. You have been witnesses, gentlemen, to the calmness with which the prisoner has sitten in his place during the trial. There was but one exception to it. You saw the emotion which overpowered him, when the illustrious person now in court, took his seat upon the bench. Can you then believe, from the evidence, for I do not ask you to judge as physiognomists, or to give the rein to compassionate fancy; but can there be any doubt that it was the generous emotion of the mind, on seeing the prince, under whom he had served with so much bravery and honor? Every man certainly must judge for himself. I am counsel, not a witness, in the cause; but it is a most striking circumstance, when you find from the Crown's evidence, that when he was dragged through the orchestra under the stage, and charged with an act for which he considered his life as forfeited, he addressed the Duke of York with the same enthusiasm which has marked the demeanor I am adverting to. Mr. Richardson, who showed no disposition in his evidence to help the prisoner, but who spoke with the calmness and circumspection of truth, and who had no idea that the person he was examining was a lunatic, has given you the account of the burst of affection on his first seeing the Duke of York, against whose father and sovereign he was supposed to have had the consciousness of treason. The king himself, whom he was supposed to have so malignantly attacked, never had a more gallant, loyal, or suffering soldier. His gallantry and loyalty will be proved; his sufferings speak for themselves.

"About five miles from Lisle, upon the attack made on the British army, this unfortunate soldier was in the Fifteenth Light Dragoons, in the thickest of the ranks, exposing his life for his prince whom he is supposed to-day to have sought to murder; the first wound he received is most materially connected with the subject we are now considering; you may see the effect of it now. The point of a sword was impelled against him with all the force of a man urging his horse in battle. When the court put the prisoner under my protection, I thought it my duty to bring Mr. Cline to inspect him in Newgate; and it will appear by the evidence of that excellent and conscientious person, who is known to be one of the first anatomists in the world, that from this wound one of two things must have happened: either that by the immediate operation of surgery the displaced part of the skull must have been taken away or been forced inward in the brain. The second stroke, also speaks for itself; you may now see its effects. (Here Mr. Erskine touched the head of the prisoner.) He was cut across all the nerves which give sensibility and animation to the body, and his head hung down almost dissevered, until by the art of surgery, it was placed in the position in which you now see it; but thus, almost destroyed, he still recollected his

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duty, and continued to maintain the glory of his country, when a sword divided the membrane of his neck where it terminates in the head; yet he still kept his place, though his helmet had been thrown off by the blow which I secondly described, when by another sword, he was cut into the very brain. You may now see its membrane uncovered. Mr. Cline will tell you that he examined these wounds, and he can better describe them. I have myself seen them, but am no surgeon; from his evidence you will have to consider their consequences. It may be said that many soldiers receive grievous wounds, without their producing insanity. So they may undoubtedly, but we are here upon the fact. There was a discussion the other day, on whether a man, who had been seemingly hurt by a fall beyond remedy, could get up and walk; the people around said it was impossible, but he did get up and walk, and so there was an end to the impossibility. The effect of the prisoner's wounds were known by the immediate event of insanity, and Mr. Cline will tell you, that it would have been strange, indeed, if any other event had followed. We are not here upon a case of insanity arising from the spiritual part of man, as it may be affected by hereditary taint, by intemperance, or by violent passions, the operations of which are various and uncertain; but we have to deal with a species of insanity more resembling what has been described as idiocy, proceeding from original mal-organization. There the disease is, from its very nature, incurable; and so where a man (like the prisoner) has become insane from violence to the brain, which permanently affects its structure, however such a man may appear occasionally to others, his disease is immovable; and if the prisoner, therefore, were to live a thousand years, he never could recover from the consequences of that day.

"But this is not all. Another blow was still aimed at him, which he held up his arm to avoid, when his hand was cut into the bone. It is an afflicting subject, gentlemen, and better to be spoken of by those who understand it; and to end all further description, he was then thrust almost through and through the body with a bayonet, and left in the ditch among the slain. He was afterwards carried to an hospital, where he was known by his tongue to one of his countrymen, who will be examined as a witness, who found him, not merely as a wounded soldier deprived of the power of his body, but bereft of his senses forever.

"He was affected from the very beginning, with that species of madness which, from violent agitation, fills the mind with the most inconceivable imaginations, wholly unfitting it for all dealing with human affairs according to the sober estimate and standard of reason. He imagined that he had constant intercourse with the Almighty Author of all things; that the world was coming to a conclusion, and that like our blessed Savior, he was to sacrifice himself for its salvation. And so obstinately did this morbid image continue, that you will be convinced he went to the theatre to perform, as he imagined, that blessed sacrifice; and because he would not be guilty of suicide, though called upon by the imperious voice of heaven, he wished that by the appearance of crime his life might be taken away from him by others. This bewildered, extravagant species of madness, appeared immediately after his wounds on his first entering the hospital, and on the very same account he was discharged from the army on his return to England, which the attorney-general very honorably and candidly seemed to intimate. To proceed with the proofs of his insanity down to the very period of his supposed guilt. This unfortunate man before you is the father of an infant of eight

months, and I have no doubt, that if the boy had been brought into court (but this is a grave place for the consideration of justice, and not a theatre for stage effect), — I say, I have no doubt whatever, that if this poor infant had been brought into court, you would have seen the unhappy father wrung with all the emotions of parental affection; yet upon the Tuesday preceding the Thursday when he went to the play-house, you will find his disease still urging him forward with the impression that the time was come when he must be destroyed for the benefit of mankind; and in the confusion, or rather delirium of this wild conception, he came to the bed of the mother, who had this infant in her arms, and endeavored to dash out its brains against the wall; the family was alarmed, and the neighbors being called in, the child was with difficulty rescued from the unhappy parent, who, in his madness, would have destroyed it.

"Now let me for a moment suppose that he had succeeded in the accomplishment of his insane purpose, and the question had been whether he was guilty of murder. Surely, the affection for this infant, up to the very moment of his distracted violence, would have been conclusive in his favor, but not more so than his loyalty to the king, and his attachment to the Duke of York, as applicable to the case before us; yet at that very period even of extreme distraction he conversed as rationally on all other subjects as he did to the Duke of York at the theatre. The prisoner knew perfectly that he was the husband of the woman and the father of the child; the tears of affection ran down his face at the very moment when he was about to accomplish its destruction; but during the whole of this scene of horror he was not at all deprived of memory, in the attorney-general's sense of the expression; he could have communicated, at that very moment, every circumstance of his past life, and everything connected with his present condition, except only the quality of the act he was meditating. In that he was under the overruling dominion of a morbid imagination, and conceived that he was acting against the dictates of nature in obedience to the superior commands of Heaven, which had told him that the moment he was dead, and the infant with him, all nature was to be changed, and all mankind were to be redeemed by his dissolution. There was not an idea in his mind, from the beginning to the end, of the destruction of the king; on the contrary, he always maintained his loyalty; lamented that he could not go again to fight his battles in the field; and it will be proved that only a few days before the period in question, being present when a song was sung, indecent, as it regarded the person and condition of his majesty, he left the room with loud expressions of indignation, and immediately sang 'God Save the King,' with all the enthusiasm of an old soldier who had bled in the service of his country. I confess to you, gentlemen, that this last circumstance, which may to some appear insignificant, is, in my mind, most momentous testimony; because, if this man had been in the habit of associating with persons inimical to the government of our country, so that mischief might have been fairly argued to have mixed itself with madness (which, by the by, it frequently does); if it could in any way have been collected, that from his disorder, more easily inflamed and worked upon, he had been led away by disaffected persons to become the instrument of wickedness; if it could have been established that such had been his companions and habits, I should have been ashamed to lift up my voice in his defence, I should have felt that, however his mind might have been weak and disordered, yet

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if his understanding sufficiently existed to be methodically acted upon, as an instrument of malice, I could not have asked for an acquittal; but you find, on the contrary, in the case before you, that, notwithstanding the opportunity which the crown has had, and which upon all such occasions it justly employs to detect treason, either against the person of the king or against his government; not one witness has been able to fix upon the prisoner before you any one companion of even a doubtful description, or any one expression from which disloyalty could be inferred, whilst the whole history of his life repels the imputation. His courage in defence of the king and his dominions, and his affection for his son, in such unanswerable evidence, all speak aloud against the presumption that he went to the theatre with a mischievous intention.

"To recur again to the evidence of Mr. Richardson, who delivered most honorable and impartial testimony, I certainly am obliged to admit that what a prisoner says for himself, when coupled at the very time with an overt act of wickedness, is no evidence whatever to alter the obvious quality of the act he has committed. If, for instance, I who am now addressing you had fired the same pistol towards the box of the king, and having been dragged under the orchestra, and secured for criminal justice, I had said that I had no intention to kill the king, but was weary of my life, and meant to be condemned as guilty, would any man, not himself insane, consider that as a defence? Certainly not, because it would be without the whole foundation of the prisoner's previous condition; part of which it is even difficult to apply, closely and directly by strict evidence, without taking his undoubted insanity into consideration, because it is his unquestionable insanity which alone stamps the effusions of his mind with sincerity and truth.

"The idea which had impressed itself, but in most confused images, upon this unfortunate man was that he must be destroyed, but ought not to destroy himself. He once had the idea of firing over the king's carriage in the street, but then he imagined he should be immediately killed, which was not the mode of propitiation for the world; and as our Savior, before his passion, had gone into the garden to pray, this fallen and afflicted being, after he had taken the infant out of bed to destroy it, returned also to the garden, saying, as he afterwards said to the Duke of York, 'that all was not over; that a great work had to be finished;' and then he remained in prayer, the victim of the same melancholy visitation.

"Gentlemen, these are the facts, freed from even the possibility of artifice or disguise; because the testimony to support them will be beyond all doubt; and in contemplating the law of the country, and the precedents of its justice, to which they must be applied, I find nothing to challenge or question. I approve of them throughout; I subscribe to all that is written by Lord HALE; I agree with all the authorities, cited by the attorney-general from Lord COKE; but above all, I do most cordially agree in the instance of convictions by which he illustrated them in his able address. I have now lying before me the case of Earl Ferrers; unquestionably there could not be a shadow of doubt, and none appears to have been entertained of his guilt. I wish, indeed, nothing more than to contrast the two cases; and so far am I from disputing either the principle of that condemnation, or the evidence that was the foundation of it, that I invite you to examine whether any two instances in the whole body of the criminal law,

are more diametrically opposite to each other than the case of Earl Ferrers and that now before you. Lord Ferrers was divorced from his wife by act of Parliament; and a person of the name of Johnson who had been his steward, had taken part with the lady in that proceeding, and had conducted the business in carrying the act through the two Houses. Lord Ferrers consequently wished to turn him out of a farm, which he occupied under him; but his estate being in trust Johnson was supported by the trustees in his possession; there were also some differences respecting coal mines; and in consequence of both transactions, Lord Ferrers took up the most violent resentment against him. Let me here observe, gentlemen, that this was not a resentment founded upon any illusion; not a resentment forced upon a distempered mind by fallacious images, but depending upon actual circumstances and real facts; and acting like any other man under the influence of malignant passions, he repeatedly declared that he would be revenged upon Mr. Johnson, particularly for the part he had taken in depriving him of a contract respecting the mines.

"Now suppose Lord Ferrers could have showed that no difference had ever existed regarding his wife at all — that Mr. Johnson had never been his steward, and that he had only, from delusion, believed so when his situation in life was quite different. Suppose, further, that an illusive imagination had alone suggested to him that he had been thwarted by Johnson in his contract for these coal mines, there never having been any contract at all for coal mines: in short that the whole basis of his enmity was without any foundation in nature and had been shown to have been a morbid image imperiously fastened upon his mind. Such a case as that would have exhibited a character of insanity in Lord Ferrers extremely different from that in which it was presented by the evidence to his peers. Before them he only appeared as a man of turbulent passions; whose mind was disturbed by no fallacious images of things without existence; whose quarrel with Johnson was founded upon no illusions, but upon existing facts; and whose resentment proceeded to the fatal consummation with all the ordinary indications of mischief and malice; and who conducted his own defence with the greatest dexterity and skill. Who then could doubt that Lord Ferrers was a murderer? When the act was done he said, 'I am glad I have done it. He was a villain and I am revenged.' But when he afterwards saw that the wound was probably mortal, and that it involved consequences fatal to himself, he desired the surgeon to take all possible care of his patient, and, conscious of his crime, kept at bay the men who came with arms to arrest him; showing from the beginning to the end, nothing that does not generally accompany the crime for which he was condemned. He was proved to be sane, to be a man subject to unreasonable prejudices, addicted to absurd practices, and agitated by violent passions; but the act was not done under the dominion of uncontrollable disease; and whether the mischief and malice were substantive, or marked in the mind of a man whose passions bordered upon, or even amounted to insanity, it did not convince the lords, that, under all the circumstances of the case, he was not a fit object of criminal justice.

"In the same manner, Arnold, who shot at Lord Onslow, and who was tried at Kingston soon after the black act passed, on the accession of George I., Lord Onslow having been vigilant as a magistrate in suppressing clubs, which were supposed to have been set on foot, to disturb the new government. Arnold had

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frequently been heard to declare that Lord Onslow would ruin his country; and although he appeared from the evidence to be a man of most wild and turbulent manners, yet the people round Guilford, who knew him, did not, in general consider him to be insane. His counsel could not show that any morbid delusion had ever overshadowed his understanding — they could not show, as I shall, that just before he shot at Lord Onslow, he had endeavored to destroy his own beloved child. It was a case of human resentment.

"I might instance, also, the case of Oliver, who was indicted for the murder of Mr. Wood, a potter in Staffordshire. Mr. Wood had refused his daughter to this man in marriage. My friend Mr. Milles was counsel for him at the assizes. He had been employed as a surgeon and apothecary by the father, who forbid him his house, and desired him to bring in his bill for payment; when in the agony of disappointment and brooding over the injury he had suffered, on his being admitted to Mr. Wood, to receive payment, he shot him upon the spot. The trial occupied a great part of the day; yet for my own part I cannot conceive that there was anything in the case for a jury to deliberate on. He was a man acting upon existing facts and upon human resentments connected with them. He was at the very time carrying on his business, which required learning and reflection, and, indeed, a reach of mind beyond the ordinary standard, being trusted by all who knew him as a practiser in medicine. Neither did he go to Mr. Wood under the influence of illusion; but he went to destroy the life of a man who was not placed exactly in the circumstances which the mind of the criminal represented him. He went to execute vengeance on him for refusing his daughter. In such a case there might, no doubt, be passion approaching to frenzy, but there wanted that characteristic of madness to emancipate him from criminal justice.

"There was another instance of this description in the case of a most unhappy woman, who was tried in Essex for the murder of Mr. Errington, who had seduced and abandoned her and the children she had borne to him. It must be a consolation to those who prosecuted her, that she was acquitted, as she is at this time, in a most undoubted and deplorable state of insanity; but I confess, if I had been upon the jury who tried her, I should have entertained great doubts and difficulties; for although the unhappy woman had before exhibited strong marks of insanity, arising from grief and disappointment; yet she acted upon facts and circumstances, which had an existence, and which were calculated upon the ordinary principles of human action to produce the most violent resentment. Mr. Errington having just cast her off and married another woman, or taken her under his protection, her jealousy was excited to such a pitch as occasionally to overpower her understanding; but when she went to Mr. Errington's house, where she shot him, she went with the express and deliberate purpose of shooting him. That fact was unquestionable; she went there with a resentment long rankling in her bosom, bottomed on an existing foundation; she did not act under a delusion that he had deserted her when he had not, but took revenge upon him for an actual desertion; but still the jury, in the humane consideration of her sufferings, pronounced the insanity to be predominant over resentment and they acquitted her.

But let me suppose (which would liken it to the case before us), that she had never cohabited with Mr. Errington; that she never had had children by him; and consequently, that he neither had, nor could possibly have deserted or injured

her, — let me suppose, in short, that she had never seen him in her life, but that her resentment had been founded on the morbid delusion that Mr. Errington, who had never seen her, had been the author of all her wrongs and sorrows; and that, under that diseased impression, she had shot him. If that had been the case, gentlemen, she should have been acquitted upon the opening, and no judge would have sat to try such a cause; the act itself would have been decisively characteristic of madness, because being founded upon nothing existing, it could not have proceeded from malice, which the law requires to be charged and proved, in every case of murder as the foundation of a conviction.

"Let us now recur to the cause we are engaged in, and examine it upon these principles, by which I am ready to stand or fall, in the judgment of the court.

"You have a man before you, who will appear, upon the evidence, to have received these almost deadly wounds which I described to you, producing the immediate and immovable effects which the eminent surgeon, whose name I have mentioned, will prove that they could not but have produced; it will appear, that from that period he was visited with the severest paroxysms of madness, and was repeatedly confined with all the coercion which it is necessary to practice upon lunatics; yet what is quite decisive against the imputation of treason against the person of the king, his loyalty never forsook. Sane or insane, it was his very characteristic to love his sovereign and his country, although the delusions which distracted him were sometimes in other respects, as contradictory as they were violent.

"Of this inconsistency there was a most striking instance on only the Tuesday before the Thursday in question, when it will be proved, that he went to see one Truelock, who had been committed by the Duke of Portland as a lunatic. This man had taken up an idea that our Savior's second advent and the dissolution of all human things were at hand, and conversed in this strain of madness; this mixing itself with the insane delusion of the prisoner, he immediately broke out upon the subject of his own propitiation and sacrifice for mankind, although only the day before he had exclaimed, that the Virgin Mary was a whore; that Christ was a bastard; that God was a thief, and that he and this Truelock were to live with him at White Conduit House, and there be enthroned together. His mind, in short, was overpowered with distraction. The charge against the prisoner is the overt act of compassing the death of the king, in firing a pistol at his majesty, an act which only differs from murder inasmuch as the bare compassing is equal to the accomplishment of the malignant purpose; and it will be your office, under the advice of the judge, to decide by your verdict to which of the two impulses of the mind you refer the act in question; you will have to decide whether you attribute it wholly to mischief and malice, or wholly to insanity, or to the one mixing itself with the other. If you find it attributable to mischief and malice only, let the man die. The law demands his death for the public safety. If you consider it as conscious malice and mischief mixing itself with insanity, I leave him in the hands of the court, to say how he is to be dealt with; it is a question too difficult for me. I do not stand here to disturb the order of society, or to bring confusion upon my country, but if you find that the act was committed wholly under the dominion of insanity; if you are satisfied that he went to the theatre contemplating his own destruction only, and that when he fired the pistol, he did not maliciously aim at the person of the king, you will

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then be bound, even upon the principle which the attorney-general himself humanely and honorably stated to you, to acquit this unhappy prisoner. If, in bringing these considerations hereafter to the standard of the evidence, any doubts should occur to you on the subject, the question for your decision will then be, which of the two alternatives is the most probable, — a duty which you will perform by the exercise of that reason of which, for wise purposes, it has pleased God to deprive the unfortunate man whom you are trying; your sound understanding will easily enable you to distinguish infirmities which are misfortunes from motives which are crimes. Before the day ends the evidence will be decisive upon this subject.

"There is, however, another consideration which I ought distinctly to present to you; because I think that more turns upon it than any other view of the subject; namely, whether the prisoner's defence can be impeached for artifice or fraud; because I admit, that if at the moment when he was apprehended, there can be fairly imputed to him any pretence or counterfeit of insanity, it would taint the whole case, and leave him without protection; but for such a suspicion there is not even the shadow of foundation. It is repelled by the whole history and character of his disease, as well as of his life, independent of it. If you were trying a man under the black act, for shooting at another, and there was a doubt upon the question of malice, would it not be important, or rather decisive evidence, that the prisoner had no resentment against the prosecutor, but that, on the contrary, he was a man whom he had always loved and served? Now the prisoner was maimed, cut down, and destroyed in the service of the king.

"Gentlemen, another reflection presses very strongly on my mind, which I find it difficult to suppress. In every State there are political differences and parties and individuals disaffected to the system of government under which they live as subjects. There are not many such, I trust, in this country; but whether there are many or any of such persons, there is one circumstance which has peculiarly distinguished his majesty's life and reign, and which is in itself as an host in the prisoner's defence; since, amidst all the treasons and all the seditions which have been charged on reformers of government as conspiracies to disturb it, no hand or voice has been lifted up against the person of the king; there have, indeed, been unhappy lunatics, who, from ideas too often mixing themselves with insanity, have intruded themselves into the palace, but no malicious attack has ever been made upon the king to be settled by a trial; his majesty's character and conduct have been a safer shield than guards, or than laws. Gentlemen, I wish to continue that sacred life, that best of all securities; I seek to continue it under that protection where it has been so long protected. We are not to do evil that good may come of it; we are not to stretch the law to hedge round the life of the king with a greater security than that which the Divine Providence has so happily realized.

"Perhaps there is no principle of religion more strongly inculcated by the sacred Scriptures than by that beautiful and encouraging lesson of our Savior himself upon confidence in the divine protection: 'Take no heed for your life, what ye shall eat, or what ye shall drink, or wherewithal ye shall be clothed; but seek ye first the kingdom of God, and all these things shall be added unto you.' By which it is undoubtedly not intended that we are to disregard the conservation of life, or to neglect the means necessary for its sustenation; nor

that we are to be careless of whatever may contribute to our comfort and happiness; but that we should be contented to receive them as they are given to us, and not seek them in the violation of the rule and order appointed for the government of the world. On this principle nothing can more tend to the security of his majesty and his government, than the scene which this day exhibits in the calm, humane, and impartial administration of justice; and if in my part of this solemn duty, I have in any manner trespassed upon the just security provided for the public happiness, I wish to be corrected. I declare to you, solemnly, that my only aim has been to secure for the prisoner at the bar, whose life and death are in the balance, that he should be judged rigidly by the evidence and the law. I have made no appeal to your passions, you have no right to exercise them. This is not even a case in which, if the prisoner be found guilty, the royal mercy should be counselled to interfere; he is either an accountable being, or not accountable; if he was unconscious of the mischief he was engaged in, the law is a corallary, and he is not guilty; but if when the evidence closes, you think he was conscious, and maliciously meditated the treason he is charged with, it is impossible to conceive a crime more vile and detestable: and I should consider the king's life to be ill-attended to, indeed, if not protected by the full vigor of the laws, which are watchful over the security of the meanest of his subjects. It is a most important consideration both as it regards the prisoner, and the community of which he is a member. Gentlemen, I leave it with you."

The prisoner was acquitted by the jury on the ground of insanity at the time the act was committed.[1]

[1] On the trial of Lord Ferrers (Ferrers' Case, 19 How. St. Tr. 945), in 1760, for the murder of Mr. Johnson, the solicitor general laid down the law to the House of Lords as follows: My lords, the law of England which is wisely adapted to punish crimes with severity, for the protection of mankind and for the honor of government provides, at the same time, with the greatest equity, for the imbecility and imperfections of human nature. Therefore, My Lord Chief Justice Hale, the weight and authority of whose writings are known to your lordships and to the whole Kingdom, explains the law upon this subject at large, with his usual clearness and accuracy. It is in his first volume of the History of the Pleas of the Crown (fol. 30) where he traces all the distinctions which the nature of this question admits, as it concerns the trial of criminals for capital offences. I will collect the substance of what he says, and submit it to your lordships, as founded not only in law and in practice, but in the most unerring rules of reason and justice. My lords, he begins with observing that "there is, first, a partial insanity of mind, and there is, secondly, a total insanity. First, partial insanity is either in respect to things, when they, who are competent as to some matters, are not so as to others; or else it is partial in respect to the degree. This is the condition of many, especially of melancholy persons. As to such, a partial insanity will not excuse them; for (he says) that persons who are felons of themselves, and other felons are under a degree of it when they offend." It is difficult to draw the line which divides perfect from partial insanity; and he refers it to the discretion of the judge and jury who must duly weigh and consider the whole, "lest on one side, there be a kind of inhumanity towards the defects of human nature; or on the other side, too much indulgence be given to great crimes." Then, my lords, he speaks of the general rule, which he would choose to lay down, as the best measure of his own judgment; and it is: "That a person who has ordinarily as great a share of understanding, as a child of fourteen years of age, is such a person as may be guilty of treason or felony. Secondly, as to total insanity or alienation of mind, which is perfect madness, this (Lord Hale agrees) will plainly excuse from the guilt of felony and treason." But he distinguishes under the head of total insanity between "that species which is fixed and

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§ 5. **Test of Knowledge of Right and Wrong in the Abstract.** — The next test which we find was given to the jury by Lord MANSFIELD, at the Old Bailey, in 1812, on the trial of Bellingham.[1] The prisoner was indicted for the murder of Hon. Spencer Percival, then prime minister of England, and the defence was insanity. Lord MANSFIELD, in charging the jury, told them, that in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder or any other crime. That in the species of madness called "lunacy," where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady, would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil, they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement. Bellingham was convicted and hanged. In the

permanent, and lunacy which comes by periods or fits." Of this latter kind he expresses himself thus: "Crimes committed by lunatics in such distempers, are under the same judgment as those committed by men partially insane. The person who is absolutely mad for a day, killing a man in that distemper, is equally not guilty, as if he were mad without intermission. But such persons as have their lucid intervals, have usually, in those intervals at least, a competent use of reason; and crimes committed by them are of the same nature, and punishable in the same manner as if they had no such defect." My lords, afterwards, he treats of that insanity which arises from drunkenness, and lays it down that "by the law of England, such a person shall have no privilege from their voluntary contracted madness, but shall have the same judgment, as if he were in his right senses (unless it be occasioned by medicine unskilfully administered, or poison accidentally taken)." Indeed, if by such practices an habitual fixed frenzy be caused, it puts the man in the like condition, with respect to crimes, as if that frenzy were at first involuntarily contracted. My lords, the result of the whole reasoning of this wise judge and great lawyer (so far as it is immediately relative to the present purpose), stands thus: "If there be a total permanent want of reason, it will acquit the prisoner. If there be a total temporary want of it when the offence was committed, it will acquit the prisoner; but if there be only a partial degree of insanity mixed with a partial degree of reason, not a full and complete use of reason, but (as Lord Hale carefully and emphatically expresses himself) a competent use of it, sufficient to have restrained these passions which produced the crime; if there be thought and design; a faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then, upon the facts of the offence proved, the judgment of the law must take place. My lords, the question must therefore be asked: Is the noble prisoner at the bar to be acquitted from the guilt of murder on account of insanity? It is not pretended to be a constant general insanity. Was he under the power of it at the time of the offence committed? Could he, did he, at that time distinguish between good and evil? The same evidence which establishes the fact, proves at the same time the capacity and intention of the noble prisoner. Did he weigh the motives? Did he proceed with deliberation? Did he know the consequences? — The prisoner was convicted and executed.

[1] Coll. on Lun. 630.

same year the same test was applied by Le Blanc, J., on the trial of Bowler,[1] — the ability to distinguish between right and wrong in the abstract.

§ 6. **Test of Knowledge of Right and Wrong as Applied to the Particular Case.** — A few years later, however, this test was somewhat modified. In *Rex* v. *Offord*,[2] the prisoner was indicted for the murder of a person named Chisnall, by shooting him with a gun. The defence was insanity. It appeared that the prisoner labored under a notion that the inhabitants of Hadleigh, and particularly Chisnall, the deceased, were continually issuing warrants against him with intent to deprive him of his liberty and life; that he would frequently under the same notion, abuse persons whom he met on the street, and with whom he had never had any dealings or acquaintance of any kind. In his waist-coat pocket a paper was found headed, "List of Hadleigh conspirators against my life." It contained forty or fifty names, and among them "Chisnall and his family." There was also found, among his papers, an old summons about a rate, at the foot of which he had written, "This is the beginning of an attempt against my life." Several medical witnesses deposed to their belief, that from the evidence that they had heard, the prisoner labored under that species of insanity which is called monomania; and that he committed the act while under the influence of that disorder, and might not be aware that in firing the gun, his act involved the crime of murder. Lord Lyndhurst, C. B. (in summing up), told the jury that they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature? His lordship referred to the doctrine laid down in *Bellingham's Case* by Sir James Mansfield, and expressed his complete accordance in the observations of that learned judge. The jury acquitted the prisoner on the ground of insanity.

In *Reg.* v. *Oxford*,[3] the prisoner was indicted for shooting at the Queen. There was strong evidence that he was insane. Lord Denman, in summing up to the jury, said: "The question for your consideration on the facts are, whether the prisoner did fire the pistols or either of them at her Majesty, and whether these pistols, or either of them, were or was loaded with ball, at the time when they were so fired. These are matters of fact; and if you think they are proved, then you will have further to inquire whether the prisoner was in the possession of his reason, so as to be responsible for what he did. These matters are quite distinct, and I think it will be the better way to abstain from making any remark upon the defence, until I have gone through the facts proved on the part of the prosecution, as to the commission of the act itself (his lordship read the evidence for the prosecution, commenting occasionally on it as he passed along). On the point whether the pistols were loaded or not, he observed, one witness says, 'the prisoner was about five or six yards from the carriage when he discharged the pistol, and on the right side of it; the report of the pistol attracted my attention; and I had a distinct whizzing and buzzing before my eyes, between my face and the carriage;' another witness says, 'it seemed something that whizzed past my ear; as I stood, it seemed like something quick passing my ear, but what

[1] Rex v. Bowler, Coll. on Lun. 673. [2] 5 C. & P. 169 (1831). [3] 9 C. & P. 525 (1840).

Notes.

I could not say.' This is the only direct evidence. I have no means of furnishing you with any observation on that evidence; it is not matter of law, and you must bring your experience to bear upon it, and couple it with the other facts of the case. With respect to the letters written by the prisoner, whether he really believed in the existence of any such society as is mentioned in them, or was only amusing himself with supposing the existence of such a society, is a matter which we cannot determine otherwise than by conjecture. Then the very important question comes, whether the prisoner was of unsound mind at the time when the act was done. Persons *prima facie* must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act, and yet not be responsible. If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed. Many cases have been referred to upon the subject. But it is a sort of matter in which you cannot expect any precedent to be found. It is the duty of the court to lay down the rule of the English law on the subject; and even that is difficult, because the court would not wish to lay down more than is necessary in the particular case. As to *Hadfield's Case*, Mr. Erskine would lose nothing by laying down the rule most widely. It must not, therefore, be said, that the admission of the counsel is to decide the matter. On the part of the defence it is contended that the prisoner at the bar was *non compos mentis*, that is (as it has been said), unable to distinguish right from wrong, or in other words, that from the effect of a diseased mind, he did not know at the time that the act he did was wrong. As to the grandfather, two points will arise, whether his conduct was evidence of insanity, or only of violence of disposition; and if of insanity, whether the insanity was or was not hereditary? (His lordship read the evidence of the medical and other witnesses on the subject of insanity, and said): It my be that the medical men may be more in the habit of observing cases of this kind than other persons; and there may be cases in which medical testimony may be essential; but I cannot agree with the notion that moral insanity can be better judged of by the medical men than by others. As to the father of the prisoner, the question will be, whether there was a real absence of the power of reason — the power of controlling himself, or whether it was only a violent, or even a cruel disposition; and then, upon the whole, the question will be, whether all that has been proved about the prisoner at the bar shows that he was insane at the time when the act was done, whether the evidence given proves a disease in the mind as of a person quite incapable of distinguishing right from wrong. Something has been said about the power to contract, and to make a will. But I think these things do not supply any test. The question is, whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the crime, that it was a crime. With respect to the letters and papers they may be brought forward on either side of the question."

In *Reg.* v. *Higginson*,[1] tried in 1843, the prisoner was indicted for the wilful

[1] 1 C. & K. 130 (1843).

murder of his son, Charles Higginson, a child five years old, by burying him alive. There was another count in the indictment, which charged his death to be by a mortal fracture of the skull. The facts of the case were clearly proved; and it appeared that the child, who was in perfect health, was taken into a wood, and there buried by the prisoner; and on the learned judge inquiring of Mr. Greatrix, the surgeon who was called as a witness for the prosecution, whether a fracture of the skull of the child was the cause of his death, or whether the child had, after the fracture of the skull, been suffocated by being buried while alive, the prisoner said in open court: "I put him in alive." The prisoner, who had no counsel, made no defence, and said he had no witness; but Mr. Brutton, the governor of the prison, informed Mr. Bellamy, the clerk of assize, that it had been suggested to him that the prisoner was insane. This being mentioned by Mr. Bellamy to the learned judge, his lordship desired that any person who could depose to the prisoner's state of mind would come into the witness-box.

Two of the officers of the prison, one of whom had known the prisoner since his committal on this (May 20, 1843), and the other of whom had known him from the time of their being at school together (the prisoner being twenty-six years of age), being sworn, deposed to the prisoner being "of very weak intellect," and Mr. Hughes, the surgeon of the prison, who was also called, by direction of the learned judge, stated that the prisoner was of "very weak intellect, but capable of knowing right from wrong."

Maule, J. (in summing up, after adverting to the facts of the case), said: If you are satisfied that the prisoner committed this offence, but you are also satisfied by the evidence that, at the time of committing the offence, the prisoner was so insane that he did not know right from wrong, he should be acquitted on that ground; but if you think that, at the time of the committing of the offence, he did know right from wrong, he is responsible for his acts, although he is of weak intellect. Verdict — guilty; and the prisoner was afterwards executed.

This test was finally adopted by the answers of the judges to the House of Lords in *McNaghten's Case*,[1] where they laid it down: "To establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong" and this test is now the settled rule of the English courts.

In *R.* v. *Vaughan*,[2] Tindal, C. J., said: "It is not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shown that the prisoner had no competent use of his understanding so as to know that he was doing a wrong thing in the particular act in question."

In *Reg.* v. *Barton*,[3] the prisoner was indicted for the wilful murder of Harriet Barton, on the 22d of June, by cutting her throat with a razor. The prisoner and the deceased were husband and wife, and up to the day named in the indictment, he had always treated her and their children with kindness. On the afternoon of the 21st of June, the prisoner and his wife were seen talking with their next-door neighbor at their door late at night, and at four o'clock on the following morning it was discovered that he had cut the throats of his wife and child, and that he had

[1] 10 Cl. & F. 200. [2] 1 Cox C. C. 80 (1844). [3] 6 Cox C. C. 275 (1848).

Notes.

attempted to commit suicide. When questioned by the surgeon, he exhibited no sorrow or remorse for his conduct, but stated that "trouble and dread of poverty and destitution had made him do it, fearing that his wife and child would starve when he was dead." He also said that he had contemplated suicide for a week past; that he had not had any quarrel with his wife, and that having got out of bed to destroy himself, the thought had first come into his head to kill his wife and child; that he had at first attacked her while asleep in bed, and that she got away from him and rushed to the window, calling for help; that he then killed the child, and seizing his wife pulled her backwards towards him, in which position he had cut her throat. This done, he next tried to cut his own throat, but his powers failed him, and he did not succeed, though he wounded himself severely, his wife having fallen down dead by his side. This narrative, coupled with a knowledge of the prisoner's private circumstances, induced the surgeon to form the opinion that the prisoner, at the time he committed the act, had not, in consequence of an uncontrollable impulse to which all human beings were subject, any control over his conduct. The desire to inflict pain and injury on those previously dear to the prisoner was in itself a strong symptom of insanity, and the impossibility of resisting a sudden impulse to slay a fellow-being, was another indication that the mind was insane. There was not necessarily a connection between homicidal and suicidal monomania, though it would be more likely that a monomaniac, who had contemplated suicide, should kill another person, than for one who had not entertained any such feeling of hostility to his own existence. Monomania was an affection which, for the instant, completely deprived the patient of all self-control in respect of some one particular subject which is the object of the disease. It was true that the prisoner had no delusion and his reasoning faculties did not seem to be affected; but he had a decided monomania evincing itself in the notion that he was coming to destitution. For that there was some foundation, in fact, but it was his (the surgeon's) decided opinion that the prisoner was in an unsound state of mind at the moment he cut his wife's throat, though he would not be so in all cases of murder.

It was also proved that on the 21st of June the prisoner had caused his razor to be sharpened, saying that he wanted to give it to some friend. *Couch*, for the prisoner, submitted that the jury were bound, after the testimony of the surgeon, to acquit the prisoner on the ground of insanity, and he proceeded to show by other witnesses that the prisoner had suffered a severe pecuniary loss not long before the occurrence of the dreadful event now the subject of inquiry, and that it had produced a decided effect on his mind, giving rise to the most gloomy anticipations on account of his wife and family. PARKE, B., told the jury that there was but one question for their consideration now, viz , whether, at the time the prisoner inflicted the wounds which caused the death of his wife, he was in a state of mind to be made responsible to the law for her murder. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, and if so, he knew he was doing wrong in so acting. This mode of dealing with the defence of insanity had not, he was aware, the concurrence of medical men; but he must nevertheless, express his decided concurrence with Mr. Baron ROLFE'S views of such cases, that learned judge having expressed his opinion to be that the excuse of an irresistible impulse, co-

existing with the full possession of reasoning powers, might be urged in justification of every crime known to the law, for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. Something more than this was necessary to justify an acquittal on the ground of insanity, and it would be, therefore, for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived him of the knowledge that he was doing wrong. Could he distinguish between right and wrong? Reliance was placed on the desire to commit suicide, but that did not always evidence insanity. And here the prisoner was led to attempt his own life, by the pressure of a real substantial fact, clearly apparent to his perceptive organs, and not by any unsubstantial delusion. The fact, however, must be taken into the account, for it might have had a serious effect on the mind of the prisoner, as also the absence of any attempt to escape from justice, and the want of all sense of sorrow and regret immediately after the death of his wife, contrasted with his more natural state of mind afterwards when he felt and expressed regret and sorrow for his act. These circumstances ought all to be taken into consideration; but it was difficult to see how they could establish the plea of insanity in a case where there was a total absence of all delusion.

Guilty — sentence of death passed.

In *Reg.* v. *Davis*,[1] tried before CROMPTON, J., in 1858, the prisoner was indicted for maliciously setting fire to a building with intent to injure the owner. There was evidence that the prisoner was insane; among other things he had told a witness that he had tried to hang himself on a tree near the house, and set fire to the tree. CROMPTON, J., instructed the jury as follows: "It is not necessary for the prosecution to prove express malice in the prisoner. Malice, in this case, does not mean that he had a particular spite against the prosecutor. If a man being in his right mind burns property belonging to another, a jury ought to infer malice from the act itself. Do you find that the prisoner set the place on fire? If you do, are you of the opinion that he knew right from wrong? It is not sufficient that you should think that he did it from being in a reckless depressed state of mind. You must find that, from mental disease, he did not know right from wrong. There seems to me very little evidence to prove that. His statement about the tree, which appears to be true, is, however, a circumstance for you to take into consideration in determining his state of mind. There is no evidence, except his own statement to the constable, that he did, in fact, set fire to the hovel. Are you satisfied from that confession that he really did the act? If so, did he know right from wrong? The fact that he was attempting to extinguish the fire, does not necessarily show that he did not cause it, or that he did not know right from wrong when he did it. He might have done so maliciously, in the sense I have explained to you, and knowing right from wrong, but immediately afterwards have repented and tried to prevent the injurious consequences of his own act." The jury in the first instance found the prisoner not guilty on the ground of insanity; but in answer to the judge, said that they thought the prisoner was in such a state of mind that he did not know that the effect of

[1] 1 F. & F. 69 (1858).

burning the hovel would be to injure any other person. CROMPTON, J. — That is a verdict of not guilty.

In *Reg.* v. *Richards*,[1] the prisoner, aged sixty-five, was charged with murdering her husband, age seventy, by beating him about the head with his crutches. The general evidence for the defence was principally of weakness of mind and lowness of spirits. A medical witness stated that the prisoner was suffering from that form of mental disease in which she would be subject to paroxysms or fits of madness, and that from his knowledge of her and from the evidence, he thought it likely she was under the influence of one of those paroxysms when the offence was committed, though there were no symptoms of this having been the case. There was some slight evidence of the prisoner having once made an attempt to drown herself. She said she had killed the deceased to get rid of him because he was dirty; that she had intended to do it and was not sorry for it. CROWDER, J., (to the jury) after stating the law as to insanity: It is for you to say whether, at the time of the act done the prisoner knew the nature of the act done, or that it was a wrong act. If she were in a state of mind in which she might have destroyed herself as she formerly attempted, you may probably think she would not be responsible for her acts, but the *onus* of proof as to this lies upon her.

A medical witness was saying that he did not consider the prisoner to be responsible for her acts.

CROWDER, J. — We do not want your opinion as to her responsibility, simply give your opinion as a skilled witness, from what you know of the prisoner, and from the evidence you have heard of the state of her mind.

The verdict was not guilty. The circumstances of this case were peculiar. The prisoner appeared to be very infirm and much older than she was. It was suggested that she was not physically capable of the violence causing the death, except on the supposition of the additional strength imparted by a state of frenzy.

In *Reg.* v. *Townley*,[2] the prisoner was tried before MARTIN, B., for the murder of Elizabeth Goodwin, a female to whom he had been formerly engaged to be married, but who had a little while before broken off the engagement. MARTIN, B., charged the jury as follows: The act of the prisoner amounted to murder, subject only to the question of insanity. No one could doubt that the prisoner knew what he was doing and that it would cause death. Unless he was insane, therefore, under these circumstances he was guilty of murder. No word was more vague than insanity. Probably there was not one of the jury but was acquainted with some man who was in the habit of doing extraordinary actions, and of whom people said, "Why that man must be insane!" Two years ago an investigation took place into the condition of mind of a gentleman from the eastern part of the county. There was a long inquiry, which excited great public interest, and there was a great divergence of opinion among medical men. Great eccentricity of conduct on the part of that person was shown, yet there was nothing to relieve him from criminal responsibility. Probably he was not the wisest of men, yet he was of sufficient intellect to take care of himself and avoid doing injury to others. There was a somewhat similar case at the last Gloucester assizes in which a young lady was under the impression that a number of

[1] 1 F. & F. 87 (1858). [2] 3 F. & F. 839 (1862).

R. *v.* Townley.

ladies had formed an unfounded dislike to her. In all probability she was laboring under a delusion with respect to those persons, yet she was as subject to the criminal law as any person in that court. What the law meant by an insane man was a man who acted under delusions, and supposed a state of things which did not exist, and acted thereupon. A man who did so was under a delusion, and a person so laboring was insane. In one species of insanity the patient lost his mind altogether and had nothing but instinct left. Such a person would destroy his fellow-creatures as a tiger would his prey, by instinct only. A man in that state had no mind at all, and, therefore, was not criminally responsible. The law, however, went further than that. If a man laboring under a delusion did something of which he did not know the real character, something of the effect and consequences of which he was ignorant, he was not responsible. An ordinary instance of such a delusion was when a man fancied himself a king and treated all around him as his subjects. If such a man were to kill another under the supposition that he was exercising his prerogative as a king, and that he was called upon to execute the other as a criminal he would not be responsible. The result was that, if the jury believed that at the time the act was committed the prisoner was laboring under a delusion, and believed that he was doing an act which was not wrong, or of which he did not know the consequences, he would be excused. If, on the other hand, he well know that his act would take away life, that that act was contrary to the law of God and punishable by the law of the land he was guilty of murder. That was the real question they had to try. In his opinion the law upon the subject was best laid down by Justice Le Blanc, as able a judge as ever sat on the bench. Justice Le Blanc, in the case alluded to, observed to the jury that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong, or under the influence of any illusion which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of the opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country and guilty in the eye of the law. That in his (Baron Martin's) opinion was a correct statement of the law. He should not allude to *Bellingham's Case*, because many were of opinion that that was an unsatisfactory trial. In *Offord's Case*, the late Lord Lyndhurst, told the jury that they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know when he committed the act what the effect of it, if fatal, would be. With reference to the crime of murder, the question was, did he know that he was committing an offence against the laws of God and nature? In *Oxford's Case*, Lord Denman said: "Something has been said about the power to contract and to make a will; but I think that those things do not supply any test. The question is, whether the prisoner was laboring under that species of insanity which satisfies you; that he was quite unaware of the nature, character and consequences of the act which he was committing, or in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act that it was a crime." His lordship continued that the

jury must judge of the act by the prisoner's statements and by what he did at the time. Unless they were satisfied, — and it was for the prisoner to make it out, — that he did not know the consequences of his act, or that it was against the law of God and man, and would subject him to punishment, he was guilty of murder. His lordship then went most carefully through the evidence. The prisoner's letters appeared to be as sensible letters as he had ever read. Again, the reason the prisoner gave for his act, was, "she should not have proved false to me." Now, if his real motive was that he conceived himself to have been ill used, and either from jealousy of the man who was preferred to him, or from a desire of revenge upon her, committed the act, that would be murder. Those were the very passions which the law required men to control, and if the deed was done under the influence of those passions there was no doubt that it was murder. The prisoner's expression that he should be hanged for it indicated that he knew the consequences of his act. Another reason he gave for what he had done was, "The woman who deceives me must die." If a young lady promised to marry a man and then changed her mind, it might truly be said that she deceived him; but what would be the consequences to society if men were to say every woman who treated them in that way should die, and were to carry out these views by cutting her throat? The prisoner claimed to exercise the same power over a wife as he could lawfully exercise over a chattel, but that was not a delusion nor like a delusion. It was the conclusion of a man who had arrived at results different from those generally arrived at, and contrary to the laws of God and man, but it was not a delusion. Evidence, indeed, had been given of an actual delusion in the prisoner's mind in supposing that there was a conspiracy against him. This was an apt and common instance of delusion. There was also evidence of insanity in the maternal line, and it was true that insanity was hereditary and did descend in families; the object of that was to show that it was possible, and not unlikely that the hereditary taint might exist in the prisoner. All the evidence, however, failed to show the existence of any delusion in the prisoner's mind which could explain this act. None of his family conceived him to be mad. It was clear that such an idea had not entered into their mind or they would not have recommended him to go and see Miss Goodwin. They treated him as sane from beginning to end, as a proper person to contract matrimony and re-engage the affections of this young woman. The account of his state of mind upon receiving her letters was most probably correct. Most men would probably suffer in the same way under similar circumstances. It had been said by one of the witnesses that the prisoner did not know the difference between good and evil. If that was a test of insanity, many men were tried who did not know that difference. In truth it was no test at all. The idea of a conspiracy was a delusion; but the mere setting himself up against the laws of God and man was not a delusion at all. The question for the jury was, was the prisoner insane, and did he do the act under a delusion believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder.

Verdict, guilty.

In *Reg.* v. *Law*,[1] tried before ERLE, C. J., in 1862, the prisoner, a female, who

[1] 2 F. & F. 836 (1862).

R. *v.* Law — R. *v.* Southey.

was indicted for the murder of her husband and child, was a person of weak intellect, who had been married to a laborer, her deceased husband, for seven years, and had had four children by him, of whom the child she had killed was tne youngest, and was only a few months old. After her confinement she had been ill some time, and for want of food and necessaries became in the last degree prostrated by physical weakness. Her husband having been sent to prison for a month for some trifling offence, she, with her child, had gone into the work-house, whither, on account of her weakness, she had to be taken in a carriage, while there, she was attended by the doctor for a female disorder, which caused a great loss of blood and by exhausting the vessels of the brain, tended to weaken it, and so led to mental weakness, as well as to the utmost nervous depression. She at times talked wildly of having seen devils, a bright light, etc., and the doctor judged these to be natural and probable results of the causes mentioned, and the chaplain, as well as the doctor, judged these to be signs of insanity. It was even thought that she must be sent to a lunatic asylum, but the physical symptoms abated under medical treatment, and with them the mental symptoms likewise began to disappear. They would, however (the doctor thought), be likely to re-appear if anything occurred to re-excite the physical disorder of the system. Still, when the month's imprisonment of the husband had expired, and he applied for his wife, it was doubted whether she ought to be sent home. However, she did so, on the 14th of January, after spending the day with her husband's parents. While there, they were reading the Bible together, and in making remarks on Christ's temptation, she said she had been tempted by the devil sometimes to cut her husband's throat, or her own, and should do so very likely some day. They went home in the evening, and early next morning she roused her mother, telling her at first that some one had cut her husband all to pieces, and then that she had killed him; and she subsequently said she had killed him with a chopper as he lay asleep, and afterwards killed the child; and that while she was doing it, she heard the devils blundering up and down the stairs, and making a dreadful noise, etc. Upon this evidence, without calling on the prisoner's counsel, ERLE, C. J. (to the jury): Are you of the opinion that the prisoner was in a state to know that she was doing what was wrong? There was a morbid action of the brain; there was a state of disease resulting from childbirth, and other causes which might lead to insanity; and there were before the act in question, delusions of the senses, which the medical men consider, and might well consider, symptoms of insanity. She seems to have fancied she saw and heard devils, even when no one was in the house alive but herself. If so, that was a delusion of such a nature as to indicate insanity. Her killing her child at the same time was no doubt under the same influence. It is for you to say whether upon such evidence you consider she was in such a state as to know the nature of her actions, or to be aware that she was committing a crime. If not, then it would be proper to acquit her, on the ground of insanity.

The jury at once found a verdict of not guilty, on the ground of insanity.

In *Reg.* v. *Southey*,[1] tried before MELLOR, J., in 1865, the prisoner was indicted for the murder of his wife. He pleaded insanity at the time and also present insanity. It appeared that his real name was Forwood, that he had been married

[1] 4 F. & F. 64.

Notes.

fourteen years ago, and was then carrying on business at Ramsgate. Two or three years after the marriage, however, he left that place, leaving his wife and child there behind him, and went to London, where he lived by the name of Southey Since then he had never seen his wife, or returned to Ramsgate. In the meantime, it appeared that he had become a marker at billiards, and he had formed a connection with a Mrs. White, and while this connection subsisted a year or two ago, he got her to go and see the Earl of Dudley, with a view to induce him to pay a large sum of money alleged by the prisoner to have been lost to him by the earl's brother at billiards. The demand was refused; the demand came before the police court, as an attempt to extort, or intimidate; and the prisoner, last year, wrote a long letter to a daily paper, containing a perfectly coherent history of his life, and an account of the particular matter. After this, shortly before the murder in question, Mrs. White left him and went to Australia; and the prisoner, who evidently resented this, went to her husband and got possession of her three boys — sons of theirs — and took them to a coffee-house, where he left them in bed, and where they were found dead next morning. This was the morning of the 9th of August. On the evening of that day, he went to Ramsgate disguised with false beard and moustache, and a pair of green spectacles, and provided with a pistol revolver, with five chambers, all of which were loaded with ball; and having found out where his wife lodged, managed to get access to her at the house of a friend, and desired to be alone with her. She, however, at first objected to this, and he then made an appointment with her for the next morning at the same house. He came there the next morning and for some time conversed sensibly; still, however, pressing her for an interview with her alone; but desiring that their child should be with them. This last was not acceded to, but his wife went with him alone, and they sat together nearly half an hour till the child came in. In five minutes afterwards, reports of fire-arms were heard, and it appeared that after shooting both his wife and child, he was taking off his disguise, when, before he had time either to reload his weapon or depart, he was seized by one of the witnesses until the police arrived.

Under the body of deceased was found a copy of his letter, cut from the newspaper in which it appeared. When asked why he had done this deed, he said: "She is better off; had she lived, she would have had more trouble; for if I had returned to London, it would have been under sentence of death!" adding, "What have I left behind!" or "What have I done!" Allusions which it was suggested referred to his murdering Mrs. White's three sons; evidence of which, therefore, was admitted to explain the allusion, and rebut the evidences of insanity, which it was intimated (as already suggested) would be set up.

When before the magistrates, he read a long written statement, acknowledging that he had taken the children to the place where they were found; and throwing the "responsibility for his acts" upon "society," and upon, in particular, eminent persons whom he denounced, and to whom, it was to be recollected he had applied for pecuniary relief. While in prison he wrote several sensible letters, and sent a telegram to a friend as to his trial, which is in these terms: "My life is over; I shall have to justify myself from terrible charges. See ———. I want her brother," etc.

Mellor, J., in summing up the case to the jury, said the first question for them was, whether the prisoner was in a fit state to be tried, or in such a state

of mental incapacity as to be unable to comprehend the nature of the proceedings and the evidence against him. If so, then that finding would be recorded, and he would be remanded until he was able to take his trial. If he was sane now, then the question would arise, whether he was guilty of the crime of which he was charged. The defence set up for the prisoner was insanity. Not a sudden frenzy — not a sudden excess of homicidal mania or fury, but as was said, chronic and permanent insanity. Insanity now, and insanity then, insanity such as to disable him from knowing right from wrong. Now, was the defence sustained? It was for those who set it up to sustain it by evidence. By the law of England, every man was presumed to be sane until the contrary was shown. It would be most dangerous if it were otherwise, and when a person was to be saved from the consequences of his acts by this defence, it must be shown, from circumstances, or positive testimony, that the person at the time of the act was in such a state of mind, from disease, as to be unable to comprehend the nature and quality of his acts, and to know whether he was committing right or wrong. A man might have been brought up unhappily, his mind might be ill-regulated and ignorant; but these were accidental distinctions of which the law could not take cognizance. It was impossible to make all men equally moral or educated, and if these distinctions were to be regarded, there would be an end of the criminal law altogether. Commenting upon the evidence of the medical witnesses for the defence, the learned judge observed that, after all, the jury must give themselves up to such testimony, but must exercise their common sense and judgment upon it. Some medical men had theories about insanity which, if applied generally, would be fatal to society. Life could not go on if men who committed great crimes were to be deemed insane upon these theories. The standard of sense or responsibility they set up was far too high for common life and human society. And when medical men came and stated that, from seeing a man once or twice, they should say he was insane; and not only so, but that he was insane four months ago, the jury must exercise their common sense as to the grounds given for this opinion. The learned judge, in commenting on the medical evidence for the defence, observed that the medical witnesses admitted (with one exception) that the expressions of the prisoner, immediately before and after the fatal act, showed that he understood its nature and knew whether it was right or wrong. The learned judge also observed, that it appeared from the evidence for the prosecution, that hysteria was quite different from insanity, and that the general manner and demeanor of the prisoner while he had been in gaol showed good sense and sanity of mind. It was remarkable, he observed, that there was no evidence as to his insanity in any former period of his life. No one who had known him in his previous life said he was insane, or even regarded him as being so. And on the other hand, the gentlemen who had been in charge of the man from the moment of his apprehension to the present time, give positive evidence that he was perfectly sane. Such was the direct and positive evidence on the subject of the prisoner's insanity. He need not say that the opinion of persons who had observed a man for months was worth far more than that of those who went to see him once for the very purpose of giving evidence that he was insane. The jury must bear in mind that a man was presumed to be sane until the contrary was shown. And the jury could judge, in part, from their own observation of the prisoner's demeanor in the dock. So much, then, for the

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direct evidence upon the question. The case for the prosecution, however, rested a good deal upon the whole of the circumstances of the case, and especially upon the circumstances immediately surrounding the act in question. The jury were to consider whether these circumstances did not show that the man at the time he committed the deed, knew that he committed a crime. It was not enough that some amount or degree of insanity was shown. It must appear that the prisoner did not know that he was doing wrong. The learned judge then read and reviewed the general evidence in the case, pointing out the circumstances relied upon as showing design and deliberation, especially the design made use of. Up to that time the jury must consider whether everything was consistent with his being in the full possession of his senses. Upon the face of it, certainly, it looked as if he very well knew what he was about. The learned judge then came to the evidence as to the circumstances of the murder, particularly commenting upon the conversations with the prisoner. This, he observed, was all very material as to the sanity of the prisoner. The learned judge observed that the prisoner was seized immediately after the act, and, therefore, there was nothing in his not attempting to escape, as he must have known it was impossible, and so as to the avowal of the act, being taken in the act, how could he help acknowledging it. There were no proofs of insanity, and on the contrary, all the other circumstances of the act, seemed to show sanity. As to the motive of the act, the learned judge observed that no one could dive into the heart of a human being, or divine the secret motives of his actions. The absence, therefore, of all proof of a motive was not of the same weight as its presence. But here there was an allusion to his being under sentence of death for another murder which evidently meant the murder of the boys, for he said he referred to what "he had done behind," or "what he had left behind." Now, did the jury doubt that he knew he had done what the law regarded as a crime, the doom of which was death. It appeared that the prisoner just after the act was calm and collected, and the circumstances seemed to have shown great deliberation; and the statement he had written to read before the magistrates showed a consciousness that he had committed a crime. It was for the jury to say whether there was any evidence of insanity. No doubt it was a strange and extraordinary document; but was there not "method in the madness?" Did it not rather show an aim and purpose to mitigate and excuse his crime? And immediately after writing this account, there were letters, and messages, and a telegram, which seemed to show perfect sense. These were most material. These inquiries were most sensible and pertinent; did all this show any want of capacity to understand the charges against him? Notwithstanding all this, one medical man, and only one, said he was of opinion that he was not in a state to understand what was going on. But as to that, the jury must form their own judgment, and upon the whole evidence they must consider whether they were or were not satisfied that he was now in a state to take his trial; and if so, then they must consider the next and great question, whether at the time of the act he was or was not in such a state of mind as to make that act murder? Every act of wilful killing of a human being was *prima facie* murder, and it was murder unless the evidence showed that the man was not in a state to know that, in the eye of the law, what he did was a crime. Was there anything in the case to satisfy their minds that, at the time he did the act he did not know that it was wrong, and that it was a

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crime? If not satisfied of that, then (assuming that they came to a similar conclusion on this first question) they must find him guilty; if otherwise, then not guilty, on the ground of insanity. The jury first pronounced their finding, that the prisoner was now of sane mind, and then, they returned the general verdict of "guilty."

Verdict guilty. Sentence, death.

§ 7. **The English Tests in the American Courts.** — Of the four legal tests of insanity which we have seen have been adopted at different times by the English judges, viz.: (1) the "child" test; (2) the "wild beast" test; (3) the test of knowledge of right and wrong in the abstract, and (4) the test of knowledge of right and wrong as applied to the particular act, — only the fourth has been adopted at any time by the courts of this country; but this test has been received with such favor as to be at present well settled as the law of such cases in a majority of the State courts and in the Federal courts.[1] We shall, therefore, speak of this fourth test hereafter as the "right and wrong test," and, in the following sections, the States in which this test is maintained will be given in their order.

§ 8. **Right and Wrong Test — Alabama.** — The right and wrong jest is approved in Alabama. In a leading case on the subject it is said: "When the plea of insanity is interposed to protect one from the legal consequences of an act which amounts to a crime, to render the defence available, the evidence must be such as to convince the minds of the jury that at the time the act was done the accused was not conscious that in doing the particular act he was committing a crime against the laws of God and his country. If he knew right from wrong, and knew that he was violating the law, he is then guilty, for it is this conscious knowledge connected with the act that constitutes the crime."[2]

§ 9. —— **California.** — In California the test is whether the accused, at the time of committing the act, was conscious that he was doing wrong.[3] An instruction, that if the jury find that the prisoner was insane at the time of the alleged murder, they should declare him not guilty without regard to the degree of insanity, is properly refused.[4]

§ 10. —— **Delaware.** — So in Delaware the test is the ability to comprehend the difference between right and wrong in respect to the very act with which he stands charged.[5]

[1] In some of the cases where the fourth test is adopted, the language of the court would seem to imply that the third test was the one intended to be applied. But it is plain in the light of all the American adjudications that the third test is not law in a single State.

[2] McAllister *v.* State, 17 Ala. 434 (1850), citing Com. *v.* Rogers, 7 Metc. 500; Clark *v.* State, 12 Ohio, 483; State *v.* Brinyea, 5 Ala. 241.

[3] People *v.* McDonnell, 47 Cal. 134 (1873); People *v.* Coffman, 24 Cal. 230 (1864); People *v.* Hoon, 16 Cent. L. J. 57 (1883); People *v.* Hobson, 17 Cal. 424 (1861).

[4] People *v.* Best, 39 Cal. 690 (1870).

[5] State *v.* Danby, 1 Houst. Cr. Cas. 166 (1864); State *v.* West, 1 Houst. Cr. Cas. 371 (1873); State *v.* Brown, 1 Houst. Cr. Cas. 539 (1878); State *v.* Hurley, 1 Houst. Cr. Cas. 371 (1873); State *v.* Windsor, 5 Harr. (Del.) 512 (1851); State *v.* Dillahunt, 3 Harr. 551 (1840).

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§ 11.—— **Georgia.** — The same test prevails in the Georgia court.[1] In an early case it was held that where it is admitted that the prisoner is neither idiot, lunatic or insane, it is not competent to prove that he is of weak mind. "All persons are considered by our code," it was said, "capable of committing crime who are neither idiot, lunatic nor insane, and who have arrived at the age of fourteen years, and before that age if they know the distinction between good and evil, and if capable of committing crime they are liable to be convicted upon their own confession. We cannot therefore recognize the distinction which is sought to be engrafted upon the law. It would lead to endless metaphysical discussion on the philosophy of the mind. Besides, experience teaches that in point of fact the cunning and crafty are much more likely to conceal and misrepresent the truth than those who are less gifted. It is the trite observation of all travellers that if you wish to learn the truth with respect to the health of a country, you must interrogate the children and servants about the matter."[2] In *Lloyd* v. *State*,[3] it was said: "We see no material error in the judge's charge on the subject of insanity. In one sense all crime is insanity. Indeed, in view of the awful responsibility of all of us to the judge of the quick and the dead, any sin is a sort of insanity. But as the judge justly said, society cannot afford to treat a man as insane because he has become so steeped in crime as to have stupified his conscience. The judge stated the rule of responsibility from the words of this court over and over again repeated, to-wit: Was the accused conscious he was doing wrong? Was his mind sound enough to judge of the right or wrong of his acts."[4]

§ 12. —— **Kansas — Maine.** — The right and wrong test is adopted in Kansas[5] and Maine.[6]

§ 13.—— **Massachusetts.** — So in Massachusetts.[7] In *Com.* v. *Heath*,[8] tried in Massachusetts, in 1858, Francis E. Heath and Miriam G. Heath were indicted for the murder of their father, Joshua Heath, and tried at Lowell, at April term, 1858, before Justices Dewey, Metcalf and Thomas. One question at the trial was, whether the defendants were of sufficient intelligence to be responsible for a homicide; and upon this point and the burden of the proof thereon, the court gave the following instructions in the charge then delivered by Thomas, J.: If the jury are satisfied that a homicide was committed, and under such circumstances that, if done by a responsible agent, by one capable of committing a crime, it would be murder, either in the first or second degree, the only question remaining, and the important and vital question of the cause is "were the prisoners at the bar capable of committing the offence." The law presumes men and women of the age of the prisoners to be sane, to be responsible agents. Where, therefore, a homicide is proved to have been committed in such way and under such circumstances, as when done by a person of sane mind, would con-

[1] Roberts *v.* State, 3 Ga. 310 (1847); Brinkley *v.* State, 58 Ga. 296 (1877).

[2] Studstill *v.* State, 7 Ga. 202 (1849).

[3] 45 Ga. 57 (1872).

[4] And see Humphreys *v.* State, 45 Ga. 190 (1872); Westmorland *v.* State, 45 Ga. 225 (1872); Choice *v.* State, 31 Ga. 424 (1860); Roberts *v.* State, 3 Ga. 310 (1847).

[5] State *v.* Mahn, 25 Kas. 182 (1861).

[6] State *v.* Lawrence, 57 Me. 574.

[7] Com. *v.* Rogers, 7 Metc. 500 (1844).

[8] 11 Gray, 303 (1858).

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stitute murder, the presumption of law, as of common sense and general experience, supplies that link. It presumes men to be sane till the contrary is shown. The presumption of law stands till it is met and overcome by the evidence in the case. The evidence may come, of course, as well from the witnesses for the government as the witnesses for the defence; and when the evidence is all in, the jury must be satisfied, in order to convict the prisoner, not only of the doing of the acts which constitute murder, but that they proceeded from a responsible agent, one capable of committing the offence. This is the rule to be applied to a case where the defence is idiocy, an original defect and want of capacity. Whether the rule is modified where the defence relied upon is insanity, disease of the mind or delusion, it is not necessary now to inquire." The prisoners were convicted.

§§ 14, 15. —— **Michigan — Minnesota — Mississippi.**—And the right and wrong test prevails in Michigan,[1] and Minnesota. In *State* v. *Shippey*,[2] it was said: "His (the prisoner's) suspicion of strangers, apparent melancholy and peculiarity of deportment generally are not proof of insanity as that term is popularly understood. Perhaps by theorists these peculiarities may be considered evidences of insanity. It is, indeed, very difficult to define that invisible line that divides insanity from sanity, but such speculation is not here necessary, for a party indicted is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offence he had capacity sufficient to enable him to distinguish between right and wrong and understood the nature and consequences of his act and had mental power sufficient to apply that knowledge to his own case," and it is followed in Mississippi.[3]

§ 16. —— **Missouri.** — In Missouri the test adhered to is the ability to know the right from the wrong of the particular act.[4] In *State* v. *Kotovsky*,[5] decided in 1881, HENRY, J., in delivering the opinion of the court affirming the judgment below says: "The instruction in relation to insanity was in exact conformity with what this court recently announced as the law in *State* v. *Redemeier*,[6] and yet more recently in *State* v. *Erb*;[7] and while two of the members of this court (Judge HOUGH and I) do not think that the only legal test of insanity is the ability to know the right from the wrong of the particular act, but that one knowing the right from the wrong may, in consequence of organic mental derangement, be incapable of exercising the will, and is therefore not amenable criminally for the act, three of our associates are of different opinion, and the judgment, therefore, cannot be reversed for this alleged error." In an earlier case it was said: "Where insanity is interposed as a defence to an indictment for an alleged crime the inquiry is always brought down to the single question of capacity to distinguish between right and wrong *at the time when the act was done.* * * * The insanity must be such as to deprive the party charged with the crime, of the use of reason in regard to the act done. The prisoner may be

[1] People *v.* Finley, 38 Mich. 482.
[2] 10 Minn. 223 (1865).
[3] Bovard *v.* State, 30 Miss. 600 (1856); Newcomb *v.* State, 37 Miss. 383 (1859); Cunningham *v.* State, 56 Miss. 269 (1879).
[4] State *v.* Redemeier, 71 Mo. 173 (1879).
[5] 74 Mo. 247 (1881).
[6] 71 Mo. 173.
[7] 74 Mo. 199.

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deranged on other subjects, but if capable of distinguishing between right and wrong in the particular act done by him, he is justly liable to be punished as a criminal. Such is the undoubted rule of the common law on this subject. Partial insanity is not by that law necessarily an excuse for crime and can only be so where it deprives the party of his reason in regard to the act charged to be criminal. The instructions here given brought down the question of insanity in regard to the act done. If the prisoner had been sane on all other subjects, and yet not able to know whether the act charged against him was right or wrong, owing to some morbid and diseased hallucination of the mind upon the very subject, the jury were instructed to find him not guilty." [1]

§ 17. —— Nebraska — New Jersey. — The same test is applied in Nebraska [2] and New Jersey.[3]

§ 18. —— New York. — The ability to distinguish between the right and wrong of the act is the test recognized in New York.[4]

In *People* v. *Pine*,[5] the prisoner was tried in Dutchess County, N. Y. for the murder of Mrs. Russell. BARCULO, J., charged the jury as follows: —

"The question of insanity, upon which this case turns, always involves difficult and intricate inquiries. It is a subject upon which much has been said and written, by way of theory and speculation, and it cannot be denied that the numerous adjudications are not altogether reconcilable. Without detaining you with technical terms, it will be sufficient to say that insanity assumes a variety of forms and has many names. Among them are: (1) General insanity; (2) partial insanity; (3) periodical insanity; (4) moral insanity; (5) drunken insanity. The first, is insanity applied to objects generally; the second, is applied to single objects; the third, occurs at periods, with sane intervals; the fourth, is a morbid perversion of the natural feelings, affections, etc.; and the fifth, is that which results directly from intoxication. Now, the rules applicable to crimes committed in any of these degrees of insanity are mainly those of sound reason. Thus, it is conceded to be the law that insanity occasioned directly by intoxication is no excuse for a crime committed by one in that state. If it were otherwise, a man by drinking to excess could divest himself of legal responsibility, and gratify his thirst for vengeance with impunity. In regard to the other kinds of insanity, the rule is laid down in a great variety of terms. The English rule is thus stated, in *Bellingham's Case*, by Chief Justice MANSFIELD: 'In order to support the defence of insanity, it ought to be proved, by the most direct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that in fact it must be proven beyond all doubt that, at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature.' As long as they could distinguish good from evil they would be

[1] State *v.* Huting, 21 Mo. 464 (1855), citing McNaghten's Case, 10 Cl. & F. 210; Freeman *v.* People, 4 Denio, 29.

[2] Hawe *v.* State, 11 Neb. 537 (38 Am. Rep. 537) 1881); Wright *v.* People, 4 Neb. 407 (1876).

[3] State *v.* Spencer, 21 N. J. (L.) 196 (1846).

[4] Cole's Trial, 7 Abb. Pr. (N. S.) 321 (1868); People *v.* Cavanaugh, 62 How. Pr. 87 (1881); People *v.* Devine, 1 Edm. Sel. Cas. 594 (1848); People *v.* Griffin, *Id.* 126 (1848); Clark's Case, 1 City Hall Rec. 176 (1816); Walker *v.* People, *ante;* Flanagan *v.* People, 52 N. Y. 467 (11 Am. Rep. 731) (1873); see *post*, p. 875.

[5] 2 Barb. 566 (1848).

amenable for their conduct. Lord LYNDHURST, in *Rex* v. *Offord*, put this question: 'Did the prisoner know that in doing the act he offended against the laws of God and man?' According to the Scotch rule, the insanity must be of such a kind as entirely to deprive the prisoner of the use of reason, as applied to the act in question, and the knowledge that he was doing wrong in committing it. If, although somewhat deranged, he is able to distinguish right from wrong in his own case, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts.

"In the case of Abner Rogers, tried in Massachusetts before Chief Justice SHAW, in 1844, he laid down the rule as follows: 'A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that he is doing wrong, and criminal will subject him to punishment.' Although he may be laboring under partial insanity, if he still understand the nature and character of his act and its consequences; 'if he has a knowledge that it was wrong and criminal, and a mental power to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts.' There are cases in which the insanity consists in a delusion by which the prisoner has a real and firm belief of the existence of a fact wholly imaginary and unfounded. In regard to this, the English courts hold that it is no defence for a criminal that the prisoner supposes he is redressing an injury or grievance. The Massachusetts rule is, that if the imaginary facts would, if true, justify the act, then he is excusable, — as, when the prisoner supposed that the person was about to kill him, and he slays the other in self-defence. There must be an immediate apprehension of danger.

"Applying the principle to the present case, if the prisoner really believed that Mrs. Russell was in the act of committing a great personal injury to him, and supposed that he shot her in self-defence, he would be excusable. But it would be no defence that the supposed Russell or his wife had injured him to any extent, because if it were true it would be no justification of the act. If a breach of promise or anything of that kind was the origin of the act, and this was done by way of revenge, he is not excusable. A simple and sound rule may be thus expressed: A man is not responsible for an act, when, by reason of involuntary insanity or delusion, he is at the time incapable of perceiving that the act is either wrong or unlawful. Keeping in mind this rule, let us look into the testimony and endeavor to apply it. It arranges itself into two kinds: (1) Hereditary insanity; (2) personal acts of insanity.

"As to hereditary insanity, the evidence is admissible upon the principle of human nature, by which the properties, temperaments and infirmities of the parents are sometimes transmitted to their children, and pass from generation to generation. It is not in any case evidence of the highest character. It would be obviously unsafe to acquit any person on the sole ground that any of his ancestors were insane. It is a mere circumstance. But before any inference can be drawn from such a source, the fact of the ancestor's insanity must be clearly established. It is endeavored to be shown from the following facts that the prisoner's father was insane: (1) He appointed a time to die; (2) was

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troubled in mind; (3) committed suicide. But do these acts necessarily prove insanity? He seems to have been a 'high spirited' man, and possessing strong passions and religious feelings. He was unfortunate in his pecuniary affairs, — his property about to be sold on execution. May not these facts account for his conduct? Is every one who becomes possessed with the idea that he is about to die, insane? Is suicide evidence of insanity? Clearly not, alone. If you were now trying the question of Tilly Pine's insanity, would the evidence authorize you to find in its favor? If not, you cannot find any just inference in this case in favor of the prisoner. Is the daughter, Mrs. Potter, insane? She seems to have been a woman of strong religious feelings, which perhaps will account for all her peculiarities. Besides, she is but half sister to the prisoner, and may have derived her temperament from her mother. Both father and daughter discharged the duties incumbent upon them of father and wife. It is not pretended that a commission of lunacy could have been issued against either of them. We come now to the evidence of insanity in the family of Dr. Per La Pine, a cousin of the prisoner. It is shown that Lewis Pine, a brother, was deranged; the father was partially deranged after a severe loss. As to the children, it may have come from mother or father, or originated with themselves. The father lived to an advanced age, and attended to his business through life. No one can contend that he was a confirmed maniac, or even subject to periodical insanity. It is for you to say, on the whole, whether any well-founded inference can be drawn from such evidence of insanity in relatives; especially, when, with one exception, the relations are not in the right line of descent. As to the evidence of personal insanity: this defence is presented under very peculiar and somewhat suspicious circumstances. It is not pretended that the prisoner is now insane. If acquitted, he must be discharged, and could not be sent to the asylum, as the court understands the testimony. The witness speaks of his being insane. Not a single medical or scientific witness gives it as his opinion that he now is or ever was insane. The prisoner comes into court and says he was insane at the time of committing the act. Has he proved it? It is for you to scrutinize the testimony carefully, and not permit him to avoid punishment on that ground, unless made out to your full satisfaction. Generally, a man is presumed innocent, and the great difficulty is to show how the deed was done, and who did it. In this case the situation of the prisoner is otherwise; there is no doubt of his being the homicide. The presumption is that he was sane; that is the general rule. The presumption is against his innocence. He must clear himself by satisfying you that he was incapable of perceiving the criminality of the act. Eccentricity or peculiarity of conduct is not sufficient; they belong more or less to all men. Even partial insanity is not sufficient. To come to the personal acts from which it is contended that insanity is to be inferred: 1. His hanging himself. This was extraordinary, but it was done near a dwelling house. He also laughed when asked why he did it. 2. No more is heard of it till 1843, when he lived at Pleasant Valley. This, it appears, was about the time or soon after he lived at Mrs. Degroff's, where Mrs. Russell, then unmarried, lived. Mr. Taylor saw him crying at times; breaking through the siding; attempted to shoot himself. These may be evidence of an aberration of mind, or of disappointment, or a disposition to terrify others. If he was insane, and wished to kill himself, it

is strange he did not do it. It is possible that the letter given in evidence, in which he speaks of a marriage agreement, may afford a solution; or it may be explained by reference to intoxication. 3. The occurrence on the night he was removed to the county house with delirium tremens. It is difficult to see how this establishes insanity. 4. Scene at Brown's, last September. It was of short duration, and occurred after he had been drinking. 5. Application to Isaac Lawton for a warrant. He had been drinking, and seems to have had an idea that Mrs. Russell had wronged him. What is here alleged may have been true, without that degree of insanity which excuses. 6. The occurrence on board the towboat was extraordinary, unless it can be referred to delirium tremens. There is some other evidence, but this case has been summed up very ably, and I will not detain you with it. There are two theories by which these circumstances may be reconciled: (1) Periodical insanity, which is the theory set up by the prisoner's counsel; (2) a morbid thirst for revenge for a real or fancied injury, arising from the rejection of his addresses by Mrs. Russell before her marriage, excited by liquor. It seems to me that this last view will explain and reconcile all the testimony except the act of his boyhood. The letter before alluded to refers to this subject. In the first place, before the marriage of Mrs. R., he threatened to kill himself in view of the church; perhaps under a vague notion that she would learn of it and relent. After her marriage he seems to have had an idea that he was in some way entitled to a share of her property, — probably as a compensation for his injuries on his former indictment for burning the barn, or a reparation for refusing to marry him. It is hardly necessary to say that neither of these will excuse him. No fancied or real injury can justify the act. There is a further view of the case. Suppose it were established that the prisoner was liable to periodical fits of insanity, will the evidence permit you to acquit? The rule of law you will remember, is, that in case of periodical insanity, it must be proved that the act was committed during an attack of the disease.

"How then stands the testimony as to his situation at the time of committing the act? On Friday he came to Poughkeepsie and bought the pistol, apparently sane. He returned to Pleasant Valley in the evening apparently sane. On Saturday and Saturday evening he is proved to have been as sane as usual. On Sunday morning he was awakened by Sales, and cleaned the bar-room; sane yet. Took his breakfast as usual. Between ten and eleven o'clock he and Mr. Holmes looked over the accounts and settled. About the same time he had a brief conversation with Mr. Bishop at the stable. Mr. Frear saw him about twelve o'clock, three-fourths of a mile from Russell's, going north; exchanged a few words and considered him sane. Mr. Doty saw him about one-fourth of a mile from Russell's and did not discover any signs of insanity. It is true that he drank several times; and one witness speaks of his having a wild eye; but the great mass of proof establishes him to be as sane as usual, nearly up to the time of the commission of the deed and not excessively intoxicated. When, then, did he become insane? was it at the moment of the act? The act itself cannot be taken as evidence; it must be proven otherwise. Can it be supposed that during all the preliminary arrangements of nearly three days, and then became insane just at the time of firing the pistol? Can you believe that at the time this act was committed, the prisoner was so insane that he was not able to perceive that

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the act was wrong or unlawful? Again let us look at his subsequent conduct. Immediately after the deed was perpetrated, he fled. Why did he flee? It is laid down in the books, it is a dictate of human reason, that the very act of fleeing and secreting himself, is inconsistent, generally, with the idea of his not knowing that the act was wrong and unlawful. The prisoner kept himself secreted with great skill and cunning from Sunday till Wednesday, when he was arrested. No traces of insanity were found on him when taken. If he had the predisposition to insanity claimed by his counsel, which could be brought into action by suffering or excitement, it is strange indeed that he was not palpably mad when discovered, and now, on the trial. Trace him down to the present time. He at once declared that he had shot her and would have done it if her husband had been present; that her death was all he asked for. You have heard the medical witnesses, Doctors Deyo, and Hughson, who both say that he has been sane since his confinement. The letter of the first of February, 1848, bears no mark of insanity, but shows that he was aware of his situation and preparing for his defence. Now all these facts are strikingly inconsistent with insanity. The insane man when he commits a crime, generally does not attempt to escape, because he does not know that he has done wrong and deserves punishment, nor can he make a skilful preparation for his defence.

"It is for you to say whether, under this testimony, you can find that this man was insane when he shot Mrs. Russell. His conduct here is an unsafe basis for a verdict of acquittal. You are to consider the case with care and patience, and if made out to your satisfaction, give him the benefit of it. But you are also to remember that you are administering criminal laws; laws made for the protection of society; laws to which we must look for our safety. If this is a case of murder, it ought to be punished as such. The prisoner deserves it. The example to others is required. The deliberate murderer should never again be permitted to walk our streets, with an opportunity to repeat his crime, and encourage others in the gratification of their revengeful passions. Upon the whole, gentlemen, it is for you to say whether this man committed the deed wilfully and understandingly; if not he must be acquitted. Public justice does not require the punishment of an insane man. If you are satisfied of his insanity, whatever be the consequences he must be discharged. But public justice does require that if that act was not committed in a state of insanity which will excuse, it should be punished. You are not the ministers of mercy and compassion, but of justice; your feelings as men must yield to your duty as jurors. To permit a man legally guilty of such an atrocious offence to go at large, would be an example of the most dangerous character and tendency, well calculated to impair public confidence in the virtue and efficiency of our courts of justice.

"The case, gentlemen is with you; and I trust your deliberations will be guided by that wisdom which can never err."

The jury found the defendant guilty, and he was executed.

In *People* v. *Lake*,[1] the prisoner having been convicted of murder, his conviction was reversed on appeal.[2] Being placed on trial a second time be pleaded present insanity and a jury was empanelled to try this issue. The presiding

[1] 2 Park. 215 (1855).

[2] See Lake *v.* People, 1 Park. 495 (1854); People *v.* Lake, 12 N. Y. 358 (1855).

judge charged them as follows: "The statute declares that 'no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state?" The prisoner stands indicted for the highest offence known to the law, murder, and that too, committed upon his own wife and offspring. He has been once tried and convicted on this charge, and a new trial granted him, not because the court believed him insane, but wholly upon the ground of error arising on the admission and rejection of improper testimony. The new trial was set down for this time, the public prosecutor moved it on, and the prisoner's counsel alleged his insanity, and the court deemed it proper to try that question first and distinct from his crime. It is for this purpose to determine whether he is now insane, that you are impanelled. You will not allow the atrocity of the offence, nor the supposed effect of your verdict, either on the prisoner or on the community, to influence you in the least, but unswayed by prejudice and unbiased by feeling, you will pass upon the question of his present sanity; if you find that he is sane, we shall then proceed to try him on the indictment; if, on the contrary, you find him insane, the humanity of the law interposes for the protection of his life, until he is restored to reason. In the meantime he will be kept in close confinement, and society protected from his fury.

"Before proceeding to call your attention to the law as applicable to this case, I will make a passing remark on the strange objection that has been made by one of the counsel in reference to the propriety of the request made by the court for physicians to examine the prisoner so as to be able to testify as to his state of mind. The court did not do this; I did it, and assume its full responsibility. And I only allude to the subject on the prisoner's account, lest you might not, if you supposed there was anything improper in the selection of these men, give to their testimony the weight it would otherwise have. The defence on the former trial had been insanity, respectable physicians had then testified, that he was insane, others, that he was not. The alleged insanity continued, and physicians it was said would not make an examination. Knowing that the object of a trial was to elicit truth, and that could only be obtained by knowledge, and that knowledge was acquired by investigation, that you might have some evidence, some rational opinions founded upon sufficient facts; I made the request for four medical men to make an examination satisfactory to themselves. The four physicians were my own selection, one of them, Dr. John Cooper, Sr., had, on the former trial, given his opinion that he was sane, another, Dr. Varick, had, on that trial, testified that in his opinion, he was insane, while the other two, Doctors Hughson and Bocker, had never seen him, and were consequently uncommitted. I need not tell you, gentlemen, what is the professional standing of these four men among their brethren in this county or in the community. If the object of this trial is, however, to go into the matter blindfold, rather than to elicit truth, then it is very improper to have anybody to examine him enough to form an opinion. It has been said that this looks like an attempt of the court to have the man found insane. Is it possible that the district attorney will make such an admission that an investigation by competent physicians must lead to a verdict of insanity?

"You should not take it as such, and I hope that you will not allow even his mistakes to prejudice the rights of the people on the one side, nor anything that

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the court may do, to affect the prisoner. You are not trying the court or any of its officers, but the sanity of the prisoner. Whenever any issue is made against me, I shall be glad to meet it here or elsewhere. If the public or any one who represents it desires to see any one hung without an opportunity to know whether he is in a proper state of mind to be tried or a fit subject of punishment, they must not ask me to assist at the execution.

"To return to the question to be tried, is the prisoner now insane? To determine this it will probably be unnecessary to give you a definition of insanity; it is a condition of mental existence which is known and recognized in the laws of all civilized States, and which exempts the person subject to it from punishment. Its symptoms or outward manifestations are well known by those who have devoted their time and attention to its study. Insanity is as various in its phases and effects as the persons in whom it appears, yet there are four general classes into which, for convenience, it is divided:

"1. Mania, where the hallucination or delusion is general, extending to all objects.

"2. Monomania, in which the hallucination is confined to a single object, a class of objects, or a limited number of objects.

"3. Dementia, or madness, where the person afflicted is rendered incapable of reasoning in consequence of functional disorder of the brain, not congenital or born with the person.

"4. Idiotism, total want of the reasoning powers from malformation of the form of thought, at the time of birth.

"It is not pretended that the prisoner is an idiot, and has never been of sound mind; nor do I think it can be claimed that he is absolutely demented, or rendered incapable of reasoning upon all subjects; his lunacy, if it exists at all, is in the form of a mania or monomania, probably the latter.

"Your position in a case of this kind is peculiar. In ordinary trials you are to hear the testimony of witnesses as to the existence of certain facts, and on them found a verdict. Here you are to form an opinion on the evidence of opinions. This results from the nature of the subject of inquiry, the mind, an existence which is invisible, impenetrable, intangible, and unmeasurable. The minutest filament of matter, the air itself, can be weighed, but there are no scales in which the mind can be balanced.

"If the title to land is in dispute the deeds and conveyances, the surveyor's compass and chain can determine the question. So of almost any action or prosecution, the facts as detailed by the witnesses will enable a jury to determine the question at issue. But here the point in dispute is the existence or non-existence of a certain mental state. It is not even the amount, but the soundness of mind.

"Ordinary persons, no matter how intelligent, cannot give an opinion, but any man who has acquired, as an addition to his name, the letters M. D., be he ever so ignorant, can give you his opinion. Another question arises, are you to base your verdict upon the opinion of medical men or your own?

"On this subject, the whole theory of jury trials, and the reason of the case, satisfy me that it is your opinion, and not that of the doctors which is to make up the verdict.

People *v.* Lake.

"How much reliance you should place on the opinion of a medical witness, depends upon his skill, his means of judging of the true mental condition of the prisoner, and the facts he details to you as the basis of that opinion.

"Mathematics, chemistry, philosophy, and surgery are sciences; but medicine, unfortunately, cannot be ranked among them. Between allopathy and homœopathy, and the various other systems, every nostrum and every humbug has its practitioners and its victims, but there are, nevertheless, among those who pursue this profession scientific men, whose opinions on mental or physical diseases are entitled to consideration. There are certain things which are settled, the state of the pulse and skin in fever, the effects of certain articles, used medicinally on the human system; so there are certain phenomena which, when they exist, are admitted to be symptoms of insanity. Among these are wakefulness, want of appetite, or the reverse, an excited pulse with cold extremities during the absence of any inflammation, heat of the head, melancholy, an expression of the eye, hard to describe, but while it shows intellectual dulness, exhibits a stare or wildness easily discernible by those acquainted with insanity, alternate laughter and weeping, without any perceptible or sufficient cause, a suspicion of friends. These symptoms, even with those known to be insane, are rarely, if ever, all present in the same person, but the existence of any number of them, accompanied by incoherent conversation and unusual conduct, ordinarily prove the patient insane. Do these symptoms or any of them exist in the case of the prisoner? The sheriff has testified in reference to his wakefulness; that he had watched him and never found him sleeping, and never but once when he seemed to have been sleeping. Houghtaling has given evidence in reference to his want of sleep the night following the murder. The only proof we have as to the pulse shows that it is accelerated or faster than of a person of his age in ordinary health. It is shown that he has been known to laugh and weep alternately, and without any apparent cause. That he is and has been, ever since the homicide, suspicious of his friends, and that he refuses to confide in or consult with his counsel. It is also an evidence, that just before the homicide, he was seen while in the public highway to stop his horse, take him by the head, lead him around in a circle, then drive a few rods, and repeat the same thing; that he was seen sitting on the top of the bureau in his house, with his feet in the drawer, laughing, crying, talking incoherently, and striking his head against the wall. These symptoms and actions are all consistent with insanity. I do not say that they are controlling, but should be carefully weighed and considered by you in deciding this question.

"Every one who has heard the evidence and observed the conduct of the prisoner during this trial, will agree that this is a case of simulated or real insanity. Which is it? In determining this, you should take into view his circumstances in life; the opportunity he has had for learning the real symptoms of insanity. If he were a physician and had committed crime, it would be far easier for him, knowing the symptoms to imitate them. The only evidence we have as to his situation is that he has lived in the interior of the country, that his circumstances are very humble, and that he cannot write even his own name. The probabilities are, therefore, that he has little if any learning of books, and consequently if he feigns, does it without knowing the precise symptoms necessary to accomplish his object.

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"There was a fact stated by Dr. Upton, which in my mind weighed very strongly in favor of the reality of his madness. You will remember that we yesterday took a recess of the court to allow the physicians subpœnaed against the prisoner to examine him. This examination was conducted by Dr. Upton, who asked the prisoner why he travelled so much in the night, just before the homicide. To this he replied that he could get no rest at home, and in describing the methods resorted to to obtain rest said he was in the habit of going down stairs and leaning against the bags of oats to sleep, instead of sleeping in a bed. Beck, in his Medical Jurisprudence, quoting from Hasam, says: "The symptoms are aggravated being placed in a recumbent position; and patients, when in the raving state, seem, of themselves, to avoid the horizontal position as much as possible, and when so confined that they cannot be erect, will keep themselves seated. This remark applies equally to mania and monomania." If Lake prior to the murder could not sleep nights, could find no rest, went instinctively to a place where he could lean against the bag of oats, instead of lying upon a bed to sleep — here is a very strong evidence of insanity. It is scarcely possible that he yesterday, when stating this fact to the physicians, knew its effect as evidence, for it seemed to attract no attention from them, and had not been alluded to by counsel; but to my mind, it is a most controlling circumstance in the case, and irreconcilable with the theory of simulated insanity. Again, we find that yesterday when the court adjourned it was announced in the prisoner's presence that the object was to allow physicians to make a personal examination, and testify in reference to him. They did make that examination; then, if ever, he would have feigned insanity or would have refused to answer. But on the contrary he answered every question, was accurate in dates until he was asked in reference to the homicide; and as to that said if his 'wife was black then it was all right; if not then he was accountable;' and as a reason for killing his children, that 'when the body went down to the ground it needed neither food nor raiment.' This to me resembles delusion far more than simulation.

"Again, wakefulness cannot be feigned for any continued length of time. Dr. Beck says: 'Pretenders are unable to prevent sleep. That wakefulness which is so constant an attendant on the insane, is scarcely to be preserved for any length of time by those who are in actual health.' He then cites the case of a seaman, who to escape punishment, enacted the part of a furious maniac; sound sleep overpowered him on the second night of attempt. This must be so; for sleep is not a voluntary state. No man, by his mere volition, can put himself to sleep, nor can the strongest will, unaccompanied by mental and physical excitement, prevent it. Both mind and body require it, and it comes unbidden.

"The counsel for the prisoner insists that the homicide itself proves the insanity of the perpetrator. To hold this sufficient evidence to establish insanity would be dangerous; but it is proper to examine the act with all its attendant circumstances, and see whether it is most consistent with real or pretended insanity; see if you could discover a motive, or a sufficient motive; whether these victims stood in his way, whether there was any jealousy of his wife. And in doing this you are to regard the prisoner as a human being, possessed of moral, intellectual and physical faculties, swayed by passions and actuated by affections. But you will not allow the atrocity of the act alone to satisfy you of the insanity of the perpetrator.

"I regret that you have not had more aid from professional men of sufficient skill to determine the prisoner's actual condition. The same author from whom I have before quoted, says: 'Madness is most commonly feigned for the purpose of escaping the punishment due to crime, and the responsibility of the medical examiner is consequently great. It is his duty and should be his privilege, to spend several days in the examination of a lunatic, before he pronounces a decided opinion.' This has been neglected in this case, though the prisoner has for nearly two years occupied a cell in your jail. But you are now on all the evidence that has been procured, to find a verdict. In coming to a conclusion, you will remember that every man is presumed sane, and responsible for his acts, until the contrary is proved, and therefore that the affirmative of the issue is with the prisoner. If the evidence satisfies you that he is insane, so that he cannot make a rational defence to the indictment you will say so, and he will then be placed where he will be treated for his disease, and if restored to sanity, will be tried for the offence. If, on the contrary, the evidence fails to satisfy that he is insane, you will pronounce him sane, and we will then proceed to his trial for the crime. You will not fail to remember during your deliberations, that it is you who are to settle this question, and not the court; that if any intimation of an opinion has inadvertently escaped, you will only regard it as far as it was supported by satisfactory reasons. The prisoner, if insane, is most unfortunate in having been so long confined, and treated merely as a criminal; if he is not insane he is still more unfortunate in being the perpetrator of a murder, which in its atrocity is scarcely paralleled in the dark annals of crime."

The jury found the prisoner insane.

In *Willis* v. *People*,[1] the prisoner was indicted for the murder of Mary E. Phelan, by stabbing. His defence, was insanity, but he was convicted. On appeal to the Court of Appeals for errors in the judge's charge, the judgment was affirmed.[2] "I am of opinion," said DENIO, C. J., "that the charge in its general scope was entirely correct, and that there was no error in the particular part which was specially excepted to. The judge instructed the jury, in effect, that an irritable temper and an excitable disposition of mind did not constitute insanity; that an individual possessing such mental peculiarities was more predisposed to an attack of insanity than men in general, but was not on that account actually insane; that such peculiarities were not of themselves evidence of insanity. He then proceeded to state what did constitute mental alienation, and said that if at the time of the act the person was under a delusion, and did not know right from wrong, or that the act was an offence or was wrong, he was insane and was not responsible for the act; but that a person was not insane who knew right from wrong, and that the act he was committing was a violation of law and wrong in itself. These positions were laid down in an abstract form. The judge might have said that if the prisoner, when he killed the deceased, was in such a state of mind as to know that the deed was unlawful and morally wrong, he was responsible, and that otherwise he was not. This would perhaps have been more precise and discriminating; but as the jury was only concerned with the prisoner's condition when he committed the act, which was under investigation, it was impossible that the instruction should have been misunderstood. The prisoner's

[1] 5 Park. 621 (1864). [2] Willis v. People, 32 N. Y. 715 (1865).

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counsel must have been of that opinion, for they did not require that it should be pointed more distinctly to the killing of the deceased. The general correctness of the position laid down cannot be questioned. It is in substance and in the language usually adopted, and which is sanctioned by the authorities."

In *People v. Montgomery*,[1] the prisoner was indicted for the murder of his wife in Rochester, N. Y., November 13, 1870. On the trial the killing was conceded. The defence was the *prisoner's insanity at the time* the crime was committed. He was a young man of twenty-two years of age; he had been married two years; his wife was a woman of bad character. She had left him a short time before he killed her, and had gone to live in a house of ill-fame. She had a child nine months old; this child he kept, and took care of himself during the nights; it was taken care of at his father's during the day. The care of the child deprived him of sleep, and this contributed somewhat to produce the condition of body and mind in which he was sworn to be for several days prior to the killing. During his infancy he had been subject to epileptic fits, and he had had them on several occasions subsequently. He had a disease of the brain also. The effect of both was to bring on dementia, which had the effect of enfeebling the mind. His trouble with his wife excited and annoyed him very much. He loved her, notwithstanding he knew she was having intercourse with other men, and he could not bear parting from her, and was willing to take her back and live with her, if she would return to him and conduct herself properly. This she had refused to do. The afternoon before the killing, his wife's uncle called on him, and proposed to him to go and see his wife and try and induce her to return and live with him. They went, and after some negotiation she returned with them to the prisoner's house, taking with her her child; and she and the prisoner remained together throughout the night. In the morning he got up before she awoke; he found an axe in the room, took it in his hand, raised it and held it some five minutes; and (as he afterwards said) tried not to strike her, but his temper got the better of him, or an impulse to kill her, which he could not resist impelled him. He struck and killed her; or, as he told one witness, cut her head off. On repeated occasions within the week before the killing, he talked and acted like an insane man, his face was flushed and his manner excited. Three physicians of the largest experience and greatest intelligence, gave it as their opinion that in view of his acts and conversations, and of the bodily and mental condition in which they found him, he was insane at the time the crime was committed. Other physicians, gave it as their opinion, that, judging from the facts proved on the trial, he was sane when he committed the murder. Several persons who had known the prisoner for years and had transacted business with him, testified that they had never discovered any evidence of insanity in his conduct or dealings. After killing his wife, the prisoner took a razor and went to the barn, and attempted to cut his throat, but was prevented by the interference of his father and brother. On the same morning, and after the crime was committed, he surrendered himself to the police of Rochester; and on his way to the police office, he met a man of whom he was accustomed to buy feed for his horse, and told him his father would pay what he (the prisoner) owed him. After he was taken into custody some of the witnesses testify that he was very much excited; his

[1] 13 Abb. Pr. (N. S.) 207.

acts and sayings were irrational; others who saw him testify to his relation of the killing and the circumstances attending it, from which it would appear that he told the transaction intelligently and substantially as it must have occurred. The jury found him guilty, and he appealed to the Supreme Court. The following judgment was there delivered:

"MULLEN, P. J. (after stating the facts): "I have given this very brief synopsis of the evidence to show that the evidence was conflicting, and that it presented a case which it was peculiarly within the province of the jury to decide. Unless, therefore, some rule of law has been violated, the verdict must stand, even if we should be of the opinion that upon the evidence we should have arrived at a conclusion different from that at which the jury has arrived.

"Several of the witnesses who testify as to the appearance and conduct of the prisoner, during the week preceding the homicide, were his relations, and it is not doing them any injustice to say, that the jury would be justified in making some allowance for the bias under which they would naturally testify whether they were called by the People or the prisoner. It may be conceded for the purposes of the case that the weight of evidence is, that the prisoner was, at the time of the killing, insane; but we cannot for that reason set aside the verdict, unless the preponderance is so great against it as to justify the inference that it was the result of passion or prejudice. No such inference can be fairly drawn from the evidence given on the trial. The case is one in which the verdict might properly be rendered; and being rendered, the court cannot, and ought not to set it aside.

"This brings us to the inquiry whether any error was committed by the court on the trial, or in the charge to, or refusal to charge the jury.

"The first exception of the prisoner's counsel is to the charge of the court; that, when the proof shows a case of fixed or of confirmed insanity, the People were bound to prove that the criminal act was committed in a lucid interval, or after the prisoner was restored to his right mind. This instruction was not excepted to by the prisoner's counsel, and the question whether it was a proper instruction is not before us. Instead of excepting, the counsel requested the court to charge that habitual insanity having been proved it devolves on the prosecution to prove more than that the prisoner has been restored to a cooler moment, an abatement of pain or violence, or of a higher state of torture; to a mind relieved from excessive pressure. The prosecution must affirmatively prove that the act was committed in an interval in which the mind, having thrown off the disease, had recovered its general habit. The judge refused to vary his charge, and the defendant's counsel excepted.

"The standard that the request asked the court to adopt, by which to determine whether the prisoner was responsible for homicide, is, whether his mind, at the time of the commission of the crime, had thrown off the disease under which it had been suffering and had recovered its general habit. By the general habit I suppose is meant its normal sound condition.

"Whatever may be the rule on this subject in England or in the other States of the Union, this is not the test in this State by which responsibility for crime is determined. If, when insanity is shown, it is incumbent on the prosecution to show that it has altogether ceased to exist, that the mind has thrown off the

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disease and is restored to a healthy condition, the conviction of an offender would be practically impossible.

"The evidence of the physicians in this case shows that a man may appear to be sane, that he may talk and act like a sane man, and yet be in fact insane; and after a lapse of time become really sane, and be entirely forgetful of all that transpired during the period when he was supposed to be of unsound mind. If perfect soundness of mind must be established, in order to make a person liable for crime, we may as well confess at once that it is impossible to say with certainty that any man who commits crime is sane, and therefore responsible for his acts. God alone can determine when and to what extent man is responsible for violation of either human or divine laws. Laws must be passed, prohibiting and punishing crime. The courts that are required to administer such laws, know that crimes are not unfrequently committed by persons who are not mentally capable of distinguishing between what is right and what is wrong, and that such persons, both by the laws of God and man, should not be held responsible for their acts, while in that condition. In applying this standard of responsibility they bring to this case all the learning and experience they possess. They must not decline or even hesitate to decide because they may find guilty and punish those who are innocent; but having done all that lies in their power to arrive at the truth, they must punish or acquit, as in view of all the considerations that are presented to their minds they shall deem to be right. They may be mistaken, but honesty of purpose and of effort to arrive at the truth must furnish the excuse for the error, if one is committed. A man may be insane, and yet be capable of distinguishing between right and wrong. It is only when the insanity has taken possession of the whole mind so as to obliterate altogether the capacity to make this distinction that he becomes irresponsible.

"In *Freeman* v. *People*,[1] it was held that when insanity is relied on as a defence for crime the question for the jury is, whether at the time of committing the act the accused was laboring under such mental disease as not to know the nature and quality of the act he was doing, or that it was wrong. In *Willis* v. *People*,[2] it was held that the proper instruction to the jury in a case of homicide when insanity was relied on as a defence was, that if the prisoner when he killed the deceased was in such a state of mind as to know that the deed was unlawful and morally wrong, he was responsible; and that otherwise he was not. In this case the decision of the Supreme Court in the case of Freeman was approved. Lord MANSFIELD, in the case of Bellingham, laid down the rule, by which the question of responsibility or irresponsibility of the accused was to be determined as follows: In order to support the defence of insanity it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt, that at the time he committed the act, that he did not consider that murder was a crime against the laws of God and nature. Lord LYNDHURST in *Rex* v. *Offord* inquired, 'Did the prisoner know that in doing the act he offended against the laws of God and man?'

[1] 4 Den. 9. [2] 32 N. Y. 715.

"By the Scotch law, the insanity must be of such a kind as entirely to deprive the prisoner of the use of reason, as applied to the act in question, and the knowledge that he was doing wrong in committing it. If though somewhat deranged, he is able to distinguish right from wrong in his own case, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal act. In the case of Abner Rogers, Chief Justice Shaw laid down the rule as follows: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he was then doing. A knowledge and consciousness that the act he is doing is wrong and criminal, will subject him to punishment; although he may be laboring under partial insanity, if he still understood the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and mental power to apply that knowledge to his own case, and, to know that if he does the act, he will do wrong and receive punishment, such partial insanity is not sufficient to exempt from responsibility for criminal acts.

"The English courts hold that it is no defence for a crime that the prisoner supposes he is redressing an injury or grievance. In Massachusetts the rule is, that if the imaginary facts would, if true, justify the act, then he is excusable, — as when the prisoner supposed that the person was about to kill him, and he slays the other in self-defence, there must be an immediate apprehension of danger.

"It follows from these principles, that proof that the accused was insane when the crime was committed is not enough to require the jury to acquit. It must be shown that the insanity was such as to destroy, for the time at least, the consciousness of the distinction between right and wrong.

"When such a degree of insanity is established, the People must prove, in order to convict, that when the crime was committed the insanity had at least temporarily passed away, leaving the prisoner in that condition of mind in which he was morally and legally responsible for the crime. Proof of insane acts or declarations that are not of a nature to indicate disease of the mind that extends to all its manifestations, or that are not in their nature permanent, fall short of establishing a defence for crime. The insanity proved in this case produced great excitement, and it had enfeebled the prisoner's mind; but he was, as a general thing, capable of transacting business, of conversing in a rational manner, and of characterizing the character and conduct of his wife, and of appreciating the danger to which his child would be exposed if brought up among the associates its mother had taken up her abode with.

"I am of the opinion that the learned judge gave to the jury the correct rule as to what constitutes a lucid interval in view of the facts proved before him. It cannot be said truthfully, that the prisoner was laboring permanently under that degree of insanity that rendered him irresponsible for crime.

"The next exception of the counsel is to the instruction of the jury, that it was unnecessary for them to consider any other malice in this case than that which was implied in a premeditated design to kill.

"The counsel does not claim that the law does not imply malice from the premeditated killing of a human being; that proposition is too well and too long established to be questioned at this day. He does not, in terms, claim, that

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actual malice toward the deceased should be proved, in order to justify a conviction; but his view seems to be that the killing was not premeditated, but the result of an insane impulse which he had not the power to resist. If such was the cause of the killing it was not premeditated within the meaning of that term, as defined by courts and writers on criminal law; so I am unable to perceive that part of the charge excepted, could affect the prisoner injuriously.

"The prisoner's counsel offered to prove that his mother, from his childhood, spoke of him as being diseased in mind, and that he was called in the family, crazy. This evidence was objected to, and rejected; and the prisoner's counsel excepted.

"The counsel has cited no case which holds such evidence admissible, except *Wright* v. *Tatham*.[1] I am unable to discover anything in that case that supports the counsel's proposition. The question there was, whether letters found in the house of the testator, purporting to be addressed to him by third persons, were competent, in which he was addressed as *compos mentis;* but there was no evidence to show that he had ever answered them, or recognized them in any way; and they were rejected. They were utterly incompetent. It was shown in that case, that children in the street called and treated the testator as an idiot; and this evidence was held competent, not to prove the declarations made, but the manner in which the testator received them. It is on this principle that statements of third persons not made to or in the hearing of the person alleged to be insane, are inadmissible. The declarations or opinions of the mother are no more competent, on the question of the prisoner's insanity, than those of any other person. It is not one of those facts that can be proved by hearsay or reputation. The prisoner had the benefit of the fact, that relations of his father had been insane.

"The particulars of the case were of no moment. Their insanity was an important link in the chain of evidence to establish the prisoner's insanity. The similarity of symptoms or of conduct could be proved by showing the symptoms and conduct of each. But to permit a person not an expert to determine their similarity, would be to permit the witness to determine the very question that was to be determined by the jury."

The judgment was affirmed.

In *People* v. *Waltz*,[2] the prisoner was indicted in a New York court for a murder committed in May, 1873; he was convicted and executed. On the trial WESTBROOK, J., charged the jury as follows: "On the 21st day of April, 1873, the deceased, a resident of Albany, and a scissors' grinder by occupation, left home upon a trip. It was a trip such as he was accustomed periodically to make in different sections of the country to follow his occupation. He fixed the date when he would return, which was somewhere about the beginning of May. Not having returned by the time appointed, and the family having become somewhat uneasy from his continued and protracted absence, his widow and her son-in-law (Mr. Kelch) left Albany in search of Holcher. They went to Hudson, Rondout, Poughkeepsie, and Catskill, and thence to the residence of the father of the prisoner, at whose house the prisoner also resided. They there had an interview with the prisoner and his father. I need not now go over in detail that

[1] 34 E. C. L. 178.

[2] 50 How. Pr. 204 (1874).

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interview, I shall have occasion to speak of it by and by on another branch of the case. They returned from that interview to Albany. The next day they returned from Albany to Catskill; having procured a warrant for the prisoner, and also a search warrant, they proceeded, in company with Officer Ernest and under-sheriff Bennett, to the residence of the prisoner and his father. When they reached this dwelling an examination of the premises that in a room in the building, that was pointed out as the room where Holcher slept, there was blood upon the floor, which had been partially erased by scraping, partially by plaining, and partially covered over by paint, and that blood led from this spot across the room and the kitchen to the outer door. They also found blood upon the partition separating this room, as I understand it, from the room in which the prisoner slept; in the wood-house they found the lounge, which had the appearance of having been recently washed, and on opening the lounge they found a quantity of blood partially hidden and partially covered over by ink, or some black substance. Pursuing their investigation over the premises, they found a spot upon a road leading to the back part of the farm where the machine of the scissor's grinder, evidently, had been burned. They found the ashes, hinges, screws, and some other parts of the machine. They also found, at a place near where the wall was lower than at other places, a number of bloody stones. Having made these discoveries they arrest the prisoner. After a denial of his guilt, and after an incarceration for a time in the jail, he tells them that if they will take him back to the old farm again, that he will point out to them the place where the body of Holcher lay; they took him to the farm; he goes about the premises, and having viewed them, he proceeds to the house; he directs one man to go out and another man to stay in, and in the midst of the company which he had selected, he asks them to tell him of what he has been accused. They say he has been accused of this murder and of robbing school-houses, and after hearing the accusations, he proceeds to make a confession, which confession admits the killing, the burial and secretion of the body, and ends by conducting the people to the spot where the deceased was interred, and an excavation showed the same in all its horrid details. There can be no doubt but that the prisoner did this deed. Indeed, his counsel in opening and closing have frankly conceded that he did the act. So that in regard to the commission of the homicide, there is no dispute. Herman Holcher came to a violent and untimely death at the hands of the prisoner, and may I not further say, that if the prisoner was capable of reasoning, if he was capable of reflection, and of understanding the act, that the killing was with the design which the statute marking the crime of murder in the first degree, emphasizes? But it is said in the prisoner's behalf, and this is an important and solemn question you are to decide, though he did do this act, he is not responsible for its commission; that he is insane; that, though the hand wielded the hatchet that struck those terrible and killing blows, the soul, the intellect, the mind of the man, did not, by reason of impaired intellect, do the act and impel the hand. If this be so, it is a defence. The statute has declared that no insane person can be punished for a criminal act; he is not in the eye of law responsible, either before this tribunal, nor before the greater and higher tribunal to which we must, in the end, render our account.

"But what is insanity? What must be the mental condition of the party who is to be excused on account of that mental condition? How much intellect,

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understanding, judgment and comprehension must he have to make him amenable to the law? This, gentlemen, is a question for the court, and as the court lays down that law to you, you will be guided and governed by it in your deliberations. Questions of fact belong to you; questions of law to the court. Trench not upon the prerogative of the court, and the court will be careful to leave to you that which the law makes it your duty to decide. What, then, I repeat, must be the mental condition of the person who has done the act, otherwise unlawful, which will excuse him for the commission of such act? The term 'insanity' is a somewhat vague one. There are different degrees of mental power in a healthy person. There are various degrees of capacity among persons whose intellect may be slightly impaired. In regard to the civil affairs of life, that act is a good and lawful one which is done by a person who understands the act. The law can make no difference between the talented and those who are not, in regard to the execution of a deed or will, so long as the person of the lesser intellect has enough capacity to understand and comprehend the act which he does; and so in regard to crime. The person who comprehends crime in all its monstrosity is liable. The person whose intellect is less than that, so long as he has sufficient comprehension to know that the act is wrong and is forbidden, and will be punished by the law, is equally responsible; no more so, and no less so. The law, gentlemen, does not recognize insanity as a defence so long as the person understands and comprehends the act. That the person pretends he is impelled by an irresistible and overwhelming impulse to commit the act, will not make a defence. It will not do for a person to say: 'I was tempted by crime and was overcome by temptation.' If he knows the act is wrong and is forbidden, he must resist the temptation; and if he commits the act, he does it at his peril. Neither will it do to excuse the commission of crime because the person believes in spirits. Belief in spirits may be evidence for a jury to found its judgment upon in regard to the understanding and comprehension of the party accused of the act and crime. But belief of spirits in itself, — that the party sees or hears spirits, that spirits whisper to him and bid him to do this act, — that of itself is no defence, provided the judgment and reason which God gave to him and spared to him declare to his consciousness that the act was wrong, and that the laws of God and man forbid it. This, gentlemen, is no new doctrine; it is as old as the country from which we have borrowed the most of our learning and our law. I refer now to the law of England. And that you may see what the law of that country is upon that question, let me call your attention to some extracts from that law which I have carefully culled: —

"'To justify the acquittal of a person indicted for murder on the ground of insanity, the jury must be satisfied that he was incapable of judging between right and wrong, and that at the time of committing the act he did not consider that it was an offence against the laws of God and nature.' This opinion was given by Lord LYNDHURST, in the case of *King* v. *Offord*. Another judge thus says: 'When, upon a trial for murder, the plea of insanity is set up, the question for the jury is: 'Did the prisoner do the act under a delusion, believing it to be other than it was?' If he knew what he was doing, and that it was likely to cause death, and was contrary to the laws of God and man, and that the law directed that persons who did such acts should be punished, he is guilty of

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murder.' This was the opinion of MARTIN, J., in the case of *Queen* v. *Tewnley*. And again: 'The circumstance of a person having acted under an irrisistible influence to the commission of homicide, is no defence if, at the time he committed it, he knew he was doing what was wrong.'' This is the opinion of BRAMWELL., B, in *Queen* v. *Haynes*.[1] The same doctrine has been enunciated in the various States of this Union: 'In a trial for murder, a charge 'that the true test of insanity is whether the accused, at the time of the commission of the crime, was conscious of doing what he ought not to do,' is proper.' This was held in the case of the *People* v. *Hobson*.[2] 'The test of such insanity in criminal cases as will excuse the commission of crime, is whether the accused, at the commission thereof, was conscious that he was doing what he ought not to do.'[3] 'It is not every kind or degree of insanity which exempts from punishment. If the accused understood the nature of the act, if he knew it was wrong and it deserved punishment, he is responsible.' This is the case of *United States* v. *McGlue*.[4] 'If a man has capacity and reason sufficient to enable him to distinguish between right and wrong as to a particular act, for the commission of which he is on trial, if he has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, he is, in the eye of the law, of sound mind and memory, and therefore criminally responsible for the act.' And, gentlemen, the same doctrine has been enunciated in a recent case in the Court of Appeals of this State, which is our highest court, and whose decisions must be our guide in the determination of this one. The case is reported in 52 N. Y.[5] The prisoner was convicted, in the General Sessions of New York City, of the crime of murder in the second degree, he having been indicted for murder in the first degree for killing his wife. The counsel for the prisoner made these points: 'No man can commit a crime, although he has understanding, if he has no will. The right and wrong test as to the contemplated act is not favored. The power of choosing right from wrong is as essential to legal responsibility as the mere capacity of distinguishing right from wrong.' That is to say, the prisoner's counsel said he must have the power to choose; that is to determine whether he would or would not do; whether he should do the act, or whether he should not do it; and this was just as important in determining whether he was insane or not, as his power to distinguish between the right and the wrong of the act. In other words, the counsel for the prisoner claimed that though the prisoner might have reason enough to tell him that the act was wrong, — that the laws of the land and God forbid it, — yet if he had no will to resist the influence which bade him do the act, then he was crazy and insane, and not criminally responsible. It presents, to a certain extent, one of the very propositions which the counsel for the prisoner has raised here. It presents the identical question which is raised by the confession of the prisoner in the case. Now, what did the Court of Appeals say? They refer, in the first place, to the case of *Willis* v. *People*. That was a case in which I was concerned, and where the rule in this State was pretty thoroughly settled. The court, through ANDREWS, J., says: 'That the test of

[1] F. & F. 666.
[2] 17 Cal. —. 424.
[3] State *v.* Spencer, 1 N. J. (L) 424.
[4] 1 Curt. C. Ct. 1.
[5] Flanagan *v.* People.

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responsibility for criminal acts, where unsoundness of mind is interposed as a defence, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of the inquiry.' Of course he must be able intelligently to distinguish between the right and the wrong; he must have a comprehension that the act is forbidden; it must be present in his mind at the time he resolves to do it. But if that intelligence and comprehension be present, — if there is a voice within him saying, 'Do not this act' and if he understands that if he does it, it is wrong and the law will punish him, — then if he does it he is responsible, even though he may claim that some mysterious influence or spirit urges him on and destroys his power to resist. I further read: 'We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them, and that the absence of the former is consistent with the presence of the latter. The argument proceeds upon the theory that there is a form of insanity in which faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates but cannot avoid. Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law. The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility in cases of crime may well cause courts to pause before assenting to it. Indulgence in evil passions weakens the restraining power of the will and conscience, and the rule suggested would be the cover for the commission of crime and justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. Rolfe, B. in *Reg.* v. *Allnut*, where on the trial of an indictment for poisoning, the defendant was alleged to have acted under some moral influence which he could not resist, said: 'Every crime was committed under an influence of such a description, and the object of the law was to compel people to control their influences.'

"That, gentlemen, is the law of the case. It is the law which must govern you in your deliberations. You are not to ask yourselves the vague question whether the prisoner was or was not insane, without having any clear or definite comprehension of what insanity is, but you are to ask yourselves the question: Did the prisoner understand this act when he raised that hatchet and smote Holcher these fatal blows? Did he understand that the laws of God and man forbade him; and did he know that these laws would hold him responsible for it when discovered and brought before a tribunal of justice? If he did, he is guilty. No matter though he says, and his counsel for him argues, that an irresistible mysterious power urged him on to the commission. This is no defence. The law says it is the duty of the person to resist these influences, and to successfully resist them. The safety of society, the protection of life, require that we should hold persons accountable for crime who know that the act which they do is a criminal one."

The prisoner was convicted.

Moett *v.* People.

In *Moett* v. *People*,[1] the prisoner was indicted for murder. The following judgment was delivered in the Court of Appeals.

EARL, J. "One of the defences presented at the trial was that the prisoner was in such a state of mind at the time of the killing, that he was not responsible for his act. In reference to this defence, the judge in his charge, among other things, said: 'If he was unconscious; if he did not know what he was doing upon that occasion; if his mind, because of the terrible scenes which he had passed through during those long and weary days preceding this tragedy, had so impaired his intellect, had so diseased his brain when the occasion came when these shots were fired that carried this woman to her grave, then, of course he cannot be held responsible for the consequences of this act. But, if he knew, if he had the power at the time he fired these shots of discerning right from wrong, if he understood the nature and character of his act, then he must be responsible so far as this defence is concerned.' The learned judge then, that there might be no mistake, read to the jury portions of the opinion of ANDREWS, J., in the case of *Flanagan* v. *People*,[2] with such comments thereon as must have made plain to the jury the rule of law there laid down. He also charged the jury upon the request of the prisoner's counsel, as follows: 'The law does not require the insanity or mental aberration which absolves from crime should exist for any definite period, and only that it existed at the moment when the act occurred with which the prisoner stands charged.' If the insanity or mental aberration which absolves from crime operated at the moment that the act with which the prisoner is charged was committed, that is sufficient in law to absolve the prisoner from guilt, and he cannot be convicted of the offence charged in the indictment or any other offence.' The People must satisfy the jury beyond all reasonable doubt that the prisoner, if he committed the act alleged in the indictment, understood the act at the moment it was committed, and that if the jury find that he did not understand it at the moment he committed it; if he did commit it, he cannot be found guilty of the crime charged in the indictment or any other crime, and it is the duty of the jury to acquit him. 'That the People must satisfy the jury beyond all reasonable doubt that at the moment the act alleged in the indictment was committed by the prisoner if he did commit it, he had reason, perception and understanding sufficient to enable him to discern the right from the wrong, and that if he had not, it is the duty of the jury to acquit him.' 'That it is the duty of the People to satisfy the jury beyond all reasonable doubt that at the moment the act alleged in the indictment was committed by the prisoner, if he did commit it, he had reason, perception, and understanding, sufficient to enable him to discern right from wrong with respect to that particular act, and if he did not, the jury must acquit.' 'That the People must satisfy the jury beyond all reasonable doubt that at the moment the act alleged in the indictment was committed, the prisoner, if he did commit it, had sufficient reason and will under all the circumstances as they may be found to have been proved, to form and have a criminal intent and purpose, and that if he had not, the jury must acquit.' The counsel for the prisoner also requested the court to charge as follows: 'That the People must satisfy the jury beyond all reason-

[1] 85 N. Y. 373 (1880), affirming People *v.* Moett, 23 Hun, 60 (1880).

[2] 52 N. Y. 467.

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able doubt that at the moment the act alleged in the indictment was committed by the prisoner, if he did commit it, he had reason, perception and understanding sufficient to know that the laws of God, and the land forbid him from committing it, and if he had not, the jury must acquit him." In response to this request, the judge said: 'I charge, in the language of the Court of Appeals in that respect, and decline to charge in the language of the request, and adhere to my original charge.' And to this the prisoner's counsel excepted, and he now presents this exception for our consideration. We are of the opinion that the jury were fully and fairly instructed as to the law bearing upon the mental condition and the legal responsibility of the prisoner. Everything is included in the charge more than once given, that the test of responsibility is the capacity of the prisoner to distinguish between right and wrong at the time of, and with respect to the criminal act complained of. The laws of God and the land are the measure of every man's act, and make it right or wrong, and it is right or wrong as it corresponds with such laws. When it is said that a prisoner must, at the time of the alleged criminal act, have sufficient capacity to distinguish between right and wrong with respect to such act, it is implied that he must have sufficient capacity to know whether such act is in violation of the law of God, or of the land, or of both. It is not the duty of the trial judge to present the matter to the jury in every possible phase and in every form of language which the ingenuity of counsel can devise. By such subtle, metaphysical distinctions, the minds of the jury would be confused, rather than enlightened or instructed."

In *People* v. *Coleman*,[1] tried in New York, in 1881, the prisoner was indicted for murder, and the defence was insanity. Davis, J., charged the jury as follows: "Insanity is usually spoken of, both in common language and in the books, as a defence to crime. But it is no defence, because, where the insanity recognized by the law exists, there can be no crime to defend. An insane person is incapable of crime. He is devoid, both in morals and in law, of the elements essential to the constitution of crime, and hence is an object of pity and protection, and not of punishment. Therefore, whenever it is established that a party accused of crime was, at the time of its alleged commission, insane within the established rules of the criminal law, he is entitled to acquittal on the ground of innocence, because of incapacity to commit the offence, however monstrous his physical act may appear. Both humanity and the law revolt against the conviction and punishment of such a person. But insanity is a condition easily asserted and sometimes altogether too easily accepted. Hence, juries, while they should be careful to see to it that no really insane person is found guilty of crime, should be equally careful that no guilty person escapes under an ill-founded pretext of insanity.

"It is important that juries on trials of alleged crime should clearly understand what insanity is, within the established rules of the criminal law. Without such rules the administration of justice in such cases would be dependent upon the shifting caprices of courts, of the equally unsubstantial passions and prejudices of jurors. In this State the test of responsibility for criminal acts, where insanity is asserted, is the capacity of the accused to distinguish between right and

[1] 1 N. Y. Crim. Rep. 1 (1881).

wrong at the time and with respect to the act which is the subject of inquiry. This rule is stated by the authorities in different forms, but always in the same substance. In one case it was said 'the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time the act was done.' This was in the *Freeman Case* — the celebrated case of the colored man who was tried for murder in Cayuga County and defended by the late William H. Seward.

"In the most authoritative of the English cases, it is said: 'It must be clearly proved that at the time of committing the offence, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.'" And in a very late case in our Court of Appeals, a charge in that exact language was held to present the law correctly to the jury.

"So you will see, gentleman of the jury, that in this case, the firing by the prisoner of the shot by which the deceased was killed, being proved and admitted, and evidence to show the alleged insanity having been given, the question whether the act was criminal depends upon your finding, as a matter of fact whether, at the time of doing the act, the prisoner knew what she was doing, and that she was doing a wrong — or, in other words, did she know that she was shooting the deceased, and that such shooting was a wrongful act? If she did know these things, her alleged insanity is not established within the rules of the law, however much you may be convinced that she acted under the intensest emotional excitement, or however fully she believed she was justified in avenging her own wrongs, or however much you may think the deceased was deserving of punishment. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law; and there is no form of insanity known to the law as a shield for an act otherwise criminal, in which the faculties are so disordered or deranged that a man, although he perceives the moral quality of his acts as wrong, is unable to control them, and is urged by some mysterious pressure to the commission of the act, the consequences of which he anticipates and knows.

"This is substantially the language of the Court of Appeals in the case already referred to. If this were not the law, every thief, to establish his irresponsibility, could assert an irresistible impulse to steal, which he had not mental or moral force sufficient to resist, though knowing the wrongful nature of the act; and in every homicide it would only be necessary, in order to escape punishment, to assert that anger or hatred or revenge or an overwhelming desire to redress an injury, or a belief that the killing is for some private or public good, has produced an irresistible impulse to do a known illegal and wrongful act. So that really there could never be a conviction if the guilty party should assert and maintain an irresistible impulse, produced by some pressure which he could not resist, as a reason for committing a crime. To restrain such impulses is the legal and moral duty of all men, and the protection of society demands that he who yields to them must take the consequences of his acts.

"You will understand, therefore, the exact distinctions upon which the law in criminal cases stands in respect to responsibility, to-wit: that the party who

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does the act knows what he is doing. If he is imbecile — that is, if he has not sense enough to know what he is doing, when he fires a pistol at another, then he is not amenable to the law as a criminal, because of his mental incapacity. But if he has knowledge enough to know that he is firing a pistol — that he is shooting a person, and thereby doing an act injurious, or likely to be injurious to that person, and also has sufficient sense to know that that act is a wrongful one — he cannot assert an irresistible impulse arising from any cause whatever as a defence or excuse. Whatever the views of scientists or of theorists on the subject of insanity may be, and however great a variety of classifications they may adopt, the law in a criminal case brings the whole to this single test: Did the person doing the act at that time have sufficient sense to know what he was doing, and that it was wrong to do it? If that be his condition, it is of no consequence that he acts under an irresistible influence or a supposed inspiration in committing the wrong, or a belief that the wrong will produce some greater good. Emotional insanity, impulsive insanity, insanity of the will or of the moral sense, all vanish into thin air whenever it appears that the accused party knew the difference between right and wrong at the time and in respect of the act he committed. No imaginary inspiration to do a personal wrong to another under a delusion or belief that some great public or private benefit will flow from it, where the nature of the act done and its probable consequences to the injured party, and that it is in itself wrong, are known to the actor, can amount to that insanity which in law disarms the act of criminality. Under such notions of legal insanity, life, property and rights, both public and private, would be altogether insecure; and every man who by brooding over his wrongs, real or imaginary, shall work himself up to an 'irresistible impulse' to avenge himself, can with impunity become a self-elected judge, jury, and executioner in his own case for the redress of his own injuries or of the wrongs of his friends, his party, or his country. But happily, gentlemen of the jury, that is not the law; and whenever such ideas of insanity are applied to a given case as the law (as too often they have been), crime escapes punishment, not through the legal insanity of the accused, but through the emotional insanity of courts and juries.

"I have felt it my duty to give you my views of the law of insanity, as applicable to the case, in emphatic terms; but I assure you, gentlemen, I have no intention, in doing so, to affect your minds in determining the facts of the case to which you are to apply the law. The prisoner is entitled to a consideration of the facts of the case by you, uninfluenced by any expression of opinion in respect to them by the court.

"Having shown you the law of insanity applicable to the case, it is important that I should give you the law in respect to its proof. The law presumes sanity in all cases. That presumption in a criminal case is *prima facie* evidence of the sanity of the accused party, and, where no evidence tending to show the contrary is produced, the case of the People, so far as relates to the question of sanity, is made out. The burden of overthrowing the presumption of sanity is upon the person who alleges insanity, and if evidence be given by him tending to rebut the presumption and to show insanity, then the general question is presented to the jury whether the alleged crime was committed by a person responsible for his acts, under the rules of law which have already been laid down. Upon the question thus presented, the presumption of sanity and the evidence

And in Ohio.

tending to prove or disprove insanity are all to be considered by the jury, and at that stage of the case the question of sanity, like all other material questions of fact, becomes one on which the prosecution holds the affirmative, and if reasonable doubt of sanity then exists upon the evidence before the jury, the prisoner is entitled to the benefit of that doubt as upon any other material question of fact.

"Now, gentlemen, this is a presentation of the law in relation to insanity as applied to criminal cases. We are not dealing with civil actions arising upon contracts or under wills, where a question of sufficient capacity to make the instrument, or of undue influence, is presented, but with the law as established to prevent crimes of violence or wrong, against which society must have power to protect itself. The inquiry for you in this case, I repeat, is whether or not at the time the accused committed the act, she knew what she was doing — to wit: that she was shooting the deceased; and knew that in shooting him she was doing a wrongful act. If those two conditions of things existed, then the assertion of insanity fails. Although she may have been laboring under the intensest excitement, and although the impulse to do the act because of the injury she alleges she had received was of such a character that she felt herself justified in avenging her wrongs, yet the defence of insanity would altogether fail. The moment it is conceded, as I have already said, that a man can assert insanity as an excuse for his otherwise criminal act, because his passions were so far aroused that it was impossible for him to stay his hand, there is no protection for society. Any man who wishes to kill his enemy or any one whom he believes or fancies has injured him, has only to bring himself up to that condition of intense emotion that he can no longer restrain himself, then do the killing, and then assert in a court of justice that he was insane because his passion had passed all bounds of restraint. It is easy for the mind least familiar with law to see that whenever that condition of things is held to be legal insanity there can be no such thing as protection of life under the law, for the law itself will abrogate all reasonable grounds for its own enforcement."

§ 19. —— **North Carolina.** — In *State* v. *Haywood*,[1] the trial judge (the indictment being for murder, the defence insanity), instructed the jury thus: "If the prisoner, at the time he committed the homicide, was in a state to comprehend his relations to other persons, the nature of the act and its criminal character; or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible. But if, on the contrary, the prisoner was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offence against the law, for guilt arises from the mind and wicked will." On the appeal this charge was approved as being clear, concise, and accurate and was commended as a model for other trial judges in the State to follow.

§ 20. —— **Ohio.** —In *State* v. *Gardiner*,[2] Wright, J., held that the same degree of insanity which excuses a man from his contracts will exonerate him from accountability for crime. In the subsequent case of *Loeffner* v. *State*,[3] the Supreme

[1] Phill. (N. C.) 376 (1867). [2] Wright, 399 (1833) [3] 10 Ohio St 599.

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Court laid it down that the test was whether the prisoner had sufficient reason and capacity to distinguish between right and wrong, and to understand the nature of the act, and his relation to the party injured.

In *Farrar* v. *State*,[1] decided by the Supreme Court of Ohio in 1853, it was said: "Further exception is taken to the charge of the court, on the ground that it gave too narrow a definition, and established an imperfect test of insanity. 'Insanity,' said the judge, 'exists in so many shapes and forms it is almost impossible for science to comprehend it.' 'Insanity, in its general legal sense, is the inability to distinguish between right and wrong; and as applied to this case particularly, this is the question for you to settle: 'Was Nancy Farrar, at the time this act was committed, capable of judging whether this act was right or wrong, and did she know at the time that it was an offence against the laws of God and man?' * * * 'She or he who administers poison to kill, and knows at the time that it is wrong to do so, is guilty of murder in the first degree.' * * * 'So far as the girl Nancy is concerned, you will carefully examine the testimony touching her knowledge of right and wrong, and if you find she was able to distinguish between them, then, no matter of how low an order may be her intellect, or how depraved her character, she is guilty as charged, if you have no reasonable doubt as to her commission of the act.' The cases of *Commonwealth* v. *Rogers*,[2] *Clark* v. *State*,[3] *State* v. *Summons*,[4] are referred to as containing the true definition of insanity, and showing the imperfection of that before us. The power of self-control — 'free agency' — is said to be quite as essential to criminal accountability as the power to distinguish between right and wrong, and I have no doubt that every correct definition of insanity, either expressly or by necessary construction, must suppose freedom of will to avoid a wrong no less than the power between the wrong and the right, and in this very case I can see many reasons why it should have been proper to say this much to the jury, in so many or similar words. But no special instruction was asked, so that the court did not expressly deny the necessity of such a qualification of its rule. The question here to be considered is, therefore, does the definition of the court shut out the notion that accountability may be destroyed by the absence of what counsel call the power of self-control, or free agency? I think not. The definition given below is such as we frequently find in the books, and giving it such a construction as it would probably receive from a sensible jury, I think it not so inaccurate as to prejudice the prisoner's rights. True, there arises upon the facts in this record a not irrational theory that some strange, irresistible wish to see the effects of poison — to produce death — may have had such power over the prisoner, as other insane fancies which so often make a man or woman little more than a piece of mechanism, — neither more capable of self-control nor of asserting the true laws of its being against the foreign influence. But the language of the court does not forbid the jury to consider such a state of fact, if it were proven; and the jury would do so unless prohibited. I should not, after mature reflection, be inclined to distrust the verdict, if the objection here considered stood alone."

In *Blackburn* v. *State*,[5] it was said: "The counsel also object to that part

[1] 2 Ohio St. 70.
[2] 7 Metc. 500.
[3] 12 Ohio, 495.
[4] West. Law Journal, 1852.
[5] 23 Ohio St. 146 (1872).

of the court's charge which relates to the defence of insanity, and insist that instead thereof the court should have given certain instructions which they asked. We see no substantial difference between the instructions asked and the charge given. The form of question submitted to the jury is substantially the same as laid down in *Clark's Case*,[1] and seems to us to embody the true rule, viz.: Was the accused a free agent in forming the purpose to kill? Was he at the time capable of judging whether that act was right or wrong? And did he know at the time that it was an offence against the laws of God and man?"

§ 21. —— **Pennsylvania.** — The right and wrong test has been recognized in many cases in this State.[2]

In *Commonwealth* v. *Farkin*,[3] the prisoner was tried in 1844 in the Philadelphia court of Oyer and Terminer for the murder of James Lemon. The defence was insanity. PARSONS, J., charged the jury as follows: "There is no doubt but that James Lemon died from violence inflicted upon his person, and that the prisoner at the bar is the guilty agent who gave the fatal wound.

"The defence to the accusation is that the prisoner was insane when he committed the act. And it is likewise contended that even if you should believe he had control of his reason, the offence is not murder in the first degree.

"Your first inquiry should be, was the prisoner conscious of what he was doing, aware of the offence he was committing, and its consequences, when he gave the terrible stab which constitutes his crime? If he was not, he cannot be held responsible to the laws of our country. But if he had reason and understanding, so that he could judge between good and evil, he is as much amenable to the criminal law as any other human being.

"In considering this part of the case I shall lay down for your reflection the following rules of law, desiring that you make a judicious application of them to the facts, as you may find them: —

"1. Every man is presumed to be of sound mind and understanding, and the law requires that where it is alleged a prisoner was insane when he committed the offence, it must be clearly proved; and the derangement of mind must by shown to have existed at the time the offence was perpetrated.

"2. That there is a distinction between civil and criminal cases in the application of the rules of law, in relation to insanity. In a civil case, if a man appears from the evidence to be *non compos mentis*, the law avoids his acts, although it cannot be traced to any cause, and this may be partial in its influence upon his acts and conduct. But to deliver a man from responsibility for crimes, above all for a crime of such great atrocity and wickedness as this, the rule does not apply. To protect a man from criminal responsibility there must be a deprivation of memory and understanding, so that he is unable to comprehend the nature of his actions, and discriminate between moral good and evil.

"3. In order to support the defence of insanity it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; and, in fact, it must be proved to the satisfaction of

[1] 12 Ohio, 494.

[2] Com. *v.* Winnemore, 1 Brewst. 356 (1867); Com. *v.* Hart, 2 Brewst. 547 (1868); Com. *v.* Farkin, 2 Pars. 439; 2 Clark, 208 (1844); Com. *v.* Freth, 3 Phila. 105; 5 Clark, 455 (1858); Com. *v.* Mosler, 4 Pa. St. 264 (1846).

[3] 2 Pars. Sel. Cas. 439; 2 Clark, 208.

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the jury, and beyond all doubt, that at the time the prisoner committed the atrocious act with which he is charged, he did not consider that murder was a crime against the laws of God and nature, and there is no other proof of insanity which will excuse murder or any other crime.

"4. The jury must discriminate between anger, rage, malice, love of gain, a heart fatally bent on mischief, and the insanity produced by the visitation of God. If you should believe that any of the former were the motives which influenced the conduct of the prisoner, and prompted the deed, then he is responsible, and ought to be convicted. Nor should insanity be inferred simply from the boldness of the deed, of the daring manner in which the crime was committed — in open day, and in the presence of witnesses — for a wicked and malevolent heart may prompt one to commit the offence under the most suspicious appearances of delirium. For it is clear that idle and frantic humors, actions occasionally unaccountable and extraordinary, mere dejection of spirits, or even such insanity as will sustain a commission of lunacy, will not be sufficient to exempt a person from punishment who has committed a criminal act. Yet it is clear from all the authorities, if there be a total permanent want of reason, or if there be a total permanent want of it when the offence was committed, the prisoner is entitled to an acquittal. Still, if there be a partial degree of reason, a competent use of it, sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil; then upon the fact being proved that the prisoner was the guilty agent (a fact not controverted in this case), the judgment of the law, the verdict of guilty must take place.

"Such are the principles of law found in our books, both ancient and modern, whatever may have been their application by juries in later times. Still, all judges who respect the law, will pronounce it as it has been settled.

"This subject has recently undergone a judicial examination in England before the judges, under peculiar circumstances. The question was agitated in Parliament, whether further legislation was not necessary in relation to the plea of insanity being a defence in criminal cases, and various questions were propounded to the judges relative to the law in such cases, and their opinion was delivered by Lord Chief Justice TINDAL on the 19th of June, 1843. I will call your attention to it for the following reasons: First, because it is entitled to respect, as being the judgment of some of the ablest judges now living; secondly, in order that we may perceive that there is no change in the law by recent decisions; and lastly, because I say to you, that these are the principles of the common law; it is the law in Pennsylvania, and I pronounce it as a rule which ought to govern your deliberations in this case.

"The lord chief justice remarked as follows: that it was not necessary on that occasion to enter into the facts of any particular case; it would be wrong to do so, as there was such an endless variety, all and each attended with such improbable circumstances, that no general rule could be laid down. Every case must be decided by its own particular circumstances. His lordship said, as the subject was about to come under the consideration of Parliament, the judges had not lost any time in considering the questions submitted to them; and as they were unanimous, with the exception of Mr. Justice MAULE, they did not con-

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sider it necessary to give their opinions *seriatim*. The first question propounded for their consideration was as follows: —

"'What is the law respecting alleged crimes committed by persons inflicted with insane delusion in respect of one or more particular subjects or persons; as for instance, when, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of, with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?'

"With respect to this question, the opinion of the judges was, that notwithstanding the party committing a wrong act, was laboring under the idea of redressing a supposed grievance or injury, or under the impression of obtaining some public or private benefit, he was liable to punishment.

"Second question. 'What are the proper questions to be submitted to the jury, when a person alleged to be inflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, murder for example, and insanity is set up as a defence?' The judges in answer to this question, wished him to state that they were of opinion that the jury ought, in all cases, to be told, that every man should be considered of sane mind unless it was clearly proved in evidence to the contrary. That before a plea of insanity should be allowed, undoubted evidence ought to be adduced that the accused was of diseased mind, and that at the time he committed the act he was not conscious of right or wrong. This opinion related to every case in which a party was charged with an illegal act, and a plea of insanity was set up. Every person was supposed to know what the law was, and therefore, nothing could justify a wrong act, except it was clearly proved the party did not know right from wrong. If that was not satisfactorily proved, the accused was liable to punishment, and it was the duty of judges so to tell the jury when summing up the evidence, accompanied by those remarks and observations as the nature and peculiarities of each case might suggest and require.

"With regard to the third question, viz: 'In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?' — the judges did not give an opinion.

"The fourth was —

"'If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?'

"The answer to this question, that the judges were unanimous in opinion, that if the delusion was only partial, that the party accused was equally liable with a person of sound mind. If the accused killed another in self-defence, he would be entitled to an acquittal, but if committed for any supposed injury he would then be liable to the punishment awarded by the laws to his crime.

"With regard to the last question —

"'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the alleged, crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law? or whether he was laboring under any, and what, delusion at the time?'

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"The judges were of the opinion that the question could not be put to the witness in the precise form stated above, for by doing so they would be assuming that facts had been proved. That was a question which ought to go to the jury exclusively. When the facts were approved and admitted, then the question, as one of science, could be generally put to a witness under the circumstances stated in the interrogatory.

"It is for you, gentlemen of the jury, to apply the facts before you to the rules of law we have laid down. It is your province to determine the facts, alone; and in forming just conclusions relative to them, I do not think it would be profitable to examine the various speculations relative to the causes of insanity, as they have been read by counsel in your hearing, and what various writers, while indulging their roving fancy, have considered as evidence of insanity, partial derangement, or monomania; but, as I have before remarked, these are not applicable in criminal cases. A more rigid rule applies when one asks a jury to acquit upon the ground of mental incapacity. To take the reported cases from insane hospitals and mad-houses, or instances of persons confined or treated for aberration of mind, would be but a poor guide to a jury in deciding whether the prisoner at the bar possessed sufficient intelligence at the time he committed the offience to be held criminally responsible to the law of his country. It cannot be denied that the opinions of learned medical writers upon the indications of deranged minds are valuable, and entitled to consideration by a jury, when they are satisfied that from long experience and observation the author has had an opportunity of forming correct conclusions upon the subject. Among the best and most safe to be regarded in criminal trials, are found in a treatise of Diseases of the Mind, by the late Benjamin Rush, of this city. A few of his remarks, which are applicable to a case like the present, I shall give you. This writer observes: 'The symptoms of mania, as they appear in the mind, vary with its causes when it is induced by impressions that have been made upon the brain, through the medium of the heart. All the faculties of the mind discover marks of the disease in all their operations. In its highest grade it produces erroneous perception. In this state of derangement, the patient mistakes persons and objects around him. This may arise either from a disease in the external senses, in which case it is called morbid sensation, or from a disease in the brain. It is when it arises from the latter cause only, a symptom of the highest grade of intellectual derangement. Persons under the influence of this grade of madness sometimes mistake their friends for strangers, and common visitors for their relatives and friends. They now and then fancy they see good and bad spirits standing by their bedsides, waiting to carry them to a place of torment or happiness, according as their moral dispositions and habits in health have prepared them for these different abodes of wicked or pious souls. Not only the eyes, but the ears likewise, are the vehicles of false perceptions, and to these we are to ascribe the soliloquies we sometimes observe in mad people. They fancy they are spoken to, and their conversation frequently consists of replies only to certain questions they suppose to be put to them. The latter occurs more or less in delirium, but we occasionally see them in the highest grade of intellectual madness. When these errors in perception take place, madness has been called ideal by Dr. Arnold, but more happily, diseased perception by Dr. Creighton. It is in this state of madness only that it is proper to say persons are 'out of their

senses,' for the mind no longer perceives the images of external objects from them.' I do not say that this is the only rule that can be observed in deciding the question of insanity, but I give it to you as one from which it is safe to draw conclusions upon this subject. It is manifest that some such state of derangement in the intellect must exist to justify a jury in rendering a verdict of not guilty on the ground of insanity, when the prisoner is charged with so heinous a crime as that of murder.

"Other traits in the character and conduct might be mentioned which often lead the mind to a similar conclusion, but this is deemed sufficient to direct your inquiries after truth. You will bear in mind that the burthen of proof lies upon those who made the allegation that the prisoner was insane when he perpetrated the offence. All the legal presumptions are against him, and they have undertaken to rebut these presumptions. Have they done it? This point the jury must decide. Should you be convinced that the prisoner was of sound mind when he committed the offence, then it is the province of the jury to determine whether the crime is that of murder in the first or second degree."

The jury found the prisoner guilty of murder in the second degree, and the court sentenced him to twelve years' confinement in the Eastern Penitentiary.

In the case of *Brown* v. *Commonwealth*,[1] decided in Pennsylvania in 1875, the defence assigned error to a charge of the trial judge in these words: "If he (the prisoner) had power of mind enough to be conscious of *what* he was doing at the time, then he was responsible to the law for the act." In the Supreme Court this instruction was held correct. "It is contended," said AGNEW, C. J., "this language was incorrect, and was liable to mislead the jury, because the prisoner might be conscious of what act he was doing, and yet, in consequence of mental disability or disease, be incapable of refraining from its commission. But the charge has a plain English meaning referring to the nature of the act, and when taken in connection with other parts of the charge this portion is not susceptible of misconstruction. All the judge said referred plainly, not to the mere act, but to the prisoner's consciousness of what he did as crime. The phrase, 'conscious of what he was doing,' is idiomatic and is understood to mean the real nature and true character of the act as a crime, and not to the mere act itself. As used by the judge in connection with what else he said, it was not contradictory or misleading. A memorable instance of this idiomatic use of the word *what* is found in the language of our Savior on the cross, when he said, 'Father, forgive them; *for they know not what they do!*' Clearly the Jews knew well that they were crucifying Jesus, but their darkened minds were unconscious of the great crime they were committing."

In *Commonwealth* v. *Winnemore*,[2] the prisoner was tried in 1867 in the court of Oyer and Terminer of Philadelphia, for the murder of Dorcas Magilton. His defence was insanity. BREWSTER, J., in charging the jury laid down the law thus: 1. The burden of proof of insanity rests on the defendant. 2. Proof of antecedent insanity raises the presumption that the disease continues until reason is restored. 3. If a man has no capacity to discern good from evil he is not accountable. 4. If he is laboring under a delusion which, if real, would excuse his act, he is not responsible 5. Evidence of insanity in prisoner's ancestors is admissible. 6. Epilepsy is to be considered as tending to mental alienation.

[1] 78 Pa. St. 122.

[2] 1 Brewst. 356.

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His charge in full was as follows: "If you should be satisfied beyond all reasonable doubt, that the defendant was the person who thus assaulted Mrs. Magilton, then you must consider the second point presented for your determination.

"Upon this branch of the case, it is contended by the defence that even, although you should be satisfied beyond all doubt, that the prisoner committed the assault which resulted in the death of Mrs. Magilton, yet he is entitled to an acquittal upon the ground of insanity. It is undoubtedly true that no person who is insane at the time of the commission of an offence is amenable to punishment. Our statute defining murder in the first degree, uses the words 'wilful, deliberate, and premeditated;' and it must be clear to the most limited understanding that no insane person is capable of exercising his own will or deliberating and premeditating.

"Independently of the words of our statute, it would be contrary to every impulse of true humanity to punish a person who, by the accident of birth, or the misfortune of disease has been deprived of sense of accountability, or of his self-control. Our Legislature distinctly recognizes this humane principle of the law. The act of March 31, 1860,[1] expressly directs that: 'In every case in which it shall be given in evidence, upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offence, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether he was acquitted by them on the ground of such insanity; and if they shall so find and declare, the court, before whom the trial is had, shall have power to order him to be kept in strict custody, * * * so long as such person shall continue to be of unsound mind.'

"Admitting, therefore, to its fullest extent, the general principle contended for by the defendant's counsel, let us inquire what that insanity is which excuses its victim from legal accountability.

"Before adverting to the principles which should guide us in such an investigation, let me remind you that the law presumes every man to be of sound mind until the contrary appears; that the burden of proving insanity rests upon a defendant, and that the point to which inquiry is always to be directed, is the condition of his mind at the time at which the crime was committed. It is not enough, therefore, to shield an accused person from punishment, that he should satisfy a jury that at some period of his life he was insane, if the whole evidence convinces them that at the time the offence was committed he was perfectly rational, free from delusion, entirely the master of his own actions.

"Proof of insanity, antecedent to the offence, raises the presumption that the disease continues until reason is fully restored; but in prosecuting these investigations we are not to look simply at one period of a life, but at all the events of which we have proof, and we should regard each item of evidence as a separate mirror, throwing its light upon the central point of the case.

"Keeping these general rules in view, let us return to our inquiry, 'What is that insanity which excuses from legal accountability?'

"I shall not attempt to cite to you the numerous definitions of insanity with

[1] Bright. Dig. 262, sect. 66.

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which our books abound, nor shall I undertake to classify the various diseases which may be included in the general expression, mental derangement. Dr. Ray gives us two general heads, and four sub-heads. Fleming states two different classifications, with upwards of thirty subordinates, and authors of eminence differ from those I have named, and from each other in their dissections of this subject. Such abstractions are well suited for those who make the treatment of disease their study; but we are in a court of law, not a school of science, and our deliberations must be guided and governed by legal adjudications, and not by theories of professors, however learned.

"It has been suggested by the learned counsel for the defence that there is no accountability in the absence of power. Properly understood and carefully applied, this statement may be accepted as correct. From it and the various decisions upon this question, we think we may safely lay down the following propositions as embracing the marrow of the law upon the subject: —

"I. If a man has no capacity to discern good from evil, nor ability to understand that the act he is about to perform will render him liable to human or Divine law, he is clearly not accountable.

"II. If he possesses the capacity to discern good from evil, but is laboring under a delusion or hallucination, which, if it was real, would excuse his act, he is still irresponsible to the law. This is illustrated by Lord Erskine's supposition that the defendant was so far operated upon by an insane delusion as to imagine that the person he struck was a brute animal or a potter's vessel. Other writers refer, under this head, to persons who imagine that they are attacked, and this illustration is used by the English judges in their answer to questions propounded to them by the House of Lords in June, 1843. His delusion may arise from disease, or it may arise from accident operating upon a perfectly healthy mind. A man may be driven to an act of violence by the delusion, amounting to insanity, that he is pursued or attacked. On the other hand, he may have full control of his reason, but may be deluded by appearances. Mr. Levet's case [1] is an illustration of this. He killed the friend of a servant who had concealed herself in the buttery, he being of the impression that she was a burglar. He was rightfully acquitted.

"III. If there is no delusion, general or partial, and there is a capacity to distinguish between right and wrong, the man may still lack, by reason of the operation of some painful disease, the power of self-control.

This is what is called by Chief Justice Gibson,[2] a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. He says: 'There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance.' He adds: 'The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. * * * To establish it as a justification in any particular case, it is necessary to show by clear proofs its contemporaneous ex-

[1] 1 Hale, 42.

[2] Com. *v.* Mosler, 4 Pa. St. 264 (1846).

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istence, evinced by present circumstances or the existence of a habitual tendency developed in previous cases, becoming in itself a second nature.'

"If you find that the defendant killed the deceased, you may be assisted in arriving at a conclusion as to his accountability by asking yourselves whether you find from the evidence the following facts: —

"1st. Did the defendant know who it was that he was attacking — that she was a human being — and that his acts would result in her death?

"2d. Did he at the time know that his act was forbidden by God and man?

"3d. Did he know and believe that she was not attacking, harming, or endangering him?

"4th. Was he entirely the master of his own actions, uninfluenced and uncontrolled by any disease or delusion, general or partial, which he could not by the exercise of his own will overcome?

"In *Freth's Case*,[1] Brother LUDLOW wisely said: 'If by moral insanity is to be understood only a disordered or perverted state of the affections or moral powers, it cannot be too soon discarded as affording any shield from punishment for crime. If it can be truly said that one who indulges in violent emotions, such as remorse, anger, shame, grief, and the like, is afflicted with homicidal insanity, it will be difficult — yes, impossible, to say where sanity ends and insanity begins; for by way of illustration, the man who is lashed into fury by a fit of anger, is, in one sense, insane.'

"Without further reference to authorities or principles, let us see what is the evidence of insanity in this particular case: —

"1st. It is said that the defendant has inherited this calamity.

"His mother says 'that there has been insanity in the family of defendant's father; that a death occurred from that.'

"Our Supreme Courts have decided that evidence of this character is clearly admissible; and if you find from the evidence that insanity is hereditary in defendant's family, this circumstance should have its due weight.

"2d. It is alleged that he received in early life a fracture of the skull, arising from a fall, and that he has been afflicted with epileptic fits from his youth to within the past week:

"Upon this point you have heard the testimony of his mother, his sister, his brother, Mrs. Patience Wilson, and Officers Coulson, Ashton, Taylor, and Thomas. Dr. Weir Mitchell, Dr. Edward A. Smith, Dr. H. T. Childs, and Dr. Pancoast, have all spoken to you of the effects of epilepsy upon the mind. They all agree that it may affect the brain, and think that it is one of the causes of insanity.

"The Commonwealth denies that the defendant has shown that he has been recently afflicted with epilepsy, and they also contend that the existence of the disease does not of itself and necessarily establish the presence of insanity.

"If you find from the evidence that the defendant is an epileptic, you should remember, in weighing the other testimony, that this disease produces great nervous susceptibility, and a tendency to mental alienation. Persons committing a violation of law while in this condition are entitled to the full benefit of all the considerations which affect the responsibility of the agent. As this disease arises from different physical causes, it exerts different influences on the mind

[1] 3 Phila. 109.

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and body. Cæsar, Napoleon, and Mohammed were affected by it in a subordinate degree. The doctrine, as laid down by eminent authors, is: 'That, in general epilepsy, the usual presumption of responsibility applies to acts committed in the intervals of the attacks.'[1] But it is added, 'that it is unjust to throw upon persons thus affected all the responsibility of actions which they may commit immediately before or after an attack, for authors are agreed that whether these attacks occur frequently or rarely, the mind never fully recovers all its power.'[2] Upon this point you should bear in mind that partial insanity is only an excuse when it has had some agency in destroying the capacity to distinguish between right and wrong, in producing a delusion, or in impairing the power of self-control.

"It is said that he has made frequent attempts to commit suicide. His mother says that on his return from the army he took laudanum twice and suffered two or three days. His sister says he several times attempted his life, and that once in her presence he was under the influence of laudanum two or three days. She adds that she 'only knows of the other efforts from what others have said. His brother also testifies to the same effect, and his letter to his friends, dated April 22, 1867, is relied upon as showing a disposition to commit suicide. You have heard the explanations of this letter from Chief Lamon, as given to him by the defendant.

"IV. It is said that his manner has been foolish and that of a demented person. His mother, his sister, his brothers, Mrs. Anna J. Wolf, Mrs. Mench, Mrs. McCormick, Mr. Taylor, Dr. Robinson, Thomas Beach, John P. Lanning and Mary Jane Marks, speak of his motions, the expression of his eyes, his general behavior, his melancholy, his sleeplessness, his declarations that he conversed with spirits, and other matters, which are doubtless well remembered by you. Finley Barber says the defendant was not considered bright, and Ella J. Beach says that in March last, when the defendant returned from Montana, he did not appear as when she had seen him before.

"Lastly, it is said by the defendant that a partial test of insanity is the presence of oxalate of lime in the urine. Upon this being testified to by Dr. Seth Pancoast, we allowed that expert to state to you the results of an examination made by him with the view of determining this question upon that test. This is the first time, so far as we have been able to discover, that such a test has ever been applied in such a case. But courts and juries, unskilled in questions of science, must necessarily receive instruction from those learned in the subject, which may be the particular subject of inquiry. We therefore felt ourselves constrained by the decisions to admit his testimony, and you have accordingly heard from Dr. Seth Pancoast his opinion that the defendant is insane, and the evidences of his insanity are the appearance of his eyes, the color of his skin, and the presence in his urine of numerous deposits of oxalate of lime. Dr. Pancoast, however, admitted that this may exist to a limited extent without insanity; and Dr. Wm. Pepper, a skilful medical expert, tells you that this oxalate of lime is frequently found in healthy urine after it has stood a short time; that it occurs in dyspepsia, is found after eating onions, rhubarb, etc., and that its existence in no way indicates a disease of the brain.

[1] Wharton & Stille, Md. Juris. sect. 144. [2] *Ibid.*

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"In rebuttal of the testimony of the defendant's witnesses, the Commonwealth relies upon the evidence of Mrs. Sarah Anthony, Robert Anthony, Chief Lamon, and Officer James McCullin, Jr. Mr. and Mrs. Anthony saw and conversed with the defendant the night before this occurrence; Chief Lamon and Officer James McCullen, Jr., conversed with him a few hours after his arrest. You doubtless remember their testimony, and I will not, unless desired to do so, pause to read my notes of their evidence. His diary is also relied upon by the Commonwealth as establishing a full possession by the defendant of his faculties.

"We have been requested by the prisoner's counsel to charge you on the following points: —

"1st. If the jury believe, from the evidence in the case, that the prisoner committed the act of killing, but at the time of doing so he was under the influence of a diseased mind, and was really unconscious that he was committing a crime, he is not guilty in law, and should not be convicted of any crime. We answer this in the affirmative.

"2d. If the jury believe that, from any predisposing cause, the prisoner's mind was impaired, and that he was mentally incapable of controlling or governing his acts at the time the homicide took place, they must acquit him. We affirm this point.

"3d. If the jury believe from the evidence that the accused, at the time this act was committed, was capable of controlling his acts, but from disease of the mind was incapable of judging of the nature of the act, with reference to the crime of murder, they must acquit him. We affirm this point.

"4th. The questions of fact implied in each of the foregoing points, like all others in the cause, are open questions for the jury, to be decided by them beyond all reasonable doubt, against the supposition that the prisoner's mind was in any manner impaired by disease so as to render him unconscious of his acts, incapable of controlling them, or of properly judging their nature with reference to the crime of murder, before they can convict the prisoner of the crime wherewith he is charged. We affirm this point.

"5th. The law does not require that insanity shall be shown to exist for any definite period, but only that the accused was suffering from a paroxysm of mental disease, whether short or long, at the time the act took place which he is accused of committing. We affirm this point.

"6th. The motivelessness of the act itself is a proper consideration for the jury in weighing the evidences of insanity. We affirm this point.

"7th. Every reasonable doubt in regard to the existence of every fact necessary to constitute the guilt of the prisoner must be removed from the minds of the jury, by satisfactory proof or evidence produced in this cause, before they can convict the prisoner. We affirm this point.

"We believe that we have answered every point presented by the learned counsel for defendant, or suggested to us by prolonged reflection upon this case. If, in your deliberations, any other matters should present themselves, you will, of course, give them their proper weight, and discard nothing simply because I have omitted to notice it.

"Upon the whole case, then, the first question is, Did the defendant kill Mrs. Magilton? Consider, upon this point, all the evidence bearing upon it, and if you have a reasonable doubt, give the defendant the benefit of the character he

has proved, and acquit him. If you have no reasonable doubt upon this first question of the case, you are then to consider the second inquiry: Was the defendant insane at the time he committed the offence? A doubt here, again, is the property of the defendant. If you acquit him, you are required to find specially whether he was insane at the time of the offence, and to declare whether he is acquitted on the ground of such insanity."

§ 22. —— **Tennessee — Texas.** — And the right and wrong test is followed in Tennessee [1] and Texas.[2]

In *Clark* v. *State*,[3] the Court of Appeals of Texas said: "A question is raised as to the sufficiency of the charge of the court on an issue of insanity, set up for the defendant on the trial. The charge of the court was excepted to, and special charges were asked which the court declined to give, on the ground that the law was properly given in the general charge. The following is found in the general charge of the court: 'Among other defences made in this case, is insanity created by jealousy and other conditions of the mind growing out of the infidelity, or suspected infidelity, as the case may be, of the wife. In this connection you are charged that only a person with a sound memory and discretion can be held punishable for a homicide, and that no act done in a state of insanity can be punished as an offence. Every man is presumed to be sane until the contrary appears to the satisfaction of the jury trying him. He is presumed to entertain, until this appears, a sufficient degree of reason to be responsible for his acts; and to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did know that, he did not know he was doing wrong, — that is, that he did not know the difference between the right and wrong as to the particular act charged against him. The insanity must have existed at the very commission of the offence, and the mind must have been so dethroned of reason as to deprive the person accused of a knowledge of the right and wrong as to the particular act done. You are to determine from the evidence in this case the matter of insanity, it being a question of fact, controlled, so far as the law is concerned, by the instructions herein given you.' On a comparison of this charge, with standard elementary writers on the subject of insanity as a defence for crime, and with adjudications of the courts of this State, we are of opinion that the charge, with reference to insanity generally, as well as the particular insanity or emotional derangement of the mind set up in the case was a substantially correct enunciation of the law of the case, and as favorable for the defendant as the testimony warranted." [4]

In the opinion of Clark, J., in the case of *Williams* v. *State*,[5] there is this paragraph; "Appellant was convicted of the murder of one Frank Strickland, and his punishment assessed at death. On the trial of the cause, there was evidence tending to show a disordered state of the mind on his part before the kill-

[1] Dove *v.* State, 3 Heisk. 348 (1872); Stuart *v.* State, 1 Baxt. 180 (1873); Thomas *v.* State, 40 Tex. 60 (1874).

[2] Erwin *v.* State, 10 Tex. (App.) 700 (1881); see *post*, p. 875.

[3] 8 Tex. (App.) 350.

[4] Whart. Cr. Law, sects. 15-24; 1 Archb. Cr. Pr. & Pl. 4-4, 4-5, and note 1; Carter *v.* State, 12 Tex. 500; Penal Code, arts. 39, 40; Webb *v.* State, 5 Tex. (App.) 596, and authorities there cited; Williams *v.* State, 7 Tex. (App.) 163.

[5] 7 Tex. (App.) 163 (1879).

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ing, and the issue of his sanity at the time of the homicide was submitted to the jury in the charge of the court. The charge upon this point was substantially to the effect that an act otherwise criminal, done and performed in a state of insanity, is not punishable; but the true inquiry should be whether or not the accused was capable of having, and did have a criminal intent. If he had such intent he was punishable, otherwise not, the true test being the capacity to distinguish between right and wrong as to the particular act with which he is charged. We deem the instruction in substantial accord with established precedents both in our own and other States. *Webb* v. *State*,[1] and authorities there cited."

§ 23. —— **United States Courts.** — In the Federal courts the right and wrong test is recognized.[2]

§ 24. **Moral Insanity — Irresistible Impulse.** — The courts of a few States have not been content with the "right and wrong test," but have imported into the law a rule of irresponsibility where, though the person knew his act to be wrong, he was driven to it by an irresistible impulse. This is known as "moral," as distinguished from "mental" insanity, and has become in some sections of the country a favorite defence to crime, where all other defences are wanting. This dangerous doctrine takes its firmest hold in Kentucky,[3] and has been favorably regarded in at least one case in Iowa,[4] and one in Connecticut.[5] There are also decisions in Ohio and Minnesota recognizing it,[6] though, as we have seen, in both these States the right and wrong test prevails.

Two *nisi prius* cases in New York, *Cole's* and *Macfarland's Cases*, are to the same effect, and in several trials of the same kind in Pennsylvania, hints of a similar doctrine are to be found.

In *Cole's Case*,[7] tried in the Albany (N. Y.) Court of Oyer and Terminer, in November, 1868, the prisoner was indicted for the wilful murder of L. Harris Hiscock, on June, 4, 1867, and pleaded not guilty. HOGEBOOM, J., charged the jury as follows: —

"This protracted trial is about to be closed and to be submitted to you for final decision. You are prepared for it by faithful attention to the testimony and the arguments of counsel. This attention is called for by the magnitude and importance of the case. The position of the jury is a solemn and responsible one. The life and liberty of a fellow-citizen is in your hands, and is not to be disposed of without the most anxious and serious consideration of all the circumstances and grave reflection upon the weighty results that hang upon your

[1] 5 Tex. (App.) 607.

[2] U. S. *v.* Holmes, 1 Cliff. 98 (1858); U. S. *v.* McGlue, 1 Curt. 1 (1851).

[3] Smith *v.* Com., 1 Duv. 224 (1864); Kriel *v.* Com., 5 Bush. 362 (1869); Scott *v.* Com., 4 Met. (Ky.) 227 (1862).

[4] State *v.* Felter, 25 Iowa, 67 (1868). But see Fouts *v.* State, 4 G. Greene, 500 (1854), where it is said: "From the authorities we conclude that insanity cannot be set up as a defence to an indictment, unless it appears that the defendant's mind at the time of committing the offence, was so deranged that he did not know the nature of the offence, or that he was so really deluded that he did not know he was doing wrong." State *v.* Stickley, 41 Ia. 232 (1875).

[5] Anderson *v.* State, 43 Conn. 514 (1876). But see State *v.* Johnson, 40 Conn. 136 (1873); State *v.* Richards, 39 Conn. 591 (1873).

[6] Blackburn *v.* State, 23 Ohio St. 146; State *v.* Gut, 13 Minn. 341.

[7] 7 Abb. Pr. (N. S.) 321 (1868).

decision. Nevertheless it is a duty which you cannot decline, which the law has imposed upon you, which you have taken an oath to discharge with conscientiousness and fidelity, and which must be discharged with absolute fearlessness and impartiality, whatever may be the consequences, and upon whomsover they may fall.

"George W. Cole stands indicted for the murder of L. Harris Hiscock, on June 4, 1867, at Stanwix Hall, in the city of Albany. Under this indictment, he may, if the evidence justifies it, be convicted of either of the two degrees of murder, or of the four degrees of manslaughter, or acquitted upon the ground of justifiable or excusable homicide, or of an absolute or temporary deprivation of reason, the result of settled insanity, or of a momentary, but ungovernable frenzy induced by the circumstances of the particular occasion.

"It may be desirable to inform you, particularly, of the ingredients which go to make up the crimes of murder and manslaughter in their various degrees. Murder, in the first degree, so far as it can have application to this particular case, is the killing of a human being, when not justifiable or excusable, nor coming under the head of manslaughter, and perpetrated with a premeditated design to effect death. The premeditated design must be completely formed before the act of killing, and must precede the act, but no particular space of time is necessary to intervene between the complete conception of its design and its execution. If a perfected design precedes the act, it is murder. This is murder in the first degree, and its punishment is death. Murder, in the second degree, embraces all the cases of murder which are not included in the definition of murder in the first degree. It is not well defined in the law, but may safely, I think, be held to include cases of unjustifiable, and unlawful, and inexcusable killing, characterized by a premeditated design, or by no premeditation beyond an intention to produce death; but not by that degree of enormity, wilfulness, and premeditation which mark the commission of murder in the first degree. The line of distinction between murder in the first degree and in the second degree, is not very clearly defined in the statute; and something is left to the sound and intelligent judgment of the jury in fixing the degree of the crime. The punishment of murder in the second degree, if I have read the statute aright, is imprisonment in the State prison not less than ten years.

"Manslaughter in the first degree is not applicable to the facts of this case. Perhaps, not manslaughter in the second degree, though one division of it, the killing of a human being without a design to effect death, in the heat of passion, but in a cruel and unusual manner, might possibly be contended to embrace it; but as manslaughter in the third degree is the same offence, except that it is killing accomplished by a dangerous weapon, instead of a cruel and unusual manner, I present that aspect of the offence to you as better adapted to the facts of this case than manslaughter in the second degree, and also as being milder in its penalty and, therefore, more favorable to the prisoner. The punishment of manslaughter in the third degree, is, I believe, as modified by the statute of 1865, punishment in the State prison not less than one, and not more than four years. Every other killing of a human being by the act, procurement or culpable negligence of another, when not justifiable, nor excusable, nor murder, nor manslaughter of a higher degree, is manslaughter in the fourth degree. The punishment of manslaughter in the fourth degree is imprisonment in the State

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prison for not exceeding one year or in the county jail not exceeding one year; or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. The feature which particularly distinguishes manslaughter from murder, is the absence of a design to effect death. Applying these definitions to this particular case; if you believe Cole killed Hiscock, without legal justification or excuse, in the possession of his faculties and with a mind capable of comprehending the quality of the act; and with a premeditated design to effect his death, he is guilty of murder in the first or second degree according to the enormity of the act and the degree of premeditation with which it was perpetrated. If done without a design to effect death, but in the heat of passion and with a dangerous weapon, then he is guilty of manslaughter in the third degree. If done in some other way, but without a design to effect death, and in the heat of passion, then he is guilty of manslaughter in the fourth degree.

"But to constitute guilt and criminality in either of these various ways, it is necessary that the person should be capable of distinguishing between right and wrong in the particular case, and as applied to the features of the particular transaction; that he should be in the possession of his faculties; in the exercise of his reason; not necessarily with faculties in the same vigor or force, or under the same equanimity of mind as when perfectly cool, or in perfect health, but with faculties from which reason is not permanently or temporarily dethroned.

"All men have not the same mental powers or characteristics, — the same man is not at all times in the same condition for the cool and equable exercise of his reason or mental powers; the strength and vigor of his faculties may even be temporarily or permanently impaired or diminished by sickness or bodily ailment, or by exciting causes calculated to disturb his equanimity or to influence his passions, yet if he be in the possession of his senses, able to judge of the moral qualities of his acts, and of the particular act for which he is arraigned, and to distinguish between right and wrong in regard to it, he is morally and legally responsible for his conduct, amenable to the laws of the land, and must abide by its mandates and penalties. If then, George W. Cole was in this condition, he must, like other men, be tried by the standards of the law, and submit to its judgment. If, on the contrary, he committed this homicide when reason was dethroned, either permanently or temporarily, no matter from what cause, he is not amenable to the law, and is not subject to its punishment or its penalties.

"And of all these facts necessary to establish crime, and to constitute responsibility for its commission, the People are to satisfy you, and to satisfy you beyond a reasonable doubt. They are to convince you that the prisoner was a rational being in the possession of his senses with the power to discriminate between right and wrong in the particular case, and that the act which he committed, and for which he is now on trial, falls within one of the various offences to which I have referred. And if there be a rational doubt of this upon your minds, the prisoner is entitled to the benefit of that doubt. The prosecution must make out to your satisfaction the guilt of the prisoner in regard to all the features of the crime, and satisfy you of their existence beyond a reasonable doubt. Thus if the charge be murder, they must convince you that the killing was perpetrated by the defendant, that it was done with premeditated design, and by a person of sane mind.

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"No doubt sanity is the normal or usual condition of human beings, and hence ordinarily you would be satisfied of its existence by much less proof than you would be in some other cases. But still, either by presumption of law or positive proof, you must be satisfied of its existence, and of its existence beyond a reasonable doubt. This doubt, however, must be one that fairly arises upon the evidence, not merely speculative or fanciful, but one that commends itself to your judgment upon a fair and rational construction of the evidence, not to be lightly or capriciously indulged, and especially not as a mere mode of evading the responsibility of a careful and deliberate judgment upon the testimony, but a doubt resting upon your minds as a result of a most conscientious examination of the evidence.

"These are the tests which you must bring to the examination and decision of this case, and by which you must be controlled in the result to which you ultimately arrive.

"Having thus defined the offences of which it is possible under this indictment to convict the prisoner, if your views of the evidence warrant it, let us turn our attention a little more particularly to the facts of this case, and the allegations of the parties in regard to them.

"I. The leading fact of the killing of L. Harris Hiscock by George W. Cole, is not denied. It is very distinctly proved to have occurred at Stanwix Hall, Albany, on the 4th of June, 1867, by a pistol shot, producing almost instant death. As no provocation appears to have been given at the time of the homicide, nor any conversation was had between the parties at the moment, we must probably look elsewhere for the cause which produced it, and for the justification by which it is to be maintained. And there being no justification (that question, I however, submit to you) apparent in the circumstances, occurring at the time, you would probably consider yourself justified in concluding, that in the absence of explanatory circumstances, it would be safe to infer malice aforethought, or a premeditated design to effect the death of the person killed.

"II. There are, however, if I understand the line of defence, two reasons claimed to exist which should protect the defendant from punishment.

"1. Because the defendant was not in a state of mind that renders him responsible for the act, — in other words, that, from causes operating for a considerable length of time beforehand, or recently or suddenly occurring, he was mentally unconscious of the act in which he was engaged, and legally irresponsible for it.

"2. Because the deceased had seduced the wife of the defendant, and that, in the transport of rage produced in the defendant by such an invasion of domestic rights, or by the sudden and overwhelming disclosure of the fact to him, he committed the homicide for which he is now on trial.

"As the first of these defences, if established, furnishes a complete and absolute protection to the defendant from any liability to the law for the act committed, it may be well to examine that first in order.

"The first defence relied on, then, is insanity, — a deprivation of reason at the time the act was committed, resulting either from a settled and well-established mental alienation, or from the pressure and overpowering weight of the circumstances occurring at the time, and the transport of passion arising from sudden and crushing information of the infidelity of his wife, yielding to the arts and seductions of her paramour. As I have just stated, this is a valid defence,

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if satisfactorily established by the evidence. If reason was in fact dethroned, if Cole was not at the time in the possession of his faculties, if they were overpowered and lost in the presence and under the influence of an overwhelming domestic calamity, if Cole was at the time incapable of distinguishing between right and wrong in regard to this transaction, or of appreciating the moral quality of his act, and the evidence satisfies you that this was so, then, like every other man in that condition, he cannot be held criminally responsible for the homicide, and is entitled to your verdict of acquittal.

"But while you must remember that the prisoner's sanity must be established by the prosecution, and established beyond a reasonable doubt, you must also remember that the ordinary condition of men is sanity, and not insanity, and that, as a general rule, he is responsible for his acts, and not exempt from responsibility.

"In judging of Cole's mental condition, it is highly important particularly to examine his conduct at the time and about the time of the transaction.

"If Cole committed this act with apparent coolness and deliberation, — although more or less excited, — spoke of it with apparent intelligence and decision and appreciation of its character and effect; if he mentioned it immediately afterwards, as if he understood what he had been doing, and recognized its nature and object; if he armed himself with a pistol or pistols the day before at Syracuse, and you shall conclude he did so with reference to this encounter and this occasion, — of which you are to judge with most careful discrimination, because it bears with much force on the issues in this case; if he took measures to have a weapon or weapons in a situation to be effective, and located them so as to be likely to operate; and if, after reflection on the subject and a conference with one or more of his friends, he proceeded deliberately to the commission of the act of killing, and with effect; these are all legitimate subjects for your consideration, as well on the question of sanity as on the question of premeditated design to effect the death of the person killed.

"You must judge of the character and motive of the defendant's acts. What was his object in providing himself with those pistols? Was it with reference to this occasion, or was it in connection with the discharge of his duties in the revenue service? Was the killing (as the defendant's counsel contend) not premeditated when the prisoner visited and entered Stanwix Hall? Was he moved to the commission of this act by the sudden access and irresistible pressure of excited and overwhelming passion, roused by the sudden and unexpected sight of the destroyer of his domestic peace, or he whom he supposed to be such, — the defiler of his marriage bed, the seducer of the dearest object of his affections, — dethroning his reason and pressing him on to the commission of this act, under the influence of an ungovernable frenzy, unsettling for the time his faculties, and enthroning insanity in their place?

"These are questions submitted to your most careful and deliberate judgment, and will require the application of your best faculties and your most impartial and conscientious deliberations, in order to conduct you to a right result.

"The defendant's state of mind, as evinced by his conduct, by his declarations, and his acts, by his bodily ailments as effecting his mental condition, his cheerful or moody temperament, the change (if there was one) in the character of his temper and disposition, the extent to which it was carried, the causes which

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produced it, and other circumstances not necessary to be alluded to at greater length, as exhibited at and about the period of the homicide, and for a period previous thereto more or less distant from the central and important, to which your attention will naturally be more especially directed — are all important subjects for your consideration, and entitled to more or less weight, according to their nature, and to some extent according to their nearness in point of time to the scene of the fatal transaction.

"In illustration of the prisoner's mental condition, much medical evidence has been introduced, and must be considered by you. It is for you to judge of its weight and character, and determine it by the best light you have. As one means of determining it, it seems to me (it is, however, for you to judge) that, other things being equal, those medical witnesses who were acquainted with the prisoner, with his ordinary habits and temperament, with his personal history before and at the time of the transaction, would on that account possess some advantages in forming an estimate of the prisoner's mental condition.

"Still much must depend upon the capacity, judgment and discrimination of the particular witness, and upon the manner in which the testimony is presented. With witnesses who have not had a personal acquaintance with the prisoner, or opportunity for a personal examination, the weight of their testimony must depend somewhat upon other considerations, and upon evidence of the causes, influence, symptoms and characteristics which usually mark the presence of mental derangement. Some of this, perhaps much of this, where the prisoner has not been known or personally examined, must necessarily be more or less matter of mere opinion, the value of which it is not always possible correctly to estimate.

"Several causes may operate to produce insanity and are entitled to more or less consideration in the particular case.

"Insanity is sometimes inherited — transmitted down in the line of family descent, occasionally not exhibiting itself, and again reappearing after one or more generations. Some evidence of this taint of insanity existed in the family of the defendant. This is a subject for your consideration; but you must recollect that the reappearance of this mental disorder is not uniform, and you must carefully scan the prisoner's declarations, his acts, his general conduct, his mental manifestations, to see whether you find in them the traces of actual insanity — that actual mental derangement, which alone can avail, so far as this point is concerned, to accomplish perfect immunity from criminal responsibility.

"Again it is said that the prisoner's bodily ailments were of such a character as justly to lead to the inference that they were calculated to affect, and did affect, his mental organization and developments in such a way as to produce insanity. There seems no reason to doubt that in 1862, while doing honorable service in the cause of his country — for which, whatever may be his fate under this accusation, he deserves grateful recognition — received a severe and crushing injury, followed by other injuries thereafter, from the effects of which he has not yet fully recovered, which more or less disabled him, and which were calculated to have, and did have, a depressing effect upon his spirits and temperament, making him more or less moody and melancholy, producing more or less and sometimes very considerable depression of spirits, resulting as his

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counsel claim, in a settled melancholy, allied to if not identical with the melancholia of the medical profession, and constituting one of the various forms in which, as they contend, insanity is manifested.

"But even if Cole's mental manifestations were of this clear and decided character, and had assumed the form of the melancholia of the doctors, this is not precisely the insanity required by law to shield its possessor or subject from responsibility to the criminal laws of the land. The insanity of the medical profession, as described before you by several of its leading professors, is not precisely the insanity of the law. They describe melancholia, which seems to be nearly synonymous with a settled melancholy of an excessive, aggravated, and unreasonable character, indicated by a highly nervous and unusually moody temperament, and by a mind more or less morbidly affected in its ordinary functions, as insanity.

"But whether these may be more or less present in legal insanity, or the insanity recognized by the law, they are not precisely that kind of insanity or mental unsoundness which marks exemption from criminal responsibility. The law, in determining a person's responsibility for, or immunity from crime, applies a very simple, but easily comprehended test, and it is this: Did the accused party understand the nature of the act in which he was engaged, so as to understand whether it was right or wrong? Was his reason dethroned or operative? Was he able to comprehend the nature of his conduct or not? If he was, then he is responsible to the laws of his country, is bound to obey them, and is punishable for their violation. It may be, therefore, that he was subject to melancholy in an aggravated form. So long as it does not sap or subvert the foundation of his intellectual faculties, he may be carried under the pressure of excited feeling into an outburst of passion, which may be next to uncontrollable; yet if reason preserves her dominion over his intellectual powers and has not yielded her throne to the frenzy of mental alienation or madness — if, notwithstanding all this, he has sufficient comprehension of the nature of the act in which he is engaged to appreciate its moral quality, to distinguish right from wrong — if he knows he is doing an act forbidden by law, he is held accountable for his acts, he must be regarded as violating the laws of his county, and must abide the fate of other criminals."

[The judge here read the opinions of the court in *Freeman* v. *People*,[1] *Willis* v. *People*,[2] and *O'Brien* v. *People*.[3]]

"This is all I deem it necessary to say to you on this first and principal branch of the defence. I cannot comment on the evidence in detail. This has been done in the most able and discriminating manner by counsel. And you will probably be able to come to a conclusion satisfactory to yourselves on this leading branch of the defence.

"The conduct, the temperament, the bodily ailments, the mental manifestations, the personal history, the traits and characteristics of the defendant, have been pretty thoroughly scanned and held up to your view, as exhibited from 1861 to the present time. And I think I need not make any further suggestions to you in regard to them than to suggest that, as far as possible, you bring them all to a practical test, and determine by his actual mental manifestations, as developed

[1] 4 Denio, 9. [2] 32 N. Y. 715. [3] 36 *Id.* 576.

Cole's Case — Continued.

in his character, his declarations and his conduct, his ordinary and daily habits of life, his attention to, and capacity for business, the impression made in all these respects upon those who associated with and knew him, whether he should stand exempt from liability to the criminal laws of his country, or had sufficient moral sense or intellectual capacity to be subjected, like ordinary men, to her mandates and her penalties.

"The value of the medical evidence you must estimate for yourselves. You are yourselves the ultimate judges on this point. And it is upon your own judgment, as founded upon the evidence, that the result must finally depend. The opinions of medical men may have a certain value in enlightening your minds in regard to it, but it should by no means induce you to discard your own careful and deliberate judgment upon the whole testimony.

"And of the existence of this fact of insanity, as of all other facts in the case, you are, as counsel have been careful to impress upon you, yourselves and not the court, to be the final and intelligent judges. The court has no disposition to invade your province on that subject; but this will not, I presume, induce you to discard or reject any suggestions, coming from what quarter they may, that seem to you to have any intrinsic force; or to aid you in arriving at an intelligent judgment upon the case. None of us are so wise that we can safely afford to reject adventitious aid on a matter so important; and in a matter of life and death the responsibilities are too great to induce us to attempt to be too self-reliant.

"Another defence set up on this occasion is, that Hiscock was the seducer of Cole's wife, and therefore justly liable to his vengeance. No doubt such a defence, if established, would strongly appeal to your sympathies, being regarded in some quarters as no more than a just vindication of marital rights, and the only efficient mode of protecting the purity and inviolability of the marriage bed. But we are not here to administer sympathy, but to execute justice; to carry into effect the laws of the land; to enforce its solemn mandates, and not to nullify or relax its positive commands by misplaced sympathy, or morbid clemency. If our duty is clear, we forswear ourselves if we do not perform it. I have taken a general oath faithfully to perform the duties of my office; you have taken a special oath, well and truly to try and true deliverance make between the People of the State of New York and George W. Cole, and a true verdict render according to the evidence, so help you God. This duty we must discharge, at whatever hazard, whether painful or agreeable. Neither manhood nor honor, the restraints of conscience, nor the solemn mandates of the law, allow us to decline its performance, or to hesitate at its execution.

"Many laws may not be in precise accordance with our views of policy, or even of strict justice, yet it would lead to the utmost confusion and injustice should we refuse to execute them. If we are dissatisfied, we should apply at the proper time to the proper forum for their amendment, or seek to avert their excessive rigor by an appeal to executive clemency. Certainly, it is to be regretted if further legal enactments could be of any avail to restrain the unholy passions and devilish arts of the seducer and adulterer, that they have not heretofore been made. But the wisdom and efficiency of such enactments have been questioned. It is enough for us to know that we must administer the law as it is, and have no right to usurp legislative power, and apply to a past transaction

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laws of our own creation. The injustice and unconstitutionality of such a proceeding would be manifest, and the gravest objections to it exist. Let us content ourselves with administering the law as we find it in our own appointed sphere of duty. Then shall we have consciences void of offence towards all men, and the happy consciousness that in the spirit of our oaths, and in conformity with the obligations which rest upon us, we have, as faithful and law-abiding citizens, executed the law of the land.

"But there are several reasons why you cannot give effect to this defence: —

"1. The adultery is not in proof. It has not been established by the evidence. If that evidence has been improperly excluded, the responsibility for that error is with the court, and its correction belongs to another forum, and may be accomplished under the exceptions taken by the defendant to the decisions of the court. The statements of the prisoner are not evidence of that fact. They were not called for with any view to make them evidence for such a purpose. Their object was to illustrate the premeditated design on his part. Being perfectly legitimate for such a purpose, and offered with that view, and direct evidence of adultery having been excluded by the court, they are not competent testimony to prove the adultery because they are not offered and received with that view, and because there is no pretence that the defendant had personal knowledge on this subject which would enable him to give primary or admissible evidence with reference to it. There might be a state of facts, — for example, if a husband should rush from his own bed-room, with a knife or dagger in his hand, red and dripping with blood, where his statement that he had just slain the adulterer in the very perpetration of a domestic wrong, contemporaneous with the act, and consistent with, and explanatory of, the surrounding circumstances, might be so interwoven and blended with the transaction as to allow it to be received, in connection with other evidence, as original or primary proof of the facts themselves. But here the declarations of the prisoner do not cover such a case, — are not intended to be applicable to such a transaction, and are shown by other proof in the case to refer to occasions considerably removed in point of time from that which is the subject of your present consideration. The confessions, or alleged confessions, of the wife do not prove it. They were not admitted for such a purpose, and are not to have that effect. Their introduction was permitted, not as furnishing evidence of the facts themselves, but as communications made to the husband, and which were calculated more or less to operate upon his mind, and influence his conduct, and to enable you in the light of subsequent events to judge how far they did so operate, and to determine to what extent the knowledge or information of these facts was calculated to explain and to mitigate, or to justify the homicide subsequently committed. As interpreting the prisoner's subsequent conduct, as throwing light upon the state of his mind, they are admissible and proper to be considered. As furnishing evidence to you in this case of the commission of adultery, they were not allowed to be introduced, and are not proper to be considered.

"Hence, if you acquit the defendant upon that ground, you acquit upon a ground not established by the evidence.

"It may be that the deceased was not guilty of this offence. He has not had any opportunity to try that question, and his lips are now sealed in death. We

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are not, therefore, in a condition to say on which side upon a fair trial, the preponderance of the evidence would be.

"It is suggested that no case has ever occurred in which this evidence has ever been ignored by a jury. That is not the question. It is not necessary for us to inquire whether former juries have or have not violated their oaths by accepting as evidence facts which have not been proved. It is a dangerous and inadmissible proceeding in a court of justice. We stand upon the recorded evidence, and no other. Whatever may be our suspicions, we have no right to give way to them, unless they are supported by the evidence in the case.

"Whatever I may suspect, or you may conjecture, outside of the range of the proved or admitted facts, we cannot justify ourselves to our God and our country otherwise than by rendering a verdict according to the evidence. Neither the presence of sympathy, nor the alleged hardship of the case, nor the sophistry of counsel should allow us to take any other course.

"But it is said that the prisoner was informed of facts tending to fix upon the deceased this invasion of his marital rights; and that, oppressed by the crushing weight of such a disclosure, he rushed to the vindication of his marriage bed, under a transport of passion which any honorable heart will justify, — which the law will excuse if it does not applaud, and which jurors who appreciate the importance of maintaining the purity of the marriage relation cannot fail to recognize and sustain.

"But neither is this the just nor the legal view of the case. It is only in the heat of passion, in the uncontrollable resentment occasioned by the discovery of his domestic dishonor, or by surprising the parties in the actual commission of the adulterous intercourse, or under influence of a state of circumstances almost equivalent to personal observation of such a transaction, that the husband is permitted to be the summary avenger of his domestic wrongs. He is not at liberty, after his passions have had time to cool, and the tempest of excited feeling to subside, to stalk abroad, seek out the unconscious and unprepared victim of his resentment, and without the intervention of the forms of law, or the judgment of his peers, become the self-appointed avenger of his own wrongs, or vindicator of the violated majesty of the law. The law must be left to maintain its own dignity and to enforce its own decrees through the constituted tribunals of its own creation, and has not in any just or legal sense commissioned the defendant to the discharge of this high office.

"In this case the adulterer, if adulterer he was, was not detected by the husband in the actual commission of his crime, nor under circumstances from which its then very recent perpetration, so far as the evidence discloses, could have been fairly inferred. The period of adultery, if adultery there was, was long since passed. The knowledge or information of its commission had been communicated to the prisoner several days, at least two or three days before, and a sufficient time, in the judgment of the law, had elapsed for the passions to cool, and for reason so far to regain her undisputed or real sway as to forbid individual vengeance, and to pronounce the act of premeditated killing, if such it was, the crime of murder.

"True it is, as I have already informed you, if, notwithstanding this lapse of time, the crushing weight of this domestic tragedy had driven the prisoner's mind to absolute distraction, and dethroned the reason of the husband, he is per-

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mitted to find immunity from punishment in the mental alienation with which he was thus overwhelmed; but if he had the possession of his senses, the exercise of his reason, and was in a situation to appreciate the quality of his acts, he stands responsible before the law for having unlawfully taken the life of his fellow-man, and must abide the stern vigor with which she maintains her violated majesty. Neither, therefore, in the alleged adultery, for which the deceased was slain, because the adultery has not been proved, and would not have been a defence if it had been, considering the period of its alleged commission, nor in the crushing and overwhelming weight with which the evidence of his domestic dishonor and of the deceased, as its alleged author, was brought home to the knowledge of the defendant, can the prisoner find exemption from the consequences of the homicide. He must find it, if he find it at all, in that dethronement of reason, if it actually occurred, which exempts every person, however great would otherwise be his crime, and however awful would otherwise be the attending circumstances, from conduct to which his mind never gave a willing and intelligent consent.

"But there is another aspect of the case, to which I feel bound to call your attention, because there is a possible view of the evidence which you may feel at liberty to take which will reduce the grade of this offence from murder in the first degree to murder in the second degree or manslaughter in one of its various degrees, and more particularly to manslaughter in the third degree, the punishment of which crime is imprisonment in the State prison for the terms which I have before mentioned.

"I have already stated to you that murder in the second degree embraced all other kinds of murder than murder in the first degree, and though not well defined in the statute, might fairly be supposed to include that kind of murder which was not characterized by that degree of enormity, or of premeditation, which might be supposed to constitute murder in the first degree, and to be justly punishable by the forfeiture of life.

"If, therefore, your view of the circumstances of this case shall enable you to take this more lenient view of the conduct of the prisoner, to which I have just referred, you may find him guilty of murder in the second degree.

"Again, if your view of the evidence, acting under the responsibility of your oaths, shall enable you to take a still more lenient view of the evidence, and to conclude that the intent of the prisoner was not to produce death, and that the homicide was committed, not with premeditated design, but in the heat of passion, by the use of a deadly weapon, then it will be your duty to convict the prisoner of manslaughter in the third degree, the punishment of which crime is imprisonment in the State prison for a term of not less than one nor more than four years.

"As heretofore stated, the radical distinction between murder and manslaughter is the presence or absence of a design, or premeditated design, to effect the death of the person killed. If you have rational doubt on that point, arising under the testimony, and justly founded thereon, it is the benevolent intention and the positive injunction of the law, that you should allow it to operate in favor of the prisoner. And if, in the dispassionate judgment which you shall give the case, you shall come to the conclusion that though you believe the prisoner to have been driven to the borders of distraction yet not actually to have entered its do-

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main, and therefore feel bound to hold him responsible for a violation of the law, and yet believe him to have been urged to the terrible catastrophe with which this domestic drama has terminated, by the crushing conviction of his domestic dishonor, and with a force and precipitation and pressure, which deprived his act of homicide of that premeditation which stamps it with the legal ingredient of malice aforethought, you are at liberty under such circumstances to negative the element of premeditated design; and finding the act committed in the sudden heat of passion, and by the use of a dangerous weapon, to declare the legal consequences of such killing, by pronouncing him guilty of manslaughter in the third degree.

"The responsibility of determining the facts by which the grade of the offence is to be measured, is of course, with you and not with me, and you must determine it under a solemn sense of the important consequences which rest upon your decision. It has been suggested that a verdict of this character, finding the defendant guilty of an offence of a less grade than that charged in the indictment, will not be acceptable to the prisoner, who desires a full acquittal, or a conviction of murder in the first degree.

"Allow me to say, gentlemen, the preferences or wishes of the prisoner, on this point, should not, in my opinion, affect your action one way or the other. You have a higher duty to discharge than either to please or to offend the prisoner or the People. You are to find a true verdict according to the facts established before you. You are to declare it without fear or favor, and without reference to the wishes of either side.

"You are not to be precipitated into a verdict of absolute acquittal, because a conviction of murder in the first degree would be too severe to correspond with your views of duty. You are not to be withheld from a verdict of partial conviction, if a verdict of greater or less severity shall not faithfully record your conclusions from the evidence. You must find a verdict founded entirely upon your own view of the testimony as it has engraven itself upon your minds. You should also be careful not to be carried away by feelings of sympathy beyond the boundaries of duty. You may justly and properly entertain a feeling of respect and gratitude to General Cole for his gallant services during the war; but when he appears in this tribunal, and is summoned to its bar to answer for crime, he is like all other men similarly situated, to be tried by the law and the evidence. Neither gratitude for his military services, nor sympathy for his unmerited sufferings, nor regret for his domestic calamities, can annul or repair the stern requirements of duty.

"Nor, on the other hand, must you be betrayed by abhorrence for a homicide, appearing, if you so regard it on the first look at the transaction, to be without justification or excuse, into a rash and precipitate verdict of conviction. The case has various aspects, all of which you must consider, and no more conscientious or imperative duty is demanded of a jury than to keep its judgment in suspense till every fact is carefully examined, and its just weight and bearing faithfully determined.

"You find in the prisoner, perhaps, an individual laboring under melancholy, more or less, whether or not it has attained that intense and aggravated character expressed by the melancholia of the medical profession. You find him, it may be, materially changed in his disposition and temperament, his tastes and

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his habits, from what they were at a former period of his life. Life, it may be, has lost for him many of its charms, and bodily ailments and injuries have not only subjected him to much pain and suffering, but have so destroyed or impaired his health and his constitution as to render life a burden rather than a blessing.

"All these things under proper circumstances, and on a proper occasion, may make him a fit subject for your consideration and sympathies. But this is not the period when you are to seek their indulgence, or at least if they operate so far as to distract your mind from the performance of a sterner and higher duty. Not, indeed, that you are to forget you are human, or that you can be expected to divest yourself of those feelings and sensibilities which are implanted in every manly and generous heart. But that you are to be careful not to be led away by them from the performance of duty or into forgetfulness of the stern obligations which rest upon you as impartial arbiters of the prisoner's destiny.

" True, indeed, if under the influence of the evidence you conclude that the prisoner's reason has been dethroned, and that he was not at the time of this transaction an intelligent agent, having the power of mental discrimination between right and wrong in regard to the particular transaction which you are undertaking to investigate, he must stand acquitted before you upon the ground of criminal irresponsibility. But if he had this power of mental discrimination, and could distinguish in regard to the moral qualities of his conduct, then, notwithstanding your pity for the man, and your sympathy for the sufferer, you must condemn the criminal, and especially you must not be led aside from the path of duty by a recollection of the severe rupture which has taken place in his domestic relations, unless the deceased is proved to have been connected therewith, and in some sense the author thereof, so as justly to call down upon himself within the limits of the law, the just vengeance of injured husband. These injuries, at least as intelligence of them was communicated to him, were of the most heartrending character, and must of necessity, excite the ardent sympathy of every feeling person. It may be difficult, perhaps impossible, wholly to divest ourselves of these feelings, but we shall fail to meet the stern and inexorable necessities of this hour if we allow them to turn us aside from the path which the law has appointed for us to tread. That path is the path of duty; that duty is to find a verdict according to the law and the evidence, and whether it enjoins upon you the agreeable task of pronouncing a verdict of acquittal because the evidence fails to satisfy you beyond a reasonable doubt of the guilt of the prisoner, or of his responsibility for crime, or the painful one of pronouncing a verdict of conviction, because the evidence satisfies you beyond a reasonable doubt of the prisoner's guilt and responsibility for crime, you will, I doubt not, acquit yourselves like men, and without fear or favor, without partiality or prejudice, discharge the solemn and responsible trust which the law has imposed upon you on this occasion.

" In this confidence, I commit this case into your hands for your final deliberation and verdict.

" In relation to the specific points submitted by the counsel for the defence, and asked to be made part of this charge, I charge the law upon the subject of insanity to be in the authorities I read to you.

Mr. Brady. — " With reference to what has been said by the court upon the

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question of finding the accused guilty of manslaughter, I desire to say in behalf of the prisoner, that, in the judgment of his counsel, there is no rational or possible view by which the offence can be demonstrated manslaughter, and that the prisoner declines to accept the offer of that sympathy that would induce a verdict for that offence, and would rather die than be sent to State prison."

The jury retired, and subsequently came into court, when the foreman stated they had not agreed upon a verdict.

Hogeboom, J. — "I have a note from you in which you request to have further information with reference to that portion of the charge which relates to insane impulse and ungovernable frenzy and the rules of law governing the same. I designed to express myself with sufficient fullness, and with all the clearness and perspicuity with which I was able to do upon those subjects. I will restate, or further comment on these points, that the foundation of all responsibility for crime is sanity, or soundness of mind, that is a sane mind in the sense in which I explained it to you in the original charge — the possession of reason, ability to discriminate between right and wrong in regard to the particular transaction, a degree of consciousness and intelligence that enables a party to appreciate the quality and nature of the act in which he is engaged; to be aware that it was wrong; if it was wrong, a crime; that he was committing an offence against the laws of his country. If his mind was in such a situation, he was, in my opinion, and as defined in the cases to which I have referred, subject to those laws, responsible for their violation, and to be punished if he did violate them. That is substantially the test in regard to both those species of offences to which your attention has been called. An insane impulse, leaving the mind incapable of exertion, holding the individual incapable of exercising his mind, so far as I have defined it to you, exempts him from responsibility, and if under the influence of such a want of mind, the prisoner commits the act, whether you call it an insane impulse or anything else, it exempts him from responsibility. Mere impulse, whether you call it irresponsible impulse or not, does not excuse, if it be the impulse of excited passion, arising from revenge, from resentment, from intention to do an act which is wrong or a crime, and the prisoner is aware of it, whether he is impelled to it by peculiarities of temperament, by a nervous disposition, by excited feeling, or anything of that sort, will not excuse him from responsibility.

"If there is the consciousness that he is committing a crime against the laws of his country, there is, in my opinion, no impulse that can excuse him from responsibility. But if this impulse arises from a defect of reason so that it cannot control the exercise of his mental powers, if he is bereft of that power in the sense which I have alluded to, and this crime is committed in such a condition and without the ability to control himself from such a cause, he is in such a condition as excuses him from responsibility.

"The question, after all, is whether he has his mental powers and the ability to exercise them to such a degree as makes him conscious, at the time, of the nature of the act in which he was engaged. He must not give way to unholy passions, to excited feelings, to a disposition for revenge or resentment, because it is just these feelings that the law punishes and makes him responsible for them. Men must curb and restrain their passions. But if he is bereft of the mental power to reason upon the subject and understand the nature of the act in

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which he is engaged, then the law relieves him from responsibility. If he acts from ungovernable frenzy, it must be the frenzy of madness or mental alienation, and not of excited and inflamed passions. If a man has sufficient consciousness of the nature of the act in which he is engaged to know that he is doing wrong, and violating the laws of his country, and yet gives way to the feeling of resentment or revenge, and gratifies it at the expense of his consciousness that he is committing a crime, whether that frenzy is of the highest and almost irresponsible degree or not, he must be held responsible. But if this is the frenzy of mental alienation, so that he cannot control the powers of his mind, and is incapable of appreciating the quality of his act, or to understand that he is violating the laws of his country in doing a thing that is morally wrong, then he is exempt from responsibility.

"It is very difficult to define these matters with absolute precision. I can only refer you to the general rule laid down in the cases I laid before you in my charge to you, and I read from them intentionally for the express purpose of defining the rules by which you are to be guided, and to explain the circumstances which exempt a person charged with crime from the responsibility of that crime.

"I do not know that I can do anything which will inform you in any greater degree of what constitutes that degree of insanity or mental alienation which excuses a person from criminal responsibility. The party is never responsible for defect of reason; it is a providential dispensation which relieves him from the imputation of crime, because it is not the act of a free, intelligent, and conscious mind. I think that every one is bound to control his passions and feelings. If he has the power of thought and ability to reason, he must be held responsible to the laws of his country, and not give way to unholy passions, or excited feelings, or wicked resentments, or revenge. On these questions you must be satisfied."

Mr. Brady. — "If there be any doubt, the benefit of it goes to the prisoner."

Hogeboom, J. — "That doubt goes to the benefit of the prisoner, if it be that kind of rational doubt, upon the evidence, or doubt which commends itself to the rational mind, applying itself to the facts of the case. It is not the mere possibility of innocence that should justify you in finding a verdict of acquittal. The question is whether on your considering the case as rational men, you believe beyond a rational doubt, a fair reasonable doubt, commending itself to your understanding, that the party is guilty and criminally responsible under the rules I have laid down, you must find him guilty. If you do not thus believe, if you have a rational doubt upon this subject, as thus understood and interpreted, you are to give the prisoner the benefit of that doubt, and render a verdict of acquittal."

"The jury again retired. Subsequently they came into court, and the foreman stated they found the prisoner to have been sane at the moment before and the moment after the killing; but they were in doubt as to his sanity on the instant of the homicide.

"The judge charged the jury that they must give the prisoner the benefit of the doubt, if they had such rational doubt founded upon the evidence, and could believe such doubt to be well founded upon such a condition of the case as was presented by this statement of the jury."

The jury returned a verdict of not guilty.

Macfarland's Case.

In *Macfarland's Case*,[1] the prisoner, Daniel Macfarland, was tried before Recorder HACKETT, of New York, for murder in the first degree in shooting Albert D. Richardson on November 25, 1869, in the office of the New York *Tribune*, in New York City. The judge charged the jury as follows: —

"While some of you, perhaps most of you, sat in court as individuals, and not yet jurors, Daniel Macfarland was arraigned at this bar. The indictment, stripped of its technical verbiage, charged that he killed Albert D. Richardson, intending to kill him. Included in the direct charge was an implied one that belongs to all cases of crime, that the intention was of a man in a state of sanity. I shall for brevity, use the phrase 'state of sanity,' or 'state of insanity' continuously through this charge. I do so because it is the statutory phrase — 'no act done by a person in a state of insanity can be punished as an offence.'

"The statute did not, and no arbitrary statute could, give a definition of insanity, which should include all cases. Hence, it is left to be interpreted by the courts. In using the phrase 'state of sanity,' I am to be understood, throughout as meaning thereby this, the state in which a man knows the act he is committing to be unlawful and morally wrong, and has reason sufficient to apply such knowledge and to be controlled by it.

"In using the phrase, 'state of insanity,' I am to be understood throughout as meaning thereby the state under which a man is not accountable for an alleged criminal act, because he does not know the act he is committing to be unlawful and morally wrong, and has not reason sufficient to apply such knowledge and to be controlled by it.

"The accused simply pleaded not guilty to the charge. That general denial (as subsequent testimony has shown you) was really a particular denial — a denial that he killed with intention to kill, because he was not legally capable of forming an intention to kill, as an intention which was recognized by the law to be criminal, and thereby to render him accountable to human law. Practically by the evidence, the physical act of killing (that is so often a subject of dispute in homicide cases), has been admitted. But the mental character of the act, the legal accountability for the act, were put in issue.

"After the arraignment you were then severally called and sworn. Whatever was said or done during the progress of challenging or impanelling, is to be disregarded or forgotten by you as in any way bearing upon the present relations between you and the prisoner. For instance, the circumstances that the defence or the prosecution excluded jurors, are not in the remotest manner in the case. Each side had that statutory right to exclude. A right given and exercised under statute is never amenable to criticism. That process of challenging and impanelling was simply upon the relation of each of you, as a juror in the then future, toward either the People or prisoner. When you were sworn, both the People and the prisoner stood practically contented to have you hear evidence and all which accompanied the impanelling of the twelve is now as if it never had been said or done.

"The evidence began and it has closed. Your inquiries in considering the whole evidence will naturally be: First. What are the theories of each side? Second. What are the rules of law that connect themselves with those theories?

[1] 8 Abb. Pr. (N. S.) 57 (1870).

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"The theory upon which the defence seeks acquittal is, substantially, that domestic troubles produced in the accused a state of insanity towards Mr. Richardson. The theory upon which the prosecution seeks conviction is, that the domestic troubles originated and fostered such a spirit in the accused towards Mr. Richardson as the law calls and rebukes as malice. Reviewing the evidence upon the subject of the state of insanity offered by the defence, I can see that nearly all of it would have been admissible had it been offered by the prosecution to prove malice. The defence justify the accused in domestically acting as he did toward his wife and friends.

"The prosecution takes some issue on that justification. The defence claim that a conspiracy to disturb the domestic relations of the accused, existed on the part of some of the wife's friends.

"But, gentlemen, retain constantly in your minds that the actual state of these domestic relations, or the blame or praise appertaining to them, or the fact, or color of fact or the falsity, of any such conspiracy, are not at all material for you to definitely adjudicate.

"The question for your consideration (whether you estimate insanity or malice) is, how did the prisoner believe about those domestic relations or a conspiracy, as a belief to impress his mind sanely or insanely?

" The law books are full of cases of sane men who have killed from a malice engendered by utterly false conceptions of occurrences or individuals. Medical records, and law books contain many instances of insane men killing under an insanity which was the result of the most delusive or unsubstantial or irrational conception of human conduct or material events, as well as of men killing from insanity occasioned by the operation of actual facts. The theory of the defence as to the operation of the domestic troubles upon the mind of the accused, was undoubtedly fully presented by the long question put by the counsel for the defence to Drs. Vance and Hammond, and which you can doubtless substantially recall. The theory of the prosecution mainly as to the malice and partially as to the sanity, was substantially presented by the compact question put to the same witness on the cross-examination, and which you may recall.

" I do not intend to comment upon the evidence. I do not think I ought to. In the first place, it has been summed up in parts by the speeches on either side during evidence, and as a whole in the closing arguments. In the next place, it is impossible for me to take up the evidence, without possibly impressing upon you by my arrangement of it, or emphasis in repeating it, the very decided conviction upon the merits of this prosecution, which I have formed. I shall simply group it as appertaining to the question of malice or insanity, or to the other legal questions, and leave the details to your memory. The legal necessity for a manslayer to have been in a state of sanity when he slew, before he can be held accountable to human law, is deeply rooted in jurisprudence.

"As far back as the civilians, the maxim was '*furiosus, furioso, solum puniter*'—a mad man's madness is his only punishment. In the early history of the common law, one of the essentials to the definition of murder (a definition which is its universal test in jurisprudence), was 'sound memory and discretion.' 'Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature, being in the peace of the king, with malice prepense or aforethought, either express or implied.' The converse phrase of our statute

Macfarland's Case — Continued.

'state of insanity' is convertible with that other phrase, 'sound memory and discretion' in the common law. As early as 1816, in this court,[1] it was said: 'An insane person is considered in law incapable of committing a crime; but it is not every degree of insanity which abridges the responsibility attached to the commission of crime. In that species of insanity where the prisoner has lucid intervals; if, during those intervals, and when capable of distinguishing good from evil, he perpetrates an offence, he is responsible; and the principle subject of inquiry is whether the prisoner at the time he committed the offence had sufficient capacity to discern good from evil; and should the jury believe he had such capacity, it will be their duty to find him guilty.' The utter responsibility to human law of the mad man (or the man who lacks a sound memory or discretion, and) who takes human life has never been doubted. The difficulty has been to decide upon the degree of the madness, or the quality of the insanity which shall claim irresponsibility. It may be interesting to the legal student to follow the discussions of legal tribunals upon this subject and, indeed, to mark their fluctuations of doctrine. But the law regulating to-day the inquiry of a jury upon the subject is not complex. If you will keep in mind what I have held to be the meaning of the phrases, 'state of sanity' or 'insanity' in the statute, I will now refer to the propositions of the counsel for the defence on that subject.

"I substantially charge every proposition of the counsel for the defence upon the subject of sanity. There is possibly no difference of legal opinion between the counsel for the defence and the district attorney regarding the law constituting state of sanity or insanity. The difference between them is one of applicability of the legal rule to the particular circumstances of the case. Those differences have been reasoned out or commented upon in the summing-up, but it is due to the counsel for the defence that I should re-read them, with my comments: —

"'Even if the evidence as to the insanity of the defendant should leave it in doubt as to whether he was insane at the time of the commission of the alleged act, if it also leaves in doubt his sanity at that time he is entitled to an acquittal.'

"Which I charge.

"'Though the evidence may leave the defence of insanity in doubt, if upon the whole evidence in the case, the jury entertain a reasonable doubt as to the perfect sanity of the defendant at the time of the commission of the alleged act, they are bound to acquit him.'

"Which I charge.

"'If the jury cannot say beyond a doubt that the defendant was sane at the time of the commission of the alleged act, or cannot say whether at that time he was sane or insane, they are bound to acquit him.'

"Which I charge.

"'If the jury entertain a reasonable doubt upon all the evidence in the case, as to the guilt or innocence of the defendant of the crime alleged against him, he is entitled to an acquittal.'

"Which I charge.

"'If at the time the prisoner committed the act charged upon him (if he did commit it), the deceased suddenly presented himself to him, without any anticipation or expectation on his part that he would then and there see the deceased, and the prisoner was, from an association of the deceased with his real or fancied domestic troubles, thrown into a state of mind in which he was deprived of his memory and understanding so as to be unaware of

[1] Clark's Case, 1 City Hall Rec. 176.

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the nature, character and consequences of the act he committed, or to be unable to discriminate between right and wrong in reference to that particular act, at the very time of its commission, he is entitled to an acquittal.'

"Denied, for the reason that there is no evidence upon the subject of sudden or expected presentation to justify the hypothesis.

"'If, at the time the prisoner committed the act charged upon him (if he did commit it), the deceased suddenly presented himself to him, without any anticipation or expectation on his part, that he would then and there see the deceased, and the prisoner was, from an association of the deceased with his real or fancied domestic troubles thrown into a state of excitement in which he was divested of his reason and judgment, and was deprived of his mental power to an extent placing him beyond the range of self-control in reference to the particular act charged against him, so that he could not possibly restrain himself from the commission of the act alleged against him, at the very time of its commission, he is entitled to an acquittal.'

"Denied for like reason.

"'Although sanity is assumed to be the normal state of the human mind, when insanity is once proved to exist, it is presumed to exist until the presumption is overcome by contrary or repelling evidence.'

"Refused, for the reason that the insanity for your inquiry relates exclusively to the time of the act.

"'If partial insanity, simply, is shown, as the human mind is not the subject of inspection or examination, and as the range or extent of the disease can only be a matter of scientific conjecture or judgment, the jury have a right to say whether the particular act charged upon the defendant was or was not an amplification, or extension, or another phase of the disease, even though the testimony may not go that length.'

"Refused.

"'The jury have the right from their own knowledge of human nature, and the tendencies of the human mind in addition to, and in confirmation of, the evidence of experts, to say how far the causes relied upon to establish irresponsibility on the part of the defendant at the time of the commission of his act, were adequate or sufficient to produce insanity, and did cause that result.'

"Which I charge you.

"'Where the cause of insanity is alleged to be an interference with a man's marital relations, or his paternal rights in taking away his wife or child, the jury have the right to judge of the probability of the existence of such an affection from their own and the known feelings of others, as husbands and as fathers.'

"Refused.

"'If the jury believe that, at the very time of the commission of the act alleged against him, from causes operating for a considerable length of time beforehand, or recently or suddenly occurring, the defendant was mentally unconscious of the nature of the act in which he was engaged, he was and is legally irresponsible for it.'

"Which I charge.

"'If the defendant was deprived of his reason at the time the act alleged against him was committed, resulting either from a settled and well-established mental alienation, or from the pressure and overpowering weight of the circumstances occurring at the time, he is legally irresponsible for what he did.'

"Which I charge.

"'If the jury believe that when the deceased entered the *Tribune* office he did not expect to see the defendant, nor the defendant him, and that after he entered, the defendant was moved to the commission of the act alleged against him by the sudden access and irresistible pressure of excited and overwhelming passion, roused by the sudden and unexpected sight of the destroyer of his domestic peace, or him he supposed to be such, dethroning his

Macfarland's Case — Continued.

reason and pressing him on to the commission of this act under the influence of an ungovernable frenzy, unsettling for the time his faculties and enthroning insanity in their place, he is not responsible for the act.'

"Refused, because not wholly justified by evidence.

"'If from the whole evidence the jury believe that the defendant committed the act, but at the time of the doing so was under the influence of a diseased mind, and was really unconscious that he was committing a crime, he is not in law guilty of murder.'

"Which I charge.

"'If the jury believe that from any predisposing cause the defendant's mind was impaired and at the time of killing deceased, he became or was mentally incapable of governing himself in reference to deceased, and at the time of his committing said act was, by reason of such cause, unconscious that he was committing a crime as to the deceased, he is not guilty of any offence whatever.'

"Which I charge.

"'If some controlling disease was in truth the acting power within him (the prisoner), which he could not resist, or if he had not a sufficient use of his reason to control his passions which prompted the act complained of, he is not responsible.'

"Which I charge.

"'And it must be born in mind, that the moral as well as the intellectual faculties, may be so disordered by disease, as to deprive the mind of its controlling and directing power.'

"Which I charge.

"'In order, then, to constitute a crime, a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand that if he commits the act he will be subject to punishment; and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he have not intelligence and capacity enough to have a criminal intent and purpose, and if his moral or intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.'

"Which I charge.

"'If the jury believe from the evidence, that previous, up to, and at the time of the homicide in question, the prisoner thought or believed that his wife and the deceased or either of them, were or was watching him with a view to ascertaining how he provided for his oldest son Percy, intending to take legal proceedings to deprive him of that son the first opportunity that offered, and that he considered his poverty would render him almost helpless against such proceedings, and so he would lose that son; that this was an unwarranted and unsound delusion on the part of the prisoner; that thereafter, and in consequence thereof, his mind became and continued diseased; that such delusion and disease increased in intensity until the prisoner became, was and remained subject to great causeless and violent frenzies and paroxysms of rage, in which his power of distinguishing whether he was committing a crime or not, was for the time destroyed or superseded, and that the act charged upon him, was committed while in such a paroxysm, and while such power of distinguishing was destroyed or superseded, he is not responsible legally for that act.'

"Refused, because, although good in part, it is not, in my opinion, correct as an entire proposition.

"'If the jury believe from the evidence, that while the prisoner was in such a paroxysm as is described in the last proposition, he committed the act charged upon him, at the time thereof, being entirely divested of all mental control over his actions, and without will or conscience, or the capacity to exercise will or conscience in reference to his conduct, so far as the deceased was concerned, and as against the deceased, he is not responsible legally

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for the act, even though he was at the time, capable of distinguishing between right and wrong in reference to his act.'

"Which I charge.

"'If the jury believe from the evidence, that, previous, up to and at the time of the homicide in question, the prisoner thought or believed that his wife actually loved him and would not have left him but for the persuasion of the deceased and females acting in his interest, and that she was willing to return and would have returned to him but for this cause, that this was an unwarranted and unsound delusion on the part of the prisoner, that thereafter, and in consequence thereof, his mind became diseased and continued diseased, that such delusion and disease increased in intensity until the prisoner became, was, and remained subject to great, causeless and violent frenzies and paroxysms of rage, in which his power of distinguishing whether he was committing a crime or not, was for the time destroyed or superseded, and that the act charged upon him was committed by him while in such a paroxysm, and while such power of distinguishing was destroyed, or superseded, he is not responsible legally for that act.'

"Refused, because, although good in part, it is not, in my opinion, correct as an entire proposition.

"'If the jury believe from the evidence, that while the prisoner was in such a paroxysm as is described in the last proposition he committed the act charged upon him, at the time thereof being divested of all mental control over his actions, and without will or conscience, or the capacity to exercise will or conscience in reference to his conduct, so far as the deceased was concerned and as against the deceased, he is responsible legally for the act, even though he was at the time, capable of distinguishing between right and wrong in reference to his act.'

"Which I decline to charge in the terms proposed.

"'That to make the prisoner responsible for the act charged upon him, the jury must not only be satisfied that he was aware of what he did at the time of doing it, but that he was not morally insane in reference to the deceased, or the act which he is charged with perpetrating upon the deceased.'

"Which I charge.

"'That to make the prisoner responsible for the act charged upon him he must have been intellectually and morally sane in reference to that act, and the deceased at the time of its commission.'

"Which I charge.

"'That the law holds no one responsible for his act, when his mind was so diseased at the time of the act, as to be without reason, conscience and will, and where from such causes the party accused was an involuntary instrument of such a disease, and incapable of refraining from the commission of the act.'

"Which I charge.

"'The accused must have sufficient mental capacity to distinguish between right and wrong, as applied to the act he is about to commit, and be conscious that the act is wrong, before he can be convicted of a crime.'

"Which I charge.

"'To constitute a crime, the accused must be acted upon by motives, and be governed by will.'

"Which I charge.

"'To convict a person of crime he must have memory and intelligence to know that the act he is about to commit is wrong, to remember and understand that if he commits the act, he will be subject to punishment, and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it.'

"Which I charge.

Macfarland's Case — Continued.

" 'To convict a person of crime he must have sufficient memory, intelligence, reason and will to enable him to distinguish between right and wrong in regard to the particular act to be done, to know and understand that it will be wrong, and that he will deserve punishment by committing.'

"Which I charge.

" 'If the proof shows that the mind of the accused was in a diseased, and unsound state, the question will be whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience and judgment; and whether the prisoner, in committing the homicide acted from an irresistible and uncontrollable impulse; if so then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.'

"Which I charge.

"But in regard to all the matters embraced in the foregoing propositions to charge, it is proper to add, that they are really rhetorical amplifications more or less (according to different phases of theory or evidence), of the rule of law which I have laid down for interpreting the phrases of the statute 'state of sanity,' or 'insanity.'

"This case differs somewhat from all those cited in one respect. Here the accused had grown familiar with the wrongs that he alleges to have been done to his marital relation by the deceased. Years progress from his first alleged discovery of the alleged wrongs. The defence claim that this very lapse of time engendered morbid fancies, and was likely to grow into settled insanity, or to beget a state of mind easily influenced to frenzy. The prosecution claims that this familiarity with alleged wrongs, and, indeed, acquiescence in them, and to some extent trafficking upon them, begot only the malice of the law of murder, and utterly destroys the idea of insanity. I think all the cases cited are of *nisi prius* acquittals, under circumstances of frenzy induced *flagrante delicto*, or by recent communication of dishonor or of sudden wrongs calculated to dethrone reason. The only case of conviction in the courts of this State under analogous circumstances which has reached very authoritative discussion, as I have been able to find, is the *Sanchez Case*. The Court of Appeals in the case of Sanchez,[1] thus says: 'Assuming the theory of the defence to have been, as the prisoner's counsel alleges, that the homicide was committed by the prisoner in an insane frenzy, superinduced by jealousy awakened in his mind in relation to his wife's conjugal infidelity — which would reduce the offence from murder to manslaughter — and that such theory was a sound one, the inquiry should have been confined to the time and occasion of the homicide, or within a period so shortly before, that the court could see that the passions had not, or might not have had, time to subside. The questions to each of these witnesses related to an indefinite period of time between the prisoner's marriage and the homicide, and therefore, if for no other reason, were clearly inadmissible.'

"Which leads me to say that (as was in the minds of the jury in the *Cole Case*, according to their verdict), the state of insanity and the act of commission must concur in direct point of time. This is the converse of the well settled rule in cases of sane persons committing murder that the design to kill may be conceived on the instant of killing. In *Cole's Case* the jury said: 'We find the prisoner to have been sane at the moment before and the moment after

[1] 22 N. Y. 147.

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the killing, but are in doubt as to his sanity at the instant of the homicide.' The doubt was given to the prisoner, because on that instant hinged the issue.

"You might conversely arrive at the conclusion that the deceased may have been in a state of insanity at periods prior to the moment of killing, or was in a state of insanity shortly afterward, and you might find him in a state of sanity at the moment of the shot — exercising perception to recognize the deceased, exercising memory in recalling wrongs, exercising will in aiming the pistol, and exercising judgment in going away — all of which are questions for you to determine.

"If you shall arrive at the conclusion that the accused was in a state of sane mind at the time he fired the shot, then it becomes important to consider the legal quality of the act.

"If you believe, from the evidence, that the accused armed himself with a loaded pistol, and sought out the deceased and shot him upon grudge or malice, intending to kill, he is guilty of murder in the first degree. If, having a loaded pistol, he shot deceased without intent or design to take life, and in the heat of passion, then it may be either manslaughter in the third or fourth degree. Technically described, by the statute, murder, first degree, is the killing of a human being, when not justifiable or excusable, nor coming under the head of manslaughter, and perpetrated with a premeditated design to effect death.

"I am requested by the counsel for the defence to charge certain propositions respecting the first shooting. This first shooting is regarded by the prosecution as evidence of malice, or grudge, or ill will, and of their manifestation by accused towards deceased, and it is an important circumstance for you to weigh.

"'As to the (alleged) shooting of the deceased by the defendant on March 13, 1867, that cannot be taken by the jury as evidence of malice, unless the prosecution have satisfied them by proof, beyond, all reasonable doubt, that the shooting was felonious.'

"Which I charge.

"'To do this the proof must be such as would induce the jury to find a verdict against the defendant, if he was on trial under an indictment for that act.'

"Which I charge.

"'If the jury believe from all the evidence in the case, that act was committed by the defendant in a state of insanity, they are to discard it from their consideration altogether.'

"Which I charge.

"'The fact that the defendant was not prosecuted for that act, is strong evidence that the act was not deemed to be a crime at the time of its commission.'

"Which I decline to charge.

"'To make the threats evidence of malice for any purpose, they would have to be uttered while the defendant was in a sane state of mind.'

"Which I charge.

"'To connect them with the shooting of November 25, 1869, the jury must find that they were uttered maliciously — seriously — with the intent to execute them when and as they imported, by the defendant in a state of sanity, and that that shooting occurred in pursuance of these threats.'

"Which I decline to charge.

"'In passing upon the question of whether that act was or not criminal the jury are to take into consideration the difficulty they may suppose the defendant to be under in defend-

Macfarland's Case — Continued.

ing himself against it from the lapse of time since it occurred, the disappearance or dispersion of witnesses, and the like.'

"Which I decline to charge.

"'As to the (alleged) shooting of March 16, 1867, it is only evidence against the defendant on the present indictment, on the principle that that shooting, and that of November 25, 1869, occurred while the defendant was in a sane state of mind.'

"Which I charge.

"'If the jury believe that the act of November 25, 1869, occurred while the defendant was in a state of insanity, it is unaffected by the act of March 13, 1867, even though that act was committed in a state of sanity.'

"Which I charge.

"'Even supposing the defendant to have threatened to kill the deceased, in conversations occurring antecedent to his being shot on November 25, 1869, if that act (the shooting on that day), was perpetrated by the defendant, while in a state of insanity, it would still exempt him from legal responsibility.'

"Which I charge.

"'Under any circumstances the jury must find that the threats and act in question were the result of a sound mind.'

"Which I charge.

"'Upon the point of the seriousness of the threats, the jury are to consider the fact that those to whom they were made, neither notified the deceased of them, nor took any steps to have the defendant arrested for them, in pursuance of law.'

"Which I decline to charge.

"'If the jury believe that the threats were unmeaning, and were uttered in a state of excitement or anger, without any intention of executing them, and wholly as the result of passion, they are not to be regarded in determining the character of the homicide in question.'

"This would only modify their weight in evidence, but would not exclude them from the jury.

"Experts have been called in this case. They are to be considered rather as mirrors with which merely to reflect upon you their opinions. But you remain the sole judges whether those reflections are accurate. Sometimes the expert is an enthusiast; sometimes he is a clever charlatan. In the one case even his good judgment may be warped; in the other his want of judgment may be speciously hidden. Hence, the usefulness of the jury as umpire.

"The exact line between sanity and insanity in medical philosophy or medical jurisprudence is as intangible and as difficult to precisely measure as a meridian line in geography. But law and science in each instance do the best they can to arbitrarily fix them for safety. Experts in mental or moral philosophy or geography can only describe and illustrate. You become the judges. Test for yourselves from this evidence the phases and conditions of sanity or insanity, or the line between aversion, anger, rage, hatred, wrath, vengeance on one side, and the dethronement of reason upon the other.

"We have all probably seen manifestations of the emotions and passions just named. A great philosopher has said, 'no man is sane.' 'That in every organization there is more or less of a deviation from the normal condition of the mind as the Deity would have it.' Anger itself is a short-lived madness; wrath is longer-lived; vengeance is still longer-lived; but neither anger nor wrath nor vengeance, unless producing a state of insanity, wholly excuse crime. Hence, as

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philosophers, experts, jurors, judges, counsel, and laymen might speculate wildly and blindly regarding the measure of the insanity that will excuse an otherwise criminal act, the law has come to define it as well as it can, and leave the application in particular cases to the sworn judgment of jurors — the real experts — and upon all the testimony.

"I will here read from Wharton & Stille's Medical Jurisprudence:[1] 'Briand says, that from the height of passion to madness is but one step, but it is precisely this step which impresses upon the act committed a distinct character. It is important to know exactly the precise characteristics of the passions and of insanity. But here science fails, for it must be admitted that we are unable to point out the place where passion ends or madness commences. M. Orfila draws the following distinction between a man acting under the impulse of the passions and one urged on by insanity: 'The mind is always greatly troubled where it is agitated by anger, tormented by an unfortunate love, bewildered by jealousy, overcome by despair, humbled by terror, or corrupted by an unconquerable desire for vengeance, etc. Then, as is commonly said, a man is no longer master of himself, his reason is affected, his ideas are in disorder; he is like a mad man. But in all these cases a man does not lose his knowledge of the real relation of things; he may exaggerate his misfortunes, but this misfortune is real, and if it carries him to commit a criminal act this act is perfectly well motived. Insanity is more or less independent of the cause that produced it; it exists of itself; the passions cease with their cause, jealousy disappears with the object that provoked it, anger lasts but a few moments, in the absence of the one, who by a grievous injury, gave it birth, etc. Violent passions cloud the judgment, but they do not produce those illusions which are observable in insanity.'"

"The counsel for the defence has stated in your hearing that several times in kindred cases he has been called upon to vindicate the sanctity of the marriage tie, or uphold and defend the marriage relation. I charge you, gentlemen, that no such ideas should enter into the jury-box. You are not to uphold nor to prostrate the marriage relation by your verdict. *Fourièrism*, free love, or sentimentalism on the one hand, and moral reflections upon the conduct of the deceased man or living woman upon the other hand, are not legitimately to affect your verdict. Some of you might arrive at the conclusion upon some of the extraneous matters that have been foisted into this case that Richardson was the demon whom counsel for the defence described him to have been, and others of you might arrive at a conclusion that the fact of Richardson and Mrs. Macfarland, both desiring a divorce and a marriage, was proof that no criminality existed between them down to the time of the homicide. Yet, either conclusion would be foreign to your duty — your sworn and solemn duty — your duty to the public and respect for due course of law and order as well as your duty to the accused. Unsworn men not clothed with the solemnity of jurors' oaths, and interpreting a worldly code, may say that he who seduces the wife of another ought to be killed, or that he who does so upholds the marriage relation. But judges and jurors must interpret the strict legal code — a code that to swerve even a hair's breadth from is often as fatal to human society as the slightest variation of the

[1] Sect. 115.

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mariner's compass is sometimes fatal to the ship and her passengers, whose safety depends on the unswerving integrity of the magnetic needle. And in interpreting that code the inflexible rule of jurors should be that the aggrieved husband, or father or relative, who takes the correction of wrongs into his own hands, with pistol or knife, and is not in a state of insanity when he did the correction, is not to be acquitted because it is the duty of any man to uphold the sanctity of the marriage tie, unassisted by legal procedure.

"When the prisoner brought suit against Richardson he was within law. When he became executioner he took the law into his own hands. If he took this law into his own hands in a state of sanity and with malice, however much sentiment for the living prisoner may applaud the act, he is guilty of felonious killing. If in a state of insanity, however much sentiment in favor of the dead might reprehend the act, or however much all persons might reprehend the wrong done the State by killing its citizen in an unauthorized mode, the accused is not guilty.

"The idea of strictly maintaining the law, is that jurors shall not speculate upon provocation. Wrongs occasioned by a swindler, by a betrayal of political friendship or by the numerous variety of social insults, could be just as logically estimated outside of law by jurors, in other cases, as the wrongs occasioned by a seducer. All wrongs may extenuate homicide from the degree of murder to one of manslaughter, when the violent vindicator of them is in a state of sanity, but under a passion which does not permit a design to take life. Laws against homicide are enacted and enforced because society is full of wrongs and temptations thereby to commit violence at the instigations of malice or passions. Under any wrongs, the same person whom they may have impressed is not at liberty after his passions have had time to cool, and after the tempest of excited feeling have subsided, to stalk abroad, seek out the unconscious and unprepared victim of his resentment, and without the intervention of forms of law, or the judgment of his peers, become the self-appointed avenger of his own wrongs, or vindicator of the violated majesty of the law.

"The law must be left to maintain its own dignity, and to enforce its own decrees through the constituted tribunals of its own creation, and it has not, in any just or legal sense, commissioned the accused to the discharge of the high office of the law. We must carry into effect the law of the land; we must enforce its solemn mandates, and not nullify nor relax its positive commands by misplaced sympathy or morbid clemency. If our duty is clear, we forswear ourselves if we do not perform it. This duty we must discharge at whatever hazard, whether painful or disagreeable. Neither manhood nor honor, the restraints of conscience, nor the solemn mandates of the law, allow us to decline its performance, or to hesitate at its execution. Let us content ourselves with administering the law as we find it, in our own appointed sphere of duty. Then we shall have consciences void of offence toward all men, and the happy consciousness, that in the spirit of our oaths, and in conformity with the obligations which rest upon us, we have as faithful and law-abiding citizens executed the laws of the land."

Mr. Graham. — "I want your honor to charge this sentence of Recorder Hoffman's charge in the *Wagner's Case*": —

"'I have been requested,' says Recorder Hoffman, 'to charge you, that if

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the prisoner committed the act in a moment of frenzy, he cannot be convicted of murder in the first degree; I not only charge that proposition, but if his mind was in that condition he cannot be convicted of any offence.' "

The COURT. "I so charge."

"The jury retired, and in an hour and forty-eight minutes returned, and rendered a verdict of 'not guilty,' and the prisoner was discharged."

In *Commonwealth* v. *Mosler*,[1] tried in 1846, in the Philadelphia court of Oyer and Terminer, before GIBSON, C. J., COULTER, and BELL, JJ., the different kinds of insanity were passed on by the chief justice in his charge to the jury, and it was held: (1) that insanity to be a defence to a crime must be shown to exist to such an extent as to blind its subject to the consequences of his acts and deprive him of all freedom of agency; (2) that want of motive, or (3) the nature of the act itself is no evidence of insanity.

The prisoner was indicted for the murder of Eve Mosler, his wife. It appeared that the parties had been married about eleven years, and that there was a great disparity of age between them, the prisoner being nearly twenty years the younger of the two. On the day of the homicide the prisoner came into the house about one o'clock, and shortly afterwards commenced taunting one Boyer, a son of the deceased by a former husband, and at the same time threatening to cut the throat of her granddaughter. At about six o'clock the prisoner and deceased were left alone in the house, having previously had a slight quarrel, and about twenty minutes past six o'clock the deceased was found lying in the house with her throat cut. No question was made on the trial as to the fact of the prisoner being the guilty agent. His shirt was torn, there were several bruises on the person of the deceased, and her left eye was black as from a blow. He was arrested while changing his shirt, in the room where the act was done. He immediately said that he "did it," and said that he "had done it with her own son's razor;" that he "was ready to go anywhere;" "he had tried to do it before," "had done it this time right." The defence was insanity, and in support of it evidence was offered to show that a year or more before he had attempted to fire his wife's house; that some time previous he had started to Pittsburg, but soon returned, saying that every night the deceased and her granddaughter stood at the foot of his bed; and that when arrested, his appearance and conduct, according to the impression of one witness, were those of a crazy man.

GIBSON, C. J., in charging the jury, said: "The fact of killing is not denied. Two points of defence have been set up: The first, that of insanity, implying an entire deprivation on the part of the prisoner of the power of self-control, and constituting a complete defence to the charge. The second, that of temporary fury induced by adequate provocation, reducing the offence to manslaughter. The first, if sustained, will acquit him altogether; the second, while acquitting him of murder, will leave him guilty of manslaughter.

"Insanity is *mental* or *moral*, the latter being sometimes called homicidal mania, and properly so. It is my purpose to deliver to you the law on this ground of defence, and not to press upon your consideration, at least to an unusual degree, the circumstances of the present case on which the law acts.

"A man may be mad on all subjects; and then, though he may have glimmer-

[1] 4 Pa. St. 264.

ings of reason, he is not a responsible agent. This is general insanity; but if it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defence to an accusation of crime. It must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed, that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will, and making the commission of the act, in his apprehension, a duty of overruling necessity. The most apt illustration of the latter is the perverted sense of religious obligation which has caused men sometimes to sacrifice their wives and children.

"Partial insanity is confined to a particular subject, the man being sane on every other. In that species of madness, it is plain that he is a responsible agent, if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may have been laboring under an obliquity of vision. A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints. On this point there has been a mistake, as melancholy as it is popular. It has been announced by learned doctors that if a man has the least taint of insanity entering into his mental structure, it discharges him of all responsibility to the laws. To this monstrous error may be traced both the fecundity in homicides, which has dishonored this country, and the immunity that has attended them. The law is, that whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action.

"But there is a *moral* or *homicidal* insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or, at least, to have evinced itself in more than a single instance. It is seldom directed against a particular individual. But that it may be so, is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, though aware of the heinous nature of the act. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of habitual tendency developed in previous cases, becoming in itself a second nature. Now, what is the evidence of mental insanity in this particular case?

"1. The prisoner's counsel rely on his behavior, appearance, and exclamations at the time of the act or immediately after it. According to one witness, his conduct was that of a reckless determination, evincing an unsound mind. 'I do it,' he repeated three times, it is said, like a raving maniac. But you must recollect that, to commit murder, a man must be wound up to a high pitch of excitement. None but a butcher by trade could go about it with circumspection

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and coolness. The emotion shown by the prisoner was not extraordinary. He seemed to know the consequences of his act — was under a delusion — and was self-possessed enough to find a reason for the act, that reason being her alleged ill-treatment.

"2. It is urged that the want of motive is evidence of insanity. If a motive were to be necessarily proved by the Commonwealth, it is shown in this case by the prisoner's own declaration; but a motive need not always be shown,— it may be secret; and to hold every one mad whose act cannot be accounted for on the ordinary principles of cause and effect, would give a general license. The law itself implies malice, where the homicide is accompanied with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, — a heart regardless of social duty, and deliberately bent upon mischief.

"3. But it is said that there is intrinsic evidence of insanity from the nature of the act. To the eye of reason, every murderer may seem a madman; but in the eye of the law he is still responsible.

"4. His trip to Pittsburg and voyage to Germany, it is contended, have not been accounted for, except that he expected to get property in the latter, but did not; and there is an equal obscurity about the motive of his setting fire to his wife's property, — her barn, I think it was; but these things do not show an insanity connected with his crime.

"The only circumstance which seems to point to a foregone conclusion, is the repeated visions he had after he started for Pittsburg of his wife and her granddaughter, whose throat he also attempted to cut, standing at the foot of his bed. This foreboding may tend to show a morbidness of mind in reference to this particular subject; but it is for you to say, — keeping in mind the fact that, to constitute a sufficient defence on this ground, there must be an entire destruction of freedom of the will, blinding the prisoner to the nature and consequence of his moral duty, — whether these circumstances raise a reasonable doubt of the prisoner's responsibility.

"To reduce the offence of manslaughter, it is necessary that a quarrel should have taken place, and blows have been interchanged between parties in some measure, upon equal terms of strength and condition for fighting; and this, without regard to the question who struck first. Yet this must be taken with some grains of allowance. If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife on a husband would bring the killing of her below murder. Under this view of the law, I have always doubted *Stedman's Case*, in which, for a woman's blow on the face with an iron patten, given to a soldier in return for words of gross provocation, he gave her a blow with the pommel of his sword on her breast, and then ran after her and stabbed her in the back, and the crime was held to be only manslaughter.[1] Where a blow is cruel or unmanly, the provocation will not excuse it; and the same law exists where there was a previous quarrel, and the killing was on the old grudge.

"You will determine whether there was provocation in this case sufficient to lower the offence, on this view of the law, to manslaughter. The behavior of the deceased immediately preceding the struggle was peaceable and soothing.

[1] Reg. v. Stedman, Fost. 292; 1 Hale, 457; 1 Hawk., ch. 31, sect. 34.

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You will recollect that, according to the evidence, she put off getting a warrant from time to time, in hopes his conduct would change. His behavior, on the other hand, was quarrelsome to every one present. His shirt, which appeared afterwards to have been torn, shows a scuffle, but no more; and if done by her, it was more probably in resisting than attacking. You will keep in mind the disparity of age and strength, and the fact that all the bruises were received on her part, and received in self-protection.

"If the evidence on these points fail the prisoner, the conclusion of his guilt will be inevitable, and it will be your duty to draw it, however unpleasant it may be. You are bound by the tremendous sanction of an oath to do your duty by him; and you are bound by the same sanction to do your duty by the Commonwealth; and to you the case of the one and the other is committed."

The jury returned a verdict of guilty of murder in the first degree.

In *Commonwealth* v. *Freth*,[1] who was tried in 1858 in the Court of Oyer and Terminer of Philadelphia for the murder of Wm. Lee Smith, LUDLOW, J., charged the jury as follows: "The defence in this case is that the prisoner at the time of the commission of this offence was not an accountable being; if, gentlemen of the jury, this allegation is true, it would be monstrous to punish him, and therefore we find the law to be, if one charged with the commission of crime is so entirely devoid of understanding as to be either an idiot or a madman, he is thereby acquitted of all guilt, he is not criminally responsible to the offended majesty of the law, but becomes at once rather an object of pity than the subject of punishment.

"Gentlemen, it is unnecessary for me to say to you, that we will be obliged to investigate a most delicate and dangerous subject; nevertheless we will endeavor to lay such rules and tests as will enable you to arrive at a satisfactory conclusion.

"If the prisoner at the bar, at the time he committed the act, had not sufficient capacity to know whether his act was right or wrong, and whether it was contrary to law, he is not responsible; that is in fact general insanity, so far as the act in question is concerned, and it must be so great in extent and degree as to blind him to the natural consequences of his moral duty, and must have utterly destroyed his perception of right and wrong.

"The test, in this instance, as you perceive, is the power or capacity of a prisoner to distinguish between right and wrong in reference to the particular act in question; for although a man may be sane upon every subject, yet if he be mad, to use an expressive phrase, upon the subject, and so far as the act under immediate investigation is concerned, he thereby loses that control of his mental powers which renders him a responsible being. The test thus suggested has been adopted by the judges of England, and by the courts of our own State, and is too well settled to be shaken.

"But suppose that the prisoner was able to distinguish between right and wrong, and yet was laboring under partial insanity, hallucination or delusion, which drove him to the commission of the act as a duty of overwhelming necessity, is he in such cases responsible for his acts?

"If the delusion were of such a nature as to induce the prisoner to believe in

[1] 3 Phila. 105; 5 Clark, 455.

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the real existence of facts which were entirely imaginary, but which, if true, would have been a good defence, he would not be responsible. We, however, desire, at this stage of our remarks, to refer to other delusions than the class thus spoken of, reserving for future consideration our remarks on this branch of the subject.

"That partial insanity, hallucination or delusion, coupled with the power of discriminating between right and wrong, was no excuse for crime, has been ruled to be the law of England, and to this point did the judges of England refer in *McNaghten's Case*,[1] in their first answer to the questions propounded to them by the House of Lords. This doctrine was also stated to be the law by our predecessors upon this bench in the case of *Commonwealth* v. *Farkin*,[2] and would have remained the law of this State, but for the opinion and charge of Ch. J. GIBSON in *Commonwealth* v. *Mosler*,[3] where the chief justice says: 'It (insanity) must amount to delusion or hallucination, controlling his will, and making the commission of the act a duty of overruling necessity;' and again he says, 'The law is, that whether insanity be general or partial, it must be so great as to have controlled the will of its subject and to have taken from him the freedom of moral action.'

"Medical writers agree that instances constantly occur of the commission of acts of killing by those who not only know that the act about to be committed is wrong, but that punishment is affixed to its commission by law.

"We cannot, however, leave this branch of the subject to doubt or uncertainty, and our conclusion is, after a somewhat extended investigation of the law, that the proper rule to be adopted upon the point in question is the following: —

"If the prisoner, although he labors under a partial insanity, hallucination or delusion, did understand the nature and character of his act, had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and knew if he did the act, he would do wrong, and would receive punishment; if further, he had sufficient power of memory to recollect the relation in which he stood to others, and others stood to him, that the act in question was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty, he would be responsible.

"A man must, therefore, labor under something more than a 'moral obliquity of perception,' and 'a man whose mind squints, unless impelled to crime by this very mental obliquity is as much amenable to punishment as one whose eye squints.'

"The jury must, therefore, even though they believed the prisoner labored under a diseased and unsound state of mind, be satisfied that this diseased or unsound state of mind existed to such a degree, that, although he could distinguish between right and wrong, yet with reference to the act in question his reason, conscience, and judgment were so entirely perverted, as to render the commission of the act in question a duty of overwhelming necessity.

"But, gentlemen, there is another species of delusion entirely distinct from those we have just considered, which is recognized by the law, and which when the jury believe that it clearly exists will entitle the prisoner to an acquittal. I

[1] 10 Cl. & F. 210. [2] 2 Pars. Sel. Cas. 431. [3] 4 Pa. St. 264.

Commonwealth *v.* Freth — Continued.

refer to that delusion by reason of which the prisoner commits the act under a fixed *bona fide* belief (which is a delusion) that certain facts existed which were wholly imaginary, but which, if true, would have been a good defence.

"The judges of England, in their answer to the fourth question propounded to them by the House of Lords, say: 'Supposing that one labors under a partial delusion, and is not in other respects insane,' we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example: if, under the influence of delusion, he supposes a man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge, he would be liable to punishment.

"But, gentlemen, if this spirit of delusion existed, the act charged against the prisoner must be the direct result of this delusion, and the delusion must have been directly connected with the act, driving him to its commission, and must have been such a delusion which, if it had been a reality instead of an imagination, would have justified him in taking life. Besides the kinds of insanity to which I have referred, and which, strictly speaking, effect the mind only, we have moral or homicidal insanity which seems to be an irresistible inclination to kill or to commit some particular offence. We are obliged by the force of authority to say to you that there is such a disease known to the law as homicidal insanity. What it is, or in what it consists, no lawyer or judge has ever yet been able to explain with precision. Physicians, especially those having charge of the insane, gradually, it would seem, come to the conclusion that all wicked men are mad, and many of the judges have so far fallen into the same error as to render it possible for any man to escape the penalty which the law affixes to crime.

"We do intend to be understood as expressing the opinion that, in some instances, human beings are not afflicted with a homicidal mania, but we do intend to say that a defence consisting exclusively of this species of insanity has frequently been made the means by which a notorious offender has escaped punishment. What, then, is that form of disease, denominated homicidal mania, which will excuse one for having committed a murder?

"Chief Justice GIBSON calls it 'that unseen ligament pressing on the mind and driving it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance' — 'an irresistible inclination to kill.'

"If by moral insanity it is to be understood only a disordered or perverted state of the affections or moral powers of the mind, it cannot be too soon discarded as affording any shield for punishment for crime; if it can be truly said that one who indulges in violent emotions, such as remorse, anger, shame, grief, and the like, is afflicted with homicidal insanity, it will be difficult, yes, impossible to say when sanity ends and insanity begins, for, by way of illustration, the man who is lashed into fury by a fit of anger is in one sense, insane. As a general rule, it will be found that instances are rare of cases of homicidal insanity occurring wherein the mania is not of a general nature, and results in a desire to kill any and every person who may chance to fall within the range of the maniac's malevolence, as it is general, so also is it based upon imaginary

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and not real wrongs; if it is directed against a particular person (as is sometimes the case), then also the cause of the act will generally be imaginary. When, therefore, the jury find from the evidence that the act has been the result not of an imaginary, but a real wrong, they will take care to examine with great caution into the circumstances of the case, so that with the real wrong, they may not also discover revenge, anger, and kindred emotions of the mind to be the real motive which has occasioned the homicidal act.

"Orfila has said, 'that the mind is always greatly troubled when it is agitated by anger, tormented by an unfortunate love, bewildered by jealousy, overcome by despair, haunted by terror, or corrupted by an unconquerable desire for vengeance. Then, as is commonly said, a man is no longer master of himself, his reason is affected, his ideas are in disorder, he is like a madman. But in all these cases a man does not lose his knowledge of the real relation of things. He may exaggerate his misfortune, but this misfortune is real, and if it carry him to commit a criminal act, this act is perfectly well motived.'

"The man who has a clear conception of the various relations of life, and the real relations of things, is not often afflicted with insanity of any description. He may become angry, and, in a fit of temper, kill his enemy, or even his friend, but this is not, and I hope never will be, called, in courts of justice, insanity. Again, one who is really driven on by an uncontrollable impulse to the commission of a crime, will be able to show its 'contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in particular cases, and becoming in itself a second nature.' And ought further to show that the mania 'was habitual, or that it had evinced itself in more than one instance.'

"Chief Justice Lewis has said, that moral insanity 'bears a striking resemblance to vice;' and further: 'It ought never to be admitted as a defence until it is shown that these propensities exist in such violence as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield.' And again: 'This state of mind is not to be presumed without evidence, nor does it it usually occur without some premonitory symptoms indicating its approach.'

"Gentlemen of the jury, we say to you as the result of our reflections on this branch of the subject, that if the prisoner was actuated by an irresistible inclination to kill, and was utterly unable to control his will or subjugate his intellect, and was not actuated by anger, jealousy, revenge, and kindred evil passions, he is entitled to an acquittal, provided the jury believe that the state of mind now referred to has been proven to have existed without doubt, and to their satisfaction."

The judge then reviewed at length the evidence, and called the attention of the jury to the Act of Assembly regulating the degrees of murder, and also to that act which requires a jury when the defence is insanity, to say so if they so believe, and also to find if the prisoner is acquitted on that ground. And after calling upon the jury in the most solemn manner to discharge their whole duty, he committed the prisoner to their charge, saying: "If the prisoner, by reason of mental infirmity, is not a responsible being, acquit him; but if you believe him to be guilty, in that event consign him to that doom which is the direct result of his own act."

Commonwealth *v.* Moore.

In *Commonwealth* v. *Moore*,[1] tried in the Court of Oyer and Terminer of Cambria County, Pennsylvania, in 1864, the prisoner was indicted for the murder of Jordan Marbourg, and insanity was set up as a defence. TAYLOR, P. J., charged the jury as follows: "Was the prisoner at the time of the homicide a responsible agent; or, in other words, was he insane?. The just principle upon which this defence rests, is, that one whose perception of right is perverted or destroyed by mental malady, is not responsible for his actions any more than an infant. The law imputes to them no guilt whatever; and when such a state of mind at the time of the commission of an act sought to be punished as a crime is shown to have existed, it is the duty of the jury to find the defendant not guilty. And, by a recent statute of this Commonwealth, — the act of 31st March, 1860, known as the 'Revised Penal Code,' it is enacted that 'in every case in which it shall be given in evidence upon the trial of any person charged with any crime or misdemeanor that such person was insane at the time of the commission of such offence, and shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether he was acquitted by them on the ground of such insanity.' This, as it is indicated in the statute, so that he shall be treated and provided for as his unhappy situation and the safety of the community in which it is thus ascertained to be unsafe to let him go at large, may require; and such, should the defence set up in this case prevail, will be your duty.

"The law, gentlemen, which must govern your inquiries, and to which you must apply, and by which you must judge of and pass upon the facts relied upon to establish the defence of insanity, as declared by all the judges in England in *McNaghten's Case*, and by the English courts ever since, and by almost every American court, including the Supreme Court of the State of Pennsylvania, and by the most able and eminent judges, among them Chief Justice SHAW, of Massachusetts, and the late distinguished Chief Justice GIBSON, of Pennsylvania, and in the words in which we have felt it to be our duty heretofore to state it to a jury in a capital case, is this:

"'Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury; and to establish a defence on the ground of insanity, it must be clearly proved, that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, did not know that he was doing what was wrong.' However others may speculate, it is the duty of a jury to bring the evidence to this test.

"Upon this general subject, we state to you the law as applied to a case before the judges of our own Supreme Court (three of them present), in the language of Chief Justice GIBSON: —

"'Insanity is mental or moral; the latter being sometimes called homicidal mania, and properly so. It is my purpose to deliver to you the law on this ground of defence, and not to press upon your consideration, at least to an unusual degree, the circumstances of the present case on which the law acts.

[1] 2 Pittsb. 502.

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" 'A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity; but if it is not so great in its extent or degree, as to blind him to the nature and extent of his moral duty, it is no defence to an accusation. It must be so great as to entirely destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will, and making the commission of the act, in his apprehension, a duty of overwhelming necessity. The most apt illustration of the latter is, the perverted state of religious obligation, which has caused men sometimes to sacrifice their wives and children.

" 'Partial insanity is confined to a particular subject, the man being sane on every other. In that species of insanity, it is plain that he is a responsible agent if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may have been laboring under a moral obliquity of perception, as much as if he were laboring under an obliquity of vision. A man, whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints. On this point there has been a mistake as melancholy as it is popular. It has been announced by learned doctors, that if a man has the least taint of insanity entering into his mental structure, it discharges him of all responsibility to the laws. To this monstrous error, may be traced, both the fecundity in homicides, which has dishonored this country, and the immunity which has attended them. The law is, that whether insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action.

" 'But there is a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have shown itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so, is proved by the case of the young woman who was deluded by an irresistible impulse to kill her child, though aware of the heinous nature of the act. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show by clear proof its contemporaneous existence evidenced by present circumstances, or the existence of a particular tendency developed in previous cases, becoming in itself a second nature.'

" We introduce here, and answer, the written points submitted by the prisoner's counsel: —

1. " 'The court are requested to instruct the jury that if they believe that at time of the killing the defendant was in such a state of mind as to be unable to

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apply the test of right and wrong to the particular case, he is not a responsible agent, and the verdict should be, not guilty.'

"This is the test or criterion, in passing upon evidence of the existence of insanity, in its common and usual forms, to a degree that will relieve from responsibility; and we answer the point in the affirmative.

2. "'The court are requested to instruct the jury that if they believe the prisoner to have been governed by an uncontrollable impulse, his will no longer in subjection to his reason, owing to the excited and continued impetuosity of his thoughts, and the tumultuous and confused condition of his mind; that, goaded by a sense of grievous wrong, he was wrought to a frenzy bordering upon madness, which, for the time being, rendered him unable to control his actions or to direct his movements, their verdict should be not guilty.'

"We are at some loss to understand what is meant. If the point is predicated of moral insanity, which is recognized in *Mosler's Case*,[1] and which we recognize, we affirm it. We recognize moral insanity, however, as they did, as of uncommon occurrence, and evidence of the existence and operation of which, since it cannot be tested by the general rule applicable to the common and usual forms of insanity, is to be received and passed upon in view of the cautions suggested in the case referred to. If the point means more or less than we have supposed, we refuse our assent.

"You will inquire, then, gentlemen, whether the prisoner was laboring under moral insanity, and in doing so, you will remember the cautions suggested in the case read. The general test here fails, for in this mania, it seems, one may be drawn on to consequences which 'he sees, but cannot avoid' and 'be aware of the heinous nature of the act.' There is little, in such case, to distinguish it from an ordinary criminal act. 'To the eye of reason, every murderer is a madman.' In the commission of every crime, the judgment and conscience are overborne for the time by temptation to evil, acting upon the wickedness of the heart, and exciting the evil passions to overmastering strength; but to allow that to excuse, would be to make crime its own justification and evidence of its own innocence, and to strike at the foundation of all accountability. It is well said, therefore, that 'the doctrine which acknowledges this mania is dangerous in its relations and can be recognized only in the clearest cases.' The evidence adduced to establish it should be subjected to the strictest scrutiny. 'It ought to be shown to have been habitual, or at least to have shown itself in more than one instance.' 'To establish it as a justification in any particular case, it is necessary either to show by clear proofs, its contemporaneous existence, evidenced by present circumstances or the existence of a particular tendency, developed in previous cases.' Is there such proof here? Were the shots fired at the deceased without discrimination or without a motive? Had a tendency to such acts been developed in a single instance in the whole life of the prisoner before this act of homicide, or has it been since?

"If the prisoner was not laboring under moral insanity, you will inquire whether, upon the evidence here, he was laboring under mental malady of any kind, so as not to know and understand the nature of the act he was doing, and that it was wrong and would subject him to punishment. And we propose to

[1] 4 Pa. St. 264.

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detain you but a short time longer, with a few observations upon the evidence in this part of the case.

"It is claimed on the part of the prisoner that his appearance and conduct on that occasion, explained and accounted for by other evidence heard in his behalf, evidenced insanity. The witnesses state that he was wild and excited in his appearance, violent in his gestures, his voice raised to a high and unnatural pitch, and heard in a crying tone, and his expressions, some of the witnesses say, were incoherent. The witnesses themselves were, of course, more or less excited, and they use their own words to describe his conduct, and to express their own impressions. Some express his manner and appearance as 'excited,' and 'wild;' some of them say he was in 'a frenzy.' They testify that he swore profanely and used also low and vulgar expressions. The question here is, was this the incoherent raving and frenzied conduct of a maniac, or one at the time insane, or was it the violence of one excited by passion and seeking revenge? Was it insanity, or was it anger? You will judge. Violent gestures, loud tones, and excited looks are the natural expressions of anger, varying in degree with the temperament of the person, and the intensity of his passion. Profanity seems also to be the natural language of angry passion. The witnesses say that his appearance was different from what they had ever noticed it; but none of them had ever seen him angry. Was his conduct natural or otherwise, supposing him to have been sane and to have sought out Marbourg and shot him down, in revenge for an injury? If, calm and unexcited, and as the witnesses had always before seen him, or with a smile on his face, instead of the fire of anger in his eye, he had met Marbourg and shot him down, without any assigned or known motive, and turned around and walked calmly away, without manifesting any excitement or concern, what would have been the conclusion, that he was sane or insane?

"It is claimed, also, that his appearance and conduct, on that occasion, were in such striking contrast with his habits and character through his whole life, as to exhibit a complete transformation, which is only reasonably explained on the supposition that the sad calamity that had befallen him, the evidence of which he had confirmed that morning by the confession of his wife, acting upon an excitable temperament for a week, during which he had ate and slept but little, had dethroned his reason. And it is true that he has shown, by all the witnesses, not merely a good, but a very good, an excellent character. It has been shown, too, that he has long been a regular, punctual, and an exemplary member of a church; an elder, occasionally officiating for the preacher in his absence; that no one had ever heard him use a profane or vulgar word, or any expression which might not be used in any company. All this is entitled to your consideration, and to such weight as you think it deserves, in determining the question of his sanity. Is it probable, the inquiry naturally arises, that if his reason had not for the time been overthrown he would have acted and talked in a manner so inconsistent with his whole previous life, and so contrary, apparently, to his very nature, as exhibited in the proof of his excellent character as a man and a Christian. And yet it is not to be forgotten that men of the most exalted personal and religious character have fallen into crime. David, who was a man after God's own heart, was guilty of adultery, and to hide it, of murder. And we read that when the mob had taken his Divine Master before the high

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priest, 'Peter sat without in the palace, and a damsel came unto him saying, thou also wast with Jesus; but he denied before them all, saying, I know not what thou sayest.' He was accused by another, 'and again he denied with an oath, saying, I know not the man.' And 'after a while they that stood by accosted him with the same accusation; then began he to curse and swear, saying, I know not the man.' He soon afterwards 'went out and wept bitterly.' Peter was guilty of lying and profanity. It was conduct grossly inconsistent with his religious character; but it is not intimated that he was insane. The Savior, 'who knew what was in the heart of man,' said to his followers, 'watch and pray that ye enter not into temptation.' And an apostle said, 'let him that thinketh he standeth, take heed lest he fall.' Such is human nature, that a good character is no certain guaranty that its possessor may not fall into sin, and but feeble evidence against clear proof of guilt. Still, we commend this evidence to your consideration upon this question of insanity, and you will allow it all the weight you think it merits in the prisoner's behalf.

"It has also been shown that one of the prisoner's brothers is insane, and has been a raving maniac for twenty-eight or thirty years; and that he has a sister who, as some of the witnesses expressed, is a weak-minded woman. She is married and has children, but, in the opinion of some of the witnesses, is not capable of giving proper attention to her children and her domestic affairs. This evidence was offered and received to show a hereditary taint. Insanity is no doubt a hereditary disease, which may appear and reappear, overlapping sometimes a generation; and proof of its existence in a family is pertinent evidence on a question like this. The evidence here, however, going no further than we have stated, is very slight. It does not appear that his parents or any of his ancestors have been insane, or any of the family except one brother. But if such proof were made, the force of it would only be to show a liability, or a predisposition at most, to the disease. That is not the disease. If a hereditary taint were established, it might aid in solving the question, whether his unusual conduct is most reasonably ascribable to insanity or anger. You will judge whether this evidence sheds any light on the question.

"We all remember, too, that the prisoner became suddenly ill here in this room on last Friday, and it has been shown that, after he was taken to the jail, he was laboring under delirium, and was for a short time, frenzied and raving. He imagined there were persons there trying to injure him, and he wanted the sheriff sent for to protect him, when the sheriff was there trying to calm him. He wanted to see his son when his son was present. He fancied they wanted to shoot him, and that he saw blood on his breast. He continued in that state near half an hour, when he fell asleep and awoke rational. This was delirium 'resulting,' as Dr. Bunn testifies, 'from depression following high nervous excitement, and resembling *mania a potu*.' During its continuance, there can be no doubt he would not have been responsible for any act done by him. But the question is not what was his condition on Friday, but on the 12th of February, when he shot Marbourg. The evidence has no other bearing on this question than as it may tend to show the existence of some predisposition to delirium or mania, under like circumstances, and from a similar cause and of the same character He had been under excitement a week before the homicide, this fact, with the evidence now under consideration, it is argued, explains and accounts for

his conduct at that time. It is not made to appear that he labored under any delusion then. He was dealing with a real character and for a reason then given. To the excitement up to that time was added that of the terrible tragedy, of everything that has followed to him, and of this trial, and yet we do not learn that he had any mania or delirium during the intervening month. That mania, too, results from and follows excitement; while he was under high excitement at the time of the homicide. It is to be remarked, also, that in *mania a potu*, with which Dr. Bunn classes it, the patient is not fierce, but fearful; his delusion being apprehended danger to himself, which he is trying to escape; and so it was with him on Friday.

"On the other hand it is urged that the prisoner, during the whole of the week before the homicide, was ferreting and trying to ascertain the truth of the reports concerning his wife and the deceased; going from one person to another, and from place to place, as he discovered some new source of information; comparing statements and noticing discrepancies in his efforts to get at the truth, as counsel would prepare a cause; that after having satisfied himself of the truth of the reports, he provided the loaded pistol, and went to the vicinity of the post-office, where, as it is alleged, he expected to find the deceased; waited and watched, lying in wait for him in Wehn's store, as it is also alleged, till he passed; followed him to the post-office, and shot him down — what he declared he would do if he found the report to be true, and giving that reason for it at the time and afterwards. In all this it is argued against the prisoner, he was following out and executing a deliberately formed and repeatedly declared purpose, reasoning at every step, and knowing and understanding what he was about. It is urged, also, that he afterwards went to the office of Irwin Rutledge, Esq., knowing where it was, and that he was a magistrate; stating to him that he had shot Marbourg, and had come to surrender himself into the hands of the law, expressing at the same time, his belief that God would forgive him, and his willingness to be tried by a jury of his countrymen. This, it is argued, all clearly shows that he knew at the time the nature and consequences of the deed, and understood before what tribunal he was answerable for it.

"You, gentlemen of the jury, will take into careful consideration the whole evidence, and determine the prisoner's responsibility, that is all we have to say to you.

"If you find the prisoner guilty, you will state in your verdict the degree of his crime, or of what you find him guilty. If you find him not guilty on the ground of insanity, the only ground on which you can acquit him, it will be your duty to state that you find he was insane at the time of the commission of the act and that you acquit him on that ground."

But these latter cases are simply the charges of trial judges, and are of no value as authority, where they conflict with the rules laid down on the same subject by the courts of last resort in the same States.[1]

§ 25. **Doctrine of "Moral Insanity" Disapproved.** — The courts of several States have expressly repudiated this doctrine. In Georgia it is said that moral insanity has no foundation in the law, and will not be permitted as a defence to

[1] See *ante*, pp. 234, 259.

In most of the States.

a crime.[1] In *Spann* v. *State*,[2] the Supreme Court of that State said: "The evidence in this record discloses the undoubted fact that the defendant and Eberhart, a girl living in the house with him, killed his wife by strangling and breaking her neck with a rope when she was lying on her bed asleep; that after they had killed her, they heated water and attempted to obliterate the marks of the rope around the neck of the deed woman, but the more they washed it the plainer the marks appeared; that then the parties fled to the State of Alabama, were pursued, and defendant was found in Coffee County, chopping cotton in the cotton patch of one Harris. When defendant was arrested by those who pursued him he asked them what authority they had to arrest him out of the State. The motion for a new trial in this case is based mainly on newly discovered evidence, since the trial, of the defendant's insanity, and the affidavits of several doctors have been procured who have examined him since the trial, and some of whom knew him before the trial, and they give it as their opinion that the defendant is afflicted with moral insanity. There are also affidavits of other persons, not doctors, who have known the defendant, who state that he is a dull, weak-minded man. If we are to understand by 'moral insanity' that the defendant was so depraved that he was regardless both of the laws of God and man, as the enormity of his crime would induce most people to believe, then the import of the words, moral insanity, requires no further explanation; but if moral insanity is to be understood as that species of insanity which, in the sense of the law, will excuse the defendant from the commission of the crime with which he is charged, then it is a great mistake on the part of those who insist on it. The insanity which the law recognizes as an excuse for crime, must be such as dethrones reason and incapacitates an individual from distinguishing between right and wrong. There is not one of the affidavits in this case containing the newly discovered evidence, including all the doctors, who venture to state that the defendant did not have sufficient reason and capacity to distinguish right from wrong at the time the crime with which he is charged was committed, and that is the fatal defect of all the evidence contained in the record, in support of the motion for a new trial. The defendant had sufficient reason and capacity to attempt to obliterate the marks of violence from the neck of his dead wife, and to flee from the State with his paramour after he had committed the crime; and he had sufficient reason and capacity to demand of his pursuers by what authority they arrested him out of the State where the crime was committed. The records of this court, we are quite sure, do not furnish a more aggravated case of cool, deliberate murder than the one now before us, and we shall not interfere with the verdict of the jury which finds the defendant guilty of that crime. Let the judgment of the court below be affirmed."

And the doctrine of moral insanity has been expressly disapproved in North Carolina,[3] Michigan,[4] and Alabama;[5] also in the other States where the right and wrong test is recognized.

In *Reg.* v. *Haynes*,[6] the prisoner, a soldier, was tried before BRAMWELL, B., for the murder of Mary MacGowan. The deceased was an unfortunate woman, with whom the prisoner had been intimate. No motive was assigned for

[1] Choice *v.* State, 31 Ga. 424 (1860).
[2] 47 Ga. 553 (1873).
[3] State *v.* Brandon, 8 Jones L. 463 (1862).
[4] People *v.* Finley, 38 Mich. 483 (1878).
[5] Boswell *v.* State, 63 Ala. 307 (1879).
[6] 1 F. & F. 666 (1859).

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the perpetration of the act, and general evidence was given that the prisoner, while in Canada, having seduced a young woman under a promise of marriage, which he had been unable to fulfil, by reason of his regiment having been ordered home, his mind had been much affected by the circumstance. BRAMWELL, B., charged the jury as follows: "It has been urged for the prisoner that you should acquit him on the ground that it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence or homicidal tendency. But I must remark as to that, that the circumstance of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resolute) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence — the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint — that forbidding and punishing its perpetration. We must, therefore, return to the simple question you have to determine: did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong?" The prisoner was found guilty.

In *Reg.* v. *Burton*,[1] tried before WIGHTMAN, J., in 1863, the prisoner was indicted for the murder of a boy, and the learned judge instructed the jury as follows: "As there was no doubt about the act, the only question was whether the prisoner, at the time he committed it, was in such a state of mind as not to be responsible for it. The prisoner's account of it was that he had done it from a morbid feeling; that he was tired of life and wished to be rid of it. No doubt prisoners had been acquitted of murder on the ground of insanity; but the question was, what were the cases in which men were to be absolved from responsibility on that ground? *Hadfield's Case* differed from the present, for there wounds had been received on the head which were proved to have injured the brain. In the more recent case of *McNaghten* the judges had laid down the rule to be that there must, to raise the defence, be a defect of reason from disease of the mind, so as that the person did not know the nature and quality of the act he committed, or did not know whether it was right or wrong. Now to apply this rule to the present case would be the duty of the jury. It was not mere eccentricity of conduct which made a man legally irresponsible for his acts. The medical man called for the defence defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This would appear to be a most dangerous doctrine, and fatal to the interests of society and security of life. The question is whether such a theory is in accordance with law? The rule as laid down by the judges is quite inconsistent with such a view, for it was that a man was responsible for

[1] 3 F. & F. 772.

No Test Adopted in New Hampshire.

his actions if he knew the difference between right and wrong. It was urged that the prisoner did the act to be hanged, and so was under an insane delusion, but what delusion was he under? So far from it, it showed that he was quite conscious of the nature of the act, and of its consequences. He was supposed to desire to be hanged, and in order to obtain the object committed murder. That might show a morbid state of mind, but not delusion. Homicidal mania, again, as described by the witnesses for the defence, showed no delusion. It merely showed a morbid desire for blood. Delusion meant the belief in what did not exist. The question for the jury was, whether the prisoner at the time he committed the act was laboring under such a species of insanity as to be unaware of the nature, the character, or the consequences of the act he committed. In other words, whether he was incapable of knowing that what he did was wrong. If so, they should acquit him; if otherwise, they should find a verdict of guilty." Verdict, guilty. The prisoner was executed, having previously acknowledged his crime and responsibility.

"The law," said Baron ALDERSON, in *Reg.* v. *Pate*,[1] "does not acknowledge the doctrine of an uncontrollable impulse, if the person was aware it was a wrong act he was about to commit. A man might say he picked a pocket from some uncontrollable impulse, and in that case the law would have an uncontrollable impulse to punish him for it."[2]

§ 26. **The New Hampshire Rule — No Test — State v. Pike.** — Finally the courts of New Hampshire, and some other States, unable to find a satisfactory one, have discarded all tests. In *State* v. *Pike*,[3] the prisoner being indicted for the murder of one Brown, his counsel claimed that he was irresponsible by reason of a species of insanity called dipsomania. The court instructed the jury that "if they found that the prisoner killed Brown in a manner that would be criminal and unlawful if he was sane, their verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintance or to labor or transact business or manage affairs, is, as a matter of law, a test of mental disease, but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury; that whether there is such a mental disease as dipsomania, and whether defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury." On appeal this instruction was affirmed.

§ 27. —— **State v. Pike — Elaborate opinion of Doe, J.** — Mr. Justice DOE, while dissenting from the opinion of the court on other points, delivered an elaborate opinion in favor of the charge of the court below on this point: —

"The defendant's exception," said he, "to the instructions given to the jury

[1] Bennett & Heard's Ld. Cas. Crim. Law, 104.

[2] And see Reg. *v.* Bowler, 54 An. Reg. 310. Martin's Case and Reg. *v.* Brixey, both cited in 1 Bennett & Heard's Leading Cas. Crim. Law, are instances of insane delusions which were the causes of the crimes committed, one the burning of York Cathedral, the other the murder of a child. In both cases the prisoners were acquitted.

[3] 49 N. H. 399 (1870).

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in relation to his responsibility as affected by dipsomania, raises the general question of the legal tests of insanity; for if the instructions given upon dipsomania, are correct, they would be correct when given upon any other alleged form of insanity.

"If knowledge of right and wrong, or delusion, is the test in other alleged forms of insanity, knowledge and delusion must be the test in alleged dipsomania. The correctness of all the instructions given on the tests of mental disease, is involved in the exception taken by the defendant.

"This was the first instance in which such instructions were ever given; but they are an application of ancient and fundamental principles of the common law. A product of mental disease is not a contract, a will or a crime; and the tests of mental disease are matters of fact.[1] Tried by the standard of legal precedent, the instructions are wrong; tried by the standard of legal principle, they are right. We have come to a point where we can plainly see that the paths of precedent and principle diverge, and where we must choose between them. In making our choice there are various considerations which weaken the attraction of precedent.

"A striking, conspicuous want of success has attended the efforts made to adjust the legal relations of mental disease. In regard to the validity of a contract as affected by insanity, the authorities have been conflicting and vacillating. Littleton says: 'No man of full age shall be received in any plea by the law to disable his own person.'[2] Coke says: 'There have been four several opinions concerning the alienation or other act of a man that is *non compos mentis*, etc. For, first, some are of opinion, that he may avoid his own act by entry or plea. Secondly, others are of opinion that he may avoid it by writ, and not by plea. Thirdly, others, that he may avoid it either by plea or by writ; and of this opinion is Fitzherbert in his *Natura Brevium*. And Littleton here is of opinion, that neither by plea, nor by writ, nor otherwise, he himself shall avoid it, but his heir shall avoid it by entry, plea or writ. And herewith the greatest authorities of our books agree; and so was it resolved with Littleton in *Beverly's Case*, where it is said, that it is a maxim of the common law, that the party shall not disable himself.'[3] 'By the law of England no man shall avoid his own act by reason of these defects.'[4] Blackstone says: 'The king, indeed, on behalf of an idiot, may avoid his grants or other acts. But it hath been said that a *non compos* himself shall not be permitted to allege his own insanity in order to avoid such grant; for that no man shall be allowed to stultify himself or plead his own disability. The progress of this notion is somewhat curious.' Blackstone gives its history, showing that it did not prevail in the time of Edward I.; that 'under Edward III. a scruple began to arise whether a man should be permitted to *blemish* himself by pleading his own insanity; and afterwards,' it was doubted whether a plaintiff who had executed a release since the commencement of his suit, and who was taken to be sane at its commencement, and at the time of pleading, should be permitted to plead an intermediate deprivation of reason existing at the execution of the release, 'and the question was asked how he came to remember the release if out of his senses when he gave it. Under Henry VI. this way of reasoning was seriously adopted by the judges, and from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to

[1] Boardman *v.* Woodman, 47 N. H. 147–150.
[2] Co. Lit. 246.
[3] Co. Lit. 247, b.
[4] 1 Hale P. C. 29.

reason, the maxim that a man shall not stultify himself, hath been handed down as settled law.' [1]

"In 1767, Lord MANSFIELD stated the law thus: 'It hath been said to be 'a maxim that no man can plead his being a lunatic to avoid a deed executed, or excuse an act done at that time, because,' it is said, 'if he was a lunatic he could not remember any action he had done during the period of his insanity.' And this was the doctrine formerly laid down by some judges; but I am glad to find that of late it hath been generally exploded; for the reason assigned for it, is, in my opinion, wholly insufficient to support it; because, though he could not remember what passed during his insanity, yet he might justly say, if he ever executed such a deed, or did such an action, it must have been during his confinement or lunacy; for he did not do it either before or since that time. As to the case in which a man's plea of insanity was actually set aside; it was not more than this: It was when they pleaded *ore tenus;* the man pleaded that he was at the time out of his senses. It was replied, how do you know that you were out of your senses? No man that is so, knows himself to be so. And accordingly his plea was, upon this quibble, set aside; not because it was not a valid one if he was out of his senses; but because they concluded he was not out of his senses.' [2] 'The party himself may set up as a defence, and in avoidance of his contract that he was *non compos mentis* when it was alleged to have been made. The principle advanced by Littleton and Coke that a man shall not be heard to stultify himself has been properly exploded as being manifestly absurd and against natural justice.' [3] 'Yet, clear as this doctrine appears, in common sense and common justice, it has met with a sturdy opposition from the common lawyers who have insisted, as has been justly remarked, in defiance of natural justice, and the universal practice of all civilized nations in the world, that, according to the known maxim of the common law, no man of full age should be admitted to disable or stultify himself. How so absurd and mischievous a maxim could have found its way into any system of jurisprudence professing to act upon civilized beings, is a matter of wonder and humiliation. There have been many struggles against it by eminent lawyers in all ages of the common law; but it is, perhaps, somewhat difficult to resist the authorities, which assert its establishment in the fundamentals of the common law; a circumstance which may well abate the boast so often and so rashly made that the common law is the perfection of human reason.' [4]

"It seems to have been finally considered, in this and other jurisdictions, that a man might avoid a contract on the ground of his insanity in all cases, excepting, perhaps, a contract for necessaries.[5] But it is now held that he is estopped to avoid a contract made in good faith, unless he restores the other party to his previous position, or makes compensation.[6] This result places the contracts of insane persons and minors, to a considerable extent, on the same ground.[7]

[1] 2 Bl. Com. 291, 292.

[2] Chamberlain of London *v.* Evans, 5 Bl. Com. App. 149 (Am. ed.), (1773).

[3] 2 Kent's Com. 451.

[4] Story Eq., sect. 225.

[5] Lang *v.* Widden, 2 N. H. 435, 438; Burke *v.* Allen, 29 N. H. 106; Seaver *v.* Phelps, 11 Pick. 304; Gibson *v.* Soper, 6 Gray, 279.

[6] Molton *v.* Camroux, 2 W. H. & G. 487; *s. c.*, 4 W. H. & G. 17; Young *v.* Stevens, 48 N. H. 133; 1 Pars. Con. 383-386 (5th ed.).

[7] Carr *v.* Clough, 26 N. H. 280; Heath *v.* West, 28 N. H. 101; Lincoln *v.* Buckmaster, 32 Vt. 652; 2 Greenl. on Ev., sects. 369, 370.

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"The English law, in proceedings for guardianship, has been confused and unsettled.[1]

"In relation to the burden of proof on the question of sanity in criminal cases, the English and nearly all the American authorities have been manifestly wrong. The uniform rule in England, and the general rule in this country, has been that the burden was on the defendant to prove sanity, either beyond reasonable doubt or by a preponderance of evidence. In *King* v. *Arnold*,[2] Mr. Justice TRACY said to the jury: 'The shooting, my Lord Onslow, which is the fact for which the prisoner is indicted, is proved beyond all manner of contradiction; but whether this shooting was malicious, that depends upon the sanity of the man.' One of the most important judicial encroachments upon the province of the jury, in England, has always been the inference of malice declared by the court as a legal presumption. The legal idea of malice includes the idea of sanity; and the legal presumption of malice threw the burden of proving insanity on the defendant. This has always been understood in England, as distinctly as it was by Erskine, when he said, in *King* v. *Hadfield:*[3] 'I must convince you that the unhappy prisoner was a lunatic. The whole proof, therefore, is undoubtedly cast upon me;' and by Mr. Baron MARTIN, when he charged the jury, in *Queen* v. *Townley*,[4] 'Unless they were satisfied — and it was for the prisoner to make it out — that he did not know the consequences of his act, or that it was against the law of God and man, and would subject him to punishment, he was guilty of murder.' This great error was corrected in *State* v. *Bartlett*,[5] — a case most revolutionary in precedent, but most conservative in principle.

"In testamentary cases, tried by a probate court without a jury, the court necessarily decides the fact as well as the law. In *Stewart* v. *Lispenard*,[6] *Blanchard* v. *Nestle*,[7] and *Clarke* v. *Sawyer*,[8] it was held that mental imbecility is not testamentary incapacity unless it amounts to a total absence of reason; but this test was abandoned in *Delafield* v. *Parish*.[9] In 1826, an English judge of probate decided, in *Dew* v. *Clark*,[10] that as a matter of fact, proved by the medical authorities of his day, delusion was the test of insanity.[11] The courts of this country inadvertently adopted in testamentary cases, as a rule of law, the test of delusion, which the English judge of probate had found as a matter of fact. And this mistake greatly increased the difficulty of extricating the subject from the embarrassments and obscurities which beset it. In 1867 it was supposed that the American doctrine of testamentary capacity was firmly established on the English probate foundation of fact, mistaken here for a basis of law, when suddenly even that foundation was destroyed by the English probate court.

"In *Smith* v. *Tebbitt*,[12] Sir J. P. WILDE said: 'What is to be the proof of disease? What is to be the test, if there be a test, of morbid mental action? The existence of mental "delusions," it would perhaps be answered. But this only postpones the question, in place of answering it. For what is a mental delusion? How is it to be defined so as to constitute a test, universally applicable,

[1] 13 Law Mag. & Law Rev. 122.
[2] 16 St. Tr. 695, 764.
[3] 27 St. Tr. 1314, 1318.
[4] 3 F. & F. 839.
[5] 43 N. H. 224.
[6] 26 Wend. 255.
[7] 3 Denio, 37.
[8] 2 N. Y. 498.
[9] 25 N. Y. 11.
[10] 3 Addams, 79.
[11] Boardman *v.* Woodman, 47 N. H. 148, 149.
[12] L. R. 1 P. & D. 398.

of mental disorder or disease? The word is not a very fortunate one. In common parlance, a man may be said to be under a "delusion," when he only labors under a mistake. The "delusion" intended is, of course, something very different. To say that a "morbid" or an "insane delusion" is meant, is to beg the question. For the "delusion" to be sought is to be the test of insanity; and to say that an insane or morbid delusion is the test of insanity or disease, does not advance the inquiry. "A belief of facts which no rational person would have believed," says Sir JOHN NICHOLL. "No *rational* person." This, too, appears open to a like objection, for what are the limits of a rational man's belief? And to say that a belief exceeds them, is only to say that it is irrational or insane. "The belief of things as realities which exist only in the imagination of the patient," says Lord BROUGHAM, in *Waring* v. *Waring*.[1] But surely, sane people often imagine things to exist which have no existence in reality, both in the physical and moral world. What else gives rise to unfounded fears, unjust suspicions, baseless hopes, or romantic dreams? I turn to another definition; it is by Dr. Willis, a man of great eminence, and is quoted by Sir JOHN NICHOLL, in *Dew* v. *Clark:* "A pertinacious adherence to some delusive idea, in opposition to plain evidence of its falsity." This seems to offer a surer ground; but then the "evidence" of the falsity is to be "plain," and who shall say if it be so or not? In many or most cases it would be easy enough. Those who have entertained the "delusive idea" that their bodies were made of glass, or their legs of butter — as it may be found in medical works that some have done — certainly have "plain evidence" at hand — the evidence of their senses — of its falsity. But what if the delusive idea concern a subject in which the senses play no part, and the "plain evidence" by which it is to be discharged is matter of reasoning, and addressed to the intellectual faculty, — will all sane men agree whether the evidence is plain or not? and, if not, shall one man, in all cases, pronounce another a monomaniac, when the evidence is plain, to his reason, of the falsity of the other's ideas.

"'I find no fault with the language of these definitions, as fairly and properly describing the mental phenomena that are used to depict. I only assert that the existence of mental delusions thus defined, is not capable of being erected into an universal test of mental disease. It is no doubt true that mental disease is always accompanied by the exhibition of thoughts and ideas that are false and unfounded, and may therefore be properly called "delusive." But what I mean to convey on this head is this: that the question of insanity and the question of "delusions" is really one and the same, — that the *only* delusions which prove insanity are insane delusions, and that the broad inquiry into mental health or disease cannot in all cases be either narrowed or determined by any previous or substituted inquiry into the existence of what are called "delusions." I say in all cases, for in some such as those to which I have already alluded, where the delusive idea ought to receive its condemnation and expulsion at once from the simple action of the senses, the contrary is the case; and the same may be said of delusions obviously opposed to the simple, ordinary and universal action of reason in healthy minds. These are the simple cases about which no one would doubt, and in them the proof of the "delusions" is also the proof of insanity,

[1] 6 Moo. P. C. 354.

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without more. But what is to be said of the more complicated cases? What if the diseased action of the mind does not exhibit itself on the surface, as it were, opposing its hallucinations to the common senses or reasons of all mankind, but can be tracked only in the recesses of abstract thought or religious speculation, — regions in which the mental action of the sane produces no common result, — and all is question and conflict? In what form of words could a "delusion" be defined which would be a positive test of insanity in such cases as these? In none, I conceive, but "*insane delusions*," or words of the like import, which carry with them the whole breadth of the general inquiry. How, then, is this question of insanity to be approached by a legal tribunal? What tests are to be applied for disease? What limits assigned, within which extravagance of thought is to be pronounced compatible with mental health? The decided cases offer no light on these heads. I nowhere find any attempt to devise such tests or assign such limits. Nor do I conceive that any tests, however elaborate, beyond the common and ordinary method of judging in such matters, would be competent to bear the strain of individual cases in the course of experience.'

"The judge held it to be the duty of the court 'to inform itself, as far as opportunity permits, of the general results of medical observation;' and he quoted Dr. Ray, Dr. Prichard and Dr. Esquirol. If the American law of insanity is to be that which the English probate court holds, from time to time, to be a matter of fact depending upon 'the general results of medical observation' and the progress of medical science, we have no assurance that this branch of our law will be more stable hereafter than it has been heretofore.

"The attempt to establish a legal test of mental disease has been as unsuccessful in criminal as in testamentary cases. In England, from 1826 to 1867, delusion was applied as the test in the latter; but it was not adopted in the former; and it was not shown how it happened that what was an infallible test of mental disease in a man when he disinherited his child, was no test of mental disease in him when he deprived his child of life.

"It has been held within one hundred and fifty years that the test in criminal cases is whether the defendant was totally deprived of his understanding and memory, and did not know what he was doing any more than a wild beast.[1] This was the original form of the knowledge test. In 1800 the attorney-general of England declared that this test had never been contradicted, but had always been adopted." Erskine, in the same case, said: 'I will employ no artifices of speech, the attorney-general standing undoubtedly upon the most revered authorities of the law, has laid it down, that to protect a man from *criminal responsibility* there must be a total *deprivation of memory and understanding*. I admit that this is the very expression used by Lord Coke and Lord Hale; but the true interpretation of it deserves the utmost attention and consideration of the court. *Delusion*, therefore, where there is no frenzy or raving madness, is the true character of insanity. I really think, however, that the attorney-general and myself do not, in substance, very materially differ. In contemplating the law of the country, and the precedents of its justice to which they must be applied, I find nothing to challenge or question. I approve of them throughout; I subscribe to all that is written by Lord Hale; I agree with all the author-

[1] King *v.* Arnold, 16 St. Tr. 695, 765. [2] King *v.* Hadfield, 27 St. Tr. 1288.

ities cited by the attorney-general from Lord COKE.'[1] The effort of Erskine was made with such 'artifices of speech,' that the court seem to have been mystified. When Lord KENYON, satisfied that the defendant was insane, stopped the trial, and ordered a verdict of acquittal, his remark that, 'with regard to the law as it has been laid down, there can be no doubt upon earth,' apparently meant as it has been laid down by the attorney-general and by Erskine. He seems not to have understood that the ancient test was questioned; and yet, tried by that test, Hadfield must have been convicted. Hadfield's acquittal was not a judicial adoption of delusion, as the test in the place of knowledge of right and wrong;[2] it was probably an instance of the bewildering effect of Erskine's adroitness, rhetoric, and eloquence.

"The common instincts of humanity have abandoned the original 'wild beast' form of the knowledge test, only to adopt others equally arbitrary, though less shocking to the intelligence and sensibility of the age. Knowledge of right and wrong, in some degree, with more or less of explanation and variation, has always been, in theory, the test of criminal capacity in England, and generally in this country; the English courts have never recognized delusion as the test. They have noticed delusion only so far as it destroyed the knowledge of right and wrong, which is the same as an explicit rejection of it as a test. If knowledge of right and wrong is the test, it is immaterial whether that knowledge be destroyed by disease assuming the forms of delusions, or any other form.

"It is matter of history that insanity has been, for the most part, a growth of the modern state of society. Like many other diseases, it is caused, in a great degree, by the habits and incidents of civilized life. In the earlier and ruder ages, it was comparatively rare. Its present extent has been chiefly attained within a few hundred years. Until recently there were no asylums for the insane, and no experts devoting their lives exclusively to the practical study and treatment of the disease. The necessary opportunities for obtaining a thorough understanding of it did not exist until they were furnished by the positions of superintendents of asylums and their assistants. Consequently, until recently, there was very little knowledge of the subject.

"In old books it is often found under the head of lunacy. Lord HALE was the first writer who undertook to introduce into a law book any considerable statement of the facts of mental disease.[3] Not only was he guided by the best medical authorities of his day, but he carefully used the language of medical men. Among other current medical ideas which he recorded was this: The insanity 'which is interpolated, and by certain periods and vicissitudes,' 'is that which is usually called *lunacy*, for the moon hath a great influence in all diseases of the brain, especially in this kind of *dementia;* such persons, commonly, in the full and change of the moon, especially about the equinoxes and summer solstice, are usually in the height of their distemper;' and 'such persons as have their lucid intervals, — which ordinarily happens between the full and change of the moon — in such intervals have usually at least a competent use of reason.' He did not imagine that this medical lunar theory was a principle of the common law. Lord ERSKINE, in delivering judgment in *Cranmer's Case*,[4] said: 'The

[1] *Id.*, 1309, 1312, 1314, 1318, 1324.
[2] 9 C. & P. 546.
[3] 1 Hale P. C. 29, 32,
[4] 12 Ves. 445, 451.

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moon has no influence;' and the reporter inserted this marginal note: 'In cases of lunacy, the notion that the moon has an influence, erroneous.' The reporter may not have distinguished between law and fact; but Erskine did not suppose that he was announcing his disagreement with HALE on a point of law.

"The other causes, symptoms, and tests of mental disease recorded by HALE were as clear matters of fact as the lunar theory. When he put them in his history of the Pleas of the Crown he merely followed the line of the custom that had been pursued by him and all other English judges of giving to the jury their opinions of the facts of the cases tried before them.[1] In the History of the Common Law, he says of trial by jury: 'Another excellency of this trial is this: that the judge is always present at the time of the evidence given in it. Herein he is able, in matters of law, emerging upon the evidence to direct them; and also, in matters of fact, to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lie; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen.'[2]

"In *King* v. *Cullender and Duny*,[3] there is an instance of the positive manner in which judges were accustomed to give their opinions to the jury on matters of fact. In that case, the defendants were tried before HALE for witchcraft; and he instructed the jury as follows: 'That there were such creatures as witches, he made no doubt at all; for, first, the Scriptures had affirmed so much. Secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their confidence of such a crime.' The jury found a verdict of guilty; the judge was fully satisfied with the verdict; and, upon his sentence, the defendants were executed. The doctrines of insanity and witchcraft, stated by Lord HALE, were held by him in common with the most enlightened classes of the most civilized nations. He was not their author, nor was he responsible for them. They were equally doctrines of fact; one was no more a matter of law than the other; and they are equally entitled to oblivion, although the ancient doctrine of insanity outlived the ancient doctrine of witchcraft.

"When we remember that the universal belief in witchcraft has been overcome within two hundred years, it is easy to understand how the phenomena of insanity were long regarded as supernatural. Witchcraft and demoniacal possession were accepted as truths taught by miraculous inspiration. Cases of insanity were found, answering the biblical description of cases of demoniacal possession; but the suggestion that any of the latter might be cases of mental or physical disease, was received as an attack upon the infallibility of the Scriptures. This state of things discouraged investigation, and encouraged the belief that insanity, at least in some of its forms, was demoniacal possession. The natural causes and operations of cerebral disease were mysterious; the theological clouds that encompassed it, were appalling.

"In a period of ignorance, credulity, superstition, and religious terrorism, before there was a science of medicine, we should not expect to find any scientific or accurate understanding of such a malady. Well might the boldest shrink from the exploration of a condition believed to be, in its origin, beyond the bounds of nature, and curable only by the power of exorcism.

[1] *Ante*, p. 416, 417. [2] 2 Hale's Hist. Com. L. 147. [3] 6 St. Tr. 700.

Mr. Justice Doe's Opinion.

"As the ancient theory of diabolism gradually passed away, insanity was still attributed to special providences, and not to the operation of the general laws of health. The sufferers were treated for wickedness rather than sickness. Among men of science, the investigation of the subject is now disencumbered of all theological complications. But this is a modern emancipation not yet realized by the mass of even the most enlightened communities. Very few persons have an adequate conception of the fact that insanity is a disease. The common notion of it, is of something not merely marvellous, but also peculiarly, vaguely, and indescribably connected with a higher or lower world. The insane are generally considered as more than sick; and if they are not spoken of as possessed, their condition, to the popular apprehension, is still enveloped in a supernatural shadow. The Lord Chancellor of England, declared, in the House of Lords, on the 11th day of March, 1862, that 'the introduction of medical opinions and medical theories into this subject, has proceeded upon the vicious principle of considering insanity as a disease.' [1] This remark indicates how slowly legal superstitions are worn out, and how dogmatically the highest legal authorities of this age maintain, at law, tests of insanity, which are medical theories differing from those rejected by the same authorities, only in being the obsolete theories of a progressive science.

"It was, for a long time, supposed that men, however insane, if they knew an act to be wrong, could refrain from doing it. But whether that supposition is correct or not, is a pure question of fact. The supposition is a supposition of fact; in other words, a medical supposition, in other words a medical theory. Whether it originated in the medical or any other profession, or in the general notions of mankind, is immaterial. It is as medical in its nature as the opposite theory. The knowledge test in all its forms, and the delusion test, are medical theories introduced in immature stages of science, in the dim light of earlier times, and subsequently, upon more extensive observations and more critical examinations, repudiated by the medical profession. But legal tribunals have claimed these tests as immutable principles of law, and have fancied they were abundantly vindicated by a sweeping denunciation of medical theories, unconscious that this aggressive defence was an irresistible assault upon their own position.

"When the authorities of the common law began to deal with insanity, they adopted the prevailing medical theories. The distinction between the duty of the court to decide questions of law, and the duty of the jury to decide questions of fact, was not appreciated and observed as it now is in this State. In criminal cases, the jury might decide the law as well as the fact.[2] In civil and criminal cases, the court gave to the jury their opinion of the facts, as well as of the law,[3] and the difference between a question of fact and a question of law was generally of little or no practical importance. When new trials had not come into use,[4] when prisoners were not allowed the assistance of counsel in relation to matters of fact,[5] and juries were punished at the discretion of the court for finding their verdict contrary to the direction of the judge,[6] the sphere of the

[1] Hansard CLXV. 1296.

[2] Pierce *v.* State, 13 N. H. 536; Quincy Mass. Rep. 558–572.

[3] *Ante*, 416, 417.

[4] 3 Bl. Com. 405; Witham *v.* Lewis, 1 Wills. 55; Quincy, Mass., 558; Hilliard on New Tr., ch. 1, sects. 2, 3.

[5] 4 Bl. Com. 355; 11 St. Tr. 476; 19 St. Tr. 944.

[6] 4 Bl. Com. 361.

Notes.

court was latitudinarian. The judicial practice of directing or advising juries in matters of fact has never been discontinued in England. And this practice has carried into reports and treatises, on various branches of the law, many opinions of mere matters of fact. Without any conspicuous or material partition between law and fact, without a plain demarcation between a circumscribed province of the court and an independent province of the jury, the judges gave to juries, on questions of insanity, the best opinions which the times afforded. In this manner, opinions purely medical and pathological in their character, relating entirely to questions of fact, and full of error, as medical experts now testify, passed into books of law, and acquired the force of judicial decisions. Defective medical theories usurped the position of common-law principles.

"The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory pretending to be legal authority cannot appeal for support to our reason or even to our sympathy. The proverbial reverence for precedent does not readily yield; but when it comes to be understood that a precedent is medicine and not law, the reverence in which it is held will, in the course of time, subside.

"The legal profession, in profound ignorance of mental disease, have assailed the superintendents of asylums — who knew all that was known on the subject, and to whom the world owes an incalculable debt — as visionary theorists and sentimental philosophers, attempting to overturn settled principles of law; whereas, in fact, the legal profession were invading the province of medicine, and attempting to install old, exploded medical theories in the place of facts established in the progress of scientific knowledge. The invading party will escape from a false position when it withdraws into its own territory; and the administration of justice will avoid discredit when the controversy is thus brought to an end. Whether the old or the new medical theories are correct, is a question of fact for the jury; it is not the business of the court to know whether any of them are correct. The law does not change with every advance of science; nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected. The legal principle, however much it may formerly have been obscured by pathological darkness and confusion of law and fact, is, that a product of mental disease is not a contract, a will, or a crime. It is often difficult to ascertain whether an individual had a mental disease, or whether an act was the product of that disease, but these difficulties arise from the nature of the facts to be investigated, and not from the law; they are practical difficulties to be solved by the jury, and not legal difficulties for the court.

"If our precedents practically established old medical theories which science had rejected, and absolutely rejected those which science had established, they might at least claim the merit of formal consistency. But the precedents require the jury to be instructed in the new medical theories by experts, and in the old medical theories by the judge.

"In *Queen* v. *Oxford*,[1] tried in 1840, Dr. Chowne testified that he considered doing an act without a motive a proof, to some extent, of an unsound mind; that one kind of insanity has been well described by the term 'lesion of the will;' that it is sometimes called moral insanity; that patients are often im-

[1] 9 C. & P. 545, 546.

pelled to commit suicide without any motive; that this state of mind is not incompatible with an acuteness of mind and an ability to attend to the ordinary affairs of life.[1] Lord DENMAN instructed the jury that, if some controlling disease was in truth the acting power with the defendant, which he could not resist, he was not responsible, and that knowledge was the test.

"In *Queen* v. *McNaghten*, tried in 1843, Dr. Monro testified that an insane person may commit murder, and yet be aware of the consequences; that lunatics often manifest a high degree of cleverness and ingenuity, and exhibit occasionally great cunning in escaping from the consequences of such acts; and that he considered a person laboring under a morbid delusion to be of unsound mind; that insanity may exist without any morbid delusion; that a person may be of unsound mind, and yet be able to manage the usual affairs of life; that insanity may exist with a moral perception of right and wrong, and that this is very common. Eight experts gave their opinions, going to show that the defendant had committed the act in question under the influence of a morbid delusion which deprived him of the power of self-control. Their testimony, in substance, was that the defendant was insane, and that knowledge of right and wrong was not the test. The medical testimony was so strong that the court stopped the trial, and substantially directed the jury to acquit the defendant; but Chief Justice TINDAL instructed the jury that knowledge was the test. It does not appear how the defendant could be acquitted by that test.[2]

"In *R.* v. *Pate*, tried in 1850, Dr. Conolly testified: 'I have conversed with the prisoner since this transaction, and, in my opinion, he is a person of unsound mind. I am not aware that he suffers from any particular delusion. He is well aware that he has done wrong, and regrets it.' Dr. Monro testified: 'I have had five interviews with Mr. Pate since this transaction, and, from my own observation, I believe him to be of unsound mind. I agree with Dr. Conolly that he is not laboring under any specific delusion. I think he may have known very well what he was doing, and have known that it was very wrong; but it frequently happens with persons of diseased mind that they will perversely do what they know to be wrong.' Mr. Baron ALDERSON instructed the jury that knowledge was the test.

"In *R.* v. *Townley*, tried in 1863, Dr. Winslow testified: 'I think that at this present moment he is a man of deranged intellect. He was deranged on the 18th of November, and I thought still more so last night when I saw him the second time.' The witness was asked: 'If the present state of mental derangement existed on the 21st of August, would it be likely to lead to the commission of the act then committed?' His answer was: 'Most undoubtedly. Assuming him to have been on the 31st of August as he was on the 18th of November and yesterday, I do not believe that he was in a condition of mind to estimate, like a sane man, the nature of his act and his legal liability.' The witness further testified: 'He does not appear to have a sane opinion on a moral point. I have no doubt he knows that these opinions of his are contrary to those generally entertained, and that if acted upon, they would subject him to punishment. I should think he would know that killing a person was contrary to law, and wrong in that sense. I should think that, from his saying he should be hanged, he knew he had done

[1] An. Reg. 1840, Part 2, p. 262.

[2] An. Reg. 1843, Part 2, pp. 35, 399.

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wrong.' Dr. Gisborne testified, 'that the prisoner's language implied that he knew that what he had done was punishable, but that he — the witness — believed he would repeat the offence to-morrow.' Mr. Baron MARTIN instructed the jury that knowledge was the test.

"In these cases, the testimony of the experts negatived the idea that knowledge of right and wrong is the test. And the admission of this evidence coupled with the rule given by the court to the jury that knowledge is the test, brought the law into conflict with itself. Either the experts testified on a question of law, or the courts testified on a question of fact. The conflict was only rendered a little more palpable in *People* v. *Huntington*, tried in New York in 1856. Experts testified, as they have long testified in England and elsewhere, that a man without delusion may be irresponsible by reason of insanity, for an act which he knows to be a crime the consequences of which he understands. One expert testified that he defined insanity as a disease of the brain by which the freedom of the will is impaired, and that almost all insane people know right from wrong. The knowledge test of insanity, as laid down by the English judges in their opinions given to the House of Lords in what is called the *McNaghten's Case*,[1] was read by counsel to the experts; the experts were directly asked their opinion of that test, and they testified that they did not agree with the English judges on that subject. The same knowledge test, as laid down by the Supreme Court of New York,[2] was read to one of the experts, and the same kind of testimony was repeated. The court instructed the jury that knowledge was the test.[3]

In *Com.* v. *Rogers*, one expert testified that insane persons generally know the distinction between right and wrong. The opinion of three experts was, that the defendant was insane; that his reason had been overborne by delusion, and an insane and irresistible impulse or paroxysm. In coming to that conclusion, it does not appear that they were guided by the knowledge test; and, upon their testimony, it would seem, that, in their opinion, knowledge was not the test. The court instructed the jury that knowledge was the test. In the application of that test to the evidence, the court adopted the language of the experts in relation to delusion and impulse, intending apparently to use delusion and impulse, not as a substitute for the knowledge test, or as a modification of it, but as an illustration of a process by which the knowledge of the wrongfulness of the act might be suddenly removed. The jury were unable to understand the law in the form in which it was stated in the instructions, and, after considering the question of sanity some time, they came into court, and asked what degree of insanity would amount to a justification: but the court added nothing to the instructions previously given.[4]

"It is the common practice for experts, under the oath of a witness, to inform the jury, in substance, that knowledge is not the test, and for the judge, not under the oath of a witness, to inform the jury that knowledge is the test. And the situation is still more impressive, when the judge is forced by an impulse of humanity, as he often is, to substantially advise the jury to acquit the accused on the testimony of the experts, in violation of the test asserted by himself.

[1] 1 C. & K. 131.

[2] Freeman *v.* People, 4 Denio, 38.

[3] Report of the trial of People *v.* Huntington, 257, 260, 261, 263, 268, 269, 270, 271, 447.

[4] Report of the trial of Com. *v.* Rogers, 149-166, 276-278, 281; *s. c.*, 7 Metc. 500.

Mr. Justice Doe's Opinion.

The predicament is one which cannot be prolonged after it is realized. If the tests of insanity are matters of law, the practice of allowing experts to testify what they are, should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified to testify as an expert.

"To say that the expert testifies to the tests of mental disease as a fact, and the judge declares the test of criminal responsibility as a rule of law, is only to state the dilemma in another form. For, if the alleged act of a defendant, was the act of his mental disease, it was not, in law, his act, and he is no more responsible for it than he would be if it had been the act of his involuntary intoxication, or of any other person using the defendant's hand against his utmost resistance; if the defendant's knowledge is the test of responsibility in one of these cases, it is the test in all of them. If he does know the act to be wrong, he is equally irresponsible whether his will is overcome, and his hand used, by the irresistible power of his own mental disease, or by the irresistible power of another person. When disease is propelling uncontrollable power, the man is as innocent as the weapon, — the mental and moral elements are as guiltless as the material. If his mental, moral, and bodily strength is subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease, or by another man, or a brute or any physical force of art or nature set in operation without any fault on his part. If a man, knowing the difference between right and wrong, but deprived, by either of those agencies, of the power to choose between them, is punished, he is punished for his inability to make the choice — is punished for incapacity; and that is the very thing for which the law says he shall not be punished. He might as well be punished for an incapacity to distinguish right from wrong, as for an incapacity to resist a mental disease which forces upon him its choice of the wrong. Whether it is a possible condition in nature, for a man knowing the wrongfulness of an act, to be rendered, by mental disease, incapable of choosing not to do it and of not doing it, — and whether a defendant, in a particular instance, has been thus incapacitated, — are obviously questions of fact. But, whether they are questions of fact or of law, when an expert testifies that there may be such a condition, and, that, upon personal examination, he thinks the defendant is or was in such a condition, that his disease has overcome or suspended, or temporarily or permanently obliterated his capacity of choosing between a known right and a known wrong, and the judge says that knowledge is the test of capacity, the judge flatly contradicts the expert. Either the expert testifies to law, or the judge testifies to fact.

"From this dilemma, the authorities afford no escape.

"The whole difficulty is, that courts have undertaken to declare that to be law which is a matter of fact. The principles of the law were maintained at the trial of the present case, when, experts having testified as usual that neither knowledge nor delusion is the test, the court instructed the jury that all tests of mental disease are purely matters of fact, and that if the homicide was the offspring or product of mental disease in the defendant, he was not guilty by reason of insanity."

One year later, in a very exhaustive judgment, the doctrine of this case was affirmed.[1]

[1] State *v.* Jones, 50 N. H. 369; 9 Am. Dec. 242 (1871).

Notes.

The New Hampshire doctrine is followed in Illinois [1] and Indiana.[2]

§ 28. **Insane Delusions.** — A person acting under an insane delusion is protected in case he would have been justified in his act had that insane delusion been true.[3] This was clearly laid down by the judges in their answers in *McNaghten's Case*.[4] Judge Cox's learned charge in *Guiteau's Case* has "gone a great way to finally establishing the rule that delusion, to constitute a defence, must be objective as distinguished from subjective. They must be delusions of the senses, or such as relate to facts or objects, not mere wrong notions or impressions; and the aberration in such case must be mental, not moral, and must affect the intellect of the individual. It is not enough that they show a diseased or depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong continuing to exist, although it may be in a perverted condition. To enable them to be set up as a defence to an indictment for a crime, they must go to such crime objectively; *i.e.*, they must involve an honest mistake as to the object at which the crime is directed.[5] The distinction before us may be illustrated by *Levet's Case*, which has never been questioned, and which has been sanctioned by the most rigid of the common-law jurists, where it was held a sufficient defence to an indictment for murder, that the mortal blow was struck by the defendant under the delusion that the deceased was a robber, who had entered the house.[6] It would have been otherwise had the delusion been that the victim was a political opponent whom it was politic to remove. To this effect is the opinion of Chief Justice Shaw, in 1844, in *Com.* v. *Rogers*:[7] 'Monomania,' said this eminent judge, 'may operate as an excuse for criminal act,' when 'the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. *A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature.*" To make such a delusion a defence, however, there must be no consciousness of the wrongfulness of the act to which the delusion prompts. If there be reason enough to dispel the delusion; if the defendant obstinately refuses, under such circumstances, to listen to arguments by which the delusion could be dispelled; if, on the contrary, he cherishes such delusion, and makes it the pretext of wrongs to others, — then he is responsible for such wrong. Thus, in a case of homicide in Delaware, in 1851, the deceased being the defendant's wife, the defence was delusion consisting in a belief that his wife was untrue to him, that his children were begotten by his wife's intercourse with another, and that sundry conjurations were being practised upon him, and the evidence showed that he was a shrewd and wealthy business man.

[1] Hopps *v.* People, 31 Ill. 385.

[2] Bradley *v.* State, 31 Ind. 492 (1869); Stevens *v.* State, 31 Ind. 483 (1869).

[3] Fain *v.* Com. 78 Ky. 183 (1879); Com. *v.* Rogers, 7 Metc. 500 (1844); Cunningham *v.* State, 56 Miss. 269 (1879); State *v.* Mewherter, 46 Iowa, 88 (1877); Boswell *v.* State, 63 Ala. 307 (1876).

[4] *Ante*, p. 150.

[5] See R. *v.* Burton, 3 F. & F. 772; R. *v.* Townley, 3 F. & F. 839.

[6] Levet's Case, Cro. Car. 438.

[7] 7 Metc. 500.

United States *v.* Lawrence.

The court charged the jury that if a person, otherwise rational, commit a homicide, though affected by delusions on subjects with which the act is connected, he is criminally responsible, if he were capable of the perception of consciousness of right and wrong as applied to the act, and had the ability through that consciousness to choose by an effort of the will whether he would do the deed. And this is good law.' '' [2]

In *United States* v. *Lawrence*,[3] the prisoner was indicted for shooting at General Jackson, then President of the United States, with a pistol with intent to kill. On the trial the fact that the prisoner was at the time under a mental delusion, supposing himself to be King of England, and of the United States, as an appendage to England, and that President Jackson stood in his way in the enjoyment of his right, was proved. The jury found him not guilty, by reason of insanity, and he was remanded to gaol by the court, as a person too dangerous to be at large.

[1] State *v.* Windsor, 5 Harr. 512.

[2] From Dr. Wharton's note in the Federal Reporter to the report of Guiteau's Case.

[3] 4 Cranch C. C. 5 (1835).

CHAPTER II.

THE BURDEN OF PROOF OF INSANITY.

BURDEN OF PROOF ON PRISONER — TEST OF INSANITY.

STATE *v.* PRATT.

[1 Houst. Cr. Cas. 249.]

In the Delaware Court of Oyer and Terminer, May Term, 1867.

STATE *v.* DANBY.

[*Id.* 167.]

In the Delaware Court of Oyer and Terminer, November, 1864.

Before Hon. EDWARD W. GILPIN, C. J.

1. **Particular Right and Wrong Test.** — The test of the responsibility or irresponsibility of a person for a criminal act done while in an alleged state of insanity is, was he at the time and as touching that act sane or insane? If he had sufficient mental capacity at the time of committing it, to distinguish between the right and wrong of that particular act, and to know that it was wrong, he is criminally responsible for it.

2. **Burden of Proof.** — The prisoner must prove the plea of insanity beyond a reasonable doubt; otherwise the presumption of sanity will remain in full force.

The prisoner, Joseph W. Pratt, was indicted for the murder, in Wilmington, Delaware, on April 29, 1867, of Joshua Pusey Smith, whom he suspected of criminal intimacy with his wife. The defence was insanity.

Moore, Attorney-General, and *Higgins*, for the State.

T. F. Bayard (*Wayne MacVeigh* with him), for the prisoner.

On the trial, after charging the jury upon the law, where a man finds another in the act of adultery with his wife, and kills him, GILPIN, C. J., said: —

The other ground of defence relied on by the prisoner, is insanity; and, therefore, it is proper I should also explain to you the law on this subject. Insanity may be either total or partial in its character. So also, it may be total and permanent; or although total in its nature, it may be but temporary in point of duration. Of course, a person totally and permanently insane, is incapable of committing any crime whatso-

ever; because the will and judgment of the man, being overborne and obliterated by the malady, his act cannot justly be considered the voluntary act of a free agent, but rather the mere act of the body without the consent of a directing or controlling mind. So, too, in regard to total, but temporary insanity. If the insanity be such, for the time being, as to utterly overwhelm the reason and conscience, the will and judgment, the accused cannot be justly held criminally responsible for acts done during the continuance of such temporary insanity.

As I have just intimated, there may exist a state of mind called partial insanity, sometimes denominated in the law, monomania, or insane delusion, which delusion consists in a fixed belief in the existence of certain things purely imaginary, as real facts, when, in truth, they have no real existence whatever. Insane delusion is that state or condition of the mind which gives to airy nothing a local habitation and a name. But in this case, it is insisted that the cause was not imaginary, but that it was real and substantial.

Now, whether partial insanity is of such a character as to exempt a person from criminal responsibility for wrongful acts, is always a question of vital importance; and its solution must necessarily depend upon the nature and intensity of the delusion, the force and degree of its controlling power over the will and conscience, and especially, and above all, whether the act which is charged as constituting the crime, was committed under the direct and irresistible influence of such insanity. Partial insanity, even when it is clearly shown to exist, is not always or necessarily an excuse for crime. There are many varying shades of it, many degrees of it. It may becloud the intellect but a very little, or it may becloud it utterly, in respect to a particular subject. In order to exempt a person from responsibility for a criminal act, the controlling power of the insanity, whether arising from delusion or from a real cause, must be so intense and overwhelming as utterly to deprive the party of his reason in regard to the act charged as criminal. The inquiry is always, in a case like this, narrowed down to the plain sharp question of the insanity of the prisoner at the time, and in respect of the criminal act charged against him. Was he at the time, and as touching that act, sane or insane? The insanity must have specific reference to the particular act charged as constituting his offence. The question is not whether he was insane on any subject whatever, but whether he was insane in respect to the particular act charged against him. If it were otherwise, there would be a total exemption from punishment for crime committed under any species of partial insanity, notwithstanding the fact that such insanity might not, in any degree, have impaired the

mental capacity of the accused, to distinguish between right and wrong in respect to the particular act charged as constituting his crime. If the prisoner had sufficient capacity at the time to distinguish between the right and wrong of that particular act, if he had sufficient capacity to know that that act was wrong, he is responsible for it, and for all its fatal consequences.

If, however, you shall be satisfied from the evidence before you that at the time when the mortal blow was given, the prisoner had not a sufficient degree of reason to enable him to distinguish between the right and wrong of that act; if, in other words, his reason was at the time so overborne or obliterated as to render him incapable of knowing or comprehending that that act was wrong, he is not criminally responsible for it, however fatal the result may have been. But if at the time the act was committed, he possessed sufficient mental capacity to comprehend the nature or character of the act and its probable consequence; or if he understood the nature of the act he was doing, and had reason sufficient to know that it was wrong to do it, he is legally and justly responsible for such act, notwithstanding he may at the time have been laboring in some degree under partial insanity. For after all has been said that can be said in elucidation of the subject, we are compelled to return to the plain and simple question whether the prisoner, at the time he committed the act, had sufficient mental capacity to distinguish between right and wrong in respect to that act. If he had, he is responsible; if he had not, he is not responsible. Now, in this case, the criminal act charged against the prisoner is the felonious killing of Joshua Pusey Smith with express malice aforethought, to which charge, as we have seen, he sets up the defence of insanity, and claims at your hands an acquittal on this ground. If he has sustained this plea by satisfactory evidence, he should be acquitted; if he has failed to establish the fact of insanity by satisfactory proof, he ought not to be permitted to escape punishment on this ground; and if he killed the deceased, he should be convicted. And now, gentlemen, before taking leave altogether of the question of insanity, it is my further duty to state to you, at least briefly, certain primary and cardinal rules or tests, by which, under your oaths, you must be guided in order to arrive at a proper solution of this question.

The first great rule on this subject is this: Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to the satisfaction of the jury. This rule is fundamental, and of universal application; it meets you at the very commencement of your inquiries, and you must carry

it with you in all your deliberations. You must, therefore, gentlemen, fully understand and remember throughout all your investigations, that the prisoner is to be considered by you, to be a sane man, and capable of committing crime, until his insanity shall be clearly or satisfactorily established by the evidence; on this ground you must take your stand, firmly and squarely, if you expect ever to arrive at a just or proper decision of this case.

In the next place, insanity being matter of defence, the second great rule is, that the burden of showing it, lies on the prisoner. It must be proved as any other fact to the satisfaction of the jury. If the proof does not arise out of the evidence offered by the State, the prisoner must establish the fact of insanity by distinct evidence, and prove it beyond a reasonable doubt; otherwise the presumption of sanity or soundness of mind will remain unrebutted and in full force. Exhibitions of mere eccentricity of mind, manner or conduct, mere passionate jealousy, or vehement suspicion of adultery, however well founded, or showing that the prisoner was at times afflicted with a sort of mental strabismus, or squinting of the mind, will not be sufficient to excuse him from the consequences of his criminal acts. The law requires more than this; the proof must go beyond this; the proof must establish the fact, that the prisoner, at the time he committed the act of killing, was incapable of distinguishing between right and wrong in respect to that fatal act.

Having thus stated to you the general law of felonious homicide, as well as the rules and principles of law applicable to the grounds of defence relied on by the prisoner, I now reverse the order in which I have presented these several matters, and charge you in conclusion as follows: —

First. If you shall be satisfied from the evidence, beyond a reasonable doubt, that the prisoner, at the time he struck the mortal blow was laboring under such a disease of the mind as to render him for the time being incapable of distinguishing between the right and wrong of that act, you should acquit him on the ground of insanity, and should so return your verdict.

Secondly. If, however, you shall not be satisfied from the evidence that he was, at the time of committing the act, an insane man, then it will be your duty to consider, whether he found the deceased in the act of adultery with his wife and then and there, in the first transport of passion, instantly inflicted the mortal blow. If you shall be satisfied from the evidence that the prisoner killed the deceased, Joshua P. Smith, in such a position, and under such circumstances, then he is guilty of

manslaughter under our statute, and your verdict should be guilty of manslaughter in killing the said Joshua P. Smith, whilst in the act of adultery with the prisoner's wife.

Thirdly. But if you shall not be satisfied from the evidence that the prisoner found the deceased in the act of adultery with his wife, and then and there, in the first transport of passion, instantly struck the mortal blow, but that, on the contrary, he killed the deceased on the ground of previous acts of adultery, then we say to you, that he is guilty of murder, either in the first or second degree, and in which degree you must determine from the evidence.

And in order to aid you in passing on this question, I repeat to you that wherever there exists a design or intention deliberately formed in the mind of the accused to take life, and death ensues from his act, it is murder with express malice, and therefore, murder in the first degree. But where there exists no design or intention to take life, but death results from an unlawful act of violence on the part of the accused, and in the absence of adequate or sufficient provocation, it is murder by or with implied malice, and consequently murder in the second degree.

Verdict — "*Not guilty by reason of insanity.*"

STATE *v.* DANBY.[1]

The prisoner, John Danby, was indicted for murder in the first degree, in killing John Barnett, *alias* John Burnett, in Wilmington, Delaware, on October 8, 1864. The defence was insanity.

Moore, Attorney-General for the State; *D. M. Bates* (*Gordon* with him), for the prisoner.

The Court, GILPIN, C. J., charged the jury.

After recapitulating the facts proved and not disputed in the case, and remarking that if there were no other matters to be noticed in the case, they would constitute murder with express malice aforethought, and of the first degree under the statute; but, as this was denied upon the ground of insanity on the part of the prisoner, he would now proceed to speak of that defence. In former times, indeed, as late as the early part of the last century, it was considered by the courts that insanity, in order to protect a person from responsibility for crime, must be total in its character, either manifesting itself in wild, ungovernable, irrational and incongruous actions, or in stupid and passive imbecility. In

[1] See *ante*, p. 327.

other words, it was held that to be insane, so as to protect the party, he must have no more reason than a brute, an infant, or a wild beast. It does not seem to have entered into the conceptions of men at that early day that a person might generally behave in a perfectly sensible manner and yet be insane upon some one or more subjects. They do not seem to have been able to comprehend that he might be capable of reasoning well or learnedly on most subjects, whilst in respect to some one subject he might be utterly deranged. Such was the old rule of law — a rule severe and cruel in the extreme. And I am happy to say to you, that, in consequence of the improvements which have since been made in medical science and jurisprudence, more enlightened views as to the effect of disease upon the human mind have, at length, prevailed upon men; and that under the influence of a clearer, a wiser, and more benevolent appreciation of Christian obligation, the sharp severity and inhumanity of this ancient doctrine has gradually given way, and that now, at this day, the plea of insanity stands upon the solid ground of humanity, reason, and justice.

A man may be totally and permanently insane, and, in such case, all his acts are excused — he is incapable of committing crime. This is called, generally, insanity. Or he may be totally, but temporarily, insane — that is, altogether insane on all subjects for a time, and insane to such a high degree that, for the time being, the reason, the conscience, the will, and judgment are utterly overborne, overwhelmed, and obliterated, so that an act done during the continuance of the malady cannot be said to be a voluntary act, or the act of a free agent, but the mere act of the body without the consent or concurrence of a controlling mind, being the result rather of an irresistible and uncontrollable impulse. For acts done during the existence of such a state of insanity the accused is not criminally responsible. Or a man may be but partially insane, and where this is the case, it is called monomania, or insane delusion, and this insane delusion consists in a belief of the existence of certain imaginary things as facts, but which are not facts, and, therefore, have no existence, and which no reasonable or rational person could or would believe. Now, whether such partial insanity can be held sufficient to exempt a person from responsibility for criminal acts will depend upon the peculiar circumstances of each particular case. The nature, the force, and effect of the delusion, the degree of its intensity and controlling power, and whether the act done was committed under the direct and irresistible influence of such insane delusion, are matters of vital importance in determining the question of responsibility. It is not every wild and frantic humor of a man, or strange and

unaccountable language or conduct that will show him to be laboring under insanity. The law requires something more than this. Nor is partial insanity or insane delusion always, or necessarily, an excuse for crime. On the contrary, it can only be so considered where it utterly deprives the party of his reason in regard to the act charged as criminal.

The question is not whether he was insane upon any subject whatever but whether he was insane in respect to the particular act alleged as constituting his offence. If it were otherwise, there would be an absolute immunity from punishment for crime committed under any species of insane delusion whatever, although such insane delusion might not in any degree becloud or obliterate the mental capacity of the accused to distinguish between right and wrong in regard to the particular criminal act with which he stands charged. If he is capable at the time of distinguishing between the right and wrong of that act, if he knows and understands that that act is wrong, he is responsible. But if he has not, at the time, a sufficient degree of reason to distinguish between the right and wrong of that act, if he does not know and understand that that act is wrong, he is not responsible. And therefore, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, such partial insanity is not sufficient to exempt him from responsibility for crime. This doctrine has been fully and clearly established by numerous well-considered decisions, both in England and in this country. The inquiry, therefore, in such cases, as you must have already perceived, must always be brought down to the simple, but sharp, question of the sanity or insanity of the accused at the time and in respect to the criminal act done by him. In this case the criminal act charged against the prisoner at the bar is the felonious killing of John Barnett with express malice aforethought. To this charge the prisoner sets up the defence that at the time that he did the act he was an insane man, and on this ground he claims an acquittal at your hands..

And now, gentlemen of the jury, having made these few remarks touching the subject of insanity generally, and in explanation of the principles of law involved in the proper consideration of the question at issue, I now proceed to state to you briefly those rules and tests by the light of which, it is your duty as good citizens and sworn jurors to be guided in investigating and considering the evidence before you, and in making up the verdict which you shall feel yourselves constrained to return as the conscientious result of your deliberations. These rules

are but few in number, and are as plain and simple as the nature of the subject will admit of. They, in fact, substantially embody all the learning and all the law on this subject. Whatever difficulty or embarrassment you may encounter in your investigations will, I am sure, mainly arise in applying the facts before you to the law of the case. I do not know that you will have any difficulty of the kind, but if you should, I feel very confident that a careful examination and consideration of the testimony, coupled with an honest and earnest purpose of mind and heart to arrive at the truth, will lead you to a just and satisfactory conclusion of your labors. The first rule, gentlemen, is this: Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury. This rule is primary and fundamental. It meets and challenges your attention at the very threshold of your inquiries. The prisoner at the bar, therefore, is to be considered by you to be a sane man and capable of committing crimes until the contrary be clearly and satisfactorily established by the evidence. You will, therefore, gentlemen, take this rule with you as the very ground upon which you must stand in prosecuting your inquiries upon this question. Secondly, insanity being matter of defence, the *onus* or burden of showing or proving it lies on the prisoner. It is true such proof may sometimes arise out of the evidence offered by the State, but if it does not so arise it must be made out from distinct evidence offered on the part of the prisoner; in either case it must be clearly sufficient to prove the fact of insanity, otherwise the presumption of sanity, or soundness of mind, will stand unrebutted and in full force. But to establish a defence on this ground, it must be clearly proved that at the time of committing the act of killing, the prisoner was laboring under such a defect of reason from disease of mind, as not to know the nature and quality of the act he was then doing, or if he did know it, that he did not know he was doing what was wrong.

If, therefore, this condition of insanity has been clearly and satisfactorily established by the evidence, you ought to acquit the prisoner. If, on the contrary, he has failed to establish clearly and satisfactorily such a condition of insanity as I have described, it will be your duty, however painful, to return a verdict of guilty in manner and form as he stands indicted. I say guilty in manner and form as he stands indicted, because if guilty at all, he is guilty of murder in the first degree.

You thus perceive, gentlemen, that the prisoner's capacity or want of capacity at the time to comprehend the difference between right and wrong in respect to the very act with which he stands charged, is the

test by which must be determined the question of his criminal responsibility.

I have now finished what I had to say on the law of this case. It is the duty of the court to explain the law to the jury. I have endeavored to discharge this duty according to my best judgment and most conscientious convictions. But your duty, gentlemen, which commenced with mine, is not yet ended; the most important part of this duty yet remains to be done; and I pray God that he will not only impress your hearts with a due sense of the solemn responsibility which now rests upon you, but that he will also be pleased to enlighten your minds by imparting to you some portion of his own great wisdom, so that you may be enabled to arrive at the very truth and right of this cause, and a true verdict give according to the evidence.

Verdict — Not guilty by reason of insanity.

BURDEN OF PROOF ON PRISONER — TEST — CONTINUANCE OF INSANITY — DECLARATIONS OF DECEASED.

STATE *v.* SPENCER.

[21 N. J. (L.) 196.]

In the Supreme Court of New Jersey, 1846.

Before HORNBLOWER, J.

1. **The Test of Insanity** is whether the accused at the time of the commission of the crime was conscious he was doing what he ought not to do.
2. **The Burden of Proof** is on the accused.
3. **The Continuance of Insanity** is presumed unless a lucid interval is shown.
4. **Declarations** of the deceased are no evidence of the insanity of the prisoner.

HORNBLOWER, J., charging the jury.

I now come to that part of the cause which constitutes the main ground of defence in this case, namely: Insanity. This question in the nature of things, is the first one for you to consider. For it is of no consequence what circumstances attended the homicide, or in what manner the crime is varied in the eye of the law by those circumstances, if the prisoner was insane at the time of committing the deed. If he was insane, he is not amenable to the law at all for what he did. A person who is out of his mind, and does not know at the time that what

he is doing is wrong, is not accountable for the acts committed by him while in that state. If he commit a homicide while in that state, it is not necessary to look into the law of homicide at all to ascertain the distinctions which the law makes between different homicides; for such a person is not under the law — he is not amenable to it. The law is all to be set out of the question as to him. He is, in one sense, an outlaw, or rather, he is out of the law, and ought to be secluded from society, in order that those who are under the protection of the law, may not be injured by him.

Was then the prisoner at the bar insane at the time of committing the homicide?

It is difficult to define, in set terms, what insanity is. We all have a notion of what it is, and there is a great variety of phrases by which we are used to designate it. We say of a man who is insane, and has committed some atrocious act while in that state, "he was out of his head," "he had not his senses at the time," "his mind was disordered," "he was crazy when he did it," "he did not know at the time what he was about," and other language of similiar import. The simple question for you to decide, gentlemen, is, "Whether the accused at the time of doing the act was conscious that it was an act which he ought not to do?" If he was conscious of this, he cannot be excused on the score of insanity — he is then amenable to the law, and in that case, if such is your opinion, from the evidence of the case, you will have to go on to the consideration of the circumstances attending the act, in order to distinguish to what kind of homicide it belongs according to the law of the land.

But if it is your opinion that at the time of committing the act, he was unconscious that he ought not to do it, or in other words, incapable of distinguishing right from wrong, in a moral point of view, then you have nothing further to do, but render a verdict of acquittal on the score of insanity.

And here I am not sure but I might safely leave this branch of the subject in your hands without further comment, for I fear that further remark might tend rather to confuse, than to assist you. But probably counsel on both sides expect, and public justice may require, that I should lay down to you what the law is as to what amounts to proof of insanity, and as to the degree of weight which different kinds of proof should have.

I will remark, then, in the first place, that the law presumes a man sane until the contrary is proved. Hence, it has been repeatedly decided that the evidence of the prisoner's insanity at the time of the act ought to be clear and satisfactory. If the evidence leaves it only a doubtful

question, the presumption of the law turns the scale in favor of the sanity of the prisoner. In such cases the law holds the prisoner responsible for his actions.

If it were doubtful whether the prisoner committed the act, then the jury ought to find in his favor; for when the jury find a reasonable ground for doubt whether the prisoner committed the homicide, they ought to acquit. Then the presumption of law is in favor of the innocence of the party; every man is presumed to be innocent until he is proved guilty.

But when it is admitted, or clearly proved that he committed the act, but it is insisted that he was insane at the time, and the evidence leaves the question of insanity in doubt; then the jury ought to find against him. For there the other presumption arises, namely, that every man is presumed sane until the contrary is clearly proved.

I do not mean to say the jury are to consider him sane, if there is the least shadow of doubt on the subject, any more than I would say they must acquit a man where there is the least shadow of doubt as to his having committed the act. What I mean is, that when the evidence of sanity on the one side, and of insanity on the other, leaves the scale in equal balance, or so nearly poised that the jury have a reasonable doubt of his insanity, then a man is to be considered sane and responsible for what he does. But if the probability of his being insane at the time is, from the evidence in the case, very strong, and there is but a slight doubt of it, then the jury would have a right, and ought to say, that the evidence of his insanity was clear.

The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be in order to find a sane man guilty.

In the second place, proof that a man has at some former period of his life been afflicted with such insanity as would render him an unaccountable being, and exonerate him from punishment, is not sufficient, if it be also proven, or comes out in the evidence that he has at any time since been so far restored to his right mind as to be capable of moral action and of discerning between right and wrong. Otherwise, a man who had once been out of his right mind, might ever afterwards commit any crimes he chose without being held responsible for it. If it were true, that insanity never left a man, after once clouding his mind, then it would be enough to exculpate him to prove that he had once been insane. But it often occurs that men have turns, or "spells" of insanity, and then enjoy intervals of entire soundness of mind. Now

although they would be excusable for what they did in the paroxysm of madness, they are by no means excusable for what they do when they have their senses. The question for you to determine is, not whether the prisoner was ever insane in the former part of his life; but whether he was insane at the time he committed the deed for which he is now on trial. His having been insane once, or several times before, may render it more probable that he was insane at the time of the homicide, if there is any direct proof that he was insane at the time. But standing by itself it proves nothing where the State shows a subsequent return to reason. Evidence of former attacks of insanity amounts to about this: It does not show that the prisoner was insane at the time of the homicide; but if there is any independent evidence that he was so, the former insanity increases the probability. The same remarks may be made with regard to the evidence of insanity in his family. Standing alone, it amounts to nothing. It is no evidence that the prisoner was insane at the time of the homicide. But if there is some independent evidence that he was insane at the time of the homicide, it increases the probability that he may have been. But, standing alone, it is the weakest kind of evidence, and but little consideration ought to be given to it. It is undoubtedly true that some families are more subject to insanity than others. But that is no reason why the sane members of the family should be free from responsibility for their own misdeeds. Nor is it any very strong evidence that the members of the family are tainted with the like disorder. I should feel hurt to suppose that my neighbors entertained a suspicion that my mind was disordered, merely because I had an unfortunate father or brother who was subject to turns of insanity. So feeble, indeed, is the influence which testimony of this kind ought to have, that many respectable jurists decide against its admissibility at all. But at all events, it can only have the effect of adding to the possibility that the prisoner may have been insane, when he committed the homicide; standing alone, it is no proof whatever that he was. I again repeat what you are always to bear in mind, that this ground of defence which we have been considering can be of no avail to the prisoner, unless from the evidence you are convinced beyond a reasonable doubt that the prisoner was insane at the time of the homicide.

In the third place, as to the degree of insanity under which the prisoner must be proven to have been laboring at the time of the homicide, in order to his exculpation. If you are satisfied beyond a reasonable doubt that he was insane, the next question for you to consider will be, whether his insanity was such as to render him incapable of committing

Insane Delusions.

crime. For there are many kinds of insanity, and there are all degrees of insanity; and it is not every kind, nor every degree that will render a man irresponsible for acts of atrocity. Almost all the books declare that "in criminal cases, in order to absolve the party from guilt a higher degree of insanity must be shown than would be sufficient to discharge him from the obligations of his contracts." [1] "In cases of atrocity, the relation between the disease and the act should be apparent." [2] As I said before, if the prisoner at the time of committing the act was conscious that he ought not to do it, the law holds him responsible, and he cannot be exculpated on the ground of insanity, although on some subjects he may have been insane at the time. There is many a man whose mind is not right on some subjects, who is nevertheless perfectly himself on all other subjects, and who knows as well as you or I what is right and wrong; and whether or not he would be doing right or wrong in lifting up a murderous hand against his neighbor. Several men of this kind have come under my own observation. One man will think himself made of glass, another will imagine himself to be a monarch or a prophet, or one of the heroes of history, another will be wild in some of his religious views, and yet each and all will know perfectly well that it would be wrong to kill a man out of revenge or provocation. Whatever the insanity of a person may amount to, if he is conscious at the time of committing an atrocious act, and has reason enough to know that he ought not to do it, he is guilty in the eye of the law. This was so expressly decided by all the judges of England, except one, in a late case in that country.[3] The question was put to them, "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons, as, for instance, when at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?" To this question the judges answered as follows: "Assuming that the question is confined to those persons who labor under such partial delusion only, and are not in other respects insane, we are of opinion that notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to

[1] 2 Greenl. on Ev., p. 296.
[2] Ld. Erskine in Hadfield's Case, 1800; Cooper's Tracts on Med. Juris., p. 318.
[3] McNaghten's Case, 2 Greenl. on Ev. 301, note.

the nature of the crime committed, if he knew at the time of committing such crime, that he was acting contrary to law." In the same case the judges also expressed themselves of opinion, that where a man commits an act, criminal in its nature, who labors under any particular delusion, as that every dog he sees in the street is mad, or any other particular delusion, his act as to criminality is to be judged of as if the thing he imagines to be true were really so. If a man is under the delusion that I am going to take his life, he would be exculpated in taking my life. But if he acted only under the delusion that I was going to carry off his property or pick his pocket, he would not be exculpated for taking my life, for those facts, if true, would be no justification of his act, unless he was also under the insane delusion that he had a right to take my life for such an act. So you see, gentlemen, that although a man may be partially insane, the law does not exculpate him any further than the extent of his insanity. And the whole matter may be summed up in this: If the evidence makes it clear to your minds, beyond a reasonable doubt, that the prisoner, at the time of the act, was unconscious that he ought not to do it, he is to be acquitted; but if not, then he cannot be acquitted on the ground of insanity, whether he was partially insane or not.

It may be thought by some persons that this is a hard law, from the possibility that some, who ought not to be held accountable for what they do, may be involved in the punishment due only to sane and conscious criminals. But such persons should reflect on the object of punishment. The object of legal punishment is principally to prevent crime and preserve the peace of society. This is to be effected so far as possible without injustice to any. But human laws are imperfect — human knowledge is imperfect; and if the law is to be administered upon such rules only as would render it an impossibility that any one should be improperly condemned, or that error or injustice should ever be done, then the administration of justice would be so impracticable that our courts, both civil and criminal, might as well be closed. Criminals would constantly escape merited punishment, and the injured parties, or the friends of the murdered, seeing the inefficiency of the law, would take the law into their own hands. This state of things has been exemplified to a considerable degree already in our own country, and I pray I may never see the day when it shall be exemplified in this State. We must administer the laws with firmness, however much we may in our hearts pity the culprit; and we are bound to be jealous of those defences, which call for the exculpation of the offender, when the criminal act is clearly proved upon him. Otherwise, we shall have no security

Passion is Not Insanity.

for our lives, or the lives of our families. These considerations lie at the foundation of the law of insanity, as I have expounded it to you, gentlemen, in relation to excusing a man from the consequences of his own atrocious acts. The law is stringent and suspicious, and it has to be so. If it were not so, we should be overrun with crimes and atrocities committed under the plea of insanity, or of some insane delusion. This is all that is meant when it is said that insanity is a defence not favored in the law. It is not intended, and God and humanity forbid it ever should be, that courts should frown upon insanity as a defence, or that if a jury are satisfied beyond a reasonable doubt that the act complained of was committed when the accused was insane, they should for one moment hesitate in pronouncing a verdict of acquittal, but is intended that they should see to it, that the defence is fully sustained by the evidence.

As germane to these remarks, it is also my duty to remind you, gentleman, that outbursts of ungovernable passion do not excuse a man for any acts of atrocity he may commit under their influence; on the contrary they rather aggravate his guilt. Men are bound to control their passions; and if they suffer them to run away with their reason and senses, they ought to suffer for it. One of the very objects of having laws to govern us, is to protect us from the fury of ungovernable passion — whether that be anger, hate, envy, jealousy, or any other of the malignant passions, a man is equally culpable for suffering himself to be goaded on by any of them to the commission of crimes at which humanity shudders. There are cases, it is true, where long and frequent indulgence in violent passions has destroyed the balance of the mental powers, completely dethroned the reason, and terminated in confirmed insanity. Then, of course, the man is no longer accountable. He is then only fit for the asylum or the mad-house.

Fourthly. Having enlarged thus much on this difficult subject, it seems proper that I should add a few observations on the nature and weight of the evidence which is usually adduced to prove insanity. The man who commits a heinous offence against God and man, is undoubtedly very unwise. The Sacred Volume calls him a fool; and in one sense, he is a madman. He madly gives way to the instigations of the evil one, or of his own evil heart. But this is not the kind of madness that is to excuse a man from the punishment due to his crimes. If it were, there would be no such thing as crime, every act of crime would only be proof of the insanity of the perpetrator; and the greater the crime, the stronger the proof. When people say a man must have been crazy to have committed such an act, they must be understood as

speaking figuratively. It is too unhappily true, that man, conscious, sensible, reasoning man, is often found prostituting his nature so low, as to be guilty of crimes of the deepest dye.

I cannot yield to the doctrine which has been suggested, founded upon what is called moral insanity. Every man, however learned and intellectual, who, regardless of the laws of God and man, is guilty of murder, or other high and disgraceful crimes, is most emphatically morally insane. Such doctrine would inevitably lead to the most pernicious consequences, and it would very soon come to be a question for the jury, whether the enormity of the act was not in itself sufficient evidence of moral insanity, and then, the more horrible the act, the greater would be the evidence of such insanity. On the contrary, in my judgment, the true question to be put to the jury is, whether the prisoner was insane at the time of committing the act; and in answer to that question, there is little danger of a jury's giving a negative answer, and convicting a prisoner, who is proved to be insane on the subject-matter relating to or connected with the criminal act, or proved to be so far and so generally deranged as to render it difficult, or almost impossible to discriminate between his sane or his insane acts.

I mean no disrespect to the learned writers on medical jurisprudence or other distinguished men of the medical profession. On the contrary, I consider the administrators of criminal law greatly indebted to them for the results of their valuable experience, and professional discussions on the subject of insanity; and I believe those judges who carefully study the medical writers and pay the most respectful, but discriminating attention to their scientific researches on the subject, will seldom, if ever, submit a case to a jury in such a way as to hazard the conviction of a deranged man.

These remarks, and all I have said, calculated to caution you against confounding mere outbreaks of passion, or mere acts of depravity, with that sort of insanity which excuses from punishment, you are not to regard as the expression of an opinion on the part of the court, that the act of homicide committed by the prisoner, was an act of criminal passion or revenge, or that it was an act of insanity. This is the very question you are to decide, and which it is my desire to submit to your decision uninfluenced by any opinion of mine.

The evidence of insanity upon which a jury should rest, will vary with every case; but generally speaking, the evidence of those who saw the person accused every day immediately previous to the commission of the act, who were intimate with him, talked with him, ate and drank with him, and who testify to his acts, his words, his conversation, his looks,

his whole deportment, is that on which a jury ought to place the greatest reliance, the evidence of competent medical men, who have had frequent opportunities of observing him about the time in question, especially if they have been in attendance upon, or have visited him with a view to probe the state of his mind, is entitled to very great consideration. It has always been held that medical men may give their opinions in evidence. These are always valuable, and more or less so according to their opportunities of observing the accused at, or about the time of the act complained of. But if they have not been in the habit of seeing him, if they were not familiar with his habits and symptoms, at or about the time in question, their opinions in relation to the particular individual, are of no more weight, and in my judgment, of not so much weight, as those of unprofessional persons of good sense, who have had ample opportunities for observation.

One strong circumstance generally attending the commission of acts of violence by persons who are really insane is, the absence of any apparent motive. It is not unfrequently their best friends, those who are most kind and attentive to them, who are the victims of their unconscious and destructive violence. I do not say that this absence of apparent motive invariably exists in the cases of homicide and other atrocious acts committed by insane persons; but I say that it is generally the case. Hence, if we witness the perpetration of such an act without any apparent motive or object, but against every motive which would appear to be naturally influential with the person committing it, we are at once awake to the inquiry, whether he was in his sound mind, and if we can lay hold of any sufficient evidence that he was not so, this absence of apparent motive confirms us in the belief that he was insane.

But where the evidence of the case shows that there were strong motives of anger, jealousy, or hate to actuate the accused, such motives as might naturally induce a man of depraved and wicked heart, and violent and ungovernable passions, to perpetrate the crime of which he stands accused, we cease to look for other causes of the deed committed, and naturally attribute it to those which so glaringly present themselves. We, at once, unless the evidence of his being actually insane is forced upon us, attribute it to his own wicked nature and the unholy indulgence of his ungovernable passions. This process of our minds is natural, and is founded in the truth and reason of things. You ought to inquire, therefore, gentlemen, whether in the case before you, the prisoner at the bar committed the act charged upon him as a crime, in the absence of any such motive as would naturally influence the mind

of a depraved man to the commission of acts of violence. If no such motive existed, that circumstance will add great strength to the proof of his insanity; but if, on the other hand he was assailed by strong motives of revenge, or other passions, you have a right to infer that it was under the influence of these motives that he committed the deed, and not under the influence of insanity, unless the proof of actual insanity at the time is clear and convincing to your minds.

I will take notice of one more consideration which it is proper for the jury to regard in making up their verdict in this case. It is this: It is undoubted law that when a man is proved to have been once insane, the presumption is that he continues so until the contrary is shown. If I have left a relative in England who was then afflicted with insanity, and I have not since heard from him, the presumption is that he is still insane. True, he may have recovered; and since the humane methods with which the disease is now treated have become general in civilized countries, the probability of recovery from mental derangement is greatly increased. Still, the presumption of law remains the same. The presumption is that my afflicted relative is in the same condition he was when I left him. But if I learn that he has recovered, or that he has sane intervals, and is sufficiently restored to attend to his business, then the aspect of things is changed; there is no longer any presumption that he is still insane. So, in the case in hand, if the prisoner has proven that he was once insane, the presumption arises that he is still insane at this moment, unless the contrary be shown. The evidence on this subject is all before you, gentlemen, and the prisoner is himself before you, and if you have no evidence of lucid intervals since the time of the insanity proved, you must, of course, find him still insane, and insane at the time of committing the act in question. But if the prosecution has succeeded in showing that since the period of insanity (if any) proved by the prisoner he has been himself conscious of right and wrong, and every way a responsible man, the presumption of insanity is done away.

This, gentlemen, is all that I deem it my duty to say to you on the question of insanity as a defence. In doing this it has been my object and design to give you, in the abstract and without reference to the evidence and the circumstances of this particular case, the law upon the subject of insanity when set up as a defence, both as respects the extent and character of that sort or degree of insanity which is required to constitute a defence, and of the evidence by which it may be established. And I hope I may not be understood by you as having, by any thing I have said, in the slightest degree indicated any opinion that

Declarations of Deceased Irrelevant.

the prisoner has failed to establish such insanity at the time of committing the homicide, as ought, upon the soundest rules of law and in accordance with the dictates of our common humanity, to exempt him from the penalty due to crime, when committed by rational and accountable beings; nor, on the other hand, is it my intention to express any opinion that the defence has been sustained. The question of the prisoner's sanity or insanity at the time of committing the act charged, is appropriately and exclusively within the province of the jury. It will be sufficient for the court to call the attention of the jury to such evidence on the part of the prisoner as lays any foundation for a belief that he was insane at the time of the homicide. I have said that insanity is not to be inferred, but to be proved. By this, however, I did not mean that such acts and conduct as established insanity can only be proved by witnesses who saw him at or about the time of the commission of the fatal deed. On the contrary, the jury may be convinced that he was then insane and unconscious of doing wrong, from evidence of prior insanity, or strong symptoms of insanity, or of an evident predisposition to it; or from proof of a peculiar temperament of mind, and of nervous excitability in the early and continued history of his life, or in his former partial aberrations of mind upon certain topics, such as temperance, politics, or mesmerism; if they are satisfied that the unhappy circumstances in which he was placed in regard to his wife, the grounds he had for believing her unfaithful, and the cruel treatment he received, or believed he received, from her mother and brother, and the attempt to drive him from her, that Richardson or some one else might occupy his place, had produced such an effect on his already shattered intellect as to dethrone the little remains of reason he possessed, and leave him unconscious of the wickedness of the act he was perpetrating. And this will present to you the true question in the case, which, in the language of Lord Chief Justice Denman, in the case of *Oxford*,[1] is, "whether the evidence given proves a disease in the mind, — as of a person quite incapable of distinguishing right from wrong; whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing; or, in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime."

The expressions of the deceased are irrelevant to the issue in this cause. If she were a party to the suit; if she were the accuser of this

[1] 9 C. & P. 525.

man, and it was a matter entirely between themselves, then her expressions — the words she may have uttered — would be admissible against her. But on this issue, between the State of New Jersey and the prisoner at the bar, what she had said or admitted should have no more weight than what any other person may have said. It has been testified that she declared the prisoner insane. This is no proof that he was so. She may have said this for the sake of her own character and credit, or she may have said it from other interested motives. What she said is not to be the rule to guide us here. Nothing but the proof of what the fact was, can or ought to have any weight with the jury.

The evidence is before you, and it is your peculiar province to judge of its weight and the results to which it leads. If, in your opinion, it is clearly proved that the prisoner at the bar, at the time of the homicide, was unconscious that what he did was wrong and that he ought not to do it, you must acquit him on the ground of insanity; but if, in your opinion, this is not clearly established beyond a reasonable doubt, then you must find him guilty of the act, and proceed to investigate the nature of the homicide.

In view of my accountability to Him, before whom judges must be judged, who knoweth the secrets of all hearts, and who cannot be deceived, I have most conscientiously declared to you the law upon the subject of insanity, when set up as an excuse for acts which, if committed by sane persons, would subject them to severe or capital punishment. I doubt not, gentlemen, the same high and holy motives will influence your decision; the same anxious desire to redeem the solemn pledges you have given will agitate your bosoms while you are making up your verdict.

BURDEN OF PROOF — REASONABLE DOUBT OF GUILT

State v. Marler.

[2 Ala. 43; 36 Am. Dec. 398.]

In the Supreme Court of Alabama, January, 1841.

Insanity, when set up as a defence to a crime, must be shown by clear and convincing proof; but if the jury entertain a reasonable doubt of the prisoner's sanity, they should acquit.

Error to the Circuit Court of Montgomery County.

The prisoner was indicted, tried, and found guilty of murder, his defence being insanity. The presiding judge referred to the Supreme

Insanity Must be Clearly Proved.

Court for revision several points arising out of the charges given by him, as novel and difficult.

Goldthwaite for the prisoner.

Lindsay, Attorney-General, *contra.*

Ormond, J.

(Omitting an immaterial point.)

The remaining question is one of much greater magnitude, and of some difficulty. In civil cases, where there is conflicting testimony as to the existence of any fact necessary to be established by either party, the jury are under the necessity of weighing the evidence, and of deciding in favor of that party on whose side the evidence predominates. But in criminal cases, the humanity of our law requires that the guilt of the accused should be fully proved. It is not sufficient that the weight of evidence points to his guilt. The jury must be satisfied beyond a reasonable doubt of his guilt, or he must be acquitted. It is not meant here that the evidence, on which to found a verdict in a criminal case, should be so conclusive as to exclude the presumption, that notwithstanding the evidence, the accused might be innocent, but only that it should be of a character to raise that high degree of probability on which all human action depends.

In what respect, then, does the question of insanity, when set up as an excuse for an act which would otherwise be a crime, differ from any other fact which a jury may be called on to decide in a criminal case? As insanity excuses the commission of crime, on the ground that the actor is not an accountable being, it is obvious that society has a deep interest in providing the means of preventing its being assumed as a cover for the commission of crime, and as this is more easily simulated, and depends more on the volition of the actor himself, than any other defence, which would excuse the commission of an act otherwise criminal, the interest of the public demands that it should be established by more conclusive proof. Thus, in *Arnold's Case,*[1] who was indicted for shooting at Lord Onslow, and who set up the plea of insanity, Tracy, justice, observed that the defence of insanity must be clearly made out; that it is not every idle and frantic humor of a man, or something unaccountable in his actions, which will show him to be such a madman as to exempt him from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, a brute, or a wild beast, he will be properly exempted from punishment. In *Bellingham's Case,* who was

[1] 16 How. St. Tr. 695.

indicted for the murder of Mr. Percival, MANSFIELD, C. J., in reference to the plea of insanity relied on for the prisoner, said: "That in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt that, at the time he committed the act, he did not consider that murder was a crime against the laws of God and nature, and that there was no other proof of insanity which would excuse murder or any other crime."

These opinions, which are undoubted law, show the stringent nature of the evidence by which insanity must be proved to be an excuse for crime; but we do not understand that even this defence must be established by evidence so conclusive in its nature as to exclude every other hypothesis. This would be requiring something akin to mathematical proof, of which the subject is clearly not susceptible; but that the jury must be fully satisfied that the evidence is made out beyond the reasonable doubt of a well ordered mind. To test the case at bar by these principles, the court was moved to charge the jury "that if they entertained any reasonable doubt as to the sanity of the prisoner, they must acquit him;" which charge the court refused. Upon the principles here laid down it was error to refuse this charge. If the prisoner was insane, he was not an accountable being; and can the public justice of the country repose with safety upon a verdict found by a jury, every member of which may have entertained a reasonable doubt of its propriety? It would have been highly proper that the court, when called on thus to charge, should have explained to the jury that this defence required to be made out by strong, clear, and convincing proof, and guided by these considerations, if they still entertain a reasonable doubt of the sanity of the prisoner, it was their duty to acquit.

The charge which was given by the court does not appear to be objectionable, but as it is probable the jury were mislead by the refusal to give the charge asked for, the judgment must be reversed, the cause remanded, and the prisoner directed to remain in custody to await a trial *de novo;* unless, in the interim, he shall be discharged by due course of law.

COLLIER, C. J. I concur in the reversal of the judgment of the Circuit Court, but as I do not entirely assent to the opinion of my brother ORMOND, I deem it proper briefly to declare my views upon the only point of difference between us. The charge as prayed in regard to the prisoner's insanity should, in my judgment, have been refused. It supposed that the jury would be bound to acquit, if they entertained a

reasonable doubt as to the prisoner's sanity. The law requires insanity, when alleged as an excuse for the commission of an offence, to be made out by proof, as full and satisfactory as is required to establish the existence of any other fact. A reasonable doubt whether the accused was sane, would not authorize his acquittal — there must be a preponderance of proof to show insanity to warrant a verdict of not guilty for that cause.

But, in my apprehension, the error consists in the charge given to the jury. They are informed that if they entertain a reasonable doubt as to the prisoner's insanity, it would be their duty to regard him as sane, and if the facts established a case of murder, they should find him guilty. Now, it was entirely possible for the jury to have entertained a reasonable doubt of his insanity, although the weight of evidence was so strong as to have led their minds to the conclusion that such was the prisoner's condition. This charge then, must have induced the jury to believe that the proof of insanity should have been conclusive and irresistible. In this point of view they may have been misled, or have required proof too stringent. Hence, I am in favor of reversing the judgment.

INSANITY MUST BE PROVED BEYOND REASONABLE DOUBT — INSANITY AFTER VERDICT AND BEFORE SENTENCE — OPINIONS OF WITNESSES.

STATE *v.* BRINYEA.

[5 Ala. 241.]

In the Supreme Court of Alabama, January, 1843.

Hon. HENRY W. COLLIER, *Chief Justice.*
" HENRY GOLDTHWAITE, } *Judges.*
" JOHN J. ORMOND, }

1. **Burden of proof — Insanity must be proved beyond reasonable doubt.** — The defence of insanity must be proved beyond a reasonable doubt.
2. **Insanity after verdict but before sentence.** — If after verdict, but before sentence, a prisoner becomes insane, it is good ground for staying the sentence; *aliter* where the insanity is the same as has been passed on by the jury.
3. **The opinions of ordinary witnesses** as to a person's sanity are inadmissible.

ERROR to the Circuit Court of Montgomery County.

This cause is presented on questions reserved for the opinion of this court, as novel and difficult.

State *v.* Brinyea.

On the trial the prisoner relied on the defence of insanity, and introduced witnesses who testified to acts and declarations of the prisoner tending to prove insanity; whereupon his counsel proposed to ask the witnesses for their opinions as to the sanity or insanity of the prisoner, as deduced from the acts or declarations testified to by them. The question was excluded by the court, the witnesses not being of the medical profession.

The court charged the jury that they must believe the offence charged in the indictment to have been committed; that if they entertained a reasonable doubt as to the commission of the act, the prisoner was entitled to the benefit of it; but the commission of the act being proved, and the prisoner relying on insanity as an excuse, the rule was reversed. In that event the prisoner was bound to make out by testimony beyond all reasonable doubt that he was insane at the time the act was committed, by proof clear, strong, and convincing; and if upon the testimony the jury should entertain no reasonable doubt of the defendant's sanity, they should find him guilty.

When the prisoner was called before the court for sentence, after a verdict of guilty against him, the counsel for the prisoner suggested that he was at that time of unsound mind and moved an arrest of judgment on that ground. The suggestion was supported by affidavits, conducing to prove its truth, but the court declined to consider the motion, and reserved the questions as novel and difficult.

The *Attorney-General* for the State; *Mays*, for the prisoner.

Goldthwaite, J. — There is a considerable diversity of decision upon the point whether a witness, not being a physician, can properly be allowed to give his opinion in evidence when the matter to be ascertained is the insanity of an individual. The cases on this subject are collected in Cowen and Hill's notes to Phillips on Evidence.[1]

Although the greater number of these recognize the rule as ordinarily understood and as declared by the Circuit Court, yet there are some which seem to sustain the position insisted for by the prisoner's counsel. Our intention is not to review them, as it would lead us into unnecessary prolixity, and as the principle applicable to this case can be ascertained without aid from them.

When it is necessary to prove to a jury that one is insane, this is done by showing a series of actions or declarations which evince an aberration of mind; the conclusion of insanity is to be drawn by the jury, and must be deduced from the actions or declarations of which

[1] 759, n 529.

evidence is given. Different individuals sometimes draw different conclusions from the same act; and if their opinions were admissible as evidence, it might often happen that different opinions formed from the same conduct would go to the jury, having no other tendency than to embarrass and mislead them. As the conclusion of the jury has to be formed from the acts and declarations before them as evidence, it is entirely immaterial what opinions are formed by others, and for this reason such opinions in this case were properly excluded from the jury. It is proper to remark here that we have not entered into the consideration of exceptions to the general rule, arising out of some peculiar relation or connection of the witness to the person whose sanity is questioned, because nothing but the general question is now presented.

2. If a person after verdict and before sentence becomes insane, it certainly is a good reason to stay the sentence, but that is not this case. We do not understand that any change in the condition of the prisoner was shown to have been taken place since the empanelling of the jury. It was then in effect, requiring the court to arrest or stay the judgment for the same reason which had been unsuccessfully urged before the jury in defence of the criminal charge. We think the Circuit Court properly refused to entertain the motion.

3. The objection to the charge cannot avail the prisoner, as it is in strict accordance with *Marler's Case*.[1] The counsel for the prisoner argues that the charge was that a different degree of proof was necessary to make out a defence than was sufficient to produce a conviction; but we do not so understand it. The court in substance declares that it was incumbent on the State to make out the prisoner's guilt beyond all reasonable doubt, and if the jury doubted the evidence as to the commission of the act, the prisoner was entitled to the benefit of that doubt; but if the act was incontestably proved, and the prisoner relied on insanity to excuse himself, the case was reversed. The prisoner then was bound to make out by testimony beyond all reasonable doubt that he was insane at the time the act was committed, by proof strong, clear and convincing; but if upon testimony the jury should entertain no reasonable doubt of the defendant's sanity, they should find him guilty.

It is true we do not very clearly comprehend what was intended by the court when it said the case was reversed, if insanity was relied on as a defence; but whatever it was it certainly was not intended to instruct the jury that they should convict the prisoner if they entertained doubts

[1] 2 Ala. 43.

of his sanity. The charge, it is true, is in the negative, that if the jury had no reasonable doubt of the sanity of the prisoner he should be convicted. This as it seems to us is precisely equivalent to a charge that if a reasonable doubt of his sanity was entertained the jury should acquit. If the charge was objectionable on account of its obscurity or so considered, the prisoner's counsel should have requested the proper explanation; if refused or not given as asked for, that tendency to mislead would have been made apparent and under the decision in *Marler's Case*, the judgment would have been reversed.

Let the judgment be affirmed.

BURDEN OF PROOF—INSANE DELUSION, WHEN A DEFENCE—SLEEPLESSNESS AND RESTLESSNESS—MORAL INSANITY.

Boswell *v.* State.

[63 Ala. 307.]

In the Supreme Court of Alabama, December Term, 1879.

Hon. Robert C. Brickell, *Chief Justice.*
" Amos R. Manning, } *Associate Judges.*
" George W. Stone, }

1. **Sleeplessness and Nervous Restlessness** are relevant on the question of insanity *vel non.*

2. **Insane Delusion a Protection, When.**—An insane delusion relieves a person from responsibility when and only when the fact or state of facts which are believed in under the insane delusion would, if actually existing, have justified the act.

3. **Moral Insanity,** which consists of irresistible impulse, co-existing with mental sanity, should not be recognised by the law.

4. **The Burden of Proof** is on the prisoner to show insanity, and a reasonable doubt of sanity will not authorize an acquittal.

From the Circuit Court of Talladega.

Tried before the Hon. John Henderson.

The prisoner in this case, George Boswell, was indicted for the murder of Eliza Embry, by stabbing her with a knife; was tried on issue joined on the plea of not guilty; found guilty of murder in the first degree, and sentenced to be hanged. The prisoner was a mulatto man, whose wife had been dead five or six years, leaving several children living with him, the oldest being a boy about fifteen years old; and Eliza Embry

Facts of the Case.

was a young mulatto woman, whom he had been courting, and who, as he claimed, had promised to marry him, but married another man, Wesley Embry by name. The murder was committed on the second of February, 1878, about the middle of the day, on the public square in Talledega, a few minutes after the said Eliza and Wesley Embrey had been married by the probate judge in his office. The circumstances immediately preceding the commission of the crime were thus stated by the probate judge, who was examined as a witness for the prosecution: "On the second of February, 1878, between one and two o'clock, P. M., while I was preparing a marriage license for Wesley Embry and Eliza Truss, the defendant came into my office, and asked me, 'if a girl could obtain a license to marry another man after having promised to marry him?' I told him 'yes; that she had the right to change her mind,' and he then left the room. After I had married Wesley and Eliza, and Wesley had gone out, the defendant returned and sat down close to Eliza, and held some conversation with her, none of which I understood. The south door of the room was opened by some one (Mr. Hamill, I think), and Eliza, rather hastily, moved her chair from near the defendant to a point near me, and sat down. About this time Wesley returned to the room, and proposed to Eliza that they go home. She immediately got up and gathered up some bundles and wraps, and the three left the room, Wesley going in front, Eliza next, and the defendant last. In a very short time I heard screams in the court-yard, and, looking out of the window, saw the defendant have Eliza pushed back against the bell-tower, with one arm around her, and striking her with the other; and I saw Eliza get loose from him and run away. I ran to the west door of the room, and just after I stepped out of it, the defendant walked up to me and said: "*Judge, I done it. She promised to marry me, and has gone back on me.*" (Or, as afterwards stated by the witness: "*Judge, I done it, and if I have got to hang, let me hang, She promised to marry me, and has married another fellow; she has gone back on me.*") The deceased ran several steps, and fell, and died in a few minutes, her throat being cut, and eight other wounds with a knife being inflicted on her person.'

Another witness for the prosecution who saw the stabbing, testified that he was standing on the steps of the court-house when the parties came out of the probate judge's office, and thus proceeded: "I heard George (the prisoner) say, 'Wesley, you go on; I've got something to tell Liza.' Wesley went on, towards the fence beyond the bell-tower; and George then said, 'Liza, you've gone back on me.' She said, 'George, I didn't love you well enough to marry you.' By this time

they were opposite the bell-tower, and Wesley was outside of the fence, at his buggy. George seized Eliza, and stabbed her three or four times. She screamed and jerked away from him, and ran towards the east side of the square; and he walked back towards the west door of the court-house and gave himself up to Judge Thornton. The stabbing was done in plain view of a large number of people. George was not excited, and did not look like he had been drinking. He did not try to get away, but went quietly to Judge Thornton, and gave himself up." Another witness for the prosecution testified, that about one o'clock in the afternoon of that day, the defendant came into his store, where guns, pistols, and knives were kept for sale, and bought a knife with two blades, the larger one being from three to three and a half inches long, "saying that he wanted a keen, sharp knife that would cut leather." The mother of the deceased testified, among other things, that the prisoner came to her house one night, in December preceding the killing, and she heard him ask Eliza to marry him; and that, on her refusal, she heard him say: "My God, woman, where is your heart? If you marry anybody but me, I'll cut your throat, and cut my own throat, and send my soul to hell." Another witness for the prosecution testified that he met the defendant one morning in December, coming from the direction of the house where the deceased was living with her father and mother; that the defendant stopped him, and, during their conversation, said: "I am afraid they are going to pull back on me down there; and if they do, it will break my heart, and I will kill." The sheriff of the county who was introduced as a witness for the defence, testified that when he arrested the defendant, immediately after the killing, he took from him a pistol with five barrels, all loaded, a knife with two blades, the larger one being bloody and slightly bent, some papers and money, and two pint bottles of whiskey, one of which was full and the other about one-third full.

Insanity was set up as a defence. Several witnesses testified to the intimate relations which existed between the deceased and the prisoner, for some time previous to the killing, the messages which were sent between them, the presents which he had given to her, and the preparations he had made, and was making for his approaching marriage with her, which, as he said, was to take place in a short time. Several exceptions were reserved by the defendant to the rulings of the court in excluding portions of this evidence, but, as the case is here presented, they require no particular notice. Charley Boswell was introduced as a witness by the defendant and testified as follows: "I am a son of the defendant. My mother has been dead five or six years. I have a sister

Evidence in the Case.

and two brothers. I am the oldest and am fifteen years old. We lived last year on Dr. McClellan's place. During last January we lived on James Wood's place. I knew Eliza Truss, and have often seen her and my father together, and have carried messages between them. One message was, Edie Collins told me to tell my father that Eliza wanted him to meet her at Edie's on last Christmas night. I delivered that message, and it was the last one. My father was away from home a good many nights last January. My father and we children lived in a house by ourselves on Mr. Wood's place. The defendant offered to prove by this witness that the defendant slept very little last January, during the nights he was at home; that he was restless at night, and spent much time in walking the floor, and complained of being unable to sleep; also, that he had heard defendant say he was engaged to marry Eliza Truss, and was going to bring her home soon, for a new mother for him; also, that defendant brought home provisions and articles of household furniture, saying that he was going to marry Eliza Truss, and was fixing to go to housekeeping." The State objected to this testimony, as it was offered, and the court sustained each objection; and the defendant separately excepted. It was proved that the defendant's character was that of a quiet and peaceable man, but some of the witnesses said that he was nervous and excitable, though they had never known him to be engaged in any personal difficulty. One absent witness for the defendant, a written statement of whose testimony was admitted, detailed an occurrence which took place about ten years before the killing, and during the life of the defendant's wife, when the defendant attempted to kill him on finding him at his (defendant's) house eating supper with his wife; but begged his pardon the next time he saw him, and said that he was not in his right mind at the time. Another absent witness, whose testimony was admitted in the same way, saw the defendant with Eliza and Wesley Embry on the morning the killing occurred, while they were on their way to town, the defendant walking, and the others riding in a buggy; saw the defendant help Wesley to fix one of the shafts of the buggy, and saw him talking and laughing with Eliza and Wesley; and she said that "he seemed in a good humor, and his manner was quiet and as usual." Numerous exceptions, over fifty in all, were reserved by the defendant to the rulings of the court in excluding evidence; but a statement of these matters is not material to an understanding of the points decided by this court. The bill of exceptions is very long, and purports to set out all the evidence adduced.

The court charged the jury in writing, and several exceptions were

reserved by the defendant to different portions of the charge; the parts excepted to being inclosed in brackets, as follows: —

"The law presumes that the defendant is innocent, and the State must prove to the jury that he is guilty beyond a reasonable doubt, as charged, before you can so find him. Murder is the felonious taking of human life, with malice aforethought. Malice is such a depraved and wicked condition of mind, as shows a total disregard of social duty, and a heart or will bent wholly on evil. Malice may be express or implied. Threats to take life, without any provocation or without reasonable provocation. Malice may be implied or inferred from the deliberate perpetration and use of deadly weapons in taking human life. If the killing was intentionally done by the defendant, and without reasonable provocation, justification or excuse, the law conclusively presumes that it was done with malice aforethought. [Passion, without a reasonable provocation which causes one person to take the life of another, is malice.] [It is, therefore, not a question proper for your consideration, whether the defendant was impelled by passion to take the life of Eliza Embry (if he, in fact, killed her), unless the circumstances and causes that moved him to take life were such as to have excited the passion and provoked a reasonable man to such an extent as to dethrone reason, and excite passion beyond control.] [All persons are alike bound to control their passions, and the law, in such cases, makes no more allowance for the passions and temper of one man than for the passions and temper of others; and passions not founded on reasonable provocation, will not reduce a killing from a higher to a lower degree of homicide.]

"If the defendant, in this county, and before the finding of the indictment in this case, wilfully, maliciously, deliberately, and with premeditation killed Eliza Embry, by stabbing her with a knife, then he is guilty of murder in the first degree. To constitute murder in the first degree, it is not necessary that the wilful, malicious, deliberate, and premeditated purpose to take life should have existed with the defendant any particular length of time before the killing. If the malice existed at and before the killing, though but for an instant of time, it was malice aforethought; and if the defendant distinctly formed in his mind the purpose to take the life of Eliza Embry, and thought over the matter, and prepared for it before the killing, and killed the deceased in accordance with this formed purpose or design, it would be a wilful, malicious, deliberate, and premeditated killing, and, consequently, murder in the first degree. [If the defendant killed the deceased, because she refused to marry him and married another man, even though she

may have promised to marry him before she married Wesley Embry, this would not be such provocation as would reduce the killing from murder in the first degree to murder in the second degree, if, independent of the fact of her promise to marry the defendant, you find all the elements of murder in the first degree, as above described, to exist in this case.] If the defendant, in this county, and before the finding of this indictment, wilfully, and with malice aforethought, but without either deliberation or premeditation, killed Eliza Embry by stabbing her with a knife, then he is guilty of murder in the second degree.

["When the plea of insanity is interposed, to protect one from the legal consequences of an act which amounts to a crime, to render the defence available, the evidence must be such as to convince the minds of the jury that, at the time the act was done, the accused was not conscious that, in doing the particular act, he was committing a crime against the laws of God and his country. [If he knew right from wrong, and knew that he was violating the law, he is then guilty; for it is the conscious knowledge, connected with the act, that constitutes the crime.] [If, therefore, the accused insists that he was insane, he must adduce proof that will satisfy the jury that the act was not connected with the knowledge of its criminality; and this proof should be clear and satisfactory.] * * *

The defendant excepted to this entire charge, and also to each part separately which is included in brackets; and he then requested the court to give the following charges, which were in writing: —

"1. Drunkenness may produce a state of mind which would render a person incapable of forming or entertaining the design or intention to take life; and if the jury find, from the evidence, that the defendant was in such a state of mind from drunkenness, at the time of the killing, then they cannot find him guilty of murder.

"2. Before the defendant can be convicted of murder, the jury must be satisfied by the evidence, beyond all reasonable doubt, that he intended to take life; and if they believe from the evidence that, at the time of the killing, he was too much intoxicated to have entertained any such intention, then they cannot find him guilty of murder.

"3. If, from any cause shown by the evidence to the satisfaction of the jury, the condition or state of the defendant's mind, at the time of the killing, was such as to render him incapable of forming and entertaining the design to take life, then the jury cannot find him guilty of murder.

"4. Moral insanity is recognized by the law; and if the jury believe

from the evidence, that the defendant was morally insane when he stabbed Eliza Embry, then he is not guilty.

"5. If the jury believe from the evidence that defendant knew right from wrong when he stabbed Eliza Embry, they must further find that he had the power to refrain from the wrong, or they must acquit him.

"6. A man morally insane, acting from an irresistible and uncontrollable impulse, is not responsible for that act; and if the defendant was in that condition, and was so acting at the time of the killing, he must be acquitted.

"7. If at the time of the killing the defendant's intellectual power was for the time overwhelmed by violent mental disease, he must be acquitted.

"8. If by the overwhelming violence of sudden mental disorder, the defendant's intellectual power was obliterated, at the time of the killing, the jury must acquit him.

"9. If by the overwhelming violence of sudden mental disorder, no matter what may have caused such disorder, the defendant's intellectual power was obliterated at the time of the killing, he must be acquitted.

"10. Did the defendant, in committing the homicide, act from an irresistible and uncontrollable impulse? If so the act was not that of a voluntary agent, but the involuntary act of his body, without the concurrence of a mind directing it; and he must therefore be acquitted.

"11. If the jury have a doubt of the sanity of the defendant at the time of the killing, they cannot find him guilty of murder in the first degree, and sentence him to be hung.

"12. If the jury have a reasonable doubt as to the sanity of the defendant at the time he killed Eliza Embry, they cannot find him guilty of murder in the first degree, and sentence him to be hung.

"13. If the jury believe from the evidence, that the defendant loved Eliza Embry, and that she had promised to marry him, but had been married to another man a few moments before the defendant killed her, they can look to these facts in determining the motive with which the deed was done, and in determining what, if any, is the degree of the defendant's guilt."

The court refused each of these charges as asked and the defendant excepted to their refusal.

Geo. W. Parsons, for the prisoner; *H. C. Tompkins*, Attorney-General, for the State.

Stone, J. — It was proposed to prove in this case by Charley Boswell, a witness for defendant, that during the month immediately preceding the homicide, defendant "slept very little during the nights he was at

Rejection of Evidence Must be Specially Excepted to.

home; that he was restless at night, and spent much time in walking the floor, and complained of being unable to sleep." The plea of insanity was relied on in defence; and if this question were so presented that we could consider it, we would be inclined to hold that the evidence ought to have been received. Sleeplessness and nervous restlessness are admissible evidence on questions of sanity *vel non*. Inconclusive, of course; for in much the larger number of persons thus affected, there is no trace of mental unsoundness. The causes of it are very various. Still it is a circumstance, although in many cases very slight, to be weighed by the jury.

But we cannot pronounce that the Circuit Court erred in this ruling. The testimony was offered in connection with other evidence clearly inadmissible; offered in one continuous sentence without any stop, or mark of separation. At the end it is said, "The State objected to this testimony, as it was offered, and the court sustained each objection, and the defendant separately excepted." This is too indefinite. We cannot certainly know what were the separate parts into which this mass of testimony was proposed to be divided; and hence we are left in doubt as to what was the subject of each and every exception reserved. To be the subject of revision here, the exception must clearly point to what it refers.[1]

It is certainly true that insanity, properly proved, is a complete answer to a criminal charge. An unsound mind cannot form a criminal intent; and as crime includes both act and intent, an indispensable constituent is wanting, when the mind of the perpetrator is diseased in that degree, which is, by the law, pronounced insanity. Few subjects have, in later times, been more discussed than diseases of the mind. The tendency of modern research has been to accord to mental disorders a wider scope than was formerly acknowledged. Care must be maintained, however, that in considerating and protecting this pitiable class, which appeals so loudly to our sympathies, we do not break down all legal barriers to crime, and leave society at the mercy of those whose evidence of insanity consists in their supreme depravity. No defence perhaps is more easily simulated than this; and hence, when presented, its evidences should be carefully and considerately scanned; not with a forgone conclusion to disallow it, as a pretence; not with an undue bias in its favor; but with a firm determination, without partiality or prejudice, to give to the testimony submitted its due weight; nothing more, nothing less.

[1] Donnell *v.* Jones, 13 Ala. 490; Newton *v.* Jackson, 23 Ala. 705; 1 Brick. Dig. 886, sect. 1186.

Boswell *v.* State.

The questions, what degree of insanity will excuse crime; on whom and to what extent, is cast the duty of making good or of overturning the defence of insanity in a criminal prosecution, and the measure of proof necessary to that end have caused the greatest contrariety of judicial opinion. The case of *McNaghten*[1] came before the British House of Lords for trial; and their lordships submitted certain questions to the judges of England, which were answered by Lord Chief Justice Tindal, speaking for all the judges except Mr. Justice Maule, who delivered a separate opinion. Among the questions propounded were the following: —

"1. What is the law respecting alleged crimes, committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons; as, for instance, when, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit."

"2. What are the proper questions to be submitted to the jury, when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence."

"3. In what terms ought the question to be left to the jury, as to the prisoner's state of mind when the act was committed."

"4. If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?"

The answer of the judges was confined to the letter of the questions. They said: "In answer to the first question, assuming that your lordships' inquiries are confined to those persons who labor under such partial delusion only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your lordships to mean the law of the land. As the third and fourth questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told, in all cases, that every man is to be presumed to be

[1] 10 Cl. & Fin. 200.

The Answers in McNaghten's Case.

sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the deceased, solely and exclusively, with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas, the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require. The answer to the fourth question must, of course, depend on the nature of the delusion; but, making the same assumption as we did before, — namely, that he labors under such partial delusion only, and is not in other respects insane, — we think he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his defence was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

Mr. Justice Maule answered the first of the questions propounded in the negative. His language was: "There is no law, that I am aware

of, that makes persons in the state described in the question, not responsible for their criminal acts. To render a person irresponsible for crime, on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong."

It must not be overlooked that the judges were considering a case of partial insanity; the case of a person afflicted with "insane delusion in respect of one or more particular subjects or persons." And the opinion most favorable to the accused — that of all the judges except Justice MAULE, was that insane delusion was no justification or excuse of homicide, unless the perpetrator was insanely deluded into the belief of the existence of a fact, or state of facts, which, if true, would justify or excuse the homicide, under the law as applicable to sane persons.

The case from which we have extracted so largely was heard before the House of Lords, in 1843. Lords Brougham, Campbell, Cottenham and Wynford expressed gratification at the answers given by the judges. LYNDHURST, then Lord Chancellor, presiding over that august court, said: "I agree that we owe our thanks to the judges, for the attention and learning with which they have answered the questions now put to them." The law of England on this very delicate question, had been declared, in a very decided majority of important cases, substantially as announced by Mr. Justice MAULE; though in some of the earlier cases a severer rule and measure of proof were exacted, where insanity was relied on as a defence.[1]

The case of *Hadfield*, a very celebrated trial for attempting to take the life of the king, seems to have been made somewhat an exception to the rule. This is the case in which Lord Erskine made his celebrated argument. We cannot find the report of it in our library; but in 1 Russ. on Crimes, 12, will be found a summary of the evidence, and the ruling of Lord KENYON on the main question. The prisoner had been severely wounded in a battle, and there was strong evidence that, both before and after the assault, he had insane delusions of very pronounced character. The attempt was made in the theatre. It was proved that the prisoner "sat in his place in the theatre, nearly three-quarters of an hour before the king entered, that at the moment when the audience rose, on his majesty's entering his box, he got up above the rest, and presented a pistol loaded with slugs, fired it at the king's person, and then let it drop; and when he fired, his situation appeared favorable for taking aim, for he was standing upon the second seat from the orchestra

[1] See the authorities collected and collated in 1 Russ. on Crimes, 9 to 14.

in the pit, and he took a deliberate aim by looking down the barrel, as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that he knew perfectly well that his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed. These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that his plan was to get rid of it by other means; he did not intend anything against the life of the king; he knew the attempt only would answer his purpose.

These facts showed, not only that he knew right from wrong, not only that he knew he was committing a crime against the law, by which he would forfeit his life; but it exhibited deliberation, and the exercise of the reasoning faculty. Lord KENYON held, that, "as the prisoner was deranged immediately before the offence was committed it was improbable that he had recovered his senses in the interim; and although were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted." He was acquitted.

This celebrated case suggests several reflections, by which we may be profited in the administration of the law. The first is that the workings of a diseased mind are so variant that it is difficult to lay down an absolute rule for the government of all cases. Each case must depend, more or less, on its own particular facts. And such is the language of the adjudged cases. In the next place, the charge to the jury should be so shaped as to apply, as far as the law will allow, to the facts of the case on trial. Third, that calmness, indifference to results, consciousness of the moral or legal criminality of the act, with connectedness in the employment of the reasoning faculty, while not conclusive evidence of sufficient sanity to justify criminal punishment, are nevertheless strong circumstances tending to prove legal accountability.

In *Hadfield's Case* we infer from the language of the court, that he would have been adjudged sane and accountable, if it had not been shown that a very short time preceding the attempt on the king's life he had shown unmistakable symptoms of insanity. So that his case can scarcely be classed as an exception to the rule, which requires the insanity which excuses to be proven to have existed at the very time the act complained of was committed. The cool, calm, indifferent conduct of the prisoner, his consciousness of right and wrong, were, neither nor all of them, evidences which Lord KENYON regarded as proving insanity. He

treated them as *indicia* of sanity, to be overcome. The recent, clearly proved insanity of the prisoner caused him to believe that in that case, reason had not re-asserted her dominion. From it he inferred the continued presence of insane delusion, when the causeless and seemingly unaccountable attempt was made on the life of the king. So, to justify the inference of insanity from the calmness of manner and indifference to consequences, which sometimes mark the conduct of the man-slayer, there should be convincing evidence of previous insanity, or insane delusions, so recent as coupled with the causelessness of the killing, to raise the presumption that the paroxysm had not entirely passed away.

The doctrine in regard to partial insanity asserted by the English judges in *McNaghten's Case*, was affirmed in a very able opinion by Chief Justice SHAW, in *Commonwealth* v. *Rogers*,[1] and the same principle is asserted by Wharton in his work on Homicide,[2] citing many authorities in support of it; and in 2 Greenleaf's Evidence.[3] See also *Flanagan* v. *People*,[4] *Spann* v. *State*,[5] *People* v. *McDonnell* [6] *Blackburn* v. *State*.[7]

There is a species of mental disorder, a good deal discussed in modern treatises, sometimes called "irresistible impulse," "moral insanity," and *perhaps* by some other names. If, by these terms, it is meant to affirm that a morbid state of the affections or passions, or an unsettling of the moral system, the mental faculties remaining meanwhile in a normal, sound condition, excuses acts otherwise criminal, we are not inclined to assent to the proposition. The senses and mental powers remaining unimpaired, that which is sometimes called "moral," or "emotional insanity," savors too much of a seared conscience, or atrocious wickedness, to be entertained as a legal defence. GIBSON, C. J., in *Commonwealth* v. *Mosler*, while recognizing the existence of moral or homicidal insanity, as "consisting of an irresistible inclination to kill, or to commit some other particular offence," adds: "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance." With all respect for the great jurist who uttered this language, we submit if this is not almost or quite the synonym of that highest evidence of murderous intent known to the common law — a heart totally depraved and fatally bent on mischief. Well might he add: "The doctrine which acknowledges this mania is dangerous in its relations, and

[1] 7 Metc. 500. [2] Sect. 566. [3] Sect. 372. [4] 52 N. Y. 467. [5] 47 Geo. 553. [6] 47 Cal. 134. [7] 23 Ohio St. 146. [8] 4 Pa. St. 264.

can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. The frequency of this constitutional malady is fortunately small; and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary to show by clear proof, either its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases becoming in itself a second nature." What is meant by "evincing itself in more than a single instance," and how this principle would work in administration, we are left to speculate. Can that be a sound legal principle, whose general recognition would destroy social order, as well as personal safety? We concur with Mr. Wharton,[1] that moral insanity, which consists of irresistible impulse, co-existing with mental sanity, "has no support either in psychology or law."

On the question of the duty and measure of proof on questions of insanity, as a defence in a criminal trial, some rulings have been made in this court. In *State* v. *Marler*,[2] (a case of murder) the Circuit Court had charged the jury, if the facts necessary to constitute the crime of murder had been established by the proof, that it devolved upon the prisoner to prove his insanity at the time of the commission of the act, and if the jury, from the evidence, entertained a reasonable doubt of the prisoner's insanity at the time of the commission of the act, and believed also that it would be murder in him, it would be their duty to find him guilty of murder." The court had been requested to instruct the jury that a reasonable doubt of the sanity of the prisoner required his acquittal. This court (ORMOND, J.) quoted from the language of MANSFIELD, C. J., in *Bellingham's Case*, as follows: "That in order to support such a defence it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt that, at the time he committed the act, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder or any other crime." Judge ORMOND added: "These opinions which are undoubted law, show the stringent nature of the evidence by which insanity must be proved, to be an excuse for crime; but we do not understand that

[1] Hom., sect. 574. [2] 2 Ala. 43.

even this defence must be established by evidence so conclusive in its nature as to exclude every other hypothesis. This would be requiring something akin to mathematical proof, of which the subject is clearly not susceptible; but the jury must be fully satisfied that the defence is made out beyond the reasonable doubt of a well-ordered mind. To test the case at bar by these principles the court was moved to charge the jury, 'that if they entertained any reasonable doubt as to the sanity of the prisoner, they must acquit him;' which charge the court refused. Upon the principles here laid down, it was error to refuse this charge. * * * It would have been highly proper that the court, when called on thus to charge, should have explained to the jury that this defence was required to be made out by strong, clear, and convincing proof; and, guided by these considerations, if they still entertain a reasonable doubt of the sanity of the prisoner, it was their duty to acquit."

We confess ourselves unable to reconcile the two propositions of this charge. Under the one the defence of insanity is required to be made out by strong, clear, and convincing proof; under the other the evidence is sufficient if it generates a reasonable doubt. If reasonable doubt of the existence of a fact is equivalent to strong, clear and convincing proof of its existence, then the charge can be reconciled and understood. With every respect for the able jurist by whom this opinion was delivered, we fear its tendency would be to confuse and mislead the jury. C. J. COLLIER dissented, saying: "A reasonable doubt whether the accused was sane would not authorize his acquittal. There must be a preponderance of proof to show insanity, to authorize a verdict of not guilty for that cause."

In the case of *State* v. *Brinyea*,[1] the same judges presiding, on the question of insanity as a defence, the Circuit Court had charged the jury that the prisoner was bound to make out by testimony, beyond all reasonable doubt, that he was insane at the time the act was committed, by proof clear, strong, and convincing; and if, upon the testimony, the jury should entertain no reasonable doubt of the defendant's sanity, they should find him guilty." It will be observed that in this case, the rule laid down by the Circuit Court as to the measure of proof of insanity required of the prisoner, was that it should be shown beyond all reasonable doubt; and as to this, the court added: "If the jury entertained no reasonable doubt of the prisoner's sanity, they should find him guilty." This court, in commenting on this charge, said: "The

[1] 5 Ala. 241.

objection to the charge cannot avail the prisoner, as it is in strict accordance with the rule declared in *Marler's Case*. * * * The prisoner then was bound to make out by testimony, beyond all reasonable doubt, that he was insane at the time the act was committed, by proof strong, clear and convincing. * * * The charge, it is true, is in the negative, — that if the jury had no reasonable doubt of the sanity of the prisoner he should be convicted. This, as it seems to us, is precisely equivalent to a charge that, if a reasonable doubt of his sanity was entertained, the jury should acquit." This charge, then, as construed by this court, and its correctness affirmed, reasserts the two propositions, which, we have said above, we cannot reconcile. It goes even further, and affirms that insanity, as a defence, must be proved beyond a reasonable doubt; and then adds, if the testimony generates a doubt of its existence, "this is sufficient." Rules of law ought not to be so declared as to leave the mind bewildered in their attempted solution. Instructions to juries should be clear and freed from ambiguity.

In *McAllister* v. *State*,[1] this court (Ch. J. Dargan delivering the opinion) said: "When the plea of insanity is interposed to protect one from the legal consequences of an act which amounts to a crime, to render the defence available, the evidence must be such as to convince the minds of the jury that, at the time the act was done, the accused was not conscious that, in doing the particular act, he was committing a crime against the laws of God and his country. If he knew right from wrong, and knew that he was violating the law, he is then guilty; for it is this conscious knowledge, connected with the act, that constitutes the crime." We feel at liberty to affirm that the question of the measure of proof, on the defence of insanity, is not settled in this court.

Much has been written, and there is much hypercriticism in the discussion of the propositions, that, in criminal prosecutions, the *onus* is never shifted, and that the presumption of innocence accompanies the prisoner through all the stages of his trial. These are valuable canons of the law, but, like most other general rules, are subject to some modifications in their application, the observance of which is essential to the good order and well-being of society. Murder, at common law, is made up of two ingredients, — the act and the intent. All men are presumed to intend the natural result of their voluntary acts. The voluntary employment of a deadly weapon, lying in wait, the admin-

[1] 17 Ala. 434.

istration of poison, each supplies the presumption which, unexplained, is proof of the intent or malice aforethought which stamps the homicide as murder. Proof of the killing and the manner of it accomplishes the purpose of establishing the *factum* or act, and the felonious intent or formed design with which it is done, unless, in the testimony which proves the act, or in some other proof, the offence is extenuated or excused. The common-law definition of murder declares that the malice which characterizes its bad eminence may be implied as well as expressed. So, one found in possession of goods, proven to have been recently stolen, is presumed to be the thief, until explanation of his possession is given. Many statutes which create offences out of certain acts, unless certain conditions exist, cast on the accused the duty of excusing himself by proof of the required conditions. In this class are the offences of carrying deadly weapons concealed about the person, and retailing spirituous liquors without license. So, then, there are cases in the law where one material element of a crime is inferred from the proof which establishes the other, if there be before the jury only the testimony which establishes that other fact. We imagine, also, there is a distinction and a difference between the constituent facts which make up a given crime, — murder, for example, — and which facts are common to every case within the class, and those occasional or exceptional questions of fact which do not necessarily belong to the class, but may be termed the accidents of the case. That a reasonable creature in being was killed; that the prisoner on trial was the agent or manslayer, and that he did the act with malice aforethought, express or implied, are facts necessary to be shown in every successful prosecution for murder. To this extent, and to each of these constituent, indispensable elements, the burden rests with the State to prove their existence beyond a reasonable doubt. The presumption of innocence, in which all men are primarily panoplied, follows and guards them through all the stages of the trial, until these uniformly constituent facts are established. The law, in its firm, yet conservative morality, declares that all men who have attained to years of discretion are presumed to be of sound mind; and without any proof of that fact, resting securely in the presumption of sanity, it adjudges the offender shall suffer its penalties. But there are persons of mature years whose minds are so diseased as that they are incapable of discriminating between right and wrong; and this defence is set up in avoidance of the facts which otherwise stamp the prisoner as a murderer. We here enter the field of the exceptional, the accidental; and inasmuch

as the law presumes sanity, that presumption, like that of innocence, should prevail throughout the trial until it is overcome. And whether the evidence of insanity arise out of the testimony which proves the homicide, or is shown *aliunde*, reason and analogy alike declare it is insufficient until it overturns the presumption of sanity.

In *Commonwealth* v. *Eddy*,[1] the court said: "The burden is on the Commonwealth to prove all that is necessary to constitute the crime of murder. And, as that crime can be committed only by a reasonable being — a person of sane mind — the burden is on the Commonwealth to prove that the defendant was of sane mind when he committed the act of killing. But it is a presumption of law that all men are of sane mind; and that presumption sustains the burden of proof, unless it is rebutted and overcome by satisfactory evidence to the contrary. In order to overcome this presumption of law and shield the defendant from legal responsibility, the burden is on him to prove to the satisfaction of the jury, by a preponderance of the whole evidence in the case, that, at the time of committing the homicide, he was not of sane mind."

Pennsylvania stands unmistakably committed to the same doctrine.[2] The opinion is both able and philosophic. Says AGNEW, C. J.: "Insanity is a defence. It presupposes the proof of the facts which constitute a legal crime, and is set up in avoidance of punishment. Keeping in mind, then, that an act of wilful and malicious killing has been proved, and requires a verdict of murder, the prisoner, as a defence, avers that he was of unsound mind at the time of the killing, and incapable of controlling his will; and, therefore, that he is not legally responsible for his act. * * * Soundness of mind is the natural and normal condition of men, and is necessarily presumed; not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated, and be adjudged to be a reasonable being, until a fact so abnormal as a want of reason positively appears. It is, therefore, not unjust to him that he should be so conclusively presumed to be until the contrary is made to appear on his behalf. To be made so to appear to the tribunal determining the fact the evidence of it must be satisfactory, and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature." To the same effect are *State* v. *Smith*,[3] *People*

[1] 7 Gray, 583. [2] Ortwein *v.* Commonwealth, 76 Pa. St. 414. [3] 53 Mo. 267.

v. *McDonnell*,[1] *State* v. *Lawrence*,[2] *Leoffner* v. *State*,[3] *State* v. *Starling*,[4] *State* v. *Felter*,[5] *McKenzie* v. *State*.[6] Mr. Wharton, in his work on Homicide,[7] classes New York among the States that hold insanity is a defence, the affirmative proof of which rests with the defendant. The question, we think, is somewhat unsettled there.[8]

There are respectable authorities to the contrary, but we decline to follow them. We hold then that insanity is a defence which must be proven to the satisfaction of the jury by that measure of proof which is required in civil causes; and a reasonable doubt of sanity, raised by all the evidence, does not authorize an acquittal. The doctrine we have been combatting is, we think, purely American; and we regard it as an erroneous application of the principle of presumed innocence. One disputable presumption should not be allowed to override and annihilate another.

Under the rules above declared the entire affirmative charge of the Circuit Court is free from error. Of the charges asked by defendant, those numbered 1, 2 and 3 were abstract, there being no evidence to support them; those numbered 4, 5, 6, 10, 11, 12, 13, were all rightly refused under the principles we have declared above; charges 6, 7 and 8 were calculated to mislead the jury, if they were not abstract, and were rightly refused; the two charges given at the instance of the prosecution are free from error; and the judgment of the Circuit Court must be affirmed.

It is, therefore, ordered and adjudged that, on Friday, the eleventh day of June, 1880, the sheriff of Talladego County execute the sentence of the law, by hanging the said George Boswell by the neck until he is dead.

Brickell, C. J., dissenting.

[1] 47 Cal. 134.
[2] 57 Me. 574.
[3] 10 Ohio St. 599.
[4] 6 Jones N. C. 366.
[5] 32 Iowa, 50.
[6] 26 Ark. 332; Wharton on Hom., sect. 665; 2 Greenl. Ev., sect. 373.
[7] Sect. 666.
[8] Flanagan v. People, 52 N. Y. 467.

Right to Open and Close.

BURDEN OF PROOF — RIGHT TO OPEN AND CLOSE.

STATE *v.* FELTER.

[32 Iowa, 49.]

In the Supreme Court of Iowa, June Term, 1871.

Hon. JAMES G. DAY, *Chief Justice.*
" JOSEPH M. BECK, }
" WILLIAM E. MILLER, } *Judges.*
" CHESTER C. COLE, }

1. **Burden of Proof.** — The defence of insanity must be established by proof satisfactory to the jury.

2. **Right to open and Close — Practice.** — In a criminal trial, where the defence is insanity, the prisoner is not entitled to open and close.

APPEAL from Linn District Court.

Indictment for murder. The case was tried before and the judgment of conviction reversed.[1] Upon his second trial the prisoner was convicted of murder in the second degree, and sentenced to the penitentiary for life. He again appeals.

I. M. Preston & Son, for the appellant.

H. O'Conner, Attorney-General, for the State.

COLE, J. The defence was grounded mainly upon the alleged insanity or monomania of the defendant.

His counsel asked that they be allowed the opening and closing argument to the jury.

The refusal to grant this constitutes the third assigned error. It was necessary for the State to prove both the killing and the malicious intent. The former was not controverted, but the latter was denied; and for the proof of the denial the defendant endeavored to show that he was so mentally deranged at the time as to be incapable of entertaining the malicious intent. The intent was therefore not admitted, but was left for the State to establish by proof. Hence, it was not error to refuse defendant's counsel the opening and closing argument to the jury.[2]

The defendant asked the court to instruct: "If the jury entertain, from the evidence, a reasonable doubt as to criminal intent, or as to whether the defendant was of sound mind and discretion, the defendant is entitled to the benefit of that doubt, and your verdict should be 'not

[1] State *v.* Felter, 25 Iowa, 67.

[2] Loeffner *v.* State, 10 Ohio St. 598.

guilty;'" which the court refused. Instead thereof, the court instructed the jury: "It is not necessary, in order to acquit, that the evidence upon the question of insanity should satisfy you, beyond all reasonable doubt, that the defendant was insane; it is sufficient, if, upon consideration of all the evidence, and the facts, and circumstances disclosed by the testimony, you are reasonably satisfied that he was insane. If the weight or preponderance of the evidence shows the insanity of the defendant, it raises a reasonable doubt of his guilt."

The refusal of the one and the giving of the other is the fourth assigned error.

It is not disputed that the current and weight of authorities are in accord with the instruction as given by the court, and in our opinion it has also the support of reason, humanity, and public policy. Formerly the rule was that where an accused relied upon the defence of insanity, it was incumbent upon him to prove his insanity beyond a reasonable doubt.[1] Many cases, however, state the rule substantially as it was given by the District Court in this case.[2]

The appellant's counsel rely upon *People* v. *McCann*,[3] and *Hopps* v. *People*,[4] in support of the instruction as asked by them. The first case[5] does not support that view, but does support the view taken by the court. BOWEN, J., who wrote the leading opinion of the court in that case, says: "It is also a rule, well established by authority, that where, in a criminal case, insanity is set up as a defence, the burden of proving the defence is with the defendant, as the law presumes every man to be sane. But I apprehend that the same evidence will establish the defence which would prove insanity in a civil case. The rule requiring the evidence to satisfy the jury beyond a reasonable doubt is one in favor of the individual on trial charged with crime, and is applicable only to the general conclusion, from the whole evidence, of guilty or not guilty." The case of *Hopps* v. *People* was decided by a majority opinion, Mr. Justice WALKER *dissenting*, and is directly in conflict with the previous unanimous holding of the court in *Fisher* v. *People*.[6] We also find that a majority of the Supreme Court of Indiana sustains the

[1] State *v.* Spencer, 21 N. J. (L.) 196; State *v.* Brinyea, 5 Ala. 241; People *v.* Myers, 20 Cal. 518; State *v.* Huting, 21 Mo. 477; 1 Whart. Am. Cr. Law, par. 55.

[2] Loeffner *v.* State, 10 Ohio St. 598; Fisher *v.* People, 23 Ill. 283; Com. *v.* Kimball, 24 Pick. 366; Com. *v.* Rogers, 7 Metc. 500; Graham *v.* Com., 16 B. Mon. 589; Bonfanti *v.* State, 2 Minn. 123; State *v.* Starling, 6 Jones, L., 366; State *v.* Klinger, 43 Mo. 127; State *v.* Bartlett, 43 N. H. 224, and many other cases.

[3] 16 N. Y. 58; *s. c.* 3 Park. 272.

[4] 31 Ill. 385.

[5] 16 N. Y. 58.

[6] 23 Ill. 283. See, also, Chase *v.* People, 40 *Id.* 352, explaining the Hopps Case.

Syllabus.

doctrine in the *Hopps Case*, in *Polk* v. *State*.[1] We have given to the question our careful and deliberate consideration, and are persuaded that the matter of reasonable doubt has ever been wisely limited to the general conclusion of guilty or no, upon all the evidence in the case; that it cannot safely be applied to any one fact in the case, howsoever material it may be; that the sanity of the accused being once established in the case, either by direct and positive testimony, or by the presumption of law, or both, the accused cannot avoid it, it being in its nature an affirmative defence, except by a preponderance of proof, or which is the same, satisfactory evidence of his insanity. The instruction of the court was therefore correct.[2]

The only other error assigned is, that the verdict is contrary to the evidence. We have given to the evidence a careful reading, and are fully satisfied that the jury came to a correct conclusion upon it.

Aside from the terrible atrocity of the crime, and the revolting circumstances attending its perpetration, there is substantially nothing to support the defence of insanity.

Affirmed.

BURDEN OF PROOF—JURY MUST BE SATISFIED OF INSANITY.

GRAHAM *v.* COMMONWEALTH.

[16 B. Mon. 587.]

In the Court of Appeals of Kentucky, Winter Term, 1855.

Hon. THOMAS A. MARSHALL, *Chief Justice.*
" B. M. CRENSHAW, }
" JAMES SIMPSON, } *Judges.*
" HENRY J. STITES, }

To authorize an acquittal on the ground of insanity, the jury must be satisfied that the accused was insane.

APPEAL from McCracken Circuit Court.

O. Turner and *L. S. Trimble*, for appellant; *James Harlan*, Attorney-General, for the Commonwealth.

[1] 19 Ind. 170; and also in Stevens *v.* State, 31 Ind. 485. See, also, People *v.* Garbutt, 17 Mich. 9.

[2] State *v.* Nash, 7 Iowa, 347; State *v.* Ostrander, 18 *Id.* 435.

Graham *v.* Commonwealth.

Stites, J., delivered the opinion of the court.

At the November term, 1855, of the McCracken Circuit Court, John Graham was tried and convicted of the murder of his wife.

The defence relied on by the prisoner was insanity at the time of the commission of the act, and some evidence was introduced in support of that defence. After the evidence was closed, the prisoner's counsel moved the following instruction: "That, if the jury believed from the evidence that there was a rational doubt growing out of the evidence, as to whether Graham was insane or *non compos mentis* at the time of committing the homicide, then they should give the prisoner the benefit of that doubt and acquit him."

This instruction was refused, and an exception taken by the prisoner's counsel, who then moved the court to instruct the jury upon the whole law of the case; and thereupon the court gave the following instructions: —

"1st. The court instruct the jury that if they believe from the evidence that Graham killed the deceased, they must find him guilty of murder, unless they believe from the evidence that at the time he did the act he was laboring under insanity of mind.

"2nd. That if they believe from the evidence Graham did kill his wife, and that he was laboring under insanity on the subject of love and jealousy, yet if they believe from the evidence he had sufficient reason to know that he was doing wrong and would be liable to punishment, and that he had sufficient power to control his actions and refrain from killing her, the law is against him, and they must find him guilty.

"3rd. The court instruct the jury that the law presumes every man to be sane until the contrary is shown by the evidence. And before the prisoner can be excused for killing the deceased on the plea of insanity, the jury must be satisfied from the evidence that the accused was laboring under such a defect of reason as not to know the nature and quality of murder; or if he did know it, that he did not know to commit murder was wrong.

"4th. That the true test of responsibility is whether the accused had sufficient reason to know *right* from *wrong*, and whether or not he had *a sufficient power of control to govern his actions*. That if they should believe from the evidence he was a *monomaniac*, yet if they should believe from the evidence he knew it was wrong to kill, and had sufficient power of control to govern his actions, and to refrain from committing the homicide, then the law is against him, and they must find him guilty.

Instructions of the Court.

"5th. That if they had a rational doubt as to whether said case is murder or manslaughter, they must find him guilty of the latter, as the lesser offence; *and if they have such rational doubt as to his guilt or innocence, they must acquit him.*

"6th. That a rational doubt is one growing out of the evidence, and not a mere chimera existing in the juror's mind; and to acquit on mere light and trivial doubts existing in the juror's mind, and not growing out of the evidence, tends to the encouragement of malefactors, is detrimental to the best interests of society, and a virtual violation of the juror's oath."

And after the instructions were read over to the jury, the court inquired if there was any other point upon which an instruction was desired, and none was requested; but an exception was taken to each of the foregoing. The jury having found the prisoner guilty, and the Circuit Court having refused a new trial, he has brought the case up by appeal.

The only question for consideration presented by the record is the propriety of the refusal of the instruction asked for by the prisoner, and granting of others in lieu thereof.

It is earnestly contended in behalf of the appellant, and that is the main ground relied on for reversal, that the humane principle adopted in favor of life, which forbids a conviction whilst there is a rational doubt of guilt, has been violated in this case by withholding from the jury the instruction asked for, and telling them, in the third instruction granted, that before they could acquit upon the ground of insanity, they must be *satisfied* that the accused was insane when he committed the homicide.

The importance of the case to the appellant has induced a thorough examination of the authorities within our reach bearing upon the question, and after full consideration we feel convinced, from the unbroken current of adjudications upon the subject, as well as from the reason of the rule, that it has not been impinged upon, and that no error was committed by the Circuit Court of which the appellant can justly complain.

The rule in question is founded upon the benign presumption of law in favor of innocence until the contrary is satisfactorily established, a presumption which continues in force in behalf of the accused, and remains his shield and protection as long as a rational doubt exists as to his guilt. To the benefit of this presumption he is always entitled, and it has been extended to the prisoner in this case, for the jury are told in

the fifth instruction that "if they have such rational doubt as to his guilt or innocence, they must acquit him."

This presumption of the law in favor of innocence is alike essential to the safety of the individual citizen and the security of society, and is universally recognized in all criminal and penal cases. But there are other legal presumptions alike important, and indispensable to the well-being and safety of society, and as necessary in their application in criminal cases. Among these is the presumption of sanity. Every man is presumed to be sane, and accountable as such, for the commission of crime. This presumption is as necessary and universal in its application in criminal cases as the presumption of innocence. The same amount of proof is required to rebut the one as the other. And when, as here, a party has committed a homicide and endeavors to shield himself from the consequences of his act by a plea of insanity, the law demands of him such evidence in support of that defence as will *satisfy* the jury that when he committed the act he was insane, and, as an insane being, not responsible for his acts.

This rule is founded in wise policy, and is obviously necessary for the protection of society, as much so as that which requires satisfactory evidence to rebut the presumption of innocence. Besides the character of the presumption, its necessary operation in almost every transaction of life, and its almost universal application in civil as well as criminal cases, there are other cogent reasons for this requisition of clear and satisfactory evidence in support of a defence in criminal cases grounded alone upon insanity. In ordinary defences, such as self-defence, want of malice, sudden heat and passion, etc., when by reason of the killing the burthen of proof rests upon the accused to rebut the legal presumption of malice, the facts relied on are usually a part of the transaction, or so directly connected with it, and so simple and few, that they are readily comprehended and appreciated by a jury, and no jury will convict in such cases, whilst a rational doubt is entertained as to the reality and merit of the defence relied on, notwithstanding the burthen of proof may be, by legal presumptions, cast upon the accused.

But the plea of insanity is peculiarly liable to abuse. It can be so easily concocted, and facts, admissible as evidence in its support, so readily manufactured by the accused. The latitude of inquiry in such cases is almost boundless. It does not, as other defences, depend upon the proof of facts comprehensible to ordinary minds, and connected remotely or immediately with the transaction under investigation, but in its support facts having no connection with the transaction, only so

Bellingham and McNaghten's Cases.

far as they may tend to show general or previous insanity of the accused, but happening long anterior to the commission of the offence for which he was tried, and the opinions of learned and scientific men upon such facts, are admissible as evidence. It not unfrequently occurs that this plea is resorted to as a last extremity, with a view of introducing under the latitudinous range of inquiry, a multitude of facts and opinions not directly relevant, but strictly admissible, to produce confusion and doubt in the mind of jurors, and interpose thereby obstacles to the attainment of just verdicts. The only safe rule in such cases is to require in support of such defence *satisfactory* evidence that at the time of the commission of the act the party accused was insane. Less than that ought not to suffice, nor with less is the law content.

This principle has been recognized in England and America, in most of the leading cases, since the time of Sir Matthew Hale.

On the trial of *Bellingham* for the murder of Mr. Percival, where the defence relied on was insanity, Lord MANSFIELD said: "The law in such cases is extremely clear. If a man is deprived of all power of reasoning so as not to distinguish whether it was right or wrong to commit the most wicked or the most innocent transaction, he could not certainly commit an act against the law. Such a man, so destitute of all power of reasoning, could have no intention at all. In order, however, to support this defence, it ought to be proved by the most distinct and unquestionable evidence that the criminal was incapable of judging between right and wrong." [1] The rule seems to have been approved by all the English judges as late as 1843.

The acquittal of *McNaghten* for the murder of Mr. Drummond, on the ground of insanity, gave rise to an animated discussion in the House of Lords, who ordered various interrogatories to be put to the judges as to the law arising on the plea of insanity in criminal cases, and, among others, the following: "In what terms ought the question to be submitted to the jury as to the prisoner's state of mind at the time the act was committed?" To this they reply: "We have to submit our opinion to be, that in all cases the jury ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his acts, until the contrary be proved to their satisfaction; and that, to establish a defence upon the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act

[1] Winslow on Plea of Insanity, Law Library, vol. 42, p. 4.

he was doing; or if he did know, he did not know that he was doing wrong." [1]

In Massachusetts, on the trial of *Rogers* for murder, the plea of insanity was set up. It was held by the Supreme Court that insanity, being in the nature of confession and avoidance, must be satisfactorily shown to entitle the jury to acquit on that ground.[2]

In New Jersey it was holden by the Supreme Court in *Spencer's Case* "that the evidence of the prisoner's insanity at the time of the act ought to be clear and satisfactory," and the chief justice, in delivering the opinion of court, said: "The proof of insanity at the time of committing the act ought to be as clear and satisfactory in order to acquit him on the ground of insanity, as the proof of committing the act ought to be to find a sane man guilty." [3]

This principle of requiring clear and satisfactory evidence in support of the defence of insanity, thus appears to be recognized and adopted in England and this country, and not to have been regarded as conflicting with the principle which deems every man innocent until the contrary is shown beyond a rational doubt. It is based upon the legal and obviously necessary presumption of sanity; and, in our opinion, it is a safe rule, founded in reason and good policy, sanctioned by experience and authority, and should not be departed from.

We are of opinion, therefore, that the Circuit Court did not err to appellant's prejudice in refusing the instruction asked, and in granting the third instruction. Without noticing in detail the other instructions, we deem it sufficient to say that they are as favorable to appellant as the law of the case permitted, and that no error was committed to his prejudice in granting them.

With the facts of the case we have nothing to do. The jurisdiction of this court is limited in such cases to questions of law arising and saved by exceptions during the progress of the case. Beyond that it does not reach.

There being, then, in our opinion, no error in the record to the appellant's prejudice, the judgment of the Circuit Court cannot be disturbed, but must stand.

Wherefore, the judgment is affirmed.

[1] 10 Cl. & F. 200; 1 C. & K. 130; 8 Scott N. R. 595.

[2] Com. *v.* Rogers, 7 Metc. 500.

[3] 21 N. J. (L.) 196.

Syllabus and Instructions.

BURDEN OF PROOF — PRESUMPTION OF SANITY — MORAL INSANITY — DRUNKENNESS.

KRIEL *v.* COMMONWEALTH.

[5 Bush, 363.]

In the Court of Appeals of Kentucky, Summer Term, 1869.

Hon. RUFUS K. WILLIAMS, *Chief Justice.*
" GEORGE ROBERTSON, }
" MORDECAI R. HARDIN, } *Judges.*
" BELVARD J. PETERS, }

1. **The legal presumption of sanity** must be rebutted by satisfactory evidence. A doubt of sanity is not sufficient to justify an acquittal; for the presumption of sanity must be overcome by a preponderance of evidence.

2. **Mental or moral insanity,** however recent, to such an extent as to destroy free agency and moral responsibility, on being established by satisfactory evidence will excuse.

3. **Drunkenness,** from social hilarity is no excuse for crime.

APPEAL from Jefferson Circuit Court.

Wm. L. Jackson and *Selby Harney,* for appellant.

John Rodman, Attorney-General, for appellee.

Chief Justice WILLIAMS delivered the opinion of the court.

Wm. Kriel having been indicted, tried and found guilty of the murder of his wife, has appealed to this court for a reversal of the judgment and sentence of death. His only defence was that of insanity, produced from habits of dissipation and excessive drinking of ardent spirits. The following instructions were give to the jury at the instance of the plaintiff and defendant, and by the court of its own accord.

For the Commonwealth: —

1. "Felonious homicide may be either murder or manslaughter.

2. "Murder is the killing of a human being by another with malice aforethought.

3. "Malice, in its legal sense, denotes a wrongful act done intentionally without just cause.

4. "Malice is implied by the law from any deliberate cruel act committed by one person against another, however suddenly done.

5. "If homicide be committed by the use of a deadly weapon in the previous possession of the person slaying, the law implies that the act was done with malice.

6. "By the term aforethought is meant a predetermination to kill, however sudden, or recently formed in the mind before killing.

7. "Before the jury can acquit Kriel on the ground of insanity from delirium tremens (if they believe all the evidence, beyond a reasonable doubt, that he did the killing with a deadly weapon and without provocation), they should be satisfied, from the whole of the testimony taken together, that he was laboring under a fit of delirium tremens at the time he shot; and the jury cannot presume its existence, at the time of the killing, from proof of antecedent fits, from which he recovered.

8. "In order to acquit the prisoner, Wm. Kriel, on the ground of insanity (if the jury are satisfied, to the exclusion of a reasonable doubt, that he killed Margaret Kriel, his wife, with a deadly weapon, and without any provocation), they should be satisfied that the evidence, all considered together, preponderates towards establishing the fact, that he was at the time he killed Margaret Kriel, his wife, deprived of the force and natural agency of his mind, and that his moral and intellectual faculties were so disordered by long continued indulgence in intoxicating liquors as to induce mental disease, and to deprive his mind of its controlling and directing power, and that he did not have, at the time, sufficient power to govern his actions.

9. "If the jury believe, beyond a reasonable doubt from all the evidence in this case, that the accused is guilty of the crime charged in the indictment, they should find him guilty."

For the defendant: —

1. "The crime of murder is the killing of a human being within the peace of the Commonwealth of Kentucky, by a person of sound mind and discretion, with malice aforethought.

2. "If the jury have a reasonable doubt as to any material fact, they must acquit.

3. "If the jury believe that, at the time of the alleged killing, the accused was a person of unsound mind, they must acquit.

4. "If the jury have a reasonable doubt as to the sanity of the accused, at the time of the alleged killing, they must acquit him; and it is immaterial how that insanity was superinduced.

5. "That to convict the accused, the jury must be satisfied, from all the evidence, beyond a reasonable doubt, that he shot his wife deliberately and maliciously, with intent to kill her, and at that time he was a man of sound memory and discretion."

By the court: —

"If the jury should find the defendant not guilty, and they acquit him on the ground of insanity, they must state that fact in the verdict."

Instructions as to Insanity.

On application of the jury, after they had retired, and being brought into court in the presence of both parties: —

"The jury being brought into court for an explanation as to what seems to them to be a conflict between the fourth instruction given for the defendant, and the seventh instruction given for the Commonwealth, the court instructs them thereon, as follows: 'The two instructions taken and considered together, meant, that if the jury have a reasonable doubt as to whether the accused was of sound mind when he did the killing, they must acquit him, and it is immaterial from what cause his unsoundness of mind may have arisen; but they cannot acquit him on the ground of unsoundness of mind arising from delirium tremens, unless they believe, from all the evidence, he labored under unsoundness of mind at the time of the killing; and they cannot presume such unsoundness of mind from the mere fact that he had previously had an attack of delirium tremens, from which he had recovered. If they have a reasonable doubt of his soundness of mind at the time of the killing — it matters not by what cause the unsoundness of mind may have been produced; but the fact of his previously having had an attack of delirium tremens from which he had recovered, is not, of itself, sufficient evidence of unsoundness of mind at the time of the killing; it is a fact, however, to be considered by them in weighing the other testimony bearing on the condition of his mind at the time of the killing.

"'The jury also inquired whether, in making their verdict, they should confine themselves strictly to the evidence and instruction of the court. They are instructed that they are to consider nothing as evidence except what was proved before them in court; and the instruction given by the court are the law of this case; they are, however, to give due consideration to the arguments of counsel, so far as the arguments seem sound and assisting to them at arriving at correct conclusions from the law and evidence. If, however, the jury believe, from the evidence, to the exclusion of a rational doubt, that the accused was of sound mind, and killed the deceased, but did so without malice aforethought, they should find him guilty of manslaughter, and fix in their verdict the period of his confinement in the penitentiary at not less than two nor more than ten years.'"

Under the provisions of our criminal code we have no jurisdiction to reverse on the evidence, for as to this the verdict of the jury and judgment of the court are conclusive; but our jurisdiction is confined to the corrections of errors of law, and, therefore, we can only look into

the facts to determine as to the proper application of the legal rules thereto.

Without a rehearsal of the various facts developed in this case, to some extent conflicting in their nature, it is sufficient to say that the evidence would have justified the jury in finding, either that the defendant was sober and of sound mind at the time of the homicide, or that he was intoxicated, and to some extent at least, irrational, as they might most credit the statements of the witnesses of the respective parties, or give more importance to the facts detailed by them.

It appears that Mrs. Kriel was a woman of feeble health, delicate and fragile; that she had taken her clothes to the house of her sister, residing in the same city (Louisville) with her, intending to go to the country, and that her mother, sister, and herself, were still at the dinner table when the accused came in and asked her relative to her taking her clothes away; when she substantially replied she was going to the country, as the doctor had advised her she must do for her health. The defendant immediately addressed her sister, and asked what she meant by saying, "If he had been my husband, I would have killed him long ago." It further appears from this sister's evidence that Kriel and wife had before divided their property, by the advice of their counsel. Immediately after this address by Kriel to his wife's sister she went up stairs, and Kriel, with violence, choked his wife until she fell prostrate and apparently dead, when her mother gathered her up into her lap; then stooping over her, he pulled from his pocket a pistol, and shot her through the head. She never spoke, but expired immediately.

The sister hearing the confusion below, and supposing Mrs. Kriel had fainted, with a pan of water was returning to the lower room, when Kriel, immediately upon her appearance in sight, shot at, but missed her. He then put his pistol to his own head, shot once or twice, the balls however lodging in the scalp, without fracturing the skull, and then immediately ran, when the crowd attracted by the alarm, and some policemen, chased him some half mile. When they came up with him, he was on his knees and hands under the bank of a small branch, as though he had fallen from exhaustion or was attempting concealment. He said but little on his way to the jail, and seemed stupid and insensible for some two or more days, eating but little.

Several apparently credible witnesses attest his sober appearance the day before, and down to nightfall, and then the next day down to within a few minutes of the homicide, between twelve o'clock M. and ten o'clock P. M.

And must be Rebutted by Satisfactory Evidence.

The physicians testified that the subsequent stupor may have been the effect of excessive drinking, or of the concussion of brain from the shots in his scalp, or from the exhaustion resulting from his long chase.

The circumstances sufficiently attest that Kriel and wife had recently had disturbances; had divided their property, and that she had taken her clothes to the house of her sister, to which place he had followed her, armed with a deadly weapon, and that without any sudden provocation, or even irritating language on her part, he assaulted, shot, and killed her.

The rules of criminal law, especially as applicable to these facts, are few and simple, being founded in wisdom and experience, with a due regard to the protection of life and the preservation of society, yet humane and indulgent to the passions and frailties of human nature and the infirmities of the mind, when diseased and irrational from mental or moral insanity. It is universally written, by all authors on criminal law, that sanity is to be presumed; and this doctrine has always been upheld by this court, especially in the two leading cases of *Graham* v. *Commonwealth*[1] and *Smith* v. *Commonwealth*.[2] Therefore, when the State makes out an unlawful homicide with a deadly weapon, and identifies the accused as the perpetrator, it has shown all that is essential to conviction.

Necessary self-defence, or misadventure, or insanity, moral or mental, as an excuse, comes as a defence; and whilst irresponsibility because of insanity need not be shown beyond a rational doubt, yet as sanity is always presumed by law, this universal legal presumption must be rebutted by satisfactory evidence; that is, the jury must be satisfied from the evidence, whether produced by the one side or the other, that the perpetrator of a homicide not in necessary self-defence, nor by mere unintentional accident, was irresponsibly insane when the deed was perpetrated; for evidence, merely raising a doubt as to mental soundness, would not be sufficient to repel the legal presumption of saneness; as this would be repelling a legal presumption by evidence raising a mere doubt or suspicion as to the mental condition.

It is the legal duty, therefore, of all juries to convict the perpretrator of an unjustifiable and *prima facie*, inexcusable homicide, unless the evidence rationally convinces them that, at the time of the killing, the perpetrator was laboring under such a state of mental aberration and disease as to deprive him of a knowledge of right and wrong; or if he knew this, still to take from him the moral power to resist his morbid inclination to its perpetration.

[1] 26 B. Mon. 587. [2] 1 Duv. 224.

Kriel *v.* Commonwealth.

A mere doubt of sanity, however rational, is wholly insufficient to rebut this legal presumption, and can never be a justification to a jury to acquit; whilst on the other hand, if the preponderating evidence convinces them that the perpetrator was in such a mentally diseased condition as to destroy his free agency, they should not convict merely because they might entertain a rational doubt as to this.

The rational doubt of guilt, so humanely entertained by the criminal law as a cause of acquittal, has never been extended to defences of excuse because of mental or moral insanity; but after the State has made out her case, with the legal presumption of insanity in her behalf, this must be overcome by a preponderance in the prisoner's behalf.

A rational doubt as to whether a homicide had been committed, or as to the perpetrator, should very rationally lead to acquittal; because the law in its humanity should never permit a human being's life to be taken without the clearest evidence that a homicide had been committed, and that the accused was the guilty agent. But if acquittal should result from a mere doubt of sanity, then the legal presumption of mental soundness would amount to but little, if anything. A mere doubt of sanity has never entered as an element into that rational doubt which should produce an acquittal.

If, however, there be mental or moral insanity, however recent, to such an extent as to destroy free agency and moral responsibility, on being established by satisfactory evidence, this will excuse; because the law, in its enlightened benignity, will not punish an irrational and irresponsible being. Malice is an essential ingredient in murder; but this, too, is to be presumed from the violence and wantonness of the assault and character of the weapon used; hence whence sudden passion has been produced from reasonable cause, such as jostling, personal violence and other things, this has been deemed by the law, in its humanity, sufficient to repel the presumption of malice, and to palliate the offence to manslaughter; and our criminal code gives the prisoner the benefit of a rational doubt, as to which grade of offence has been committed.

So drunkenness from mere social hilarity, though wrong in the perpetrator, may be of such a character, and to such a degree, as to show that the mind was incapable of preconceived malice or intentional homicide, and reduce the homicide to manslaughter; but as this state of mind is superinduced by the wrongful act of the perpetrator, a due regard for the interest of society, and the personal security of every one, precludes it from being a satisfactory excuse, and an entire exemption from punishment. Indeed, if it appeared that intoxication

excited the animal passions and aroused a destructive propensity in the accused, why should even drunkenness, in such a case, be considered even a mitigating cause any more than the unchaining of a mad dog in the streets of a town, or the riding a vicious animal into a crowd, merely because the perpetrator had no particular malice at any one, or, indeed, expected death at all to ensue; yet, if by reason thereof, any one should lose his life, this recklessness is set down as malice toward mankind in general, and the perpetrator criminally responsible in the highest degree? But it is not essential that this should now be decided. Excuse, because of drunkenness, is at all times to be received with great caution, and because so easily perverted, and the danger so great of a revenge, for real or imaginary cause of pre-existing offence or malice, under such cover.

And these are the true and essential doctrines as expounded in the two recited cases of *Graham* v. *Commonwealth*, and *Smith* v. *Commonwealth*, when properly understood and construed; for they are consonant with each other in premises and principle, but somewhat diverse in argument; yet the rules of law, as announced by this court, are identical. None of these wise and humane rules were violated in the instructions given on behalf of the State, but were essentially contravened in those given in defendant's behalf, and at the court's own instance, all of which, however, were greatly calculated to benefit him, whilst no possible injury could result to him; for under these instructions, the jury could not convict him at all, if they entertained a rational doubt as to his sanity; therefore, the finding is equivalent to saying he was sane beyond a rational doubt when the offence was committed. The case of *Smith* recited, was upon a sudden and unexpected broil; therefore the court said the instruction as to the presumption of malice from the possession and use of the deadly weapon, without reference to the other circumstances, or explanation of its possession, was misleading in his case. But here the husband followed the wife to her sister's house, armed with a deadly weapon, which he used without any immediate exciting cause; and he does not attempt to account for its possession by showing any necessity for self-defence or other reason. The instructions Nos. 4 and 5, given in this case in behalf of the Commonwealth, were not, therefore, misleading, but a true exposition of the legal presumptions from the facts.

There are other alleged errors; but on close scrutiny we have failed to discover any such to defendant's prejudice; and as the circuit judge, in his written opinion overruling the motion for a new trial, sufficiently responded to them we shall not notice them in detail.

The name of the deceased was alleged to be Barbara Kriel, the wife of the defendant. The evidence is that her name was Margaret. The name is, however, but descriptive, and when the person killed is also properly described as the prisoner's wife, and no objection to the evidence was made on that account, and no motion to withdraw it from the jury, and after conviction and judgment, we cannot suppose the misdescription of the given name, when placed in juxtaposition with the further description that she was his wife, could have misled him, or in any manner have prevented him from a fair trial, and therefore furnish no reversible grounds.

Wherefore being satisfied that the essential errors committed in this case were calculated to facilitate the finding of the prisoner either not guilty at all, or for manslaughter only, and all for his benefit, and when the law was more favorably expounded in his behalf than any elementary writer or decision of this court authorized, and notwithstanding which, he has been found guilty of murder in the first degree, we cannot, in the legal discharge of our duty, with a due regard to the security of society and prevention of crime, disturb the judgment.

Therefore it is affirmed.

BURDEN OF PROOF ON PRISONER.

State *v.* Lawrence.

[57 Me. 574.]

In the Supreme Judicial Court of Maine, 1870.

Hon. John Appleton, *Chief Justice.*
" Jonas Cutting,
" Edward Kent,
" Charles W. Walton,
" Jonathan G. Dickerson, } *Judges.*
" William G. Barrows,
" Charles Danforth,
" Rufus P. Tapley,

1. **Burden of proof on defendant.** — To establish the defence of insanity, the burden is on the defendant to prove by a preponderance of evidence that at the time of committing the act he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did, that he did not know he was doing what was wrong.

2. **Partial Insanity,** if not to the extent above indicated, will not excuse a criminal act.

The Facts of the Case.

Indictment for murder.

It appeared, on the part of the government, that Elmira Atwood had been living at the house of one Mrs. Marsh, on Hammond Street, Bangor, some four weeks prior to the murder; that the defendant Lawrence went there more or less; that on Saturday, January 1, 1870, he went there considerably intoxicated, conversed with Elmira Atwood, and called her by an opprobrious epithet, she answering, that if he called her that, she would make him prove it; whereupon he went away without any reconciliation taking place between them at that time; that on the next (Sunday) evening, he went there again; that he, living by himself on Main Street, and Mrs. Marsh having been in the habit of preparing food for him, handed her a little tin pail, and requested her to put up some hashed fish; that he asked Mrs. Marsh if she were alone; that Mrs. Atwood had gone into a little bedroom; that after Mrs. Marsh went into the pantry, Lawrence went into the bedroom, where he saw Mrs. Atwood; that Mrs. Marsh heard voices talking, but could not understand what was then said, until she heard Mrs. Atwood say, "I will, I will, I will, John." That when Mrs. Marsh came out of the pantry, she saw Mrs. Atwood coming out of the bedroom, Lawrence having already come out, and gone across the kitchen, facing the door as if going out; that Mrs. Atwood said, "Oh, the pistol! the pistol!" and came near fainting; that Lawrence turned round, drew out his pistol, and without taking any more aim than merely raising his arm and pointing it toward Mrs. Atwood, fired twice; that Mrs. Atwood fell; that Mrs. Marsh rushed out of the house, and heard two more pistol shots, at least, fired after she went out; and that Lawrence passed Mrs. Marsh, going out of the house as she returned. It also appeared that about seven o'clock on the same Sunday evening, Lawrence was found in his room, on Main Street, with his throat cut; that he still had a knife in his hand; that when found, his first words were, "Do you think I am cut enough to die?" "Is that damned whore dead?" "I hope she is. If she is, I can die happy?" It also appeared that the defendant was jealous of Mrs. Atwood, who, he alleged, had agreed to marry him, and then went with other men.

The defence was insanity, and considerable testimony tending to show the condition of Lawrence at the time of shooting Mrs. Atwood, and before and afterwards, was introduced.

The presiding judge, *inter alia*, charged the jury as follows: —

"Was it a case of jealousy, or was it an insane delusion? You are to determine whether insanity of any kind existed at the time of the

homicide. If it is not established, then the defence of insanity fails, and the case stands upon the facts.

"If you find a general or partial insanity, then what is the rule? If you take the monomania upon the subject of the woman, as he expresses it, 'going back upon him,' if there was an insane delusion upon that subject, then how far did that excuse him for the killing? Suppose he was insanely jealous, it would not necessarily follow that he should not know it was not right for him to kill her.

"But if it is shown that he not only had an insane delusion on that subject, but that he supposed he had a right to kill her, that covers the whole. But the mere fact that a man is jealous with cause, does not justify him in killing a woman, if she is his lawful wife. So, if he is insane with a monomania, he is not justified in killing her, unless it is shown that he had a faith that it was right for him to do it, and had lost all sense of responsibility for it. I have now reached the point where I can give you the general instructions that I intended.

"To excuse a man from responsibility on the ground of insanity, it must appear, that at the time of doing the act he had not capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was doing. That he had not knowledge, consciousness, or conscience enough to know that the act he is doing is a wrong act and a criminal act, and one that he will be subject or liable to punishment for doing. In order to be responsible, he must have sufficient mind and memory to understand and remember the relation he stands to others, and others to him, and that the act he is doing is contrary to the plain dictates of right, wrongfully injurious to others, and a violation of the dictates of duty. If there be partial derangement, or insanity of mind, so that it is not in all respects perfectly sane and sound, yet if not to the extent above indicated it will not excuse a criminal act. In other words, a man may be a monomaniac, his mind may be disordered, and to a certain extent, it may be proved that he is of unsound mind, and yet, if he has mind and understanding enough and is not carried away so but that he understands the difference between right and wrong as to the act he is then doing — that is to say: if the man knew that what he was doing was wrong, and he was liable to be punished for it, and that the act would not be excused, then he is subject to punishment, although there might be some partial derangement.

"But if he does not understand the relation of parties, as, for instance, where a son killed his father, and was so deranged that he did

Illustrations.

not know it was his father, he could not be responsible. But if the party feels and knows that he is doing wrong, although he may have wrought himself up by hatred and jealousy to a determination to kill, yet if it appears that at the time he had capacity sufficient, and did know he was doing wrong, as before explained, he would not be excused. The rule is as I have stated. If there be a partial insanity, yet if it is not proved he was insane and unsound to the extent I have stated, it will not excuse criminal acts.

"I am requested, by the counsel, to give some instructions: —

1. " 'That if, at the time of the commission of the act, the defendant was under the influence of an insane delusion, impelling to the commission of the act, for which he had no rational motive, notwithstanding he may have appeared able to distinguish right from wrong, they shall find for the defendant on the ground of insanity.'

"On that request I will say if he was under an insane delusion, it would be a defence if the act, under that delusion, would be justifiable in assuming the delusion to be a fact. If he acts under the delusion, for instance, that he has a right to kill, then he is justifiable; but if he acts under another delusion, not the cause, then he may not be. For instance, take the case of Abraham offering up his son Isaac. Where he had a special commission to do it; he had faith, and believed it was the command of God, and was about to do it. Now suppose some gentleman here should think he heard, in the night, a voice coming to him distinctly and audibly and saying, 'Take your son and build a pile and sacrifice him,' and he fully believed it, and took his little son and carried him out the next day, and actually sacrificed him.

"There insanity would be fully proved, because he actually believed it as much as Abraham believed that it was the commandment of the Almighty. A thing would be excused from delusion, where it would be excused if that delusion were true, as before explained. I do not think that the evidence in this case calls upon me to give any ruling as to a case of blind, unreasoning impulse to take life irrespective of motive as to the person assaulted, and having no connection with any existing relation between the assailant and the assailed, which impulse overcomes reason, power of the will, conscience, and all fear of the consequences, and all power to resist the impulse to kill, although the person might not be shown to have lost all sense of right and wrong. That would be like cases read by the counsel for the defence in his very clear and able opening. A French woman had a desire to kill young children, — an insane desire to kill, without any jealousy, and without any occasion whatever. There have been cases of that kind, and it is a

question how far that impulse might excuse. I think there is nothing of the kind shown in this case.

2. "That in capital cases the prosecution must prove the felonious killing, and if the jury have a reasonable doubt of the murder, the verdict must be for acquittal.

3. "That the plea of insanity does not deprive the accused of the benefit of this principle of law, and does not relieve the government from proving, beyond a reasonable doubt, the guilt of the prisoner."

On these requests the judge said he had already given them in his charge, but would repeat the substance of what he had said, viz.: That the government was not relieved from proving the guilt of the accused beyond a reasonable doubt by such plea, or on any other ground; but if it had proved beyond such doubt, all that was required to constitute the offence charged before any evidence of insanity was offered; that insanity must be established by a preponderance of evidence as before fully stated and explained in the charge.

4. "That where insanity is offered in defence, it is not necessary for the prisoner to prove his insanity by a preponderance of testimony, but on the contrary, if the jury find a reasonable doubt of the sanity at the time of the commission of the act, there must arise in their minds a doubt of the malice, which alone constitutes murder." By the Court: "I give you no other ruling than what I have given you before."

5. "In this case where insanity is set up as a defence, the court is requested to instruct the jury that they are to be satisfied from all the testimony in the case, beyond a reasonable doubt, of the guilt of the prisoner, and if they have a reasonable doubt of his sanity, they are bound to acquit." No new instruction was given under this request.

6. "Will the court also instruct the jury that if they find that at the time of the commission of the act the defendant was laboring under an insanity which would excuse him from legal responsibility for its commission they will render a verdict of acquittal, whether or not they are satisfied as to the causes which produced the insanity or its particular form." The judge stated, in regard to this request, that he had already instructed the jury, that if the prisoner was laboring under insanity at the time of the commission of the act, sufficient to excuse him, they will acquit him, whatever may be the cause of the insanity, or whether ascertained or not.

The judge then proceeded as follows: "There is only one other thing I wish to call your attention to, and I think it is my duty to say a word upon it. That is the non-production of the prisoner in this case. It is

The Inferences to be Drawn Therefrom.

only a few years since the prisoner was allowed to testify in criminal cases. The law has been altered, giving the prisoner the privilege of testifying if he chooses. He is not bound to testify to anything criminating himself, or bearing on the case. But if he is not put upon the stand you must necessarily understand and know the fact that he is not put upon the stand to state his knowledge to the jury. The jury would not be bound to, and should not convict simply on the ground that the prisoner does not testify. But it is a fact in the case, more or less potent or important, as you may consider it. In this case the counsel say the plea being insanity, they did not propose to put on the prisoner himself. Ordinarily when insanity is alleged to have continued, if he was a crazy man when tried, this suggestion would have more weight than when not laboring under insanity at the time of the trial. While he was not obliged to go on, you are not to draw forced inferences. Perhaps he might have explained his conduct more fully, but he chose to rely upon the evidence presented. At all events it is for you to consider that he did not choose to go on to the stand, and the government say there are many facts that he might have explained."

The jury returned a verdict of guilty of murder in the first degree; and the defendant alleged exceptions.

A. Knowles and *John F. Godfrey*, for defendant.

W. P. Frye, Attorney-General, *contra*.

DANFORTH, J.

The instructions and refusals to instruct in relation to the responsibility of the insane, complained of in the first exception, are in strict conformity to the most approved judicial authorities.[1] It is possible that the increased knowledge of the nature and effects of insanity may, in appropriate cases, require instructions more in harmony with the requests in this case. But, however this may be, a careful examination of the testimony, which is reported in full, shows that this is not one of those appropriate cases, and that the respondent is not, in any legal sense, aggrieved by the instructions given or withheld upon this point.

So of the last instruction excepted to, if such it may be called. It would seem to be rather a suggestion of a fact already existing in the case, than a ruling in a matter of law. That the prisoner did not go upon the stand is a fact in the case, and is made no more or less so, simply because the presiding judge saw fit to call the attention of the jury to it.

[1] United States *v.* Holmes, 1 Cliff. 98; Com. *v.* Rogers, 7 Metc. 500, and cases cited.

It could hardly have escaped the notice of the jury if the judge had not alluded to it in his charge. It will exist in every case, so long as the act permitting parties to testify remains the law, unless the party himself chooses to make it otherwise. It will, too, have its legitimate effect upon the minds of the jurors, more or less convincing, according to the circumstances of each case, whatever may be the ruling of the court in regard to it. Belief is controlled by principles more potent in their action than artificial rules of evidence. When a person has an opportunity to testify in relation to a matter of which he has knowledge, and in which he is deeply interested, and refuses to do so, such refusal will have its weight, modified only by the accompanying circumstances. We act upon such testimony constantly. It is the instinct of our nature, and will not be eradicated by the ruling of any court. If this leads to injustice, the wrong is inherent in the law permitting parties to testify, and the remedy is with the Legislature alone.

The remaining question as to the burden of proof in criminal cases, where insanity is set up as a defence, is one of much more difficulty, though, until recently, the authorities seem to have been uniform in imposing it upon the defendant. Quite lately doubts have been suggested, and in a few instances, judicial tribunals, entitled to the highest respect, have come to a conclusion the reverse of the former decisions. As a matter of principle, the question lies in a very narrow compass. The difficulty is in the starting point, in determining the premises. These being once settled the conclusion is evident. Those who maintain that the burden is upon the prosecutor, contend that sanity is an elemental part of the crime, and is a necessary part of its definition, and as such the jury must have the same satisfaction of its truth as of any other part. It is undoubtedly true, that there can be no guilt except as the result of the action of a sound mind, there can be no crime except there be a criminal; nevertheless there is a palpable distinction between these two; one cannot exist without the other, still they are two and not one and the same. The person doing the act is not the act itself. He may or may not be responsible for the act, but in no sense can he be the act. So, too, whether he committed the act, is one question, and whether he is responsible for that act is another and entirely different question. Now, it should not be forgotten that we start with the legal presumption that all men are sane and responsible for all their acts, in other words, that no man is insane and irresponsible, precisely as we do with the proposition that no man has legal authority for doing that which otherwise would be a crime or a trespass. Hence, the statute defines murder to be "the unlawful killing of a human being, with malice afore-

thought, either express or implied." Here are all the elements necessary to constitute the crime assuming a responsible agent. Not one word, as to what is or is not required to make him responsible, and so of all other statute definition. Whoever shall do the certain acts set out, shall be guilty. Here, as everywhere in the law, sanity is assumed and treated as an essential attribute of humanity. The indictment follows the statute, setting out all the acts deemed essential to the crime, but omitting all reference to the capacity of the accused. Of all that is set out in the indictment he is presumed innocent, and that must be proved and nothing else. When that is proved he is convicted, unless he interposes some defence other than a sane denial of the allegations against him. A simple plea of not guilty puts in issue the allegations, and only the allegations in the indictment, and as to them the prosecution has the affirmative. But if the accused would put in issue any other allegation, any question as to his capacity or responsibility, he must do it by an affirmative statement. If he puts in the plea of insanity he assumes the affirmative, he changes the issue. And it is immaterial whether it is in writing or merely verbal; in either case it just as effectually raises a new issue. It is true it may be resorted to in connection with the plea of not guilty, but it is not and cannot be a part of it. The plea of insanity is, and of necessity must be, a plea of confession and avoidance. It does not deny a single allegation in the indictment, but simply says, grant all these allegations to be true, that all these acts have been done, and still guilt does not follow, because the doer of them is not responsible therefor. It does not meet any question propounded by the indictment, but raises one outside of it. It is not a mere denial, but a positive allegation. It is, however, said in the argument, that the plea of insanity does deny the allegation of malice, because the insane is not capable of such a state of the mind. If the term malice is used in the common meaning of that word, it is not now necessary to discuss the question as to how far those who are insane may or may not indulge in it, though it may well be doubted whether a person may not be so unsound in mind as to be irresponsible, and yet be actuated by malice as implying hatred. But however this may be, he may have malice in the legal and technical sense, or he may be so wilful and deliberate in his action, that the law in the absence of proof of insanity, will conclusively infer malice. When insanity is found, it does not show that the act was any less wilful or deliberate or intentional even; but it does show an excuse, an irresponsibility of what would otherwise have been criminal. So here, as in other respects, the plea of insanity does not deny, but avoids; confesses this element as well as the others, but ex-

cuses. It would seem, then, that the question of insanity can never be raised, unless by the prisoner; and by him only in an affirmative allegation, such as carries with it the burden of proof.

Every man is presumed to be innocent. The presumption stands till every reasonable doubt is removed. The law presumes every man sane. Why should not this presumption stand till removed by at least a preponderance of evidence? Does it not, and must it not necessarily still stand, though we may have some doubts of its truth? That which exists is not destroyed simply because it may be enveloped in a thin cloud. However we may theorize, it will still exist until demolished.

If this presumption is to be overthrown by a doubt as well might it be abolished at once, and leave the question of sanity like that of malice, to be proved by the government, or implied from the circumstances of each case. But this presumption cannot be abolished. It is inherent in human nature and will exist as long as rationality is an attribute of man, and existing, it should have some meaning, some force; enough, at least, to enable it to withstand something more than a reasonable doubt.

In *Commonwealth* v. *Mackie*,[1] is very clearly stated the limits of the burden of proof in criminal cases as resting upon the government, where the issue is raised by a simple denial of the allegations in the indictment. It is there held that "where the defendant sets up no separate independent fact, in answer to a criminal charge, but confines his defence to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful." It is further said in the opinion, "there may be cases where a defendant relies on some distinct, substantive ground of defence to a criminal charge, not necessarily connected with the transactions on which the indictment is founded (such as insanity, for for instance), in which the burden of proof is shifted upon the defendant."

In the more recent case of *Commonwealth* v. *Eddy*,[2] where the question as to the plea of insanity came directly before the court, it was held that the burden of proof was upon the defendant, and that he must satisfy the jury of his insanity by a preponderance of evidence.

In accordance with this authority are many others entitled to great respect.[3]

[1] 1 Gray, 61.
[2] 7 Gray, 583.
[3] United States *v.* Holmes, 1 Cliff. 98; Wharton's Am. Crim. Law, sects. 16, 7, 11, and cases cited; 2 Greenl. on Ev., sect. 373, and notes.

But in this matter, we are not left to the principles of the common law alone. Our statute law, by implication at least, leads to the same conclusion. By the Revised Statutes of 1859,[1] it is provided that, "when the grand jury omits to find an indictment against any person arrested by legal process to answer for any offence by reason of insanity, they shall certify that fact to the court; and where a traverse jury, for the same reason, acquits any person indicted, they shall state that fact to the court when they return their verdict." And in either case, he is to be retained in prison or the insane hospital till restored to his right mind, or delivered according to law. It can hardly be supposed that the Legislature expected or intended that this jury should return as a fact, the insanity of the prisoner when they have only a reasonable doubt of his sanity, or that he should be detained in custody till restored to his right mind, when there is not sufficient proof to make even a *prima facie* case that he is otherwise than sane. Our conclusion is, that upon this point, as well as upon the others, the ruling was sufficiently favorable to the prisoner.

Exceptions overruled

Appleton, C. J.; Cutting, Walton, and Dickerson, JJ., concurred.

BURDEN OF PROOF — OPINIONS OF WITNESSES — INSANITY PRESUMED TO CONTINUE — TEST OF INSANITY — INSANITY OF RELATIVES.

Baldwin *v.* State.

[12 Mo. 223.]

In the Supreme Court of Missouri, October Term, 1848.

Hon. William B. Napton,
" William Scott,
" Preistly H. McBride, } *Judges.*

1. **Burden of Proof.** — The prisoner pleading insanity as a defence to crime must establish it to the satisfaction of the jury.

2. **Opinions of Witnesses** as to the prisoner's insanity are admissible.

3. **Insanity Proved to Exist Presumed to Continue.** — Where it is shown that the prisoner was insane at any time prior to the commission of the crime charged, the law presumes the continuance of such insanity until a lucid interval, or a restoration to reason is proved.

1 Ch. 137, sect. 2.

Baldwin *v.* State.

4. **The Test of Insanity** is the ability to distinguish between the right and the wrong of the act charged.

5. **Where there is Evidence** of the prisoner's insanity, the fact that some of his ancestors were insane is relevant.

Appeal from St. Louis Criminal Court. The prisoner was convicted of the murder of his brother-in-law, Victor Mathews.

Sharp, for appellant, *Stingfellow*, for the State.

McBride, J. —

(Omitting rulings on other points.)

When the evidence closed the defendant's counsel asked the court to instruct the jury as follows: —

1. That if the jury believe from the evidence that the defendant was of unsound mind previous to the time at which the offence charged in the indictment was committed, and that derangement or unsoundness of mind was such as to leave him without sufficient reason, judgment, and will, to enable him to distinguish between what was right and what was wrong, with regard to the particular act in question, the killing of Mathews for violence used upon his, defendant's, sister; and unless he knew that the act was a crime against God and nature, they must find him not guilty.

2. If the jury believe from the evidence that the prisoner acted under a false and insane, but sincere belief that the deceased had threatened to kill his sister, and that from this cause, he, under an uncontrollable impulse, killed Mathews, they must find him not guilty.

3. If the facts are such as to satisfy the jury that the prisoner had been laboring under a delusion or particular insanity, or if from his acts and conduct testified to by witnesses, they believe him insane, or resting under a fixed delusion upon the particular act in question for some time previous to the killing of Mathews, the presumption of law is, that he was so insane when the act was done.

4. If at the time the prisoner fired the pistol at Mathews, he was not conscious of doing wrong, and had not self-control to prevent him from doing the act, they should acquit the prisoner.

5. As to the question of insanity or unsoundness of mind, the true point for the jury is not whether the prisoner was capable of distinguishing between right and wrong generally, but whether he knew in the particular case, with reference to the act in question, that he was committing an offence against the laws of God and nature.

6. That if the evidence in the cause is such as to satisfy the jury that the prisoner was insane or of unsound mind previous to his going to Arkansas, and previous to the killing of Mathews, they must acquit him,

Instructions.

unless they believe from the evidence, that the prisoner had recovered his reason, and was of sound mind at the time the offence charged was committed.

7. That if the preponderance of evidence was in favor of his insanity or unsoundness of mind — if its bearing as a whole inclined that way, they should find him not guilty.

8. That as it is difficult to draw the line of demarkation and say where soundness of mind ends and insanity begins, the jury should be governed by facts and circumstances showing the condition of the prisoner's mind, and if from those facts, as stated in evidence, the jury believe that the prisoner rested under a delusion that Mathews had attempted to kill his sister, and did intend to kill her, and that from that delusion he was left without sufficient reason, judgment, and will, to know that the offence was a crime against God and nature, they should acquit him.

9. That although facts may have been proved which, in the absence of insanity or unsoundness of mind, or the proof of it, might go to show malice in the prisoner, yet if the killing was done while insane, or resting under a delusion that was fixed in his mind, which left him without the use of his reason, judgment, and will, at the time of the killing, the malice is not presumed, but the existence of it rebutted, and the jury should acquit.

10. That every other question is merged in the question whether or not the prisoner was insane at the time of the killing, the only question for them to determine is, was he insane or of unsound mind with reference to the particular act in question, and at the time the offence is charged to have been committed, if so, he should be acquitted.

11. In order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose, and if his reason and mental powers are either so deficient that he has no will, no conscience, no controlling mental power, or, if through the overwhelming violence of mental disease, his intellectual power is, for the time, obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

12. That if the jury believe from the facts and circumstances testified to by the witnesses, that the defendant was of unsound mind previous to the killing of Mathews, and up to the time when the act was done, and that unsoundness of mind was such as to fix a delusion upon the mind of the defendant upon the subject of violence to his sister, which left him incapable of judging between right and wrong with reference to that subject, he should be acquitted.

13. That in forming a conclusion as to the guilt or innocence of the defendant, the jury should consider the state and condition of the prisoner's mind prior and subsequent to the killing, and if from all the evidence in the case, they believe him of unsound mind at the time the act was done, they should acquit.

14. That the evidence of physicians examined as experts, is competent evidence to assist them in forming correct opinions of what unsoundness of mind is, and what the state of the prisoner's mind now is.

15. That if the jury have a reasonable doubt resting on their minds of the guilt of the defendant, they should acquit.

16. That the jury have the power to find the defendant guilty of a less offence than the one charged in the indictment, if from the evidence in the cause they believe him guilty of such less offence.

17. The rule of law is, that the whole of a confession must be taken together, if introduced by the prosecutor, and it is entirely a question for the jury, how far and to what extent the confessions of the prisoner are proved.

All of which said instructions the court refused, except the last; to which refusal the defendant excepted.

Thereupon the court gave the jury the following charge: —

"*Gentlemen of the jury:* The evidence in this cause and the arguments of counsel on behalf both of the prisoner and the State having been now concluded, the weighty and most responsible duty is devolved upon you of saying upon your oaths, from the evidence before you, whether the defendant is or is not guilty of the crime of murder, with which he stands charged. To the commission of any crime there is necessary, not only the doing of an unlawful act, but the possession of adequate mental capacity to know that the act is wrong at the time of doing it, and the power of choosing between the commission of the act and its non-commission.

"In accordance with this definition, the law of the present case may be considered under two branches: (1.) Whether the act charged in the indictment has been committed, as therein charged, and if so, (2.) whether at the time of committing it, the defendant was capable of committing crime; in other words, what rules and principles of law ought to govern you in passing upon the defence set up in the case.

"And here it may be proper to remark that the statutes of this State do not permit the court to express an opinion upon the evidence given upon this trial, but only to place before you such legal rules and principles applicable to the case as ought to govern you in its decision.

Burden of Proof of Insanity.

First, then, in regard to the commission of the act charged. It is exclusively your province, gentlemen of the jury, to say from all the evidence which has been given before you, whether the defendant did or did not commit the act charged in this indictment to have been done by him. The indictment charges the defendant with murder in the first degree, and if from the evidence you find that the defendant committed the act charged in the indictment, in manner and form as therein charged; that he committed it wilfully, deliberately, premeditatedly, and with malice aforethought, that is, without legal justification or excuse, and under circumstances showing wickedness and depravity of heart, you ought to find him guilty, unless you shall believe from the evidence, that at the time of committing the act, the defendant was incapable of committing crime.

"It is a rule of law, founded in reason, that the confessions of a defendant, when voluntarily made, are evidence against him, because common experience proves that a man will not, without motive for doing so, confess facts to his disadvantage unless they are true; such confessions are always strengthened by circumstances corroborative of their truth. It is also a rule of law that when the confessions of a defendant are given against him, the whole of what he says at the time of such confession, as well that which is in his favor as that which is against him, must be taken together as evidence of the facts stated; but it is the right of the jury to disbelieve and reject any portion of such statements, which the jury may believe either intrinsically improbable, or contradicted by other and more satisfactory evidence.

"If, gentlemen, upon consideration given in the cause, you shall entertain a reasonable doubt of the commission of the act by the defendant as charged in the indictment, it will be your duty, gentlemen, without proceeding farther, to acquit the defendant. But if, from the evidence, you are satisfied beyond a reasonable doubt that the act as charged in the indictment was committed by the defendant, it will then become necessary for you to proceed to the consideration of the defence here set up, to wit: that at the time of the commission of the act the defendant was, by reason of insanity, incapable of committing crime.

"Before proceeding to lay down legal rules to aid you in the decision of this question, or rather the first legal rule which it is incumbent on the court to bring to your attention, is that the law presumes every man who has arrived at the years of discretion to be sane and capable of committing crime until the contrary is shown; so that the State, after proving the unlawful act, need offer no evidence whatever of the sanity

of the defendant, but may rest upon the legal presumption of sanity until the defendant shows the contrary.

"This defence is emphatically one which the defendant must make out, and it must be made out to the satisfaction of your minds. For if the evidence merely shows a case of doubt where the defendant might or might not be insane, this is not sufficient to authorize an acquittal.

"I repeat, if the evidence shows merely that the defendant might have been insane at the time of the commission of the act, but does not show satisfactorily to your minds that he was insane at that time, this is not sufficient to warrant an acquittal.

"Another point to which I think it necessary to call your attention, gentlemen, is, that in order to constitute a defence to this charge, insanity must not only be proved to have once existed, but it must be shown to have existed at the time of the commission of the unlawful act.

"The question, therefore, for your decision is not as to the mental condition of the prisoner at the present time. This is entirely immaterial, except so far as it may have a tendency to show in connection with other evidence, that he was insane at the time of committing the act. I say, in connection with other evidence, for even the most positive and conclusive proof of the defendant's present insanity would be insufficient to warrant his acquittal, without evidence of his insanity at the time of committing the act. For it by no means follows that because a man is found to be insane at one time that, therefore, he has always been insane, or that therefore he was insane at any prior point of time. But if you find from the evidence that the defendant was insane at any time prior to that of the alleged commission of the act of homicide, the law in such case presumes the continuance of that insanity, until a lucid interval or a restoration to reason is shown. But if you find from the evidence that after the occurrence of the insanity, and before the commission of the act charged, a lucid interval did take place, then no presumption of the existence of insanity at the time of the act can arise from the proof of such former insanity.

"In regard to the degree of insanity necessary to exempt an individual from responsibility for criminal acts, the law is that his mind must have been so far impaired or destroyed that he was unconscious at the time of committing the act that it was wrong, and that he ought not to do it, or he must have been so irresistibly impelled to the commission of the act, by insane impulse, that he had not the ability to resist that impulse, to control his action, and choose between right and wrong. I repeat, therefore, if you find from the evidence that the defendant com-

What is an Insane Delusion?

mitted the act charged, the question for you to determine is, whether at that time he was capable of knowing that the act which he was committing was an offence against the laws of God and man, and had at that time the power of choosing between good and evil in reference to that act. If, though laboring under hallucination or partial insanity, his mind was not so far clouded or destroyed as not to know the act was wrong, he cannot be excused for the commission of the act.

"In determining this question, gentlemen, you ought carefully to consider and review all the facts and circumstances given in evidence, to ascertain whether, at the time of committing the act, the defendant evinced a knowledge or consciousness that he was doing, or about to do, a wrong and criminal act.

"When monomania, or partial insanity is set up as a defence to the charge of crime, in order to constitute such defence, it is necessary that the subject of insanity should lead to the fatal act; in other words, there must be a connection between the crime and the insanity, so that, but for the existence of that insanity, the crime would not have been committed. In the present case you ought first to consider whether the defendant was really under the insane delusion that the deceased, Mathews, had abused and ill treated his sister, or whether this statement was merely a falsehood invented by him after the act, as an excuse for it.

"To make this an insane delusion, it must have had no existence in fact; the defendant must have believed it true, and have been led to that belief under the influence of insanity, and without such reason or cause for believing it, as would have influenced a sane man; for if the fact had existence and the defendant knowing it, took the life of Mathews for that reason, this would be evidence of killing with malice, and not from insanity.

"In the second place you ought to consider whether, supposing such insane delusion to have existed, the defendant was under the still further insane delusion, that for those supposed injuries and indignities to his sister, he had the right to take the life of Mathews; in other words, that to take the life of Mathews in revenge for such injuries, was not against the laws of God or man, but was right and proper. For you will perceive, gentlemen, that the imaginary existence of these facts, under the influence of insane delusion, could furnish no farther justification or excuse for the act, than the real existence of those facts would have done; so that unless the defendant was, by his insanity on this subject, deprived of the mental power of drawing the proper conclusions in regard to these facts; in other words, deprived by his insanity of the power

of knowing that these facts did not authorize the taking of life, his delusion upon the subject of these injuries can form no excuse for his act.

"The fact that some, or all of a person's ancestors have been insane, does not of itself prove that person insane; but where there is some direct evidence of insanity, it serves to increase the probability of insanity.

"The opinions of medical men, gentlemen, should have weight with you only so far as their means of knowledge and correct information upon the facts testified to, show them deserving of it.

"In conclusion, gentlemen, if you are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the act charged upon him in the indictment, and in the manner and form therein set forth and charged, and if it has been shown to the satisfaction of your minds at the time of committing the act, he was [not] so far deprived of reason as not to know that the act which he was committing was wrong, and was not so far deprived of will as not to possess the power of choosing between right and wrong in regard to this act, you ought, in such case, to find him guilty of murder in the first degree. But if, on the other hand, from the evidence, you have a reasonable doubt of the commission of the act as charged; or, if your minds are satisfied from the evidence, that at the time of the alleged commission of the act of homicide, the defendant had not the possession of reason sufficient to know that the act was wrong, or impelled by insane impulse had not the power of refraining from the commission of the act, you ought in any one of the cases last mentioned, to acquit."

To the giving of which the defendant's counsel excepted.

The charge given by the court to the jury is comprehensive enough to cover the whole case, and we do not perceive any legal objection to it. It embraces most of the principles contained in the instructions asked for by the defendant's counsel; those not embraced in it are either wrong in principle or have no particular application to the case under consideration; therefore we see no error on this point.

After the jury had been charged by the court and retired to their room to consider of their verdict, they returned into court and made the following inquiry of the judge: "The jury wish to know, whether they can find the prisoner guilty in any other degree than that charged in the indictment for murder in the first degree." The court replied: "Not if you find from the evidence that the defendant committed the act charged upon him in the indictment, and committed it wilfully, deliberately, premeditatedly, and with malice aforethought, and in all

Power of Jury as to the Statutory Crime.

other respects, in manner and form as charged in the indictment; and that at the time of so committing the said act, he knew that it was wrong and that he ought not to do it, and at the same time had the power or will to choose between its commission and its non-commission."

It is insisted that the court committed error in not informing the jury that they had a right, under the law of the land, to find the defendant guilty of murder in the second degree or of manslaughter. We entertain a different opinion, and think that the court very properly responded to the inquiry of the jury. The defendant stood charged with murder in the first degree. He impliedly admitted the taking of the life of the deceased and placed his defence upon the fact, that, at the time he committed the act, he was incapable of crime by reason of being insane, this defence he was bound to make manifest to the jury, otherwise, the crime with which he stood charged remained confessed, without any palliating or extenuating circumstances to reduce it to an inferior degree of crime. The jury had, therefore, no legal discretion; they were bound either to convict the defendant of murder in the first degree, because he had not established the truth of his defence; or, having proved to the satisfaction of the jury that he was insane at the time of doing the deed, they should have acquitted him of all crime. It is not like a case where a defendant is charged in an indictment with murder in the first degree, whilst the evidence proves the killing to have been done under circumstances which makes the offence only manslaughter; in which case the jury may find a verdict for manslaughter. Our statute divides murder into two degrees, first, when committed by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or other felony; and second, all other kinds of murder at common law, not declared by statute to be manslaughter or justifiable or excusable homicide. The evidence on the part of the State, consisting mainly of the confessions of the defendant, voluntarily made, make out a case coming within the first degree of murder, and although the duty is a disagreeable one to find an individual guilty of the crime of murder in the first degree, the penalty of which is a forfeiture of life, yet the jury were bound under their oath so to find in the case, unless they were satisfied from the evidence, that the defendant was insane at the time he committed the act. If the truth of the defence made was thus established, the defendant was entitled, upon the principles of law, and not through the clemency of the jury, to an absolute acquittal. It is a case in which there is no middle

ground to occupy, no legal compromise to make, no discretion vested in the jury; they must either find the defendant guilty as charged and confessed, or acquit him on the ground, that by reason of insanity he is irresponsible to the laws.

There is only one other question which we deem it necessary to notice, and which was raised on the examination of the evidence. The father of the defendant being under examination, testified as to the state of defendant's health for some time prior to the commission of the act charged; also as to his conduct and other circumstances tending to show that at different periods he was not in his proper mind; when the defendant's counsel asked the witness the following questions: —

First. Was his mind affected by his dreams and other sights which he saw in his dreams? *Second.* From all that you have seen and known of the defendant, what is your opinion as to whether he was or was not insane at the time he left your house for Arkansas? *Third.* From the acts and conduct of the prisoner for two years previous to his going to Arkansas, was he an insane person? *Answer.* His conduct was such as to induce my particular and special attention. It was because I did not know but that he was going distracted. These questions and answers were objected to by the prosecuting attorney, and the objections sustained by the court. To the action of the court, on this point, the defendant excepted, and also assigns it for error.

The principle involved in the above exception has been examined by the appellate court of North Carolina, in the case of *Clary's Admr.* v. *Clary*,[1] wherein it was attempted to set aside a will, because of the insanity of the testator, at the time of its execution; and the opinion of a witness was asked as to the state of the testator's mind at the time of making the will, The opinion of the court is so comprehensive and conclusive, and meets our views of the law so fully, that we shall adopt that part of the opinion which discusses this question. The court say: It is certainly the general rule that witnesses shall be examined as to facts, whereof they have personal knowledge, and not as to those in regard to which they have no personal knowledge, but have only formed an opinion or belief. But this rule necessarily admits of exceptions. There are facts, which from their nature exclude all direct positive proof, because they are imperceptible by the senses, and of these no proof can be had, except such as is mediate or indirect. No man can testify, as of a fact within his knowledge, to the sanity or insanity of another. Such a question, when it arises, must be determined by other

[1] 2 Ired. 78.

than direct proof. The precise inquiry then is, must the evidence be restricted to the proof of other facts, coming within the knowledge of the witnesses, and from which the jury may draw an inference of sanity or insanity, — or may the judgment and belief of the witnesses, founded on opportuuities of personal observation, be also laid before the jury, to aid them in forming a correct conclusion. We understand that this is a matter on which different judges have ruled differently on the circuits, and it is important that a uniform rule should be settled in regard to it. The point was not determined in *Crowell* v. *Kirk*,[1] nor are we aware of any direct and authoritative decision, which supersedes the necessity of recurring to general principles and legal analogies to ascertain what is right. In the first place, it seems to us that the restriction of the evidence to a simple narrative of the facts, having or supposed to have a bearing on the question of capacity, would, if practicable, shut out the ordinary means of obtaining truth; and, if freed from this objection, cannot in practice be effectually enforced. The sanity or insanity of an individual may be a matter notorious and without doubt in a neighborhood, and yet few, if any, of the neighbors may be able to lay before the jury distinct facts that would enable them to pronounce a decision thereon, with reasonable assurance of its truth. If the witness may be permitted to state that he has known the individual for many years; has repeatedly conversed with him, and heard others converse with him; that the witness had noticed in these conversations that he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that in his conduct he was wild, irrational, extravagant, and crazy; what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in the conversation; what reasonable cause or resentment, and what the *indicia* of sound or disordered intellect? If he may not so testify, but must give the supposed silly or incoherent language, state the degrees and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts, regarded as irrational, and this without the least intimation of any opinion which he has formed of their character — where are such witnesses to be fonnd? Can it be supposed that those not having a special interest in the subject shall have so charged their memories with those matters, as distinct independent facts, as to be able to present them in their entirety and simplicity to the jury? Or if such a witness be found, can he conceal from the jury the impression which has been made upon his own mind; and

[1] 3 Dev. 355.

when this is collected, can it be doubted, but that his judgment has been influenced by many, very many, circumstances, which he has not communicated, which he cannot communicate, and of which he is himself not aware? We also think there is an analogy in the investigation of questions of this kind and in the investigation of other questions, where positive and direct evidence is unattainable, and in which the rule of evidence is well established. Of this kind are questions of personal identity and handwriting. Mere opinion as such is not admissible. But where it is shown that the witness has had an opportunity of observing the character of the person or the handwriting, which is sought to be identified, then his judgment or belief, framed upon such observation, is evidence for the consideration of the jury; and it is for them to give to this evidence that weight, which the intelligence of the witness, his means of observation, and all the other circumstances attending his testimony may, in their judgment, deserve. And why is this, but because it is impossible for the witness to specify and detail to the jury all the minute circumstances by which his own judgment was determined, so as to enable them by inference from these to form their judgment thereon. And so it is in questions respecting the temper, in which words have been spoken or acts done. Were they said kindly or rudely, in good humor or in anger, in a jest or in earnest? What answer can be given to these inquiries, if the observer is not permitted to state his impression or belief? Must a *fac-simile* be attempted, so as to bring before the jury the very tone, look, gestures, and manner, and let them collect thereupon the disposition of the speaker or agent? It is a well known exception to the general rule requiring witnesses to testify facts and not opinions, that in matters involving questions of science, art, trade, or the like, persons of skill may speak not only of facts, but give their opinions in evidence. It is insisted that by the terms of this exception, persons not claiming to possess peculiar skill, and all persons upon matters not requiring peculiar skill are excluded from giving opinions. Professional men are allowed to testify to the principles and rules of the science, art, or employment in which they are especially skilled, as general practical truths or facts ascertained by long study and experience; and also may pronounce their opinion as to the application of these general facts to the special circumstances of the matters under investigation; whether these circumstances have fallen under their own observation, or have been given in evidence by others. The jury being drawn from the body of their fellow-citizens are presumed to have the intelligence which belongs to men of good sense, but are not sup-

posed to possess professional skill, and, therefore, in matters requiring the exercise of this skill, are permitted to obtain what is needed from those who have it, and who are sworn to communicate it fairly. Thus, shipmasters have been allowed to state their opinions on the seaworthiness of a ship from a survey taken by others; physicians to pronounce upon a wound which they have not seen; and painters and statuaries to give their opinion whether a painting or statue be an original or copy, although they have no knowledge by whom it was made. This is mere opinion, although the opinion of skilful men. This, none but professional men are permitted to give in matters involving peculiar skill, and none whatever are allowed to give in matters not thus involving skill; because with this exception, the jury are equally competent to form an opinion as the witness, and, with this exception their judgment ought to be founded on their own unbiased opinion. But judgment founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features, or handwriting of others, is more than mere opinion. It approaches to knowledge, and is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury, because they have not the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observation of others. Before a witness should be received to testify as to the condition of mind, it should appear that he had an adequate opportunity of observing and judging of capacity. But so different are the powers and habits of observation in different persons, that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than that it has, in fact, enabled the observer to form a belief or judgment thereupon; and the weight of his opinion must depend upon a consideration of all the circumstances, under which it was formed.

For the foregoing reasons we are of opinion that the Criminal Court committed error in excluding the question and answer of the defendant's father from the consideration of the jury, and that for this reason, the verdict should have been set aside, and a new trial awarded.

The judgment of the Criminal Court is reversed; the verdict set aside, and a new trial granted the defendant.

The cause is remanded to the Criminal Court.

BURDEN OF PROOF.

STATE *v.* McCOY.

[34 Mo. 531.]

In the Supreme Court of Missouri, March Term, 1864.

Hon. BARTON BATES, *Chief Justice.*
" WILLIAM V. N. BAY, } *Associate Justices.*
" JOHN D. S. DRYDEN, }

The Burden of Proof is on the defendant to show that he was insane at the time of the commission of the crime charged.

APPEAL from St. Louis Criminal Court.

Jecko, Gantt & Johnson, for appellant.

Voullaire, for respondent.

BAY, J., delivered the opinion of the court.

At the May term, 1863, of the St. Louis Criminal Court, the defendant was indicted for the murder of Catherine Moran, alleged to have been committed on the 20th of April, 1863. Upon the trial the killing was admitted and the plea of insanity set up by the prisoner's counsel. Being convicted of murder in the first degree, a motion was made for a new trial, which was overruled, and the defendant now appeals to this court. The main ground relied upon by defendant's counsel for a reversal of the judgment is the giving by the court below of the second, third, and thirteenth instructions, which are as follows: —

"The law presumes every man who has arrived at the years of discretion to be sane and capable of committing crime, until the contrary is shown; so that the State, after proving the unlawful act, need offer no evidence whatever of the sanity of the defendant, but may rest upon the legal presumption of sanity until the defendant shows the contrary."

"This defence of insanity is emphatically one which the defendant must make out, and it must be made out to the satisfaction of your minds; for if the evidence merely shows a case of doubt when the defendant might not be insane, this is not sufficient to authorize an acquittal on that ground only. If the evidence shows merely that the defendant might have been insane at the time of the commission of the act, but does not show satisfactorily to your minds that defendant was insane at that time, this is not sufficient to warrant an acquittal."

"The jury are instructed that the *onus* or burden of proof of defendant's insanity at the immediate time of the killing rests upon the defend-

ant; and if the same be not established to the entire satisfaction of the jury, then they will find her guilty of murder in the first degree."

The theory of the defence as urged in this court, and shown in the instructions asked and refused, is that it is incumbent upon the State to show by positive and affirmative testimony that the defendant was sane at the time of the killing; and if the jury entertain a doubt as to the sanity or insanity of the prisoner at such time, the jury must give her the benefit of such doubt and acquit her.

It is true that it is incumbent upon the State to prove every fact necessary to constitute the crime of murder, which necessarily includes the sanity of the prisoner; but the burden of proving such sanity is fully met by the presumption of law that every person is of sound mind until the contrary appears; and he who undertakes to escape the penalty of the law by means of the plea of insanity must rebut such presumption by proof entirely satisfactory to the jury. It is a defence to be made out by the prisoner, and by proof that will satisfy the jury that he was incapable of distinguishing between right and wrong.

In *Bellingham's Case*, which was an indictment for murder, the defence set up was insanity, and MANSFIELD, C. J., in charging the jury, told them: "That in order to support such a defence it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature, and that there was no other proof of insanity which would excuse murder or any other crime." This doctrine, founded in reason, has been fully recognized by the courts of this country.

The idea, therefore, advanced by the prisoner's counsel that it is incumbent upon the State to prove that the accused was sane at the time she committed the act, by evidence in addition to and independent of the presumption of law above referred to, is not sustained by authority.

The first instruction asked by defendant and refused, required the jury to acquit if they entertained a doubt as to the sanity or insanity of the defendant at the time of the commission of the homicide.

The doctrine of this instruction was repudiated by this court in the case of the *State* v. *Huting*,[1] and very properly, for it virtually requires the jury to acquit if they entertain a doubt as to whether the defendant has succeeded in maintaining the defence. The true rule in our opinion

[1] 21 Mo. 464.

was laid down by C. J. Shaw, in *Commonwealth* v. *Rogers*,[1] which was a case of murder and the defence insanity. The jury received a very elaborate charge from the learned judge, and after being in consultation several hours, came into court and asked the opinion of the court upon the following question: "Must the jury be satisfied beyond a doubt of the insanity of the prisoner to entitle him to an acquittal?" To which the chief justice replied: "That if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane."

The second, third, and fourth instructions asked by defendant are embraced in those given by the court, and it was unnecessary therefore to give them again.

As no other ground of error has been suggested, the judgment of the Criminal Court will be affirmed; the other judges concurring.

BURDEN OF PROOF — PARTICULAR RIGHT AND WRONG TEST.

STATE *v.* KLINGER.

[43 Mo. 127.]

In the Supreme Court of Missouri, October Term, 1868.

Hon. David Wagner,
" F. J. C. Fagg,
" James Baker,
} *Judges*

1. **Burden of proof.** — The burden of establishing the insanity of the prisoner is on the defence. But it is not necessary that it be proved beyond a reasonable doubt; it is sufficient if the jury are satisfied by the weight and preponderance of the evidence, that the accused was insane at the time of the commission of the act.

2. **Particular right and wrong test.** — To establish insanity as a defence, it must be proved that at the time of committing the offence, the prisoner was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, such as not to know that he was doing wrong.

Appeal from St. Louis Criminal Court.

The prisoner was indicted in the St. Louis Criminal Court for the murder, on November 25th, 1867, of Henry Wider. He was found guilty of murder in the first degree.

W. H. H. Russell, for the appellant.

[1] 7 Metc. 500.

Burden of Proof.

C. P. Johnson, circuit attorney, for the State.

WAGNER, J., delivered the opinion of the court.

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The only defence set up by the accused was insanity; and it is urged by his counsel that the court committed error in its instructions on that question. It would subserve no useful purpose to go into a labored or lengthy review of the authorities on that subject, as they will be found diverse and irreconcilable. Recent researches in medical science have eliminated rules, going very far to mitigate the doctrines laid down by the old authors. It may be said that it is now universally conceded that insanity is a disease of the brain — of that mass of matter through and by which the powers of the mind act. There are different kinds of insanity, and different degrees of the same kind, and it has been found exceedingly difficult to furnish any sure test for the guidance of courts and juries.

The question of insanity is always one of fact; but how much proof shall be required and where the *onus* ends, is involved in perplexity. The defence may be made out by circumstances; but every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is shown; and to establish the defence it must be proved that at the time of committing the offence he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, such as not to know that he was doing wrong.

The instruction mainly complained of is the following: "The law presumes that every man is sane until the contrary is established by the evidence to the satisfaction of the jury; and when insanity in any form is set up as a defence, it is a fact which must be proved like any fact. The burden of proving such insanity is upon the defendant, and he is not entitled to the benefit of a mere doubt whether he was or was not insane."

It is now insisted that if the evidence was sufficient to raise a mere doubt in the minds of a jury concerning the defendant's sanity, that doubt inured to his benefit, and would have authorized his acquittal, and that the court should have so directed.

The instruction given is in entire consonance with the previous decisions of this court, and has been considered the established law of this State for many years.

In *State* v. *Huting*,[1] it was declared in explicit terms that a party charged with murder, who admits the killing and relies upon the defence

[1] 21 Mo. 464.

of insanity, must make it out to the satisfaction of the jury, and that he is not entitled to the benefit of a reasonable doubt as to his sanity. The subject was not much considered, but the rule was announced as one considered well settled. In the case of the *State* v. *McCoy*,[1] the same question was again presented, and the ruling in *Huting's Case* reaffirmed. But there are some recent cases in which the doctrine contended for by the appellant receives strong support.[2] In *Hopps* v. *People*[3] it was held by a majority of the court that it was not necessary that the insanity of the accused should be established by even a preponderance of proof; but if, upon the whole evidence, the jury entertain a reasonable doubt of his sanity, they should acquit. *Bartlett's Case*[4] is to the same effect. In the former of these cases, Judge Breese took the strong position that the burden of proof was on the government throughout. I should be very reluctant to give this proposition my unqualified assent.

Both observation and experience show that insanity is easily simulated; and if a bare doubt, which may be created in the minds of a jury by slight circumstances, is permitted to control and produce an acquittal, the guilty will often go unpunished, and the interests of society suffer great injury. Mr. Bishop, a writer of great accuracy on criminal law, remarks: "Sanity, as observed by a learned judge, is presumed to be the normal state of the human mind, and it is never incumbent on a prosecutor to give affirmative evidence that such state exists in a particular case. But, suppose this normal state is denied to have existed in the particular instance, then, if evidence is produced in support of such denial, the jury must judge of it and its effect on the main issue of guilty or not guilty; and if, considering all the evidence, and considering the presumption that what a man does is sanely done, and suffering the evidence and the presumption to work together in their minds, they entertain a reasonable doubt whether the prisoner did the act in a sane state of mind, they are to acquit; otherwise they are to convict." [5]

I think that the safest and most reasonable rule is that, as the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crimes, the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury on the trial of a criminal case, rests upon the defence. It is not

[1] 34 Mo. 531.

[2] People v. McCann, 16 N. Y. 58; Hopps v. People, 31 Ill. 385; State v. Bartlett, 43 N. H. 224.

[3] *Supra.*

[4] 43 N. H. 224.

[5] 1 Bish. Crim. Prac., sect. 534.

necessary, however, that this defence be established beyond a reasonable doubt. It is sufficient if the jury is reasonably satisfied, by the weight or preponderance of the evidence, that the accused was insane at the time of the commission of the act.[1]

[The judgment was reversed on other grounds.]

BURDEN OF PROOF — INSTRUCTIONS — COURT MUST NOT INSTRUCT AS TO WEIGHT OF EVIDENCE — REASONABLE DOUBT ON WHOLE EVIDENCE.

STATE *v.* SMITH.

[53 Mo. 267.]

In the Supreme Court of Missouri, July Term, 1873.

Hon. DAVID WAGNER,
" WASH. ADAMS,
" H. M. VORIES,
" T. A. SHERWOOD,
" W. B. NAPTON,
} *Judges.*

1. **Burden of Proof — Instruction.** — The burden of proof being on the prisoner to prove his insanity, an instruction that to overthrow the presumption of sanity he must satisfy the jury by "the weight and preponderance" of the testimony that he was insane at the time he committed the crime, is not error.

2. **Instructions — Court Must Not Instruct as to Weight of Evidence.** — It is error for the court to select certain facts shown by the evidence, and tell the jury what weight should be attached to them.

3. **Reasonable Doubt on Whole Evidence.** — If the jury have a reasonable doubt of the commission of the crime on the whole evidence they should acquit.

APPEAL from Greene County Court.

VORIES, J., delivered the opinion of the court.

The appellant was prosecuted and tried in the Greene Circuit Court, upon an indictment for an assault with the intent to kill. It is charged, in substance, by the indictment, that the defendant on the fifth day of July, 1871, at the county of Greene, etc., did unlawfully, wilfully and feloniously, with a chopping axe, which was a deadly weapon, etc. make an assault upon the body of one Amanda Hancock, with the intent to kill, etc. The evidence on the part of the State was circum-

[1] Loeffner *v.* State, 10 Ohio St. 598, Fisher *v* People, 23 Ill. 283; Commonwealth *v.* Rogers, 7 Metc. 500; Commonwealth *v.* Eddy, 7 Gray, 583.

stantial, no direct evidence of the assault by defendant being introduced. The defendant introduced several witnesses, whose evidence tended strongly to prove insanity on the part of the defendant. This evidence tended to prove insanity at a time commencing four or five months before the assault, and only a few days previous to the assault, and after the assault while the defendant was in prison.

At the close of the evidence the court, on the part of the State, instructed the jury as follows: —

First. "The court instructs the jury that the law presumes that every man that has arrived at years of discretion is sane, and that the presumption continues until the contrary is shown by the weight and preponderance of testimony."

Second. "The court declares the law to be that, when the State has proven the offence charged, she can rest her case upon the legal presumption that the party accused is of sound mind, and if the defendant seeks to avoid the punishment, he must satisfy the jury by the weight and preponderance of testimony that he was insane at the moment that he committed the crime."

Third. "That it is not sufficient to warrant an acquittal for the defendant simply to show that at times he acted and talked strangely and singularly; but that the jury must believe from the testimony that he was insane at the very time that he committed the offence, and that he was so insane that he could not distinguish right from wrong."

To the giving of these instructions the defendant objected, and, his objections being overruled, he excepted. The defendant then asked the court to give the jury several instructions, all of which were refused. And he again excepted.

Two of these instructions asked and refused, were as follows: —

"The court instructs the jury that it devolves upon the State to prove that the defendant is guilty, as charged by the indictment, and unless the State has established beyond all reasonable doubt that the defendant is guilty, as charged, they will acquit."

"That if upon a review of the whole case, and a consideration of all the circumstances connected with it, the jury have a reasonable doubt as to the guilt of the defendant, they will find him not guilty."

After the above instructions were refused, the defendant asked the court to instruct the jury that, "if they have a reasonable doubt as to the guilt of the defendant, they will acquit." This was also refused and the defendant again excepted.

The jury then returned a verdict of guilty against the defendant, and assessed his punishment at imprisonment in the penitentiary for the

"Weight and Preponderance of Testimony."

term of two years. The defendant filed a motion for a new trial on the ground, among others, that the court has erred in refusing proper instructions asked for by the defendant, and in giving improper instructions on the part of the State. This motion was overruled, and final judgment rendered against the defendant. The defendant again excepted and appealed to this court.

The only questions presented by the record for the consideration of this court are as to the propriety or impropriety of the action of the court trying the cause, in giving instructions on the part of the State and in refusing those asked for by the defendant.

By the first and second instructions given by the court on the part of the prosecution, the jury are told that the law presumes that every man who has arrived at years of discretion is sane or of sound mind; and that if the defendant seeks to avoid this presumption, he must satisfy the jury by the weight and preponderance of testimony, that he was insane at the time he committed the crime.

It is urged by the defendant that the court committed error in these instructions. The authorities upon the subject of insanity, and upon the subject of the burden and amount of proof in such cases, will be found to be very conflicting, some courts holding that it devolves on the defendant in such cases to prove the fact of insanity by the evidence, so clear as to leave no reasonable doubt as to the insanity. Other courts have held that all that is necessary is to produce enough evidence to create a reasonable doubt in the minds of the jurors as to whether insanity exists in the given case or not; while it has been repeatedly held in this court that "insanity is a simple question of fact to be proved like any other fact, and any evidence, which reasonably satisfies the jury that the accused was insane at the time the act was committed, should be deemed sufficient."[1]

The burden of proof, of course, is held by this court to be on the defendant to rebut the presumption of sanity which exists in all cases until the contrary is made to appear. The instructions under consideration would have been more satisfactory if they had been differently worded, though the principle asserted in them is in effect the same as that enunciated in the cases decided by this court above referred to. The jury are told that they must be satisfied by the weight and preponderance of testimony. This language is well understood by lawyers to mean, that the evidence must be sufficient to satisfy the minds of the jurors as to the fact of insanity, and that is all that is required. Of course this must necessarily be accomplished by a preponderance of the

[1] State v. Hundley, 46 Mo. 414; State v. Klinger, 43 Mo. 127; State v. McCoy, 34 Mo. 531.

evidence. But the jury are told by the instruction that this conviction of their minds must be produced by the "weight and preponderance of the testimony." It is barely possible that jurors might be held to believe that it took something more than a conviction of the mind to find in favor of a plea of insanity, from the language used in the instructions. Yet, instructions using almost the same language have been approved in the cases above referred to. The case would, therefore, not be reversed merely on the ground of the informality of these instructions.

The third instruction given by the court on the part of the prosecution, tells the jury, "that it is not sufficient to warrant an acquittal, for the defendant simply to show that at times he acted and talked strangely and singularly, but that the jury must believe from the testimony that he was insane at the very time he committed the offence, and that he was so insane that he could not distinguish right from wrong." This instruction was clearly wrong; it is not the province of the court to select certain facts shown by the evidence, and tell the jury how much and what weight they shall give to such facts, or whether they shall give such evidence any weight at all. The court passes upon the legality or admissibility of the evidence, but after the evidence is legally admitted, it is the exclusive provision of the jury to pass upon the weight of the evidence given, and give each part of the evidence such weight as in their judgment it is entitled to receive, without any interference or direction of the court whatever. Their minds ought to act freely on the facts of the case without any other control than that of their own unbiased judgment. This instruction is a comment on the evidence, which is expressly forbidden by our statute.[1]

The statute provides that the court shall not "sum up or comment on the evidence." If the court can, under this statute, select certain portions of the evidence and tell the jury how much weight to give, or whether they shall give the evidence selected any weight at all, then no reason can be perceived why the court could not select other parts of the evidence, or all of the facts in the case, and tell the jury what weight to give the same, and in effect tell what verdict should be found. To permit this, would be to wholly destroy whatever value there is in the right of trial by jury. The decisions of this court have been uniformly in condemnation of such instructions.[2]

The defendant on the trial asked the court to instruct the jury: "That if upon a review of the whole case and a consideration of all the

[1] W. S. 1106, sect. 30.

[2] State v. Hundley, 46 Mo. 414; Fine v. St. Louis Public Schools, 30 Mo. 166; State v. Cushing, 29 Mo. 215.

circumstances connected with it, the jury have a reasonable doubt as to the guilt of the defendant, they will find him not guilty." The court was clearly wrong in refusing to give this instruction. In this case, the assault charged in the indictment was not admitted so as to leave the issue of insanity or no insanity the only issue to be tried. The assault was denied and was only attempted to be proved by circumstantial evidence, so that the jury had to pass upon not only the fact of insanity, but also on the evidence tending to prove that the accused committed the assault complained of. In such case the instruction asked was clearly right and ought to have been given.

In delivering the opinion of the court in the case above referred to, of *State of Missouri* v. *Klinger*, Judge Wagner approvingly makes the following quotation from Bishop on Criminal Law: "Sanity, as observed by a learned judge, is presumed to be the normal state of the human mind, and it is never incumbent on a prosecutor to give affirmative evidence that such state exists in a particular case. But suppose this normal state is denied to have existed in the particular instance, then, if evidence is produced in support of such denial, the jury must judge of it and its effect on the main issue of guilty or not guilty, and if, considering all the evidence, and considering the presumption that what a man does is sanely done, and suffering the evidence and the presumption to work together in their minds, they entertain a reasonable doubt whether the prisoner did the act in a sane state of mind, they are to acquit. Otherwise they are to convict."

I am of the opinion that the judgment should be reversed. The other judges concurring, the judgment is reversed and the cause remanded.

BURDEN OF PROOF—INTOXICATION—INSTRUCTIONS AS TO WEIGHT AND SUFFICIENCY OF EVIDENCE.

STATE *v.* HUNDLEY.

[46 Mo. 414.]

In the Supreme Court of Missouri, August Term, 1870.

Hon. DAVID WAGNER,
" PHILEMON BLISS, } *Judges.*
" WARREN CURRIER.

1. **Burden of Proof.** — The burden of proving insanity to the satisfaction of the jury rests upon the defence; but it is not necessary that insanity should be established beyond a

State *v.* Hundley.

reasonable doubt. An instruction, therefore, which requires a *clear preponderance* of the evidence to establish insanity is erroneous.

2. **Drunkenness — Insanity Resulting Therefrom.** — Temporary insanity resulting immediately from voluntary intoxication is no defence to crime. But insanity remotely occasioned by previous bad habits, is entitled to the same consideration as if it arose from any other cause.

3. **It is Error** for the court to instruct on the weight and sufficiency of the evidence.

Appeal from the Fifth District Court.

H. M. Vories, with him *B. F. Loan* and *S. Woodson*, for appellant.

Attorney-General Johnson and *Chandler & Davis*, for the State.

Wagner, J., delivered the opinion of the court.

The defendant was indicted in the Circuit Court of Gentry County, for murder in the first degree, in the killing of Wm. A. Boyer, and, on a change of venue to DeKalb County, he was sentenced to be executed. The killing was most clearly proved, and the defence was rested solely upon the ground of insanity. The only question presented for consideration is the propriety of certain instructions given by the court, of its own motion and at the request of the prosecution, and also certain instructions which were asked by the defendant and refused.

An objection is raised against the third instruction given at the instance of the State, because it told the jury that it devolved upon the defendant to show to their satisfaction, by a clear preponderance of the testimony, that he was insane. The earlier decisions in this court announce the doctrine that a party relying on insanity as a defence should make it out to the satisfaction of the jury, and that he was not entitled to the benefit of a reasonable doubt as to his sanity.[1] But in the more recent case of *State* v. *Klinger*,[2] the question was again considered, and we held that the most reasonable rule was, that as the law presumed every person who had reached the age of discretion to be of sufficient capacity to be responsible for his crimes, the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury, on the trial of a criminal case, rested upon the defence; but that it was not necessary that the defence should be established beyond a reasonable doubt; it was sufficient if the jury were reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of the commission of the act. It seems to me that the court, in the present case, by requiring a clear preponderance of evidence, introduced a qualification that was not enunciated in the *Klinger Case*, and which had an evident tendency, and was calculated, to mislead. Insanity is a simple question of fact, to be proved like any

[1] State *v.* Huting, 21 Mo. 464; State *v.* McCoy, 34 Mo. 531.

[2] 43 Mo. 127.

other fact, and any evidence which reasonably satisfies the jury that the accused was insane at the time the act was committed, should be deemed sufficient.

After taking into consideration and overcoming the presumption of sanity, it is not perceived why any higher degree of evidence, or any greater amount of proof should be required to prove the fact of insanity than any other question which may be raised and submitted upon the trial of a cause. The correct doctrine is that all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury; and that evidence which reasonably satisfies the jury that the disease exists, and which would warrant and induce a verdict upon any other issue, ought to be considered sufficient. From the instruction, the jury might have well inferred that a preponderance, or what would reasonably have satisfied them, was not enough, but that something more was necessary.

The fourth instruction, given at the request of the State, and the third instruction, given by the court of its own motion, may be considered together. The first of the two, in substance, declared that the voluntary drunkenness of the defendant, so far as the same was shown by evidence to have existed at the time of the homicide, was no mitigation of the crime charged; and if the jury believed from the evidence that the defendant was laboring under a temporary frenzy or insanity at the time of the killing of Boyer, which was then and there the immediate result of intoxicating liquors or narcotics, he was equally guilty under the law as if he had been sober or sane at the time of the killing. The latter instruction, which was given directly by the court, told the jury that if they were satisfied, from the weight or preponderance of the whole evidence, that at the time the defendant killed Boyer he was so insane as not to know right from wrong, and as not to know that the act he was committing was wrong at the time of its commission, and that he was so far deprived of will at the time of the commission of the act as not to possess the power of choosing between right and wrong in regard to the act, and that his insanity was not the result of fits of intoxication, but was occasioned by previous habits of intoxication and the long use of narcotics, then they should find the defendant not guilty.

It is well settled that drunkenness does not mitigate a crime. Any other principle would be destruction to the peace and safety of society. Every murderer would drink to shelter his intended guilt. There would be an end of convictions for homicide, if drunkenness avoided responsibility. As it is, most of the premeditated murders are committed under

the stimulus of liquor. When the guilty purpose is first sedately conceived, most men fortify themselves for the scene of blood by the use of intoxicating drinks. If, therefore, drunkenness imparted irresponsibility, there would be no convictions. If the assassin would not take liquor to strengthen his nerves he would to evade the penalty of his crime.[1]

Temporary insanity, produced immediately by intoxication, does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily drunk. Sir Edward Coke lays down the common-law rule to be, that, "as for a drunkard who is *voluntarius dæmon*, he hath, as has been said, no privilege thereby; but what hurt or ill soever he doeth, his drunkenness doth aggravate it, *omne crimen ebrietas et incendit et detegit.*"[2] And, although it is doubtful whether it can be said that drunkenness aggravates a crime in a judicial sense, yet it is unquestioned that it forms no defence to the fact of guilt. Thus, Judge STORY, after noticing that insanity, as a general rule, produces irresponsibility, went on to say: "An exception is where the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime."[3] Sir Matthew Hale, in his "History of the Pleas of the Crown," written nearly two hundred years ago, says: "The third kind of *dementia* is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive men of the use of reason, and puts many men into a perfect but temporary frenzy; and, therefore, according to some civilians, such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness, answerable to the nature of the crime occasioned thereby; so that yet the primal cause of the punishment is rather the drunkenness than the crime committed in it. But by the laws of England such a person shall have no privilege by his voluntarily contracted madness." He then states two exceptions to the rule, one where intoxication is without fault on his part, as where it is caused by drugs administered by an unskilful physician; and the other where indulgence in habits of intemperance has produced permanent mental disease, which he calls "*fixed frenzy.*"[4]

The doctrine and the distinction laid down by Hale have been generally followed by the English courts and in this country. *United States* v. *Drew*,[5] and *United States* v. *McGlue*,[6] will be found to maintain

[1] Wh. & St. Med. Jur., sect. 67; 1 Whart. Crim. Law, sect. 38; State *v.* Cross, 27 Mo. 332.

[2] Co. Litt. 247.

[3] United States *v.* Drew, 5 Mason, 28.

[4] 1 Hale, P. C. 32.

[5] *Supra.*

[6] 1 Curtis C. C. 1.

The Law in the United States.

the principle, upon the authority of Judge Story and Judge Curtis, of the Supreme Court of the United States. These last two cases not only state the general principle, but confirm the distinction announced by Hale, that where mental disease, or, as he terms it, a "*fixed frenzy*," is shown to be the result of drunkenness, it is entitled to the same consideration as insanity arising from any other cause. The first of these was a case of *delirium tremens*, and Judge Story directed an acquittal on that account. In the other the evidence left it doubtful whether the furious madness exhibited by the prisoner was the result of present intoxication or of delirium supervening upon long habits of indulgence. Upon this state of the evidence Judge Curtis stated the rule and the exceptions with remarkable clearness and force.

Prof. Greenleaf, whose general accuracy in the statement of legal principle is unquestioned, says that "in criminal cases, though insanity, as we have just seen, is ordinarily an excuse, yet an exception to this rule is where the crime is committed by a party while in a fit of intoxication; the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime, to be within the exception, and therefore punishable, must take place and be the immediate result of the fit of intoxication, and while it lasts, and not the result of insanity remotely occasioned by previous habits of gross indulgence in spirituous liquors. The law looks to the immediate and not the remote cause — to the actual state of the party and not to the causes which remotely produced it." [1]

The instruction given at the instance of the prosecution told the jury that if they believed from the evidence that the defendant was laboring under a temporary frenzy or insanity at the time of the killing of Boyer, which was then and there the immediate result of intoxicating liquors or narcotics, he was guilty. This instruction was unobjectionable, for, as we have already seen, temporary insanity produced immediately by intoxication does not destroy responsibility where the accused, when sane and responsible, made himself voluntarily drunk. But the crime, to be punishable under such circumstances, must take place and be the immediate result of a fit of intoxication, and while it lasts, and not the result of insanity remotely occasioned by previous bad habits.

The subsequent instruction, given by the court, of its own motion, was unguarded, open to misconstruction, and liable to mislead. It declared that if the defendant was so far deprived of will at the time of

[1] 2 Greenl. on Ev., sect. 374.

the commission of the act as not to possess the power of choosing between right and wrong, and if his insanity was not the result of fits of intoxication, but was occasioned by previous habits of intoxication and the long use of narcotics, then they should find him not guilty.

The distinction that the act must take place and be the immediate result of the fit of intoxication, and while it lasts, in order to render the accused responsible, is here utterly ignored. The insanity might have been found to be permanent, and still the result of fits of intoxication; so that it actually existed and did not come within the exception to the rule rendering the crime punishable, it could make no difference what it resulted from. The two instructions are inconsistent and contradictory. The one laid down the law correctly, the other impaired its force, and, coming as it did directly from the court, was calculated to operate injuriously against the defendant.

The seventh instruction, upon which error is predicated, is as follows: "The testimony and opinions of the medical witnesses given in this case should be received by the jury with caution, and are entitled to but little weight unless sustained by reasons and facts that admit of no misconstruction; and said opinions and testimony are not binding on you against your own judgment, for on you alone rests the responsibility of a correct verdict." It is objected that this instruction is a comment on the evidence, and in direct conflict with the provisions of the statute. The instruction might find countenance and support where the old system of practice prevails, and where it is permissible for the court to make comments on the evidence, and instruct the jury as to its sufficiency and weight. But under our statute the whole rule is changed, and comments by the court are entirely forbidden.[1] Since the adoption of this clause in the statute the ruling has been uniform, and there is hardly a volume of the reports in which it is not laid down that it is error for a court to instruct a jury upon the weight and sufficiency of the evidence. It is for the court to determine upon the legitimacy and appropriateness of the evidence, but the jury are the sole and exclusive judges of the credit and weight that is to be attached to it. For a court to single out certain testimony in a cause, and tell the jury that it is entitled to either great or little weight, is contrary to the statutory provision on the subject.

The testimony of medical witnesses, like any other testimony, should be taken into the account by the jury, and they should give it just such weight as they may think it deserves. Whilst the opinions of quacks, mountebanks, and pretenders are entitled to little or no consideration, the opinions of persons of great experience, skill, fidelity, and correctness of judgment deserve, and should receive, attention and respect.

[1] 2 Wag. Stat., 1106, sect. 30.

Defence of Insanity Should be Watched.

In speaking on this subject the late Chief Justice SHAW said: "The opinion of a medical man of small experience, or of one who has crude and visionary notions, or of one who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity, and impartiality of the witness who gives it." [1]

In the examination of the witnesses it is the privilege and duty of the counsel, for the enlightenment of the jury, to draw forth the capabilities, fitness, and experience of those who undertake to give medical testimony. But where these tests are applied, and the court decides that the evidence is competent, the jury then are the exclusive judges, and are not to be controlled in their determination by the advice and instructions of anybody. An intelligent jury, after hearing the witnesses, and observing their respective capacity, will not be slow in coming to a correct conclusion and awarding such consideration as the merits or demerits of the evidence may deserve. The instruction was an invasion of the province of the jury, and, I think, clearly wrong.

There is no attempt to deny the killing in this case. The only defence set up to excuse or palliate the deed of violence and wrong, is insanity. This question is at all times difficult to deal with, and it would be wrong to punish a person who was so unfortunate as to be unaccountable by reason of a diseased and disordered mind. On the other hand, there is too much foundation for the remark of Mr. Baron GURNEY, on the trial of the case of *Rex* v. *Reynolds*, that "the defence of insanity has lately grown to a fearful height, and the security of the public requires that it should be closely watched." Recent examples have shown that guilty criminals have escaped merited punishment on this assumed plea, and have been turned loose, to the great detriment and outrage of justice.

The interests of society and the welfare of the community require that justice should be faithfully and rigorously administered. On the one hand, care should be taken that no one be punished whose affliction renders him irresponsible; on the other, the defence of insanity, which is easily simulated, about which there are many crude and pervert notions, and which is usually resorted to when all other defences fail, should be scanned with the severest scrutiny. The court, we think, committed error in regard to the instructions above noticed in this opinion; otherwise, we have found nothing calling for special comment or revision.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded for a new trial.

[1] Com. *v.* Rogers, 7 Metc. 500.

BURDEN OF PROOF — PARTICULAR RIGHT AND WRONG TEST — NEW TRIAL — CUMULATIVE EVIDENCE.

STATE *v.* REDEMEIER.[1]

[71 Mo. 173.]

In the Supreme Court of Missouri, October Term, 1879.

Hon. THOMAS A. SHERWOOD, *Chief Justice.*
" WILLIAM B. NAPTON,
" WARWICK HOUGH,
" ELIJAH H. NORTON,
" JOHN W. HENRY, } *Judges.*

1. **Burden of Proof.** — The burden of proving insanity as a defence to a criminal charge rests on the prisoner. To establish such a defence evidence is necessary, such as will reasonably satisfy the jury.
2. **Particular Right and Wrong Test.** — The test of the prisoner's responsibility is whether he was capable of distinguishing between right and wrong in respect to the act charged.
3. **A new trial will not be granted** on account of newly discovered evidence which is cumulative.

APPEAL from St. Louis Court of Appeals.

A. N. Merrick, for appellant.

Smith, Attorney General, for the State.

NORTON, J.

The defendant was indicted at the July term, 1878, of the St. Louis Criminal Court for murder in the first degree, for killing one Franz Vosz. The cause was tried at the November term, 1878, of said court, and defendant was found guilty and sentenced to be hanged. An appeal was taken to the St. Louis Court of Appeals, where the judgment of the Criminal Court was affirmed, and from which defendant has appealed to this court. The fact that deceased was killed by the defendant in the most brutal manner, without cause or excuse is not disputed, but it is claimed that no criminality attaches to defendant because it is alleged that he was insane at the time the homicide was committed. The insanity of defendant was the only defence relied upon in the trial court, and a reversal of the judgment is sought mainly upon alleged error committed by the court in its charge given to the jury and in refusing to give the declarations of law asked by defendant.

The charge complained of is as follows: —

"As a defence to this prosecution the defendant by his counsel has interposed the plea of insanity. He says that the act which he is al-

[1] Affirming State *v.* Redemeier, 8 Mo. (App.) 1 1879.

leged to have committed is not an act for which he can be held criminally responsible, in other words, that the act was and is excusable in law, because at the time of its commission, as charged, he was insane.

"The term insanity, as used in this defence, means such a perverted and deranged condition of the mental and moral faculties as renders a person incapable of distinguishing between right and wrong, and makes him unconscious at times of the nature of the act he is about to commit. Such insanity, if proved to the reasonable satisfaction of the jury to have existed at the time of the commission of the act, is in law an excuse for it, however brutal or atrocious it may have been.

"The law presumes every person to be of sound mind until the contrary is shown, and when, as in this case, insanity is interposed as a defence, the fact of the existence of such insanity at the time of the commission of the offence charged must be established by the evidence to the reasonable satisfaction of the jury, and the burden of proving this fact rests with the defendant.

"The opinions on questions of insanity which have been given by the medical experts are testimony before you, and are subject to the same rules of credit or discredit as the testimony of other witnesses. The opinions neither establish nor tend to establish the truth of the facts upon which they are based. Whether the matter testified to by the witnesses in the cause, as facts, are true or false, is to be determined by the jury alone. Neither are the hypothetical questions put to the medical experts by the counsel in the cause, evidence of the truth of the matters stated in these questions.

"Although the jury may believe and find from the evidence that the defendant did commit the act charged against him, yet, if they further find that, at the time he did so, he was in such an insane condition of mind, that he could not distinguish between right and wrong, then such act was not malicious, and the jury should acquit him of the crime charged, on the ground of insanity, and so say in their verdict.

"To establish his insanity positive or direct testimony is not required. Circumstantial evidence which reasonably satisfies the minds of the jury that the defendant was, at the time the alleged shooting was done, incapable of distinguishing between right and wrong, or of comprehending the nature of the act, will be sufficient.

"The jury are the sole and exclusive judges of the degree of credit which shall be given to the testimony in the case, and have the right to receive and credit as true, or to reject and discredit as untrue, the whole or any part of the testimony of any witness in the case. If, after the jury have carefully taken into account and considered all the

evidence in the case, there remains in their minds a reasonable doubt of the guilt of the defendant, the law, in its humanity, gives to him the benefit of that doubt, and they should acquit. But to authorize an acquittal on the ground of doubt alone, such doubt should be reasonable and substantial, and not a mere guess or conjecture of his 'probable innocence.' ''

The objections urged to the above charge are that it does not properly define insanity, and that the rule as to the burden of proof when the defence is insanity, and the degree of proof sufficient to authorize a jury to find insanity, are not correctly stated. Testing these objections by repeated decisions of this court, it will be found that they are not well taken. These decisions, we think, clearly establish that the law presumes every person who has reached the years of discretion, to be of sound mind and capable of committing crime, and that such a person, charged with the commission of crime, before he can escape the penalty affixed thereto, under the plea of insanity, must rebut such presumption, by evidence which reasonably satisfies the jury that he was insane at the time the act was committed, or that his mind was so diseased as to render him incapable of distinguishing between right and wrong in respect to the act for which he is sought to be made criminally responsible; that the question of insanity is one of fact, to be determined by the jury, and that, when the unlawful killing is proved by the State or admitted by the accused, the State may rest upon the legal presumption of the sanity of the accused till he shows the contrary; that the burden of proving insanity rests upon the party setting it up, and that, to discharge himself of this burden, it is not necessary to introduce evidence which establishes, beyond a reasonable doubt, his insanity, but only sufficient to reasonably satisfy the jury that it existed at the time the offence was committed; that if the preponderance of the evidence offered establishes insanity, it is sufficient.[1] In the case of *State* v. *McCoy*,[2] it was held "that it is incumbent on the State to prove every fact necessary to establish the crime of murder, which necessarily includes the sanity of the prisoner; but the burden of proving such sanity of the prisoner is fully met by the presumption of law that every person is of sound mind until the contrary appears; and he who undertakes to escape the penalty of the law by means of the plea of insanity must rebut such presumption by proof entirely satisfactory

1 Baldwin *v.* State, 12 Mo. 223; State *v.* Huting, 21 Mo. 464; State *v.* McCoy, 34 Mo. 531; State *v.* Klinger, 43 Mo. 127; State *v.* Hundley, 46 Mo. 414; State *v.* Smith, 53 Mo. 267; State *v.* Holme, 54 Mo. 153; State *v.* Simms, 68 Mo. 305.

2 *Supra.*

to the jury. It is a defence to be made out by the prisoner, and by proof that will satisfy the jury that he was incapable of distinguishing between right and wrong." The instructions of the court as to the burden of proof of insanity and the *quantum* of evidence to establish it are justified, not only by the case last cited, but by all the cases hereinbefore cited.

It is also insisted that the capacity of defendant to distinguish between right and wrong was the only test laid down by the court in its charge for the guidance of the jury in determining the question of insanity, and that, for this reason, it is erroneous. If the charge means that, and nothing more, the court would have been authorized to give it under the authority of the case last cited, and 2 Greenleaf Ev.,[1] *Rex* v. *McNaghten*,[2] *Rex* v. *Offord*,[3] *Commonwealth* v. *Mosler*,[4] *Freeman* v. *People*.[5] But we think the construction placed by counsel on the instruction is too narrow, and that the capacity of defendant to distinguish between right and wrong was not the sole and only test by which the jury were to be governed in determining the criminal responsibility of defendant, because they were expressly told that, if defendant was incapable of comprehending, or was unconscious of the nature of the act at the time he committed it, they would acquit.

It is also earnestly and ably argued by counsel that the rule as to the degree of evidence necessary to establish insanity, as adopted in this State, should be modified and made to conform to the rule laid down in the case of *State* v. *Crawford*,[6] and other cases in Illinois, Indiana, and New Hampshire, of which the case of *State* v. *Crawford* is a type. The rule approved in that case is that, whenever the defence offers evidence which raises a reasonable doubt as to the insanity of the accused, that is sufficient to rebut the presumption of sanity and to authorize an acquittal.

As to the degree of evidence which the accused is required to offer to establish the fact of insanity, the authorities are so conflicting as to be irreconcilable. It is held by some courts of the highest authority, both in this country and England, that insanity, when set up as an excuse for the crime charged, should be established by evidence sufficient to satisfy the minds of the triers of the fact beyond a reasonable doubt, that it existed at the time the act was committed. The conclusion reached in this class of cases is based upon the theory that, in every criminal case, two presumptions of law are indulged — one in favor of

[1] Sect. 373.
[2] 10 Cl. & Fin. 200.
[3] 5 C. & P. 168.
[4] 4 Pa. St. 267.
[5] 4 Denio, 9.
[6] 11 Kas. 32.

the person charged, that he is innocent of the charge — the other in favor of the public, that the accused, if of the years of discretion, is of sound mind and capable of committing crime, and that as the presumption of innocence protects the accused till the State, by evidence, establishes his guilt beyond a reasonable doubt, so the presumption that he was sane when the act was committed, protects society till it is overthrown by a like degree of evidence offered in support of the plea of insanity.

While some courts have gone to this extreme, others of high authority have gone to the other extreme of holding that to support the plea of insanity it is only necessary that the evidence offered should be sufficient to raise a doubt as to the insanity of the accused. Other courts, equally authoritative and much greater in number, acting on the principle that *in medio tutissimus est*, have adopted a rule lying between these two extremes, holding that the defence of insanity is established when the evidence offered in support of it preponderates in favor of the fact, and reasonably satisfies the jury that it existed at the time the criminal act charged was committed. The rule last referred to has been the established law of this State since the case of *Baldwin* v. *State*[1] was decided, and believing that it is sustained not only by reason, but by the weight of authority, both in this country and England, we are unwilling to make a departure from it. The fact that insanity is so easily simulated demonstrates the wisdom of the rule and affords a strong reason why we should adhere to it, and decline to adopt the rule contended for by defendant's counsel, the tendency of which, in my judgment, would be to stimulate, rather than repress, homicidal mania. It follows from what has been said that the charge given to the jury on behalf of the State is not subject to the objections urged against it, and it also follows that the court properly refused the instructions of defendant, which asked the court to lay down a rule for the guidance of the jury in determining the question of insanity, at variance with the rule above announced as settled in this State. The instructions asked by defendant in regard to the test to be applied in determining the insanity of defendant having been already substantially given, were for that reason properly refused.

It is also urged that the judgment should be reversed because the verdict of the jury was against the evidence, and because the preponderance of the evidence established the insanity of the defendant. The claim that such preponderance existed is based upon the facts that the

[1] *Supra.*

Evidence to Show Motive.

evidence did not disclose an adequate motive for the commission of the homicide; that deceased was killed in a public street in the presence of several witnesses; that defendant was indifferent to the consequences of his crime, and made no effort to escape, and previous to the homicide would frequently sit for an hour or more at a time without engaging in conversation. While the absence of motive may be considered, in connection with the other facts, in reaching a conclusion as to whether defendant was or was not insane, it by no means follows from the mere fact that the evidence offered fell short of discovering a motive, that a motive did not in fact exist, locked up in the breast of the accused. That defendant was operated upon by some motive in killing deceased may be deduced from the circumstances in evidence, that about two years before the homicide, deceased went into a saloon where several persons were present, defendant being one of the number, and invited all but the defendant to drink with him, at which defendant took umbrage, and had some "words" with the deceased. That this slight or insult took root in the breast of defendant is evident by the statement made by him immediately after the homicide when questioned about it, that, "I had it in for the son of a b——h for the last two years; I could have got even with him a year ago, but I didn't do it; but to-day I got a good chance and I took that chance with powder and ball."

Besides this three physicians were examined on the trial. One of them, introduced on behalf of defendant, testified that he had never made insanity a specialty, but had treated, in a practice of twenty years, forty or fifty persons of unsound mind; that he had made, since the homicide, personal examination of defendant, and from his examination and so much of the evidence as he had heard, he was of the opinion that defendant was insane. The other two physicians were introduced on the part of the State. One of them, Dr. Bauduy, testified that he was a professor in a medical college of diseases of the mind and nervous system, and had been for fourteen years in charge of St. Vincent's Lunatic Asylum, and for that period of time had from one hundred and fifty to five hundred patients under his daily care; that it was his constant occupation to be with the insane, and that he had made the study of insanity and diseases of the nervous system specialties. The other, Dr. Hughes, testified that he had for eleven years made the study of insanity a specialty, and for about six years of that time had been in charge of the State Insane Asylum, at Fulton, and had treated three thousand insane patients. A question in writing, stating a hypothetical case embracing all the material evidence submitted on either side, was put to these witnesses, and they were requested to base their opinion

upon the facts stated in the question as to the insanity of the defendant at the time he killed the deceased. Dr. Bauduy answered that, basing his opinion solely upon the hypothetical case, it was that at the time of the commission of the homicide the defendant was sane, and after giving his scientific reasons for his conclusions added: "I see in that hypothetical case no scintilla of insanity whatever." Dr. Hughes, in answer to the question, also gave it as his opinion that the accused was sane at the time the homicide was committed. We have held that in criminal cases, where it clearly appears that the verdict is against the weight of evidence, this court would interfere to set it aside. But in this case, after a careful examination of the evidence, we cannot say that the verdict is against the weight of evidence and will not therefore interfere.

The newly discovered evidence set out in the motion as a ground for a new trial being entirely cumulative, the motion was properly overruled for that reason. Perceiving no error either in giving or refusing instructions or in admitting or rejecting evidence, the judgment is affirmed in which Judges SHERWOOD, HOUGH and NAPTON concur, and Judge HENRY dissents.

HENRY, J, dissenting.

I cannot concur in the foregoing opinion, and will briefly state my reasons for dissenting. The allegation that defendant wilfully, deliberately and premeditatedly committed the homicide for which he is indicted, includes the allegation that he had a mind capable of willing, deliberating and premeditating. Wilfulness, premeditation and deliberation are constituent elements of murder, and none but a sane person can commit that, or any other crime. Homicide is not necessarily a crime, for one may kill in self-defence, or by accident, or in a state of mental aberration. If the State prove the killing, she is not also required to prove that it was not in self-defence, or not the result of accident; but when defendant has proven enough to raise a reasonable doubt, whether it was in self-defence, or accidental, the State must show, not by a mere preponderance of evidence, but beyond a reasonable doubt, that it was not accidental or in self-defence; and it is difficult to perceive a reason why the same principle is not equally applicable to the issue of sanity made by the plea of not guilty. It is true that the law presumes every one to be sane, and, therefore, the State is not required to introduce evidence of the sanity of the accused except in rebuttal. The sanity of defendant is as much in issue as the homicide; and although the law presumes certain facts to exist when certain other facts are proven, yet in a criminal case, when the fact presumed is disproved, or sufficient evidence is adduced to

warrant a reasonble doubt of its existence, the presumption ceases. To say that only a sane person can be guilty and declare the law to be that the State must establish defendant's guilt beyond a reasonable doubt, and yet that unless defendant establishes his insanity by a preponderance of evidence, the jury should convict, is a palpable contradiction. If one accused of murder admit the homicide and allege that it was an accident, it is for him to make that appear, but if he introduce evidence tending to prove that fact sufficient to beget in the minds of the jury a reasonable doubt that the killing was intentional, the benefit of that doubt he is entitled to by law. What is the substance of the defence in either case? Simply that, although the homicide was committed by the defendant, his mind did not concur in the act; and yet in the case of the one who admits his sanity, he has the benefit of a reasonable doubt that the act had the assent of his mind, while it is urged that the other who alleges his insanity shall not have the benefit of a reasonable doubt, but must prove, by a preponderance of evidence, a state of facts showing that the mind did not concur. The distinction has no reasonable foundation for its support. If a jury are to acquit on a reasonable doubt of defendant's guilt, and one cannot be guilty if insane, by what process of reasoning will a jury, having a reasonable doubt of defendant's sanity, come to the conclusion that they should convict, notwithstanding the instruction that a reasonable doubt of his guilt entitles him to an acquittal? A man whose thinking is not regulated by artificial rules would not hesitate to acquit under such circumstances, and it would require a most refined and ingenious argument to demonstrate to him that he could convict without disregarding that instruction. But it is said that the law presumes him sane, and that this presumption deprives the accused of the benefit of a reasonable doubt as to his sanity. The one proposition is based upon the fact that sanity is the normal condition of the human mind, and that insanity is exceptional and abnormal. The other presumption is in favor of life and liberty. The former presumption has no effect but to relieve the State, in the first instance, from making any proof on the subject, holding that the fact that the accused is a human being dispenses with proof of his sanity, because that is the normal condition of human beings. It simply reverses the order, not the burden of proof. It presumes the accused sane, but requires him to make no more proof of his insanity than of any other fact which he relies upon for his acquittal of the crime he is charged with. The one presumption does not destroy the other, as to any fact which must be found to exist in order to a conviction. I cite no authorities in support of these propositions, but they are numerous and respectable.

BURDEN OF PROOF — TEST — PLEA OF NOT GUILTY — RIGHT TO OPEN AND CLOSE.

Loeffner *v.* State.

[10 Ohio St. 598.]

In the Supreme Court of Ohio, December Term, 1857.

Hon. Thomas W. Bartley, *Chief Justice.*
" Joseph R. Swan,
" Jacob Brinkerhoff,
" Josiah Scott,
" Milton Sutliff, } *Judges.*

1. **Plea of Not Guilty — Defence of Insanity — Right to Open and Close.** — The defence of insanity under the plea of not guilty does not entitle the defendant to the opening and closing argument to the jury.
2. **Particular Right and Wrong Test.** — A person who has reason sufficient to distinguish between right and wrong and to understand the nature of the act is punishable.
3. **Burden of Proof.** — The burden of proving the defence of insanity to the satisfaction of the jury rests on the prisoner.

Error to the Court of Common Pleas of Hamilton County.

The prisoner, Joseph Loeffner, was indicted for killing with a knife on July 21, 1857, one Nicholas Horton.

At the trial, the defence set up on behalf of the defendant was, "not guilty, by reason of insanity."

On behalf of the State, testimony was given in regard to the commission of the homicide by the defendant, and to prove him guilty, as charged in the indictment. On behalf of the defendant, testimony was given to sustain the defence of insanity. Rebutting testimony was given on behalf of the State.

After the conclusion of the testimony, the defendant's counsel moved the court to allow them to open and close the argument to the jury, they holding the affirmative of the issue made by the plea of "not guilty, by reason of insanity." The court overruled this motion, and counsel for the defendant excepted.

In charging the jury, the court used the following language touching the plea of insanity.

"The defendant, Joseph Loeffner, through his counsel, pleads that he is not guilty of killing Nicholas Horton, in manner and form as set forth by the State, by reason of insanity. His counsel claim that he was an insane man at the time of the commission of the act, and,

therefore, an irresponsible being; irresponsible to the law for murder in the first or second degree, or for the crime of manslaughter. Was, then, Joseph Loeffner insane and irresponsible to the law at the time he committed the act of which the State complains?

"If you resolve this important question, after a full investigation and consideration of the testimony in the affirmative, the defendant must be acquitted on the ground of insanity, and in such a case your verdict will be: 'We, the jury, find the defendant not guilty, by reason of insanity.' But here your most earnest and careful attention is required Look at all the evidence touching this issue. You will examine all the detailed evidence touching upon the subject, and permit not your minds to be carried away by loose inferences or careless deductions. The plea of insanity is an affirmative issue of the defendant. He, by his counsel, says that he is not guilty, because he was insane at the time of the commission of the act. His counsel are therefore called upon to prove this fact, and to prove it affirmatively. It was formerly held, indeed up to within very recent time, that this issue being thus affirmatively made by defendant or his counsel, must be proved beyond a reasonable doubt, holding the defendant to as strict proof of insanity as the State is held when she makes a charge against the defendant. But perhaps it would be going too far to lay down this doctrine in so strict sense, as the law now exists with us upon this subject, at least, 'in favor of life.' The great difficulty upon this subject is our want of knowledge; and the policy of the law is to let no innocent man be condemned, or let no guilty man escape punishment; yet that policy says, rather let the guilty go free than subject the innocent or irresponsible to punishment. But you must observe this in examining this question, you must consider it important, both for the protection of the community and the safety of the innocent; and let me lay down to you these principles of the law: —

"1. Every individual charged with the commission of a crime or an offence, is presumed to be sane, if over the age of childhood. Every individual charged with the crime of murder, over the age of infancy or childhood, is presumed to be sane until the contrary is shown, when the plea of insanity is set up.

"2. When the plea is preferred, the burden of proving insanity rests upon the part of the defendant. He must prove it affirmatively. But it is for the jury to conclude upon the proof offered; and if, on due consideration, they are convinced by the proof, upon weight of evidence, that insanity, in its legal sense, existed at the time of the com-

mission of the act, it will be their duty, at least in favor of life, so to find.

"To apply these principles to this case: Joseph Loeffner, by the law, at the time of the crime charged, is presumed to have been sane, and to be fully responsible for the consequences of his own acts. If, however, from a full and careful examination of all the testimony of the case, in its weight and character, the conclusion is fixed upon your minds that the defendant was insane at the time of the commission of the act, then it is your duty to find in favor of insanity. But what is the insanity about which you are about to pronounce your judgment? For upon this point your pathway must be made clear by the law. Insanity, indeed, exists in so many shapes and forms, has so many varied insignia and manifestations, that it is almost impossible for science to comprehend it or give it intelligible definition. The learned and the unlearned differ about it; what is insanity to one is not so to another. The classes, species, and modifications are not well understood by any of us, learned or otherwise. It seems, indeed, as indefinite in extent as mind itself. Then, how shall we determine the responsibility, on this subject, of man to the law? The policy of the law ought to fix it as far as it can, and the law does fix it. Insanity, in its general legal sense, is the inability or incapacity to distinguish between right and wrong, as applied to particular cases of crime; it is the inability or incapacity to distinguish between right and wrong, or the want of knowledge of right and wrong as to the particular act committed. If, in the commission of a criminal act, the capacity of distinguishing between right and wrong is overcome or destroyed, or the knowledge of such a distinction is buried in oblivion, such a fact would make a perpetrator irresponsible. We will adopt the language of Chief Justice SHAW, in the *Abner Rogers' Case*, 'that in order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose, and if his reason and mental powers are either so deficient that he has no will, or conscience, or controlling mental power; or if through the overwhelming violence of mental disease, his intellectual power is, for the time, obliterated, he is not a responsible moral agent, and is not punished for criminal acts.' And the court here, gentlemen of the jury, in this connection, will adopt further the language and sentiments of the learned judge: "But a man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and may subject him to punishment. In order to be responsi-

Instructions of the Court.

ble, he must have sufficient power of memory to recollect the relation in which he stands to others, and to which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and be liable to punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts.'

"And further we say for the purpose of enlightening you upon this subject, we will quote from 12 Ohio,[1] the language of Judge BURCHARD in the case: 'Was the accused a free agent in forming the purpose to kill? Was he at the time the act was committed capable of judging whether that act was right or wrong? And did he know, at the time, that it was an offence against the laws of God and man? If you say nay, he is innocent; if yea, and you find the killing to have been purposely, with deliberate and premeditated malice, he is guilty. In trying this question, you will bear in mind that the law presumes every person of the age of fourteen years or upward, to be of sufficient capacity to form the criminal purpose, to deliberate and premeditate upon the act which malice, anger, hatred, revenge, or other evil disposition might impel him to perpetrate. To defeat this legal presumption, which meets the defence of insanity at the threshold, the mental alienation relied upon by the accused must be affirmatively established by positive or circumstantial proof; you must be satisfied from the evidence that the perverted condition of the faculties of the mind indicated in the main question, which I have already stated as excusing from crime, did exist at the time Sells was killed. It is not sufficient, if the proof barely shows that such a state of mind was possible; nor is it sufficient if it merely shows it to have been probable. The proof must be such as to annul the legal presumption of sanity; it must satisfy you that he was not sane. It would be unsafe to let loose upon society great offenders upon mere theory, hypothesis, or conjecture. A rule that would produce such a result would endanger community by creating a means of escape from criminal justice which the artful and experienced would not fail to embrace. The defence of insanity is not uncommon. It is by no means a new thing in a court of justice.

[1] Clark *v.* State, p. 494.

Loeffner *v.* State.

It is a defence often attempted to be made, more especially in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt act, and render hopeless all other means of avoiding punishment. While, then, the plea of insanity is to be regarded as a not less full and complete than it is a humane defence when satisfactorily established, and while you should guard against inflicting the penalty of crime upon the unfortunate maniac, you should be equally careful that you do not suffer an ingenious counterfeit of the malady to furnish protection to guilt.'

"So, gentlemen of the jury, in a thorough examination of the testimony, apply these principles touching this subject of insanity. Was Joseph Loeffner, at the time of the homicide of Nicholas Horton, capable of judging between right and wrong? Had he the knowledge, at the time the act was committed, of right and wrong as to the act itself? Did he know, at the time of the fatal stab in the body of the deceased, that he was committing crime? Was his knowledge and capacity obliterated in the dethronement of reason at the time of the homicide? These questions are for you to settle; and if you find that he could not distinguish between right and wrong; that his mental powers were destroyed — his reason gone — you will find him insane. If, on the contrary, you find that he did know that his act was wrong, that it was criminal, then no matter what may have been his depravity of nature, his feebleness of intellect, his want of capacity or the degradation of his morals, his act was a homicide for which he is responsible to the law, according as you find the degree of guilt.

"In examining the testimony touching upon these grave and important questions of insanity, it will be necessary for you to consider all the circumstances of the commission of the act itself. Do these show the act to be one of a rational being who knew what he was about — who knew that it was wrong so to do, and who knew he must be responsible for the consequences? Did he act in such a way as convinces your minds that it was the act of a sane mind? Was the act produced in such a way as a murderer would accomplish, or was it the act of an insane being, according to the law? Take also into consideration all that has been testified to in reference to his history — how he lived in Germany; his boyhood; the condition of his maternal parent; how he came to this country; his conduct and behavior when here; his marriage; his conduct to his wife; the homicide of his wife; his conduct to Mr. Horton and family; his conversation; his deportment before, at the time and after the commission of the crime. Examine with care

the opinions of his acquaintances as to his sanity; scrutinize well, too, the opinions of the learned physicians; and you must regard these opinions of acquaintances and physicians as opinions merely. They are not, in themselves, positive testimony, though, from the necessity of the case, they are introduced and allowed for what light they may throw upon the condition of the defendant. Test, then, these opinions, and give your undivided attention to the facts upon the subject. It is for you to find the truth, and in your verdict so to say."

"The jury found the defendant guilty of murder in the first degree, in manner and form as charged in the indictment; and sentence of death was passed upon the prisoner. To reverse the sentence a writ of error was prosecuted.

Hassaureck & Elliott and *Wm. L. Spooner*, for plaintiff in error.

C. P. Wolcott, Attorney-General, for the State.

BARTLEY, C. J.

(After passing on other objections.)

7. In the trial of an indictment for murder, the defence of insanity under the plea of not guilty, does not change the nature of the issue so as to give the affirmative to the defendant, and entitle the defendant to the opening and closing argument to the jury.

8. The accused in a criminal case is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offence he had capacity and reason enough left to enable him to distinguish between right and wrong, and understand the nature of his act, and his relation to the party injured.

9. As the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime, the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury, on the trial of a criminal case, rests upon the defence. It is not necessary, however, that this defence be established beyond a reasonable doubt; it is sufficient if the jury is reasonably satisfied, by the weight or preponderance of the evidence, that the accused was insane at the time of the commission of the act.

Judgment of the Court of Common Pleas affirmed.

SWAN and SCOTT, JJ., concurred; BRINKERHOFF and SUTLIFF, JJ., dissented on other grounds.

BURDEN OF PROOF — QUANTUM OF PROOF REQUIRED.

Ortwein *v.* Commonwealth.

[76 Pa. St. 414.]

In the Supreme Court of Pennsylvania, January, 1875.

Burden of Proof — Quantum of Proof Required. — On the trial of an indictment for murder, where the defence is that the prisoner was insane at the time he committed the act, it is not sufficient to raise a doubt in the minds of the jury as to whether the prisoner was sane, but the evidence must be such as satisfies the minds of the jury that he was in fact insane.

Error to the Court of Oyer and Terminer of Alleghany County.

Agnew, C. J., delivered the opinion of the court.

The chief question in this case arises under the fifth point of the prisoner, which was negatived by the court below. It is this: —

5. If the jury have a reasonable doubt of the sanity of the prisoner at the time of the killing, they cannot convict.

The industry of the able counsel of the prisoner, has collected and classified many cases on this point. While we think their weight accords with our own conclusions, we cannot help perceiving, in their number and variety, that the decision of the question should rest rather on a sound basis of principle, than on the conclusions of other courts. In order to apprehend the true force of the principles to be applied, we must keep in the foreground the facts of the case before any question of insanity can arise. Insanity is a defence. It presupposes the proof of the facts which constitute a legal crime, and is set up in avoidance of punishment. Keeping in mind, then, that an act of wilful and malicious killing has been proved and requires a verdict of murder, the prisoner, as a defence, avers that he was of unsound mind at the time of the killing, and incapable of controlling his will; and therefore that he is not legally responsible for his act. This is the precise view that the statute itself takes of the defence, in declaring the duty of the jury in respect to it. The sixty-sixth section of the Criminal Code of 31st of March, 1860, taken from the act of 1836, provides: "In every case in which it shall be given in evidence, upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offence, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and declare whether he was acquitted by them on the ground of such insanity." Thus the

Jury must be "Satisfied" of Insanity.

verdict must find the fact of insanity, and that the acquittal is because the fact is so found. The law then provides for the proper custody of the insane prisoner. This being the provision of the statute, it is evident that a jury, before finding the fact of insanity specially, must be satisfied of it by the evidence. A reasonable doubt of the fact of insanity, cannot, therefore, be a true basis of the finding of it as a fact, and as a ground of acquittal and of legal custody. To doubt one's sanity is not necessarily to be convinced of his insanity. It has been said in a nearly analagous case, "as to whether a reasonable doubt shall establish the existence of a plea of self-defence, I take the law to be this: If there be a reasonable doubt that *any* offence has been committed by the prisoner, it operates to acquit. But if the evidence clearly establishes the killing by the prisoner, purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burden then falls upon the prisoner, and not on the Commonwealth, to show that it was excusable as an act of self-defence. If, then, his extenuation is in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some of its grades — manslaughter at least." [1] Such also was the opinion of the late Chief Justice Lewis, a most excellent criminal law judge (in the trial of John Haggerty), when president of Lancaster County Oyer and Terminer, in the year 1847.[2] He said: [3] "The jury will decide upon the degree of intoxication, if any existed, and upon the existence of insanity. The burden of proof of this defence rests upon the prisoner; the fact of killing, under circumstances of deliberation detailed in this case, being established, the insanity which furnishes a defence must be shown to have existed at the time the act was committed. The evidence must be such as satisfies the minds of the jury." Thus, according to both statutory and judicial interpretation, the evidence to establish insanity as a defence, must be satisfactory and not merely doubtful.

If we now analyze the subject, we shall find that this is the only safe conclusion for society, while it is just to the prisoner. Soundness of mind is the natural and normal condition of men, and is necessarily presumed, not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated and be adjudged to be a reasonable being until a fact so abnormal as a want of reason positively

[1] Commonwealth *v.* Dunn, 58 Pa. St. 22.

[2] 4 Clark, 187.

[3] U. S. Crim. Law, p. 406.

appears. It is, therefore, not unjust to him that he should be so conclusively presumed to be until the contrary is made to appear on his behalf. To be made so to appear to the tribunal determining the fact, the evidence of it must be satisfactory and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature. It cannot, therefore, be said to be cruel to the prisoner to hold him to the same responsibility for his act, as that to which all reasonable beings of his race are held, until the fact is positively proved that he is not reasonable. This statement derives additional force from the opinion of Chief Justice Gibson in the case of the *Commonwealth* v. *Mosler*,[1] tried before him and Justice Bell and Coutler, in Philadelphia, and quoted from in Lewis.[2] "Insanity," he says, "is mental or moral, the latter being sometimes called homicidal mania, and properly so. A man may be mad on all subjects, and then, though he may have a glimmering of reason, he is not a responsible agent. This is general insanity; but if it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defence to an accusation of crime. It must be so great as entirely to destroy his perception of right and wrong, and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination controlling his will, making the commission of the act, in his apprehension, a duty of overruling necessity." Again, "partial insanity is confined to a particular subject, being sane on every other. In that species of madness it is plain that he is a responsible agent if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may be laboring under a moral obliquity of perception, as much so as if he were merely laboring under an obliquity of vision." And again, "the law is, that whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject and to have taken from him the freedom of moral action." Thus, all the utterances of the chief justice on this subject are positive and emphatic, and allow no room for doubts, or merely negative expressions.

And if this reasoning were even less than conclusive, the safety of society would turn the scale. Merely doubtful evidence of insanity would fill the land with acquitted criminals. The moment a great crime would be committed, in the same instant, indeed often before, would preparation begin to lay ground to doubt the sanity of the perpetrator.

[1] 4 Pa. St. 264. [2] U. S. C. L. 403, 404.

Danger of Permitting a Small Degree of Proof.

The more enormous and horrible the crime the less credible, by reason of its enormity, would be the evidence in support of it; and proportionately weak would be the required proof of insanity to acquit of it. Even now the humanity of the criminal law opens many doors of escape to the criminal. Then a wider door would be opened by the doubtful proof of insanity made still more open by the timidity of jurors, their loose opinions on this subject of punishment, and their common error that the punishment is the consequence of their finding the truth of the facts, instead of the consequence of the commission of the crime itself. The danger to society from the acquittals on the ground of doubtful insanity, demands a strict rule. It requires that the minds of the triers should be satisfied of the fact of insanity. Finally, we think this point has been actually ruled by this court in the case of *Lynch* v. *Commonwealth*, decided at Pittsburg in 1873. The prisoner's second point was in these words: "That if the jury had a reasonable doubt as to the condition of the defendant's mind at the time the act was done, he is entitled to the benefit of such doubt, and they cannot convict." The court below said in answer: "The law of the State is, that where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify a jury in acquitting upon that ground." This ruling was sustained.[1]

BURDEN OF PROOF — "MORAL INSANITY" — EVIDENCE — ATTEMPT AT SUICIDE.

COYLE *v.* COMMONWEALTH.

[100 Pa. St. 573.]

In the Supreme Court of Pennsylvania, 1882.

1. **Burden of Proof.** — It is error to instruct the jury that insanity must be proved by "clearly preponderating" evidence. It is only necessary that the evidence supporting it should "fairly preponderate."

2. "**Moral insanity**" criticised.

3. **Evidence of Insanity.** — An attempt at suicide raises no presumption of insanity.

[1] Lynch *v.* Com., 77 Pa. St. 205.

Coyle *v.* Commonwealth.

Error to the court of Oyer and Terminer of York County.

Mercur, J., delivered the opinion of the court.

It was clearly proved that Coyle killed Emily Myers. That fact is admitted. The only defence set up is that he was insane at the time.

The first specification assigned for error is that in referring to homicidal insanity the court cited approvingly a portion of the language of Mr. Chief Justice Gibson, in *Commonwealth* v. *Mosler*,[1] in which it is said: "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion, which while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual or at least so have evinced itself in more than a single instance."

The able argument of counsel has failed to convince us that this was not a correct declaration of the law, or that it has since been ruled otherwise by this court.

The validity of such a defence is admitted, but the existence of such a form of mania must not be assumed without satisfactory proof. Care must be taken not to confound it with acts of reckless frenzy. When interposed as a defence to the commission of high crime, its existence should be clearly manifest. Such defence is based on an unsound state or condition of the mind proved by the acts and declarations of violence. It certainly is not requiring too much to hold that it shall be shown in more than a single instance. We know no later case in this State where the precise question has been ruled otherwise.

The second specification relates to the effect which shall be given to the attempt of the prisoner to take his own life. This attempt was made immediately after he had fired the shots which caused the death of his victim. The language objected to was not in answer to any point submitted, but appears in the general charge. The court said: "It appears proper to say to you, as a matter of law, that even if you believe the prisoner really intended to take his own life, this would not be of itself evidence of insanity. It would only be a circumstance in the case to be considered by you in connection with other facts and circumstances, for the purpose of enabling you to determine the mental condition of the prisoner. The fact of the attempted suicide raises no presumption of insanity."

The court was dealing with the question of attempted suicide only,

[1] 4 Pa. St. 264.

Evidence of Insanity Need Not "Clearly Preponderate."

and whether that alone was evidence of insanity. It adopted the very language used by the court below in *American Life Ins. Co.* v. *Assetts*, and affirmed by this court in 74 Pa. St.[1] In *Laros* v. *Commonwealth*,[2] the defence was insanity. It was objected that the court below said to the jury, "you cannot, however, infer insanity from the heinous, atrocious character of the crime or constitute it as an element in the proof of actual insanity." The answer here was, "the court did not mean to say that where proof of insanity is given, the horrid and unnatural character of the crime will lend no weight to the proof; but meant only that the terrible nature of the crime will not stand as the proof itself, or an element in the proof of the fact of insanity. There is a manifest difference between that which is actual evidence of a fact, and which merely lends weight to the evidence which constitutes the proof. This is all the court meant."

So we understand the language used in the present case to mean that the attempt to commit suicide, of itself, is not evidence of the fact of the insanity of the prisoner, and it raises no legal presumption thereof, but it may be considered by the jury with all the other facts and circumstances bearing on the question of insanity. Sometimes it may be evidence of a wicked and depraved heart, familiar with crime. At others, of despondency and discouragement; but perhaps more frequently of cowardice, of a lack of courage to face ignominy and public disgrace, or to submit to the punishment likely to be imposed on him.

The third specification presents more difficulty. In answer to a point submitted, the court charged, "the law of the State is that when the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify the jury in acquitting on that ground. The law presumes sanity when an act is done, and that presumption can only be overthrown by clearly preponderating evidence." Excluding the last sentence, this answer contains a clear and correct statement of the law. It is not sufficient cause for an acquittal of one charged with crime, and defending under the plea of insanity, that a doubt is raised as to its existence. As sanity is presumed, when the fact of insanity is alleged, it must be satisfactorily proved.[3] The question remains, what degree of proof is necessary to overthrow the presumption of sanity? The court said it can be "only by clearly preponderating evidence."

[1] p. 176.
[2] 84 Pa. St. 200.
[3] Ortwein *v.* Commonwealth, 76 Pa. St. 414; Lynch *v.* Same, 77 Pa. St. 205.

The court also (misled, it is said, by the language in the brief furnished it) cited the case of *Brown* v. *Commonwealth*,[1] as declaring "to establish this defence (viz., insanity) it must be clearly proved by satisfactory and clearly preponderating evidence."

This is not the language of that case. It is demanding a higher degree of proof than the authorities require. It may be satisfactorily proved by evidence which fairly preponderates. To require it to "clearly preponderate" is practically saying it must be proved beyond all doubt or uncertainty. Nothing less than this will make it clear to the jury, and make them conclusively convinced. This is not required to satisfy the jury.[2]

It is not necessary that the evidence be so conclusive as to remove all doubt.[3] When one is on trial for his life care must be taken that he receives from the court that due protection which the law has wisely thrown around him. Evidence fairly preponderating is sufficient.

We discover no error in the fourth specification.

Judgment reversed and venire facias de novo awarded.

BURDEN OF PROOF — REASONABLE DOUBT — TEST OF INSANITY — EVIDENCE OF GOOD CHARACTER — EVIDENCE OF ANOTHER CRIME.

Hopps *v.* People.

[31 Ill. 385.]

In the Supreme Court of Illinois, April Term, 1863.

Hon. John D. Caton, *Chief Justice.*
" Pinkney H. Walker, } *Judges.*
" Sidney Breese, }

1. **Burden of Proof — Reasonable Doubt.** — A prisoner charged with crime who sets up insanity as a defence, does not thereby assume the burden of proof of such insanity. Such a defence is only a denial of one of the essential allegations to be proved by the State; and therefore, if, on the whole evidence, the jury entertain a reasonable doubt of his sanity, they must acquit. Foster's Case, 23 Ill. 293, overruled.

2. **Test of Insanity.** — Wherever it appears from the evidence that at the time of doing the act charged, the prisoner was affected with insanity, and such affection was the

[1] 78 Pa. St. 122.
[2] Heister *v.* Laird, 1 W. & S. 215.
[3] Ortwein *v.* Commonwealth, *supra;* Brown *v.* Same, *supra;* Myers *v.* Same, 83 Pa. St. 141; Pannell *v.* Same, 86 Pa. St. 260.

Evidence of Prisoner's Previous Good Character Relevant.

moving cause of the act, without which he would not have done it, he ought to be acquitted.

3. **Evidence of the Uniform Good Character** of the prisoner is admissible where the defence is insanity.

4. **Evidence of Another Crime.** — As a general rule, on the trial of one crime, proof that the prisoner has committed another is not permissible. But where the defence is insanity, and the coolness and unconcern of the prisoner at the time are relied on as evidence of it, it is competent to show that the prisoner had in former years been a smuggler, as tending to rebut the impression that his deportment was the result of insanity.

Writ of Error to the Circuit Court of Cook County. Hon. Judge Manierre, presiding.

Messrs. McComas & Dexter, for the plaintiff in error.

Mr. W. K. McAllister, for the defendants in error.

Mr. Justice Breese delivered the opinion of the court.

The plaintiff in error was convicted, in the Cook Circuit Court, on an indictment for the murder of his wife. He brings the record here, complaining of several errors alleged to have been committed to his prejudice, the most important of which we propose to notice.

He complains first that the Circuit Court would not permit him to give evidence of his uniform good character as a man and a citizen.

It was, at one time, a disputed question, whether such evidence could be given in a case where, as in this, the homicide is not denied. Some of the books say such evidence, if offered, ought to be restricted to the trait of character in issue, or, in other words, should bear some analogy to the nature of the charge.[1]

To the same effect is 2 Russell on Crimes,[2] but yet he says the good character of an accused party is an ingredient which should always be submitted to the consideration of the jury, along with the other facts of the case.[3]

In a case where the defence is insanity we cannot have a doubt that evidence of uniform good character as a man and a citizen is proper for the jury to consider; whether a person whose character has been uniformly good has, in a sane moment, committed the crime charged. It is undoubtedly true, a sane man, whose previous character has been unexceptionable, may commit an atrocious homicide, no doubt, may exist of the fact, yet under his plea of insanity, should he not be entitled to all the benefit which may be derived from the fact of uniform good character as tending, slightly it may be, to the conclusion that he could not have been sane at the time the deed was done? Generally, a person of good character does not, of a sudden, fall from a high posi-

[1] 3 Gr. Ev., sect. 25.

[2] p. 784.

[3] *Id.* 785.

tion to the commission of outrageous crimes; should he do so would it be an unnatural or forced inference that he may have been affected with insanity at the time? But be this as it may, it seems to be now settled that such evidence, in capital cases, is admissible. In the case of *Commonwealth* v. *Hardy*,[1] which was a capital case, PARSONS, C. J., said a prisoner ought to be permitted to give in evidence his general character in all cases. SEWELL and PARKER, justices, said they were not prepared to admit that testimony of general character should be admitted in behalf of the defendant, in all criminal prosecutions, but they were clearly of opinion that it might be admitted in capital cases in favor of life. The same rule was stated in the case of *Commonwealth* v. *Webster*.[2] The court there say, it is the privilege of the accused to put his character in issue or not.

In 2 Bennett & Heard's Leading Cases [3] the cases are collected and commented on, in which this rule is recognized.

In the case of *People* v. *Vane*,[4] the court held that evidence of the good character of the defendant on the trial of an indictment, is always admissible, though it cannot avail when the evidence against him is positive and unimpeached; but when the evidence is circumstantial, or comes from a suspected or impeached witness, proof of good character is important.

We think, at least in view of the defence relied on, the evidence of the prisoner's uniform correct bearing, as a man and a citizen, should have been made known to the jury. A good character is a most precious possession, and it ought to be permitted, in favor of life, at least, to go to the jury.

The plaintiff in error also complains, that the prosecution was permitted to prove that about thirty years before the commission of the crime charged, he had been engaged in a violation of the revenue laws of the country, by a career of smuggling goods and property to and from Canada. The prisoner insists it was not competent to prove this offence against him; that all the facts proper to be proved, should be strictly relevant to the particular charge, and have no reference to any of his conduct, not connected with the charge.

This is undoubtedly true as a general principle, but we think such proof was warranted in this view. The defence being insanity, the coolness and unconcern of the prisoner at the time he did the fatal act, was made a prominent feature in the case, and inferences were sought to be drawn from it, favorable to the plea.

[1] 2 Mass. 317.
[2] 5 Cush. 325.
[3] p. 159, and notes.
[4] 12 Wend. 78.

Tests of Insanity.

Is it possible, asks his counsel, that a man who could show so much coolness, self-possession, and apathy, at the moment and after the fatal deed, could be otherwise than insane? To this the People reply, the prisoner had spent years of his early life in a perilous calling, demanding at all times great coolness and hardihood, and therein had educated his nerves to withstand any shock; in such a school he learned the deportment exhibited by him on the fatal occasion. To account for this coolness and unconcern the testimony of Beardsley and Phelps was properly received, it being in the nature of rebutting evidence on the point made.

But these are small points compared to those we must consider.

The prisoner claims that the court did not lay down to the jury correctly the law of his case. That he was prejudiced by the charge of the court, not coming up, as he alleges it should have done, to the true principles involved in it, by which guilt was established in a case where guilt could not exist, and for which his life must be forfeited if this court has no corrective power.

The homicide stands confessed. It has never been denied by the prisoner; on the contrary, he declared, on its commission, that it had been long contemplated and was right; that his wife was unchaste. After his arrest he justified the deed, and has, throughout, exhibited total indifference and unconcern.

His counsel say for him, he was not of sound mind when the deed was done, and the court, trying the cause, gave to the jury, at great length, its views of the nature of the defence, and prescribed the rule which should govern them in the decision of the case.

We do not propose to examine, in detail, the several instructions given by the court for the prosecution, or those refused when asked by the defence. We are fully convinced what the rule or tests should be in such cases. The results of scientific investigation on this intricate subject are so imperfect as to render it very difficult to establish any general rule by which judicial proceedings of a criminal nature should be governed, when the defence of insanity is interposed. Writers on the subject treat of several different kinds of insanity, and of different degrees of the several kinds, and among them, there is considerable diversity of opinion on the same point. They furnish, as yet, no true and safe guide for courts and juries; but it is hoped, as science advances, a rule will be eliminated which, whilst it shall throw around these poor unfortunates a sufficient shield, shall, at the same time, place no great interest of the community in jeopardy.

Hopps *v.* People.

It is now generally conceded, that insanity is a disease of the brain, of that mass of matter through and by which that mysterious power, the mind acts. There, the mind is supposed to be enthroned, acting through separate and distinct organs. These organs may become diseased, one or more or all, and in the degree, or to the extent of such disease, is insanity measured. A disease of all the organs, causes total insanity, while of one or more, partial insanity only. There is, it seems, a general intellectual mania, and a partial intellectual mania, and a moral mania, which is also divided into general and partial. It is claimed for the prisoner that the species of insanity with which he is afflicted, is of the partial intellectual order, denominated monomania; that is to say, a mania on one subject, and that subject the infidelity of his wife, in which his belief, without the least ground to base it upon, was so fixed as to become a deep-seated delusion amounting to mania. In the simplest form of this species of mania, the understanding appears to be tolerably sound on all subjects but those connected with the hallucination.[1]

Premising these, it is truly said, it has been found difficult to establish any general rule under which all these varieties of insanity may be safely included and controlled, when such a defence is made.

The rule prevailing in the time of Lord Coke, Hale, and other luminaries of the law, in its not most enlightened days, was that to exempt from punishment the party charged must be totally deprived of his understanding and memory. As science advanced, and closer investigations were had upon this subject, it was held, if the accused had so far lost the use of his understanding as not to know right from wrong, he was not responsible, and this rule has been so far modified as to be applied to the precise act for which the prisoner may be indicted.

This rule seems to have been adhered to by the English courts, and by some of the courts of this country, with occasional departures, as in *Hadfield's Case*, and other cases commented upon in notes to 1 Leading Criminal Cases.[2] In *Hadfield's Case*, tried before Lord Kenyon in 1800, it was held if the accused was laboring under a sincere and firm delusion it was his duty to do the act charged, and it was done under the influence of such a delusion, he was not responsible. Yet in *Bellingham's Case*, tried before Sir James Mansfield, in 1812, reported in 5 Carr. & Payne,[3] the old rule of Lord Hale's time was announced and enforced, and an undoubted lunatic condemned to the gallows.

[1] Ray's Med. Jur. 164.
[2] p. 93.
[3] p. 169.

Burden of Proof.

We do not propose to go into an examination of the various decisions, English and American, on this subject, it being sufficient to say that no certain, uniform, and definite rule can be gathered from them. In the midst of this uncertainty, with the best reflection and examination which we have been able to give to this very important and most interesting question, we have come to the conclusion that a safe and reasonable test in all such cases would be that whenever it should appear from the evidence that at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind or affection of insanity must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. If it be shown the act was the consequence of an insane delusion and caused by it, and by nothing else, justice and humanity alike demand an acquittal. Our statute was designed to ameliorate the vigor of the old rule of the common law, in declaring that a person "affected with insanity" shall not be considered a fit subject of punishment for an act done which, under other circumstances or disposition of mind, would be criminal. The rule we have endeavored to prescribe seems to fulfil this demand of the statute.

Another question remains as to the proof necessary in such cases, and the duty of the jury thereupon. In this case the court instructed the jury, if the act was proved to their satisfaction by the weight and preponderance of evidence to have been one of insanity only, the prisoner was entitled to an acquittal though the defence should not be proved beyond all reasonable doubt.

This instruction greatly modifies the old rule, but it does not, in our judgment, announce the true principle in criminal cases. In every criminal proceeding before a jury, without any exception, if a reasonable doubt is entertained of the guilt of the accused, the jury are bound to acquit. Now what is essential to the commission of a crime? Our statute declares to constitute crime, there shall be an union or joint operation of act and intention, or criminal negligence. The overt act is one ingredient, the intention another, and their union is indispensable to constitute guilt. Intention is proved by the circumstances connected with the perpetration of the offence, and the sound mind and discretion of the person accused. The killing alone, under the most aggravated circumstances, will not suffice, if sound mind and discretion be want-

ing. Sound mind is presumed if the prisoner is neither an idiot, lunatic, nor "affected with insanity." If he be affected with insanity, then sound mind is wanting and crime is not established. Sound mind or sanity, then, is an ingredient in crime quite as essential as the overt act. Who will deny, if there be a reasonable doubt as to the overt act, that the jury are bound to acquit? Equally imperative must be the rule, if a reasonable doubt be entertained as to the sanity of the prisoner. Sanity is guilt, insanity is innocence; therefore a reasonable doubt of the sanity of the accused on the long and well-recognized principles of the common law must acquit. Suppose the question was one of identity, would not a reasonable, well-founded doubt on the point acquit the prisoner? Suppose an *alibi* was sought to be proved, and proof sufficient was offered to create a reasonable doubt whether the accused was, at the place and at the time when and where the offence was alleged to have been committed, is not the prisoner entitled to the benefit of the doubt? So, if the defence be that a homicide was justifiable or excusable, is not the principle well settled, a reasonable doubt will acquit? The rule is founded in human nature as well as in the demands of justice and public policy. Innocence is the presumption, guilt being alleged, the State making the charge, is bound to prove it; the State is bound to produce evidence sufficient to convince the mind of the guilt of the party. If a reasonable doubt is raised, then the mind is not convinced, and being in that unsettled state, whatever the probabilities may be, a jury cannot convict. It is entirely impossible for them to say the accused is guilty when they entertain a reasonable doubt of his guilt.

It is urged by the prosecution that the burden of proof is on the accused to make out his defence. That sanity being the normal condition, insanity must be established by preponderating evidence.

We do not understand the burden of proof is shifted on the defendant. Every man charged with crime is entitled to claim the benefit of all the provisions of the law. In every case of murder the first inquiry is, has the homicide been committed — did the prisoner do the deed — did he intend to do it — was he of sound mind, and not affected with insanity, when the act was done, and was the act done with malice aforethought, express or implied? The State avers their existence — they are essential to constitute the crime, and the State must prove them — the burden of proof is on the State. But it is said that the State is relieved of the burden by proving the prisoner did the act, the law implying that he intended to do it, and that the presumption is every man is of sound mind. These are but presumptions, and when they are rebutted by proof of absence of criminal intention by reason of un-

soundness of mind, or a reasonable doubt is raised on the point, that doubt must avail the prisoner. Can it be properly said, in criminal cases, the burden of proof ever shifts, so long as the defendant bases his defence on the denial of any essential allegation in the indictment? We think not. The prosecution is bound on every principle of correct pleading and of justice, to maintain their allegations and it is not in their power to shift the burden on the defendant.[1] The presumption of innocence is as strong as the presumption of sanity. The burden of proof must therefore always remain with the prosecution to prove guilt beyond a reasonable doubt — a serious and substantial doubt, not the mere possibility of a doubt.

The rule here announced differs from that laid down in *Fisher's Case*.[2] In that case we said sanity, being the normal condition, it must be shown by sufficient proof that from some cause it has ceased to be the condition of the accused. The opinion in that case was prepared under peculiar circumstances not admitting of much deliberation, and this point was not pressed upon the attention of the court, or argued at length. Further reflection has satisfied us it was too broadly laid down, and that justice and humanity demand the jury should be satisfied beyond a reasonable, well founded doubt of the sanity of the accused. The human mind revolts at the idea of executing a person whose guilt is not proved, a well founded doubt of his insanity being entertained by the jury.

In these views we are supported by the cases of *State* v. *Marler*,[3] *People* v. *McCann*,[4] and *Polk* v. *State*.[5] Other cases may no doubt be found to the same purport. Be the cases few or many, the principle is, nevertheless, correct.

The judgment of the Circuit Court is reversed, the cause remanded, and a *venire de novo* awarded.

Mr. Chief Justice Caton. While I concur with my brother Breese, I may be permitted to make a few suggestions upon a single point in this case.

It is a general rule in all criminal trials that if from the whole evidence the jury entertain a reasonable doubt, it is their duty to acquit; and the reason is that it is better that many guilty persons should be acquitted than that one innocent person should be convicted. The bare possibility that a person about to be executed is innocent of crime pro-

[1] Com. v. McKee, 1 Gray, 61.
[2] 23 Ill. 293.
[3] 2 Ala. 43.
[4] 16 N. Y., 58.
[5] 19 Ind. 170.

duces a shudder in every one who is not callous to all sense of justice and humanity; and the all-pervading sentiment of civilized man demands this rule. Does humanity less demand it in a case where the defence is insanity than where it is excusable or justifiable homicide? Is it any less revolting to an enlightened humanity to hang an innocent crazy man than one who is sane?[1] His very helplessness commends him to the commiseration of mankind. One who, being indicted for murder, says, true, I killed the man, but I did it in necessary self-defence, shall be acquitted if he can raise a reasonable doubt on this question, although the preponderance of evidence is and the probabilities are that he was the attacking party, and pursued his victim unto death, with malice aforethought, and shall it be said when the same doubt exists as to the insanity of the prisoner, he shall be convicted and executed? The very suggestion is shocking to a sense of even-handed justice.

The question at last returns, is the prisoner guilty or not guilty? If there is a reasonable doubt of his guilt he must be acquitted. If there is such doubt of malice all agree that he must have the verdict. If he was insane there could be no malice, and hence, to raise a doubt of sanity is to raise a doubt of malice. Sanity is as necessary to guilt as any other fact, and if there is a reasonable doubt of that there must be a doubt of guilt. Why should there be an exception to this otherwise universal rule? I can see none in reason, and it is against the fundamental principles of the law. The old common law is silent on this subject. It is only in modern times that the question has arisen, and the first who held that insanity was an exception to the rule, overturned the rule itself; but they could not abolish or destroy it. It still remains, and I trust will ever remain, an immovable monument to the civilization and humanity of our age and country.

It is said insanity may be simulated. So may any other fictitious defence be got up to screen the guilty. The evidence in this case is that it is exceedingly difficult to simulate insanity so as to avoid detection. It is but very lately that insanity has become a subject of careful scientific investigation which has made and is making rapid progress. This investigation enables experts to detect simulated insanity with much more certainty than could formerly be done.

Shall we ignore and denounce the results of human study and research on this subject, while we recognize and applaud the advancement

[1] The chief justice rather mistakes the question. It should be: "Is it any less revolting to an enlightened humanity to hang a guilty crazy man than an innocent sane one?" Many persons could be found who would readily answer this question in the affirmative.

Dissenting Opinion by Walker, J.

of science in all other directions? Peoples and governments in all civilized countries recognize them by the erection of vast asylums for these unfortunates, where this science can be carefully studied by those who will devote their lives to the investigation of this subject, where very many, by careful scientific treatment, are restored, and become useful members of society. To say that men by careful study and investigation can acquire no skill on this subject, while the same study and investigation will constantly develop new truths on all other subjects, would be a daring assumption upon which we cannot consent to hang a fellow-man. At the time this question was first brought before the courts, it may be that it was in some cases difficult to detect simulated insanity, and thus the courts may have been induced to overturn the well established law to meet the apprehension; but this danger, to say the least, is very much diminished now.

I am well convinced that we should adhere to the old and well established rules of the criminal law, and that we should require at least as much evidence to convict a crazy man as a sane one.

Mr. Justice WALKER dissenting.

I am unable to concur in all of the reasons assigned by the majority of the court for reversing this judgment. On the question of the measure of proof necessary to a conviction where the plea of insanity is interposed, there may be a conflict in the authorities, but it will be found that the current, in fact, all but two cases so far as I can find, establish the rule that the plea must be established by at least a preponderance of evidence. It is a presumption lying at the foundation of jurisprudence, as well as all the business relations of life, that all men are of sound mind. This proposition cannot be controverted, and to be avoided must be rebutted by evidence.

The plea of insanity, like all other special pleas, confesses the act charged and avoids the consequence by showing circumstances which establish a defence. This defence, like every other plea which confesses and avoids, must be proved. And, in analogy with the practice under special pleas generally, the proof must devolve upon the party interposing the defence. In this defence the accused admits the homicide, but alleges that he was incapable of distinguishing right from wrong at the time, owing to mental derangement. Having averred the facts necessary to his defence, and being required to establish the truth of his plea, can it be said that he has done so when he has only rendered it doubtful whether he was sane or insane. This plea, like all other affirmative facts, is capable of satisfactory proof. It cannot be that a person is so far insane as not to know right from wrong, and yet those

with whom he associates be ignorant of the fact. Such cases cannot occur among people of ordinary intelligence and observation.

In the case of *Reg.* v. *Oxford*,[1] Lord Chief Justice DENMAN announced the rule that all persons must be taken *prima facie*, to be of sound mind until the contrary is shown. He says, "the question is whether the prisoner was laboring under that species of insanity that satisfies the jury that he was quite unaware of the nature and consequence of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was commiting the act that it was a crime." It is here distinctly announced that the jury must be satisfied, and not merely left in doubt of the truth of the plea. He says nothing about any species of doubt as to its truth.

In Great Britain, as late as in June, 1843, a series of questions was propounded to the fifteen judges, on the subject of the defence of insanity, to which they returned answers. In answer to the second question they say the jury ought in all cases to be informed that every man should be considered of sound mind until the contrary is clearly proved in evidence. "That before a plea of insanity should be allowed undoubted evidence should be adduced that the accused was of diseased mind, and that at the time he committed the act he was not conscious of right and wrong."[2] This answer of all the judges of England clearly establishes the rule of law in the courts of that country to be that the accused must prove this defence of insanity by undoubted evidence of its truth. It is believed that no well considered case can be found, decided in any British courts announcing a different rule.

In the case of *Fisher* v. *People*,[3] this court announced the rule that, "before such a plea can be allowed to prevail satisfactory evidence should be offered that the accused, in the language of the criminal code, was 'affected with insanity,' and at the time he committed the act was incapable of appreciating its enormity." The rule here announced is a modification of the rule of the British courts, and accords with the current of decisions in this country. Whilst this is not the uniform rule of the American courts, yet it has been announced by a large majority. This rule seems to accord with reason and justice, and is well calculated to protect community against the perpetration of crime, insure the accused a fair trial, and is in accordance with the analogies of the law.

[1] 9 C. & P. 525.

[2] McNaghten's Case, 10 Cl. & F. 200; Whart. Crim. Law, 46.

[3] 23 Ill. 283.

Experience teaches us that insanity is readily simulated to the extent of creating a doubt in the minds of those who have no opportunity, by associating with the accused, of detecting the fraud. If the rule announced by the majority of the court becomes the established law, I have grave apprehensions that it will be found a ready means of screening the guilty of merited punishment, and will operate injuriously upon society. It appears to me that the well being of society, the prevention of crime, and justice to the people all require that the rule in *Fisher's Case* should be no further relaxed.

I however concur with the majority of the court in holding that the accused was entitled to give evidence of his previous good character. This seems to be held to be evidence that the accused may resort to, and have considered by the jury. Its weight in many cases may justly be of great moment to him, whilst in others entitled to but little weight. It, like all other evidence, must be left to the consideration of the jury, to be weighed in connection with all the other testimony in the case. We are not able to say what its effect might have been had it been admitted.

The court below therefore erred in rejecting this evidence.

Judgment reversed.

BURDEN OF PROOF — FRENZY ARISING FROM ANGER OR JEALOUSY — OPINIONS OF EXPERTS.

Guetig *v.* State.

[66 Ind. 94; 32 Am. Rep. 99.]

In the Supreme Court of Indiana, May Term, 1879.

on. James L. Worden, *Chief Justice.*
" George V. Howk,
" William E. Niblack,
" Horace P. Biddle,
" Samuel E. Perkins, } *Judges.*

1. **Burden of Proof — Instruction Approved.** — G. was indicted for murder, the defence being insanity. The court instructed the jury that, " the law presumes that a man is of sound mind until there is some evidence to the contrary. * * * An accused is entitled to an acquittal, if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offence is charged to have been committed. Evidence tending to rebut the presumption of sanity, need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raises in your minds a reasonable doubt." *Held*, correct.

Guetig *v.* State.

2. **Frenzy arising solely from the passion** of anger and jealousy, no matter how furious, is not insanity which will excuse a crime.

3. **Experts — Weight of testimony.** — Instructions as to the weight to be given to the testimony of experts approved.

Indictment for murder.

J. L. Griffiths, *A. F. Potts*, *J. W. Gordon*, *R. N. Lamb* and *S. M. Shepherd*, for appellant.

T. W. Wollen, Attorney-General, *J. B. Elam*, *J. S. Duncan*, *C. W. Smith* and *R. B. Duncan* for the State.

Biddle, J. — Louis Guetig was indicted for the murder of Mary McGlew, convicted and sentenced to death. He appealed to this court. The judgment was reversed for an error in the lower court and the cause remanded for a new trial.[1] Upon a second trial he was again convicted and is now again under sentence of death.

(Omitting rulings on other questions.)

3. The appellant complains of the refusal by the court to give several instructions to the jury, but the only one insisted upon in the brief, and the only one, therefore, which we shall notice is the following: —

"3. It is true, that in the absence of any countervailing fact or presumption, every person is presumed to be of sound mind; but in the case of the defendant, which you are now engaged in trying, there is opposed to the presumption of soundness of mind, the presumption that the defendant is innocent until the contrary is proved, and this presumption of the innocence of the defendant countervails and overcomes the presumption that he was of sound mind; and in the absence of any evidence on the part of the State tending to prove that the defendant was of sound mind at the time of the homicide, you ought to find the defendant not guilty."

This instruction was properly refused. We cannot regard it as the law of the case, Besides the instructions numbered eight and nine, given by the court, cover the entire ground attempted to be presented by instruction numbered three, refused by the court.

4. The court gave to the jury the following instructions, to which exceptions were properly reserved: —

"7. Frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity. A man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions. If he yields to wicked passions, and purposely and maliciously slays another, he cannot escape the penalty prescribed by

[1] Guetig *v.* State, 63 Ind. 278.

Test: Burden of Proof: Opinions of Experts.

law, upon the ground of mental incapacity. That state of mind caused by wicked and ungovernable passions, resulting not from mental lesion, but solely from evil passions, constitutes that mental condition which the law abhors, and to which the term 'malice' is applied. The condition of mind which usually and immediately follows the excessive use of alcoholic liquors is not the unsoundness of mind meant by our law. Voluntary drunkenness does not even palliate or excuse."

"9. The law presumes that a man is of sound mind until there is some evidence to the contrary. In prosecutions for offences against the Criminal Code, an accused is entitled to an acquittal, if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offence is charged to have been committed. Evidence rebutting or tending to rebut the presumption of sanity need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raise in your minds a reasonable doubt.

"10. The presumption of innocence attends the accused step by step throughout the entire case, and he is entitled to its benefit upon every question involved, as well upon that of mental capacity as upon all others. The effect of the presumption of innocence upon the question of mental capacity is of such strength as to require that the evidence shall establish soundness of the mind beyond a reasonable doubt, but is not of such power as to require the State in the first instance, and before the introduction of evidence tending to show mental incapacity, to prove the mental capacity to have been in the normal condition usually possessed by ordinary men. The presumption of innocence is so far of greater strength than that of sanity, that when evidence appears tending to prove insanity, it compels the prosecution to establish, from all the evidence, mental soundness beyond a reasonable doubt.

"13. The opinions of medical experts are to be considered by you, in connection with all the other evidence in the case, but you are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if such arises from the evidence.

"15. You are not to take for granted that the statements contained in the hypothetical questions, which have been propounded to the witnesses, are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine, what, if any, of the averments are true; and what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not

correct, and that they are of such character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine from all the evidence, what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. I need hardly remind you (for it will suggest itself to your own minds) that an opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight. Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you are to give the defendant the benefit of all reasonable doubt, if any there should be; and where there is a reasonable doubt as to the truth of any one of the material facts stated, resolve it in the defendant's favor."

Counsel for appellant object particularly to the first sentence of instruction numbered seven. It is true that that sentence does not state a legal proposition. It only says that "frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity." This is doubtless correct.

Frenzy arising from passion of any kind is violent and temporary and would subside with the passion. Insanity may be without violence and permanent, and not in any way caused by passion. We think the sentence is harmless. It does not appear to us that it could possibly have injured the appellant. It affords no ground, therefore, to reverse the judgment. The remainder of the instruction is correct; indeed, we do not understand the counsel as objecting to any part of it except the first sentence.

In our opinion instruction numbered nine is so clearly right that we do not discuss it.

We can scarcely approve of the last sentence of instruction numbered ten, but it contains nothing of which the appellant can complain. If it is erroneous, the error is in his favor. It is true that if the defendant introduced sufficient evidence to raise a reasonable doubt of his soundness of mind, it then would become necessary for the State, if she insisted upon a conviction, to prove the defendant's mental soundness beyond a reasonable doubt; but there may be evidence tending to prove insanity, and not be sufficiently strong to raise a reasonable doubt of mental soundness. In this we think the proposition is incorrect. But the error, being against the State, the appellant is not injured thereby. The remaining portion of the instruction is correct.

Instructions numbered thirteen and fifteen properly express the law,

and are fully sustained by the authorities cited under question numbered two, already discussed.

(Omitting minor points.)

We have thus carefully examined all the questions presented for our consideration on behalf of the appellant. There is nothing in the record to show us that the appellant was not indicted, tried, and convicted according to the law and the facts of the case.

The judgment is therefore affirmed at the costs of the appellant.

Judgment affirmed.

BURDEN OF PROOF.

STATE *v.* CRAWFORD.

[11 Kas. 32.]

In the Supreme Court of Kansas, January Term, 1873.

Hon. SAMUEL A. KINGMAN, *Chief Justice.*
" D. M. VALENTINE, } *Associate Justices.*
" D. J. BREWER, }

Burden of Proof. — The defendant under a plea of insanity is not required to establish its truth by a preponderance of the evidence; but if, upon the whole of the evidence introduced on the trial, together with all the legal presumptions applicable to the case under the evidence, there is a reasonable doubt whether he is sane or insane, he must be acquitted.

APPEAL from Marion District Court.

Lewis Crawford was charged with the crime of murder in the first degree in shooting and killing Charles H. Davenport on April 14, 1872. He was found guilty and sentenced to be executed November 22, 1872, and from this judgment and sentence he appealed.

Frank Foster and *Case & Putnam*, for appellant.

Martin, Burns, & Case, for the State.

VALENTINE, J.

(Omitting rulings on other points.)

Did the court charge the jury correctly with regard to the question of insanity? The court in substance charged that it devolved upon the defendant to prove that he was insane, and that he must do so by a preponderance of the evidence in order to be acquitted. This, we think, is not the law. We suppose it will be conceded that no crime can be committed by an insane person; or, at least, it will be conceded that no

act which is the result of insanity, total or partial, the result of an insane delusion, or the result of an insane, uncontrollable impulse, can be denominated a crime. Murder at common law is defined to be "where a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice prepense, or aforethought, either express or implied." [1] And our statutes have nowhere attempted to change the common-law definition of murder. But they have simply taken murder as defined at common-law and divided it into two, or probably three, degrees.[2] The fact, then, of soundness of mind is as much an essential ingredient of the crime of murder as the fact of killing, or malice, or any other act or ingredient of murder, and should, it would seem, be made out in the same way, by the same party, and by evidence of the same kind and degree and as conclusive in its character as is required in making out any other essential fact, ingredient, or element of murder. In every criminal action in this State, "a defendant is presumed to be innocent until the contrary is proved. Where there is a reasonable doubt whether his guilt is satisfactorily shown, he must be acquitted. When there is a reasonable doubt in which of two or more degrees of an offence he is guilty, he may be convicted of the lowest degree only." This is the statute law of Kansas,[3] and we suppose will not therefore be controverted. This statute in substance is, that every defendant is presumed to be innocent of all crime until his guilt is legally shown; that it devolves upon the State to show his guilt; that his guilt must be shown by evidence that will convince the jury beyond a reasonable doubt; and if, upon the whole of the evidence submitted to the jury, there should be a reasonable doubt as to whether his guilt is satisfactorily shown, he must be acquitted. Now, as no insane person can commit a crime, it necessarily follows that if the jury have a reasonable doubt of the defendant's sanity, they must also have a reasonable doubt of his guilt; and to doubt his guilt (if the doubt be a reasonable one) is to acquit. The doubt of guilt cannot be of a less degree than the doubt of sanity; and if the doubt of sanity be a reasonable doubt, the doubt of guilt must also, and necessarily, be a reasonable doubt.

It has been said that this reasonable doubt goes only to the *corpus delicti*, the body of the offense. We scarcely know in what sense the words *corpus delicti* are here intended to be used. But in whatever sense they may be intended to be used, the proposition is probably erroneous.

[1] 4 Blackstone Com. 195; 2 Chitty Cr. Law, 724; 3 Coke Inst. 47.

[2] Crimes Act, Gen. Stat. 319, 320, sects. 6, 7, 12.

[3] Gen. Stat. 856, Crim. Code, sect. 228.

If it be said that the offence itself, with all its essential ingredients (and this, in fact, is what constitutes the body of the offense, the *corpus delicti*) must be proved beyond a reasonable doubt; but that the defendant's connection therewith and his capacity to commit the same may be proved by a less degree of evidence, then the proposition is glaringly erroneous. For if the supposed offence be committed by the defendant alone, then, unless he has capacity to commit an offence, no offence is in fact committed. And if it devolves upon the defendant to prove his want of capacity (when, possibly, a vast amount of evidence is introduced by both parties, and on each side of the question), by an equilibrium of the evidence, by less than a preponderance of the evidence, then it follows as a logical necessity that the offence itself may be proved by less than a preponderance of the evidence. With capacity in the perpetrator a crime is committed. Without capacity no crime is committed. The capacity is proved by less than a preponderance of the evidence; therefore, the crime itself is proved by less than a preponderance of the evidence. The plea of insanity is not in any sense like the plea of confession and avoidance. The defendant does not say by his plea of insanity: "It is true, I have committed murder as charged in the indictment, but I was insane at the time, and therefore should not be punished therefor;" for if he committed murder he could not have been insane; and if he was insane he could not have committed murder. The two things are wholly inconsistent with each other. But the defendant does say by the plea: "I am not guilty of murder at all, nor of any other offence, because I was insane at the time the supposed offence was committed, and was therefore incapable of committing any offence." Neither is the plea of insanity an affirmative plea on the part of the defendant. It is merely a part of the negative plea of "not guilty." All evidence of insanity is given under this negative plea of "not guilty," and it is given merely in the rebuttal of the *prima facie* case that the State must make out of guilt and sanity. The defendant is never required to prove that he is not guilty by proving that he is insane; but the State must always prove that the defendant is guilty by proving that he is sane. It is true that the State is not required in the first instance to introduce evidence to prove sanity, for the law presumes that all persons are sane, and this presumption of sanity takes the place of evidence in the first instance. It answers for evidence of sanity on the part of the State. But if evidence is introduced which tends to shake this presumption, the jury must then consider the same, and its effect upon the main issue of guilty or not guilty, and if, upon considering the whole of the evidence introduced on the trial,

together with the presumption of sanity, the presumption of innocence, and all other legal presumptions applicable to the case under the evidence, there should be a reasonable doubt as to whether the defendant is sane or insane he must be acquitted. It is also true that when it is shown on the trial of a case that the defendant has committed an act which would be criminal if he were sane, and no evidence of insanity has been introduced, a *prima facie* case of crime and guilt has been made out by the State against the defendant. But the law does not in such a case, nor in any case require that the *prima facie* proof of crime and guilt made out by the State shall prevail, unless it shall be overcome by a preponderance of the evidence. The State nearly always makes out a *prima facie* case of crime and guilt before it closes its evidence in chief and rests its case. But the defendant is never then bound to rebut this *prima facie* case by a preponderance of the evidence. He is required only to raise a reasonable doubt as to his guilt. The burden of proof is always upon the State, and never shifts from the State to the defendant. The making out a *prima facie* case against the defendant does not shift the burden of proof. With the view that we have taken of this question, considering it to be governed principally by our own statutes, it makes but little difference what the common law was upon the subject, or what sundry courts have supposed it to be; but we would refer, however, to the following decisions of courts as sustaining the view we have taken: *State* v. *Bartlett*,[1] *Hopps* v. *People*,[2] *Chase* v. *People*,[3] *Polk* v. *State*,[4] *Stevens* v. *State*,[5] *People* v. *Garbutt*,[6] *People* v. *McCann*,[7] *Smith* v. *Commonwealth*;[8] and in this connection see *Ogletree* v. *State*.[9] With regard to the common law, we suppose it will be conceded that it was a rule of the common law, that it devolved upon the State to prove the guilt of a defendant in a criminal action beyond a reasonable doubt. We will, also, suppose, for the sake of argument, that said rule had some exceptions, and that proof of insanity was one of them. If so, then our statutes have re-enacted the rule of the common law without the exception, and by so doing the statutes have unquestionably made the rule general and abolished the exceptions.

The judgment was reversed.

BREWER, J., concurring.

[1] 43 N. H. 224, 228.
[2] 31 Ill. 385, 393.
[3] 40 Ill. 352.
[4] 19 Ind. 170.
[5] 31 Ind. 485.
[6] 17 Mich. 9, 21.
[7] 16 N. Y. 58, 64.
[8] 1 Duv. (Ky.) 224, 228.
[9] 28 Ala. 693; 1 Bish. CRIM. PROC., sect. 534.

Syllabus.

BURDEN OF PROOF — DRUNKENNESS — HEREDITARY INSANITY — INSANITY IN RELATIVES — EVIDENCE.

PEOPLE *v.* GARBUTT.

[17 Mich. 9.]

In the Supreme Court of Michigan, April Term, 1868.

Hon. THOMAS M. COOLEY, *Chief Justice.*
" ISAAC P. CHRISTIANCY, } *Associate Justices.*
" JAMES V. CAMPBELL, }
" BENJAMIN F. GRAVES, }

1. **Burden of Proof. — Burden on Prosecution, when.** — Whenever evidence is given which tends to overthrow the presumption of sanity, the burden of proof of sanity is cast upon the prosecution.

2. **Voluntary Drunkenness** of whatever degree constitutes no defence to the commission of crime.

3. **Irrelevant Evidence.** — G. being indicted for murder pleads insanity. The opinion of one who was in the army with G. as to whether G. when in battle was unduly excited, is irrelevant.

4. **An Hereditary Tendency** to insanity in the prisoner may be shown.

5. **Evidence — Insanity in Relatives.** — Evidence of mental unsoundness on the part of a brother or sister of the person whose sanity is in question is admissible.

From the Recorder's Court at Detroit.

Wm. L. Stoughton, Attorney-General, for the People.

S. Larned, for the defendant.

COOLEY, C. J. — The defendant was convicted in the Recorder's Court of the City of Detroit, on an information charging him with the murder of one La Plante. On the trial, it was shown that La Plante and a young woman named Emily Boucher were coming down Woodward Avenue together on the afternoon of September 21, 1867, when they were overtaken by the defendant, who, after a few words, fired a pistol at La Plante, wounding him mortally. No question was made that La Plante died of this wound; but it was insisted on behalf of defendant that it was inflicted by him under circumstances of great provocation, sufficient to reduce the offence from murder to manslaughter, and it was further claimed that he was at the time mentally incompetent of a criminal intent, the reason being temporarily overthrown through the combined influence of intoxicating drink, the great provocation, and, perhaps, of hereditary tendencies also.

The defendant's statement went to show that he was engaged to be married to Emily Boucher, the first day of May, 1868, being fixed upon for the ceremony; that he visited her twice a week, and had spent the evening of Tuesday, September 18th, with her as usual, but was informed by his mother on the next day of rumors that Emily was to be married to La Plante; that these rumors received confirmation from the statements of others who added the circumstance that La Plante — who would appear to have been in better circumstances than the defendant — had deeded her forty acres of land; that defendant came to Detroit on the day of the homicide, saw La Plante and Emily get into a buggy together; followed them to a millinery shop where he succeeded in getting an interview with her which he describes as follows: —

"I said, 'I hear you are going to get married to La Plante.' She said, 'Yes.' I said, 'Do you love him better than me?' She made no reply. I said, 'Do you love him or his property?' She said nothing. I went closer to her, put my arm around her and kissed her, and said, 'Emma, are you going to do as you promised?' She answered, 'Come up in the morning and I will tell you.' She made no resistance when I kissed her, but said: 'You must be careful.' We parted, and she got into a buggy; we got to the house No 58 Dubois Street, from there I don't know where I went. Other evidence showed that he went immediately for the pistol with which the fatal wound was inflicted, but it tended to corroborate the statement of the prisoner as to his engagement, and there was also evidence tending to show that he was at this time considerably under the influence of liquor.

(Omitting rulings on other points.)

As bearing upon the question of insanity a witness for the defence who had been in the army with defendant was asked to say whether he saw during any engagements, any undue and unnatural excitement about the defendant. This question was objected to and excluded by the Recorder, and we think correctly. The opinions of witnesses as to what is undue and unnatural excitement in time of battle cannot generally afford ground for safe conclusions as to a person's mental condition years afterwards, unless it appears that the excitement actually mastered the intellect and deprived the person of accountability, which we do not understand was pretended here.

The most important questions arise upon the exclusion by the Recorder of evidence offered to show the insanity of a brother of the prisoner, and upon his charge to the jury and refusals to charge as requested on behalf of defendant.

Those questions which relate to the discovery and proof of insanity

Evidence of, Admissible.

in criminal cases are perhaps the most difficult of any with which courts and juries are compelled to deal. Mental disease is itself so various in character, so vague sometimes in its manifestations, and so deceptive, especially in its early stages, and its causes are so subtle and so difficult to trace, that the most experienced medical men are sometimes obliged to confess that however careful and thorough their investigations, they still prove unsatisfactory, leaving the mind not only in a condition of painful uncertainty upon the principal question whether mental disease actually exists, but when its actual presence is demonstrated, failing utterly, in many cases, to trace it to any sufficient cause. This fact is very forcibly brought home to us by the conflicting views expressed on criminal trials by careful, experienced, and conscientious medical men, who, regarding the same state of facts in the light of their scientific investigations and actual but diverse experience, are forced to express different views, in consequence of which juries, in these difficult cases, are sometimes left in a state of greater doubt and difficulty, if possible, than if no such evidence had been given. The case of *Freeman* v. *People*,[1] and the more recent and noted case of the forger Huntington, are conspicuous instances in illustration of this truth, but others will readily occur to the mind.

The defence sought to show hereditary tendency to insanity on the part of the defendant. That insane tendencies are transmitted from parent to child, there is no longer a doubt; and though it was once ruled that proof that other members of the same family have decidedly been insane is not admissible, either in civil or criminal cases,[2] yet this ruling has since been rejected as unphilosophical and unsound, and it is now allowed to prove the insanity of either parent, or even of a more remote ancestor, since it is well established that insanity sometimes disappears in one generation and reappears again in the next.[3]

In the case at bar it was not claimed that either parent, or any other ancestor, had been insane; but the defence offered to show that insanity had been developed in a brother arising from a cause similar to that which, it was alleged, had induced the destructive act of the defendant; and this fact was sought to be placed before the jury as throwing some light on the defendant's conduct and accountability.

Although this evidence could not be very satisfactory in character, we think it was legally admissible. It is now generally believed that other things besides actual mental disease in the parents may cause the trans-

[1] 4 Denio, 9.

[2] McAdam *v.* Walker, 1 Dow. P. C. 148, 174; Chitty's Med. Jur. 354, 355.

[3] Taylor's Med. Jur. 628, 629, and cases cited; Whart. & Stille's Med. Jur. 85, *et seq.*

mission of taints to their offspring, which result in some cases in idiocy or insanity. The children of habitual drunkards are thought to be much more susceptible to mental disease than those of persons whose habits have been correct and regular, and the medical opinion has been expressed that the children of those who are married late in life are also more subject to insanity than those born under other circumstances.[1] But it sometimes occurs that persons in vigorous health and correct habits, who have nevertheless entered into a marriage which violates some physiological law, may become parents of weak and diseased children only, so that insanity enters the family for the first time in the person of the children, but through qualities derived exclusively from the parentage. Melancholy examples of this fact are presented sometimes in the case of the intermarriage of near relatives. The reasons for this are not fully understood, and cannot be explained. We can only say of such cases, that observation teaches us the existence of a law of nature which cannot be broken with impunity, but the full boundaries, extent, and force of which we are as yet unable to fully comprehend, point out and explain. But there are other cases where we may be able to discover effects without the ability to point out either the law or the causes which produce them. What peculiar combination of qualities in parents may tend to produce mental perversion, weakness, or disease in children, must forever remain, in many cases, matter of profound mystery. If a family of several children should be found, without known cause, to be idiotic, or subject to mental delusion, the inference of hereditary transmission would in many cases be entirely conclusive, notwithstanding the inability to point out anything of similar character in any ancestor. Insanity in a part of the children only would be less conclusive; but the admissibility of the evidence in these cases cannot depend upon its quantity, and it could never be required that it should amount to a demonstration. In some cases its force must be small; in others it will prove hereditary taint with great directness. We think evidence of mental unsoundness on the part of a brother or sister of the person whose competency is in question is admissible, and that the jury should be allowed to consider it in connection with all the other evidence bearing upon that subject.

The counsel for the defendant requested the court to charge the jury that if they believed the defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the offence, the defendant must be acquitted.

[1] Taylor's Med. Jur. 629.

Burden of Proof of Insanity.

A doctrine like this would be a most alarming one to admit in the criminal jurisprudence of the country, and we think the Recorder was right in rejecting it. A man who voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving the person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognized it as an excuse for crime.[1] Whether all the charges given by the Recorder on this subject were correct we do not feel called upon to consider, as the only exception to the charge as given was a general one to the whole charge, which is not sufficient, when a part of it is correct, to raise questions upon other parts.

The defendant's counsel also requested the court to charge the jury that sanity is a necessary element in the commission of crime, and must be proved by the prosecution as a part of their case whenever the defence is insanity. Also, that where the defence makes proof of insanity, partial or otherwise, whenever it shall be made to appear from the evidence that prior to, or at the time of, the offence charged, the prisoner was not of sound mind, but was afflicted with insanity, and such affliction was the efficient cause of the act, he ought to be acquitted by the jury. These requests were refused.

It is not to be denied that the law applicable to cases of homicide where insanity is set up as a defence, is left in a great deal of confusion upon the authorities; but this, we conceive, springs mainly from the fact that courts have sometimes treated the defence of insanity as if it were in the nature of a special plea, by which the defendant confessed the act charged, and undertook to avoid the consequences by showing a substantive defence, which he was bound to make out by clear proof. The burden of proof is held by such authorities to shift from the prosecution to the defendant when the alleged insanity comes in question; and while the defendant is to be acquitted unless the act of killing is established beyond reasonable doubt, yet when that fact is once made out, he is to be found guilty of the criminal intent, unless by his evidence he establishes with the like clearness, or at least by a preponderance of testimony, that he was incapable of criminal intent at the time the act was done.[2] These cases overlook or disregard an important and

[1] Commonwealth *v.* Hawkins, 3 Gray, 463; United States *v.* Drew, 5 Mason, 28; People *v.* Hammill, 2 Parker, 223; Pirtle *v.* State, 9 Humph. 663.

[2] Regina *v.* Taylor, 4 Cox C. C. 155; Regina *v.* Stokes, 3 C. & K. 185; State *v.* Brinyea, 5 Ala. 241; State *v.* Spencer, 21 N. J. (L.) 202; State *v.* Stark, 1 Strob. 479.

necessary ingredient in the crime of murder, and they strip the defendant of that presumption of innocence which the humanity of the law casts over him and which attends him from the initiation of the proceedings until the verdict is rendered. Thus, in *Regina* v. *Taylor*,[1] it is said: "In cases of insanity there is one cardinal rule, never to be departed from, viz.: that the burden of proving innocence rests on the party accused." And in *State* v. *Spencer*,[2] the rule is laid down thus: "Where it is admitted or clearly proved that the prisoner committed the act, but it is insisted that he was insane, and the evidence leaves the question of insanity in doubt, the jury ought to find against him. The proof of insanity at the time of committing the act ought to be clear and satisfactory in order to acquit the prisoner on the ground of insanity as proof of committing the act ought to be in order to find a sane man guilty." These cases are not ambiguous, and, if sound they more than justify the Recorder in his charge in the case before us.

The defendant was on trial for murder. Murder is said to be committed when a person of sound mind and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either expressed or implied.[3] These are the ingredients of the offence; the unlawful killing, by a person of sound mind and with malice, or to state them more concisely, the killing with criminal intent; for there can be no criminal intent when the mental condition of the party accused is such that he is incapable of forming one.

These, then, are the facts which are to be established by the prosecution in every case where murder is alleged. The killing alone does not in any case completely prove the offence, unless it was accompanied with such circumstances that malice in law or in fact is fairly to be implied. The prosecution takes upon itself the burden of establishing not only the killing, but also the malicious intent in every case. There is no such thing in the law as a separation of the ingredients of the offence, so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent.

[1] *Supra.*

[2] *Supra.*

[3] 3 Coke Inst. 47; 4 Bl. Com. 195; 2 Chit. Cr. L. 724.

Burden of Proof on Prosecution.

It does not follow, however, that the prosecution at the outset must give direct proof of an actual malicious intent on the part of the defendant; or enter upon the question of sanity before the defendant has controverted it. The most conclusive proof of malice will usually spring from the circumstances attending the killing, and the prosecution could not well be required in such cases to go further than to put those circumstances in evidence. And on the subject of sanity, that condition being the normal state of humanity, the prosecution are at liberty to rest upon the presumption that the accused was sane, until that presumption is overcome by the defendant's evidence. The presumption establishes, *prima facie*, this portion of the case on the part of the Government. It stands in the place of the testimony of witnesses, liable to be overcome in the same way. Nevertheless it is a part of the case for the Government; the fact which it supports must necessarily be established before any conviction can be had; and when the jury come to consider the whole case upon the evidence delivered to them, they must do so upon the basis that on each and every portion of it they are to be reasonably satisfied before they are at liberty to find the defendant guilty.

This question of the burden of proof as to criminal intent was considered by this court in the case of *Maher* v. *People*,[1] and a rule was there laid down which is entirely satisfactory to us, and which we have no disposition to qualify in any manner. Applying that rule to the present case, we think the Recorder did not err in refusing to charge that proof of sanity must be given by the prosecution as a part of their case. They are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defence. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh, and pass upon it with the understanding that, although the initiative in presenting the evidence is taken by the defence, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt.

Upon this point the case of *People* v. *McCann*,[2] is clear and satisfactory, and the cases of *Commonwealth* v. *Kimball*,[3] *Commonwealth* v. *Dana*,[4] *State* v. *Marler*,[5] *Commonwealth* v. *McKee*,[6] *Commonwealth* v. *Rogers*,[7] and *Hopps* v. *People*,[8] may be referred to in further illustration of the principle. See also *Doty* v. *State*.[9] The recent case of *Walter* v.

[1] 10 Mich. 212.
[2] 16 N. Y. 58.
[3] 24 Pick. 373
[4] 2 Metc. 340.
[5] 2 Ala. 43.
[6] 1 Gray, 61.
[7] 7 Metc. 500.
[8] 31 Ill. 385.
[9] 7 Blackf. 427.

People,[1] does not overrule the case of *People* v. *McCann*, but so far as it goes is entirely in harmony with the views here expressed.

But it is claimed that the Recorder erred when he declined to charge that if it appeared from the evidence that defendant was afflicted with insanity, and such affliction was the efficient cause of the act, he ought to be acquitted by the jury. This refusal, however, must be considered in connection with the charge actually given, and we are not satisfied that other portions of the charge do not fully cover the ground. Were this the sole error charged it might be necessary to examine all the instructions to the jury with some care, to see if, taken as a whole, they could tend to mislead. As, however, a new trial must be ordered on other grounds, it does not become important to make any such critical examination. If we do not misapprehend the charge, the view of the Recorder seems to have been substantially the same as our own.

New trial ordered.

Christiancy, J., did not sit.

BURDEN OF PROOF — TEST OF INSANITY — MORAL INSANITY.

Cunningham *v.* State.

[56 Miss. 269; 31 Am. Rep. 360.]

In the Supreme Court of Mississippi, January Term, 1879.

Hon. Horatio F. Simrall, *Chief Justice*
" H. H. Chalmers, } *Judges.*
" J. A. P. Campbell. }

1. **Burden on State to Prove Sanity.** — When any facts are proved which raise a doubt of the sanity of a person accused of crime, it devolves on the State to remove that doubt, and establish the sanity of the prisoner to the satisfaction of the jury beyond all reasonable doubt.

2. **Insanity to Excuse Crime** must destroy the power of distinguishing between right and wrong.

3. **The Doctrine of Moral Insanity** disapproved.

Conviction of murder. The facts are stated in the opinion.

Collins & Rasberry, for the prisoner.

Attorney-General Catchings, for the State.

Chalmers, J. — Adeline Cunningham was convicted, in the Circuit

[1] 32 N. Y. 147.

[1] Cunningham *v.* State.

Court of Clay County, of the murder of her husband, and sentenced to be hung.

That she committed the deed and that it was one of peculiar atrocity is not denied or gainsaid. In the dead hour of night, while the husband lay sleeping on the common bed, she split open his head with a hatchet, without provocation or motive as far as can be ascertained. She waited quietly till morning came, and then freely and voluntarily avowed the act to all inquirers, offering no excuse save that to one person she stated that her husband was attempting to take her life with a knife, which, she said, would be found in the bed, but which could nowhere be discovered.

The defence set up for her is temporary or periodic insanity, produced by derangement in her monthly menstruations, and which, it is said, was liable to attack her at each recurring monthly period.

Without desiring to express any opinion on the facts, it is proper to say that there was sufficient evidence to suggest at least a possibility of the truth of her defence, and to demand that the jury should be left free to determine the question, unembarrassed by erroneous instructions from the court.

They were not so left. By the first instruction given for the State they were informed that "the legal presumption of sanity is not overcome by the mere probability that the party was insane, but will stand until overthrown by evidence. Mere probability of insanity cannot prevail over the presumption of sanity, so as to work the acquittal of the party on the ground of insanity. For a defence resting on the ground of insanity, the insanity must be clearly proved." In other words the jury were told that, though they believed the defendant probably insane, she must be convicted on some presumption of law which overthrew all probabilities of fact.

Is this a sound principle of law? Undoubtedly there are numerous authorities which so declare, as there are many also going far beyond this, and holding that the defence of insanity can never avail unless its existence is established to the exclusion of every reasonable doubt. There is perhaps no subject connected with criminal law upon which the authorities are more hopelessly in conflict than the one here presented.

Three distinct theories are held by courts and text-writers of the highest character, and each may be supported by a long array of respectable authorities, viz.: 1. The prisoner must prove his insanity beyond a reasonable doubt. 2. He must establish it by a preponderance of evidence. 3. He must raise a reasonable doubt as to his sanity.

The first of these views receives most countenance from English adjudications and text-books; the second is supported by a majority of the American courts; while the third, though held as yet perhaps by a minority of the adjudged cases, is gaining in favor, is the well settled law in many of the States, and is supported by a power of reasoning which we deem convincing.

Every indictment charges the commission of a criminal act by a responsible being, and no conviction can occur until the jury shall have been satisfied beyond all reasonable doubt that such an act has, by such a being, been committed. Sanity is the normal condition of the intellect; so that when the party indicted is seen to be a human being, the presumption of the law (because it is the presumption of common sense) is that the person is sane. Hence in the absence of evidence to suggest the contrary, the jury acts on this presumption, and the deed being proven, the conviction follows. But if in proving the deed, evidence is offered which suggests a doubt of the party's sanity, the State must promptly meet it, and this without regard to the side from which the proof suggesting the doubt comes. The law clothes the accused with a presumption of innocence which he never loses until a verdict of conviction has been pronounced. He pleads nothing affirmatively, save in rare and exceptional instances, but by his plea of not guilty he puts upon the State the burden of establishing every fact necessary to constitute guilt. The changing phases of the evidence may make his case at various stages wear various aspects. At one moment it may seem that his guilt has been conclusively shown, and at the next it may appear to have been as conclusively negatived; but his own attitude never changes. To every fresh development and every new circumstance he repeats his plea of not guilty, and in every new complication he rests upon his legal presumption of innocence. The testimony offered against him may indeed necessitate the production of something on his part to meet the case as made out; but it can never do this until, uncontradicted and unexplained, it has demonstrated his guilt beyond a reasonable doubt. Shall it be said that because this has been accomplished at some particular stage of the testimony, the burden of proof has shifted, and thenceforward the duty is imposed upon him of re-establishing his innocence beyond all reasonable doubt? Nobody would venture so to assert, if the demonstration of guilt so made out was in regard to the commission of the act. Why should the rule be different in reference to the mental accountability of the defendant? There can be no crime without mental accountability, and it is just as essential to show the conscious mind as the unlawful

The Arguments for this Theory.

act. But it is said that the law presumes sanity. So the law presumes malice from the fact of killing; but if anything in the testimony, either of the State or of the defendant, suggests a reasonable doubt of its existence, nobody ever supposed that the State could stop short of removing this doubt, and of establishing the malice to a moral certainty.

The presumptions or implications, which in criminal cases the law deduces from the establishment of particular facts, have no other force than to dispense with further proof of the thing presumed, unless something in the testimony, either theretofore or thereafter offered, suggests a doubt of the existence of the presumed fact. But the moment that doubt is engendered in reference to it, if it be as to a fact necessary to conviction, the State must establish the fact independently of the presumption; and the obligation to do this rests continuously upon her. The accused need do nothing save repose upon the presumption of innocence with which the law has clothed him, and claim the benefit of all the doubts which the testimony has evolved.

Apply these principles to the question of sanity. Because he is a human being, the accused is presumed to be sane. He must be sane in order to be guilty. The trial commences with the presumption that he is so. If nothing in the testimony suggests otherwise, there is no obligation to establish it; but the moment the proof warrants a reasonable doubt of it, no matter from which side it comes, that doubt must be removed. Which side must remove it? Manifestly that side which set out to show guilt, because there can be no guilt without sanity. That condition of sanity which is ordinarily the attribute of all men has been rendered doubtful as to this particular man, and as his guilt depends upon his sanity, its existence must be shown in the same manner and to the same extent as any of the other elements which go to make up the crime. What logic or consistency can there be in saying that all the other elements must be established beyond a reasonable doubt, but that this one — certainly as essential as any other — may be assumed on less satisfactory proof? True, the case started with the theory that it existed, but can this in any wise affect the condition in which it must be left at the close, if it has, during the progress of the trial, been rendered doubtful? How can a jury say, "We have no doubt of the guilt of the prisoner, but we do doubt whether he was sane?" If a jury in a capital case should bring in such a verdict would it not be judicial murder to inflict a sentence of death? And yet many such verdicts are practically inevitable under a theory of the law which holds that the burden of proving insanity rests upon the accused, and that he must be

convicted unless he has clearly proved it beyond all probability, or beyond all reasonable doubt.

We think the true rule is this: Every man is presumed to be sane, and in the absence of testimony engendering a reasonable doubt of sanity, no evidence on the subject need be offered; but whenever the question of sanity is raised and put in issue by such facts, proven on either side, as engender such doubt, it devolves upon the State to remove it, and to establish the sanity of the prisoner to the satisfaction of the jury, beyond all reasonable doubt arising out of all the evidence in the case.[1]

When we speak of insanity as an excuse for crime, we refer, of course, to such degree of insanity as disqualifies from a proper perception of the difference between right and wrong, and thereby shields its victim from legal accountability for his acts.[2]

We find in the record, among the instructions asked by the defendant, one numbered twelve, in which the rule here laid down is announced — to-wit, that the jury must acquit if they entertain a reasonable doubt of the sanity of the accused. This instruction is neither marked "given" nor "refused," and we have no means of discovering what was the action of the court upon it. If it was refused, such refusal was erroneous, because it correctly enunciated the law. If it was given, it was in direct conflict with the fifth instruction for the State, upon which we have been commenting, and the giving of conflicting instructions is erroneous.

The ninth instruction asked by the defendant, and refused by the court, was in these words: "When the delusion of a party is such that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he has done an act which would be justifiable if such fact existed, he is not responsible for such act. Nor is a party responsible for an act done under an uncontrollable impulse which is the result of mental disease."

The doctrine announced in the first clause of this instruction first found distinct utterance in the celebrated prosecutions of *Hadfield* for the attempted assasination of King George III.,[3] and owes its birth and adoption into the English law to the genius and eloquence of Erskine. It has been repeatedly since recognized both in England and America, notably in this country in *Commonwealth* v. *Rogers*,[4] and in *Roberts* v. *State*.[5] Of its correctness there can, we think, be no doubt. Indeed,

[1] Pollard v. State, 53 Miss. 410; People v. McCann, 16 N. Y. 58; State v. Bartlett, 43 N. H. 224; State v. Crawford, 11 Kan. 32; Polk v. State, 19 Ind. 170; Hopps v. People, 31 Ill. 385; Ogletree v. State, 28 Ala. 701.

[2] Bovard's Case, 30 Miss. 600.

[3] 27 How. St. Tr. 1281.

[4] 7 Metc. 500.

[5] 3 Ga. 310.

though it has by some courts been denied recognition, it seems to us only another method of stating that there can be no crime where there is a mental incapacity to distinguish between right and wrong; for though delusions as to particular matters frequently exist in minds which are perfectly rational upon all other subjects, yet if the delusion be so fixed and vivid as to make the imaginary seem the real, there must be upon that subject a total incapacity to distinguish between right and wrong, since the entire relation between the victim of the delusion and its unconscious subject being mentally perverted, there can be no proper standard of right and wrong in the diseased mind. That which to the rest of the world seems right is to him the most flagrant wrong, and *vice versa*. If to his deluded imagination his best friend, or the wife of his bosom, seems a relentless foe, bent upon his destruction, he necessarily acts upon the hallucination which possesses him; and if his action is such as would be justifiable or proper if the reality was as he supposes it to be, there can be no accountability, because there has been no conscious crime.

If a crazed enthusiast violates the law, impelled by a madness which makes him deem it the inspired act of God, he has only done that which his diseased and deluded imagination taught him was right; and if the act would be proper in one so divinely inspired, and was the direct and necessary consequence of the delusion, there can be no punishment, because, however rational on other subjects, he was on that subject incapable of having a criminal intent.

The juries must, under the instructing guidance of the courts, be the judges of the sincerity and firmness of the belief, and of whether the act was in truth the direct and necessary result of the insane delusion. There is but litttle danger that the sober common sense of mankind will be deceived by a feigned madness or will fail to detect the craftiest imposter, who, under the guise of insanity, violates the criminal law. The danger rather is, that indignation at the crime and incapacity to appreciate the delusion will make them incredulous of its existence.

We think that the first clause of the instruction, which is taken substantially from the opinion of Chief Justice SHAW in *Commonwealth* v. *Rogers*,[1] announces a correct principle of law.

The second clause declares that there is no responsibility for "an act committed under the uncontrollable impulse resulting from mental disease." If the impulse meant is the direct result of such mental disease as destroys the preception of right and wrong, this is only a reaf-

[1] *Supra.*

firmation of the doctrine announced in several preceding charges, and it derives no additional strength from the prefix of the word "uncontrollable." But there is said to be an uncontrollable impulse springing from a mental condition quite different from this, a state of the mind which perfectly perceives the true relations of the party and recognizes all the obligations thereby imposed, but which, it is said, is unable to control the will.

This character of insanity is variously styled moral or emotional or impulsive or paroxysmal insanity. It is known among medical writers as lesion of the will. Its peculiarity is said to be that while the mental perception is unimpaired the mind is powerless to control the will; that while its unhappy subject knows the right and desires to pursue it, some mysterious and uncontrollable impulse compels him to commit the wrong. This kind of insanity, if insanity it can be called, though sometimes recognized by respectable courts, and still oftener perhaps by juries seeking an excuse to evade the stern dictates of the law, is properly rejected by the authorities generally. The possibility of the existence of such a mental condition is too doubtful, the theory is too problematical and too incapable of a practical solution to afford a safe basis of legal adjudication. It may serve as a metaphysical or psychological problem to interest and amuse the speculative philosopher, but it must be discarded by the jurist and the law-giver in the practical affairs of life. To it may well be applied the language of Judge Curtis, who, in speaking of this and similar questions, says: "They are an important as well as a deeply interesting study, and they find their place in that science which ministers to diseases of the mind. * * * But the law is not a medical nor a metaphysical science. Its search is after those practical rules which may be administered without inhumanity for the security of civil society by protecting it from crime, and therefore it inquires not into the peculiar constitution of mind of the accused, or what weakness or even disorders he was afflicted with, but solely *whether he was capable of having, and did have, a criminal intent.* If he had it punishes him, if not it holds him dispunishable."[1]

The latter clause of the instruction in question is copied, as indeed the whole instruction is, from the syllabus or head-notes of *Commonwealth* v. *Rogers*,[2] but it fails to embody the qualifications and restriction thrown around the doctrine in the opinion itself.

The uncontrollable impulse which the learned chief justice declares will excuse the act is said to be that "which overwhelms reason, con-

[1] U. S. v. McGlue, 1 Curt. 1.

[2] 7 Metc. 500.

science and judgment." "If so," says he, "then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of the mind directing it." In other words, it is the uncontrollable act of a mind destitute of reason, conscience or judgment as to the particular object, however sane as to other matters. The latter clause of the instruction, therefore, should have been restricted by words conveying the idea that the act was the direct result of an uncontrollable impulse springing from mental disease, existing to so high a degree that for the time it overwhelmed the reason, judgment and conscience.

The exceptions taken to the action of the court in its rulings on the evidence are without merit.

For the errors indicated in the instructions the judgment is reversed and a new trial awarded.

BURDEN OF PROOF — TEST OF INSANITY.

WRIGHT *v.* PEOPLE.

In the Supreme Court of Nebraska, January Term, 1876.

[4 Neb. 407.]

Hon. GEORGE B. LAKE, *Chief Justice.*
" DANIEL GANTT, } *Judges.*
" SAMUEL MAXWELL, }

1. **Insanity — Burden of Proof.** — Where, in a criminal case, the accused relies upon insanity as a defence, the burden of proof is on the prosecution to show sanity.
2. —— **Evidence — Reasonable Doubt.** — In sustaining such a defence, where there is testimony to rebut the legal presumption that the accused was sane, unless the jury are satisfied beyond a reasonable doubt that the act complained of was not produced by mental disease, they must acquit.
3. —— **Test of Insanity.** — But the degree of mental unsoundness, in order to exempt a person from punishment, must be such as to create uncontrollable impulse to do the act charged. If it be found insufficient to deprive the accused of ability to distinguish right from wrong, he should be held responsible for the consequences of his acts.

ERROR from the Otoe County District Court.

This was a conviction upon an indictment for assault with intent to commit murder. The defence was insanity. Exceptions taken to refusal of instructions to the jury requested on behalf of the prisoner, and to the charge of the court. Verdict of guilty. Judgment and sentence. Cause brought up by writ of error.

Wright *v.* People.

The instructions requested were: *First.* The burden of proof is on the prosecution to show sanity. *Second.* If the jury believe that the accused was insane at the time of the assault, they must acquit. The first instruction was refused. The second modified and given as follows: "If the jury believe the accused insane at the time of the assault, and that such insanity produced a total deprivation of understanding, they must acquit." The court further instructed the jury, in substance, that to justify a conviction they must find: *First.* That the assault was made with intent to murder Carroll, but that the intent to murder may be inferred from the acts of the accused. *Second.* That sanity is presumed, and that insanity is a defence to be proved by the accused, directly and clearly, so as to satisfy the jury that the deprivation of understanding was total, fixed and permanent, or if adventitious, that during the frenzy there was a total deprivation of understanding, so as to deprive the accused of the use of reason as applied to the act controlling his will, taking away freedom of action, and rendering him incapable of distinguishing right from wrong at the time of the offence.

Peckham and *Watson*, for plaintiff in error.

J. R. Webster, Attorney-General, for the People.

Lake, C. J.

There are but two errors assigned in this record. The first is the refusal of the court to give certain instructions to the jury as to the defence of insanity which had been interposed, and of which there was some evidence. The first instruction requested and refused was, "that the burden of proof is on the prosecution to show sanity."

We find the authorities on this subject very conflicting. but the question being an open one in this State, we feel at liberty to adopt that rule which to our mind seems not only to be founded in reason, but to conform to those humane principles which underlie our system of criminal law.

It is a familiar rule of the common law that to constitute a crime there must, in almost all cases, be first, a vicious will, and secondly, an unlawful act consequent upon such vicious will.[1] And where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible.[2] This mental incapacity may result from various causes, such as non-age, lunacy or idiocy, and whenever interposed as a defence, the inquiry is necessarily reduced to a single question of the ability of

[1] Broom & Hadley's Com. (Am. ed.) 339.

[2] Flanagan *v.* People, 52 N. Y. 467; 11 Am. Rep. 731; State *v.* Lawrence, 57 Me. 574; Com. *v.* Heath, 11 Gray, 303.

the accused to distinguish between right and wrong at the time of committing the act complained of.[1] But even where insanity is shown to exist, and whether it is general or partial, the rule seems to be substantially as charged by the court below, that if there remain a degree of reason sufficient to discern the difference between moral good and evil at the time the offence was committed, then the accused is responsible for his acts.[2]

We now come to the vital question in this case, the point of conflict in the authorities; the one wherein we cannot approve of the rule laid down in the court below, which was that "the burden of proving the defence of insanity lies upon the accused, * * * and that it must be proved distinctly and clearly that the accused was incapable of distinguishing right from wrong," etc. This, to be sure, is the rule, substantially, as established in England in *McNaghten's Case*,[3] and which has been followed by many of the courts in this country. By this rule the burden of this defence is shifted from the prosecution to the defendant, which, we think, ought never to be done.

If the minds of the jury be left in reasonable doubt as to whether or not the act charged as criminal was the product of mental disease, we perceive no good reason why the accused should be deprived of the benefit of that doubt. It being conceded that an act produced by insanity cannot be criminal, it must necessarily follow that whatever uncertainty or doubt there may be as to the sanity of a defendant, must exist as to his guilt. "Indeed, to make a complete crime cognizable to human laws, there must be both a *will* and an *act*."[4] We hold the true rule to be that, whenever there is testimony tending to rebut the legal presumption of insanity, the jury should be instructed, substantially, that unless they are satisfied beyond a reasonable doubt that the act complained of was not produced by mental disease, the accused should be acquitted on the ground of insanity.[5]

We are of opinion, therefore, that this *first* instruction offered on behalf of the defendant should have been given; and that in its rejection, as well as in giving that portion of the charge above quoted, there was manifest error which requires a reversal of the judgment.

As to the second instruction, there was no error in refusing to give it as tendered, nor in giving it as modified by the court. As before stated, the degree of mental unsoundness, in order to exempt a person from

[1] Freeman *v.* People, 4 Denio, 28.
[2] Hopps *v.* People, 31 Ill. 385.
[3] 10 Cl. & F. 200.
[4] Broom & H. Com. (Am. ed.)339.
[5] State *v.* Jones, 50 N. H. 369; 9 Am. Rep. 242; Chase *v.* People, 40 Ill. 352; Peck *v.* State, 19 Ind. 170; People *v.* Garbutt, 17 Mich. 23.

punishment, must be such as to create an uncontrollable impulse to do the act charged. But if it be found insufficient to deprive the accused of the ability to distinguish right from wrong, he should be held responsible for the consequences of his acts.

The judgment of the court below is reversed and a new trial awarded.

BURDEN OF PROOF ON PROSECUTION.

STATE *v.* BARTLETT.

(43 N. H. 224.)

In the Supreme Court of New Hampshire, December, 1861.

Hon. SAMUEL D. BELL, *Chief Justice.*
" J. E. SARGENT,
" HENRY A. BELLOWS,
" CHARLES DOE,
" GEORGE W. NESMITH,
" WILLIAM H. BARTLETT, } *Justices.*

Where insanity is set up as a defence to an indictment, the jury must be satisfied beyond reasonable doubt, of the soundness of the prisoner's mind and his capacity to commit the crime, upon all the evidence before them, regardless of the fact whether it be adduced by the prosecution, or by the defendant.

Indictment of three counts, substantially charging that the respondent, on the 20th day of June, 1861, with force and arms, at Upper Gilmanton, did make an assault upon one Lucien Dicey, and with a gun charged with powder and ball did shoot at and wound said Dicey, feloniously, wilfully, and of his malice aforethought, intending him to kill and murder.

The defence of the prisoner, in part, was, that at the time of the supposed commission of the offence he was a monomaniac upon the subject of the infidelity of his wife, imputing an improper connection between her and the said Dicey.

Upon this part of the defence, the counsel for the prisoner requested the court to charge the jury:—

1. "That if upon the whole evidence they are of the opinion that it was more probable that the prisoner was insane so as not to be responsible for his acts, than that he was sane, they ought to find him not guilty by reason of insanity.

Instructions Refused and Given.

2. "That though if the jury find the prisoner committed the offence, the burden of the proof is on him to remove the natural presumption of sanity, yet that the jury must be satisfied beyond a reasonable doubt that he was a sane man and responsible for his acts, or it is their duty to find him not guilty, by reason of insanity."

Among other things, the court did say to the jury: "That a man is not to be excused from responsibillty, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing. He must have a knowledge or consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the dictates of justice and right, injurious to others, and a violation of the dictates of duty.

"On the contrary, although the person may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know, if he does the act, he will do wrong and receive punishment, such partial insanity is not supposed to exempt him from responsibility for criminal acts. If it be proved to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that, for the time being, it overwhelmed the reason, conscience and judgment, and whether the prisoner, in committing the act, acted from an irresistible and uncontrollable impulse.

"If so, the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of the mind directing it. Every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury, and to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what was wrong; and that he was not therefore a moral agent, responsible in a legal sense for his acts, and a proper subject for punishment. One kind of insanity known to our law was "monomania," where the mind, in a diseased state, broods over one idea, and cannot be reasoned out of it; and in this case, in order to find the act of the prisoner, if com-

mitted by him, to be not criminal, the jury must be clearly satisfied it was the result of the disease, and not of a mind capable of choosing; that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will.

"On the other hand, it devolved upon the State to show that the prisoner committed the act as charged, with the malicious intent to kill; and that the jury must be satisfied of the existence of such malice, at the time, beyond a reasonable doubt, in the prisoner, and that he had sufficient degree of mental capacity or sanity, as to render him a fit subject of punishment upon the principles before suggested."

The court declining to charge otherwise than as before stated, the counsel for the prisoner excepted. The jury having rendered their verdict against the prisoner, he moved that the verdict be set aside, and for a new trial.

E. A. Hibbard, for the respondent.

Blair, for the State.

Bellows, J. — The defendant's counsel requested the court to charge the jury that if it was more probable that the prisoner was insane than otherwise, it was their duty to find him not guilty by reason of insanity; and, also, that although the burden was on the prisoner to remove the natural presumption of sanity, the jury must be satisfied, beyond a reasonable doubt, that he was a sane man, or else acquit him.

But the court declined to charge the jury according to either request, unless it be found in the direction "that the jury must be satisfied of the existence of such malice at the time beyond a reasonable doubt, in the prisoner, and that he had a sufficient degree of mental capacity or sanity to render him a fit subject of punishment, upon the principles before suggested."

If the term "beyond a reasonable doubt" could be applied to the finding of the jury in respect to the sanity of the prisoner, it must be regarded as a full compliance with both branches of the request; because if his sanity was established beyond all reasonable doubt, there could be no ground to claim that he was probably insane. But we think the term "beyond a reasonable doubt" cannot be so applied, or at least not necessarily; and this is indicted by other parts of the charge, in which it is stated, in substance, that to overcome the presumption of sanity, it must be clearly proved that the prisoner was laboring under a disease of mind as to render him unable to discriminate between right and wrong; and again, that to find the act not criminal, they must be clearly satisfied that it was the result of the disease, and not of a mind capable of choosing. It must be taken, then, that the judge declined

Arguments in Support of this Rule.

to charge the jury that it would be sufficient if the prisoner's evidence rendered it more probable that he was insane than otherwise; or that they must be satisfied beyond a reasonable doubt that he was sane, and responsible for his acts. It must be taken, also, that evidence had been adduced tending to prove the prisoner's insanity; otherwise there was no occasion to give any instructions upon the subject.

Upon this state of the case, two questions arise: —

1. Is it enough that the proof should render the insanity more probable than otherwise?

2. Ought the prisoner to be found guilty, when, upon the whole evidence, there is a reasonable doubt of his sanity?

Upon a careful examination of the questions, both upon principle and authority, we are of the opinion that the jury ought not to return a verdict of guilty, so long as a reasonable doubt rests in their minds of the prisoner's capacity to commit the offence charged, and this, of course, is an answer to both questions. Nor do we think it at all material whether the proof of insanity comes from the Government or the accused, or part from each; but, however adduced, it is incumbent upon the prosecutor to satisfy the jury beyond a reasonable doubt of the existence of all the elements, including the necessary soundness of mind, that constitute the offence. We are aware that there is conflict in the adjudged cases upon this subject, and that highly respectable authorities have maintained that when insanity is set up as a defence, the burden of proof is thrown upon the respondent, by force of the natural presumption of sanity, and that he must establish his defence by a preponderating weight of evidence; and that some cases have even gone so far as to hold that it must be sufficient to remove all reasonable doubt of the insanity, as in the case of *State* v. *Spencer*,[1] but we are unable to assent to either view, for reasons which we shall proceed to state.

The rule in criminal cases requiring the prosecutor to establish the guilt of the accused beyond a reasonable doubt, has its origin in the humane maxim, that it is better that many guilty persons escape than that one innocent person should suffer. This maxim, obviously, is not founded upon any technical rule or system of pleading, but is based upon the broad principles of justice, which forbid the infliction of punishment until the commission of the crime is to a reasonable certainty established.

It has received the sanction of the most enlightened jurists in all civilized communities, and in all ages; and with the increasing regard

[1] 21 N. J. (L.) 196.

for human life and individual security, it is quite apparent that the energy of the rule is in no degree impaired. When the evidence is all before the jury, they are to weigh it, without regard to the side from which it comes, and determine whether or not the guilt of the prisoner has been established beyond a reasonable doubt. To hold that the quantity and weight of the evidence is in any degree affected by the fact that the prosecutor has been able to make a case without introducing any matter in excuse or justification, is clearly contrary to the spirit of the rule, and is giving to mere form an effect which, in many cases, must be contemplated with great pain; inasmuch as juries might feel bound to find the prisoner guilty of a capital crime, when, in their consciences, they had serious doubts of the existence of malice or of mental capacity sufficient to charge the prisoner. Such a doctrine must inevitably lead to a constant struggle on the part of the prosecutor to prove his case without introducing any evidence of those facts or circumstances upon which the respondent is understood to rely. In a large number of cases, with skilful management, he might succeed, and thus deprive the accused of that protection which the rule, independent of all technicality or matters of form, was designed to afford.

The conflict which exists has probably arisen, in a great degree, from an attempt to apply to criminal causes the rules which govern the trial of issues in civil causes. In the latter, where the defendant sets up matter in excuse or avoidance, he must establish the defence by a preponderance of proof; and by analogy it has sometimes been held, in criminal cases, that matters of defence arising from accident, necessity, or infirmity, must be established by a like preponderance of proof. In some cases it has been carried so far as to require the same quantity of evidence to prove such matters of defence as to prove the commission of the crime, namely, enough to remove all reasonable doubt. But we think there are marked distinctions between the two classes of trials, and that the rules as to the weight of evidence or burthen of proof in civil cases, are not safe guides in criminal causes. In civil causes the burthen of proof is, in general, upon the party who maintains the affirmative; and, when thrown upon the defendant it is because he sets up by his plea, matters which avoid the effect of the plaintiff's allegations, but do not deny them. It is, therefore, right that the burthen of proof should be upon him to establish the truth of such matters in avoidance by a preponderance of evidence, especially as nothing more is required than to render the truth of such matters more probable than otherwise. In criminal causes, the trial is usually had upon a plea that puts in issue all the allegations in the indictment

All Elements of a Crime Must be Proved.

and, upon every sound principle of pleading and evidence, the burthen is upon the prosecutor to sustain them by satisfactory proofs. A system of rules, therefore, by which the burthen is shifted upon the accused of showing any of the substantial allegations in the indictment to be untrue, or, in other words, to prove a negative, is purely artificial and formal, and utterly at war with the humane principle which, *in favorem vitæ*, requires the guilt of the prisoner to be established beyond reasonable doubt. Not only so, but, fairly considered, such a system derives no countenance from the rules which govern the trials of civil causes, inasmuch as in respect to all the allegations in the declaration, provided they are put in issue, the burthen of proof, in general, rests with the plaintiff.

The indictment in this case is for an assault with intent to commit murder; and, by the well settled definition of the offence, murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being under the peace of the State, with malice aforesaid, either express or implied. To justify a conviction, all the elements of the crime, as here defined, must be shown to exist, and to a moral certainty, including the facts of a sound memory, an unlawful killing, and malice. As to the first, the natural presumption of sanity is *prima facie* proof of a sound memory, and that must stand unless there is other evidence tending to prove the contrary; and then, whether it come from the one side or the other, in weighing it, the defendant is entitled to the benefit of all reasonable doubt, just the same as upon the point of an unlawful killing or malice. Indeed, the want of sound memory repels the proof of malice, in the same way as proof that the killing was accidental, in self-defence, or in heat of blood; and there can be no solid distinction founded upon the fact that the law presumed existence of a sound memory. So the law infers malice from the killing when that is shown, and nothing else; but in both cases the inference is one of fact, and it is for the jury to say whether, on all the evidence before them, the malice or the insanity is proved or not. Indeed, we regard these inferences of fact as not designed to interfere in any way with the obligation of the prosecutor to remove all reasonable doubt of guilt; but are applied as the suggestions of experience, and with a view to the convenience and expedition of trials, leaving the evidence, when adduced, to be weighed without regard to the fact whether it come from one side or the other.

Our opinion, then, is that the inference which the law makes of sanity, malice, and the like, is to be regarded as merely a matter of evidence and standing upon the same ground as the testimony of a

witness;[1] and in this respect is like the presumption of innocence.[2] Nor does it shift the burthen of proof in the sense of changing the rule as to the quantity of evidence; but is merely *prima facie* proof of the sanity, or malice, upon which, other things being shown, the jury may find a verdict of guilty. If further evidence is offered upon the point, by either party, tending to repel the presumption, the whole must be weighed by the jury, who are to determine whether the guilt of the prisoner is established beyond a reasonable doubt. The criminal intent must be proved as much as the overt act, and without a sound mind such intent could not exist; and the burthen of the proof must always remain with the prosecutor to prove both the act and the criminal intent.

In the English courts, the direct question does not appear to have been discussed, though it is laid down by the elementary writers that when the defence is insanity, the burthen of proving it is upon the prisoner.[3] In Foster's Crown Law,[4] it is said: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth; and very right it is that the law should so presume. The defendant, in this instance, standeth just upon the same ground that every other defendant doth; the matter tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them." So it is laid down in 1 East on Criminal Law,[5] and Hawkins' Pleas.[6] On this point *Ornbys Case*[7] is relied upon as a leading case; but it will be observed that the question of the quantity of the evidence was not at all considered, and its weight, as an authority, is greatly diminished by the fact that it was there held that whether there was malice or not, was a question of law; and so, also whether the act was deliberate or in the heat of passion. In the opinion of the judges, in answer to questions propounded by the House of Lords,[8] TINDALL, C. J., says: "Every man is presumed to be sane and responsible for his crimes until the contrary is shown to the satisfaction of the jury; and that to es-

[1] Greenl. Ev., sects. 33, 34.

[2] See Sutton *v.* Sadler, 1 Eng. C. L. 87.

[3] Rosc. Ev. (15th Am. ed.) 1944; Russ. on Cr. 10, citing Bellingham's Case, 1 Collinson on Lunacy, 636, and Rosc. Ev. 946, and note to Rex *v.* Offord, 5 C. & P. 168, where the judge told the jury that to support such defence, it ought to be proved, beyond reasonable doubt, that the respondent was insane.

[4] p. 255.

[5] p. 224, 230.

[6] Ch. 31, sect. 32; 4 Bl. Com. 201.

[7] Reported 2 Str. 766, and, also, in Ld. Raym. 1845, and decided in 1727.

[8] Reported in note to Reg. *v.* Higginson, 1 C. & K. 130.

Of Facts Particularly Within His Knowledge.

tablish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know it was wrong."

Another class of cases in the English courts, are referred to in Wharton's Criminal Law,[1] as cases where the facts of the prosecution are conceded, but the defendant sets up some matter in excuse or avoidance; in which event it is said that the presumption of innocence no longer works for the defence, and such matter of excuse or avoidance should be proved by the defendant by a preponderance of testimony. The cases cited in support of this doctrine are prosecutions for selling liquor without license, shooting game without the necessary qualifications, practising medicine without a certificate, and the like. Some of these cases were civil suits, brought for the penalty, and the substance of the doctrine held in them all, was, that the affirmative of the facts being with the defendant, and matter being peculiarly within his knowledge, the burthen of proof was upon him. But the question before the court in this case was not considered, and it was nowhere announced that in case evidence was adduced by the defendant, tending to prove such fact, the jury must require that it should be made to preponderate in his favor.

It will be perceived, then, that according to the general statement of the English doctrine, which is fairly expressed in the extract from Foster's Crown Law, which we have quoted, the obligation of proving any circumstances of accident, necessity, or infirmity, which may be set up as a defence to a charge of murder or other crime, is thrown upon the prisoner; unless such proof arises out of the evidence offered by the prosecution. It is said, indeed, that such circumstances must be satisfactorily proved; but it is not stated by what quantity of evidence, whether such as to preponderate in favor of the prisoner, or whether he is to be entitled to the benefit of reasonable doubts, as in other cases. When we consider, however, that the passage clearly applies to everything which rebuts malice, whether by showing that the act was justifiable, was done in necessary self-defence, or that the prisoner was not capable of committing the crime by reason of insanity, it may well be urged that nothing more was intended than this. If the prosecutor has proved the commission of the offence without disclosing any circumstances of justification, necessity, or infirmity, or other matter of de-

[1] pp. 264, 265.

fence relied upon by the accused, then the burthen will be upon the latter, to offer so much proof of the matters constituting his defence, as will, upon the rules of law, entitle him to a verdict of not guilty. Not that his proof shall be sufficient to establish such facts by a preponderance of evidence, but sufficient to entitle him to an acquittal. If it were not so, what shall be the rule when some evidence of the matter in excuse or justification unavoidably creeps in with the government proof, and still the accused offers more to the same facts? To hold that the rule upon which the life or death of a human being may depend, is to be affected by a circumstance so trivial before any enlightened conscience, would be giving to mere form a weight wholly inconsistent with the humane spirit of our criminal laws. In the opinion of TINDALL, C. J., before cited, which was given without argument, and without the attention of the court being distinctly drawn to this point, it is by no means clear that any different rule, as to the quantity of evidence, was intended to be announced, although there may be some expression tending that way.

In *Commonwealth* v. *York*,[1] it was decided that the malice was to be inferred from a wilful and voluntary killing, unless it was proved by a preponderance of evidence, by the accused, that the act was done in an affray in the heat of blood. The opinion was pronounced by SHAW, C. J., after a most able and thorough examination of the authorities, and it is apparent that he gave great weight to the statement of Sir MICHAEL FOSTER, which we have cited. The court, however, were not unanimous, WILDE, J., having delivered an able dissenting opinion. In the previous case of *Commonwealth* v. *Rogers*,[2] it was held that the ordinary presumption of sanity must stand, until rebutted either by evidence offered by Government or by the prisoner; and in either case, the evidence must be sufficient to establish the fact of insanity. Subsequently, in *Commonwealth* v. *Hawkins*,[3] the doctrine of *Commonwealth* v. *York* was restricted by SHAW, C. J., to cases where killing was proved, and nothing else; but it was held that where the circumstances were fully shown, the burden was upon the State to show the malice beyond a reasonable doubt. The cases of *Commonwealth* v. *Rogers* and *Commonwealth* v. *York*, put upon the same ground the rebutting of malice, by showing that the act was done during an affray, in the heat of passion, and that by reason of insanity, the accused was incapable of malice. And it is quite obvious, we think, that in principle there is no difference; in both cases the same element of the crime is proved not to exist, and the in-

[1] 9 Metc. 93.
[2] 7 Metc. 504.
[3] 3 Gray, 463.

The Authorities Reviewed.

dictment therefore is not sustained, and to that effect is the doctrine of the passage before cited, from Foster's Crown Law.

The general doctrine of *Commonwealth* v. *York* has been followed in several of the American courts, giving it as authority.[1] The doctrine of *Commonwealth* v. *York* has since been greatly shaken, if not overthrown, in *Commonwealth* v. *McKee*,[2] in an able opinion of BIGELOW, J., which decided that where evidence of the facts constituting a justification came from both sides, the burden of proof remained on the Government throughout, to remove all reasonable doubt of guilt; and the reasons assigned apply with equal force, when such evidence all comes from the prisoner. It is true, that the learned judge says: "There may be cases where a defendant relies upon some distinct, substantial ground of defence, not necessarily connected with the transaction on which the indictment is founded, in which the burden of proof is shifted upon the defendant;" and he instances the case of insanity, but expresses no opinion upon it. It was, however, held in the subsequent case[3] that the burden of proof resting on the Government, is sustained so far as the defendant's mental capacity is concerned, by the presumption of sanity, until rebutted and overcome by a preponderance of the whole evidence; thus giving to the presumption of sanity an effect that is not given by the doctrine of *Commonwealth* v. *McKee*, to the presumption of malice; which, nevertheless, as we think, stands upon the same ground. According to these decisions, then, the rule in Massachusetts, as to the quantity of evidence to establish a defence, arising from accident or necessity, now corresponds with the views we entertain; and with our construction of the passage cited from Foster's Crown Law; and the principle of the rule includes, also, the defence arising from insanity, or infirmity.

In accordance with our views is the doctrine of *People* v. *McCann*,[4] where the subject is most ably discussed.[5]

Such, also, we think, has been the course of trials in this State. It was clearly so on the trial of *Corey*, in Cheshire county, for murder, in 1830, October term, before the Superior Court of Judicature, RICHARDSON, C. J., presiding, where the defence set up was insanity. The court charged the jury that the State had no claim to their verdict until they were satisfied, beyond all reasonable doubt, that the prisoner was guilty;

[1] People *v.* Milgate, 5 Cal. 127; Graham *v.* Commonwealth, 16 B. Mon. 587; State *v.* Stark, 1 Strob. 479; State *v.* Spencer, 21 N. J. (L.) 196.

[2] 1 Gray, 61.

[3] Commonwealth *v.* Eddy, 7 Gray, 583.

[4] 16 N. Y. 58.

[5] Ogletree *v.* State, 28 Ala. 692; United States *v.* McGlue, 1 Curt. 1, 7 Law Rep. (N. S.) 439, by Sprague, J.; 1 Am. Lead. Cr. Cases 347, and note, and cases cited.

and in that case the only question was whether he was insane, the guilt otherwise being clear.

So was *State* v. *Prescott*, tried in Merrimack county, September, 1834, before RICHARDSON, C. J. In that case, which was for the murder of Mrs. Cochran, the fact of killing was also clear, and the only defence was insanity. The judge charged the jury, that it was their duty not to pronounce the respondent guilty until every reasonable doubt of his guilt was removed from their minds. And, again, he said, "we are of the opinion that if, under all the circumstances of the case, you have any reasonable ground to suppose that the prisoner could not have had the use of his reason, you are bound to acquit him."

With these views of the law, and the course of our own courts, there must be

A new trial.

BURDEN OF PROOF ON PROSECUTION.

PEOPLE *v.* MCCANN.

[16 N. Y. 58.]

In the Court of Appeals of New York, September, 1867.

Hon. HIRAM DENIO,
" ALEXANDER S. JOHNSON,
" GEORGE F. COMSTOCK,
" SAMUEL L. SELDEN,
" JOHN W. BROWN,
" ALONZO C. PAIGE,
" WILLIAM H. SHANKLAND,
" LEVI F. BOWEN,
} *Judges.*

Burden of Proof—Erroneous charge.—On a trial for murder where the defence was insanity, the judge charged the jury that sanity being the normal state of the mind there is no presumption of insanity; that the burden of proving it is upon the prisoner; that a failure to prove it, like a failure to prove any other fact, is the misfortune of the party attempting the proof, and that they must be satisfied of his insanity beyond a reasonable doubt; otherwise they must convict. *Held*, error.

WRIT OF ERROR to the Supreme Court.

The prisoner was indicted for the murder of his wife. The killing was not controverted, but the defence rested entirely on the ground that he was in a state of insanity at the time the crime was committed. Evidence was received upon this point, and the presiding judge gave

instructions to the jury in relation thereto which are set forth in the following opinions. The prisoner was convicted.

Lyman Tremain and *Rufus W. Peckham*, for the plaintiff in error.

Hamilton Harris, for the People.

Bowen, J. — On the trial of the prisoner, the presiding justice charged the jury, among other things, as follows: "The fact of the killing is admitted; that the act was done by the prisoner is not disputed; thus the issue is really reversed from the usual one. The question of his insanity is matter of positive defence, to be affirmatively proved; a failure to prove it is (like the failure to prove any other fact) the misfortune of the party attempting to make the proof; and in this case, as in all cases of fact, you are not to presume what has not been proved, under the distinctions and upon the principles already given you. The act being plainly committed, and that the prisoner did it being undoubted, and the defence set up on his part that he was insane, the burden of the proof is shifted. In the proof of the deed itself, if any reasonable doubt be left on your minds, the prisoner is to be acquitted; but as sanity is the natural state, there is no presumption of insanity, and *the defence must be proved beyond a reasonable doubt*. If (canvassing the whole evidence on the legal principle laid down in the charge) the prisoner has satisfied you so far beyond a reasonable doubt that you find that he was at the time of the killing so far really insane as not to be responsible (under the distinctions stated to you) for this particular act, you acquit; otherwise you cannot."

When an erroneous ruling or an erroneous charge is excepted to, the judgment is reversed, unless the appellate court is satisfied that the party could not have been prejudiced thereby; but this act requires a reversal only where the court is satisfied that the party has been actually prejudiced; and I do not see how the court can ordinarily be thus satisfied, unless upon a review of the whole evidence introduced upon the trial, a very small portion of which is before us in this case.

The prisoner's counsel, however, complain of that part of the charge in which the jury were instructed, in effect, that unless they were satisfied, beyond a reasonable doubt, that the prisoner was insane at the time of the homicide, he was not entitled to a verdict of acquittal on that ground. If this part of the charge was erroneous, I think it must be held that the verdict was, in the language of the statute, "against law." That the deceased died from blows inflicted by the prisoner was not disputed upon the trial, the only defence interposed being insanity; and as evidence was introduced tending to substantiate the defence, the

verdict should have been predicated upon correct legal rules applicable to such defence.

It is a general rule, applicable to all criminal trials, that to warrant a conviction the evidence should satisfy the jury of the defendant's guilt beyond a reasonable doubt, and it has been held that there is a distinction in this respect between civil and criminal cases. This rule is based upon the presumption of innocence, which always exists in favor of every individual charged with the commission of a crime. It is also a rule, well established by authority, that where, in a criminal case, insanity is set up as a defence, the burden of proving the defence is with the defendant, as the law presumes every man to be sane. But I apprehend that the same evidence will establish the defence which would prove insanity in a civil case. The rule requiring the evidence to satisfy the jury beyond a reasonable doubt is one in favor of the individual on trial charged with crime, and is applicable only to the general conclusion, from the whole evidence, of guilty or not guilty.

In *State* v. *Spencer*,[1] Chief Justice Hornblower laid down the rule that in order to acquit a person on the ground of insanity, the proof of insanity, at the time of committing the act, ought to be as clear and satisfactory as the proof of committing the act ought to be, in order to find a sane man guilty.

But, with all due deference, I think the rule is incorrect in principle and contrary to the ancient authorities, especially if, as is said by elementary writers, a jury is authorized to find a fact, when the effect will be to charge an individual with a debt, from evidence less satisfactory than when it will convict him of a crime.

In *Commonwealth* v. *Kimball*[2] it was held that a charge, in a criminal case, that where the Government had made out a *prima facie* case, it was incumbent upon the defendant to restore himself to that presumption of innocence in which he was at the commencement of the trial, was erroneous, and that the instruction should have been that the burden of proof was upon the Commonwealth to prove the guilt of the defendant, and that he was to be presumed to be innocent unless the whole evidence in the case satisfied them he was guilty.

In *Commonwealth* v. *Rogers*,[3] the defendant was tried on an indictment for murder, and insanity was set up as a defence; and after the jury had retired to consider of their verdict, they returned into court to inquire whether they must be satisfied beyond a doubt of the insanity of the prisoner to entitle him to an acquittal. The chief justice, in reply, in-

[1] 21 N. J. (L.) 196. [2] 24 Pick. 366. [3] 7 Metc. 500.

structed them that if the preponderance of the evidence was in favor of the insanity of the prisoner, they would be authorized to find him insane.

In *Commonwealth* v. *York*,[1] the defendant was tried for homicide; and in answer to a question from the jury whether it was for the prisoner to prove provocation, or mutual combat, and whether he was to have the benefit of any doubts upon that subject, the judge who presided at the trial said in reply, among other things, "that the rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law is that it is malicious, and an act of murder, and that the proof of matter of excuse or extenuation lies on the accused; * * * but when there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the fact, upon which the excuse or extenuation depends, according to the preponderance of evidence."

I think the part of the charge complained of is erroneous, and that, although no exception was taken, the error is such that, under the provisions of the statute above referred to, the judgment should be reversed for that cause; and if I am right in the above conclusions, it is unnecessary to consider the other questions in the case.

Brown, J. — I cannot give my assent to the legal presumption embraced in the charge of the judge upon the trial of this action; I think it at variance with sound reason and the just and humane principles of the common law. The killing by violence was clearly made out by the proof, and the defence was insanity. The judge, in the charge, treated the condition of the prisoner's mind as a thing separate from the act which constituted the crime, and the delusion or defect of reason under which it was alleged the act was committed to be affirmatively established by the prisoner, like those defences in civil actions which admit the cause of action, but insist it has been determined by some subsequent matter; that until the homicide is made out to the satisfaction of the jury, the burden of proof is upon the People, and if there is any doubt, the prisoner is to have the benefit of it; but whenever the killing is proved or admitted, and the question of sanity arises, the issue and the burden, as well as the party to be benefited by the existence of a reasonable doubt, are changed. If the principal question, and indeed the only question litigated, is involved in so much uncertainty that the jury were unable to say whether the prisoner was sane or insane — whether, in fact, he was a responsible creature or one without reason,

[1] 9 Metc. 93; 7 Boston L. R. 510.

their duty was to convict, and not to acquit. This is the theory of the charge. It is very technical and artistic, and strictly applicable to defences in civil actions upon matter arising subsequent or separate from the cause of action, but not to crimes which consist of acts coupled with intentions animating minds capable of reason and reflection, and of comprehending the distinction between right and wrong. So that there may be no misapprehension, I quote from the charge as I find it in the bill of exceptions. "The fact of killing," said the judge, "is admitted; that the act was done by the prisoner is not disputed; thus the issue is really reversed from the usual one. The question of insanity is matter of positive defence, and it is a defence to be affirmatively proved; a failure to prove it is (like the failure to prove any other fact) the misfortune of the party attempting to make the proof; and in this case, as in all other cases of fact, you are not to presume what has not been proved, under the distinctions and upon the principles already given you. The act being plainly committed, and that the prisoner did it being undoubted, and the defence set up on his part that he was insane, the burden of proof is shifted. In the proof of the deed itself, if any reasonable doubt be left on your minds, the prisoner is to be acquitted; but as sanity is the natural state, there is no presumption of insanity, and the defence must be proved beyond a reasonable doubt. If (canvassing the whole evidence on the legal principles laid down in the charge) the prisoner has satisfied you so far, beyond a reasonable doubt, that you find that he was at the time of the killing so far really insane as not to be responsible (under the distinctions stated to you) for this particular act, you acquit; otherwise you cannot."

It certainly is true that sanity is the normal condition of the human mind, and in dealing with acts criminal or otherwise there can be no presumption of insanity. But it is not true, I think, upon the traverse of an indictment for murder, when the defence of insanity is interposed and the homicide admitted, that the issue is reversed and the burden shifted. The burden is still the same, and it still remains with the prosecution to show the existence of those requisites or elements which constitute the crime; and of these the intention or *malus animus* of the prisoner is the principal. The doctrine of the charge proceeds upon the idea that the homicide is *per se* criminal; that the mere destruction of human life by the act of another is, without any other circumstance, murder, or some of the degrees of manslaughter. "The fact of killing," says the judge, "is admitted; that the act was done by the prisoner is not disputed; thus the issue is really reversed from the usual one." It is doubtless true that when the killing by the prisoner is es-

tablished by proof, the law presumes malice and a sufficient understanding and will to do the act. The malicious purpose, the depravity of heart, the sufficient understanding and will must, however, actually exist. They are each of them as much of the essence of the crime as the act of killing. The rule which presumes their existence is a rule of evidence, and nothing else, and when the law presumes their existence, it recognizes and demands their presence as essential to constitute the crime. The jury must conscientiously believe they exist, or else they cannot convict. The killing of a human being by another is not necessarily murder or manslaughter. It may be either excusable or justifiable. It may have been effected under either of those conditions referred to by the elementary writers, in which the will does not join with the act, and then it is not criminal.

We must be careful to distinguish between what constitutes proof, including those presumptions which the law regards as equivalent to proof in a criminal case, and what we understand by the burden of proof. By the *onus probandi*, I understand, is meant the obligation imposed upon a party who alleges the existence of a fact or thing, necessary in the prosecution or defence of an action, to establish it by proof. It may be proved by the production of evidence in the usual way; or the law, under certain circumstances, in certain cases may presume its existence without proof. But it is nevertheless a part of the case of the party who alleges its existence, and to be made out beyond any reasonable doubt. Whenever it may be presumed to exist, in the absence of proof, the presumption may be repelled, and overcome by evidence; and whenever the repelling proof leaves the fact to be established in doubt and uncertainty, the party making the allegation is to suffer, and not his adversary. Sound memory and discretion at the time of killing is oftentimes the only material question upon the trial of an indictment for murder. They are essential elements of the crime, to be established upon the trial as a part of the case of the prosecution. A vicious will, without a vicious act, says Blackstone,[1] is no civil crime. So, on the other side, an unwarrantable act, without a vicious will, is no crime at all; so that to constitute a crime against human laws, there must be first, a vicious will, and secondly, an unlawful act, consequent upon such vicious will. If there be a doubt about the act of killing, all will concede that the prisoner is entitled to the benefit of it; and if there be any doubt about the will, the faculty of the prisoner to discern between right and wrong, why should he be deprived of the benefit of

[1] 4 Bla. Com. 21.

it, when both the act and the will are necessary to make out the crime? The same writer also remarks that where there is a defect of understanding, the will does not join with the act; for where there is no discernment there is no choice, and where there is no choice there can be no act of the will, which is nothing else but a determination of one's choice to do, or abstain from, a particular action. He, therefore, that has no understanding can have no will to guide his conduct. I am not controverting the legal presumption in favor of sanity until the contrary appears. I am not dealing with legal presumptions of any kind. I am treating of doubts and uncertainties touching guilt or innocence, which arise upon the trial of most capital offences, and of the obligations which the law imposes, and which reason and humanity demand, that such doubts and uncertainties shall be removed before there can be a conviction and a consequent deprivation of life.

It is worth while now to turn to the definition of the crime at common law, as given by the old writers, in order to see of what it consists. The statute has introduced some slight modifications, but for all the purposes of the present inquiry the definition remains the same. It is thus defined by Sir Edward Coke:[1] "When a person of sound memory and discrimination unlawfully killeth any reasonable creature, in being, and under the king's peace, with malice aforethought, express or implied." It is to be remarked that every member of this sentence is of the weightiest import in determining the constituents of the crime. The killing must have been effected by a person of sound memory and discretion. It must have been unlawful killing; that which is deprived of life must have been a reasonable creature in being, under the king's peace, and the killing must have proceeded from malice, expressly proved or such as the law will imply, which is not so properly spite or malevolence to the deceased as any evil design in general; the dictate of "a wicked, depraved and malignant heart." Every one of these things must have existed, in order to make out the crime, and they must be proved or presumed upon the trial to have existed, or the prisoner is to be acquitted. They are primarily a part of the case for the prosecution, to be established to the satisfaction of the jury beyond any reasonable doubt. The law presumes malice from the mere act of killing, because the natural and probable consequences of any deliberate act are presumed to have been intended by the author. But if the proof leaves it in doubt whether the act was intentional or accidental, if the scales are so equally balanced that the jury cannot safely determine the ques-

[1] 3 Inst. 47.

tion, shall not the prisoner have the benefit of the doubt? And if he is entitled to the benefit of the doubt in regard to the malicious intent, shall he not be entitled to the same benefit upon the question of his sanity, his understanding? For if he was without reason and understanding at the time, the act was not his, and he is no more responsible for it than he would be for the act of another man. The cases which have arisen under the license laws, and the English game laws, and when the doubt has been upon the existence of the license or the necessary qualifications, are not analogous to the present; because the necessary qualifications and the license upon which the defendant relied for a defence are entirely separate from and independent of the acts which constituted the offence. In the *Commonwealth* v. *York*,[1] the question in dispute was provocation or mutual combat; the Supreme Court of Massachusetts held that "if the case or the evidence should be *in equilibrio*, the presumption of innocence will turn the scale in favor of the accused. But if the evidence does not leave the case equally balanced, then it is to be decided according to its preponderance." In the case of *Commonwealth* v. *Rogers*,[2] the defence was insanity; and it was held that being in the nature of a confession and avoidance, it must be shown beyond a reasonable doubt to entitle the jury to acquit the accused. These two cases are irreconcilable in principle, and the reason given for the latter is utterly unsound; for the defence of insanity so far from confessing the offence and then seeking to avoid it, denies absolutely the existence of sufficient capacity to incur guilt and commit crime. The answer of the judges, as given by TINDALL, Ch. J., in *McNaghten's Case*,[3] does not by any means dispose of the question under consideration. He says: "The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act the party was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did, that he did not know he was doing what was wrong." These expressions are not without their value, but they furnish no guide when the question is shrouded in doubt and obscurity. When psychological science shall be able to define with precision the exact line where reason leaves and unreason supervenes, then we shall be better able to say what is to be considered the clear proof of a defect of reason, re-

[1] 9 Metc. 93. [2] 7 Metc. 500. [3] 10 Cl. & F. 200.

ferred to in this opinion. What was said by HORNBLOWER, C. J., in *State* v. *Spencer*,[1] is not consistent with itself. After asserting that, when there is doubt of the insanity, the jury ought to find against the prisoner, it proceeds to say: "I do not mean to say that the jury are to consider him sane if there is the least shadow of a doubt on that subject, any more than I would say they must acquit a man when there is the least shadow of a doubt of his having committed the act. What I mean to say is that when the evidence of sanity on the one side, and insanity on the other, leaves the scales in equal balance, or so nearly poised that the jury have a reasonable doubt of his insanity, then a man is to be considered sane, and responsible for what he does. But if the probability of his being insane at the time is, from the evidence in the case, very strong, and there is but slight doubt of it, then the jury would have a right, and ought, to say that the evidence of his insanity was good." I find it difficult to reconcile the different parts of this opinion. The result, however, seems to be that the jury are to be governed by the degree of uncertainty in which the question is left by the proof. Whatever has fallen from these eminent men will, doubtless, be accepted with the most profound respect; but what they have said would be entitled to greater weight, upon the present occasion, did it distinctly appear that their attention was directed to the circumstance that, notwithstanding the legal presumption, the sanity of the prisoner's mind is, under all the definitions of the crime, to be made out affirmatively upon the trial as a part of the case for the prosecution. I conclude, therefore, that the judge erred in his charge to the jury. If my brethren see no objection to the form in which this question comes before the court for review, under the provisions of the third section of the act of the 12th of April, 1855, to enlarge the jurisdiction of general sessions of the peace in and for the city and county of New York (a subject which I have not been able to examine), then the judgment should be reversed and a new trial granted. Whatever may be the event, I have deemed it a fit occasion to discuss the principal question involved in the judge's instructions to the jury, to the end that those who preside at the trial of persons accused of capital offences may know whether the presumption of innocence applies to all, or only some of the facts which constitute the crime.

All the judges concurring.

Judgment reversed and new trial ordered.

[1] 21 N. J. (L.) 196.

BURDEN OF PROOF ON PROSECUTION.

O'CONNELL *v.* PEOPLE.

[87 N. Y. 377.]

In the Court of Appeals of New York, January, 1882.

Hon. CHARLES ANDREWS, *Chief Justice.*
" THEODORE MILLER,
" ROBERT EARL,
" GEORGE F. DANFORTH, } *Judges.*
" FRANCIS M. FINCH,
" BENJAMIN F. TRACY,

The burden of proof is upon the prosecution to show by the whole evidence that a person charged with crime, alleged to have been committed in a state of insanity, is sane.

ERROR to the general term of the Supreme Court, in the Third Judicial Department, to review a judgment entered upon an order made September 20, 1881, which affirmed a judgment of the court of general sessions in and for the county of Albany, entered upon a verdict convicting the appellant of an assault with intent to kill.

The fact of the commission of the alleged assault by the prisoner was proved, and upon his behalf an attempt was made to show he was insane at the time of the assault. This question was submitted in the following language: "You are to determine, from the evidence, whether or no he was insane at the time of this occurrence. The presumption of the law is, in this instance, against the prisoner, as in the other it was in his favor. He is presumed to be innocent of the performance of an act until he is proven to be guilty. He is presumed to be a sane man, and amenable to all the appliances of the law, until he convinces you, by evidence, that he is insane. And he is responsible for the appliance of the law until he relieves himself by convincing you that he is insane, and not responsible, and by insanity is to be understood, in the sense of the law, a diseased condition of the mind and conscience of the person so as not to be able to comprehend the nature and quality of the act which he does, and so that he is not able to determine the right or the wrong of that act. If he can determine those two, the nature and quality of the act, and is able to determine whether or no that act is right or wrong in the light of God's law, then he is not insane, and is not relieved from the responsibility attaching to the act which he does. * * * If a man does not comprehend the nature and quality

of that which he does, and the right or the wrong, then he is relieved; if he does comprehend both, then he is responsible for that which he does. If you have a reasonable doubt, from the evidence in this case, that the prisoner is guilty of this crime, then you should give him the benefit of that doubt, and he should stand upon his acquittal; if you have no such doubt, then you should pronounce him guilty."

At the close of the charge, the prisoner's counsel requested the judge to charge, "that if, from the evidence in the case, a reasonable doubt arises in the juror's mind as to the sanity or insanity of this defendant, that he is entitled to the benefit of that doubt." The court: "No, I decline to charge that."

A further request to charge, "the defence are not required to establish, beyond a reasonable doubt, the insanity of the prisoner; if the evidence raises a reasonable doubt whether he was insane or not, he is entitled to that doubt. The court: "I decline to charge that."

The prisoner's counsel excepted to such refusals to charge. Further facts appear in the opinion.

D. Cady Herrick, for plaintiff in error.

J. H. Clute, for defendant in error.

DANFORTH, J. — The appellant was convicted of an assault with intent to kill. The conviction was affirmed by the general term of the Supreme Court, and upon appeal from that decision two points are made in his behalf. *First*, that the court erred in charging the jury. In support of this proposition it is assumed by his counsel that the judge charged "that the defence of insanity is an affirmative defence," and the prisoner bound to satisfy the jury by proof that he was insane. *Second*, that the court erred in refusing to charge that the defendant was entitled to the benefit of any reasonable doubt arising on the evidence as to his sanity or insanity. We think neither are well taken. The questions upon the trial were *first*, were the acts charged committed by the prisoner, and *second*, at the time of their commission was he in such condition of mind as to be responsible for them. If answered in the affirmative the acts constituted a crime, and the conviction was proper. As to each, therefore, the burden was upon the prosecutor, for upon the existence of both the guilt of the prisoner depended.

This result follows the general rule of evidence which requires him who asserts a fact to prove it. That the first proposition was established is not denied. The legal presumption that every man is sane was sufficient to sustain the other until repelled, and the charge of the judge, criticised in the first point made by the appellant, goes no further. If the prisoner gave no evidence the fact stood; if he gave evidence tend-

ing to overthrow it, the prosecutor might produce answering testimony, but in any event he must satisfy the jury, upon the whole evidence, that the prisoner was mentally responsible; for the affirmative of the issue tendered by the indictment remained with the prosecutor to the end of the trial. Without going to other authorities these observations are warranted by *Brotherton* v. *People*,[1] where the general rule above stated was applied to questions similar to those before us.

It was not violated by the trial court. After referring to acts constituting the offence charged, and the rules of law applicable thereto, the learned judge called attention to the fact alleged in behalf of the prisoner, that he was an insane man at the time they were committed and so not responsible therefor, and directed them "to determine from the evidence whether or no such is the fact." "He is presumed," the court said, "to be a sane man, until he convinces you by evidence that he is insane;" defined insanity in a manner not objected to, and said, "if such was the prisoner's condition he was relieved from responsibility, otherwise he was responsible for that which he does," and in conclusion said, "if you have a reasonable doubt, from the evidence, that the prisoner is guilty of this crime, then you should give him the benefit of that doubt." These words related to and covered the whole issue tendered by the indictment. It is quite impossible that the jury should have misapprehended them. The prosecutor had conducted the trial upon the theory that the burden was upon him of maintaining, as a part of that issue, the sanity of the prisoner; this further appears from his request, when, anticipating that the jury might fail to find the greater offence, the district attorney asked the court to charge "that if the jury find the wounds were inflicted by the prisoner, and that he was sane, etc., they would convict of an offence lesser in degree," and the court complied. Here again, as well as in the preceding part of the charge, the sanity of the prisoner is made a necessary element in the definition of the crime.

It therefore was not necessary to comply with the request of the prisoner's counsel. The substance of the request was embraced in the charge made, and the court could not be required either to repeat it or answer again to different portions as analyzed by counsel.

We think the charge will not bear the construction on which the first point of the appellant rests, and, as the trial was conducted without error, the conviction should be affirmed,

All concur, Earl, J., concurring in result.

Judgment affirmed.

[1] 75 N. Y. 159.

Dove *v.* State.

BURDEN OF PROOF — TEST OF INSANITY — EXPERTS — HYPOTHETICAL CASE — CHARGE OF COURT — PLEA OF INSANITY.

Dove *v.* State.

[3 Heisk. 348.]

In the Supreme Court of Tennessee, January, 1872.

1. **Burden of Proof. — Erroneous Instruction.** — A charge that "the proof of insanity must be as clear and satisfactory, in order to acquit, as the proof of the crime ought to be to find a sane man guilty;" or to charge that if the jury have a reasonable doubt as to the insanity of defendant they ought to convict, is error.
2. **Test of Insanity.** — No person can be guilty of murder who has not sufficient discernment to distinguish between good and evil, and who has no consciousness of doing wrong in the act he is committing.
3. **Hypothetical Case. — When to be Submitted.** — It is not error for the court, on a trial for murder, where insanity is set up as a defence, to require the defendant to submit his hypothetical case to his professional witnesses, before the rebutting evidence of the State is heard on the question of insanity. If evidence materially varying the hypothetical case is afterwards introduced, the defendant must ask leave to re-examine as to the new matter. If the new proof does not make any change in the hypothetical case submitted, the defendant would not be injured by the refusal.
4. **Opinions of Unprofessional Witnesses.** — Unprofessional witnesses may be asked, after giving the circumstances and conduct of the party, to state their opinion as to his sanity; and the exclusion of such evidence offered by a defendant is error.
5. **Definition. — Plea, for Defence.** — It is not error for the court, in its charge, to speak of the defence of insanity set up as a plea of insanity put in.
6. **Plea Admits the Killing.** — In a case where the killing is proved beyond question, for the judge to charge the jury that the plea of insanity put in (the defence of insanity) was an admission of the killing, is not error.

Appeal from Montgomery County.

Horace H. Lurton, for the prisoner.

Attorney-General *Heiskell*, for the State.

Nicholson, C. J., delivered the opinion of the court.

Richard Dove was tried and convicted of murder in the first degree, for killing William Diggins. The jury found that the murder was committed with mitigating circumstances, whereupon he was sentenced to the penitentiary for life. He has appealed to this court. The case was tried at the January term, 1871, of the Criminal Court of Montgomery County, where the following evidence was adduced: —

The first witness introduced by the State was Virginia Holland. Defendant objected to her examination on the ground that she was his wife, but refused to examine her on *voir dire*, and objected to her examination by the State to prove her competency. Defendant offered to prove by evidence *aliunde*, that she was his wife. The court gave

The Evidence in the Case.

leave to prove that fact. Defendant then offered to prove the marriage of the witness with defendant, by reputation, cohabitation, conduct, and acknowledgment of the parties; and tendered proof of that character, but the court refused to hear such proof, and ruled that a marriage could only be shown by the certificate of marriage, the testimony of the officer who performed the ceremony, or the evidence of witnesses who witnessed the performance of the ceremony. Defendant excepted to the ruling. Witness then proved that she had been living with defendant three or four years. They were living in a house in the coaling ground of Poplar Springs Furnace, in Montgomery, at the time of Wm. Diggins' death, which took place in 1869. Dove was working for Diggins in the coaling grounds. Dove, witness, her two children, her mother, her sister, and Diggins, all lived in the same house, it having but one room. There were three beds in the room; witness and Dove occupied one, her mother and sister another, and Diggins and her oldest child, seven years old, the third. Dove and Diggins ate supper together; they were very friendly; there was no bad feeling between them; they laughed and talked together, and then went to bed, and were so laughing and talking when witness went to sleep. About two o'clock at night, witness was awakened by the blows being struck by Dove with an axe, and by the cries of Diggins, who said: "Oh! Dick; oh! Dick." Witness saw and heard Dove strike Diggins two or three blows with the axe. She jumped up and went to Diggins' bed, saying: "Dick, you have killed my child!" She pulled the child from under Diggins. Dove said: "You see what I have done, and it is not the first I have done that way. I have done many a one that way." He walked across the floor, and then said: "Now, if the old son-of-a-bitch has any money, I intend to take it to travel on;" and took up Diggins' pants, and took out his pocket-book and examined it, and said: "He's got no money; here's some scrip; I won't have that; but I'll take his knife;" and did put it in his pocket. He then threw a blanket over Diggins. Dove then asked witness what she was going to do; whether she was going with him. She replied she did not know; that she didn't want to go with him. He then went out, and came in again with the axe in his hand and said: "Now say what you are going to do, and say it quick. I can't leave you to witness against me. If you don't go with me I shall see the last of all of you. You shan't be left for witnesses against me." He then told witness's mother to take Diggins' chickens to the Furnace, about a mile and a half or two miles, and sell them, and collect a half dollar a negro owed him, and meet him at the Furnace that night at

twelve o'clock. Witness, Dove, and her two children then went off into the woods; but before leaving, Dove hid the axe under the sill of the house, where he said it could not be found. They stayed in the woods all day. Dove kept the knife in his hand, and said he would kill witness if she tried to leave him. Late in the evening they went towards the Furnace, and upon getting near the road, she saw Mr. Mathis and Mr. Brown, and she ran to them with her children, and asked for protection. She went on with them to the Furnace. Dove had lived with Diggins five or six months. She said Dove was once jealous of Diggins, but he had been satisfied about that. Diggins was an old gray-headed man, about sixty years old. He was a quiet, good old man. She said Dove was a very passionate man; often got very mad without any cause; would be violent and irritable when no one had troubled him. Sometimes threatened witness and her mother, and had struck her without provocation. He frequently threatened to kill somebody; frequently said he would have the heart's blood of somebody, walking the floor in a great fury, throwing his arms wildly about, though nobody had done anything to him. His threats were not at anybody in particular. During one evening, while they were all sitting around the fire, he jumped up, gathered a chair, and tried to strike Diggins; but was prevented by a young man present. There was no cause for this, no quarrel, nor was any warning given of his attack. He was not drunk, but had taken two or three drinks. He often complained of headache; he so complained during the day before Diggins' death. To the question of the attorney-general, whether Dove, from all she knew of him, was a man of sane or insane mind, answered: She never saw any thing wrong about him; he was a very quiet man; a sullen and irritable man often, but talked like a man of sense. Sarah Holland, the mother of the last witness, gave the same account of the transaction, and stated the character and peculiarities of Dove about as the last witness. John W. Mathis proved that Dove was a lazy, trifling, indolent man; he was a strange man; nobody knew him; witness never knew him, though he had lived with him. Sam Tally, worked with Dove; he talked like any other man; he never had much to say; was very quiet. One day, when they were working, he suddenly stopped, and said, with an oath, "he would kill any man who would not work for himself, but made other people work for him." He said Diggins did not work for himself, but made him work for him; that he would kill him before he would stand it any longer. This was some time before Diggins was killed. Diggins was not present, and they had no quarrel. He talked and acted like any other man.

The Evidence in the Case.

The State introduced and read a paper purporting to be the return of a jury of inquest over Diggins' body, over the objections of defendant.

Jefferson Sly, for defendant, had employed Dove to work. He quit without cause; witness went to see him; complained of his head; acted strangely; walked the floor, and acted like a drunken man, but he had no whiskey. While Dove worked for witness, he was very taciturn and gloomy; would sit by himself for hours at a time; indulged in talking to himself a great deal; would mumble and sing to himself; complained often of pains in his head; wouldn't work as long as he had anything in his house to eat. He was asked by defendant's counsel what, from all he had stated, was the condition of his mind: was he of sound or unsound mind? The attorney-general objected to the question, and the objection was sustained by the court. James Andrews, T. J. Sly, and Jeff Wooten, testified to similar characteristics of Dove as the last witness. Patsey Cozzart, a sister of Dove, testified that he was forty-seven or forty-eight years of age; was born in Alabama; went to East Tennessee, and lived there until he was thirteen or fourteen years of age, when he came to Nashville. He was a clerk for Mr. Norman, in the grocery business, one or two years. While engaged with Mr. Norman, he received a bad wound on one side of his head; he was not expected to live. He was deranged from the wound. He talked silly and incoherently. He stayed with witness, while he was laboring under the wound, about four months. He then left, and returned to Mr. Norman's. He was not then well; he was not much better. He complained of pains in the head all the time. He received the injury about fourteen or fifteen years ago. Before receiving the injury he was as smart, active, and energetic as any man. She never saw him but once after he left, and that was twelve or fifteen years ago. She saw him but a few minutes; he said his head was not well.

The counsel for the defendant announced to the court, that he expected to examine several physicians, as experts, on the subject of defendant's sanity, but desired, before doing so, that the State might examine any further witnesses she might have on that subject. The court ruled that the defendant must complete his testimony before the rebutting evidence of the State should be introduced. Defendant excepted to the ruling.

Dr. D. F. Wright testified, that he had been practising as a physician and surgeon for twenty-seven years. He had examined the head of defendant, and found that he had received an injury to his head, apparently from a blow. It appears that there are two injuries to his head —

one on the right side, just below the crown; the skull has been fractured, and a portion of the bone is depressed upon the brain. The depressed portion is fractured about the centre, and a piece of the skull bone is broken off, which protrudes through the fracture, and is now sticking down upon the brain. One of the injuries may have been the result of concussion, resulting from the blow which caused the depression. Without knowing anything of the previous history of the defendant, witness said such an injury was bound, more or less, to produce a diseased mind. Such an injury might produce disease of the mind that might lay dormant an indefinite length of time, or it might indicate its presence only in paroxysmal insanity. Its presence might only be detected by some startling crime, that would, for the first time, call attention to symptoms that only an experienced person could have noticed. Paroxysmal insanity would be the character of insanity most likely to result from such an injury. During the intervals between the paroxysms of one afflicted with that form of insanity, the patient might appear reasonably rational, and might converse with intelligence. The symptoms of paroxysmal insanity are, moodiness, gloominess, melancholy, love of solitude, a feverish restlessness, irritability, passion without apparent cause. The persons afflicted often commit the most horrible crimes without any known cause, murders without motives discernible, and often upon those persons to whom they are most dearly attached, or those to whom they are indifferent. The patient is often overpowered by an impulse to commit murder, and yet is conscious of the crime he commits, and of the penalty incurred. He may converse rationally about his crime, confess, or seek to conceal it. An effort to conceal the crime, or to escape, would not be evidence of sanity.

The counsel for defendant then submitted to the witness a written synopsis of the facts, as proven in the case, relative to the condition of defendant's mind, and asked his medical opinion on the hypothetical case stated. He said the symptoms there stated were the precise symptoms of one laboring under paroxysmal insanity, and that he should say the strong probability was, that he was insane at the time of the commission of the crime; that, without personally knowing the facts and the defendant, he could not put it in stronger language.

Drs. T. D. Johnson and J. M. Larkins were asked their opinions on the same hypothetical state of facts, and they fully concurred in the opinion given by Dr. Wright.

After charging the law correctly as to the several grades of homicide, the circuit judge proceeded to instruct the jury on the defence of insanity, as follows:—

Expert Evidence; Order of Proof.

"The law presumes a man to be sane, until the contrary is proven. The evidence of the insanity of defendant must be as clear and satisfactory to overturn the presumption of the law in favor of sanity, as it is required to be, to overturn the presumption in favor of innocence. If the testimony leaves only a doubtful question, whether he was insane at the time of the killing, the presumption of the law turns the scale in favor of the sanity of defendant. In such case the law holds the defendant responsible for his acts. If the evidence leaves it doubtful in your minds, whether the defendant killed the deceased, then you should acquit; for there you find a reasonable ground for doubt, whether the defendant committed the homicide; and in such case, the testimony is not sufficient to overturn the presumption of innocence. But where it is admitted, or clearly proven, that the defendant committed the homicide, but it is insisted he was insane at the time he did it, and the evidence leaves the question of sanity in doubt, then you should find him guilty; for the other presumption arises, namely: that every man is presumed to be sane until the contrary is proven; or, in other words, where evidence of sanity on one side, and of insanity on the other, leaves the question in an even balance, or so nearly poised that you have reasonable doubt of the insanity of the defendant, he is in that case to be considered sane, and therefore responsible for his acts. The proof of insanity at the time of committing the homicide, ought to be as clear and satisfactory in order to acquit on the ground of insanity, as the proof of committing the act ought to be to find a sane man guilty."

(Omitting rulings on other points.)

3d. It is said the court erred in requiring the defendant to submit his hypothetical case to the medical experts, before the State's rebutting evidence on this question of insanity was given to the jury. The court followed the usual practice of requiring the defendant to adduce all his evidence before the State should be called on to bring its rebutting evidence. If the defendant had applied to the court, after the State had finished its rebutting proof, to examine the medical experts, with the additional evidence of the State before the jury, and the application had been refused, it would have been error. But no such application was made, nor was the defendant in any way damaged, as the State introduced no rebutting evidence which made it necessary to re-examine the medical experts.

(Omitting another irrelevant ruling.)

5th. It is insisted that it was error in the court to refuse to allow witnesses, to the question of sanity, to express an opinion as to sanity of defendant, after having stated facts upon which their opinion was

based. This question arose in the case of *Gibson* v. *Gibson*.[1] Upon examination of the authorities, which were not found very satisfactory, the court laid down the following propositions: "First. Attesting witnesses, and they only, are trusted to give their opinion merely, and without cause or reason assigned, of testator's sanity. Second. Physicians may state their opinion of the soundness of a testator's mind, but they must state the circumstances or symptoms from which they draw their conclusions. As to all others, their opinions, considered merely as opinions, are not evidence. But having stated the appearance, conduct or conversation of testator or other particular fact from which his state of mind may be inferred, they are at liberty to state their inference, conclusion or opinion, as the result of those facts." The court adds: "After all, it is the facts which a witness details, the conduct which he describes, which chiefly and principally constitute the testimony to be relied on." This question was again fully examined in the case of *Norton* v. *Moore*,[2] where the same rule was adopted. The rejection of the opinions of the witnesses, based upon the facts and circumstances stated by them, was erroneous.

6th. It is insisted that the judge trenched upon the province of the jury in charging them as follows: "But the plea of insanity is put in for the defendant. He admits that he killed the deceased, but says that his mind was so much diseased at the time of the killing that he was incapable of committing the crime of murder, he being insane." The obvious meaning of the judge was, that the plea or defence of insanity was put in for the defendant, and not that the defendant had put in a formal plea of insanity to the indictment. The residue of the statement was evidently intended to instruct the jury, that in relying upon the defence of insanity the killing was necessarily admitted. We cannot well see how the jury could have been mislead, or how they could have misunderstood the true meaning and purport of this language. We, therefore, think this assignment of error is not well taken.

7th. The last and most important error assigned is, as to that portion of the charge already quoted, in which the judge, among other things, said: "The proof of insanity must be as clear and satisfactory, in order to acquit on the ground of insanity, as the proof of the crime ought to be to find a sane man guilty." The plain and unambiguous meaning of this language is, that the defence of insanity cannot be available, unless it is proved beyond a reasonable doubt. In another portion of the charge, the judge says: "That, if the evidence of sanity and of insanity

[1] 9 Yerg. 329. [2] 3 Head, 480.

be on an even balance, or so nearly an equipoise that you have a reasonable doubt of the insanity of the defendant, he is in that case to be considered sane, and, therefore, responsible for his acts." It is conceded that this cause is sustained by English cases, and by cases in a few of the States, but it is certain that it is in contravention of a large number of decisions in other States of the Union.

We have had no case in our own State where the exact question involved in the present one has arisen; but we consider the principle which must govern the decision as having been laid down in the case of *Coffee, Ridley & Short* v. *The State*,[1] and followed ever since in subsequent cases. These cases were determined in 1832, and separate opinions were given by Judges CATRON, GREEN and PECK. The cases had been tried before Judges STUART and KENNEDY, of whom Judge CATRON said: "They are gentlemen of decided talents, accurate and extensive information on the criminal law, and great experience." They had charged the juries, "that the law presumed the defendant innocent, and that presumption stood until the fact of killing was clearly made out by proof; and if they entertained a reasonable doubt as to the fact of killing by the defendant, they should acquit him; but if the fact of killing by the defendant be proved, the law presumed him guilty of murder, unless the proof showed clearly and satisfactorily the offence was one of less magnitude; and, therefore, if they entertained doubts under the testimony, whether the act amounted to murder or manslaughter, they were bound to find defendant guilty of murder, as it lay upon the defendant to show clearly and beyond a reasonable doubt, that the offence was not murder, but manslaughter, unless it appeared otherwise in the testimony of the State." Judge CATRON said: "The defendant is charged with the fact of killing and the intent with which it was done, and the fact and the intent, must concur to constitute the crime. The fact and intent are charged by the State, and must be proved to the conviction of the jury. But suppose they are not convinced that it is their duty to find the defendant not guilty; that is what is meant by a reasonable doubt."

In such case he says: "If, from this whole body of evidence, they are convinced of the killing, but are not convinced that it was done with malice, they ought not to find the defendant guilty of murder." Judge GREEN said: "There is no reason in saying that a jury must acquit upon a doubt as to the fact of killing, and yet upon a stronger doubt as to the equally important fact of malice, they must convict. It

[1] 3 Yerg. 283.

is admitted that if this state of the mind (doubt) exist as to the fact of killing, an acquittal must follow. But not so as it relates to the malice. And why? Because we are told there is a legal presumption to afford the mind a resting-place. In answer to that proposition, it has already been shown that this legal presumption, which was *prima facie* evidence of the fact, has been opposed by evidence so weakening its force as no longer to be satisfactory, and consequently a doubt as to the fact thus presumed, must now exist. I hold, therefore, that to warrant a verdict of guilty of murder — the whole evidence taken together — must generate full belief of the guilt of the party as consisting in the killing with malice. Whether, therefore, the doubt exists as to the killing, or as to the evidence of malice in the perpetrator, it results in the same thing — that is, a doubt whether the accused be guilty of the crime of murder." Judge PECK concurred in the reasoning and conclusions of Judges CATRON and GREEN. The charges of the circuit judges were overruled, and from that time to the present the law has been settled in our State, that, if the proof fails to generate full conviction of every material ingredient constituting the crime of murder, the defendant must be acquitted. But the question is now raised, whether this principle of law is applicable to a case where there is reasonable doubt of the sanity of the defendant? The criminal judge, it has been seen, adopts the same doctrine as to reasonable doubt in the matter of sanity that Judges STEWART and KENNEDY did as to the presumption of malice from killing.

Is there any sound reason upon which it can be held that a doubt as to the malice in the killing shall operate as an acquittal, but that a doubt as to the sanity of the defendant at the time of the killing shall not so operate?

"If any person of sound memory and discretion unlawfully kill any reasonable creature, in being, and under the peace of the State, with malice aforethought, either express or implied, such person shall be guilty of murder." [1] We have adopted the definition of murder given by Sir Edward Coke. The person, to be guilty of murder, must be of sound memory and discretion; "for," as Blackstone says, "lunatics or infants are incapable of committing any crime, unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil."

Assuming that this interpretation of the words "sound memory and discretion" is sufficiently accurate, it may be safely stated that no per-

[1] Code, 4597.

son can be guilty of murder who has not sufficient discretion or discernment to distinguish between good and evil, and who has no consciousness of doing wrong. The law presumes every person to have this sound memory and discretion. Therefore, when the defendant was put upon his trial for murder, it was not necessary for the State to adduce proof of his sanity. The presumption of law stood for and supplied the proof.

If he relied on the defence of insanity, the burden of proof was upon him to show that he was not of sound memory and discretion, unless the proof of the State showed that he was not of sound memory and discretion. To warrant a conviction, it must appear that the accused was capable, at the time of the killing, of distinguishing between good and evil, and had a consciousness of doing wrong. If he was thus sane, he could act wilfully, deliberately, maliciously and premeditatedly. We have seen that, to justify a conviction for murder in the first degree, the State must show beyond a reasonable doubt that the killing was done wilfully, deliberately, maliciously and premeditatedly. All these are essential ingredients in the offence, and all must be proved beyond reasonable doubt. But suppose the proof in the cause makes it an even balance in the minds of the jury whether the defendant was sane or insane? How, in that state of doubt, could the jury find that the defendant did the killing wilfully, deliberately, maliciously and premeditatedly? They are in doubt about his being of sound memory and discretion. Of course they must doubt whether he could have done the killing wilfully, deliberatedly, maliciously and premeditatedly. Yet, in the case before us, the judge instructed them that if the proof left their minds in *equipoise* as to the sanity or insanity of the defendant, the presumption of law turned the scale, and the defendant must be regarded as sane. The presumption of sanity stands for sufficient proof of sanity until the presumption is overturned. When the proof of insanity makes an *equipoise*, the presumption of sanity is neutralized — it is overturned, it ceases to weigh, and the jury are in reasonable doubt. How, then, can a presumption, which has been neutralized by countervailing proof, be resorted to to turn the scale? The absurdity to which this doctrine leads will be more obvious by supposing that the jury should return a special verdict. It would be as follows: "We find the defendant guilty of the killing charged, but the proof leaves our minds in doubt whether he was of such soundness of memory and discretion as to have done the killing wilfully, deliberately, maliciously and premeditatedly." Upon such a verdict no judge could pronounce the judgment of death upon the defendant.

Dove *v.* State.

It is impossible to read the evidence in this case and not feel shocked by the enormity and atrocity of the crime, if we assume that the defendant was of sound memory and discretion. An old, quiet, inoffensive man is brutally cut to pieces with an axe while he is sleeping peacefully in the room with the defendant and his family. No provocation had been given; there was entire friendship and cordiality between them when they retired to bed. Yet the jury found that the murder was attended with mitigating circumstauces, and the defendant was sentenced to hard labor for life in the penitentiary.

We have searched the record in vain for any semblance of a single mitigating circumstance. We are forced to the conclusion that the jury doubted whether the defendant was sane, and being instructed by the court that such doubt would not justify an acquittal, they gave the defendant the benefit of this doubt, as a mitigating circumstance, by way of saving him from the gallows. It has been earnestly and ably pressed upon us in argument that the doctrine charged by the criminal judge ought to be adopted from considerations of public policy. It is conceded that the doctrine ought not to be carried to the extent of subjecting defendant to capital punishment, about the soundness of whose memory and discretion the juries may have doubts. This, it is admitted, would be too shocking to humanity to be tolerated. But it is insisted that the peace of society and the prevention of the repetition of such horrible tragedies by defendants whose sanity is doubtful would justify the courts in holding that defendants who rely upon the defence of insanity should be required to establish their defence beyond reasonable doubt; otherwise, that they should be held responsible as criminal, and subjected to imprisonment for life.

The force of this argument is much strengthened by the facts proven as to the violent character of this defendant. To turn him loose might be to subject some other innocent victim to the same fate with Diggins. But this is not the tribunal to which the consideration of public policy can be appropriately addressed.[1] Our business is to administer and not to make the law. We find the law well settled that when the State charges a citizen with crime, his guilt must be established beyond reasonable doubt. We apply this rule to the worst men, about whose sanity no doubt is raised, and turn them loose to repeat their crimes, because they are entitled to the benefit of the humane doctrine of doubts. With what show of reason or humanity could we reverse the rule as to that

[1] The argument that it was intended to urge was, that the established law of England recognized this rule, and that policy forbade a departure from it — not that a new rule should be adopted upon such considerations now. — [REP.

Three Theories as to the Burden of Proof of Insanity.

unfortunate class of citizens whose memory and discretion is found to be of doubtful soundness and subject them to imprisonment for life? If the law, as it now stands, furnishes no remedy for the protection of society against the danger of turning loose homicidal maniacs, it is time that the Legislature had provided a remedy. But it seems to us that every society has the remedy within its reach. We do not see what obstacle is in the way of having all such cases tried by regular proceeding to ascertain the fact of insanity, and for the proper disposal of its unfortunate victims.[1] But section 1554 of the Code provides specially that when the defence of present insanity is urged on the trial of a person charged with a crime which subjects him to imprisonment or death, it is the duty of the judge to submit the question of sanity to the jury as a preliminary question, and if the defendant is found to be insane, the judge orders him to the lunatic asylum. The facts of the case might well have induced the judge to follow the directions of this section of the Code.

Our duty is discharged in declaring that the defendant has been convicted and sentenced to imprisonment for life contrary to law.

We reverse the judgment, and remand the case for a new trial.

NOTES.

§ 29. **Presumption of Sanity.** — A person is presumed to be sane until the contrary is shown. Sanity is presumed to be the normal state of the human mind, and it is never incumbent upon the prosecution to give affirmative evidence that such state exists in a particular case. The question, upon whom is the burden of proof when insanity is interposed as a defence in a criminal trial is one upon which there has been a great amount of discussion, and much difference of opinion. Three different theories are to be found in the cases on this point. The first is that inasmuch as every man is presumed to be sane, the prisoner must overcome this presumption by proving his insanity beyond a reasonable doubt. The second is that the presumption of sanity must prevail until it is shown to be false to the satisfaction of the jury by a preponderance of the evidence. The third is that where any evidence is introduced tending to cast uncertainty upon the sanity of the prisoner, the State is bound to prove his sanity, like all other elements of the crime, beyond a reasonable doubt.

§ 29. *a*. **Burden on Prisoner — First Theory.**—The first theory, viz., that the prisoner must prove his insanity beyond a reasonable doubt, was laid down in

[1] Code, 1553. The obstacle lies in the fact that the defence of present insanity is never put in when the fact of insanity at the time of the offence will answer the purpose. — [REP.

[2] People *v.* Kirby, 2 Park. 28 (1823).

[3] Walter *v.* People, 32 N. Y. 147 (1865).

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early cases in Alabama[1] and Missouri,[2] but has been since overruled,[3] and prevails at present in only two States, Delaware[4] and New Jersey.[5] In *State* v. *Henley*,[6] in charging the jury the judge said: "There is but one more matter which the court feels called upon to notice in the case, and that was the concluding request of the counsel for the prisoner, that we should instruct you that if after a mature consideration of all the evidence in it, you should have any reasonable doubt on this last point as to the mental capacity and criminal responsibility of the prisoner for the act in question, you should give him the benefit of such doubt in making up your verdict. But the court does not consider the rule of law so to be in relation to the plea or defence of insanity when the act of killing is conceded, admitted, or positively proved by the evidence. For every such homicide is presumed in law to be murder until the contrary appears, and every person is presumed to be of sound mind until the reverse is shown, and as insanity must be shown by the party who alleges or sets it up as a defence, it is incumbent and obligatory on him to establish it as a fact in the case to the satisfaction of the jury. The rule alluded to, as we understand it, has relation solely to the *corpus delicti*, or to the act of killing in the case simply, and if the jury in any case of homicide, after maturely considering and weighing all the evidence for and against the accused, entertain any reasonable doubt as to that fact, it is their duty to give him the benefit of it."

§ 29. *b*. **Burden on Prisoner — Second Theory.**—The second theory, viz.: that the presumption of sanity prevails until it is overcome by a preponderance of evidence showing the prisoner's insanity to the satisfaction of the jury is the rule in the following States:—

§ 30. **Alabama.**[7]

§ 31. **Arkansas.**[8]

§ 32. **California.** — The burden is on the prisoner to prove insanity, but it may be established by a preponderance of the evidence.[9] In *People* v. *Myers*[10] it was said: "As the burden of proving the existence of insanity rests upon the accused, it follows that this fact must be satisfactorily established, and that is by a preponderance of proof. The fact is not proved by raising a doubt whether it exists or not." In *People* v. *Messersmith*,[11] the court read to the jury extracts from

[1] State *v.* Brinyea, 5 Ala. 241.

[2] State *v.* Huting, 21 Mo. 464.

[3] See cases, p. 518, *post*.

[4] State *v.* Danby, 1 Houst. Cr. Cas. 166 (1864); State *v.* West, 1 Houst. Cr. Cas. 371 (1873).

[5] State *v.* Spencer, 21 N. J. (L.) 196 (1846). But New Jersey is probably ready to abandon this rule. In State *v.* Martin, 3 Crim. L. Mag. 44, tried in New Jersey in 1881, Depue, J. charged the jury that "when an accused sets up the defence of insanity, the burden of proof is upon him; and to make effectual such a defence, the proof of the prisoner's insanity ought to be satisfactory. He must overcome the legal presumption of insanity by a clear preponderance of proof."

[6] 1 Houst. Cr. Cas. 28 (1873).

[7] State *v.* Brinyea, 5 Ala. 241 (1843); State *v.* Marler, 2 Ala. 43 (36 Am. Dec. 398) (1841); Boswell *v.* State, 63 Ala. 307 (1879); McAllister *v.* State, 17 Ala. 434; see *posi*, p. 874.

[8] McKenzie *v.* State, 26 Ark. 334 (1870).

[9] People *v.* Wilson, 49 Cal. 13 (1874); People *v.* McDonnell, 47 Cal. 134 (1873); People *v.* Coffman, 24 Cal. 230 (1864); People *v.* Myers, 20 Cal. 518 (1862).

[10] 20 Cal. 518 (1862).

[11] 57 Cal. 575 (1881), citing People *v.* Myers, 20 Cal. 518.

The Rule in California.

English cases holding that insanity must be proved beyond a reasonable doubt, and also a decision of the Supreme Court of the State to the effect that it is sufficient if insanity be proved by a preponderance of evidence. On appeal it was held that the charge was contradictory and erroneous, and the verdict was set aside. In *People* v. *Bell*,[1] WALLACE, C. J., said: "Insanity, when relied upon as a defence in a criminal case, is to be established by the prisoner by preponderating proof. It is an issue upon which he holds the affirmative, and before it can be availed of, he is bound to establish not only the fact of insanity, but insanity of the character, *i.e.*, arising from such a cause as in point of law amounts to a defence. If therefore, as here, there be a question as to whether the supposed insanity was the result of intoxication immediately indulged or insanity caused by a habitual and long continued intemperate use of ardent spirits, the burden is cast upon the prisoner of establishing it to be of the latter character." In *People* v. *Wreden*,[2] decided in California in 1881, the judge had charged the jury that the defence of insanity must be "clearly established by satisfactory proof." The Supreme Court held that this was equivalent to "established by satisfactory proof beyond a reasonable doubt," and was erroneous. "In a late case,"[3] said SHARPSTEIN, J., "it was held to be well settled in this State that insanity, in order to constitute a defence in a criminal action, need not be proved beyond a reasonable doubt, but that it might be established by mere preponderating evidence. Is not the expression 'clearly established by satisfactory proof' the full equivalent of 'established by satisfactory proof beyond a reasonable doubt?' How can a fact be said to be clearly established so long as there is reasonable doubt whether it is established at all? There can be no reasonable doubt of a fact, after it has been clearly established by satisfactory proof. 'Clearly,' according to Webster's definition of it, means in a clear manner, without obscurity, without obstruction, without entanglement or confusion, without uncertainty, etc., and that is doubtless the sense in which it is popularly understood. The definition of a reasonable doubt given by C. J. SHAW, which has been generally approved by the courts, is as follows: 'It is that state of the case which, after the entire comparison and consideration of all evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, * * * a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.'[4] A juror would have no excuse for saying he did not 'feel an abiding conviction to a moral certainty' of the truth of a fact which had been 'clearly established by satisfactory proof.' Such proof, if any could, would convince and direct the understanding and satisfy the reason and judgment of a conscientious juror. Under the instructions given it was the duty of the juror to require that the defence of insanity should be proved beyond a reasonable doubt. This was error." But an instruction that where a person's defence is insanity, this must "be satisfactorily established, and that by a preponderance of evidence" is correct. "In other words" said the court "insanity, like any other affirmative defence relied on by a defendant in a criminal case, must be proven to the satisfaction of the

[1] 49 Cal. 485 (1875).
[2] 59 Cal. 341 (1881).
[3] People *v.* Wilson, 49 Cal. 13.
[4] Com. *v.* Webster, 5 Cush. 320.

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jury. It is a fact; and a fact proven by a preponderance of evidence is a fact 'satisfactorily established.' As an expression, a preponderance of evidence is the equivalent of satisfactory proof. While, therefore, the instruction under consideration may be faulty in phraseology, it is, as a legal proposition, substantially correct."

§ 33. **Connecticut.** — In this State the burden of proof is on the defendant;[2] and the jury must be satisfied that the prisoner was of sound mind.[3]

§ 34. **Georgia.** — The same rule prevails in Georgia.[4] In *Holsenbake* v. *State*,[5] the court said: "*Prima facie*, all persons are to be considered sane, and this is true in criminal as well as civil trials. If this be the legal presumption, it would seem to follow that unless the jury are satisfied of insanity they must consider the prisoner sane. Perhaps the word *satisfied* is rather strong, and were there any evidence here of insanity, we might hesitate to sustain the judge. But there seems to have been no such evidence." In *Westmoreland* v. *State*,[6] it was made a ground of error on appeal that the trial court refused to charge the jury that if they had a reasonable doubt of the prisoner's sanity they should acquit, but did charge them that the law presumed sanity until the contrary is made to appear, and that the burden of proof on this point is on the defendant, and that "it ought to be made to appear to a reasonable certainty, to your reasonable satisfaction, that at the time of the commission of the act, he did not know the nature or quality of the act, or if he did, did not know that the act was wrong." On appeal this instruction was affirmed principally on the ground that the judge had afterwards charged the jury that "if after a careful survey of all the testimony, you have a reasonable doubt of the defendant's guilt, you will acquit him." For this latter charge the Supreme Court thought was tantamount to telling the jury that if they had a reasonable doubt of the prisoner's sanity they should acquit.

§ 35. **Iowa.** — In Iowa the same rule is established.[7] In *State* v. *Bruce*,[8] an instruction that while sanity was presumed, to warrant an acquittal on the ground

[1] People *v.* Messersmith, 61 Cal. 247 (1882.)

[2] State *v.* Hoyt, 46 Conn. 330 (1878). "The accused introduced a witness, an expert upon the point of insanity, and the court permitted an expert to testify upon the same subject in behalf of the State, by way of rebuttal. The accused complains of this, and urges that the State should have introduced this evidence in chief. The complaint is without foundation. The law presumes every person of mature years to be of sound mind, and competent to commit crime. If the defence be insanity, it is to be proved substantially as an independent fact, and the burden of proof is on the accused. Upon this issue he goes forward and the State rebuts." *Id.* "The accused having introduced evidence tending to show that he was of unsound mind when he committed the homicide, the court permitted the State in rebuttal to offer evidence to prove that the defendant was of sound mind at the time in question. To this the accused objected, on the ground that the burden rested on the State to prove that the defendant was of sound mind when he committed the homicide, and that the testimony should have been offered in chief. This precise point was made by the accused when his case was previously before this court, and was decided adversely to his claim. This ought to be satisfactory, especially when all the authorities accord with that decision." State *v.* Hoyt, 47 Conn. 518 (1880).

[3] State *v.* Johnson, 40 Conn. 136 (1873.)

[4] Humphreys *v.* State, 45 Ga. 190 (1872); Anderson *v.* State, 42 Ga. 9 (1871).

[5] 45 Ga. 55 (1872).

[6] 45 Ga. 225 (1872); see *post*, p. 874.

[7] State *v.* Felter, 32 Iowa, 49 (1871); State *v.* Bruce, 48 Iowa, 530 (1878).

[8] 48 Iowa, 530 (1878); see *post*, p. 878.

Rule in Kentucky, Louisiana, Maine and Massachusetts.

of insanity, it was sufficient if the jury on all the evidence was reasonably satisfied that the prisoner was insane; that if the weight or preponderance of the evidence shows his insanity, it raises a reasonable doubt of his guilt, was approved on appeal, the court citing the earlier cases of *State* v. *Felter* and *State* v. *Mewherter*.

§ 36. **Kentucky.** — In this State the burden of proof is on the accused. There must be more than a mere doubt raised as to the prisoner's sanity. The presumption of sanity must be overcome by a preponderance of proof in the prisoner's favor.[1]

§ 37. **Louisiana.** — In Louisiana the insanity must be clearly shown to the satisfaction of the jury to have existed at the time of the commission of the act.[2] The burden of proof, where temporary insanity is alleged, is on the accused, and the insanity must be proved beyond a reasonable doubt.[3]

§ 38. **Maine.** — In this State the burden rests on the prisoner to establish his insanity by a preponderance of the evidence.[4]

§ 39. **Massachusetts.** — Here the presumption of sanity exists until overcome by a preponderance of the whole evidence.[5] In *Commonwealth* v. *Eddy*,[6] tried in Massachusetts in 1856, Winslow Eddy was indicted for the murder of his wife. The trial took place before Justices METCALF, BIGELOW, and MERRICK. After the prisoner had put in all his evidence, including testimony as to his insanity at the time of committing the act, the attorney-general offered evidence tending to prove his sanity, to which the defence objected, but the court ruled that this was the proper stage at which to offer this evidence, as the presumption of law that every person is sane stood until rebutted. METCALF, J., then instructed the jury as follows: "The burden is on the Commonwealth to prove all that is necessary to constitute the crime of murder. And as that crime can be committed only by a reasonable being — a person of sane mind — the burden is on the Commonwealth to prove that the defendant was of sane mind when he committed the act of killing. But it is a presumption of law that all men are of sane mind; and that presumption sustains the burden of proof, unless it is rebutted or overcome by satisfactory evidence to the contrary. In order to overcome the presumption of law and shield the defendant from legal responsibility, the burden is on him to prove to the satisfaction of the jury, by a preponderance of the whole evidence in the case, that at the time of committing the homicide, he was not of sane mind. This is not only required by the general rule of law, but is distinctly implied in the provisions of the Revised Statutes,[7] that 'when any person indicted for an offence shall, on trial, be acquitted by the jury by reason of insanity, the jury, in giving their verdict of not guilty shall state that it was given for such cause.' The same legal doctrine may be stated in another form of words. The law infers from the fact that a prisoner is a human being of

[1] Kriel *v.* Com., 5 Bush, 362 (1869); Graham *v.* Com., 16 B. Mon. 587 (1855); Brown *v.* Com., 14 Bush, 398 (1878); Smith *v.* Com., 1 Duv. 224.

[2] State *v.* Coleman, 27 La. An. 691 (1875).

[3] State *v.* De Rance (La.), 14 Reporter, 208.

[4] State *v.* Lawrence, 57 Me. 574 (1870).

[5] Com. *v.* Eddy, 7 Gray, 583; Com. *v.* Heath, 11 Gray, 303; Com. *v.* Rogers, 7 Metc. 500 (1844.)

[6] 7 Gray, 583 (1856.)

[7] Ch. 137, sect. 12.

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sufficient age to be deemed capable of committing crimes, the further fact that he is a reasonable being, that is, that he is of sane mind. And proof of the former fact is sufficient of the latter, until the latter is disproved by the preponderance of evidence. And the burden of thus disproving it is on the prisoner."

§ 40. **Minnesota.** — In this State the burden of proof is on the prisoner to show insanity to the satisfaction of the jury.[1] In *State* v. *Grear*[2] the jury were instructed that where irresponsible drunkenness is relied on as a defence, the burden of proving such drunkenness is on the defendant, and he must establish it by a fair preponderance of evidence. "The expression, fair preponderance of evidence," said the court, "is unobjectionable. It means no more than that the evidence spoken of must fairly preponderate, that is it must preponderate so that the preponderance can be perceived upon fair consideration of the evidence."

§ 41. **Missouri.** — In Missouri it is now settled that to entitle a person to an acquittal on the ground of insanity, such insanity must be proved to the reasonable satisfaction of the jury.[3]

§ 42. **North Carolina.** — In North Carolina the jury must be "satisfied" of the prisoner's insanity,[4] and as insanity must be established to their satisfaction, it is error of which the prisoner cannot complain, to charge the jury that the burden is upon the prisoner to prove insanity by a preponderance of the evidence.[5]

§ 43. **Ohio.** — The same rule prevails in Ohio.[6] In *Bond* v. *State* it was said: "The counsel for the defendant requested the court to instruct the jury that if they entertained a reasonable doubt as to the sanity of the defendant they should acquit. This instruction the court refused to give, and, on the contrary, instructed the jury that in order to an acquittal on that ground it was incumbent on the defendant to prove the fact of insanity by a preponderance of evidence. In this, we think, the court was right and the counsel wrong."[7] In *Bergin* v. *State*,[8] the Supreme Court say: "The court below charged the jury as follows: 'To defeat the legal presumption of sanity which meets the defence of insanity at the threshold, the burden of establishing mental alienation of the accused affirmatively rests upon the accused.' The counsel for the motion admits that this is held to be the law in Ohio, but ably argues that it is not good law. If the

[1] Bonfanti *v.* State, 2 Minn. 123 (1858); State *v.* Gut, 13 Minn. 341 (1868.)

[2] 29 Minn. 221 (1882.)

[3] State *v.* Erb, 74 Mo. 199 (1881); State *v.* Redemeier, 71 Mo. 173 (1879); State *v.* Baber, 74 Mo. 292 (1881); State *v.* McCoy, 34 Mo. 531 (1864). But see State *v.* Huting, 21 Mo. 464 (1855), where it was said: "The defendant's counsel contend that the court should have told the jury that if they had a reasonable doubt of the insanity being made out by the proof in the case they ought to find for the prisoner. This is carrying the doctrine too far. Insanity may be made out by circumstantial proof; it does not require positive proof; but the jury must believe from the evidence at least that it exists. If the jury have a reasonable doubt of the guilt of the defendant, they are to acquit. If the State makes out but a doubtful case, the jury will acquit. But this doctrine of doubt has not been carried to the extent that if the defendant makes out but a doubtful defence, they must acquit." p. 464 (1855.)

[4] State *v.* Payne, 86 N. C. 609 (1882); State *v.* Starling, 6 Jones (L.) 366 (1859).

[5] State *v.* Payne, 86 N. C. 609 (1882).

[6] Loeffner *v.* State, 10 Ohio St. 598 (1857).

[7] Bond *v.* State, 23 Ohio St. 349 (1872).

[8] 31 Ohio St. 111 (1876).

Rule in Ohio.

question was an open one a majority of the court would be in favor of the rule as it stands, and inasmuch as the rule has been so long established and so repeatedly recognized in this State, as shown by the cases below cited, the court is unanimous in the opinion that it should not be changed by judicial action." In *Farrar* v. *State*,[1] decided in Ohio in 1853, it is said on this point: "The court below charged the jury that when the plea of insanity is set up, the defence must be established by a preponderance of testimony — that the insanity must be affirmatively proved. But taking the whole charge together, I do not think the sense of these words is so extensive as counsel appear to construe it. The court characterized the old rule requiring insanity to be proved beyond all reasonable doubt, as a doctrine which, though useful in its time, is too hard to uphold, and I cannot see that a reasonable doubt of a prisoner's sanity can legally arise except upon a preponderance of testimony. A mere preponderance of testimony as to the guilt of a person will not satisfy the law; there must be such a preponderance as removes all reasonable doubt. But as we understand the court below, a mere preponderance of testimony in favor of insanity may raise a reasonable doubt of guilt, though such preponderance may not prove insanity beyond a reasonable doubt. I think this the true sense of what was charged in this case; and I do not discover any reason for setting aside the verdict so far as this particular instruction is concerned. Secondly. As to the degree of proof. Nothing can be better settled than that insanity must be clearly proved. If the testimony only raises a reasonable doubt of sanity the defence fails. But what is 'clear proof?' According to Chief Justice Hornblower, in *Spencer's Case*,[2] it is proof that leaves no reasonable doubt of insanity; in other words, insanity can be said to be clearly proved only when it is proved beyond a reasonable doubt. When, said the Chief Justice, the question is, did the accused commit the homicide, the law presumes him innocent until its commission by him is shown beyond a reasonable doubt; but when the question is, was he sane when he committed it? the law presumes him sane until the contrary is in like manner established. And again: 'The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find a sane man guilty.' This definition of the term 'clearly proved,' has been questioned, and it seems to me justly. 'Clearly proved' and 'proved beyond a reasonable doubt' have not, I think, been generally considered as convertible terms. The latter, if I am not mistaken, has usually been held to imply a higher degree of certainty than the former. If the preponderance of testimony is clearly on the side of insanity, the fact ought, in my judgment, to be considered as clearly proved, although there is a reasonable doubt of its existence. No act is a crime unless perpetrated by an accountable being, and if we were to apply the same rule to the question of sanity that we do to all other facts necessary to constitute a crime, we would have to hold that a reasonable doubt of sanity is sufficient to acquit. But a different rule has always prevailed, and wisely. It is carrying the distinction far enough, however, and as far as public policy, upon which it is founded, requires, when we say that insanity must be established by a clear preponderance of proof."

[1] 2 Ohio St. 70.

[2] 21 N. J. (L.) 196.

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§ 44. **Pennsylvania.** — In Pennsylvania it is not necessary that the jury should be satisfied of the insanity of the accused beyond a reasonable doubt, but there must be proof that is satisfactory, such as flows fairly from a preponderance of evidence.[1] In *Myers* v. *Commonwealth*,[2] it is said by AGNEW, C. J., delivering the judgment of the Supreme Court: "There is one error, for which the sentence in this case must be reversed. It appears in several parts of the charge, leaving no doubt as to the meaning of the learned judge who presided at the trial. It must, therefore, have impressed the minds of the jurors. Without specifying each instance, it may be summed up in a single statement, that the judge instructed the jury that they must be satisfied beyond a reasonable doubt that the prisoner was insane at the time the act was committed. This statement is too stringent, and throws the prisoner upon a degree of proof beyond the legal measure of his defence. That measure is simply proof which is satisfactory — such as flows fairly from a preponderance of the evidence. It need not be beyond a doubt. A reasonable doubt of the fact of insanity, on the other hand, is not sufficient to acquit upon a defence of insanity. This has been held in several cases.[3] Sanity being a normal condition of men, and insanity a defence set up to an act which would otherwise be a crime, the burthen rests upon the prisoner of proving his abnormal condition. But the evidence of this need be only satisfactory, and the conclusion such as fairly results from the evidence. Where the evidence raises a balancing question, and the mind is brought to determine its preponderance, there may be a doubt still existing in the mind, yet the actual weight may be with the prisoner; and this proof should be considered satisfactory. In cases of conflicting evidence the preponderance must govern, there being no other rational means of decision. But if we say in such a case it must be satisfactory beyond a reasonable doubt, it is evident the expression implies more than a mere preponderance. It is difficult to define the precise difference between the two measures, yet we are conscious in our own minds that to be convinced beyond a reasonable doubt is a severer test of belief than to be satisfied that the preponderance falls on that side. Probably the true reason of the difficulty in defining the difference lies in the inability to define a reasonable doubt. A reasonable doubt must be an honest and conscientious difficulty in believing — one not merely subtle or ingenious; it must arise out of the evidence and not be fanciful, or be conjured up to escape consequences. It must strike the mind with such force as to compel it to pause in yielding belief. These are characteristics, but do not define the measure of belief, which is beyond a reasonable doubt. The judge stated well all these characteristics, and yet in conclusion said, by way of illustration of his meaning: 'If the beam waver, then the doubt is thrown into the defendant's scale; but the jury must not so hold the beam as to cause it to tremble either in favor of the Commonwealth or the defendant.' Now, if we apply this illustration of the reasonable doubt which operates to acquit a prisoner, to the evidence of his insanity, and say that his proof of the fact

[1] Myers *v.* Com., 83 Pa. St. 141; Pannell *v.* Com., 86 *Id.* 260 (1878); Sayres *v.* Com., 88 *Id.* 291 (1879); Brown *v.* Com., 78 Pa. St. 122 (1875); Com. *v.* Winnemore, 1 Brewst. 356 (1867); Com. *v.* Hart, 2 Brewst. 547 (1868); Ortwein *v.* Com., 76 Pa. St. 414 (1875); Lynch *v.* Com., 77 Pa. St. 205 (1874); Coyle *v.* Com., *ante*, p. 441.

[2] 83 Pa. St. 141.

[3] Ortwein *v.* Com., 76 Pa. St. 414; Lynch *v.* Com., 77 *Id.* 205; Brown *v.* Com., 78 *Id.* 122.

Rule in Virginia and West Virginia.

shall be beyond a reasonable doubt, and if the beam waver, it is to be found against his defence, we discover that it implies a higher degree of proof to establish the defence of insanity than the law warrants. It must be not only satisfactory, but be satisfactory beyond a reasonable doubt. The beam must not waver when preponderating to the defendant's scale, but it must go down quickly. It seems to us, therefore, that this expression, so often repeated to the jury, must have impressed them with a belief that a high measure of proof of the insanity of the prisoner was required. The distinction may appear nice; yet we must not overlook the effect of language upon common minds, when the stake is life. Justice cannot suffer it to be imperiled beyond a just measure of belief in those who are the triers. Common minds do not analyze accurately the degrees of belief or the nature of the doubts which affect it. We think, therefore, there was error in stating the degree of belief in regard to the defence of insanity too strongly." In *Pannell* v. *Commonwealth*,[1] the court was asked to charge that "if the jury believe that at the time the homicide was committed the defendant was insane, he must be acquitted." The court gave this, but added "that the jury must be satisfied by satisfactory and *conclusive* proof of the insanity of the defendant." On appeal this was held erroneous. "That the proof of insanity must be satisfactory and not merely doubtful, to justify an acquittal," said the Supreme Court, "is undoubtedly correct; but we do not know any case in which it has been held that it must be conclusive. To require it to be absolutely conclusive is asking far too high a degree of certainty. It is not necessary that the proof of insanity should be so conclusive as to remove all doubt. It may be established by satisfactory and fairly preponderating testimony." In *Sayres* v. *Commonwealth*,[2] the court instructed the jury that "the evidence which is intended to establish the defence of insanity must be satisfactory to the jury, and the conclusion such as fairly results from the evidence." This instruction was approved on appeal.

§ 45. **Virginia.** — Insanity as a defence must be proved upon the whole evidence to the satisfaction of the jury.[3]

§ 46. **West Virginia.** — In *Strauder* v. *State*,[4] the trial court instructed the jury as follows: "To entitle the prisoner to an acquittal upon the ground that he was insane at the time of the commission of the offence charged in the indictment, such insanity must be proven to the satisfaction of the jury, though in passing upon this question they may look at the whole evidence in the case, as well that for the State as the prisoner." On appeal this instruction was approved. "This conclusion is, I think," said GREEN, P., "sustained not only by the weight of authority but also by sound reason. When the State proves the *corpus delicti*, and that the act was done by the accused, it has made out its case. And if the prisoner relies on the defence of insanity, he must prove it to the satisfaction of the jury. This rule is necessary to protect the public interests and is just to the accused."

1 86 Pa. St. 260 (1878).

2 88 Pa. St. 291 (1879); reported below, Commonwealth *v.* Sayres, 12 Phila. 553 (1879.)

3 Boswell *v.* Com., 20 Gratt. 860; Dejarnette *v.* Com., 75 Va. 867; Baccigalupo *v.* Com., 33 Gratt. 807.

4 11 W. Va. 745; see *post*, p. 873.

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§ 47. **English Rule.** — In England the burden of proof of insanity is on the prisoner.[1] In *Reg.* v. *Layton*,[2] the prisoner was indicted for the murder of his wife. The defence was insanity. It appeared from the evidence on the part of the prosecution, that on the 7th of May, the prisoner and his wife were walking along the road between Leamington and Banberry, and according to the dying declaration of the deceased, confirmed by other evidence, the prisoner, who had been for some time chasing his wife, fired a pistol at her — she fell — the prisoner pulled her up and they proceeded a few yards, when he pushed her down and inflicted a wound on her throat with a knife. He then got over the hedge into a field, and ran some distance until he was overtaken by a person who had seen the woman fall. The prisoner wiped the blood off his hands, saying he had met with a misfortune and cut his finger. He would not tell what he had done with the pistol and knife, but said: "I did it. I intended to do it, and that will put an end to it. I have been unhappy since Christmas." He afterwards began to talk about his family affairs. To another witness who came up soon after, and who called the prisoner's attention to the blood on his hands, saying, "There is your wife's blood, are you not ashamed of yourself?" the prisoner replied: "If you knew all the circumstances, you would not blame me so much." At the time the prisoner shot and cut his wife, he must have known that persons were within a short distance, having just before met them in the road. The woman lived until the 29th of May. On the 8th the prisoner had an interview with his wife, who said to him: "I forgive you all you have done, but I shall never see you any more." The prisoner afterwards observed to the constable: "I wonder what my wife meant when she said she should never see me any more. Do you suppose she means if she were to die, I should be hanged, or if she gets well, I shall be transported for life?" He repeated this on the following morning, and also said, he hoped she would get well again for the sake of her family. The prisoner had threatened to murder his wife before the 7th of May; on the day before he was heard sharpening a knife, and the deceased was afterwards seen running out of the house, followed by the prisoner with a knife resembling one found the following day near the spot where the murder was committed. The prisoner at the time of the murder was, it appeared, going to Banbury to get work. The deceased's object in going there was to consult her friends as to a separation between herself and her husband in consequence of his threats of violence, but the object of her journey was concealed from her husband. The prisoner had been confined for two months in Warwick gaol, in the early part of the year, for debt, having previously kept in the house for years to avoid his creditors; he had been unfortunate in building speculations. These were the material facts of the case, proved on the part of the part of the prosecution, tending to throw any light on the state of the prisoner's mind. Rolfe, B., in summing up the case, said as there was no doubt that the prisoner had killed his wife, and the only question was whether, when doing so, he was a responsible agent, he should confine his observations to this question. The duty which now was incumbent on the jury was the most difficult that could devolve on a jury or judge. Insanity was the most difficult question which could engage the attention of any tribunal. It was difficult to define it in words, or even in idea. The opinion of

[1] Reg. v. Turton, 6 Cox, 385 (1854).

[2] 4 Cox, 149 (1849).

The Rule in England.

the judges was taken by the House of Lords a few years back, as to what was to constitute a definition of insanity, and it created very great difficulty, but after great and anxious deliberation, they came to the conclusion that the old description was the best, viz.: that insanity should constitute a defence only when a party was in such a state of mind arising from disease as to be incapable of deciding between right and wrong,[1] but that this definition was imperfect, as all definitions must be, and would require to be modified with reference to each particular case. Applying that law to the present case, he thought what the jury had to consider was, whether the evidence was such as to satisfy them that at the time the act was committed by the prisoner he was incapable of understanding right from wrong, as that he could not appreciate the nature of the act he was committing. Perhaps it would be going too far to say that a party was responsible in every case where he had a glimmering knowledge of what was right and wrong. In cases of this description, there was one cardinal rule which should never be departed from, viz.: that the burden of proving innocence rested on the party accused. Every man committing an outrage on the person or property of another must be, in the first instance, taken to be a responsible being. Such a presumption was necessary for the security of mankind. A man going about the world marrying, dealing, acting as if he was sane, must be presumed to be sane till he proves the contrary. The question therefore for the jury would be, not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind. On the other hand, however, they might arrive at the conclusion, from the nature of his conduct and acts up to the time of the act in question, or shortly preceding it, that he was insane, though he was not capable of proving it by positive testimony, as such was the nature of the mind, that it might be one minute sane and the next insane, and therefore it might be impossible for a party to give positive evidence of its condition at the particular moment in question.

He would now, with a view to enable them to form an opinion on this subject, direct their attention to the evidence as to the state of the prisoner's mind.

After going through the evidence, his lordship said he confessed that, to his mind, the evidence carried a conviction almost irresistible that the man was laboring under some mental delusions. So many people could not be all so deceived as to arrive at that conclusion without some good grounds for it. There were two attorneys at Banbury, the superintendent of the Leamington police, Pearson, the hair-dresser, the prisoner's brother and sister and nephew, and a comparative stranger, from London, all agreeing that his manner and conduct left an impression that he was not in his right mind. A question asked by the counsel for the prosecution of the witnesses for the prisoner, namely, whether they thought him capable of judging between right and wrong, seemed to him to be very irrelevant, for that was what no witness thought of or was prepared to answer. All that witnesses thought of was whether or not a person was in his senses, and the other was a mere technical mode of expression adopted by the judges. It was probable that the prisoner was feigning madness, but all the circumstances showed that it was very improbable. The conclusion, then, seemed irresistible that he was to some extent laboring under a delusion, but he quite

1 McNaghten's Case, 10 Cl. & F. 200.

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concurred with the counsel for the prosecution that he was not exempt from responsibility, because he was laboring under a delusion as to his property, unless that had the effect of making him incapable of understanding the wickedness of murdering his wife. But when that was the question they had to consider, he could not say that it was altogether immaterial that he was insane on one point only. Indeed, his insanity on that point might guide them to a conclusion as to his sanity on the point involved in this case, and in this view of the matter there were two circumstances detailed in the evidence of great importance. These were the want of the motive for the commission of the crime, and its being committed under circumstances which rendered detection almost inevitable. His lordship, after going through the parts of his evidence which supported these positions, concluded by telling the jury that they could come to no other conclusion than that the prisoner had taken away the life of his wife, and that this was murder, unless he satisfied them that he was not capable at the time of appreciciating his acts.

Verdict, not guilty, on the ground of insanity.

In *Reg.* v. *Stokes*,[1] the prisoner, a soldier, was indicted for the murder of Mary Ann Garrard. He was tried before Mr. Baron ROLFE at the York Spring Assizes of 1848. The fact of the murder was not disputed. On the previous 20th of January the prisoner, in the Leeds barracks, took up his musket as if to clean it with a rag, leveled it at the deceased, fired and killed her on the spot, her husband and child being in the room and two other soldiers being present. It appeared in evidence that the prisoner was a man of singular habits; that he seldom spoke to the other soldiers; was very "secluded, sulky and sullen," and was described as "a close-minded man," and a "man of very nasty temper." He had frequently complained of illness, and had made efforts to get into the hospital, but he was rejected as a man having no visible disorder or sickness. It also appeared that some months previously a bayonet had been wrenched from him in the night-time by his fellow-soldiers, as they supposed he was about to destroy himself. On being arrested the prisoner made no resistance, but held out his hands and gave himself up to the sergeant, who told him he was a prisoner. He declared that he had loaded his musket designedly, saying that he had no chance of shooting her before; that he was glad she was dead, as he could now die in peace, as he had had no rest for nights. It was proved, too, that for some nights before the murder, while under the excitement of liquor, the prisoner was raging in the guard-room, and while handcuffed had attempted to burn himself, and afterwards to kill himself by striking his head with a poker. There had been no quarrel of any kind between the husband of the deceased and the prisoner, as far as was known. When asked why he had killed the woman, he said: "No one on earth should know but the priest," adding that he rejoiced in her death, and could then die happy. He also said there was "a man of the company, absent on furlough, that he would also have shot had he been there;" but it did not appear from the evidence whether there was a man on furlough or not. The medical witnesses were cross-examined at considerable length on the general character and characteristics of the different classes of insanity. The opinions of Dr. Pritchard on Insane Impulses[2] were cited, who says: "The will is

[1] 3 C. & K. 185 (1848).

[2] Lib. Med. (ed. Dr. Tweedie), 2 Prac. Med. 118.

The Third and Last Theory.

occasionally under the influence of a disordered impulse, which suddenly drives the persons affected to the perpetration of acts of the most revolting character, and to the commission of which he has no motive." Also those of M. Esquirol on the same subject, who remarks that "numerous and well authenticated cases have demonstrated the fact, that while some madmen commit homicide under the influence of delirium or illusions, while others perpetrate similar acts with premeditation and design, influenced by an intense feeling of malevolence which may be part of the general perversion of their moral feelings, there is a third class, who are under neither illusions, nor moral perversion, if we inquire into the general state of their affections and moral feelings, and who are driven to commit homicide by a sudden and merely blind and instinctive impulse, without consciousness of the nature of the act." Taylor's Med. Jurisprudence, tit. Homicidal Monomania was also cited; and the opinions in the several works were assented to as questions of science by the medical witnesses. ROLFE, B. (in summing up) — If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The *onus* rests on him; and the jury must be satisfied that he actually was insane. If the matter be left in doubt, it will be their duty to convict him; for every man must be presumed to be responsible for his acts till the contrary is clearly shown. A case occurred some time ago, at the Central Criminal Court, before ALDERSON, B., and the jury hesitated as to their verdict, on the ground that they were not satisfied whether the prisoner was or was not of sound mind when he committed the crime, and that learned judge told them that unless they were satisfied of his insanity it would be their duty to find a verdict of guilty. Every man is held responsible for his acts by the law of this country, if he can discern right from wrong. This subject was, a few years ago, carefully considered by all the judges, and the law is clear upon the subject. It is true that learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart and see the real motive that prompted the commission of such deeds? It has been urged that no motive has been shown for the commission of this crime. It is true that there is no motive apparent but a very inadequate one; but it is dangerous ground to take to say that a man must be insane because men fail to discern the motive for his act. It has also been said by the prisoner's counsel that the conduct of the prisoner was that of a madman in committing the act at such a time, in the presence of the woman's husband, who had arms within his reach; but it would be a most dangerous doctrine to lay down, that because a man committed a desperate offence, with the chance of instant death, or the certainty of future punishment before him, he was therefore insane — as if the perpetration of crimes were to be excused by their very atrocity.

The jury found the prisoner guilty, and sentence of death was passed upon him.

§ 48. **Burden of proof on Prosecution — Third Theory.** — The third theory is that the burden of proof rests on the State to prove the sanity of the prisoner. The presumption of sanity will be indulged in the absence of evidence to the

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contrary. If the defendant introduces no evidence which tends to prove insanity, the presumption stands. But if he gives evidence tending to overthrow the presumption of his sanity, casting doubt and uncertainty upon it, it is the duty of the State by affirmative evidence to prove his sanity beyond a doubt. This theory is maintained in the following States:

§ 49. **Illinois.** — In *Fisher* v. *People*,[1] it was said: "The jury in all cases where such a defence is interposed should be distinctly told that every man is presumed to be sane until the contrary is shown — that is his normal condition. Before such a plea can be allowed to prevail, satisfactory evidence should be offered that the accused, in the language of the criminal code, was affected with insanity, and at the time he committed the act, was incapable of appreciating its enormity. This rule is founded in long experience, and is essential to the safety of the citizen. Sanity being the normal condition, it must be shown by sufficient proof that from some cause it has ceased to be the condition of the accused." But in *Hopps* v. *People*,[2] this case was overruled, and it was laid down that the burden was on the State, and that if the jury entertained a reasonable doubt of the prisoner's insanity they should acquit. Three years later, the judge who delivered the opinion in *Hopps* v. *People*, thought it necessary to explain that case. "What we designed to say in that case," said he, "was simply this, that sanity is an ingredient in crime as essential as the overt act, and if sanity is wanting there can be no crime, and if the jury entertain a reasonable doubt on the question of insanity, the prisoner is entitled to the benefit of the doubt. We wish to be understood as saying as in that case that the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt, whatever the defence may be. If insanity is relied on, and evidence given tending to establish that unfortunate condition of mind, and a reasonable, well founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demand that the accused shall have the benefit of the doubt. We do not desire to be understood as holding the prosecution to the proof of sanity in any case, but we do hold, where evidence of insanity has been introduced by the accused, and a reasonable doubt of his sanity is thereby created, the accused cannot be convicted of the crime charged. We deemed it necessary to say this much in explanation of the ruling in the case of Hopps, as some expressions used therein may have a tendency to mislead."[3]

§ 50. **Indiana.** — "If, upon the whole evidence in the cause, the jury have a reasonable doubt whether the accused upon trial was sane when he committed the homicide or act charged against him, they must have a reasonable doubt whether he purposely and maliciously committed the act; and hence, a reasonable doubt whether he committed the crime defined by statute."[4] An instruction to the jury that "the jury are to presume the defendant innocent until his guilt is established by the evidence beyond a reasonable doubt," is not

[1] 23 Ill. 283 (1860).
[2] 31 Ill. 385 (1865).
[3] Chase *v.* People, 40 Ill. 352 (1866).
[4] Polk *v.* State, 19 Ind. 170 (1862); Stevens *v.* State, 31 Ind. 483 (1869); Guetig *v.* State, 66 Ind. 94 (1879); see *post*, p. 875.

Kansas, Michigan, Mississippi, Nebraska and New Hampshire.

inconsistent with an instruction that "every man is presumed to be sane and to intend the natural and ordinary consequences of his acts."[1]

§ 51. **Kansas.** — The same rule has been adopted in Kansas.[2] In *State* v. *Mahn*,[3] the prisoner asked the court to instruct the jury that, "in order to entitle the defendant to an acquittal, he is required only *to raise* a reasonable doubt as to his sanity," and the court modified the instruction and gave it in these words: "In order to entitle the defendant to an acquittal, he is required only *by evidence to establish* a reasonable doubt as to his sanity." In the Supreme Court this was held to be correct.

§ 52. **Michigan.** — And the same rule prevails in Michigan.[4]

§ 53. **Mississippi.** — Sanity is presumed in the absence of testimony relating thereto, but whenever the question is put in issue by evidence such as engenders a reasonable doubt, it devolves on the prosecution to remove it and establish the sanity of the prisoner to the satisfaction of the jury, beyond all reasonable doubt arising out of all the evidence in the case.[5]

§ 54. **Nebraska.** — Where evidence of insanity is produced by the prisoner, unless the jury are satisfied that the act complained of was not the product of mental disease, they must acquit.[6]

§ 55. **New Hampshire.** — The same rule was adopted in this State in 1861.[7] In *State* v. *Pike*,[8] the judge instructed the jury that sanity was presumed, but that when any evidence was introduced tending to show insanity the State must satisfy the jury beyond a reasonable doubt that the prisoner is sane. The majority of the Supreme Court approved this rule. But Mr. Justice Doe was not satisfied with this liberal rule; he thought there should be no legal presumption of sanity at all. "Malice," said he, "was alleged in the indictment, and that allegation, as well as every other material averment of the indictment, was traversed by the general issue. On the question of malice, the State had the affirmative and the burden of proof; and the State was required to prove the allegation of malice as well as every other material averment, beyond all reasonable doubt. Sanity being an essential element of malice, must be proved by the State beyond all reasonable doubt. This rule is not peculiar to cases in which malice is formally alleged. Sanity is an indispensable ingredient of all crime. If the crime is denied, sanity is denied, and the party alleging it must prove it.[9] It was held in that case, that the presumptions of sanity and of malice are presumptions of fact that do not change the burden of proof, but merely authorize the jury to

[1] Greenley *v.* State, 60 Ind. 141 (1877).

[2] State *v.* Crawford, 11 Kas. 32; State *v.* Reddick, 7 Kas. 144 (1871).

[3] 25 Kas. 182 (1881).

[4] People *v.* Garbutt, 17 Mich. 9 (1868). What is a "reasonable doubt," was well defined in People *v.* Finley, 38 Mich. 482 (1878).

[5] Cunningham *v.* State, 56 Miss. 269 (1879); Newcomb *v.* State, 37 Miss. 383 (1859); Russell *v.* State, 53 Miss. 367 (1876).

[6] Wright *v.* People, 4 Neb. 409 (1876); Hawe *v.* People, 11 Neb. 537.

[7] State *v.* Bartlett, 43 N. H. 224; State *v.* Jones, 50 N. H. 369.

[8] 49 N. H. 399 (1870).

[9] State *v.* Bartlett, 43 N. H. 224.

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find sanity and malice without any direct testimony of witnesses upon these points. The instruction given in this case is a departure from *State* v. *Bartlett;* for when the jury were told that every person of mature age is presumed to be sane they would naturally understand that they received a legal presumption from the court, and not that the presumption was one of the facts for them to pass upon. The presumption was laid down with this important qualification, that it existed only so long as there was no evidence of insanity, and vanished at the moment the slightest particle of evidence appeared tending to show insanity. Such a legal presumption would be irregular, exceptional and anomalous. If there was a legal presumption of sanity, it operated throughout the trial, to keep the burden of proving insanity on the defendant, or to support the burden which belonged to the State. If it did not establish sanity beyond reasonable doubt, it was immaterial. If it did establish sanity beyond reasonable doubt, it shifted the burden of proof contrary to the doctrine of *State* v. *Bartlett*. Shifting the burden of proof upon the defendant, and allowing him to throw it back upon the State by a scintilla of testimony, would naturally be followed by allowing the State to throw it back again upon the defendant by another scintilla, and so on through an interminable subdivision of the evidence. There is no legal guilt in a homicide solely caused by a mental disease. Mental capacity to commit an offence, includes sanity. And if there is a legal presumption of innocence, as the books say, how is it overpowered in the absence of all evidence, by a legal presumption of sanity? When the two presumptions come in conflict without assistance, how does the law ascertain which prevails? [1] If it is necessary to abolish one of the presumptions to avoid their conflict, the presumption of innocence can well be spared, for it is entirely useless. The State, alleging guilt, must prove it. The burden of proof is attached to the affirmative. The accused does not need a presumption of innocence, and it is of no advantage to him. There is no legal presumption of guilt, and the defendant is as well protected by the rule which puts the burden of proof on the party alleging an affirmative, as he would be by a presumption of innocence. Greenleaf, indeed, says that the legal presumption of innocence is to be regarded by the jury as a matter of evidence.[2] But this is an incorrect view. A legal presumption is not evidence; it establishes a point where there is no testimony and no inference of fact from the absence of testimony, and also when all the testimony is so balanced that the point is not decided by the testimony. Putting upon the State the burden of proving guilt, and giving to the defendant a presumption of innocence as evidence tending to disprove the guilt which the State must prove, would be like doubling the weight of any testimony the defendant might introduce, and weighing at once against the State and again in favor of the defendant. The burden of proof affixed to the affirmative, generally renders a legal presumption of law unnecessary; but it seems sometimes to be supposed that there is a necessity for such a presumption for or against every fact alleged and denied in pleading; and more so-called legal presumptions have been constructed than can be conveniently used. There are certain natural or usual causes, effects, conditions and customs,

[1] Greenborough *v.* Underhill, 12 Vt. 604; 1 Gr. on Ev., sect. 35.

[2] 1 Gr. on Ev., sect. 34.

No Presumption of Sanity.

generally within the reach of the experience or the observation of men, which a jury are justified in finding by an inference or presumption of fact, when there is no testimony showing an exceptional instance in the case on trial.[1] When it is proved that one man has killed another with a deadly weapon, under some circumstances there may be, as a matter of fact, a fair inference of malice and intent to kill; but in England, and generally in this country, such inferences have been improperly changed into legal presumptions and used to change the burden of proof throughout the trial.[2] It is not necessary in this climate to offer testimony to show that the ground was frozen the last January, or that it was not frozen the last August. Seedling fruit trees do not generally bear fruit of the best quality; and without any testimony of witnesses as to the product of a particular seedling, a jury would be authorized to presume the fact. In such cases the absence of testimony tending to show an exception, may be satisfactory evidence tending to show the operation of the known general rule. The inference drawn by the jury from the absence of particular testimony is a presumption of fact. But many such presumptions have been unnecessarily promulgated by the court, and improperly called presumptions of law, — the court having a great advantage of position in encroaching upon the province of the jury. The presumption of sanity is not an artificial or legal presumption, but a natural inference of fact to be made by a jury from the absence of evidence to show that a party did not enjoy that soundness which experience proves to be the general condition of the human mind.[3] The State has no more need of a legal presumption of sanity than the defendant has of a presumption of innocence."

§ 56. **New York.** — In *O'Brien* v. *People*,[4] the court refused to charge the jury that "where insanity is interposed as a defence, the affirmative of the issue is with the People, and they must establish the sanity of the prisoner at the time of the commission of the alleged crime by a preponderance of the evidence." In *Brotherton* v. *People*,[5] the Court of Appeals said: "Crime can be committed only by human beings who are in a condition to be responsible for their acts; and upon this general proposition the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence, a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved *prima facie*. Whoever denies this, or interposes a defence based upon its untruth, must prove it; the burden, not of the general issue of crime by a competent person, but the burden of overthrowing the presumption of sanity, and showing insanity, is upon the person who alleges it; and if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts, and upon this question the presumption of sanity and the evidence are all to be considered; and the prosecutor holds the

[1] R. *v.* Burdett, 4 B. & Ald. 121; R. *v.* Rosser, 7 C. & P. 648; Ottawa *v.* Graham, 28 Ill. 73.
Ante, p. 431.

[3] Sutton *v.* Sadler, 3 C. B. (N. S.) 87, 96.
[4] 48 Barb. 274 (1867).
[5] 75 N. Y. 159 (1878).

Notes.

affirmative, and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt and to an aquittal. The question may be stated in a variety of language. There is no rigid rule prescribing the particular terms to be employed, if the substance of the rule is preserved. The judge in this case, among many others not criticised, used this expression: 'The allegation of insanity is an affirmative issue which the defendant is bound to prove, and you must be satisfied from the testimony introduced by him that he was insane.' And he also charged that, 'if there is a well founded doubt whether this man was insane at the time he fired the pistol, you will acquit him.' Take the two paragraphs of the charge together, there was no error. The prisoner was bound to prove that he was not sane; and whether insanity is called an affirmative issue, or it is stated that the burden of proof of insanity is upon the prisoner, in order to overcome the presumption of sanity, is not very material, if the jury are told, as they were in this case, that a reasonable doubt upon that question entitled the prisoner to an acquittal. The jury could not have misunderstood their duty under these instructions, nor have been misled by them, and if an exception had been taken it must have been overruled." In *Wagner* v. *People*,[1] the court was asked to charge that, "where the evidence establishes an hypothesis consistent with the prisoner's insane state of mind, it is the duty of the jury to adopt that hypothesis in accounting for the killing." To which the court responded: "Of course that is so, if you have any doubts as to the degree of the offence committed." The prisoner, who was being tried for the murder of his wife, was convicted and sentenced to death. On appeal, the judgment was affirmed. "What was meant precisely by this request," said Hunt, J., "it is difficult to comprehend. The case is probably imperfect, as the answer is not entirely responsive to the proposition. It was probably intended to request a charge that, where the evidence established 'a state of facts' consistent with the prisoner's insane condition of mind, it was the duty of the jury to give the prisoner the benefit of that evidence, or give due weight to these facts in accounting for the killing. If so, the request in the abstract was correct and the proposition implied was reasonable. It was quite unimportant, however, in the present case, for two reasons: First, the court had already, with great clearness and accuracy, laid down the law upon the subject of insanity. Among other statements, the judge had used this language to the jury: 'Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts. When the question of insanity is presented upon the evidence, the prisoner is entitled to the benefit of any doubt which may arise upon the question; that is, the jury must be satisfied, beyond all reasonable doubt, that he was sane when he committed the act; but if the jury are satisfied, beyond the reasonable doubt, that the prisoner knew that the nature and quality of the act he was doing was wrong, the law holds him responsible. I have been requested to charge you that, if the prisoner committed the act in a moment of frenzy he cannot be convicted of murder in the first degree. I not only charge that proposition, but if his mind was in that condition he cannot be convicted of any offence. The true test for respon-

[1] 4 Abb. App. Dec. 509.

Rule in New York and Tennessee.

sibility for acts committed is commonly known as the test of right and wrong. If the jury are satisfied that the prisoner knew the difference between right and wrong, in regard to the particular act in question, then the law holds him responsible for his act. If they are not so satisfied, of course it would be their duty to acquit him absolutely.' This, I think, gave the prisoner the full benefit of the law, as embraced in his special request as intended to have been made. But again, the charge of the judge on this point, and his answer to the special request, in detail and its entire scope, were gratuitous and beyond the rights of the prisoner. The testimony in the case does not furnish a single fact, idea, or suggestion on which a claim of insanity can be based. The evidence discloses that on July 22d the prisoner had been engaged at his work, and in the after part of the day went into the room where his wife was staying. After the lapse of a short period of time, shrieks and screams were heard, the bystanders rushed in and found the prisoner in the act of taking the life of his wife. She was upon the floor, the prisoner standing or kneeling above her, inflicting frequent blows with a hatchet, which he left imbedded in her brain. He fled a short distance, was pursued, arrested, and when asked why he had committed such a deed, simply answered that he had a cause for it. This is the whole of the evidence on this point. We know nothing of the provocation to the deed, real or imaginary. We are ignorant of what took place at the last fatal interview. We only know the result. The prisoner was not greatly excited. He gave no evidence then, or before, or since of any aberration of mind, or even of eccentricity. He was an ordinary unmarked man, exhibiting the usual evidence of capacity and of sanity, with no evidence of delusion, of delirium, or of ignorance of his moral or social duties. He simply murdered his wife, cruelly, brutally and remorselessly. The fact that he had been previously a man of good character formed no defence to the act, and furnished no evidence of insanity. The case called for no charge on the subject of insanity, and no exception lies for the want of it.[1] The judgment of the court below should be affirmed, and the record remitted to the Supreme Court for further proceedings."

But the doubt which existed in this State by the uncertain and conflicting rulings on this question[2] was effectually put to rest by the recent decision of the Court of Appeals, in *O'Connell* v. *People*,[3] In that case it is said that the prosecution must satisfy the jury "upon the whole evidence that the prisoner was mentally responsible; for the affirmation of the issue tendered by the indictment remained with the prosecution to the end of the trial." The presumption of sanity stands until repelled. If the prisoner gives no evidence as to his insanity, the presumption stands, but if he gives evidence tending to overthrow the presumption the prosecution must produce answering testimony.

§ 57. **Tennessee.** — In Tennessee, sanity when questioned by evidence, must be proved beyond a reasonable doubt by the State.[4]

1 See Willis *v.* People, 32 N. Y. 715.

2 See Lake *v.* People, 1 Park. 495 (1854); People *v.* McCann, 3 Park. 272 (1857), reversed in People *v.* McCann, 16 N. Y. 58 (1857); Moett *v.* People, 85 N. Y. 373.

3 87 N. Y. 380.

4 Lawless *v.* State, 4 Lea, 179 (1879); Dove *v.* State, 3 Heisk. 348 (1872).

Notes.

§ 58. **Texas.** — In a case in the Court of Appeals of this State it was said: "We do not deem it necessary or incumbent upon us to unravel or attempt to answer the misty mazes and the metaphysical disquisitions indulged by the opposing theorists about sanity being essential to criminal intent, and criminal intent being essential to punishable crime, nor their equally abstruse and obscure views as to which side has the burden of proof when the sanity of the defendant, from whatever cause, acquires a *status* in the case." The court held that "the evidence of insanity, to warrant an acquittal, should be sufficiently clear to convince the minds and consciences of the jury."[1] But in a more recent case it is laid down that the burden is on the prisoner in such cases to establish his insanity by a preponderance of the evidence.[2]

[1] Webb *v.* State, 9 Tex. App. 490 (1880); King *v.* State, *Id.* 553; Johnson *v.* State, 10 *Id.* 577 (1881); Clark *v.* State, 8 *Id.* 350 (1880); Carter *v.* State, 12 Tex. 500 (1854).

[2] Jones *v.* State, 13 Tex. App. 1 (1882).

CHAPTER III.

DRUNKENNESS.

DRUNKENNESS NO EXCUSE — BURDEN OF PROOF.

McKenzie *v.* State.

[26 Ark. 335.]

In the Supreme Court of Arkansas, December Term, 1870.

Hon. W. W. Wilshire, *Chief Justice.*
" Lafayette Gregg,
" William M. Harrison,
" Thomas M. Bowen,
" John McClure. } *Associate Justices.*

1. **Drunkenness is no Excuse for Crime.**
2. **The Burden of Proof** is on the prisoner who pleads insanity as a defence; and the jury are the judges of the weight of the testimony adduced thereon.

Appeal from Sebastian Circuit Court.

Du Val & King, for appellant, *Montgomery*, Attorney-general, for appellee.

Gregg, J. —

(Omitting rulings on other points.)

The second ground is, that the finding of the jury was not warranted by the evidence, the substance of which follows: —

John Speet testified that he came to Noble's brewery, in Fort Smith, and McKenzie, the appellant, and Brown, the deceased, were sitting near each other at the door of the Brewery. Brown said to McKenzie, "let us go home." McKenzie called him a d—d son of a bitch, and told him to kiss (an indecent part of his person). Brown then said, "I do not wear any pistol." McKenzie said, "You are not able to wear any such things." McKenzie then put on his shoes and got up from his seat inside the door, stepped back about two steps, raised his coat, drew a revolver from his side, and said, "You d—d son of a bitch, don't bother me any more," and shot Brown, who fell. Brown was then about three steps outside the door. Mrs. Noble testified that as soon as the pistol fired, she went into the brewery and saw the man in the back room with a pistol in his hand, and saw the man lying dead out at the

door. Frank Wesley testified that he was near the brewery; saw Brown standing, and saw him fall and die, about three steps out of the door; did not see McKenzie any more until an officer had arrested him. Mrs. Brown testified that she saw the accused and her husband, the deceased, on the 17th of June, 1867, near Fort Smith, on the Van Buren road, and in about three hours thereafter she saw the body of the deceased lying near Noble's brewery; that on the morning of the same day, she heard the accused tell deceased that he would kill him that day; that the accused then had no pistol, but half an hour afterwards she saw him with a pistol and lead in his hand; that she and others came to town with accused and deceased, in a wagon, soon after dinner; she knew of no difficulty between the accused and deceased; they talked together on the road; the accused told deceased to shut his mouth, that he knew nothing, but she supposed they were joking. Crawford testified that he knew the accused and deceased; saw them at Fishback's farm, where they lived, in the forenoon; they were playing, slapping each other and running around, and he heard the accused say, "I will kill you before night." McKenzie seemed to be drunk; saw him with a pistol; they started to town soon after dinner; in the evening he heard that Brown had been killed. Other witnesses testified as to the killing, the wound, etc.; but the most material, for the prosecution, was the above alluded to. All the witnesses showed that they knew of no previous quarrel between the parties.

The defendant introduced several witnesses. The first testified that the appellant was of singular habits of mind; another said he regarded him as very much broken down, physically and mentally; had not considered him in his right mind for ninety days, and not more responsible than a lunatic; that when drunk he is different from other persons; never heard him say anything angry or vicious; he seemed prostrated; he went with one Taylor, and they were up much night and day. The next witness testified that he was a graduate of Maryland University, and had practised medicine for twenty years; had for several months known the accused, and he had concluded he was simple-minded; and if talking to medical men, he would call him insane — not in the full sense of that term; he was of the opinion he was imbecile to such an extent as at times to render him unconscious of any act, and that this imbecility was increased by the excessive use of intoxicating drinks; he was of opinion the accused would generally know the difference between right and wrong, and would be responsible for his acts; but it is probable, in his case, that the use of intoxicating drinks to any great extent would render him totally insane. The next witness said he

had practised medicine, etc., seventeen years, and had known the accused six months, and he was of the opinion his mind was very much impaired from some bad habits, or the commission of some crime, that had preyed upon his mind, so as to produce mental imbecility; and that that would be greatly increased by excessive use of strong drink. The next testified, that he had seen freaks in the accused that made him think that he was not a man of sound mind; and again, he had thought him a very intelligent man; he is a man of no sense when on a spree, no reason or control of himself when under the influence of liquor; he saw him once when he was putting a band on a gutter, and told him he was not putting it on very straight; he made no reply, but picked it up and kissed it; and that witness went and told the foreman that he was "a perfect luna." This was in March, 1867; the accused said but little when sober, and at such times he considered that he would know right from wrong. Jackson Brooks testified that he saw the accused at the brewery; he was about the bar pretty much all day, and he saw him drinking "right smart;" thinks he was sober in the morning, but about three o'clock he was pretty tight; this was the 17th of June, 1867. The next witness said, he came to town with the accused, and he took a glass of beer at the "Last Chance," and again drank at the brewery, and was pretty drunk; this was the only time he ever saw him drunk. The State then introduced a witness, who said he had for several months known the accused, and regarded him not very bright — hardly medium sense. The next witness said he and the accused were both carpenters, and worked together in the government shop; had known him since December, 1866; was foreman over him, and could not say he ever thought he wanted sense; he was a good man and a good mechanic; that he knew the witness who said he told him, as foreman, that the accused was a "perfect luna," and did not remember of his ever having such talk to him. The next witness said the accused had worked for him a month and a half, and he thought him an ordinarily sensible man. The next witness said he was a carpenter; had frequently seen the accused; worked in the shop with him, and never saw anything in him that indicated insanity. The next witness stated the same. The next said he had been with the accused every day for two weeks before the killing, and saw no evidence of insanity. The widow of the deceased then testified that she had never seen any indications of the accused being insane, and that about a week before the killing she heard the accused say, if he were to commit murder he would claim to be insane, and when he got out of it he would be as smart as any of them.

We have thus, at length, referred to the substance of the evidence, because the principal question here presented is as to the sufficiency of this evidence to sustain the verdict of murder in the first degree. The rule is well understood that where the State proves beyond a reasonable doubt that the accused perpetrated the murder by lying in wait, or by other kind of wilful, deliberate, malicious, and premeditated killing, it is murder in the first degree. The intention is manifested by the circumstances connected with the act of killing. Express malice is that which is capable of proof, and malice is implied when no considerable provocation appears, or when all the circumstances of the killing manifest an abandoned and wicked disposition, and this court has decided that the length of time is not material, so that the killing was the result of a wilful, corrupt, and malicious intent to take life; a design thus formed before the act of killing is sufficient.[1]

There can be no question, leaving the insanity out of view, but that the evidence here shows a wilful, intentional killing, and not only a want of considerable provocation, but without the slightest provocation. Take the entire testimony, and there is not the slightest word or act from the deceased towards him, in any way calculated to injure him or arouse his passions. On the other hand, there is some evidence going to show that he, before and at the time of the killing, was haboring malice toward the deceased. A settled intent to commit the most diabolical crimes may, and often does, remain secret until an opportunity offers to carry the wicked purpose into effect. And by concealing the malice, and cause of ill-will that exists, a wicked one can better hope to accomplish his purpose and escape punishment; hence it is wise for the law to presume that every one intends the first and natural consequences of his act.

In this case two witnesses testify to threats made on the morning before the killing. One of these same witnesses testified that a week before the accused declared what he would do in case he should commit murder, and the fact of his preparing himself with a deadly weapon, immediately after making the threats, his impolitic, if not insulting, words while going to Fort Smith, and the unprovoked attack and killing of the deceased, certainly well justified the jury in finding that the killing was wilful, malicious, and premeditated.

To refute this very violent presumption against him, the prisoner attempted to set up that he was then insane, and not conscious of the act he did.

1 Bivens v. State, 11 Ark. 460, Burgess v. Com., Va. Cases, 483, and 6 Rand. (Va.) 121.

Drunkenness no Defence.

The legal presumption is in favor of sanity, and that the party intended to do what was the natural consequence of his act, and if he made no denial of the killing, but assumed that he was excusable, he thereby took the burden of proof; and if he failed to produce evidence sufficient to change the presumption raised against him by the proof of the killing, the penalty of the law would be legally adjudged against him, and the jury is the only proper tribunal to determine the weight of the evidence, and this verdict was not a finding without evidence.

It was by the physicians and some others testified that the accused was imbecile — a man of weak mind, and liable to be much affected from excessive use of strong drink; but while this may have been probable, even if it had been most likely, it is by no means conclusively shown that such result, as an excusable insanity, would follow from the free use of intoxicating liquors; and in that conflict of evidence the jury alone could determine.

If it had been shown that drunkenness would necessarily produce insanity in the accused, the proof is by no means conclusive that at the time of the killing he had been laboring under the influence of ardent spirits long enough or to an extent sufficient to produce that insanity. One witness spoke of his drinking some the day before the killing. Another supposed he was drinking in the morning before the killing in the afternoon; but one who had been with him for two weeks, except the previous day, said he was sober for that whole time, Different other witnesses testified that he was sober in the forenoon of that day and when he came to town. Brooks testified that he, at the time of the killing, was drunk, or as he termed it, "pretty tight;" that he had seen him about the brewery *nearly all day*, and had seen him drink. This statement is not well sustained by other witnesses. It was shown by a number of them that he did not come to town until afternoon, and that the killing was about three o'clock, and this made it quite clear that he was not there, *nearly all day*, and that Brooks did not fairly state the facts. Except a glass of beer no one else testified that he had been drinking after coming to town.

To place no stress upon the evidence tending to show he was sane, and if not at the time, up to near the time of killing, and we do not see how the jury on either point, — being drunk, or being insane, if drunk, — could well have found in the accused's favor; and would it not endanger the rights of society beyond what the law will allow, to hold that any one who voluntarily beclouds his mind with intoxi-

cating drinks may thereby be excused in taking the life of an innocent man? [1]

* * * * * * * * * * * * *

The testimony shows a most wanton and unnecessary killing of a fellow-man, and while his attempt to prove his own insanity at the time of the killing was such as may have afforded him a hope of acquittal, yet it was strongly rebutted, so much so as to remove any doubt that might have been raised as to his criminal intent and responsibility, and the jury having so decided, the judgment and the sentence of the court below must be, and the same is in all things, affirmed.

Affirmed.

DRUNKENNESS — VOLUNTARY DRUNKENNESS NO EXCUSE — PARTICULAR RIGHT AND WRONG TEST — OINOMANIA — MORAL INSANITY — EVIDENCE — STATEMENTS OF PRISONER — REPUTATION — ORDER OF PROOF — EXPERTS — OPINIONS.

Choice *v.* State.

[31 Ga. 424.]

In the Supreme Court of Georgia, August Term, 1860.

Hon. Joseph H. Lumpkin, *Chief Justice.*
" Richard F. Lyon, } *Judges.*
" Charles J. Jenkins, }

1. **Insanity — Evidence — Statements of Prisoner.** — Where the defence to an indictment for murder is insanity, evidence of a subsequent conversation with the prisoner and of the tests made at that time, are not admissible to show his insanity.
2. **Order of Proof — Evidence of Malice in Rebuttal.** — Where the prosecution has proved a homicide, and the prisoner introduces evidence tending to show his insanity, the prosecution may, in rebuttal, offer evidence of express malice.
3. **Evidence of Non-Experts.** — The opinions of persons not experts as to the sanity of the prisoner are admissible, if accompanied by the facts upon which they are founded.
4. **The Opinions of Witnesses,** that the prisoner appeared to be drinking are admissible.
5. **The Opinions of Physicians** as to the sanity of the prisoner on facts hypothetically stated are admissible.
6. **Evidence of Insanity by Reputation.** — The insanity of the prisoner cannot be shown by evidence of reputation.
7. **Intoxication — No Defence When Voluntary.** — If a man's mind, unexcited by liquor, is capable of distinguishing between right and wrong, and he voluntarily deprives himself of reason by intoxication, such intoxication is no excuse for a crime committed in that condition.

1 See Bishop on Criminal Law, Vol. 1, sects. 434 and 499, and note 1.

Syllabus.

8. —— **Same.** — Nor does it make any difference that a man, either by a former injury to the head or brain, or a constitutional infirmity, is more apt to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, he is responsible for his acts while in that condition.

9. **An inordinate thirst for liquor,** produced by the habit of drinking, is no excuse for the consequences of such indulgence. The disease called *oinomania* questioned.

10. **Moral Insanity** or irresponsibility for crime from inability to control the will from the habit of indulgence, has no foundation in the law.

11. **Test of Insanity — Particular Right and Wrong Test.** — If a man has capacity enough to distinguish between the right and wrong of his act, he is a subject for punishment.

Indictment for murder in Fulton Superior Court. Tried before Judge BULL at the October term, 1859, on an indictment found in the previous April term, charging William A. Choice with the murder of Calvin Welsh. The jury returned a verdict of guilty. The prisoner appealed.

B. H. Hill, *A. R. Wright*, and *Calhoun & Son*, for the appellant.

Thomas L. Cooper, Attorney-General, for the State.

LUMPKIN, C. J., delivered the opinion of the court:

To avoid being tedious I was strongly inclined to pass all the minor points in this case. They were not dwelt upon by the able counsel in the argument. On account of the importance of the case, however, I concluded that every assignment of error had best be noticed. I shall dispatch them with as much brevity as possible.

When the bill of exceptions was presented to Judge BULL for his signature, he made in his own handwriting, several corrections of the facts as therein stated. To these additions counsel for the plaintiff in error object; and it becomes necessary, therefore, to dispose of this preliminary point before proceeding further. After verdict, a rule *nisi* was moved for a new trial. The motion was ordered to be entered upon the minutes. Upon hearing the application, it was refused. It is now insisted that the rule *nisi*, by being placed upon the minutes, became a record, imparting absolute verity, and that it is not competent for the presiding judge to alter or modify the statement of the facts as set forth in the rule *nisi*, when he comes to certify subsequently to the bill of exceptions. Is this position tenable? The rule *nisi* was, upon the hearing, denied; perhaps partly because the statements in it were not true and consistent with what transpired on the trial; at any rate this is a sufficient reason for refusing such an application. The only effect of placing the motion upon the minutes was to show that such a motion had been made at that term of the court, and upon the grounds therein stated. That could not be controverted. But it did not concede that the facts therein stated were true.

Choice *v.* State.

1. It is complained that the court erred in refusing to allow the witness, Daniel S. Printup, to state in evidence the following facts: That a short time after the homicide was committed, he visited the prisoner, and for the purpose of testing his sanity, among other things, informed prisoner that it might be very important in his defence to know from whom he procured the pistol with which he shot deceased, for the two-fold purpose of proving by the person from whom he procured it, his condition of mind at the time; and also to show that the pistol was not the property of the prisoner; and it could not be ascertained from any other person from whom it was procured; and that he said nothing to the prisoner but what showed that it would be to his interest to disclose the fact if he knew it; when the prisoner replied, that he had no recollection whatever of having a pistol, nor any person from whom he could or did procure it; and had no recollection of shooting or even seeing the deceased. And also in refusing to allow said witness to state the means adopted by B. H. Hill to test the sanity of the prisoner at the time of committing the act, before he was employed to defend prisoner, and in refusing to allow the counsel to state before the court what facts he did propose to prove on this subject.

To this first ground of alleged error in the bill of exceptions the judge appends this note: "The counsel only offered to prove a conversation with the prisoner, by himself, some three months after the homicide." Let us look at this ground for a moment, apart from the qualifying statement added by the judge; if the prisoner were sane at the interview between Col. Printup and himself, and he is deserving of the reputation which he has always sustained, of being a young man of more than ordinary talents, it would have occurred to a much duller intellect, in the twinkling of an eye, to have feigned entire ignorance and forgetfulness of the whole transaction, as much more available to his defence than any information he could communicate upon the points to which his attention was directed.

What tests were applied by Mr. Hill, the powerful and indefatigable champion of the accused, we are not informed. We know that Mr. Hill does not profess to be an expert; and if he did, we are not aware that the law recognizes any such mode as the one pursued in this case for testing the sanity of culprits. It is not the conduct or declarations of the party, at the time of the act, which are sought to be proven as a part of the *res gestæ*, but matters transpiring subsequently. In the hands of honorable men — and the character of those concerned in this matter are above suspicion — a precedent like this might not be so mis-

Evidence in Rebuttal by State.

chievous. It is a practice, however, so liable to abuse that we think it safer to discourage an innovation. We were glad that no point was made in the argument upon the refusal of the court to allow counsel to state before the court, and, of course, in the hearing of the jury, what facts he did propose to prove as to the matter we have been discussing.

2. The second assignment of error is in the court's refusing to allow prisoner to prove that, owing to the diseased condition of prisoner's mind, the family and friends about Rome had long refused to allow him to have deadly weapons. To which the court adds: "I have no recollection of any offer to prove any control, or attempt to control, the defendant in carrying weapons, or any refusal to permit him to carry them. The witness did testify that the family had endeavored to prevent prisoner from carrying a pistol." As the presiding judge refuses to certify that the facts stated in the ground are true, it is needless to review it. It is a very immaterial matter at best. For what prudent family would not have dreaded to see deadly weapons in the hands or about the person of William A. Choice — one who, while in his cups, as all the proof demonstrates, was so dangerous to both friend and foe.

3. The third complaint is in allowing the State to prove, in rebuttal, by Luther J. Green, the difficulty between prisoner and deceased, the night before the homicide, as evidence of express malice, and in allowing the evidence of Thomas Gannon and Samuel Wallace to prove the same point. The State having proved the homicide closed, as the law would imply malice from the killing. To rebut this presumption, the plea of insanity was interposed, and a large amount of evidence adduced to support it. An insane person is not supposed to act from malice. Does it not weaken the force and effect of the prisoner's defence to show express malice? Who would not more readily believe that the prisoner was insane had he shot a friend or an indifferent person, as he frequently threatened to do, but as usual, failed or forbore, instead of one against whom he manifestly harbored a spirit of revenge for a supposed insult or injury? A drunken man rarely if ever shoots or stabs another, unless he cherishes some resentment towards him. It is quite otherwise with the insane. A drunken man reasons from correct data; whereas the insane draw right conclusions from false data. In this view of the testimony, it was strictly in rebuttal. But this question has been repeatedly decided by this court; that is, that the introduction of testimony, whether cumulative or in the rebuttal, or for any other purpose, is entirely within the discretion of the circuit courts. We said in one case, that in no case could we consent to reverse the circuit judge for letting in testimony which was relevant, at any

stage of the case.[1] In this last case the court say: "The State relied upon the facts first proven, as making out a clear case of malice, the malice ingredient being implied, as it clearly was reasonably to be implied from all the circumstances of the killing. The prisoner then put in evidence facts which went to some extent in rebutting the presumption of malice. The State then asked leave to strengthen its case by proving express malice; and it being granted, the prisoner excepted. I confess," says the learned judge who wrote out the opinion, "my inability to see upon what ground. Surely it is not necessary to discuss this point."

4. The next assignment is, that the court erred in allowing Luther J. Glenn and J. A. Hayden to give their opinions as to the sanity or insanity of the prisoner; and in allowing them to give their statements, that the prisoner was drinking, when such statements were made as conclusions, and not as facts. The judge subjoins a note to this exception to this effect: "I heard no objection to this testimony at the time it was given. The opinions of witnesses, other than experts, as to the question of the sanity or insanity of the defendant, was first introduced by defendant's counsel, and at their instance; and after objection made by the State's counsel, was admitted by the court with the distinct avowal, that as the question was somewhat unsettled, if the defendant's counsel insisted on it, the evidence would be admitted, with the condition, that the rule should work alike in favor of both sides; and the defendant's counsel expressly accepted the condition." Perhaps it would be better to dismiss this point without a word of comment. Unless the memory of the judge is greatly at fault, this ground should never have been incorporated in this bill of exceptions. When parties stipulate expressly with each other and with the court, that a certain course shall be pursued in the management of a cause, that agreement should be considered binding, more especially when the record shows, as it does most abundantly in this case, that the defendant has reaped the full benefit of the rule of evidence thus agreed to. Still that it may not be said that any injustice has happened or fallen to the accused for want of recollection in the presiding judge, I propose to examine this fourth ground to some extent. It has been the settled doctrine of this court, from its organization, that the opinions of witnesses, other than experts, are admissible as to matters of opinion, especially as it respects sanity or insanity, provided such opinions be accompanied by the facts

[1] Bryan v. Walker, 20 Ga. 480; Lumpkin v. Williams, 19 Ga. 569; Walker v. Walker, 14 Ga. 242; Bird v. State, *Id.* 43.

upon which they were founded.[1] Our books are full of precedents upon this point.

As for myself I would rely as implicitly upon the opinions of practical men, who form their belief from their observation of the appearance, conduct and conversation of a person, as I would upon the opinions of physicians who testify from facts proven by others, or the opinions even of the keepers of insane hospitals. But the question in all such cases is, not which is the most reliable evidence, but the inquiry is shall the witnesses be restricted, in their testimony, to a simple statement of facts coming within their knowledge, leaving the jury to draw an inference of sanity or insanity, or may the judgment of the witnesses, founded on opportunities of personal observation, be also laid before the jury, to assist them in forming a correct conclusion? One who has seen and conversed with an insane person, and observed his countenance and behavior has an impression made upon his mind which is incommunicable. This court is committed to the rule, that the jury, in such case is entitled to the benefit of this impression. It may be said that Col. Glenn's opportunity of observing and judging of the capacity of Choice was too limited. But it has been truly remarked that so different are the powers and habits of observation in different persons, that no general rule can be laid down as to what shall be deemed a sufficient opportunity for observation other than, in fact, it has enabled the observer to form a belief or judgment thereon. Col. Glenn had known prisoner for several years, though not intimately; had met with him in the last three days before his arrest by Webb; learned from him that he was about going to New York, having engaged to travel for a house in that city; always considered him sane, and a man of more than ordinary intelligence.

Before dismissing finally this fourth exception, upon which I am fully conscious of having occupied too much time already, I would suggest that it does not fairly represent the testimony of Glenn and Hayden. Their testimony, when taken altogether, is wholly unexceptionable, Glenn, for instance, says, "prisoner from his appearance had been drinking." And Hayden upon his cross-examination, swore that, "although he did not see Choice drinking, yet he judged, from his manner and appearance, that he had been drinking; had seen him frequently in that condition before." By reading the testimony, it will be seen that expressions similar to that excepted to abounds on every

[1] Potts *v.* House, 6 Ga. 324; Walker *v.* Walker, 14 Ga. 242; Bryan *v.* Walker, 20 Ga. 480; Goodwyn *v.* Goodwyn, 20 Ga. 600.

page of it. The witness Gregory says: "Saw prisoner a short time before he left Rome for Atlanta; had been drinking several days; does not know that he was drinking; was acting like a man who had been drinking." Again by the same: "Thought at the time he left Rome, the exciting cause of prisoner's insanity was liquor." Echols testified: "Prisoner appeared to be drinking; witness supposed him to be drunk." Bartlett sworn: "Did seem like a drunken man." After such expressions as these, selected almost at random from the answers of the prisoner's witnesses, it would seem rather captious to object to the statements of Glenn and Hayden that the prisoner "appeared to be drinking." Such impressions both in ordinary life and in the courts, convey to the mind, with sufficient certainty the condition of a person, so as to enable one to pronounce a decision thereon, with a reasonable assurance of its truth. Really no other rule is practicable. If the witness must be confined to a simple narration of facts; how the person leered or grinned, how he winked his eyes or squinted, how he wagged his head, etc., all of which drunken men do, you shut out, not only the ordinary, but the best mode of obtaining truth.

We reiterate then, what we have said from the first, — that, legally and philosophically considered, there is no merit in this objection. And in the case before us what benefit would it be to the cause of the accused to exclude this truth? Did not Choice himself state to D. H. Branan, when sober and sane, that, "he was drinking that night; that Webb knew that he was, and ought not to have treated him so?" Why I ask, should Mr. Webb know it, any more than Glenn and Hayden, except from his conduct and appearance? But all the proof shows that such was his condition the night before the homicide was committed.

5. In the next place, it is complained that when the State had closed its rebutting testimony, the defendant reintroduced Dr. H. W. Brown and Dr. W. F. Westmoreland to prove that the additional facts, proven in the rebutting testimony, did not change their opinions of the insanity of the prisoner at the time of the killing. Each witness stated that he did hear some of the witnesses in rebuttal; when the defendant moved these facts be read to them from the evidence as taken down, which the court would not allow to be done. To this assignment of error the court adds: "This motion was made as to Dr. Westmoreland, who stated that he was present while the witnesses were being examined, but did not hear all their testimony. I had, at the request of defendant's counsel, permitted portions of the testimony to be read over in the hearing of the medical witnesses as a foundation for their further examination; and refused to allow it, any further, stating that counsel might

state the facts hypothetically, and ask the witnesses' opinion on them." We understand the law to be this: Medical men are permitted to give their opinion as to the sane or insane state of a person's mind, not on their own observations only, but on the case itself, as proved by other witnesses on the trial. And while it is improper to ask an expert what is his opinion upon the case on trial, he may be asked his opinion upon a similar case hypothetically stated. And this the court expressly offered to permit the defendant's counsel to do. What more could be asked? The judge was not bound to read or suffer to be read, the testimony as taken down. He had already allowed this indulgence, at the request of the counsel; still it was a matter of favor and not of right.

I shall for the present, pretermit the sixth, seventh, eighth, ninth and tenth grounds of error, and consider them together hereafter, in connection with the fifteenth and sixteenth assignments.

6. The next error which I shall discuss, is the eleventh ground in the motion for a new trial; because the court charged the jury, that they should not find the prisoner guilty of any grade of homicide below murder, and that he was guilty of murder or not guilty at all. The ground is not correctly stated in the motion for a new trial, but differs in the material point from the charge as given to the jury; and this discrepancy illustrates the propriety of the view expressed in the beginning of this opinion upon the preliminary question. Judge BULL would have been justified in refusing the motion for a new trial upon this ground, because it does not state correctly his charge given. Instead of saying to the jury, by way of direction, that they should not find the prisoner guilty of any grade of homicide below murder, and that he was guilty of murder or not guilty at all, the charge was this: "There are several grades of homicide recognized by the law, involving different degrees of punishment; such as murder, voluntary and involuntary manslaughter, and justifiable homicide. The defendant in this case is indicted for murder, and in the opinion of the court there can be no intermediate verdict between that of guilty of murder, and that of not guilty; and it is, therefore, unnecessary to charge you on the minor grades of homicide." In the one case, his charge is in the form of a direction; in the other it is the expression of an opinion merely, and for that reason, declining to instruct the jury as to the minor grades of homicide, but at the same time leaving the jury untrammelled by his judicial fiat.

And we concur fully in opinion with the presiding judge, that the killing was murder, or excusable on account of the insanity of the ac-

cused. If Wm. A. Choice was sufficiently rational to be criminally responsible for his acts, the killing of Calvin Webb, was, in the eye of the law, murder without provocation, and without one mitigating circumstance; if insane, he was entitled to a verdict of acquittal; and there can be no intermediate ground. And for the court to have charged the jury as to manslaughter, would have been foreign from the case made by the pleadings and the proof. No such defence was set up for the accused; no such request was made of the court. In *Bond* v. *State*,[1] this court held, that it was not error to refuse or omit to give in charge to the jury portions of the Penal Code, which have no application to the issue submitted upon the pleadings and proof. And the court in that case say: "We ask what had the law of manslaughter to do with this case?" What a mockery and farce for the presiding judge to have instructed the jury as to involuntary manslaughter! And yet he is charged with "manifest error" in omitting to add this! He would have been guilty of manifest folly if he had. Had there been any evidence in the case before us, upon which the jury might have mitigated the offence from murder to a lower grade of homicide, it would have been different. There was not a scintilla of proof to that effect. Without the shadow of an excuse, Choice, with deliberate aim, shoots down an unoffending citizen, in the peace of the State. If the law is administered, his life must atone for it, if he be subject to punishment; if he be not, it is fit and proper that he go free altogether as would the infant and the idiot.

7. It is alleged as error in the court, that it refused to allow the defendant to prove by Printup, Hooper, and others the family and neighborhood reputation of prisoner, as injured permanently in his mind, by reason of the injury he had received. No authority is produced to justify the proof of a particular fact by general reputation — a fact, too, in which the public were not concerned. We know of no rule which would allow the introduction of this kind of hearsay testimony. In *Wright* v. *Tatham*,[2] the question was much discussed, whether letters addressed to a person whose sanity was in issue, were admissible to prove that he was treated as insane by the writers of the letters; and after undergoing several investigations before the Court of the King's Bench and Exchequer Chamber it was finally decided by a large majority of the House of Lords, that such letters were inadmissible, unless connected by proof with some act of the person implicated, in regard to the letters themselves or their contents.

[1] 17 Ga. 194.

[2] 1 Ad. & El. 3. 8.

Errors Alleged in Instruction of Court.

8. The sixth error alleged in the motion for a new trial, is because the judge failed to include in his charge to the jury, the law on the material facts proven in the evidence, and insisted on in the argument of counsel; and especially in failing to charge the jury whether the prisoner was or was not responsible for crime, if by reason of the injury to his brain or otherwise (mark that expression!) he was afflicted with the disease called oinomania, and by reason of this disease, was irresistibly impelled, by a will not his own, to drink; and being so impelled, did drink, and thus became insane from drink, and while thus insane, he committed homicide. The court also erred in not charging the jury, that if they believed the prisoner had suffered by injury or otherwise (mark that again), a pathological or organic change in the brain which produced the disease of oinomania, and by this disease was irresistibly impelled to drink liquor, and from the liquor thus drank became insane, and while thus insane, killed deceased, he was not guilty of murder. And —

Seventhly, because the court erred in charging the jury, that if the prisoner labored under a disease of the brain, which did not render him insane, but notwithstanding the disease, knew right from wrong when sober, and then drank liquor, which produced madness or insanity, and killed the deceased, he was not guilty of murder.

Eighthly, because the court erred in refusing to charge the jury, in language or substance, as requested by defendant's counsel, in writing as follows: If the jury believe that prisoner was insane when he left Rome and came to Atlanta, and continued insane until he killed deceased, the fact that he drank liquor in the meantime cannot render him liable, but he must be acquitted of murder.

Ninthly, because the court erred in charging the jury that insanity produced proximately by drunkenness is no excuse for crime.

Tenthly, because the court erred in charging the jury that insanity was an excuse, unless such insanity was produced by liquor.

Fifteenthly, because the court erred in submitting to the jury the question of drunkenness, as explanatory of his conduct at the time of the homicide; and that the defendant could not protect himself from the responsibility of one crime, when committed during insanity produced by another crime voluntarily assumed. And —

Sixteenthly, because the charge of the court, as a whole, and in each part, was error, in that it submitted to the jury questions not made by the issues and the facts, and did not submit to the jury the questions made by the issues and the facts.

Now, what is substantially the response of Judge BULL to all this? "I will not, gentlemen of the jury, confuse you or myself by attempting to notice all these learned distinctions. The simple rule laid down by the law is, that if a man has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act in question; if he has knowledge and consciousness that the act he is doing is wrong, and will deserve punishment, he is, in the eye of the law, of sound mind and memory, and consequently the subject of punishment. For the Code declares that a person shall be considered of sound mind who is not an idiot, a lunatic, or affected by insanity; or who hath arrived at the age of fourteen years, or before that age, if such person knew the distinction between good and evil. But, though it is the general rule, that insanity is an excuse, there is an exception to this rule, and that is when the crime is committed by a party in a fit of intoxication, though the party may be as effectually bereft of his reason by drunkenness as by insanity produced by any other cause. For drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, artifice or contrivance of another. Nor does it make any difference, that a man by constitutional infirmity, or by accidental injury to the head or brain, is more liable to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, he is responsible for his acts in that condition. But if a man is insane when sober, the fact that he increased the insanity by the superadded excitement of liquor, makes no difference. An insane person is irresponsible, whether drunk or sober."

I pause to remark how fully does this concluding proposition meet the eighth ground of alleged error in the motion for a new trial, to-wit: that if the jury believed that Choice was insane, when he left Rome and came to Atlanta, and until he killed deceased, then the fact that he drank liquor in the meantime cannot render him liable, but he must be acquitted of murder. Certainly, responds the judge; for an insane man is irresponsible, whether drunk or sober?

But to proceed with the charge: "These are rules for determining the question of insanity and the degree and nature of irresponsibility to the law. The law presumes every man of sound mind till the contrary appears, and the burden of proof is on the defendant, that at the time of the commission of the act, he was not of sound mind. And it ought to be made to appear to a reasonable certainty, to your reasonable satisfaction, that at the time of the commission of the act, the party did not know the nature and quality of the act, or if he did, did not know

Admirable discussion by Lumpkin, C. J.

the act was wrong; and it devolves upon you to decide whether the defendant has by proof rebutted this legal presumption of sanity. If, after mature deliberation, you are satisfied beyond a doubt, that the prisoner is guilty, you will find so; if not, you will find him not guilty."

Would that I could transcribe this admirable charge entire. For, in our judgment, it submits to the jury, full and fairly the law upon the only questions made by the issues and the facts in this case.

Whether any one is born with an irresistible desire to drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself I capitally doubt whether it ever can be. And if it were, how far this crazy desire for liquor would excuse from crime, it is not for me to say. That this controlling thirst for liquor may be acquired by the force of habit, until it becomes a sort of second nature, in common language, I entertain no doubt. Whether even a long course of indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition, however, I plant myself immovably; and from it nothing can dislodge me but an act of the Legislature, namely: that neither moral nor legal responsibility can be avoided in this way. This is a new principle sought to be engrafted upon criminal jurisprudence. It is neither more nor less than this, that a want of will and conscience to do right will constitute an excuse for the commission of crime; and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrong doing. If this doctrine be true, — I speak it with all seriousness, — the devil is the most irresponsible being in the universe. For, from his inveterate hostility to the author of all good, no other creature has less power than Satan to do right. The burglar and the pirate may indulge in robbing and murder, until it is as hard for an Ethiopian to change his skin, as for them to cease to do evil; but the inability of Satan to control his will, to do right, is far beyond theirs; and yet, our faith assures us that the fate of Satan is unalterably and eternally fixed in the prison-house of God's enemies. The fact is, responsibility depends upon the possession of will, not the power over it. Nor does the most desperate drunkard, lose the power to control his will, but he loses the desire to control it. No matter how deep his degradation, the drunkard uses his will, when he takes his cup. It is for the pleasure of the relief of the draught that he takes it. His intellect, his appetite and his will, all work rationally, if not wisely, in his guilty indulgence, and were you to exonerate the inebriate from responsibility, you would do violence both to his consciousness and to his conscience; for he not only feels the self-

prompted use of every rational power, involved in accountability, but he feels also, precisely what this new philosophy denies, — his solemn and actual wrong-doing, in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity, — just compose him, so as to reach his clear, constant experience, and he will confess that he realizes the guilt, and therefore the responsibility of his conduct. A creature made responsible by God, never loses his responsibility, save by some sort of insanity. There have always existed amongst men a variety of cases, wherein the will of the transgressor is universally admitted to have little or no power to dictate a return to virtue. But mankind have never, in any age of the world, exonerated the party from responsibility, except when they were considered to have lost rectitude of intellect by direct mental alienation.

Mr. M. N. Bartlett testified that prisoner after one of his sprees, would swear that he would quit drinking, and he stated to Mr. Wilkes, that vicious associations would lead young men to drink; and he thought there was no security where a young man took to his cups. Here was both consciousness and conscience. He did not seek to shield himself from responsibility, because he had lost the power to control his will, any more than David did from the crime of "blood-guiltiness," because overpowered by his lust, he had caused the life of Uriah to be sacrificed in order that he might possess himself of his beautiful wife.

On the trial of *Kleim*, before Judge Edwards, of spiritual rapping notoriety, in 1845, we find the first clear legal recognition of this moral insanity doctrine — a doctrine which destroys all responsibility to human and divine law; and one originating, as I verily believe, in an utter misconception of man's moral and physical nature; an offshoot from that Bohon Upas of humanism, which has so pervaded and poisoned the Northern mind of this country, and which, I fear, will cause the glorious sun of our Union to sink soon in the sea of fratricidal blood! And this is the doctrine which is intended to be covered by the term "or otherwise" twice repeated in the sixth ground of the motion for a new trial, and to which attention was directed by the words in parenthesis, in copying that ground. Had the court been requested, in writing, to give charges upon this doctrine favorable to the prisoner he ought to have declined. For in the judgment of this court no such principle has been recognized in criminal law, whatever may be the opinion of medical writers and others upon the subject.

When Choice killed Webb, he was sober, or drunk, or insane. If he was sober, or the homicide was committed in a mere fit of drunkenness,

Less Required in Former Case.

which is no excuse for crime, in either of these events, the offence was confessedly murder. But his defence is, that he was insane. It, then, becomes important to inquire, what was the degree of insanity under which he labored? For the law, acting upon the assumption, perhaps, that all men are more or less insane, and that it is a question of degree only, has established a standard or test by which courts are to be governed in the trial of criminal cases.

Judge BULL charged the jury that the rule was this: that "if a man has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act in question; if he has knowledge and consciousness, that the act he is doing is wrong, and will deserve punishment, he is in the eye of the law, of sound mind and memory," and, therefore criminally responsible for his acts. Did he state the rule correctly? This must be decided by authority — to which I must say, very little reference has been made in the argument — and not by the speculations of Ray and Winslow, Bucknill and Tuke, and other medical writers, however ingenious they may be.

And it is worthy of notice that a less degree of capacity is required in criminal cases than in civil contracts. It may be an anomaly, still, this difference was distinctly maintained in *Bellingham's Case*, who was tried for the murder of the Hon. Spencer Percival, in 1812, and was convicted; by Lord ERSKINE on the trial of *Hadfield* for shooting at the King in 1800, Indeed the amount of capacity which would make one responsible for criminal conduct, would stop far short of binding him upon a civil contract.

Lord HALE, in his Pleas of the Crown,[1] says: "There is a partial insanity and a total insanity. Some persons that have a competent reason, in respect to some subjects, are yet under a peculiar dementia in respect to some particular discourses, subjects or applications; or else it is partial in respect to degrees; and this is the condition of every man, especially melancholy persons who, for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in committing any offence, for its matter capital; for doubtless, most persons that are felons of themselves and others, are under a degree of partial insanity, when they commit these offences. It is very difficult to define the invisible line that divides perfect and partial insanity, but it must rest upon circumstances, duly to be weighed and considered by the judge and jury; lest on the one side there be a kind

[1] p. 30.

of inhumanity towards the defects of human nature, or on the other, too great an indulgence given to great crimes. Such a person, as laboring under melancholy distempers, hath yet, ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."

Arnold was tried in 1728 [1] for shooting at Lord Onslow. In this case, Mr. Justice TRACY laid down the rule to be "that it is not any kind of frantic humor, or something unaccountable in a man's actions that points him out to be such a madman, as is exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant — than a brute or a wild beast."

The trial of *Hadfield* took place in the King's Bench before Lord KENYON in 1800, and is fully reported in 27 Howell's State Trials.[2] Some of the grounds occupied by Lord ERSKINE, and in which the court acquiesced, were substantially:

"That it is unnecessary that reason should be entirely subverted or driven from her seat, but that it is sufficient, if distraction sits upon it, along with her, hold her trembling hand upon it, and frightens her from her propriety; that there is a difference between civil and criminal responsibility; that a man affected by insanity is responsible for his criminal acts, where he is not for his civil; that a total deprivation of memory and understanding is not requisite to constitute insanity."

In *Bellingham's Case*, to which I have already alluded, and which is reported in 1 Collinson on Lunacy,[3] tried in 1812, Lord MANSFIELD, charged the jury that "the single question for them to determine was, whether when he committed the offence charged upon him he had sufficient understanding to distinguish good from evil, right from wrong; and that murder was a crime, not only against the law of God, but against the law of his country." The defendant was convicted and executed, notwithstanding he labored under many insane delusions, as the facts in the case show. He determined to assassinate the premier, that he might thus secure an opportunity of bringing his imaginary grievances before the country, and obtain a triumph over the attorney-general. And the test applied in this case by Lord MANSFIELD, of the power of distinguishing right from wrong, has ever since been adopted as the only one to mark the line between sanity and insanity, responsibility and irresponsibility.

[1] 8 Hargrave's State Trials, 322. [2] p. 1218. [3] p. 650.

The English Cases Reviewed.

Mr. Justice Le Blanc, reiterated the test prescribed by Lord Mansfield, in *King* v. *Bowler*.[1] Lord Lyndhurst did the same thing in the late case of *King* v. *Offord*,[2] and in the still more recent case of *Green Smith*,[3] occurring in 1837, Mr. Justice Parke told the jury that as regards the effect of insanity or responsibility for crime "it is merely necessary that the party should have sufficient knowledge and reason to discriminate between right and wrong." With one other citation, I shall conclude this branch of the discussion.

In 1843, took place the trial of *McNaghten* for killing Drummond, which excited through England a great degree of interest. Lord Chief Justice Tindall in this case instructed the jury that, before convicting the prisoner, they must be satisfied that when committing the criminal act he had that competent use of his understanding as that he was doing a wicked and wrong thing; that he was sensible it was a violation of the law of God and man. This trial occasioned the submitting of certain questions, by the House of Lords, to fifteen judges (that being the number, instead of twelve as formerly) with a view to eliciting their opinions in regard to criminal responsibility. Those questions and answers were designed to settle the law of England on the subject.

Question 1: What is the law respecting alleged crimes, committed by persons afflicted with insane delusions, with respect to one or more particular subjects or persons; as for instance, when at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with the view and under the influence of some insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit? Answer: The opinion of the judges was that, notwithstanding the party committed a wrong act while laboring under the idea that he was redressing a supposed grievance or injury, or under the impression of obtaining some public or private benefit, he was liable to punishment. Question 2: What are the proper questions to be submitted to the jury when a person alleged to be affected with insane delusions, respecting one or more particular subjects or persons, is charged with the commission of a crime — murder, for example — and insanity is set up as a defence? Answer: Before a plea of insanity should be allowed, undoubted evidence ought to be adduced that the accused was of diseased mind, and that at the time he committed the act he was not conscious of right and wrong. Every person was supposed to know what the law was, and, therefore, nothing could justify

[1] 1 Collinson on Lunacy, 673.
[2] 5 C. & P. 168.
[3] See statement of the case in Taylor, 513.

a wrong act except it was clearly proved that the party did not know right from wrong. Question 3: If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused? Answer: If the delusion were only partial, the party accused was equally liable with a person of sane mind. If the accused killed another in self-defence, he would be entitled to an acquittal; but if the crime were committed for any supposed injury he would be liable to the punishment awarded by the laws to his crime.

The charge of the court, then, tested by a full review of the English cases from Lord HALE to the present time, and with which all the best considered American cases agree, is fully sustained. And humanitarians should deliberate maturely before they lend their aid to break down a rule which has received the sanction and approbation of the wise and good for centuries. One other point and we are done. Was the verdict of the jury contrary to the evidence?

9. Under the act of 1853–54, it is not only the privilege, but made the imperative duty of this court, to express an opinion upon the testimony in this case, because several of the grounds in the motion for a new trial are, that the verdict was contrary to and decidedly against the weight of the evidence. I have carefully examined the evidence again and again, and speaking, as it were, from the jury-box, rather than the bench, I will state succinctly the conclusions at which I have arrived: The proof has utterly failed to establish that, apart from liquor, the accident of 1850 has inflicted any permanent injury upon the brain of the accused. During the eight years which intervened between the accident of 1850 and the homicide, where was William A. Choice, and what was his manner of life? He was no recluse, but from his education, social position, and employments, he mingled much in society. He had been a clerk at Milledgeville; and Dr. Gordon, in his testimony, states as a reason why he noticed him while there, was that he had often heard him spoken of as a man of a high order of talents, and that his prospects were bright for making a star comedian. Having heard such reports often, and also having seen his name favorably spoken of by the press, he was induced to examine him critically. There were, perhaps, few men of his age more generally known. Where are all his acquaintances — the cloud of witnesses that might have been brought forward to testify to his insanity? Not to distinct facts, these might have been forgotten; but who would state that they had known him for years, that they had repeatedly conversed with him, and heard others converse with him, that apart from the influence of liquor and when entirely sober, they had noticed in these conversations that he was inco-

herent and silly; that when wholly free from the use of stimulants, he was wild, irrational, and crazy. Some few, it is true, have spoken; but where are the five hundred who keep back? On the contrary, you are met at every step in the evidence with such expressions as the following: "Think prisoner was drunk at the time of the difficulty in the bar-room." "Has known Choice intimately for several years, and considers him a man of promise and talent, but subject to eccentricities — never seen him when he considered him insane; witness thinks him, when drinking, the most dangerous man he ever saw. Has never seen him, only when under the influence of liquor, insane." "Mr. Choice is a very violent man when drinking." "When prisoner threatened to kill witness, three or four years ago, he had been drinking at the time — when under the influence of liquor he is a very violent man." The proof of insanity, apart from liquor, in this case, is too meagre to raise a reasonable doubt as to the capacity of the accused to commit crime. Who cannot count from one to twenty men within the circle of their acquaintance, who never suffered any injury on the head or elsewhere, and whose rationality, except when drinking, was never questioned, concerning whom more proof could be adduced to convict them of insanity, than the record in this case furnishes to prove the insanity of Choice? It may be that owing to the accident of 1850, the defendant was not only more easily affected by liquor, but also, that he had less power to control his appetite for drink. Still this, if true, would not excuse him. A man may have partial or general insanity, and that, too, from blows upon the head, yet if he drink and bring on temporary fits of drunkenness, and while under the influence of spirits takes life, he is responsible "There are men," says Mr. Justice Story, "soldiers who have been severely wounded in the head especially, who well know that excess makes them mad; but if such persons wilfully deprive themselves of reason, they ought not to be excused of one crime by the voluntary perpetration of another." [1]

It is insisted particularly that the finding was against the medical testimony in this case; without repeating it, I would state generally, that the strength of this evidence is greatly overstated in the argument, as the brief of it will show. As it respects this species of testimony generally, the doctrine is this: It is competent testimony, and where the experience, honesty and impartially of the witnesses are undeniable, as in this case, the testimony is entitled to great weight and consideration. Not that it is so authoritative that the jury are bound to be governed by

[1] United States *v.* Drew, 5 Mason. 28.

it, — it is intended to aid and assist the jury in coming to correct conclusions in the case. With something short of a hundred more opinions to write out during the recess, to say nothing of numerous other pressing engagements, we have bestowed upon this case all the time and consideration at our command. And what is the case?

Choice comes down from Rome to Atlanta. He engages in a drunken debauch, as has been the habit and manner of his life. Webb, the deceased, a constable serves bail process upon him for ten dollars. Choice is greatly incensed, and such was the sense of injury which he felt that he spoke complainingly of Webb's treatment to Brannan, when he was brought up from Milledgeville, the April afterwards. Mr. Glenn who happened to be present, interposed his kind offices, and agreeing to pay the debt the parties separated, while Choice professed to acquiesce in the suggestion of Mr. Glenn that the officer had done nothing more than his duty. It is clear that he was still writhing under the indignity, as he felt it to be, that had been offered him. He said to Thos. Gannon "What do you suppose that damned bailiff done? He arrested me for ten dollars, and would not take my word for the amount;" and after soliciting a knife or a pistol, he said he would cut the bailiff's heart or Dr. Dowsing's, — the creditor's heart. Rising next morning from the carouse of the overnight, he commenced drinking again, and coming up with Webb, who was walking between the Trout House and Atlanta Hotel towards the depot, — he fires a pistol at him, and thus takes his life. The only thing said by deceased was "Don't shoot," and the only words uttered by Choice were, "Damned if I don't kill you anyhow." When Webb staggered and fell, Choice started off, saying, "You will take that," or "Damn you take that."

In his interview with Mr. Wilkes in the calaboose, Choice ascribes his situation to drink, which made him a fool and a madman; but made no allusion to any permanent injury to his brain in 1850. Choice understood himself much better than the intelligent witnesses who testified, and this whole record demonstrates to my mind that he was right. Unless his offence can be excused or mitigated by the plea and proof of drunkenness the verdict of the jury was fully justified by the facts. The prisoner has had a fair trial. The law, in the judgment of this court, has been correctly administered, and when we have said this, our duty is discharged.

Whereupon it is considered and adjudged by the court, that the judgment of the court below be affirmed.

VOLUNTARY DRUNKENNESS DOES NOT MITIGATE CRIME.

SHANNAHAN *v.* COMMONWEALTH.

[8 Bush. 463; 8 Am. Rep. 465.]

In the Court of Appeals of Kentucky, 1871.

Hon. WILLIAM S. PRYOR, *Chief Justice.*
" MORDECAI R. HARDIN, }
" BELVARD J. PETERS, } *Judges.*
" WILLIAM LINDSAY, }

1. **The voluntary drunkenness of a murderer** neither excuses the crime nor mitigates the punishment.
2. **One in a state of voluntary intoxication** is subject to the same rules of conduct and principles of law as a sober man, and where a provocation is offered, and the one offering it is killed, if it mitigates the offence of the man drunk, it should mitigate the offence of the man sober.
3. **On the question of malice** evidence of the prisoner's intoxication is admissible.

A. H. Field, for appellant.

John Rodman, Attorney-General, for appellee.

APPEAL from a sentence and conviction under an indictment for murder. The opinion states the case.

PRYOR, C. J.— The appellant, Matthew Shannahan, was indicted in the Jefferson Circuit Court, for the murder of C. W. Montgomery, and under the indictment was tried by a jury and found guilty as charged, and by the judgment of that court condemned to be hung, and from that judgment he prosecutes this appeal.

It will be necessary to recite, in substance, the facts proven upon the trial in order to determine the propriety of the refusal by the court below to give certain instructions asked for by counsel for the appellant, and the giving of instructions in lieu thereof.

It appears from the evidence that the appellant, on the 22d of August, in the year 1870, about twelve or one o'clock of that day, announced his intention of going to see Montgomery (the deceased) for the purpose of getting his (appellant's) stone-hammer, saying "that Montgomery had taken it away." The appellant had been informed that the deceased was working for a man by the name of Shanks. He went to the grocery of Shanks and inquired for Montgomery, and was told that he was in the woods at work some half mile distant from the house. While at Shank's he took a dram, purchased a quart of whiskey, and started in the direction of the woods where Montgomery was at

labor, and upon his arrival there found Montgomery and a man by the name of Applegate at work. The appellant and the deceased, as the witness Applegate states, met each other in a friendly manner, and engaged in conversation relative to deceased having previously worked for him, and appellant offered to employ him again. The three drank the quart of whiskey, and late in the evening returned to Shank's grocery, where they took another drink and had the quart bottle refilled. Applegate left them late, and says that when he left them they were still friendly and drinking. The appellant and deceased left Shank's house after night, and went in company to Brown's residence, where deceased was boarding, and reached there about half past eight o'clock at night. From Shank's house to Brown's is a distance of about five hundred yards. Upon their arrival at Brown's he refused to permit the appellant to remain all night; but upon the suggestion of the deceased, that if he persisted in refusing he would sleep with appellant in the stable, Brown consented that the appellant might remain all night. The two then entered the family room of Brown, placed the quart bottle of whiskey on the mantle, with about one-third of its contents gone, and conversed with Brown fifteen or twenty minutes. They then left by a stairway for their bed-room upstairs, and when they reached the floor above Brown says he heard a scuffle and fall, and Montgomery cried out, "*You have killed me.*" He hurried to the room and met the appellant coming down the stairway with a knife in his hand and witness ordered him not to leave. He made his escape through the back door leading to the rear of witness' premises, and was in a few days afterward arrested. The witness found Montgomery badly cut upon the arms, legs and other parts of the body, and his entrails protruding. He lived but a short time; stated that Shannahan had killed him without cause. The deceased had no weapons upon his person, and so far as the circumstances indicate, offered no resistance. The evidence establishes the fact that the appellant, when sober, is a quiet, peaceable, and industrious man, but when drunk is boisterous, unruly, and always when in that condition ready to attack friend or foe. There is no doubt from the proof but that both the appellant and the deceased were under the influence of liquor at the time of the killing.

The appellant's counsel relies in his argument upon five different grounds for the reversal of this case: —

1. Because the verdict is against the evidence.

2. An improper effort upon the part of the attorney for the Commonwealth to convict the accused.

3. That the special judge had no power to pronounce the judgment upon the verdict.

4. That the court misinstructed the jury.

5. That the court refused properly to instruct the jury.

This court has no power to revise a judgment of convictions for either the first, second or third grounds relied upon by counsel, and the only question presented by the record is, did the court err in refusing the instructions asked for by appellant's counsel, and in giving other instructions in lieu thereof? Counsel insists that the instructions given in this case are *multitudinous, misleading and inapplicable.* While instructions given to a jury upon such an issue as is here presented should be as plain and concise as possible, and no more in number than the case requires, still the defendant's counsel asked twenty-two instructions, and the court, in lieu of and in explanation of these instructions, gave about one-half the number, the most of which contain the law of the case, and were certainly not prejudicial to the appellant.

The effort upon the part of the defence, from the legal propositions submitted to the jury, was to reduce the offence from murder to manslaughter by reason of appellant's intoxicated condition at the time of the killing. The propriety of the instructions on this branch of the case will alone be considered, as all the other instructions given by the court are substantially correct.

Instruction No. 9, given by the court in behalf of the appellant is as follows: "That if, at the time of the alleged commission of the crime charged in the indictment, the accused was, from sensual gratification and social hilarity, and not with the design of committing a crime, under the influence of whiskey to such an extent as to seriously interfere with or deprive him of reason, they should find him not guilty of murder; but, if guilty at all, of voluntary manslaughter, unless they believe from the evidence he drank with the intention of committing the deed with which he is charged. In which case he would be guilty of murder."

Instruction No 10 is as follows: "If, at the time of the killing, the defendant was intoxicated from the use of whiskey, and said intoxication was not feigned or simulated, nor contracted with the intention of committing the deed, and the killing was prompted by the intoxication alone, and except for it could not have occurred, you should find him not guilty of murder; but if guilty at all, of voluntary manslaughter."

The counsel for appellant insists that the following instruction should have been given without containing any of the qualifications embraced in instructions Nos. 9 and 10, viz.: "*That if, at the time of the killing,*

the defendant was intoxicated from the use of whiskey, and the killing was prompted by it alone, and except for it would not have occurred, you should find the accused not guilty of murder; but, if guilty at all, of voluntary manslaughter."

In the opinion of this court, if drunkenness can be pleaded in excuse for crime, or by way of mitigating the punishment on account of crime, we perceive no valid reason for withholding from the consideration of the jury such an instruction as asked for by the counsel for the appellant in a case like this.

It was a settled rule of the common law that voluntary drunkenness excused no man from the commission of crime; and, instead of palliating the offence, it was held as an aggravation of the wrong committed. Some of the more recent American authorities upon this subject have greatly relaxed this rule, and gone so far as to establish as law the reverse of the proposition, viz.: "That voluntary drunkenness, instead of aggravating the offence, is such a mitigating fact as to lessen the punishment;" and upon an indictment for murder, in the absence of any proof showing that intoxication was resorted to in order to enable the party charged to take human life, the fact of *drunkenness itself* is held sufficient to reduce the crime from murder to manslaughter. By the statute law of Kentucky, drunkenness is made an offence for which a penalty may be imposed; and although drunkenness is in violation of good morals as well as the law of the land, it may be proper, out of charity to the passions of men and their inability to control in many instances either their passions or appetites, not to adhere to the vigorous rule of the common law, and add to the punishment of a party who, by committing a penal offence, places himself in such a condition as causes him to commit a still greater offence. But, while we sanction this modification of the common-law doctrine, we are well satisfied that neither the interests of society nor the wisdom and justice of law requires or authorizes the judicial tribunals of the country to establish the legal principles that the violation of one law, resulting in inflaming and exciting the worst passions of men, shall be deemed a sufficient cause for mitigating the punishment to be inflicted upon those who commit great crimes. "*The law of England considering how easy it is to counterfeit that excuse (drunkenness), and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another.*"[1] It is true that some of the recent adjudged cases qualify the principle involved by stating "*that if intoxication is resorted to for the purpose of*

[1] 2 Blackstone's Commentaries, 25.

But Relevant on Question of Malice.

stimulating one to the commission of a meditated felony, then there can be no mitigation of the punishment;" but it seems to us that no man, unless he is so wanting in intellect as to make him irresponsible for his acts, would be so reckless of his own security as to announce his intention of becoming intoxicated so as to enable him to take human life or inflict punishment upon his enemy.

But, on the contrary, men of violent passions and wicked designs would avail themselves of this very principle of law, by becoming drunk in order to take the lives of their fellow-men, with the consciousness on the part of the offender that his drunkenness would be the mitigating feature of his case. The recognition of such a rule of law is but an invitation to men of reckless habits to commit crime; and while their punishment is by incarceration only, in the State prison for a few years, the sober man, whose cause for revenge and the desire to take human life therefor, is kept within his own breast, for the commission of a like offence is made to suffer death. There is no reason or philosophy that would hang the sober man for murder, and lessen the punishment of the man intoxicated for the same offence, because the latter had voluntarily placed himself in a condition by which he is induced to take human life.

In the present case the jury were not only told by instructions Nos. 9 and 10, that drunkenness mitigated the offence by the reducing it from murder to manslaughter, but they were told by the fourteenth instruction, based upon the fact of drunkenness alone, that, "if they believed appellant was insane at the time of the killing they must acquit." These instructions were all more favorable to the appellant than the law or facts of the case authorized.

If one is insane, and while in that condition commits an offence, he is not responsible, for the reason that he is not enabled to know right from wrong, and, if he kills, does not know that to take human life is wrong; or as has been held in cases of moral insanity, where from the existence of some of the natural propensities in such violence it is impossible not to yield to them; but voluntary drunkenness, that merely excites the passions, and stimulates men to the commission of crime, in a case of homicide by one in such a condition, without any provocation, neither excuses the offence nor mitigates the punishment.

We are not to be understood, however, as determining that the fact of drunkenness in a case like this is incompetent testimony before a jury upon the question of malice. Malice, express or implied, must be proven in order to constitute the crime of murder, and in the absence of this proof no conviction can be had for such an offence; and evidence

as to the condition of the accused at the time of the killing, whether drunk or sober, should be permitted to go to the jury, in connection with other facts, in determining the question of malice. What we do adjudge is, that in the trial of a case like this, the fact of drunkenness, while it may be a circumstance showing the absence of malice, should not be singled out from the other proof, and the jury told that it mitigates the offence. The proper rule is, that one in a state of voluntary intoxication is subject to the same rule of conduct, and to the same rules and principles of law that a sober man is; and that where a provocation is offered, and the one offering it is killed, if it mitigates the offence of the man drunk, it should also mitigate the offence of the man sober.

We feel that public policy, the demands of society, and more than all the wisdom and justice of the law require that the principles herein established should be adhered to; and as a different construction is placed by many upon the law as declared by this court in the cases of *Smith* v. *Commonwealth*,[1] and *Blimm* v. *Commonwealth*,[2] involving similar questions, those cases are overruled so far as they conflict with the principles of this opinion.

The judgment of the court below is affirmed.

VOLUNTARY INTOXICATION NO DEFENCE.

KENNY *v.* PEOPLE.

[31 N. Y. 330.]

In the Court of Appeals of New York, March, 1865.

Hon. HIRAM DENIO, *Chief Judge*.
" HENRY E. DAVIES,
" WILLIAM B. WRIGHT,
" JOHN K. PORTER,
" JOHN W. BROWN, } *Judges*.
" PLATT POTTER,
" WILLIAM W. CAMPBELL,
" NOAH DAVIS, JR.,

Voluntary intoxication is no defence to crime: so long as the offender is capable of conceiving a design he will be presumed to have intended the natural consequences of his acts.

[1] 1 Duv. 224. [2] 7 Bush, 320.

Facts of the Case.

Writ of Error to the general term of the Supreme Court of the Second District. The plaintiff in error was convicted of murder in the first degree in the Court of Oyer and Terminer, for the county of Kings, for July, 1863.

C. E. Pratt, for plaintiff in error.

S. D. Morris, for the People.

Potter, J.

(Omitting a ruling on practice.)

Four points are made in the case, upon exceptions taken by the prisoner's counsel, to the refusal of the judge to charge the jury. The requests to charge are as follows: —

1. "Intoxication does not furnish immunity of crime, but may be considered in determining what degree of crime has been committed."

2. "That intoxication may be considered in determining whether the homicide was committed by premeditated design."

3. "If the jury believe that the accused was in a state of mind from intoxication that rendered him incapable of premeditation or design, they must find manslaughter."

4. "If the jury find that the accused was in a state of mind, although caused by the voluntary use of intoxicating liquor, that his judgment was obscured or impaired, so that he was incapable of knowing the degree of violence he was perpetrating, or properly calculating its effects, they must find for the lesser offence, manslaughter."

In order to show the application of these propositions to the case, it is necessary to present some of the leading facts established by the evidence. A fair abstract of these is found in the opinion of the justice who delivered the opinion in the case in the Supreme Court, as follows: —

"The prisoner is a car driver. On the night of the 21st of April, at eight o'clock, with his wife and two small children, he entered the grocery store of Frederick Mohrmann, at the corner of Fulton and Albany Avenues, in the city of Brooklyn, and purchased some groceries for his family use. While there he commenced speaking about some railroad conductor with whom he had a quarrel about two hours previous. His wife said the conductor was a nice man, and did not want to do him any harm. He told her in an angry tone not to interfere in his business, and be quiet, otherwise he would punch her. He thereupon struck her in the face and kicked her. Mohrmann came from behind the counter and told him to leave the store — that he wanted no fighting, and that if he did not stop he would put him out. Kenney said he could not put him out. Mohrmann made the attempt and

failed. He thereupon called the witness, Rink, to assist him, and by their joint efforts he was removed from the store to the street, and the door locked, and while this was being done he declared he would kill the Dutch son of a bitch — meaning Mohrmann. The prisoner then threw stones through the windows and doors of the store, and said he wanted his two children. The door was opened by Mohrmann and the children put out into the street, and the door was closed again. He also threw coal, a coal shovel, a measure, and with a stone of about twenty pounds weight, smashed open the door, and came into the store. Here he took up a saw and a piece of ham and threw them at Mohrmann and struck him with them. The prisoner went again into the street, and the door was again shut against him. He broke the door in once more and came into the store. There was in the store what the witnesses called a meat bench, upon which was lying a large knife. The prisoner seized this knife and struck the bench once, then rushed into the room behind the store, when he met the deceased, John Ravensburg, a person residing with Mohrmann at the time, and with whom the prisoner had no words or controversy, and struck him three blows or thrusts with the knife, two of which entered the chest, and the other one the abdomen of the deceased, who died therefrom almost instantly. The prisoner at once became quiet, consulted with his wife where he should go, and as to the best means to escape. She recommended him to go to East Brooklyn, and he left the scene of the murder, going in that direction, after telling his wife that if any policeman made inquiry to say he had not been about there that night." "The proof leaves little doubt that the prisoner was in a state of intoxication more or less at the time, but otherwise in the full possession of his senses, and quite conscious of what he was doing. There was also proof to show that while sober he was civil, but when drunk unusually vicious."

"The court instructed the jury, among other things, that voluntary intoxication furnished no immunity nor excuse for crime; that even where intent is a necessary ingredient in the crime charged, so long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his own act, and when one, without provocation, kills another with a deadly or dangerous instrument, no degree of intoxication, short of that which shows that he was at the time utterly incapable of acting from motive, will shield him from conviction. In the present case the jury would consider from the conduct and acts of the prisoner in the afternoon, as disclosed by the testimony of those who were with him, from his going into the store for the purpose of making a purchase

Exceptions to Charge.

of family groceries and supplies, and the other circumstances attendant and immediately consequent on the transaction, whether he was capable of acting from motive or not; that the principal question to be determined by the jury, if they found the prisoner guilty of killing the deceased, was whether the crime was murder or manslaughter. To convict of murder it was necessary that the killing should have been perpetrated from a premeditated design to effect the death of the deceased or of any human being; it was therefore sufficient to convict, if the intention of the prisoner was to kill the storekeeper, although he may not have intended to kill the deceased; if that intention existed, although it was conceived and formed immediately before the fatal act was committed, the offence was murder; if, on the other hand, the act was committed without a design to effect death, in the heat of passion, then the crime would be reduced to manslaughter. It therefore became material for them to consider whether such intent had been satisfactorily proved. To determine this, it was proper that the manner, acts, and conduct of the prisoner, prior to the act, his declaration that he would kill the storekeeper, his acts after the declaration, the instrument used, and the manner in which it was used, and his acts, conduct, and statements immediately after the offence was committed, and upon his arrest, should be taken into view and carefully considered, and as the testimony showed that the prisoner was angry, and in a passion, at the time of his struggle with the storekeeper, and when he was put out of the store, it was especially important for them to consider what length of time elapsed after that before the fatal act was committed, in determining whether he was acting under the impulse of passion, without any intention to kill, or whether such intention had been formed, and in fact existed when the fatal act was committed. If such intention was shown, they would find the prisoner guilty of murder; if not, they would then convict him of manslaughter only."

To each of the requests, made by the prisoner's counsel, above stated, the court declined to accede, except so far as is embraced and covered by the said charge, and refused to charge the jury as so requested, further or otherwise than as is charged, to which decision and refusal the counsel for the prisoner then and there duly excepted.

The whole charge of the judge is given, in order that the distinct points in the requests to charge may be seen. The charge is plain, clear, and conceded to be unobjectionable. No exception was taken to it. It was as favorable to the prisoner as he was entitled, from the case as it appears in all that was charged. The prisoner was indicted

under the fifth section of the act of 1862,[1] for murder in the first degree, and was convicted of that crime, that is "of a premeditated design to effect the death of a human being."

It is not claimed that this act would be murder in the second degree. If it was not wilful or premeditated murder, it would be manslaughter in the third degree, for the reason that the blows were struck in the heat of passion without any design to effect death, or manslaughter in the fourth degree, for the reason that the person was in such an extreme condition of insensibility by reason of intoxication, or otherwise, that he was incapable of acting from volition. This latter condition is not claimed in behalf of the prisoner, and there is nothing in the evidence to show that he was not capable of reasoning or competent to control his will. How, then, would it have been proper for the judge to have charged the jury, that intoxication might be considered by them in determining what degree of crime had been committed. It is not claimed that there was any intoxication, but such as was voluntary. There was no previous provocation. The proposition was not that the jury might consider the intoxication of the prisoner upon the question whether the blows were struck in the heat of passion, but to determine *what* crime had been committed. "This," as was well remarked by *Denio*, J., in *People* v. *Rogers*,[2] "would be precisely the same thing as advising them that they might acquit of murder on account of the prisoner's intoxication, if they thought it sufficient in degree." This proposition in effect was what the court was requested to charge in the first and second propositions of the prisoner's counsel. If we are right in this view, the case of *People* v. *Rogers*, and the opinions delivered therein, and authorities therein cited, are conclusive, and control this case. The principle involved in the propositions or requests to charge in this case cannot be distinguished in effect from that. The rule established in that case, and in fact, the uniform rule found in all cases is: "that where the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated, cannot be allowed to affect the legal character of the crime." The requests to charge, therefore, that the jury might consider intoxication, — without reference to the degree of intoxication — in determining what crime had been committed, or whether homicide had been committed "by premeditated design," were properly denied by the judge.

The third request to charge, while it is subject to the same objections as the first and second are, would, in addition to those objections, if

[1] Ch. 197. [2] 18 N. Y. 20, 21.

charged, be equivalent to saying to the jury that if the prisoner, by his voluntary intoxication, had rendered himself incapable of premeditation or design, the law would not impute to him the offence which would otherwise be its legal character. Harris, J., in the case of *People* v. *Rogers*, said: "I am not aware that such doctrine has before been asserted. It is certainly unsound." Indeed I have doubts whether the charge of the judge in this respect was not more favorable to the prisoner than the rule would justify. It may fairly be implied from the charge that the judge intended to instruct the jury that there was a degree of voluntary intoxication that would shield from conviction, for an act which, if committed when sober, he might be convicted.

The fourth request to charge seems to be the most objectionable of all. It might fairly be implied from a charge made in the language of that request, that though the act was committed by premeditated design, if the prisoner's judgment was so obscured by liquor that he was incapable of knowing the degree of violence he was perpetrating, or properly calculating its effects, they might find it an offence of a lower grade. What adds to this objection is, that the evidence presents nothing upon which to base such a charge. There is no feature of the case, in the facts or evidence, to warrant a jury to infer that the prisoner was in a state that rendered him incapable of understanding, or that his judgment was obscured or impaired by intoxication. It would have been improper for the court to charge the jury upon a hypothesis not presented by the evidence and unwarranted by law, if the evidence did sustain the hypothesis. As was said in *People* v. *Rogers*, "if by a voluntary act, the party temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society;" or, in the language cited from Plowden, in the same case, "if a person that is drunk kills another this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding or memory, but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby." [1]

The crime committed in this case, as was remarked by Brown, J., "was committed with circumstances of brutality and atrocity almost unexampled." The evidence justifies the verdict of the jury; the evidence is clear that the prisoner was sober enough to commit an act to bring him-

[1] Plowd. 19.

self within the meaning of the law defining murder in the first degree, "a premeditated design to effect the death of a human being;" that he was sober enough to force his way into the building where his intended victim was, to trace him from room to room; to seek to provide himself with a murderous weapon fitted for the intended work; of announcing his intention, and of executing his purpose by a repetition of fatal blows, and of planning and executing an immediate escape from justice. The law would indeed suffer reproach that did not hold such a man sober enough to suffer the penalty of his crime when fairly convicted. I am of opinion that no legal error was committed on the trial, and that the proceedings should be remitted to the Court of Oyer and Terminer, to sentence the prisoner anew.

DAVIES, J.

(Omitting rulings as to challenge of jurors.)

The requests to charge, made by the prisoner's counsel, were properly refused by the court. The law, upon the points suggested, has been settled by adjudication in this court, and no reasons are presented why the doctrine thus enunciated should be reviewed or disturbed. The case of *People* v. *Rogers*,[1] was well considered, and the doctrine then declared should be rigidly adhered to. Judge DENIO, in the opinion of the court, declares that all the authorities agree upon the main proposition, namely, that mental aberration, produced by drinking intoxicating liquors, furnished no immunity for crime.

In *Burrow's Case*,[2] the prisoner was indicted for rape, and urged in his defence that he was in liquor. HOLROYD, J., in addressing the jury, said: "It is a maxim in law that if a man gets himself intoxicated he is answerable to the consequences, and not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong. If, indeed, the infuriated state at which he arrives should continue and become a lasting malady, then he is not answerable." In the case of *Rex* v. *Carroll*,[3] the prisoner was tried in 1825, at the Central Criminal Court for murder. It appeared that shortly before the homicide the prisoner was drunk. His counsel, though he admitted that drunkenness could not excuse the commission of the crime, yet submitted that in a charge for murder, the material question being whether the act was premeditated or done with sudden heat and impulse, the fact of the party being intoxicated was a proper circumstance to be taken into considera-

[1] 18 N. Y. 9. [2] Lew. C. C. 75 (1823). [3] 7 C. & P. 145.

tion, but this was repudiated by PARKE, J., and concurred in by LITTLEDALE, J.

In the case of *Rogers*,[1] the prisoner's counsel requested the court to instruct the jury, "that if they were satisfied that by reason of intoxication there was no intention or motive to commit the crime of murder, they should convict the defendant of manslaughter only." Such, in substance, were the requests to charge in the case at bar. The Court of General Sessions refused to charge as requested in *Rogers' Case*, and this court held the refusal to be right, and said: "If by this request the counsel for the defendant meant, as the request seems to have been interpreted by the Supreme Court, that the jury should be instructed to take into consideration the intoxication of the defendant in determining the intent with which the homicide was committed, the proposition is not law. It has never yet been held that the crime of murder can be reduced to manslaughter, by showing that the perpetrator was drunk, when the same offence, if committed by a sober man, would be murder." That precise proposition, thus condemned by this court, was embraced in the fourth request of the prisoner's counsel for the judge to charge. It was in these words: "If the jury find the accused was in a state of mind, although caused by the voluntary use of intoxicating liquor, that his judgment was obscured or impaired, so that he was incapable of knowing the degree of violence he was perpetrating, of properly calculating its effects, they must find for the lesser offence, manslaughter." The court properly refused so to charge, and the previous requests were only modifications of the same general idea, namely, that the state of intoxication might be taken into consideration by the jury, by which the crime of murder could be reduced to manslaughter, if they found the prisoner was under the influence of intoxicating liquors at the time he committed the crime, when the same offence, if committed by him when not intoxicated, would have been murder. In this State the cases of *People* v. *Hammill* and *People* v. *Robinson*,[2] show the consistency with which the doctrine enunciated has been adhered to in our criminal courts and in the Supreme Court.

Judge DENIO, in his opinion in the case of *Rogers*,[3] justly observes that "when a principle of law is found to be well established by a series of authentic precedents, and especially when, as in this case, there is no conflict of authority, it is unnecessary for the judges to vindicate its wisdom or policy. It will, moreover, occur to every mind that

[1] *Supra*. [2] 2 Park. C. C. 223, 235. [3] *Supra*.

such a principle is absolutely essential to the protection of life and property. In the forum of conscience, there is, no doubt, considerable difference between a murder deliberately planned and executed, by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow-men, and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable; but if by a voluntary act he temporarily casts off the restraints of reason and conscience, no mercy is due him, if he is considered answerable for any injury which in that state he may do to others or to society." The same doctrine was long since enunciated by the eminent judge, Lord MANSFIELD, who said, in the celebrated case of the *Chamberlain of London* v. *Evans*, in the House of Lords, February 4, 1767, that "a man shall not be allowed to plead that he was drunk in bar of criminal prosecution, though, perhaps, he was at the time as incapable of the exercise of reason as if he had been insane; because his drunkenness was itself a crime, he shall not be allowed to excuse one crime by another." It is a settled maxim of the law "that a man shall not disable himself." These views appear to my mind to be eminently sound and wise, and receive my entire concurrence. They are decisive of the present case, and the judgment must be affirmed. The day fixed by the judgment for the execution of the sentence having passed, the proceedings must be remitted to the Supreme Court, with directions to that court to transmit the same to the Kings County Oyer and Terminer, with directions to that court to pronounce sentence anew against the prisoner.

All the judges concurring.

Judgment affirmed.

No Defence to Crime.

INTOXICATION NO DEFENCE — MADNESS PRODUCED THEREBY.

Bennett *v.* State.

[Mart. & Yerg. 133.]

In the Supreme Court of Tennessee, 1827.

Hon. Robert Whyte,
" John Catron,
" Jacob Peck,
" Henry Crabb, } *Judges*

Artificial and temporary madness by drunkenness voluntarily contracted is no defence to the charge of homicide.

Catron, J., delivered the opinion of the court.

The defendant (James R. Bennett) was indicted in the Maury Circuit Court for the murder of Thomas Callahan, pleaded not guilty, was convicted and judgment passed upon him, from which he took his writ of error to this court

(After passing on other points.)

A main defence on part of the accused before the jury was that he was a lunatic when he committed the crime, and not responsible for the act. After the court had charged the jury in all respects correctly upon the whole facts arising in the cause, it is remarked by the judge to the jury, " that upon the subject of derangement, such was the structure of the human mind, that philosophers might forever speculate upon the subject, but could not define in what it consists; but that if a hundred men should look at a drunken man, they would agree in saying he was drunk; and if a hundred men were to look at a deranged man, they would agree in saying he was deranged."

That the defendant was either deranged or intoxicated, or both, when he committed the homicide, is certain. The part of the charge above set forth was excepted to. The question is, was it erroneous?

No part of the charge of the court being set forth except the paragraph cited, and only a general statement in the record that all other parts of the charge were satisfactory to the prisoner, it is difficult to see the reasons of the part set forth. We take the charge to import that there is an intuitive principle in our nature which, when combined with our experience, qualifies men to judge what is drunkenness and what insanity, although the reasons why the mind is insane cannot be defined in the theory. That if a man was solely deranged, or solely

drunk, an hundred men would all agree his mind was affected in the one way or the other, and that this judgment formed upon observation would be the better test of the fact.

This court think the speculation of the circuit judge very reasonable, and very probably correct, and that the reasons for making the remarks to the jury, in all probability, were necessary, but that necessity grew out of the facts not appearing in the record. We must, however, take them as stated alone; and when we do so, nothing can be seen in the charge calculated to lead astray the jury in their finding. Therefore, we do not apprehend there is any error in this point.

In this cause a new trial was moved for and refused upon the evidence, the whole of which is set out in the record; from which it appears that the defendant was intoxicated at the time he committed the homicide charged in the indictment; that he had been for a year or more in the constant habit of drinking spirits to excess, and was very turbulent and even dangerous when drinking; that by reason of the long continuance of the habit his mind had become irritable when drinking, and almost without discretion; that the slain was a poor debilitated old man, worn out by age and an irregular life, inoffensive in his character, and who had not given the least cause to the defendant to injure him; that the deceased was at the house of the defendant, and they had been drinking in company; the defendant captiously, and without any cause for doing so, accused the slain of stealing his poultry and pigs, took down his rifle and shot him through the body about the middle; after the crime was committed, he stayed at home and vaunted of the act to all whom he saw, and stated the facts. If in any case a temporary suspension of reason, caused by voluntary intoxication, would excuse homicide, this would be a case to which such rule would reasonably apply.

But that the state of mind of the defendant was artificial, — voluntarily contracted madness by drunkenness, — and that the frenzy was temporary, this court have no doubt; that such temporary frenzy was no excuse for the act, is most clear.[1] We would refer to Sir Matthew Hale's Pleas of the Crown,[2] as laying down the true rule and settled law upon this subject.

The court order that the judgment of the Circuit Court be affirmed; that the defendant be executed on Monday, the 12th day of March next; and that the sheriff of Davidson County carry this sentence into execution.

[1] 1 Hale, 32; 1 Hawk. ch., 3, sect. 7; 4 Bl. Com. 25. [2] B. I. P. 32.

DRUNKENNESS — NO AGGRAVATION OF CRIME — DEGREES OF MURDER.

HAILE *v.* STATE

[11 Humph. 154.]

In the Supreme Court of Tennessee, December, 1850.

Hon. NATHAN GREEN,
" R. J. MCKINNEY,
" A. W. O. TOTTEN. } *Judges.*

1. **Drunkenness—No Aggravation of Crime.** — H. was indicted for murder. It was proved that he was drunk at the time of the offence. The judge charged the jury that drunkenness was an aggravation of the offence, unless the prisoner was so deeply intoxicated as to be incapable of forming a deliberate and premeditated design to do the act. *Held* error.

2. **Drunkenness — Degrees of Murder.** — Where there are degrees of murder, the fact of drunkenness is relevant on the question whether the killing sprang from a premeditated purpose, or from passion excited by inadequate provocation.

Haile was indicted for murder in the Circuit Court of Smith County. The case was submitted to a jury, under the direction of Judge CAMPBELL, and the defendant was found guilty of murder in the first degree, and judgment entered thereupon. From this judgment he appealed.

J. S. Brien & Caruthers, for the plaintiff in error.

The *Attorney-General* and *M. Brien*, for the State.

GREEN, J., delivered the opinion of the court.

The plaintiff in error was indicted in the Circuit Court of Smith County, for the murder of J. H. Davis, and upon his trial was found guilty of murder in the first degree.

Upon the trial there was evidence that the prisoner was intoxicated at the time he committed the homicide. Upon the subject of the defendant's intoxication, the judge told the jury, that " voluntary intoxication is no excuse for the commission of crime; on the contrary, it is considered by our law as rather an aggravation; yet if the defendant was so deeply intoxicated by spirituous liquors at the time of the killing, as to be incapable of forming in his mind, a design, deliberately

and premeditatedly to the act — the killing, under such a state of intoxication, would only be murder in the second degree."

It is insisted that his honor did not state the principle upon this subject, as it has been ruled by this court.

In the case of *Swan* v. *State*,[1] Judge REESE, who delivered the opinion of the court, says: "But although drunkenness, in point of law, constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made to depend by law upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state and condition of the mind is a proper subject for consideration and inquiry by the jury. The question in such case is, what is the mental *status?* Is it one of self-possession, favorable to fixed purpose, by deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation, acting, it may be, on a peculiar temperament, or upon one already excited by ardent spirits? In such case it matters not that the provocation was inadequate or the spirits voluntarily drank; the question is, did the act proceed from sudden passion, or from deliberation or premeditation? What was the mental *status* at the time of the act, and with reference to the act? To regard the fact of intoxication as meriting consideration in such a case, is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes, has been in point of fact committed."

In these remarks, the court intended to be understood as distinctly indicating, that a degree of drunkenness, by which the party was greatly excited, and which produced a state of mind unfavorable to deliberation and premeditation, although not so excessive as to render the party absolutely incapable of forming a deliberate purpose, might be taken into consideration by a jury, in determining whether the killing were done with premeditation and deliberation.

The whole subject was ably reviewed by Judge TURLEY, in the case of *Pirtle* v. *State*.[2] In delivering the opinion of the court, in that case, the judge says: "It will frequently happen necessarily when the killing is of such a character as the common law designates as murder, and it has not been premeditated by means of poison, or by lying in wait, that it will be a vexed question, whether the killing has been the result of sudden passion produced by a cause inadequate to mitigate it to man-

[1] 4 Humph. 136. [2] 9 Humph. 663.

slaughter, but still sufficient to mitigate it to murder in the second degree, if it be really the true cause of the excitement, or whether it has been the result of premeditation and deliberation; and in all such cases, whatever fact is calculated to pass light upon the mental *status* of the offender, is legitimate proof; and among others, the fact he was at the time drunk, not that this will excuse or mitigate the offence if it were done wilfully, deliberately, maliciously, and premeditatedly, which it might well be, though the perpetrator was drunk at the time, but to show that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such as might reasonably be expected to arouse sudden passion and heat to the point of taking life, without premeditation and deliberation."

Here the court explicitly lays down the rule to be, that in all cases where the question is between murder in the first, and murder in the second degree, the fact of drunkenness may be proved, to shed light upon the mental *status* of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by inadequate provocation. And the degree of drunkenness which may then shed light on the mental state of the offender, is not alone that excessive state of intoxication which deprives a party of the capacity to frame in his mind a design deliberately and premeditatedly to do an act; for the court says that in the state of drunkenness referred to, a party well may be guilty of killing wilfully, deliberately, maliciously, and premeditatedly; and if he so killed, he is guilty as though he were sober.

The principle laid down by the court is, that when the question is, can drunkenness be taken into consideration in determining whether a party be guilty of murder in the second degree, the answer must be, that it cannot; but when the question is, what was the actual mental state of the perpetrator at the time the act was done, was it one of deliberation and premeditation, then it is competent to show any degree of intoxication that may exist, in order that the jury may judge, in view of such intoxication, in connection with all the other facts and circumstances, whether the act was premeditatedly and deliberately done.

The law often implies malice from the manner in which the killing was done, or the weapon with which the blow was stricken. In such case, it is murder, though the perpetrator was drunk. And no degree of drunkenness will excuse in such case, unless by means of drunkenness an habitual or fixed madness be caused. The law in such

cases does not seek to ascertain the actual state of the perpetrator's mind, for the fact from which malice is implied having been proved, the law presumes its existence, and proof in opposition to this presumption, is irrelevant and inadmissible. Hence, a party cannot show that he was so drunk as not to be capable of entertaining a malicious feeling. The conclusion of law is against him.

But when the question is, whether a party is guilty of murder in the first degree, it becomes indispensable that the jury should form an opinion as to the actual state of mind with which this act was done. All murder in the first degree (except that committed by poison and by lying in wait), must be perpetrated wilfully, deliberately, maliciously and premeditatedly. The jury must ascertain, as a matter of fact, that the accused was in this state of mind, when the act was done. Now, according to the cases of *Swan* v. *State*, and *Pirtle* v. *State*, any fact that will shed light upon this subject may be looked to by them, and may constitute legitimate proof for their consideration. And among other facts, any state of drunkenness being proved is a legitimate subject for inquiry, as to what influence such intoxication might have had upon the mind of the offender in the perpetration of the deed.

We know that an intoxicated man will often, upon a slight provocation, have his passions excited and rashly perpetrate a criminal act. Now, it is unphilosophical for us to assume that such a man would, in the given case, be chargeable with the same degree of deliberation and premeditation that we would ascribe to a sober man perpetrating the same act, upon a like provocation.

It is in this view of the question that this court held, in *Swan's Case*, and in *Pirtle's Case*, that the drunkenness of a party might be looked to by the jury, with the other facts in the case, to enable them to decide whether the killing were done deliberately and premeditatedly.

But his honor, the Circuit Court, told the jury that drunkenness was an aggravation of the offence, unless the defendant was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditatedly to do the act. In this charge there is error, for which the judgment must be reversed.

Reversed.

Intoxication and Mental Unsoundness.

DRUNKENNESS—INTOXICATION AND MENTAL UNSOUNDNESS.

Beasley *v.* State.

[50 Ala. 149.]

In the Supreme Court of Alabama, June Term, 1873.

Hon. Thomas M. Peters, *Chief Justice.*
" Benjamin F. Saffold, } *Associate Justices*
" Robert C. Brickell, }

Drunkenness—Intoxication and Mental Unsoundness produced by.—Drunkenness may produce intoxication or mental unsoundness. So far as it produces the former it is no defence to crime. But mental unsoundness resulting from drunkenness may, if it overthrows the prisoner's sense of right and wrong, be an excuse or palliation for crime.

From the Circuit Court of Madison.

Tried before the Hon. W. J. Haralson.

Houston & Pryor and *L. P. Walker*, for the prisoner.

Ben. Gardner, Attorney-General, for the State.

Peters, C. J. — The offence charged in this prosecution is thus stated in the indictment: " That before the finding of this indictment, Henry Beasley, unlawfully, and with malice aforethought, killed Joseph Todd, by shooting him with a pistol; against the peace and dignity of the State of Alabama." To this the accused pleaded " not guilty," and went to trial on this plea by a jury. The verdict of the jury was against him, and he was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for eleven years. From this judgment of conviction the accused appeals to this court. The only errors complained of are those alleged to be founded on the charges of the court below, which were excepted to, and made a part of the record by bill of exceptions.

The defence set up on the trial was insanity, from the effects of a gunshot wound in the head, and habitual drunkenness. Murder in the second degree is thus defined in the Code: " Every other homicide " (murder in the first degree excepted), " committed under such circumstances as would have constituted murder at common law, is murder in the second degree." [1] Blackstone defines murder at common law to be " when a person *of sound memory and discretion* unlawfully killeth any reasonable creature in being, and under the king's peace, with malice

[1] Rev. Code, sect. 3653.

aforethought, express or implied." [1] This definition, with such change of phraseology as renders it suitable to the institutions and government of this country, is adopted and approved by the courts of the States, and of the government of the United States.[2] This court has declared that the law of homicide in this State is derived from the common law of England.[3] From this it appears that the sanity or insanity of the accused is involved in the very definition of the offence of murder in all its degrees, and is necessarily a fact which influences the determination of the jury upon the question of guilt or innocence. In the case of *Commonwealth* v. *Rogers*,[4] the evidence showed that Rogers, the accused stabbed Lincoln, the warden of the prison in which Rogers was confined, and killed him without any provocation whatever. The sole defence was the insanity of the prisoner. SHAW, C. J., stated the law of that case in these words: "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose. * * * In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty." [5]

In the case at bar, the killing was most clearly proven. There can be no doubt about the perpetration of the criminal act. It was done in a manner the most deliberate and cruel, if the accused was of sound memory and discretion at the time the homicide was committed. Then, the defendant would be clearly guilty as charged in the indictment, if he was of sound memory and discretion at the time Todd was killed by him. To show that the accused was not of sound memory and discretion at the time he committed the fatal act that resulted in the death of Todd, evidence was introduced by the defence, tending to show that the prisoner had shot himself in the head some nineteen years before the trial in the court below, which produced "a depression in the skull, and a compression of the brain;" that after this wound, which was on the right side of the head, the prisoner had been affected with "partial paralysis in his left arm and left leg," up to the day of the trial, and that the wound in the head still remained "sensitive to the touch." Evidence was also offered in the defence, which tended to show that for several years before the killing, the accused was a great drunkard;"

[1] 4 Bla. Com. [195]; 3 Inst. 47.

[2] Amer. Law of Hom., by Wharton, p. 33; Med. Juris. by Wharton & Stille, (ed. 1855,) p. 664, sect. 966.

[3] Pierson v. State, 12 Ala. 149.

[4] 7 Metc. 500.

[5] *s. c.*, 1 Lead. Cr. Cas. 87, 89.

Evidence of Drunkenness.

"that he was generally drunk;" his habits were "to drink from a half to one gallon of spirits every night, and large quantities before breakfast, and before dinner, and before supper each day." He "frequently saw sights such as witches and devils, and imagined that men were after him to kill him." He fancied that "hair grew in the palms of his hands," which he tried to pluck out, and in "his mouth, and was choking him;" and about three weeks before the killing, he had an attack of *delirium tremens*. There was also proof, that, when drunk, he was "a crazy man, wild and furious, and without sense or reason;" and on the Saturday before the killing, which took place on Monday, "he was seeing witches and devils, and was a wild and crazy man." There was evidence also showing that on Monday, the day of the killing, "he was in like condition," as on the Saturday before. The evidence for the prosecution tended to show that the killing was wholly unprovoked, and perpetrated in the most deliberate and brutal manner; that the accused was not totally deprived of memory and discretion at the time of the commission of the act, which constitutes the offence charged. There was no serious conflict in the testimony, except as to the state of mind of the defendant, in the court below, at the time of the homicide.

Upon this evidence the court gave seven charges to the jury, each of which was excepted to by the accused, and incorporated into the record by bill of exceptions. The first of these charges was in these words: "Drunkenness, in itself, was no palliation or excuse." And the fifth charge was in these words: "Upon the evidence, the defendant was guilty of murder in the first degree, or of nothing."

It is said in *Martin* v. *State*,[1] that "where there is any rebutting proof, the court ought so to charge as to recognize its effect." This is particularly so when the charge is general, and applies to the whole case. Here the proof tended to show, not only that the accused was drunk, but when drunk was "a crazy man, wild and furious, and without sense or reason;" that on Saturday before the killing on Monday, "he was seeing witches and devils, and was a wild and crazy man;" and on Monday, the day of the killing, "he was in like condition, as he had been on the Saturday before. The first charge of the court above set out ignores all this evidence of mental unsoundness, and seems to take it for granted that, if it existed, it must necessarily be the immediate effects of the defendant's drunkenness. Such a charge is vicious, because it excludes from the jury all the evidence of mental unsoundness, which might or might not be a palliation or excuse for acts which

[1] 47 Ala. 564, 573.

would otherwise be criminal, according to the degree and character of the mental unsoundness. The *policy* of the law forbids that mere drunkenness alone should do away with the responsibility for crimes.[1] But as all crime implies some degree of intelligence in the criminal, the humanity of the law will not sanction the punishment of a person incapable of rational action.[2] Drunkenness may be said to have two degrees in its effects upon the memory and discretion. The one of these is mere intoxication. No degree of this will palliate or excuse, where it is the effect of the voluntary act of the defendant.[3] Blackstone, and the older authorities, say that drunkenness itself is a crime; and, "the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another."[4] The other effect of drunkenness is mental unsoundness, brought on by excessive drinking, which remains after the intoxication has subsided. This latter mental unsoundness, if it exists to such excess that the accused loses the government of his reason, may be interposed as a palliation or excuse for crime.[5] Here there was proof not only of excessive intoxication, but also some proof of mental unsoundness which was separable from mere intoxication. It should, therefore, have been left to the jury to determine whether there was any mental unsoundness which was separable from the intoxication; and if there was, whether it was sufficient to overthrow the defendant's sense of right and wrong. The defendant's drunkenness might be looked to as a means of producing this effect. The charge of the court was calculated to misdirect the jury in making this inquiry. The evidence of insanity of the accused may have been regarded by the learned judge in the court below as very feeble, yet this would not justify a charge which, in effect, withdrew it from the jury.[6]

The second charge above quoted, which is numbered the fifth in the bill of exceptions, is erroneous. It is a charge upon the effect of the evidence, without the request of either party. In *Edgar* v. *State*,[7] this was declared to be error. Besides the charge is not free from contradictions in itself. It is very well calculated to confuse and mislead the jury. The testimony was not wholly free from contradictions. Yet it is founded on the presumption that there was no such contradiction. Doubtless the learned judge intended to charge the jury, if they believed

[1] Whart. & Stille's Med. Juris., p. 50, sect. 66.

[2] U. S. *v.* McGlue, 1 Curt. C. C. 1; 1 Lead. Cr. Cas. 87, and notes, 93; Rogers' Case, *supra*, 1 Russ. Cr. 1, 2.

[3] State *v.* Bullock, 13 Ala. 413.

[4] 4 Bla. Com. 25.

[5] U. S. *v.* Drew, 1 Lead. Cr. Cas. 115 and notes.

[6] Martin *v.* State, 47 Ala. 564.

[7] 43 Ala. 312.

from the evidence that the defendant was merely drunk and not insane, when he committed the act of killing, then he was guilty as charged in the indictment; but, if they believed he was so insane as not to know right from wrong, then he was not guilty. This would have been correct.

The unsoundness of mind which excuses a criminal act must be of such degree as deprives the accused of the capacity to know right from wrong. Short of this it does not excuse.[1]

The monstrous barbarity of the act of killing should not be admitted as a presumption of insanity.[2]

The judgment of the court below is reversed, and the cause is remanded for a new trial; and the accused, Henry Beasley, will be held to answer the indictment under which he has been arrested, until discharged by due course of law.

INTOXICATION OF INFANT.

COMMONWEALTH *v.* FRENCH.

[Thatch. Cr. Cas. 163.]

In the Boston Municipal Court, March Term, 1827.

Before Hon. PETER O. THATCHER, *Judge*.

A temporary mental derangement produced by drinking intoxicating liquor, under which a boy of thirteen years of age committed a theft, authorizes a jury to acquit him.

This was an indictment against the prisoner, for stealing the watch of one Harvey McClenathan, in his shop, on the 17th of February, 1827. McClenathan, the prosecutor, testified that the prisoner, who was in his thirteenth year, with one Cyrus Wilder, a boy of about the same age, came twice to his shop in Purchase Street, on Saturday evening, the 17th of February, at about seven o'clock. The second time he sold to French a cigar, and to Wilder a cake of ginger bread. While they were in his shop he took out his watch and hung it over his desk, which was near to the door leading to the street. Soon after they had left the shop the second time, Wilder returned for another cake of ginger

[1] 1 Rus. Cr. 9, Sharswood's ed. and notes; Mosler's Case, 4 Pa. St. 264.

[2] Stark's Case, 1 Strobh. 479.

bread, but came no further than the door. Shortly afterwards the watch was missed, and his suspicions rested on these boys. He went to the house where French lived, saw him and charged him with stealing the watch, but he strenuously denied the fact. The next morning, however, French informed him that the watch was in the possession of one Alfred Johnson, another lad, and upon a warrant Johnson was taken with the watch, and he, French and Wilder were carried before the police court, where, upon their examination, Johnson and Wilder were discharged, and French was committed for trial.

Curtis Wilder testified, that he knew nothing of the taking of the watch till French showed it to him as they were going from McClenathan's shop that evening to a book auction, in Broad Street. Alfred Johnson testified that French and Wilder came that evening to a cellar where he was, that French took him aside and informed him that he had taken a watch. He advised him to return it to the owner, and he got it into his own possession, with the intention of returning it to the owner the next morning. The evidence for the prosecution was here closed.

A female, whose name was Miram, a witness for the prisoner, testified that she resided in the family of the father of the prisoner; that the evening on which this occurred, French appeared to be intoxicated with liquor, and under a derangement of his intellect, which she imputed to the liquor which he had taken. McClenathan, being called again, admitted that when the boys first came to his shop, he sold them three cents worth of tom and jerry, which they drank there. On being interrogated as to the composition of that liquor, he refused to answer the question until he was informed by the court that it was a proper question to be answered by him. He then said that the liquor was composed of eggs and sugar, beaten together with ginger, allspice, nutmeg and saleratus, to which was added a portion of rum, brandy or gin to suit the purchaser. He further said that he sold this composition to all who wanted it, children as well as men, and that it was usually sold in shops similar to his own.

Austin, for the Commonwealth. *A. Moore*, for the prisoner.

THATCHER, J., instructed the jury substantially as follows: —

If you believe that the prisoner had been put into a state of mental derangement, by drinking the noxious liquor and smoking the cigar which the prosecutor sold to him at the time, and committed the act while in this condition, it will be your duty to acquit him of the charge. It is an immoral act in the prosecutor to sell to these children such a vile composition, and it might well have happened that the combined

influence of the liquor and cigars on a child of so tender years would produce a temporary insanity. This case essentially differs from that where a crime is committed by a person, who by a free indulgence of strong liquors, has at the time voluntarily deprived himself of his reason. By the policy of the law this rather enhances the offence. It was, however, an excuse constantly offered by offenders, and it is certainly true, that but few crimes are committed by persons who are habitually temperate in the use of ardent spirits.

The jury returned a verdict of acquittal, and after an admonition from the court the prisoner was discharged.

DRUNKENNESS — INSANITY RESULTING THEREFROM

CORNWELL *v.* STATE.

[Mart. & Yerg. 147.]

In the Supreme Court of Tennessee, 1827.

Hon. ROBERT WHYTE,
" JOHN CATRON,
" JACOB PECK,
" HENRY CRABB,
Judges.

Insanity resulting from long continued drunkenness is an excuse for crime; but insanity, the immediate result of intoxication, is not.

At the May term of the Circuit Court of Davidson county, Burrell Cornwell and Moses M'Clanahan were indicted for the murder of Owen Hughes.

In the progress of the cause Lewis Carter was introduced, who swore that on the evening of the homicide, and about two hours previously, the prisoner and M'Clanahan came to the house of witness, and M'Clanahan asked witness whether he had seen a man by the name of Hughes, after which he called for liquor, which he and the prisoner divided between them, touched glasses and drank, after which M'Clanahan took a knife out of his pocket, and observed to witness that there was but one man against whom he had enmity, and struck his knife several times into the baluster, and said if he caught him that night he would give him first hell; he then said to the prisoner, "let us go." To the ad-

missions of the declarations of M'Clanahan, as evidence against him, the prisoner, by his counsel, objected; but the objection was overruled, and the evidence admitted. It was proved that the prisoner was intoxicated, and that a free use of ardent spirits on the part of the prisoner produced partial insanity.

The court, after some remarks upon the subject of malice, charged the jury, "that if, at the time the homicide was committed, the prisoner had not sufficient understanding to distinguish right from wrong, and was in a state of insanity, it would be excusable; but that must be proved; but if his insanity or bad conduct arose from drunkenness, it was no excuse. There may be cases where insanity is produced by long-continued habits of intoxication; but it must be a permanent insanity. Insanity which is the immediate effect of intoxication is no excuse; the party is fully responsible for all his acts."

The counsel for the prisoner requested the court to charge the jury, if they believed all the circumstances of the case, that the prisoner at the time of slaying labored under a temporary suspension of reason, although intoxication might have been the exciting cause, it is a circumstance of excuse or mitigation, and more especially if intoxication were not intended at the time of drinking, but the same was accidental, or a consequence not intended or apprehended. But the court refused to charge, except as above.

The jury found the prisoner guilty of murder; upon which finding judgment was entered that he be hanged, etc. A rule for a new trial was obtained, which, upon argument, was discharged, and the case brought by the prisoner to this court by appeal in the nature of a writ of error.

Balch, *Duncan*, and *O. B. Hayes*, for appellant.

A. Hayes, Attorney-General, and *Grundy*, for the State.

The opinions of WHYTE, CATRON, and CRABB, J.J. — PECK, J., dissenting — were delivered by CRABB, J.

(Omitting rulings on other points.)

It is also contended that the court below erred in their charge to the jury, and in refusing to charge as requested. The bill of exceptions presents us with what the judge said, as follows: "The court, in charging the jury, after defining the crime of murder, stated that the fact of killing being proved, the law presumes malice; and it lies on the defendant to show, from proof, circumstances of excuse or alleviation, unless they otherwise appear. Malice is express or implied; and, when there is no previous grudge it is implied when one kills another with a deadly weapon, not having been previously assaulted, in which case it is mur-

The Dangers of Such Doctrine.

der; you will inquire whether there was express malice, or whether there was a previous assault. If, at the time, he had not sufficient understanding to know right from wrong, and was in a state of insanity, it would be an excuse; but that must be proved. But if his insanity or unusual bad conduct arose from drunkenness, it is no excuse. There may be cases where insanity is produced by long-continued habits of intoxication, but it must be a permanent insanity. Insanity which is the immediate effect of intoxication is no excuse; he is equally responsible for all his acts. The counsel for the prisoner requested the court to charge the jury, if they believed, from all the circumstances of the case, that the defendant at the time of the slaying labored under a temporary suspension of reason, and was insane, although intoxication might have been the exciting cause, it is a circumstance of mitigation or excuse; and more especially, if intoxication were not intended at the time of drinking, but the same were accidental, or a consequence not intended or apprehended. But the court would not so charge, but said insanity thus produced was no excuse."

Three cases of conviction for murder have been brought before this court at the present term; in two of which, the prisoner was defended, in the court below, on the ground of madness, occasioned by drunkenness; and yet in neither does it seem to us was there a colorable foundation for such a defence. This court would be remiss in the performance of their duty if they did not, under these circumstances, declare the law explicitly on this most important subject. In the argument of these causes very untenable positions have been assumed, and very dangerous doctrines have been advanced by counsel. And from what was stated by some of those counsel, these doctrines have been repeatedly urged, and sometimes sanctioned in the courts below.

It has become fashionable of late to discourse and philosophize much on mental sanity and insanity. New theories have been broached, and various grades and species of mania have been indicated. Some reasoners have gone so far as to maintain that we are all partial maniacs.

Whatever differences of opinion there may be as to the construction and operations of the mind of man, whatever difficulty in discovering the various degrees of unsoundness, it is only necessary for us to ascertain the kind of prostration of intellect which is requisite to free a man from punishment for crime by the law of the land. It is with this alone we have to do. "What the law has said, we say; in all things else we are silent. We put our feet in the tracks of our forefathers; *non meus hic sermo, sed quæ præcepit Offellus.* Let us then for a moment resort

to the sages of the law of different ages, and learn from them whether that species of frenzy which is produced by inebriety constitutes any excuse for crime, and what sort of insanity it is which will serve this purpose?

The good and the great, the humane yet firm, Sir Matthew Hale, in in his history of the Pleas of the Crown divides madness, *dementia*, into three kinds, — idiocy, accidental or adventitious madness, and drunkenness. "The second species, when it amounts to a total alienation of the mind, or perfect madness, excuses from the guilt of felony and treason, and further, persons afflicted with accidental madness, whether temporary — as in the case of lunacy — or continued, if they are totally deprived of the use of reason, cannot be guilty ordinarily of capital offences; for they have not the use of understanding, and act not as reasonable creatures; but their actions are, in effect, in the condition of brutes."[1]

"The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive man of the use of reason, and puts many men into a perfect but temporary frenzy; but by the laws of England, such a person shall have no privilege by this voluntarily contracted madness, but shall have the same judgment as if he were in his right senses."

In the case of *Reniger* v. *Fogossa*,[2] we have a rule laid down, which has been approved again and again, from the early day in which it was advanced to the present time, "that if a person that is drunk kills another, this shall be felony, and he shall be hanged for it; and yet he did it through ignorance, for when he was drunk he had no understanding or memory; but, inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby." Here we have the strongest case put; a case of a total deprivation of understanding by drunkenness. Yet it is held to form no excuse. Lord Coke, in his commentaries,[3] says: "As for a drunkard, who is *voluntarius dæmon*, he hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness does aggravate it." And we are told in *Beverly's Case*,[4] "that although he who is drunk is for the time *non compos mentis*, yet his drunkenness doth not extenuate his act or offence, nor turn to his avail." Hawkins, in his Pleas of the Crown,[5] says: "That he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been

[1] p. 30.
[2] Plowden, 19
[3] p. 247 a.
[4] 4 Rep. 125.
[5] Vol. I., ch. 1, sect. 6.

The Early English Cases Reviewed.

sober." The erudite commentator on the laws of England, writes as follows on this subject: [1] "As to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehavior. The law, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another."

But the part of the judge's charge which is most earnestly objected to is in the following words: "There may be cases where insanity is produced by long-continued habits of intoxication, but it must be a permanent insanity.

It has been already stated by us that madness, or insanity, if the term be preferred, occasioned immediately by drunkenness, does not excuse. Yet the judge correctly says, "that if, by the means of drunkenness a permanent, or, as Lord HALE to the same effect expressed it, an habitual or fixed madness be caused, that it will excuse." [2]

In the above extracts we see the law in this respect. A contrary doctrine ought to be frowned out of circulation, if it has obtained it, by every friend to virtue, peace, quietness and good government.

The history of criminals and criminal trials shows that he who has not learned betimes to restrain the evil inclinations of our nature, — envy, malice, revenge, and their kindred passions,— but has a sufficiency of moral sense left to deter him from the commission of enormity while sober, will often "screw his courage to the sticking-point," by the free use of ardent spirits, and, thus made able to silence the twinges of his conscience, will voluntarily imitate the demon. But let courts once approve the doctrine now contended for, and it will not be resorted to as a plea by persons of this description alone; but even the cold-blooded, calculating assassin will never be a sober homicide; he will always exhibit himself at the bar of a court of justice as a specimen of insanity produced by drunkenness. And thus this degrading and disgraceful, yet too common vice, instead of being hunted from society as the bane of good morals and social and domestic happiness, will be converted into a shield to protect from punishment the worst of crimes. All civilized governments must punish the culprit who relies on so untenable a defence; and in doing so they preach a louder lesson of morality to all those who are addicted to intoxication, and to parents, and to guard-

[1] 4 Black. Ch. 25, 26.

[2] See H. H. P. C., pt. 1, ch. 4.

ians, and to youth, and to society, than "comes in the cold abstract from pulpits."

In order to be clearly understood, we have supposed the strongest case, — a case of entire prostration of intellect immediately occasioned by drunkenness, and have said that that constitutes no excuse.

Instances, however, of heinous offences, committed under such circumstances, are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil-disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intent. He says and does when drunk what he thinks when sober.

The court entirely concur with the Circuit Court in the charge given to the jury.

Parts of this opinion may appear to partake of the character of a moral lecture. It is believed to be called for by the occasion.

We have seen before us this day three fellow-beings who are about to be ushered into the presence of their Maker, two of whom may probably attribute his unnatural exit from this world to the immoderate use of ardent spirits. Disagreeable as it is, the solemn duty is devolved upon the court of pronouncing, in this instance also, the sentence of the law that the judgment of the Circuit Court be affirmed.

INTOXICATION — INSANITY RESULTING THEREFROM — TEST OF INSANITY — PARTIAL INSANITY.

CARTER *v.* STATE.

[12 Tex. 500.]

In the Supreme Court of Texas, 1854.

Hon. JOHN HEMPHILL, *Chief Justice.*
" ABNER S. LIPSCOMB, } *Associate Justices.*
" ROYALL T. WHEELER, }

1. **Voluntary intoxication** does not excuse or palliate a crime, through insanity — **mania** a potu or **delirium** tremens — may.

2. **Test of Insanity — Partial Insanity.**—The test of insanity is the ability to distinguish between right and wrong. In case of partial insanity, the question is whether the

The Facts of the Case.

prisoner was capable of distinguishing between right and wrong in the particular connection in which the unlawful act was done.

APPEAL from Panola. Indictment for murder of William Mills. The killing occurred in the town of Pulaski, near a grocery, on the 3rd of December, 1851. The prisoner had been drinking to excess for several days, and more or less for several weeks. On the day of the killing there were several persons in and about the grocery, drinking and playing cards. While the prisoner and one Dodson were playing cards, the latter said to the other, on some trivial occasion, that he, the prisoner, did not have a soul larger than a mustard seed. A bystander, who stated that he considered it unjust, remarked to the prisoner in the same spirit, that if it were he, he would not take that. Thereupon the prisoner struck at Dodson, and a fight ensued between them, during which Mills stood by and declared that no one should interfere until one hollowed, and which ended in Dodson knocking the prisoner down with a piece of chimney timber by a blow on the head. After this, the prisoner was ranting and raving around the premises, with his gun, and by his appearance and manner caused some fear that he would injure some of the party, and from the testimony it seemed that two or three of the party were each apprehensive of an attack by the prisoner. At this time Mills remarked to Dodson that if he would give him a good whipping he would go home and behave himself. Mills, and his brother-in-law, Baker, loaded a gun, and Mills picked up a two pound weight and put it in his pocket. A short time before the killing, Mills took a bowie knife which was handy, and put it in his bosom. It did not appear whether the prisoner knew of these hostile actions on the part of Mills or not. The prisoner started and went a short distance down the hill from the grocery, and shot off one barrel of his gun. Deceased proposed to Dodson to go down to him; Dodson refused to go, remarking that he might shoot. Deceased went, and as he approached the prisoner asked him whom he shot at. The prisoner replied he knew whom he would shoot. Deceased replied he would not shoot a deer; told him he was his best friend, to put down his gun and come in, and Dodson would treat. Deceased kept advancing; prisoner told him not to come any further or he would shoot, and presently did shoot and inflicted the wound which caused death. The shot appeared to have been duck shot, and some of them were flattened against the two pound weight which the deceased still had in his pocket. Several of the witnesses who took up the deceased, testified that he had no weapons about his person. The prisoner was a quiet peaceable man when sober, but troublesome and quarrelsome when drunk. There was

an effort to prove that the prisoner had been rendered insane by excessive drinking and the blow on the head. There was in proof a vague remark of the prisoner, made soon after he was arrested, to prove an old grudge. The prisoner and the deceased had been near neighbors for a long time, and so far as everybody knew had always been friendly. The prisoner made no effort to escape.

Verdict, guilty of murder in the second degree, and confinement in the penitentiary for three years.

M. D. Rogers and *S. M. Hyde*, for appellant; *L. D. Evans*, with them.

The Attorney-General for the State.

WHEELER, J.

(Omitting other rulings.)

The defence was that at the time of committing the homicide the accused was insane, occasioned by the excessive use of ardent spirits. The court gave instructions to the jury upon the law applicable to this defence, which were not and are not now complained of. But it has been insisted in oral argument at the bar, that certain legal principles of which the accused should have had the benefit were omitted; and that upon a proper view of the whole law upon the subject, the jury would have been warranted by the evidence in acquitting, or at least in imposing a milder punishment. We have attentively considered the charge of the court and the evidence; and are unable to concur with counsel in the view they have taken of the case.

It is unnecessary to review the charge of the court, as there is no part of it applicable to this defence, which is complained of as erroneous. Nor is it necessary to review the evidence. It may, however, be observed that the principal if not the only evidence in the case to support the plea of insanity is to be found in the facts and immediate circumstances attending the killing. There is no other evidence in the case from which the conclusion may be drawn that the accused was bereft of reason, than that which is to be found in the fact of killing under the circumstances. That was such as to afford conclusive evidence of malice; but not of insanity. In a certain sense, though certainly not in a legal sense, every unnecessary or unlawful homicide may be said to be an insane act. But to derive the evidence which is to acquit on the plea of insanity, from that source alone, if not equally as irrational as the act may be supposed to be, would at least be of extremely dangerous consequences. For the more causeless, unnatural and indefensible the homicide, the more deserving of condign punishment, the more fruitful would it be in the evidence which would screen from punish-

United States *v.* McGlue, approved.

ment. It is manifest, therefore, that the absence of any known cause or apparent motive for the commission of a homicide, can never be considered evidence to support the plea of insanity. Every man is presumed to be sane until the contrary appears. Insanity is an exception to the general rule; and before any man can claim the benefit of the exception, he must prove that he is within it. It has been laid down as the law upon great authority and consideration, "that before a plea of insanity should be allowed, undoubted evidence should be adduced, that the accused was of diseased mind, and that, at the time he committed the act, he was not conscious of right and wrong. This opinion related to every case in which a party was charged with an illegal act, and the plea of insanity was set up. Every person was supposed to know what law was, and therefore nothing could justify a wrong act until it was clearly proved that the party did not know right from wrong. If that was not satisfactorily proved, the accused was liable to punishment."[1]

It is also to be remarked that it appears from the evidence that the accused was perfectly conscious of what he was about to do; and he does not appear to have even fancied that he was acting upon provocation, or was constrained to act in necessary self-defence. He does not appear to have labored under any delusion; but to have had, or believed he had, and it would seem not wholly without reason, — cause of ill-will towards the deceased for being the friend of his enemy. There does not seem, therefore, to have been an entire absence of the usual [malice] which incites to wicked, malicious, and revengeful acts. But without attempting to trace the act to the secret motive which prompted it, or to find the real or any adequate cause for its commission (which is unnecessary), it is further to be observed upon the evidence (and it is a very material fact where the plea of insanity is set up, alleged to have arisen from the cause to which it is ascribed in this case), that the accused shortly before starting out with his gun upon an avowed errand of death, indulged in such potations as were calculated in his excited state to excite to those acts of desperation, which are not unfrequently the fruits of the madness and frenzy occasioned by a sudden fit of drunkenness; and for which, when voluntary and intentional, the law makes no allowance, and admits no extenuation of crime.

The judge then cites with approval the charge of the court in *United States* v. *McGlue*,[2] and affirms the judgment.

[1] Wharton Am. Cr. L. 13.

[2] 1 Curt. C. C. 1.

INTOXICATION — INSANITY PRODUCED THEREBY — BURDEN OF PROOF — PREMEDITATION AND DELIBERATION.

Boswell's Case.

[20 Gratt. 860.]

In the Court of Appeals of Virginia, March Term, 1871.

Hon. Richard C. L. Moncure, *President.*
" William T. Jaynes,
" Joseph Christian,
" Waller R. Staples,
" Francis T. Anderson, } *Judges.*

Voluntary Drunkenness does not excuse a crime, but permanent insanity, like every other kind of insanity, excuses an act which otherwise would be criminal.

2. **Burden of Proof.** — The defence of insanity must be proved to the satisfaction of the jury.

3. **Intoxication is relevant** on the question of deliberation and premeditation.

Error to the Corporation Court of Alexandria.

James Boswell was indicted for the murder of Martha French, a colored girl seven years old. He was convicted of murder in the second degree, and appealed.

F. L. Smith & Neale, for the prisoner.

The *Attorney-General*, for the Commonwealth.

Moncure, P.

(After passing on other points.)

The facts proved on the trial, and on which the said instructions were founded, are in substance as follows: On the evening of the 4th of July, 1870, Boswell (the accused), being drunk and staggering, came up King Street (in Alexandria) to West Street, and upset a barrel in front of a store on King Street, as he went by; that he turned down West Street, going in a northerly direction, and keeping on the east side of the latter street; that, as he walked along, he exclaimed in violent tones: "I will blow his damn brains out; will kill the damn little sons of bitches;" that there were at the time two little negro girls passing along the west side of West Street, going in a southerly direction and toward King Street, a number of ducks in the street about ten feet from him, and still further on a cart, both the ducks and the cart being between the prisoner and the other side of the street, though it did not appear that the cart was between prisoner and the little girls; that,

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when about midway of the square, Boswell picked up a brick, and casting it across the street, struck one of the little girls on the right side of the head, above the ear; that the girl fell in a dying condition, and expired at ten o'clock in the night of that day; that the girl so struck was named Martha French, and was about six years and nine months old; that after throwing the brick, Boswell turned and walked to the corner of King and West Streets, took off his coat or jacket, put it on the curbstone and sat down; while there he was told by a witness not to go away, and replied: "If I have done anything wrong, you can take out your penknife and cut my throat. I give myself up. If I killed the child, I did not intend to do it." That Boswell had been grossly intoxicated for a week, except on the day preceding the day on which the alleged crime was committed, and had no previous acquaintance with the deceased; that Boswell, the day before the killing of the child, when asked by Thomas Huntington why he did not reform and behave himself, said he wanted to die, but did not know why; that one day in the latter part of June, 1870, he threw himself into a small stream near Alexandria, called Hooff's Run, at a place where the water is about eight inches deep, and Lucien Hooff and another man who was passing by, found him lying on his face in the water, out of which they pulled him, and laid him on the grass; if he had been left in the water he would have drowned; that they then went away, and Hooff, on looking back, saw Boswell again throw himself into the water, and Hooff and a man named Cunningham pulled him out and left him lying on the bank in an insensible condition; he would have been drowned in two minutes, had he not been rescued; that in June, 1870, some two weeks prior to the killing of the child, Boswell came to the depot of the Orange, Alexandria and Manassas Railroad, excessively drunk, and staggering, and throwing himself about, and threw himself across the cow-catcher of an engine in motion, which dragged him some distance; that the engineer stopped, and two men took him off the cow-catcher, and threw him on a pile of manure; that about an hour afterwards, as the southern bound train was leaving the depot, Boswell was discovered lying on one or both rails of the track, near the culvert, a short distance from the depot; that the engineer stopped the train, and the same two men dragged him off the track, and threw him down the embankment; that each month, about the change of the moon, John Boswell, the prisoner's younger brother, would go home, refuse to work, and when approached with directions to go to work, would be listless, indifferent, and seem not to understand.

Boswell's Case.

After the evidence was heard by the jury, the accused, by counsel, moved the court to give them the following instructions: —

1. If the jury shall believe, from the evidence, that the prisoner was drunk at the time of the killing in the indictment mentioned, and that such drunkenness was brought on by sensual or social gratification, with no criminal intent, then they are justified in finding a verdict of voluntary manslaughter, provided they also believe from the evidence that there was no malice.

2. If the jury believe, from the evidence, that the drunkenness was the result of long-continued and habitual drinking, without any purpose to commit crime, and that the drunkenness produced insanity, whether temporary or permanent, and that the prisoner was in such condition, at the time of the killing aforesaid, then the jury may find a verdict of not guilty; and further, that when the jury, from the evidence, should entertain a reasonable doubt on the question of insanity, they should find in favor of insanity; or if they should entertain, from the evidence, reasonable doubt of any material portion of the charge, the prisoner shall have the benefit of that doubt.

And the court refused to give the said instructions, and gave the following to the jury: —

1. That every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; that if, from the evidence, the jury believe that at the time of throwing the brick, the blow from which caused the death of the deceased, the prisoner was laboring under such a defect of reason from disease of the mind (remotely produced by previous habits of gross intemperance), as not to know the nature and possible consequences of his act, or if he did know, then that he did not know he was doing what was wrong, they will find the prisoner not guilty.

2. That if the jury shall believe beyond reasonable doubt, from the evidence, that the prisoner threw the brick at the deceased without provocation and through reckless wickedness of heart, but that at the time of doing so, his condition, from intoxication or other causes, was such as to render him incapable of doing a wilful, deliberate, and premeditated act, then they will find the prisoner guilty of murder in the second degree.

3. That if the jury believe, from the evidence, beyond reasonable doubt, that the prisoner, though intoxicated at the time of throwing the brick which caused the death of the deceased, was capable of knowing the nature and consequence of his act, and if he did know, then that he knew he was doing wrong, and that so knowing he threw the brick at

the deceased with the wilful, deliberate, and premeditated purpose of killing her, then they will find the prisoner guilty of murder in the first degree.

4. That if the jury believe from the evidence that the prisoner, at the time of throwing the brick at the deceased, was in such a condition as to render him incapable of a wilful, deliberate, and premeditated purpose, and that he did not so throw it out of any reckless wickedness of heart or purpose, then they will find the prisoner guilty of voluntary manslaughter.

5. If the jury should acquit the prisoner, by reason of their believing him insane, that they will so state in their verdict.

The law in regard to the extent to which intoxication affects responsibility for crime, seems to be now well settled; and the only difficulty is in the application of the law to the facts of a particular case.

In 1 Hale's P. C.[1] he says: "The *dementia affectata;* namely, drunkness; this vice doth deprive a man of his reason, and puts many men into a perfect but temporary frenzy; but by the laws of England, such a person shall have no privilege by his voluntarily contracted madness, but shall have the same judgment as if he were in his right senses."[2] Blackstone says, in regard to the excuse of drunkenness, "the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another." In *Rex* v. *Thomas*,[3] PARKE, B., said to the jury: "I must also tell you, that if a man makes himself voluntarily drunk, it is no excuse for any crime he may commit while he is so; he must take the consequences of his own voluntary act, or most crimes would go unpunished. And in *John Burrow's Case*,[4] HOLROYD, J., told the jury: "Drunkenness is not insanity nor does it answer to what is termed an unsound mind, unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong."

The American cases establish the same doctrine with the English on this subject.[5] In *Pirtle* v. *State* the court in explaining the decision in *Swan* v. *State*,[6] says: "This reasoning is alone applicable to cases of murder under our act of 1829,[7] which provides that all murder committed by means of poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing, etc., shall be deemed murder in the

p. 32.

[2] See also 1 Russell on Crimes, 7; and 4 Bl. Com. 26.

[3] 7 C. and P. 817, 820.

[4] 1 Lew. C. C. 238.

[5] 9 Humph. 663.

[6] 4 Humph. 136

[7] ch. 23.

first degree, and all other kinds of murder shall be deemed murder in the second degree. Now this is drawing a distinction, unknown to the common law, solely with a view to the punishment; murder in the first degree being punishable with death, and murder in the second degree by imprisonment in the penitentiary. In order to inflict the punishment of death, the murder must have been committed wilfully, deliberately, maliciously and premeditatedly. This state of mind is conclusively proven when the death has been inflicted by poison or by lying in wait for that purpose; but if neither of these concomitants attend the killing, then the state of mind necessary to constitute murder in the first degree, by the wilfulness, the deliberation, the maliciousness, the premeditation, if it exist, must be otherwise proven." "In all such cases, whatever fact is calculated to cast light upon the mental *status* of the offender is legitimate proof; and among others, the fact that he was at the time drunk; not that this will excuse or mitigate the offence if it were done wilfully, deliberately, maliciously and premeditatedly (which it might well be, though the perpetrator was drunk at the time); but to show that the killing did not spring from a premeditated purpose." "This distinction can never exist except between murder in the first degree and murder in the second degree under our statute." "As between the two offences of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing being voluntary, the offence is necessarily murder in the second degree, unless the provocation, were of such a character as would at common law constitute it manslaughter, and for which latter offence, a drunken man is equally responsible as a sober one." I have quoted thus largely from this case, because it lays down the law very correctly, and is specially applicable in this State, in which there is a law very much, if not precisely like that of Tennessee, distinguishing between murder in the first and second degrees. The most material cases, English and American, bearing upon this whole subject, are collected in a note to the case of *United States* v. *Drew*.[1]

With this general view of the law on the subject, I will now take some notice of the instructions in detail; and first of those asked for by the accused. The first instruction asked for, was properly refused. It states a case of murder, and asks the court to instruct the jury that it was a case of voluntary manslaughter. The words at the conclusion, "provided they also believe from the evidence that there was no malice," do not alter the case. The law implies malice from the facts stated in the former part of the instruction. The word "malice" in the *proviso*,

[1] 5 Mason 28; in 1 Lead. Crim. Ca. 113-124. See also 1 Wharton's Am. C. L. sects. 32-44.

can mean only express malice, which is necessary to constitute murder; malice express or implied, being sufficient, or if it mean malice generally, then the *proviso* is in conflict with the body of the instruction, which is therefore faulty, and it was proper on that ground, if no other, to refuse to give it.

The second instruction asked for was also properly refused. Drunkenness is no excuse for crime, although such drunkenness may be, "the result of long continued and habitual drinking without any purpose to commit crime," and may have produced temporary insanity, during the existence of which the criminal act is committed. In other words, a person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become, on that account, irresponsible for his conduct during such drunkenness. He may be perfectly unconsious of what he does, and yet he is responsible. He may be incapable of express malice, but the law implies malice in such a case from the nature of the instrument used, the absence of provocation, and other circumstances under which the act is done. Public policy and public safety imperatively require that such should be the law. If permanent insanity be produced by habitual drunkenness, then like any other insanity, it excuses an act which would be otherwise criminal. The law looks at proximate, and not remote causes in this matter. Finding the accused to be permanently insane, it inquires not into the cause of his insanity. In the leading case of *United States* v. *Drew*, before referred to, which was a case of murder, Mr. Justice Story held the accused not responsible, the act having been done under an insane delusion, produced by disease brought on by intemperance, called delirium tremens. "In general," said the judge "insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take place and be the immediate result of the fit of intoxication, and while it lasts; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party arising from gross and habitual drunkenness. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate not the remote cause; to the actual state of the party, and not to the causes which re-

motely produced it." That is the first case in which it has been held that an act otherwise criminal, done by a person laboring under the disease of delirium tremens, might be excusable on the ground of insanity. Without meaning to question the authority of that case, and conceding it to be good law, as it may be, still it does not apply to this case; for it expressly admits that "had the crime been committed while Drew was in a fit of intoxication he would have been liable to be convicted of murder." In this case it is not pretended that the accused had delirium tremens, or anything like it, when he committed the act, and the instruction asked for expressly admits that the act was done by the accused while he was drunk. So that according to the law, as it was admitted to be in the case of *United States* v. *Drew*, such drunkenness is no excuse. This is a sufficient reason for refusing to give the second instruction asked for. The latter part of that instruction embraces another proposition, which will be noticed presently.

As to the instructions which were given by the court, the first, I think, is unexceptionable. To the greater part, and all but the first two or three lines, no objection has been, or properly can be taken. To the first part of it, which is in these words: "That every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction," the accused objects. Of course he does not and cannot object to so much even of that part, as says "that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes." He only objects to the concluding words of the sentence, "until the contrary is proved to their satisfaction." Indeed, the objection only goes to the three concluding words "to their satisfaction;" which he seems to think is an excessive measure of the proof required by law to repel the presumption of sanity. He seems to think (and that is the thought which is embodied in the latter part of the second instruction asked for), that all the proof required by law, to repel the said presumption, was only so much as would raise a rational doubt of his sanity at the time of committing the act charged against him. Now I think this is not law; and that the law is correctly expounded in the first instruction given by the court. There are, certainly, several American cases which seem to sustain the view of the accused and are referred to by his counsel. But I think the decided weight of authority, English and American, is the other way, as the cases referred to by the attorney-general will show. In 1 Wharton's Am. Cr. L.,[1] the writer says: "At

[1] sect. 711.

common law the preponderance of authority is, that if the defence be insanity, it must be substantially proved as an independent fact;" and for this he cites, *Rex* v. *Stokes*,[1] *Rex* v. *Taylor*,[2] *State* v. *Brinyea*,[3] *State* v. *Stark*,[4] *State* v. *Huting*,[5] *State* v. *Starling*,[6] *State* v. *Spencer*,[7] *Bonfanti* v. *State*,[8] *State* v. *Brandon*,[9] *People* v. *Myers*.[10] "On the other hand," he proceeds, "it has been ruled in Massachusetts, in 1856, that the defence is made out if the prisoner satisfied the jury by a preponderance of evidence, that he is insane." And for this he cites: *Commonwealth* v. *Eddy*,[11] *Commonwealth* v. *Rogers*.[12] "And in other courts it has been held, that in this, as in all other constituents of guilt, the burthen is on the prosecution." And for this he cites, *People* v. *McCann*,[13] *Ogletree* v. *State*,[14] *United States* v. *Mc Glue*,[15] *State* v. *Bartlett*,[16] *Polk* v. *State*,[17] *Hopps* v. *People*.[18] See also *Chase* v. *People*,[19] in which *Hopps* v. *People*, is explained. Now, here we have a reference to nearly all the authorities on either side bearing upon this question, and I think the fair results of them is to show that insanity, when it is relied on as a defence to a charge of crime, must be proved to the satisfaction of the jury, to entitle the accused to be acquitted on that ground; though such proof may be furnished by evidence introduced by the Commonwealth to sustain the charge, as well as by evidence introduced to sustain the defence. This result consists with reason and principle. The law presumes every person sane till the contrary is proved. The Commonwealth having proved the *corpus delicti*, and that the act was done by the accused, has made out her case. If he relies on the defence of insanity, he must prove it to the satisfaction of the jury. If, upon the whole evidence, they believed he was insane when he committed the act, they will acquit him on that ground. But not upon any fanciful ground, that though they believe he was then sane, yet as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal. Insanity is easily feigned, and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence. Some of the cases have gone so far as to place the presumption of sanity on the

[1] 3 C. & K. 185.
[2] 4 Cox. C. C. 155.
[3] 5 Ala. 244.
[4] 1 Strobh. 479.
[5] 21 Mo. 464.
[6] 6 Jones (N. C.), 471.
[7] 21 N. J. (L.) 196.
[8] 2 Minn. 123.
[9] 8 Jones (N. C.), 463.
[10] 20 Cal. 518.
[11] 7 Gray 583.
[12] 7 Metc. 500.
[13] 16 N. Y. 58.
[14] 28 Ala. 692.
[15] 1 Curt. C. C. 1.
[16] 43 N. H. 224.
[17] 19 Ind. 170.
[18] 31 Ill. 385.
[19] 40 Ill. 358.

same ground with the presumption of innocence, and to require the same degree of evidence to repel it. But I do not think it necessary or proper to go to that extent.[1]

As to the second instruction given by the court, it seems to be free from any just ground of objection, except that I think the words "other causes," ought to have been omitted. If a person be incapable from other causes than intoxication, of doing a wilful, deliberate, and premeditated act, he would seem to be incapable of murder in the second degree, or any other crime. To be sure the words "through reckless wickedness of heart," in the former part of the instruction, imply malice; but it is difficult to see how a person guilty of doing an act, through reckless wickedness of heart, could, at the same time, be in such condition from other causes than intoxication, as to render him incapable of doing a wilful and deliberate and premeditated act. There is, therefore, an apparent conflict between the different parts of the instruction, and at all events it was calculated to mislead the jury.

The third instruction given by the court is unobjectionable and unobjected to.

The fourth instruction given by the court, is objectionable on the ground taken by the counsel of the accused, that it assumes the fact that the accused threw the brick at the deceased, which ought to have been referred to the jury. The instruction ought to have stated the fact hypothetically, thus: "That if the jury believed from the evidence that the prisoner threw a brick at the deceased, which caused her death, and that at the time of so doing he was in such a condition of drunkenness, as to render him incapable of a willful, deliberate and premeditated purpose, and that he did not so throw it, out of any reckless wickedness of heart or purpose, then they will find the prisoner guilty of manslaughter."

Whether the accused threw the brick at the deceased or not, was a fair question of controversy before the jury upon the evidence. He might have thrown it at her, or he might have thrown it at the ducks in the street, or he might have thrown it at random. In either case he did an unlawful act, likely to do mischief, considering the time and place and circumstances under which it was done, and he was, therefore, responsible for the consequences of the act as a crime. But the degree of such crime depended upon the intention with which the brick was

[1] See also Roscoe's Cr. Ev., library addition, pp. 905-909; opinions of the judges on questions propounded by the House of Lords, 47 Eng. C. L. R., 129; State v. Willis, 63 N. C. 26; Graham v. Commonwealth, 16 B. Mon. 587.

thrown. Such intention was therefore a material fact to be determined by the jury, and the court invaded their province in assuming it.

The result of my opinion is that there is no other error in the judgment than those in the second and fourth instructions given by the court as aforesaid; but for those errors the said judgment ought to be reversed, the verdict set aside, and the case remanded for a new trial to be had therein.

JOYNES, J., concurred in the opinion of MONCURE, P., except as to what is said therein upon the burden of proof on the question of insanity. He was of the opinion that the burden was on the Commonwealth to prove the sanity of the prisoner.

The other judges concurred in the opinion of MONCURE, P.

Judgment reversed.

DRUNKENNESS—INSANITY RESULTING THEREFROM.

UNITED STATES *v.* DREW.

[5 Mason, 28.]

In the United States Circuit Court for the District of Massachusetts. May, 1828.

Hon. JOSEPH STORY, } *Judges.*
" JOHN DAVIS. }

Where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors. But it is otherwise, if he be at the time intoxicated, and his insanity be directly caused by the immediate influence of such liquors.

Indictment for the murder of Charles L. Clark on the high seas on board of the American ship *John Jay*, of which Drew was master, and Clark was second mate. Plea, general issue.

At the trial the principal facts were not contested. But the defence set up was the insanity of the prisoner at the time of committing the homicide. It appeared that for a considerable time before the fatal act, Drew had been in the habit of indulging himself in very gross and almost continual drunkenness; that about five days before it took place, he ordered all the liquor on board to be thrown overboard, which was accordingly done. He soon afterwards began to betray great restless-

ness, uneasiness, fretfulness, and irritability, expressed his fears that the crew intended to murder him; and complained of persons, who were unseen, talking to him, and urging him to kill Clark; and his dread of so doing, He could not sleep, but was in almost constant motion during the day and night. The night before the act, he was more restless than usual, seemed to be in great fear, and said that whenever he laid down there were persons threatening to kill him, if he did not kill the mate, etc. In short, he exhibited all the marked symptoms of the disease brought on by intemperance, called *delirium tremens.*

Upon the closing of the evidence, the court asked *Blake*, the district attorney, if he expected to change the posture of the case.

He admitted that unless upon the facts the court were of opinion that this insanity, brought on by the antecedent drunkenness, constituted no defence for the act, he could not expect success in the prosecution.

After some consultation the opinion of the court was delivered as follows: —

Story, J. — We are of opinion, that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offence. And the question made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is or is not an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime. But the crime must take place and be the *immediate* result of the fit of intoxication, *and while it lasts;* and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal, in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to have been convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate,

and not to the remote cause; to the actual state of the party, and not to the causes which remotely produced it. Many species of insanity arise remotely from what, in a moral view, is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence.

B. Davis and *Basset* for the prisoner.

Verdict, not guilty.

INTOXICATION — MURDER IN FIRST DEGREE — DELIBERATION — TEST OF INSANITY — EVIDENCE.

STATE *v.* JOHNSON.

[40 Conn. 136.]

In the Supreme Court of Errors of Connecticut, April Term, 1873.

Hon. THOMAS BELDEN BUTLER, *Chief Justice.*
" ORIGEN S. SEYMOUR,
" JOHN D. PARK,
" ELISHA CARPENTER,
" LAFAYETTE S. FOSTER, } *Justices.*

1. **Murder in First Degree — Deliberation — Intoxication.** — On an indictment under a statute providing that all murder "perpetrated by any kind of wilful, deliberate, and premeditated killing" is murder in the first degree, a state of intoxication or any other fact tending to prove that the prisoner was incapable of deliberation may be shown.
2. **Test of Insanity.** — To be criminally responsible a man must have reason enough to be able to judge of the character and consequences of the act committed, and must not be overcome by an irresistible impulse arising from disease.
3. **Where insanity is shown to exist** a short time before the act, the evidence should show sanity at the time or the jury should acquit.

Indictment for murder in the first degree; brought to the Superior Court in New Haven County and tried, on the plea of not guilty, before FOSTER and GRANGER, JJ.

The murder charged was that of a woman named Johanna Hess, at Meridan, in New Haven County, on the eighth day of July, 1872. By statute,[1] "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and pre-

[1] Gen. Stats., tit. 12, sect. 6.

meditated killing, or which shall be committed in perpetrating, or attempting to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder in the first degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty, ascertain in their verdict whether it be murder in the first degree or second degree." Another section of the statute makes murder in the first degree punishable by death, and in the second degree by imprisonment in the State prison for life.

Upon the trial the attorney for the State having offered evidence to prove, and claiming to have proved, that the murder was wilful, deliberate and premeditated, and therefore murder in the first degree, the counsel for the prisoner offered evidence to prove that he was insane at the time he committed the act. And that he had been insane on previous occasions, and had a disease called dipsomania. He also offered evidence to prove, and claimed to have proved, that the prisoner was intoxicated at the time, and was also suffering from a severe injury which had affected his nervous organization, and which rendered him more easily affected by intoxicating liquor.

After the evidence was in, the counsel for the prisoner filed a written request that the court would give the jury the following instructions in writing: 1st. That if the evidence shows that intoxicating liquor on previous occasions had rendered the prisoner insane, or had caused an habitual madness or fixed frenzy, and that if at the time he was laboring under a temporary insanity caused by excessive drinking, in combination with an infirm state of mind, or a previous wound or illness, which rendered ardent spirits fatal to his intellect to a degree unusual in other men, the jury should wholly acquit the prisoner. 2d. That if upon the whole evidence the jury believe that the prisoner, at the time of committing the act, was under the influence of a diseased mind, and was unconscious that he was committing a crime, the jury should acquit him. 3d. That if the prisoner was laboring under some controlling disease, which was an active power within him which he could not resist, then he was not responsible. 4th. That if the jury believe, that from any cause, either from personal injuries or the use of ardent spirits, the prisoner's mind was impaired, and at the time of committing the act was, by reason of such cause, unconscious that he was committing a crime, he is not guilty of any offence whatever. 5th. That if the jury find that the prisoner was greatly excited or affected by the use of liquor, and which produced a state of mind unfavorable to deliberation and premeditation, although not such as to render the party entirely incapable of forming a deliberate purpose, he

Instructions.

cannot be convicted of any higher crime than that of manslaughter. 6th. That the law does not require that the insanity which absolves from crime should exist for any definite period or for any particular length of time; but only that it should exist at the moment when the act charged was committed. 7th. That the proof of prior insanity, at any time, imposes upon the State the burden of proving the crime to have been perpetrated during a lucid interval; and that the proof of prior insanity defeats the legal presumption of sanity, and creates a legal presumption of continued lunacy, which, like the former, must be overthrown by proof. 8th. That if the jury have any doubt as to the case, on the question of the sanity of the prisoner at the time of the commission of the act, he should be acquitted. 9th. That if intoxicated at the time of committing the act, he is guilty of no higher crime than that of manslaughter. 10th. That in order to convict of murder in the first degree, the jury must find that the accused killed the deceased with premeditation and while in the possession of a sound mind and of his reasoning faculties; and that if the jury have any doubt on this point, or on any point in the case, they are bound to give the prisoner the benefit of that doubt.

The court declined to give any of the instructions so requested, but in lieu thereof charged the jury in writing, as follows: "To be a subject of punishment, an individual must be a moral agent; must have mind and capacity, must have reason and understanding enough to enable him to judge of the nature, character and consequences of the act charged against him, that the act is wrong and criminal, and that the commission of it will properly and justly expose him to penalties. He must not be overcome by an irresistible impulse arising from disease. The law can give no full and precise definition of sanity or of insanity; each is a question of fact, and the jury should be satisfied beyond a reasonable doubt, before convicting a man of crime, that he is of sound mind — a sane man; if insane, he should be acquitted. Every person of mature years is presumed to be competent to commit crime, and to be of sound mind. If a person charged with crime be shown to have been insane a short time before the commission of the act, the evidence should show sanity at the time, or the jury should acquit." "Drunkenness does not excuse a party from the consequences of a criminal act; one crime cannot justify another. A man committing a criminal act, though intoxicated at the time, is a legal and proper subject of punishment. If a man, by long continued habits of intoxication, has brought on insanity, or so impaired and enfeebled his mind as to be utterly imbecile, he is no longer punishable for

crime. If upon the whole evidence the jury entertain a reasonable doubt as to the prisoner's sufficient soundness of mind to be responsible for his acts, it will be their duty to give him the benefit of the doubt, and to render a verdict of acquittal."

The court further charged the jury orally as follows: "Murder in the first degree is defined by our statute as the killing of any person by poison, by lying in wait, or by any other kind of wilful, deliberate, premeditated killing, or when perpetrating the crime of robbery, rape, burglary or arson. This indictment does not charge the commission of this crime, either by lying in wait, by poison, or when committing either of the other crimes named in the statute. The question will be for you, under this indictment, to decide whether the accused committed the crime wilfully, deliberately and with premeditation. On this indictment the jury may bring in a verdict of guilty of murder in the first degree, or second degree, or manslaughter, or not guilty."

The jury returned a verdict of guilty of murder in the first degree, and the prisoner moved for a new trial, for error in the refusal of the court to charge as requested, and in the charge given.

There was also a motion in error on the ground of the insufficiency of the indictment, but as the decision of the case was wholly upon the motion for a new trial, that part of the case is not stated.

Hicks, for the prisoner.

G. A. Fay, *contra*.

CARPENTER, J. — There being a difference in opinion on the questions arising upon the motion in error, none of those questions are now decided, but we confine our attention to the motion for a new trial.

We think the charge of the court upon the subject of insanity was unexceptionable. It fully complied with the requests of the prisoner's counsel, so far as those requests were according to law. The language of the court differed, and very properly differs from the language of the requests; but the law of the charge is correct, and all that the prisoner was entitled to.

We are also of the opinion that the court was not bound to charge as requested upon the subject of intoxication. If the prisoner was in fact intoxicated at the time of the homicide, that does not as a matter of law reduce the offence to manslaughter, much less does it justify the prisoner. Nor does it in point of law reduce it to murder in the second degree. There was no error, therefore, in refusing to charge according to these requests.

Relevant on Question of Deliberation.

The court charged the jury that "drunkenness does not excuse a party from the consequences of a criminal act; one crime cannot justify another. A man committing a criminal act, though intoxicated at the time, is a legal and proper subject of punishment."

This, too, as a general proposition, is correct. If that was the only question involved in the case it would be entirely free from difficulty. But the real question is, whether drunkenness as a fact may be considered by the jury as evidence tending to disprove an essential fact in the case, a deliberate intention to take life.

We have entertained some doubts whether this question was made in the court below, and so presented here as that we can properly consider it. In the first place, it does not very clearly appear that the intoxication proved or claimed was of such a degree as to impair the capacity of the prisoner to form a deliberate, premeditated purpose to take life. In the next place, it does not appear that the prisoner's counsel asked the court to say to the jury that the intoxication was evidence tending to prove that the killing was not premeditated, and that he could only be convicted of murder in the second degree; but the claim was, in substance, that, intoxication, as matter of law, reduced the offence to manslaughter.

In a case of less importance these considerations might have some weight and induce us to hesitate to grant a new trial; but in a capital case we are not disposed to enforce the rules, however salutary those rules may be in their general application, so rigidly as to hold the prisoner to the consequences of a mistaken view of the law by his counsel; especially, when the course taken on the trial was such as practically to exclude from the minds of the jury, a fact material to be considered in determining not whether a crime was committed, but the measure of guilt.

The prisoner was indicted and on trial for murder in the first degree. As the homicide was not perpetrated by the means of poison, or lying in wait, or in committing or attempting to commit any of the crimes enumerated in the statute, he could only be convicted of the higher offence by showing that it was a wilful, deliberate, and premeditated killing. A deliberate intent to take life is an essential element of that offence. The existence of such an intent must be shown as a fact. Implied malice is sufficient at common law to make the offence murder, and under our statute to make it murder in the second degree; but to constitute murder in the first degree actual malice must be proved. Upon this question the state of the prisoner's mind is material. In behalf of the defence, insanity, intoxication, or any other fact which

tends to prove that the prisoner was incapable of deliberation, was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less and not the greater offence was in fact committed. I cite a few only of the many authorities which sustain this position: *Keenan* v. *Commonwealth;*[1] *Roberts* v. *People*;[2] *Pigman* v. *State;*[3] *State* v. *Garvey;*[4] *Haile* v. *State;*[5] *Shannahan* v. *Commonwealth;*[6] Ray's Medical Jurisprudence.[7]

As I have already said, the charge of the court was in itself well enough; but we must consider it in its application to the case on trial, and in the sense in which the jury probably understood it. When they were told that "drunkenness does not excuse a party from the consequences of a criminal act," it is probable that they did not distinguish between excusing a crime and showing that the specific crime charged had not been committed, and when they were further told that "a man committing a criminal act, though intoxicated at the time, is a legal and proper subject of punishment," they undoubtedly understood the "criminal act" to mean murder in the first degree, and punishment to mean capital punishment, and that the intoxication of the prisoner whether little or much could legally have no bearing upon the question whether it was murder in the first or second degree. The danger is that the jury, while making up their verdict, excluded from their minds the subject of intoxication altogether; and that they were led to believe that the malice implied by law from the weapon used, and the circumstances attending the offence, was sufficient to constitute murder in the first degree, and that a deliberate, premeditated design to take life was not essential. If so, it is manifest that injustice may have been done the prisoner. I think the court should have submitted to the consideration of the jury the fact of intoxication, if it was a fact to be weighed by them, in connection with the other evidence in the cause, in determining whether it was a wilful, deliberate, and premeditated killing.

For these reasons, a majority of the court are of the opinion that a new trial should be advised.

In this opinion, PARK, J., concurred. SEYMOUR, J., dissented. FOSTER, J., having tried the case below, did not sit.

[1] 44 Pa. St. 55;
[2] 19 Mich. 401.
[3] 14 Ohio 555.
[4] 11 Minn. 154.
[5] 11 Humph. 154.
[6] 8 Bush (Ky.), 463.
[7] (5th ed.), 566.

Syllabus.

DEGREES OF MURDER — INTOXICATION — MALICE — IMPLIED MALICE.

STATE *v.* JOHNSON.

[41 Conn. 585].

In the Supreme Court of Errors of Connecticut, November Term, 1874.

Hon. JOHN DUANE PARK, *Chief Justice.*
" ELISHA CARPENTER, }
" LAFAYETTE S. FOSTER, } *Justices.*
" JAMES PHELPS, }
" DWIGHT W. PARDEE, }

1. **Intoxication does not necessarily disprove** the existence of malice in the commission of a criminal act.

2. **Murder in First Degree — Intoxication — Malice.** — On an indictment for murder in the first degree which by statute requires the existence of actual malice, the fact that the prisoner was intoxicated at the time is to be considered as tending to prove that such malice did not exist.

3. **Murder in Second Degree — Implied Malice.** — In murder in the second degree which rests upon implied malice, the jury may find the existence of malice, although the prisoner's condition at the time of the crime disproves express malice.

4. **Intoxication — When relevant.** — The intoxication of the prisoner is relevant in determining the prisoner's state of mind at the time of the act; and in connection with proof of provocation may tend to show that the act was one of sudden passion and not of premeditation, and that therefore the homicide is manslaughter and not murder.

The prisoner [1] was again put on trial, this time on an indictment charging him with murder in the second degree. Verdict guilty, and prisoner appealed.

Hicks, for the prisoner.

G. A. Fay, *contra.*

CAMPBELL, J. — The prisoner was on trial upon an indictment for murder in the second degree. His counsel requested the court to charge the jury " that if the jury find that the defendant was intoxicated at the time of the commission of the act alleged in the indictment, and was thereby in such a condition as to be unable to form a deliberate and premeditated purpose to kill any person, and was at the same time unconscious of the character and consequences of his acts, provided he had no deliberate or premeditated purpose to kill any person prior to his being intoxicated, then the jury cannot convict the defendant of any crime higher than manslaughter."

[1] See State *v.* Johnson, *ante.*

This request contemplates a condition of mind and body in which it would be difficult to do any criminal act. The mind would be incapable of forming a criminal intent, and if it was in that condition by reason of intoxication, the physical organs would ordinarily be powerless to do harm. The case does not show that the defence proved or claimed that he was intoxicated to any such degree. It is manifest from the motion that the prisoner if intoxicated at all, was slightly so. "Some evidence" tending to prove it was offered; and it was claimed "that his health was such that he was more easily affected by intoxicating liquors;" and "that he was provoked by the conduct of the deceased to such a degree that he was wholly beside himself and for the time being insane." The request, therefore, was not pertinent to the facts of the case, nor to the evidence offered, and the court properly refused to charge as requested.

The court charged the jury that "the law recognizes the general principle that it is wrong for a man to cloud his mind and excite his passions to evil actions by the excessive use of intoxicating drink, and if he does this voluntarily, and by reason of its effect, does what the law punishes as a crime, the intent to drink, and the evil consequence combine and make the act a crime." The court then noticed three important qualifications of that doctrine. 1. When the intoxication is involuntary, or produced by stratagem or fraud of another. 2. When excessive drinking long continued results in insanity or imbecility. 3. When the law requires some specific intent, or some particular state of mind, as an essential element of the offence, as express malice, in murder in the first degree. The jury were then told that murder in the second degree rested on implied malice, and that intoxication does not necessarily rebut or disprove any essential element of that crime; that intoxication might have the effect in connection with the provocation to reduce the offence to manslaughter. The prisoner certainly ought not to complain of this charge. It will be noticed that the charge which his counsel claimed should have been given, was only intended to reduce the offence to manslaughter. For that purpose he had the benefit of whatever intoxication was proved, and in the only way in which he could have it legitimately. A criminal intent is an essential element of either crime. To constitute murder in the second degree, it is necessary that that intent shall be the result of malice. In manslaughter it may be the result of provocation or sudden passion. If the evidence was sufficient to show that it was caused by provocation, then it disproved the malice; so that the condition which the prisoner was in, must have been considered by the jury with reference to the question of malice.

Does not Disprove Malice.

The counsel for the prisoner during the argument seemed to claim that intoxication was an excuse for any crime; at least the argument logically tended to that conclusion, and it was claimed that this court, when this case was before us on a former occasion,[1] had taken one step in that direction, and that we could not now consistently refuse to take another. We have enunciated no such doctrine; and nothing said in that case, if comprehended, and candidly considered, will bear any such construction. We distinctly held that on a trial for murder in the first degree, which, under our statute, requires *actual express malice*, the jury might and should take into consideration the fact of intoxication as tending to prove that such malice did not exist. And we as distinctly held that "drunkenness does not excuse a party from the consequences of a criminal act; one crime cannot excuse another, a man committing a criminal act, though intoxicated at the time, is a legal and proper subject of punishment."

We are now asked to recede from this latter position, and take a departure from the common law, and the law of our sister States, and to establish the doctrine that a drunken man cannot commit the crime of murder; that intoxication, in law, disproves the existence of malice.

Murder in the second degree, as the jury were properly told, rests upon implied malice. Malice may be implied from the circumstances of the homicide. If a drunken man takes the life of another, unaccompanied with circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though no express malice be proved. Intoxication which is itself a crime against society combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and all together afford sufficient grounds for implying malice.

Intoxication, therefore, so far from disproving malice, is itself a circumstance from which malice may be implied. We wish, therefore, to reiterate the doctrine emphatically, that intoxication is no excuse for crime; and we trust it will be a long time before the contrary doctrine, which would be so convenient for criminals and evil disposed persons, will receive the sanction of this court. A new trial must be denied.

In this opinion the other judges concurred.

[1] State *v.* Johnson, 40 Conn. 136

DRUNKENNESS — DEGREES OF MURDER — PROVOCATION.

JONES *v.* STATE.

[29 Ga. 594.]

In the Supreme Court of Georgia, January Term, 1860.

Drunkenness — Degrees of Murder — Provocation. — In deciding as to the degree of a homicide, the jury may consider the drunkenness of the accused at the time of the killing, not to excuse or mitigate or extenuate his crime, but to assist them in deciding, when there was a provocation, whether the intention to kill preceded the provocation, or was produced by it.

The prisoner was tried in the Richmond Supreme Court before Judge HOLT, for the murder of William Osborne. The killing was admitted and the defence turned entirely upon the grade of the homicide. Verdict, guilty.

Alex. H. Stephens and *E. J. Walker*, for prisoner.

Solicitor-General Rogers and *W. R. Lewis*, for the State.

STEPHENS, J., delivered the opinion of the court.

(Omitting a decision on another point.)

In grading this homicide, what instructions ought to have been given to the jury concerning the drunkenness of the accused? This court, approving of the judge's refusal to give the instructions asked by the defence, thinks that other important instructions not given would have been appropriate to the facts in evidence. I shall point out what we think would have been the proper instructions, but shall first present those views of the general subject which lead my own mind to the conclusions at which the court arrived.

One side in the argument affirms as a great principle, that no man, drunk or sober, should be punished for a crime which he did not have sufficient mind to perpetrate; and the other replies, with an equally important principle, that drunkenness is no excuse for crime. The two sides, each relying upon its chosen principle, have arrived at singularly conflicting conclusions. The truth is, that both these principles are correct, and constitute, with the just deductions from them, but parts of an harmonious whole, sustained by law and sanctioned by reason.

The error which the side of the accused commits, lies in assuming too large a *quantum* of mind as the *minimum* which can furnish the necessary mental element in all crime — in erecting too high a standard of mental capacity. Different classes of crime do involve different degrees of mind, and in all cases there may arise particular instances which in

the mode and circumstances of their perpetration may involve even a high degree of scientific knowledge. But subject to this qualification of the general truth, the general truth itself is that the *minimum* of mind which can furnish the necessary mental element in crime is a far smaller quantity than was claimed by the argument for the accused. The argument, rightfully assuming that there can be no murder without the mental element of malice, proceeded to claim, as being necessarily involved in malice, an amount of memory and reason, which, I think, is not justified by the legal dimensions of that malice which enters into the constitution of murder. The popular idea of malice, in its sense of revenge, hatred, and ill will, has nothing to do with the subject. A number of cases might be given to show the difference between the popular idea, and that malice which forms a necessary part of the legal crime of murder.

The crime of infanticide presents the difference in a striking light. This crime is clear murder, and the mother who destroys her infant to conceal her own shame, has legal malice, though in point of fact she may feel no hatred towards any human being in the world, nor any indifference to human life in general, and may actually have the yearnings of a mother's love towards her innocent victim, loving its life just less than her own reputation. Here there is no malice, in the popular sense assumed in this argument, and yet the law says there is malice, and that the killing is murder; and reason gives its undoubting sanction to the law. The legal idea of malice in the crime of murder is, simply, an intent to kill a human being, in a case where the law would neither justify nor in any degree excuse the intention, if the killing should take place as intended. I make no distinction between malice express and malice implied in this definition, for there is no difference except in the mode of arriving at the fact. You may prove the particular intent, or you may prove the more general intent, which includes it, and implies it, but the thing when once you get it, is the same in both cases, and is the simple intent to kill a human being in such a case as I have stated, whether this intent springs from hatred or a sense of shame, or from the mere frenzy of drunkenness, it is malice, it is the mental constituent of murder, unless there is something to justify the intent or in some degree to excuse it. Now the kind of a case in which this intent happens to be formed, obviously has nothing to do with the *quantum of mind* involved in its formation. Whoever then has mind enough to form the simple intention to kill a human being, has mind enough to have malice, and to furnish the mental constituents of murder. And even this *quantum* of mind, small as it is, is to be viewed and

investigated in the light of an important rule of evidence, applicable to all men alike, and founded on reason and necessity. It is, that all men are presumed to intend the natural and proximate consequences of their actions. When a man kills another by the use of means appropriate to that end, he is presumed, drunk or sober, to have intended that end.

This is but a presumption, but it must prevail until it is rebutted by other facts and circumstances, showing that the end was not intended, but was accidental. It cannot be rebutted by the mere vague opinions of witnesses that the man had "no mind," or "didn't seem to know he was doing wrong" The result is, then, that any man, sober or drunk, sane or insane, has mind enough to furnish the mental element in murder, when he has enough to form the intention to kill a human being; and he shall be presumed to have formed that intention, whenever he has done the act of killing by the use of appropriate means, unless there are circumstances to show that death was an accidental and not an intended consequence of his act. This doctrine, faithfully enforced, offers no escape to the drunken man, from punishment for the crimes which he commits, and for those not committed by him, he ought not to be punished. Under this doctrine, if it were the whole law applicable to his case, even the poor idiot could "scarcely be saved." But it is not the whole law applicable to his case.

And this brings me to a consideration of the great perversions which have been made of the doctrine that drunkenness is no excuse for crime. The foundation stone of these perversions, not distinctly shaped in the argument, but unconsciously assumed in it, is a feeling or notion that the exemption of insane persons and young children from criminal responsibility is not the result of positive law excusing them, but is the simple consequence of their mental deficiency, which is supposed to be so complete as not to be capable of furnishing the mental element of crime; while the drunken man, with the same actual mental deficiency, is held responsible for his actions, not because they are crimes having the mental and physical element of crime, but by virtue of a certain destructive capacity infused into him, from reasons of policy, by the law which declares that drunkenness shall be no excuse for crime. The reverse of all this is the true philosophy of the law. The law deals with all of these classes of people, as having a sufficient *quantum* of mind to have bad passions and evil intentions, and carelessness in their actions, and so to furnish the mental element of crime, but as laboring also under an inferiority of reason, which serves to betray them into these evil intentions and carelessness, and at the same time breaks down this power

But may show that no Crime was Committed.

of resisting temptation. The law comes in then, and excuses the young and the insane, out of tenderness towards an infirmity which is involuntary, and at the same time, to guard against the possibility that men might make the same excuse whenever there is the same infirmity of reason, the law takes special care to exclude drunken men from the excuse, because their infirmity is voluntary.

The result is that the young and the involuntary insane occupy a platform of their own by virtue of an exception made in their favor, while the voluntary insanity of drunkenness, being excluded from the exception, stands just as if no exception had been made, and the drunk man and sober man occupy the same great platform of responsibility for the crimes which they commit, and for no others. When their actions have the criminal mental element united with them, they become crimes, *but not till then.*

The crimes of drunk men, like those of sober men, are actual crimes, not constructive ones — whole crimes, not pieces of crimes. And drunkenness, like all other things which are not made excuses by positive law, is no excuse for crime, but is like all the rest, a fact which ought to be used whenever it can, as it often may do, to shed light upon either branch of the alleged crime, the physical or mental, in investigating what crime, or whether any crime has been committed.

The argument might safely be left where it now stands, but I prefer to trace the *fallacies* which have been founded on a sound principle through the two special forms in which they have presented themselves. One is this: Drunkenness is no excuse for crime, therefore drunkenness cannot be used for any purpose of defence in a criminal accusation. A *non-sequitur* if ever there was one. Ignorance of chemistry is no more an excuse for crime than drunkenness; therefore, if the reasoning be good, ignorance of chemistry can not be used for any purpose of defence in a criminal accusation. If Dr. Webster, on his celebrated trial at Boston some years ago for the murder of Dr. Parkman, could have shown that he was ignorant of chemistry, he could have shown conclusively, not that he had an excuse for the murder, but that he did not commit it; for the slayer, whoever he was, had carried the dead body through a process of destruction, involving high chemical knowledge. No doubt the court would have allowed him to save his life by proving his ignorance of chemistry, although ignorance of chemistry was no excuse for crime. Suppose now, the Doctor could have proved that he had been drunk to the point of stupor or *mania potu*, during the time when that chemical process must have been performed. No doubt the court would have allowed him to do so, not to excuse, miti-

gate, or extenuate his crime, but simply to show in a very satisfactory way that he had not committed the crime; for it is exceedingly improbable that a man in that degree of drunkenness could have conducted the chemical process. And Dr. Webster would have been allowed to save his life by proving that he was drunk.

Some years ago I knew an attempt at house-burning, where the slow match found after the fire had been extinguished, exhibited great ingenuity in the bending of wires and crooking of pins in a peculiar way, so as to secure both slowness and certainty of ignition. The crooking of the pins, especially, in a manner so peculiarly adapted to the end in view, was the theme of village wonder for weeks afterwards, and is still remembered by many persons as a remarkable display of mechanical genius. Now there were two or three men who frequented that village in those days, any one of whom, if suspicions had fallen on him, could have proven that at any time for a week before the fire he had been too drunk to crook a pin. Would any man have discarded that evidence if he had been seeking for the truth? Both these illustrations show the absurdity of excluding the consideration of drunkenness, in investigating the act which enters into the alleged crime; but another form of the fallacy, is that when the act appears to have been done by the accused he shall not be allowed to excuse his act by any consideration of his drunkenness. It might be sufficient to reply to this by saying the law says that for crimes, not acts, drunkenness shall be no excuse. This form of the fallacy ignores utterly the most important element of the crime; for the mental part of the crime is criminal in morals and religion without its union with any act whatever, while neither in law nor morals has the act any criminality whatever until connected with a criminal state of mind. Acts need no excuse; crimes do. This form of the fallacy puts a drunk man, not on the same platform with sober men, but on a much more disadvantageous one. The act, when done by appropriate means, carries a presumption against all men, sober or drunk, that it was intended to be done; but this proposition is to leave it but a presumption against sober men, and to fix it irrevocably against a drunk man. The proposition admits, that drunkenness, like any other "no excuse" for crime, may be used to throw light on the investigation into the physical constituent of the crime, but denies that it may be used in examining into the mind, which is the special field where drunkenness displays its power. That is to say, it may be used in that part of the investigation on which it ordinarily throws least light, but must be excluded from that branch in which it usually throws most light. Can there be a sensible reason for such a discrimination between

the purposes for which drunkenness may be used? It is too apparent to need argument, that when the act is shown, the mental constituent of the crime still remains to be investigated, and in this investigation there can be no rational discrimination made between the light which may be shed upon it by drunkenness, and that which may be shed by any other fact in the world. Let me illustrate this branch of the investigation. The fact of being a skilful physician is no more an excuse for crime than drunkenness is, and, therefore, if the reasoning in the last form of the fallacy be good, the fact of being a skilful physician, ought not to be used for the purpose of showing with what intention an act was done. A man indicts another for an attempt to poison him, and proves that the accused actually administered arsenic to him. Here the act is done, and the sole question is as to the intent with which it was done. The accused simply shows that he was a skilful physician, and this single fact, in connection with other facts that the man did not die, but got well, explains the whole case, and shows that the act was done with an innocent and praiseworthy intention; for if a skilful physician should intend to kill by arsenic, he would infallibly regulate the dose to kill and not to cure. And here the man is permitted "to excuse" his act in the language of the fallacy, by proving his own superior knowledge, a fact which of all others, is surely the last which ought to be allowed to excuse any crime. Is it not plain, that he does not use the fact "to excuse his act," but simply to show that the act was an innocent one which needed no excuse? Shall not drunkenness be used for the same purpose when it can shed the same light?

A skilful marksman shoots at a bird, at a short distance, but misses the bird and kills a man who was behind the bush, and who turns out to be one with whom the marksman had a deadly feud. He is indicted for murder The fact that a man so skilful with his gun should have missed the bird at so short a distance, and should have hit his enemy, makes a strong impression that the shooting at the bird was but a pretense to cover the real intention to slay his enemy. But the man shows that he was very drunk, a fact which renders it at once very probable that he should have missed the bird, and very improbable that he had sufficient capacity for so deep an artifice as the one imputed to him, for drunk men are much more apt to be the victims than the perpetrators of tricks. Is there in the world an enlightened Christian, or a barbarian, who will say that this man ought not to be allowed to save his life by proving that he was drunk? The fact has no effect to excuse his crime nor to excuse his act, but to show that his act though an unfortunate one, was innocent and needed no excuse; or else to show that it was not an act of

murder, but an act of involuntary manslaughter, in the pursuit of a lawful intent without due caution and circumspection. On the question of murder, his drunkenness is in his favor, but on the question of carelessness in the pursuit of his lawful intent, it is against him; for carelessness is much more easily believed of a drunken man than of a sober man. His drunkenness saves him from the one charge and convicts him perhaps of the other, not by excusing the one crime, nor aggravating the other, but simply by shedding the light of truth upon both. Apply these principles to the case before us. Osborne with one hand seizes Jones by the arm, and with the other by the throat and pushes him back. Jones stabs Osborne and kills him. Jones is indicted for murder. His defence is that the killing was but the repelling of an assault and battery, which reduces it to manslaughter at all events, and will also reduce it to justifiable homicide, if the jury should think he had reasonable fear that Osborne would choke him to death. The State replies that though such an assault and battery occurred, the killing was not produced by it, and was but the execution of an intent formed and in progress of execution before the assault and battery occured. Right here hangs the case, the defence maintaining that the intent to kill was produced by the provocation, and the State maintaining that it existed before. What is the evidence to support the view of the State? Jones was walking up to Osborne with a knife in his hand, and he was very drunk. Here his drunkenness is against him, for it is easier to believe that a reckless drunk man intends to kill without provocation, than that a thoughtful sober man has such an intention. This is the whole case made by the circumstances of the fatal rencontre to show that Jones had an intention to kill before he received the provocation. But the State wisely chose not to rest the case there, and the strongest evidence on the point is light reflected from a previous rencontre, in which Jones had much more clearly manifested the intent to kill. The argument was, that having had the intention in the first rencontre, he must be presumed to have persisted and continued in the same state of mind, up to the time of the second rencontre, a very short time afterwards. The interval between the two rencontres is not definitely stated, but it was sufficiently long for Jones to be put out of the house and come back again, and be the interval long or short the whole force of the argument lies in his presumed persistence and continuance in the *same state of mind* from the first rencontre to the second, and right here his deep drunkenness was evidence in his favor, tending to rebut the presumption of such a persistence or continuance in the same state of mind. Who needs to be told that drunkenness may almost destroy memory for the

Does not Mitigate Crime.

time, making it as a mere *sieve*, letting events and thoughts and intentions slip through it as soon as they fall into it? He might have forgotten the first rencontre and all its passions and intentions, and so brought none of them to the second — if he was *very* drunk. But drunkenness far short of the point of extreme forgetfulness, renders the mind inconstant in purpose, and exceedingly whimsical and rapid in its changes from one emotion to another, and even from one class of emotions to another class. Who has not seen the drunken man breathing threats one moment, and the next uttering maudlin professions of friendship — in one moment an imaginary hero, in the next an abject whimperer?

The whole tendency of drunkenness was to change that state of mind — which the State maintained had not been changed, but had continued from the first rencontre to the second. Its tendency was to rebut the strongest evidence which showed the formation of an intent to kill before the provocation was given, and it is exactly for this purpose that the drunkenness, in the opinion of this court, ought to have been considered by the jury, to assist them in deciding whether the intent to kill preceded the provocation, or was produced by it.

Judgment reversed.

Lyon, J. dissenting.

DRUNKENNESS DOES NOT MITIGATE CRIME — IRRELEVANT ON QUESTION OF DEGREE.

State *v.* Cross.

[27 Mo. 332.]

In the Supreme Court of Missouri, October Term, 1858.

Hon. William Scott,
" William B. Napton,
" John C. Richardson. } *Judges.*

Drunkenness does not mitigate a crime; neither can it be taken into consideration by a jury in determining whether a person committing a homicide acted therein wilfully, deliberately, and premeditatedly, so as to constitute murder in the first degree.

Appeal from Franklin Circuit Court.

Mauro, for the State.

C. Jones for appellant.

State *v.* Cross.

Napton, J., delivered the opinion of the court.

[After deciding that the judgment must be reversed because the record does not show that the prisoner was present in court when the verdict was rendered.]

The following instruction was asked upon this trial by the counsel for the prisoner, and refused: "That before the jury can find the prisoner guilty of murder in the first degree they must ascertain as a matter of fact that the accused was in such a state of mind as to do the act of killing wilfully, deliberately, premeditatedly and maliciously, and any fact that will shed light upon the condition of his mind, at the time of the killing, may be looked into by them, and constitute legitimate proof for their consideration; and among other facts any state of drunkenness being proven, it is a legitimate subject of inquiry as to what influence such intoxication might have had upon the mind of the prisoner in the perpetration of the deed, and whether he was not, at the time of the killing, in such a state of mind, by reason of intoxication, as would be unfavorable to the commission of a crime requiring deliberation and premeditation." The court gave the following instruction on this branch of the case: "The jury are further instructed that if the circumstances attending the killing, the weapon used, the nature and extent of the injury inflicted, and the amount of violence used, with all the other evidence in the case, satisfy them that Cross intended to kill McDonald, then the circumstance of his being drunk at the time is not sufficient to repel the inference of malice and premeditation arising out of such evidence, or to mitigate the offence from murder in the first degree to murder in the second degree, or any other less offence."

The old and well established maxim of the common law is that drunkenness does not mitigate a crime in any respect; on the contrary, that it rather is an aggravation. Insanity is a full and complete defence to a criminal charge; yet drunkenness is a species of insanity, and is attended with a temporary loss of reason and power of self-control. But drunkenness is voluntary; it is brought about by the act of the party, whilst insanity is an infliction of Providence, for which the party affected is not responsible. This is understood to be the basis of the distinction which the law has made between these two kinds of *dementia*, and is the principal reason why the rules of law have been settled so as to allow the one madness to constitute an exemption from legal responsibility, but deny to the other any mitigating qualities whatever. There are also obvious reasons of public policy why the law should be so established.

The Cases Reviewed.

Some efforts have been made, of comparatively recent date — for the maxim we have quoted is as old as the common law itself — to qualify or to get rid of this ancient rule. Some very authoritative books on criminal law and some courts of great respectability, both in England and this country, have suggested interpretations and modifications of the axiom, tending, as we think, to subvert the principle itself for all practical purposes. Russell, in his work on Crimes, says: "Though voluntary drunkenness cannot excuse from the commission of a crime, yet when, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated *has been holden* to be a circumstance proper to be taken into consideration." The authority for this suggestion of Russell is the case of *Rex* v. *Grindley*, decided at the Worcester assizes in 1819; but in *Rex* v. *Carroll*,[1] PARKE, B., in the presence of LITTLEDALE, J., said: "That case was not law."

In this country the subject is very ably discussed by Judge TURLEY, of the Supreme Court of Tennessee, in the case of *Pirtle* v. *State*,[2] and by Judge WARDLAW, of South Carolina, in the case of *State* v. *McCants*.[3] The authorities on both sides of the question are pretty generally referred to and reviewed in each of these cases, yet the results to which the two courts arrived were quite the opposite of each other. It is true the Supreme Court of Tennessee declare their maintenance of the ancient doctrine of the common law in all its original severity, and repudiate quite distinctly the case of *Rex* v. *Grindley*, and the *dictum* of Russell, based thereon; but by a process of ingenious reasoning the court seem to arrive at a conclusion indirectly overturning the principles and rules they start out with, maintaining and leading practically to the doctrine advanced by Russell and the decision of Justice HOLROYD in *Rex* v. *Grindley*. It is not perceived how drunkenness can be held to be a circumstance proper to be considered by a jury in determining the question of premeditation and malice, and at the same time be considered as no mitigation of the crime. It is said that there is no inconsistency in the two doctrines, because the fact of drunkenness may show that the crime charged was not committed. If the crime charged was not committed, then it is immaterial whether the defendant was drunk or sober; he is, in either event, entitled to an acquittal. But if all the circumstances in the case, except drunkenness, show that the crime charged was committed, and

[1] 7 C. & P. 145. [2] 9 Humph. 663. [3] 1 Spear, 392.

drunkenness alone is the circumstance to show that by reason of its intervention among the circumstances of the case, the crime was different from what it would have been in the absence of this circumstance, then it is manifest that this circumstance alone has produced the mitigation, and the old principle of the common law which pronounces drunkenness to be no mitigation is overturned.

In the case of *Pirtle* it is conceded in the opinion that, except in relation to the two grades of homicide distinguished in their code as they are in ours as murder in the first and second degrees, drunkenness would not be a legitimate subject of inquiry; that upon the question of provocation it should have no weight, but on the question of premeditation, it should. It is singular that in *Rex* v. *Thomas*,[1] a British judge, Baron PARKE, took quite the opposite position. He is reported to have said to the jury: "I must also tell you that if a man makes himself voluntarily drunk, this is no excuse for any crime he may commit when he is so; he must take the consequences of his own voluntary act, or most crimes would go unpunished. But drunkenness may be taken into consideration in cases when what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober." The Supreme Court of South Carolina, in commenting on this charge of Baron PARKE, admit its propriety, if it is to be understood as maintaining that he who is in a state of voluntary intoxication is subject to the same rule of conduct and the same legal influences as the sober man, and that when a provocation is received which, if acted on instantly, would mitigate the offences of a sober man, and the question in the case of the drunken man is, whether that provocation was in truth acted upon, evidence of intoxication may be considered in deciding that question. But the remarks of Baron PARKE, thus construed, would clearly be unfavorable to the defence, and would substantially make intoxication an aggravation rather than a mitigation.

The case put by Judge TURLEY to illustrate his views, and probably as strong a case as could be imagined, is where the crime charged is murder by poison, and the question is, whether the poison was administered intentionally or by mistake. The facts supposed are that two medicines are on the table — the one poison and the other not — and

[1] 7 C. & P. 817.

the poison is administered. The inquiry made is, whether the fact that the man who administered the poison was drunk, is not evidence to show the probability of mistake. The answer is very easy if we adhere to the doctrine that drunkenness does not palliate or mitigate a crime. A mistake or accident may happen to a man, whether drunk or sober, and if they are more likely to occur when in the former predicament, he is not entitled to any advantage over the sober man by reason of this. If he is, the maxim of the common law is worthless, or is so easily evaded as to furnish no practical guide in the administration of justice; there is one rule for the sober man and another for the drunken man.

According to our understanding of the law, the instruction asked by the defendant in this case was properly refused; such instructions, we think, would subvert ancient and well settled principles, and proclaim virtual impunity to the most enormous crimes. It would only be necessary for a man to dethrone his reason by intoxicating drafts — reduce himself to a state of brutal insensibility to the value of human life, and then take shelter under the plea of drunkenness for protection against the consequences of his acts. If a man can thus divest himself of his responsibility as a rational creature and then perpetrate deeds of violence with a consciousness that his actions are to be judged by the irrational condition to which he has voluntarily reduced himself, society would not be safe. To look for deliberation and forethought in a man maddened by intoxication is vain, for drunkenness has deprived him of the deliberating faculties to a greater or less extent; and if this deprivation is to relieve him of all responsibility or to diminish it, the great majority of crimes committed will go unpunished. This, however, is not the doctrine of the common law; and to its maxims, based as they obviously are upon true wisdom and sound policy, we must adhere.

The instruction given by the Circuit Court was, in my opinion, substantially correct. It might, and perhaps ought to be so modified as to include, among the circumstances specifically alluded to, some of those favorable to the prisoner in connection with those already stated of an unfavorable bearing, such as the previous relations of the parties, the previous and subsequent conversations, etc.

The judgment will be reversed and the cause remanded.

RICHARDSON. J., dissented.

INTOXICATION — RELEVANT ON QUESTION OF PREMEDITATION, ETC. — INSANITY RESULTING FROM DRUNKENNESS.

PEOPLE *v.* ROGERS.

[18 N. Y. 9.]

In the Court of Appeals of New York, September Term, 1858.

Hon. ALEXANDER S. JOHNSON, *Chief Judge.*
" GEORGE F. COMSTOCK,
" SAMUEL L. SELDEN,
" HIRAM DENIO,
" JAMES J. ROOSEVELT, } *Judges.*
" IRA HARRIS,
" DANIEL PRATT,
" THERON R. STRONG,

1. **Voluntary Intoxication** is no excuse for crime.

Intoxication—Relevant upon Deliberation and Heat of Passion.—Where the crime was committed after provocation, evidence of intoxication is admissible on the question whether it was done in the heat of passion, and whether threatening words were uttered by the prisoner with deliberate purpose or otherwise.

3. **Insanity Resulting from Intoxication.**— Insanity resulting from habits of intemperance, and not directly from the immediate influence of intoxicating liquors, may amount to a defence to crime.

WRIT OF ERROR to the Supreme Court of the First District to review a judgment of that court in favor of James Rogers, the present defendant in error.

Rogers was indicted in the Court of General Sessions of the Peace of the city and county of New York, for the murder of John Swanston, in that city, on the 17th of October, 1857. The trial took place in that court on the 12th November of that year, before A. D. RUSSELL, city judge. It appeared that Swanston, the deceased, and his wife were returning from market about ten o'clock in the evening, when they were met by the prisoner and two other young men, with whom they were unacquainted, at the corner of Twenty-first Street and the Tenth Avenue. The prisoner rudely ran against the wife of the deceased, pushing her upon her husband. According to the testimony of the wife, the prisoner, at the time, asked the deceased what he was saying, and the latter answered, " What is that to you? " One of the prisoner's companions said to him: " They are not talking to you." At this time the three had passed the deceased and his wife. They then turned about and came back towards the deceased, who turned his head towards them,

Facts of the Case.

and the prisoner, who had been taken hold of by the other two, broke from them, came up to the deceased, stabbed him in the breast, and then ran up the avenue. The wound was about three inches deep, and penetrated the artery of the heart, and the deceased died immediately. The weapon was not found. The surgeon testified that the wound appeared to have been made by a sharp instrument, which he judged was a large dirk-knife. Other evidence upon that point tended to show that shortly before, and on the same evening, the prisoner had in his pocket a jack-knife. The prosecution proved the prisoner's confession that it was a common pocket-knife, and that he had thrown it away when he heard that the man he had struck was dead; and his mother and sister swore that he carried a small pocket-knife, with two blades, and they did not know of his having any other knife. The companions of the prisoner and another person, all called by the prosecution, gave testimony as to the circumstances of the homicide; one, a man who lived near the spot, saw the affair from his window. He saw the motion of the prisoner as though striking the deceased, who went a few steps and then fell. He saw no other striking. The two young men who were with the prisoner agreed in testifying that the affair commenced by the prisoner running, or, as one of them said, staggering, against the deceased's wife; and they united in saying that the deceased then struck at the prisoner without hitting him. One of them said that they, the two witnesses, then took the prisoner away, but he broke from them, came to the deceased and struck the fatal blow; the other represented that there were mutual and successive blows between the deceased and the prisoner after they had let the prisoner go, and that the latter said he wanted to fight. They both swore that the prisoner had drank beer with them twice during the evening; that he was intoxicated, and that they were trying to get him home. The prisoner went to the house of his mother, which was his home, immediately after the homicide; and she and his sister testified that he was then so much intoxicated that he could not walk, but fell upon the floor, and that they had to undress him and put him to bed. The testimony as to intoxication was given without any objection on the part of the public prosecutor, and a portion of it on his examination.

Two exceptions were taken to rulings of the judge upon the reception of testimony. The first arose as follows: The prosecution proved, by a boy of the name of Scott, that a few minutes before the homicide the prisoner and his two companions passed by where the witness was standing in the door of a house eating an apple. The prisoner asked him for the apple, and then tried to get something out of his pocket,

and the witness saw that he had a jaek-knife. There was an objection to this evidence by the prisoner's counsel as immaterial, but the objection was overruled, and the counsel excepted. The confession of the prisoner, which has been mentioned, respecting the knife, was proved by a New York policeman, who had him in custody and who brought him from New Brunswick in New Jersey, where he received him from a constable at the jail, to New York, without process. The admission in substance was that he, the prisoner, was drunk, and killed the deceased with a common pocket-knife. The objection to this testimony conceded in terms that no inducement had been held out to the prisoner, but it assumed that no admission made by an accused person, when under arrest, could be used against him. The prisoner's counsel excepted to the decision overruling the objection. The bill of exceptions states that there was other testimony on the part of the defendant not set forth in it. In the charge to the jury, the judge stated the definition of murder and of the first and third degrees of manslaughter as contained in the Revised Statutes, with some remarks upon the law of the case. He stated that if the prisoner had time to think, and did intend to kill, it was murder, though he conceived the intent but on the instant before the blow was struck; but if they were satisfied that the mortal blow was struck in the heat of passion, without a design to effect death, the offence would be manslaughter in the third degree. There is a general exception to the charge. The remainder of the bill of exceptions, upon which the most material of the questions in the case arise, is as follows: "The counsel for the prisoner requested the court to charge that, if it appeared by the evidence that the condition of the prisoner from intoxication was such as to show that there was no intention or motive, by reason of drunkenness, to commit the crime of murder, that the jury should find a verdict of manslaughter. But the court refused to instruct the jury in the words of the proposition, but charged that, under the old law, intoxication was an aggravation of crime; but that intoxication never excused crime unless it was of the degree to deprive the offender of his reasoning faculties; to which refusal to charge, the prisoner's counsel excepted."

The jury returned a verdict of guilty of murder, and the court sentenced the prisoner to be executed.

A writ of error was allowed, with a stay of execution. The record, with the bill of exceptions, was returned to the Supreme Court, where, after argument, the judgment of the sessions was reversed and a new trial awarded, upon which the present writ of error was brought on behalf of the People.

John Graham, for the plaintiffs in error.

E. W. Andrews, for the defendant in error.

DENIO, J. — I do not perceive that there was any valid objection to the testimony of the witness Scott. The surgeon had testified that the injury of which the deceased died was an incised wound. The object of the prosecution was to show that it was inflicted by the defendant, and to that end it was proved that he struck the deceased immediately before he fell dead; but the witness who testified to this, did not see any weapon. If it could be shown that the prisoner had a knife or other similar weapon about his person at the time, such proof would considerably advance the case of the prosecution; and it was this fact which Scott swore to. He saw the handle of a knife in the prisoner's possession, as the latter attempted to draw it from his pocket, while on his way to the place where the homicide took place, and only a few minutes before that time.

The objection to the testimony of the policeman assumes that no admission by a person accused of crime to an officer who has him in custody can be received. It was not pretended that any threats, promises or other inducements to make a confession had been held out to the prisoner, but the objection was placed distinctly upon the ground first mentioned. I have looked carefully into all the cases referred to by the defendant's counsel, in support of that position, and many others and do not find that it has ever been held that the single fact of the prisoner being in custody was sufficient to exclude his declarations, whether made to the officer or to third persons. On the contrary, many of the cases, upon the competency of confessions, show that the prisoner was in custody at the time, and the question generally has been whether the confession was voluntary, or was influenced by what was said to him by the officer or by others. In *Ward* v. *People*,[1] the prisoner made an admission while in the custody of a constable; and a question having arisen, whether it ought not to be excluded in consequence of promises of impunity, held out by the prosecutor before the arrest, the court held it admissible, and it was received. *Commonwealth* v. *Mosler*,[2] was likewise the case of a confession made by a prisoner while in the custody of a constable, and the point made by the defendant was, that a caution should have been given, such as is required from examining magistrates; but the court held it unnecessary, and decided that the evidence was competent. *Rex* v. *Richards*,[3] was also the case of an admission made to a constable while holding the prisoner in custody,

[1] 3 Hill, 395. [2] 4 Pa. St. 264. [3] 5 C. & P., 318.

which was held to be competent, no inducement having been held out at the time. It is very plain that this exception cannot be sustained.

The principal exception to the judge's charge which is now relied on, relates to the consideration which should be given to the proof that the prisoner was intoxicated at the time of the homicide. The commission of crime is so often the attendant upon and the consequence of drunkenness, that we should naturally expect the law concerning it to be well defined. Accordingly we find it laid down as early as the reign of Edward VI., 1548, that "if a person that is drunk kills another, this shall be felony, and he shall be hanged for it; and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby." [1] The same doctrine is laid down by Coke in the Institutes, where he calls a drunkard *voluntarious dæmon*, and declares that "whatever hurt or ill he doeth, his drunkenness doth aggravate it." [2] So in his reports it is stated that "although he who is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate his act or offence, nor turn to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time; and that as well in cases touching his life, his lands, his goods, or any other thing that concerns him." [3] Lord Bacon, in his "Maxims of the Law," dedicated to Queen Elizabeth, asserts the doctrine thus: "If a madman commit a felony, he shall not lose his life for it, because his infirmity came by the act of God; but if a drunken man commit a felony, he shall not be excused, because the imperfection came by his own default." [4] And that great and humane judge, Sir Matthew Hale, in his "History of the Pleas of the Crown," written nearly two hundred years ago, does not countenance any relaxation of the rule. "The third kind of *dementia*," he says, "is that which is *dementia affectata*, namely, drunkenness. The vice doth deprive men of the use of reason, and puts many men into a perfect but temporary frenzy; and, therefore, according to some civilians, such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness, answerable to the nature of the crime occasioned thereby, so that yet the primal cause of the punishment is rather the drunkenness than the crime committed in it; *but by the laws of England* such a person shall have no privilege by his voluntarily

1 Plowden, 19.
2 3 Coke, 46.
3 Beverley's Case, 4 Co, 125 a.
4 Rule 5.

contracted madness, but shall have the same judgment as if he were in his right senses." He states two exceptions to the rule, one where the intoxication is without fault on his part, as where it is caused by drugs administered by an unskilful physician, and the other, where indulgence in habits of intemperance has produced permanent mental disease, which he calls "*fixed frenzy.*" [1] Coming down to more modern times, we find the principle insisted upon by the enlightened Sir William Blackstone. "The law of England," he says, "considering how easy it is to contract this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another." [2] A few recent cases in the English courts will show the consistency with which the rule has been followed down to our own times. In *Burrow's Case*, [3] the prisoner was indicted for rape, and urged that he was in liquor. HOLROYD, J., addressed the jury as follows: "It is a maxim in the law if a man gets himself intoxicated, he is answerable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong. If, indeed, the infuriated state at which he arrives should continue and become a lasting malady, then he is not answerable." A similar charge was given to the jury in the next case in the same book, where drunkenness was urged upon the trial of an indictment for burglary. *Patrick Carroll* was tried in 1835, at the Central Criminal Court, before a judge of the King's Bench, and a judge of the Common Pleas, for the murder of Elizabeth Browning. It appeared that shortly before the homicide the prisoner was very drunk. His counsel, though he admitted that drunkenness could not excuse from the commission of the crime, yet submitted that in a charge for murder, the material question being whether the act was premeditated or done with only sudden heat and impulse, the fact of the party being intoxicated, was a proper circumstance to be taken into consideration, and he referred to a case before HOLROYD, J.,[4] where that doctrine was laid down. PARKE, J., in summing up, said: "Highly as I respect that late excellent judge, I differ from him, and my brother LITTLEDALE (the associate) agrees with me. He once acted on that case, but afterwards retracted his opinion, and there is no doubt that that case is not law. I think that there would be no safety for human life if it were considered as law." The prisoner was convicted and executed.[5] It would be easy to multiply citations of modern cases upon this doctrine; but it is

[1] 1 Hale, 32.
[2] 4 Com. 26.
[3] Lewin C. C. 75, A. D. 1823.
[4] Reported in 2 Russ. on Crimes, 8 (Rex v. Grindley).
[5] 7 C. & P. 145.

unnecessary, as they all agree upon the main proposition, namely, that mental alienation produced by drinking intoxicating liquor furnishes no immunity for crime. *Rex* v. *Meakin*,[1] and *Rex* v. *Thomas*,[2] may be mentioned; and in this country, *United States* v. *Drew*,[3] and *United States* v. *McGlue*,[4] will be found to maintain the principle upon the authority of Judge STORY and Judge CURTIS, of the Supreme Court of the United States. These last two cases are interesting, not only for stating the general principle, but for confirming the distinction laid down so long ago by Sir MATTHEW HALE, that where mental disease, or as he terms it, a "fixed frenzy," is shown to be the result of drunkenness, it is entitled to the same consideration as insanity arising from any other cause. The first of them was a case of *delirium tremens*, and Judge STORY directed an acquittal on that account. In the other the evidence left it doubtful whether the furious madness exhibited by the prisoner was the result of the present intoxication, or of delirium supervening upon long habits of indulgence. This state of the evidence led Judge CURTIS to state the rule and exception with great force and clearness. In this State the cases of the *People* v. *Hammill* and the *People* v. *Robinson*, reported in the second volume of Judge PARKER'S reports [5] show the consistency with which the doctrine has been adhered to in our criminal courts and in the Supreme Court. The opinion in the last case contains a reference to several authorities to the same effect in the other States of the Union. Where a principle in law is found to be well established by a series of authentic precedents, and especially where, as in this case, there is no conflict of authority, it is unnecessary for the judges to vindicate its wisdom or policy. It will, moreover, occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of

[1] 7 C. & P. 297.
[2] 7 C. & P. 817.
[3] 5 Mason, 28.
[4] 1 Curtis C. C. 1.
[5] pp. 223, 235.

reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society.

Before proceeding to examine the judge's charge, it is necessary to state one other principle connected with the subject of intoxication. I am of the opinion that, in cases of homicide, the fact that the accused was under the influence of liquor, may be given in evidence in his behalf. The effect which the evidence ought to have upon the verdict will depend upon the other circumstances of the case. Thus, in *Rex* v. *Carroll*, which was a case of murder by stabbing, there was not, as the court considered, any provocation on the part of the deceased, and it was held that the circumstance that the prisoner was intoxicated was not at all material to be considered. *Rex* v. *Meakin* was an indictment for stabbing with a fork, with intent to murder, and it was shown that the prisoner was the worse for liquor. ALDERSON, Baron, instructed the jury that, with regard to the intention, drunkenness might be adverted to according to the nature of the instrument used. "If," he said, "a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect upon the consideration of the malicious intent of the party." In *Rex* v. *Thomas*, for malicious stabbing, the person stabbed had struck the prisoner twice with his fist, when the latter, being drunk, stabbed him, and the jury were charged that drunkenness might be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question in such cases is, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation; and that passion, it was said, is more easily excitable in a person when in a state of intoxication than when he is sober. So, it was added, where the question is whether the words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded, for it would furnish no excuse."

It must generally happen, in homicides committed by drunken men, that the condition of the prisoner would explain or give character to some of his language, or some part of his conduct, and, therefore, I am of

opinion that it would never be correct to exclude the proof altogether. That it would sometimes be right to advise the jury that it ought to have no influence upon the case, is, I think clear from the foregoing authorities. In a case of lengthened premeditation, of lying in wait, or where the death was by poisoning, or in the case of wanton killing without any provocation, such an instruction would plainly be proper.

Assuming the foregoing positions to be established, I proceed to an examination of the exceptions to the charge of the judge. It is difficult to know precisely what was meant by the request to charge; but I think its sense may be expressed thus — that drunkenness might exist to such a degree that neither an intention to commit murder, nor a motive for such an act, could be imputed to the prisoner. It was, therefore, asked that it should be left to the jury to determine whether such a degree of intoxication had been shown, and that they should be instructed that if it had, the prisoner should be found guilty of manslaughter only. We must lay out of view, as inapplicable, the case of a person who had become insensible from intoxication, and was performing an act unaccompanied by volition. There was nothing in the evidence to show that the prisoner's conduct was not entirely under the control of his will, or which would render it possible for the jury to find that he did not intend to stab the deceased with his knife. The mind and will were no doubt more or less perverted by intoxication, but there was no evidence tending to show that they were annihilated or suspended. Assuming, therefore, that the request did not refer to such a hypothesis, the only other possible meaning is, that it supposes that the jury might legally find that the prisoner was so much intoxicated that he could not be guilty of murder, for the want of the requisite intention and motive; and the request was that they might be so instructed. This would be precisely the same thing as advising them that they might acquit of murder on account of the prisoner's intoxication, if they thought it sufficient in degree. It has been shown that this would be opposed to a well established principle of law. The judge was not at liberty so to charge, and the exception to his refusal cannot be sustained. What he did charge on the subject of intoxication was more favorable to the prisoner than he had a right to claim. It implies that if he was so far intoxicated as to be deprived of his reasoning faculties, it was an excuse for the crime of murder; or, as perhaps it was intended to state, that he could not be guilty of murder. The rule which I have endeavored to explain assumes that one may be convicted of murder or any other crime, though his mind be reduced by drunkenness to a condition which would have called for an acquittal, if the obliquity of mind had arisen from any other

cause. The judge ought to have charged that if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit while he is so, and that he must take the consequences of his own voluntary act.[1] The charge, therefore, gave the prisoner the chance of an acquittal, to which he was not entitled; but this was not an error of which he can take advantage.

The judgment of the Court of Sessions was reversed by the Supreme Court on the ground, as it appears from the opinion, that the judge altogether withdrew the attention of the jury from the consideration of the fact that the prisoner was intoxicated. I do not so understand the charge; all the evidence which was offered to show the prisoner's condition in that respect, was received without objection. The judge refused to charge that it would entitle him to be acquitted of murder, whatever the jury might think of its degree. Upon the question whether it could be taken into consideration to explain or characterize his acts, nothing appears to have been said either by the counsel or the judge. It does not appear whether the whole charge is given, or only such parts as were excepted to. As I do not find any error in the portions which are set forth, I am of the opinion that the judgment of the Sessions ought not to have been reversed on the ground that it is not sufficiently full in other respects.

Under the act of 1855, courts of error are to order a new trial when they are satisfied that a conviction for murder is against evidence or law, or that justice requires another trial.[2] In the exercise of this jurisdiction, I have examined this case with the attention which its importance to the prisoner and to the public merits. It satisfactorily appeared that the prisoner, without any provocation on the part of the deceased, who was a stranger to him, came upon him and stabbed him to the heart with a knife. The jury have found, and upon sufficient evidence, as I think, that the prisoner intended to kill the deceased. The case is within the principle of *People* v. *Clark* and *People* v. *Sullivan*.[3] Independently of the question of intoxication, already disposed of, the evidence disclosed a clear case of murder.

The judgment of the Supreme Court ought to be reversed, and the proceedings remitted to that court, with directions to pronounce sentence anew against the prisoner.

Harris, J. — That the defendant was guilty of some crime, was conceded upon the trial. He had committed homicide. The act of killing was perpetrated with a deadly weapon. The only question to be de-

[1] Rex v. Thomas, *supra*. [2] p. 613, sec. 3. [3] 3 Seld. 385, 396.

termined by the jury was, whether the crime was murder or manslaughter.

Upon the law applicable to this question, the jury were properly instructed. They were told that if there was an intent to kill, even though that intent was conceived but the instant before the fatal blow was struck, the crime was murder. But if, on the other hand, the blow was struck in the heat of passion, without a design to effect death, the crime was manslaughter. The charge was unobjectionable. The distinction between the crime of murder and that of manslaughter was sufficiently stated. The jury were made to know that it was their duty to convict the defendant of the one offence or the other, according as they should find upon the question of intent. If they should find that there was an intent to kill, they were to pronounce the defendant guilty of murder. If they should find an absence of such intent, they were to convict of manslaughter only.

But there was evidence to show that, when he struck the deadly blow, the defendant was intoxicated; and the court was asked to charge the jury that, "if it appeared by the evidence that the condition of the prisoner from intoxication was such as to show that there was no intention or motive by reason of drunkenness, to commit the crime of murder, they should convict him of manslaughter." The court refused so to charge, but, upon this point, instructed the jury "that intoxication never excused crime, unless it was of such a degree as to deprive the offender of his reasoning faculties."

In the proposition, as it was thus given to the jury, there was no error. No rule is more familiar than that intoxication is never an excuse for crime. There is no judge who has been engaged in the administration of criminal law, who has not had occasion to assert it. Even where *intent* is a necessary ingredient in the crime charged, so long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his own act. Thus, if a man, without provocation, shoot another or cleave him down with an ax, no degree of intoxication, short of that which shows that he was at the time utterly incapable of acting from *motive*, will shield him from conviction. This was, in substance, the doctrine which the jury received from the court in this case. The defendant had struck a blow with a deadly weapon, which had resulted in immediate death. To this act, the law, without further proof, imputed guilty design. If the perpetrator would escape the consequences of an act thus committed, it was incumbent on him to show, either that he was incapable of entertaining such a purpose, or that the

Relevant on Question of Design.

act was committed under provocation. In respect to the latter, there was nothing said by the court, nor any request to charge. Had it been contended that the blow was struck in the heat of passion, it might then have been proper to instruct the jury that, in determining this question, the intoxication of the defendant might well be considered. No such ground appears to have been taken by the counsel for the defence. There was, indeed, some testimony tending to show that the defendant had been struck before he committed the act for which he was tried. But the weight of the testimony is clearly against this theory of the case. It was no doubt judicious, therefore, for the defendant's counsel to refrain from asking the court to charge that the intoxication of the defendant might be considered by the jury in determining whether the blow was struck in the heat of passion, or with premeditated design. Had such a request been made, I think it would have been the duty of the court so to charge; though from the state of the testimony, it is not likely that the result would have been favorable to the defendant.

The Supreme Court seem to have understood that, in all cases where without it, the law would impute to the act a criminal intent, drunkenness may be available to disprove such intent. I am not aware that such a doctrine has before been asserted. It is certainly unsound. The adjudications upon the question, both in England and in this country, are very numerous, and are characterized by a singular uniformity of language and doctrine. They all agree that, where the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime. But when the circumstances are such as to raise the question whether the act was the result of design or impulse of sudden passion, the intoxication of the accused is a proper subject of consideration. "Drunkenness," says PARKE, B., in *Rex* v. *Thomas*,[1] "may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger, excited by the previous provocation and that passion is more easily excitable in a person when in a state of intoxication than when he is sober." Again, in *Rex* v. *Meakin*,[2] ALDERSON, B., says: "With regard to the intention, drunkenness may, perhaps, be adverted to according to the nature of the instrument used. If a man use a stick, you would not infer a malicious intent so strongly against him, if drunk when he made an intemperate use of it, as you would if he had used a different kind

[1] 7 C. & P. 817. [2] 7 C. & P. 297.

of weapon; but, where a dangerous weapon is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent."

This subject has been well considered by the Court of Appeals in South Carolina, in the *State* v. *McCants*.[1] In pronouncing the judgment of the court, WARDLAW, J., after referring to the language of PARKE, B., in *Rex* v. *Thomas*, above cited, and what is said on the subject in Russell on Crimes,[2] says: "To this doctrine I subscribe, understanding by it that he who is in a state of voluntary intoxication shall be subject to the same rule of conduct, and the same legal influences, as the sober man, but that where a provocation has been received, which, if acted upon instantly, would mitigate the offence of a sober man, and the question in the case of a drunken man is, whether that provocation was in truth acted upon, evidence of intoxication may be considered in deciding that question. The law infers malice against the drunkard who, in his frenzy, shoots into a crowd and kills, he knows not who, no less than against a sober man for like conduct. And it would be jeopardizing the peace and safety of society to say that he who, by half a dozen glasses, is habitually rendered irritable and fierce, shall be looked upon with more indulgence, when he has barbarously resented a trivial affront, because he had taken the quantity of liquor requisite to make him a savage." So in *Kelly* v. *State*,[3] the defendant had been indicted for murder in killing his slave. It was proved that when the act was committed he was drunk. The counsel for the defendant had asked the court to instruct the jury that they might take the evidence of intoxication into consideration as a proof, more or less strong, according to their view of the circumstances, of the absence of that premeditated design required as an indispensable ingredient of murder. The court declined so to charge. In reviewing the case upon error, the Court of Appeals, in Mississippi, say: "The fact of the party being intoxicated has, indeed, been holden to be a circumstance proper to be taken into consideration, where the sole question is, whether an act was premeditated or done with only sudden heat or impulse."

In Pennsylvania, Tennessee, and some other States, the crime of murder is classified by statute into two degrees. When the killing is "wilful, deliberate, malicious and premeditated," it is murder in the first degree. All other kinds of murder are declared to be murder in the second degree. Where this distinction prevails, it has been held

[1] 1 Speers, 384. [2] p. 8. [3] 3 Sm. & M. 518.

Cannot Reduce Killing to Manslaughter.

that the influence of intoxication may be considered by the jury in determining whether there had been that deliberation and premeditation necessary to constitute the crime of murder in the first degree. But it has been repeatedly said, when asserting this rule, that it is confined to the question whether the crime is murder in the first or second degree under the statute. In such a case, deliberation as well as design is a question of fact to be determined by the jury.[1]

In the case now before us, there was no attempt to show that the act of killing was committed under the impulse of sudden passion. All that the court was requested to do, was, to instruct the jury that if they were satisfied that, by reason of the intoxication, there was no intention or motive to commit the crime of murder, they should convict the defendant of manslaughter only. In refusing so to charge, there was no error. If, by this request, the counsel for the defendant meant, as the request seems to have been interpreted by the Supreme Court, that the jury should be instructed to take into consideration the intoxication of the defendant in determining the intent with which the homicide was committed, the proposition is not law. It has never yet been held, that the crime of murder can be reduced to manslaughter by showing that the perpetrator was drunk, when the same offence, if committed by a sober man, would be murder. If, on the other hand, it was intended that the court should instruct the jury that if, by reason of intoxication, the defendant was so far deprived of his senses as to be incapable of entertaining a purpose, or acting from design, the jury were so instructed. This was enough, unless the counsel for the defendant desired to have the jury decide whether the act was not committed in the heat of passion. In that case, his proposition, must have been very differently framed.

Upon the whole case, I am satisfied that no error has been committed by the court, and no injustice done the defendant. The judgment of the Supreme Court, should, therefore, be reversed, and that of the Sessions affirmed.

Judgment of the Supreme Court reversed and that of the General Sessions affirmed.

[1] Swan *v.* State, 4 Humph., 136; Pirtle *v.* State, 9 *Id.* 670; Haile *v.* State, 1 *Id.* 154.

INTOXICATION — DEGREES OF MURDER.

JONES *v.* COMMONWEALTH.

[75 Pa. St. 403.]

In the Supreme Court of Pennsylvania, 1874.

Hon. DANIEL AGNEW, *Chief Justice*
" GEORGE SHARSWOOD,
" HENRY W. WILLIAMS,
" ULYSSES MERCUR,
" ISAAC G. GORDON,
" EDWARD M. PAXSON,
" WARREN J. WOODWARD,

Intoxication is no excuse for crime; but if it deprives the reason of power to think and weigh the nature of the act committed, it may prevent a conviction for murder in the first degree.

ERROR to the Court of Oyer and Terminer of Luzerne County.

William S. Jones was indicted for the murder of Frances Hughes, and convicted of murder in the first degree. A new trial being allowed, he pleaded guilty, and the judge sentenced him as for murder in the first degree.

AGNEW, C. J. — In this case if we confine our attention to the weapon, its previous preparation, the threat proved by Mr. Crooks, the time for deliberation, and the circumstances of the killing of Mrs. Hughes by the prisoner, we might conclude that his crime was murder in the first degree. In this aspect the learned judge of the Oyer and Terminer had sufficient evidence to justify his finding of the degree. But ample time for reflection may exist, and a prisoner may seem to act in his right mind and from a conscious purpose; and yet causes may affect his intellect preventing reflection and hurrying onward his unhinged mind to rash and inconsiderate resolutions, incompatible with the deliberation and premeditation defining murder in the first degree. When the evidence convinces us of the inability of the prisoner to think, reflect and weigh the nature of his act, we must hesitate before we pronounce upon the degree of his offence. That reasonable doubt which intervenes to prevent a fair and honest mind from being satisfied that a deliberate and premeditated purpose to take life existed, should throw its weight into the scale to forbid the sentence of death. Intoxication is no excuse for crime; yet when it so clouds the intellect as to deprive it of the

power to think and weigh the nature of the act committed, it may prevent a conviction of murder in the first degree. The intent to take life, with a full and conscious knowledge of the purpose to do so, is the distinguishing criterion of murder in the first degree; and this consciousness of the purposes of the heart is defined by the words deliberately and premeditatedly. Much has been said upon the meaning of these words; some of which may mislead, if we do not consider well the cases in which it has been uttered. In *Commonwealth* v. *O'Hara*, tried in 1797, Chief Justice McKean said: "What is the meaning of the words deliberately and premeditatedly? The first implies some degree of reflection. The party must have time to frame the design. The time was very short, — it cannot be said to be done coolly. The Legislature must have put a different construction on the words deliberately and premeditatedly. If he had time to think, then he had time to think he would kill. If you are of opinion he did it deliberately, with intention to kill, it is murder in the first degree. If he had time to think, and did intend to kill, for a minute, as well as an hour or day, it is sufficient." The correctness of this charge to the jury will not be doubted if we examine the circumstances, and yet this is essential to understand it properly. O'Hara was a journeyman shoemaker, sitting on his bench at work with Haskins and others. Aitkins, the deceased, his friend, came upstairs, and said to him: "I have been talking about you below this hour." "Yes," said Haskins, "about the five sheep you stole." Thereupon O'Hara immediately left his work upon the bench, took up a shoemaker's knife by his side, went up to Aitkins and stabbed him in the belly. The act was not thoughtless, for the prisoner had time to lay down his work, take up the knife, rise and walk up to his friend, and to strike him in a vital part. Upon every principle of human action, we must conclude under these circumstances, that O'Hara intended to take Aitkins' life, otherwise the thoughts of man never can be determined from clear and distinct acts evidencing the purposes of the mind. There was an irritation, it is true, heightened by the previously existing story about the sheep; but it was without any just cause of provocation to take life, and therefore, evidenced a heart malignant, and ready to execute a vengeance even upon a friend, in a moment of wicked passion. In such a case, a moment was sufficient to form and deliberate upon the purpose to take life, and premeditate the means of executing it. But these words of the Chief Justice are sometimes wrested from their application and applied to cases where reason has been torn up by the roots, and judgment jostled from her throne.

Jones *v.* Commonwealth.

Another case often quoted and misapplied is that of Richard Smith, tried before President Rush in 1816. Smith had become intimate with the wife of Capt. Carson, and had a difficulty with him in his own house. He returned with Mrs. Carson and went with her into the parlor. Carson came up unarmed, and ordered him to leave. Smith had armed himself, and held one hand under his surtout, and the other in his breast. Carson told Smith he had come to take peaceable possession of his own house, and the latter must go. Smith said to Mrs. Carson, "Ann, shall I go." She replied, "No." Smith moved into the corner of the room, Carson following him and telling him he must go, at the same time letting his arms fall by his side, and saying he had no weapon. Upon this, Smith drew a pistol from under his surtout, and shot Carson through the head, threw down his pistol and ran down stairs. In this state of the facts, Judge Rush, charging upon the subject of deliberation, said: "The truth is, in the nature of the thing, no time is fixed by the law, or can be fixed for the deliberation required to constitute the crime of murder." Speaking then of premeditation, he says: "It is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind the scheme of murder, and to contrive the means of accomplishing it." We cannot doubt the correctness of these remarks in the case in which they were made, but cases often arise, when this readiness of intent to take life, when imputed, may do great injustice. Hence it was said in *Drum's Case:*[1] "This expression (of Judge Rush) must be qualified, lest it mislead. It is true that such is the swiftness of human thought, no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose; yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find the actual intent, that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind fully and consciously the intention to kill, and to select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it then there is time to deliberate and premeditate." This was said in the case of a sudden affray, when the circumstances made it a serious question whether the act was premeditated, or was the result of sudden and rash resentment.

[1] 58 Pa. St. 16.

Relevant on Question of Degree of Crime.

Thus we must perceive, that at the bottom of all that has been said on the subject of murder in the first degree, is the frame of mind in which the deadly blow is given, that state of mind which enables the prisoner either to know and be fully conscious of his own purpose and act, or not to know. Why is insanity a defence to homicide? Because it is a condition of the mind which renders it incapable of reasoning and judging correctly of its own impulses, and of determining whether the impulse should be followed or resisted. Intelligence is not the only criterion, for it often exists in the madman in high degree, making him shrewd, watchful, and capable of determining his purpose, and selecting the means of its accomplishment. Want of intelligence, therefore, is not the only defect to moderate the degree of offence; but with intelligence there may be an absence of power to determine properly the true nature and character of the act, its effect upon the subject and the true responsibility of the actor; a power necessary to control the impulses of the mind and prevent the execution of the thought which possesses it. In other words, it is the absence of that self-determining power, which in a sane mind renders it conscious of the real nature of its own purpose, and capable of resisting wrong impulses. When this self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influence, it cannot be said truthfully that the mind is fully conscious of its own purposes, and deliberates or premeditates in the sense of the act describing murder in the first degree. We must, however, distinguish this defective frame of mind from that wickedness of heart which drives the murderer on to the commission of his crime, reckless of consequences. Evil passions do often seem to tear up reason by the root, and urge on to murder with heedless rage. But they are the outpourings of a wicked nature, not of an unsound or disabled mind. It becomes, therefore, necessary to inquire upon the evidence in this case, whether the prisoner was really able to deliberate and premeditate the homicide.

William S. Jones had been upon bad terms with his wife. She had become too intimate with another Jones, called Charley. William S. Jones failing to break off the association, got to drinking hard, and finally, after another quarrel with his wife, on the 10th of June, 1871, attempted suicide by taking a large quantity of laudanum. Dr. Davis found him lying on a lounge partly insensible, eyes nearly closed, pupils contracted and face discolored by congestion. Energetic remedies were used and he was so far restored as to be out of danger; but the effects of the laudanum remained. From this time until the night of the 19th of June, when he took the life of Mrs. Hughes, his mother-in-

law, he was in a constant state of nervous excitement, continued drinking, and had bottles of laudanum about his person, Many witnesses describe him as without sense, constantly talking nonsense, wild in appearance, and incoherent in speech. Some say he acted like a man drinking hard, was intoxicated, and once fell from a horse. Others described him as looking crazy, talking to himself, his hands going, his head thrown back, walking to and fro, throwing his head about, swinging his arms, and wild, nervous, and excited. He would jump upon a chair and begin to preach, and run off upon Charley Jones and his wife; said he was going to build to a tavern on the mountain, and a church beside it; claimed all the property about, and was evidently much out of the way. These appearances were particularly noticed on the 19th day of June, the day of the homicide. He was then on very bad terms with his wife, yet seeking her and remonstrating with her, and on the afternoon of that day, he had beaten and abused her, chasing her down stairs, and into the street, and then striking and kicking her until separated by others. He continued in this condition down into the night of the 19th, when he came to Mrs. Hughes' house, between nine and ten o'clock. Stepping inside of the door, he asked Mrs. Hughes if the fuss was settled; said he had come down to settle it. She rose and told him to go away; told Lizzie to fetch a poker; said she would strike him if he did not go away. He stepped back. She picked up a stool, and told him if he did not go away she would level him with it. He said, "I'll level you now," pulled out a pistol, stepped forward and shot her. Mrs. Hughes twice exclaimed, "I am shot," and went back into the kitchen; while Jones was seized by the persons present, and the pistol wrested from his hand. Between him and Mrs. Hughes there had been a state of good feeling before he took the laudanum, and she attended him upon the day when he was under its influence. He spoke of her as his best friend. His conduct towards his wife, her daughter, had led Mrs. Hughes to resent it, and some feeling had arisen on the part of Jones; but after his arrest, he said he took the pistol to kill his wife, and the old woman had got it.

Looking then at the state of Jones' mind from the 10th until the 19th of June, and down to the very moment he fired the pistol, and also at the suddenness of his quarrel, her call for the poker and lifting the stool, it seems to us a matter of grave doubt, whether his frame of mind was such that he was capable either of deliberation or premeditation. It seems to have been rather the sudden impulse of a disordered brain, weakened by potations of laudanum and spirits, and of a distorted mind, led away from reason and judgment by dwelling upon the con-

duct of his wife, influenced by his continued state of excitement. It presented a case of the preparation of a weapon, and an undefined purpose of violence to some one, where the time for reflection was ample; but where the frame of mind was wanting, which would enable the prisoner to be fully conscious of his purpose, or the resolve to take the life of the deceased, with deliberation and premeditation. Yet it was clearly murder, done without sufficient provocation and without necessity, and in a frame of mind evincing recklessness, and that common-law malice, which distinguishes murder from manslaughter. There was error, therefore, in ascertaining the degree and sentencing to death.

DRUNKENNESS — DEGREES OF MURDER.

Swan *v.* State.

[4 Humph. 136.]

In the Supreme Court of Tennessee, July, 1843.

Hon. Nathan Green,
" William B. Reese,
" William B. Turley. } *Judges.*

On the question of the degree of a murder evidence of the drunkenness of the prisoner is relevant.

The prisoner, was indicted for the murder of Samuel G. Moore, and convicted and sentenced to be hanged. He appealed.

Jarningan, for the prisoner.

The *Attorney-General* for the State.

Reese, J., delivered the opinion of the court.

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With regard to the charge of the court the record informs us as follows: —

"The court, it was admitted on all sides, charged the law correctly, with one exception, to wit: counsel for defendant requested the judge to state to the jury, that if the defendant was drunk at the time he inflicted the wound, it would reduce the crime from murder in the first degree to murder in the second degree. But the court stated to the jury that drunkenness was no excuse or justification for any crime, and then read the act of Assembly to the jury, and left it to them to say, in

the event they should find the defendant guilty of murder in the first degree, in their verdict, whether there was any mitigating circumstance or circumstances."

The court was asked to charge, as a matter of law, that drunkenness would reduce the crime of murder in the first degree to that of murder in the second degree. The court, in reply, said that drunkenness is no excuse or justification for any crime. The legal correctness of the general statement of the court is abundantly sustained by a long and unbroken series of authority in ancient and modern times, and by none more strongly and fully than by this court in the case referred to in Martin & Yerger's Reports. Whatever ethical philosophy may make of the matter, such, probably, for stern reasons of policy and necessity, will ever remain the doctrine of criminal courts. But, although drunkenness, in point of law, constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made by law to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. The question in such case is, what is the mental *status?* Is it one of self-possession, favorable to the formation of fixed purpose, by deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation, acting, it may be, on a peculiar temperament, or upon one already excited by ardent spirits. In such case it matters not that the provocation was inadequate, or the spirits voluntarily drank; the question is, did the act proceed from sudden passion, or from deliberation and premeditation? What was the mental *status* at the time of the act, and with reference to the act? To regard the fact of intoxication as meriting consideration in such a case, is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes has, in point of fact, been committed. If the mental state required by law to constitute the crime be one of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by drunkenness or such other cause, but has not, in fact, been committed. Even in England, where the crime of murder in the first degree has not been created and defined by law, it has been held, in the case of *King* v. *Grindley*,[1] that, "though voluntary drunkenness cannot excuse from the commission of crime, yet when — as upon a charge of murder — the material question is whether an act is

[1] 1 Russ. on Cr.

premeditated, of done only with sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration." And in Pennsylvania upon a statute similar to ours,[1] it has been held that "drunkenness does not incapacitate a man from forming a premeditated design of murder, but, as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design." But the bill of exceptions informs us that the charge of the court was in all respects unquestionable except as to the point stated. We are, therefore, to suppose that the court, when charging upon the nature and character of murder in the first degree, did charge whatever was proper upon the subject we have been discussing; upon the whole, then we have felt it to be our duty to affirm the judgment in this case.

DRUNKENNESS -- DEGREES OF MURDER -- PREMEDITATION — DELIBERATION — MANSLAUGHTER.

Pirtle *v.* State.

[9 Humph. 663.]

In the Supreme Court of Tennessee, April Term, 1849.

Hon. Nathan Green,
" William B. Turley,
" Robert J. McKinney. } *Judges.*

Drunkenness — Relevant on Deliberation and Premeditation. — Drunkenness works no mitigation of the grade of the guilt of any one who has committed a criminal offence; yet in a case where under the act of 1829, ch. 23, sec. 3, there must be a deliberate and premeditated killing to constitute murder in the first degree, proof of drunkenness is admissible, because it may show that the party accused was incapable, by reason of the state of his mind, of forming a deliberate and premeditated design to take life. As between the offences of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate subject of inquiry; the killing voluntary, the offence is necessarily murder in the second degree, unless the provocation were such as to reduce the offence to manslaughter.

This is an indictment against Pirtle, in the Circuit Court of Madison County, for the commission of murder in the first degree by stabbing. The defendant was tried by a jury and under the charge of the presid-

[1] Pennsylvania *v.* McFall, Add. 237.

Pirtle *v.* State.

ing judge (READ), he was found guilty, and the judgment rendered against him. He appealed.

M. Brown and *Totten*, for the plaintiff in error.

The *Attorney-General*, for the State.

TURLEY, J., delivered the opinion of the court.

The prisoner was convicted of the crime of murder in the second degree at the August term, 1848, of the Circuit Court of Madison; upon the trial it was proved that he was intoxicated, from the use of ardent spirits, at the time he committed the offence, and in relation thereto the judge charged the jury, "that the fact of such drunkenness could not be taken into consideration by them, unless the defendant was so far gone, as not to be conscious of what he was doing, and did not know right from wrong." Out of this charge arises the point to be considered by the court in this case, and that is, how far drunkenness, in law, is a mitigation or excuse for the commission of offences.

This is no new question, presented for the first time for consideration, but one of the earliest consideration in the law of offences; one which has been again and again adjudicated by the courts of Great Britain and the United States, and, as we comprehend, with a consistent uniformity rarely to be met with in questions of a like interest and importance. Upon the subject we have nothing to discover, no new principle to lay down, no philosophical investigation to enter into, in relation to mental sanity or insanity, but only to ascertain how the law upon this subject has been heretofore adjudged, and so to adjudge it ourselves. Lord HALE in his History of the Pleas of the Crown,[1] says: "The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive a man of reason, and puts many men into a perfect but temporary frenzy; but by the laws of England, such a person shall have no privilege by his voluntarily contracted madness, but shall have the same judgment as if he were in his right senses." In the case of *Reniger* v. *Fogossa*,[2] it was laid down as a rule, "that if a person that is drunk kills another, this shall be felony, and he shall be hanged for it; and yet he did it through ignorance; for when he was drunk he had no understanding or memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby." Lord COKE in his first Institute,[3] says: "As for a drunkard, he is *voluntarius dæmon*, he hath no privilege thereby; but what hurt or ill soever he doth, his drunken-

[1] p. 32. [2] Plow. 19. [3] p. 247.

ness doth aggregate it." In *Beverly's Case*,[1] it was held, "that although he who is drunk, is for the time *non compos mentis*, yet his drunkenness doth not mitigate his act or offence, nor turn to his avail." Hawkins in his Pleas of the Crown,[2] says: "He who is guilty of any crime whatever through his voluntary drunkenness, shall be punished for it as much as if he had been sober." Blackstone in the fourth book of his Commentaries,[3] says: "As to artificial voluntarily contracted madness, by drunkenness or intoxication, which deprives men of their reason, and puts them into a temporary frenzy, our law looks upon this as an aggravation of the offence, rather than an excuse for any criminal behavior. The law, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another." So Russell, in his Treatise on Crimes,[4] says: "With respect to a person *non compos mentis* from drunkenness, a species of madness which has been termed *dementia affectata*, it is a settled rule, that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime; but on the contrary must be considered as an aggravation of whatever he does amiss?" In the case of *Cornwell* v. *State of Tennessee*,[5] the able judge who delivered the opinion of the court, in speaking upon this subject, uses the following emphatic language: "A contrary doctrine ought to be frowned out of circulation, if it has obtained it, by every friend to virtue, peace, quietness, and good government. All the civilized governments must punish the culprit who relies on so untenable a defence, and in doing so they preach a louder lesson of morality, to all those who are addicted to intoxication, and to parents, and to guardians, and to youth, and to society, than comes in the cold abstract from pulpits." To the justice and correctness of these remarks, all who have had experience in the annals of crime can bear testimony. It is only at the present term of the court that we have seen it proven that an offender, a short time before the perpetration of a horrid murder, inquired of a grocery-keeper, what kind of liquor would make him drunk soonest, and swallowed thereupon a bumper of brandy. We have had three cases of murder, and one of an assault with intent to murder, before us at this term of the court, in every one of which there were convictions in the Circuit Court, and affirmances in this; every one of which is of aggravated character, and in every one of which the perpetrator at the time of the commission of the offence was laboring under *dementia affectata*, drunken-

[1] 4 Rep.
[2] B. 1 ch. 1, sec. 6.
[3] p. 26.
[4] Vol. 1, p. 7.
[5] Mart. & Yerg. 147, 149.

ness; an awful illustration of the necessity of holding the law, as it has been adjudged upon this subject. There is, in our judgment, no conflict of authority upon this point of law; every case which may have such appearance, being a case of exception in the application of the rule, or a case of no authority upon the subject. Lord Hale in his work before referred to,[1] says: "If by means of drunkenness, an habitual or fixed madness be caused, that will excuse, though it be contracted by the vice and will of the party; for this habitual or fixed frenzy puts a man in the same condition, as if it were contracted at first involuntarily." And it was to this principle the circuit judge was alluding when he charged the jury in the present case, that the drunkenness of the prisoner could not be taken by them into consideration, unless he were so far gone as to be unconscious of what he was doing, and did not know right from wrong; in saying which he put the case most favorable for the prisoner, for a man may be intoxicated so as to be unconscious of what he is doing and not know right from wrong; and yet not have contracted an habitual and fixed frenzy, the result of intemperance, of which Lord Hale is speaking above. The case of *Rex* v. *Grindley*, decided at Worcester,[2] by HOLROYD, J., not reported, but referred to by Russell in his works upon Crimes,[3] and now insisted upon by the prisoner as putting the circuit judge in the wrong in his charge to the jury, and holding different principles upon this subject, is expressly overruled by PARKE and LITTLEDALE, Judges, in the case of *Rex* v. *Carroll*,[4] and if it were not, it is an anomalous case; and perhaps was not intended or considered by HOLROYD, to be in conflict with principles so well and so long settled. The case as stated by Russell, holds that, "though voluntary drunkenness cannot excuse from the commission of crime, yet when upon a charge of murder, the material question is whether an act was premeditated, or done only with sudden heat and impulse, the fact of the party being intoxicated is a circumstance proper to be taken into consideration." Now, in relation to this principle as thus laid down, it may be observed that cases may arise even of murder at common law, in which it would be proper to receive such proof as explanatory of intention. To constitute murder at common law, the killing must have been done with malice aforethought; the existence of this malice necessarily implies the absence of all circumstances of justification, excuse, or mitigation arising from adequate provocation; and this malice is either express or implied; express when it has been per-

[1] Part 1, ch. 4.
[2] Sum. Ass. 1819.
[3] p. 8.
[4] 7 C. & P. 145.

The Limits of the Rule.

petrated by poison, lying in wait, or other deliberate and premeditated manner, implied from the nature of the weapon, the violence of the assault, and the inadequacy of the provocation. It may become important in a case to know whether poison which has been imbibed, was administered knowingly and designedly, or accidentally; and if it be wilful, which it is in the case of the administration of a medicine, there being two on the table, one a poison, the other not, and the poison being administered, is not the fact that the person who administered it, was drunk at the time, legitimate proof for the purpose of showing that it was a mistake which a drunken man might make, though a sober one would not? This would not be to protect him from the punishment for this crime, but to show that he had not given the poison premeditatedly, and therefore was guilty of no crime. So if the question be whether the killing is a murder or manslaughter, the defence being adequate provocation, and it be doubtful whether the blow be struck upon the provocation or upon an old grudge, it seems to us proof that the prisoner was drunk when he struck the blow is legitimate, not to mitigate the offence, but in explanation of the intent, that is whether the blow was struck upon provocation, or upon the old grudge; for the law only mitigates the offence to manslaughter, upon adequate provocation, out of compassion to human frailty; and therefore, though there be adequate cause for such mitigation, yet if in point of fact, one avail himself of it to appease an old grudge, it is murder, and not manslaughter; and in all such cases the question necessarily is, whether the blow was stricken premeditatedly, or upon the sudden heat and impulse produced by the provocation, and the fact of the self-possession of the perpetrator of the crime, is very material in a conflict of proof upon the subject. If this be the intent of the opinion of Holroyd in the case of *Rex* v. *Grindley*, we are not prepared to hold that it is not law. But if it be understood to hold that a killing may be mitigated from murder to manslaughter in consequence of the drunkenness of the perpetrator, thereby making that adequate provocation, in the case of a drunken man, which could not be so in the case of a sober one, we are prepared to hold with Parke and Littledale, that it is not law. The case of *Swan* v. *State*[1] has also been relied upon as containing doctrine adverse to that as above stated, upon the subject of drunkenness as a defence in criminal cases. This is not so. That case expressly recognizes the correctness of the proposition upon this subject as laid down in this opinion, with an exception which necessarily exists under our statute classing

[1] 4 Hump. 136.

murder into two degrees. The judge who delivered the opinion in that case, says: "The court was asked to charge as a matter of law, that drunkenness would reduce the crime of murder in the first degree, to that of murder in the second degree. The court, in reply, said that drunkenness is no excuse or justification for any crime. The legal correctness of the general statement of the court is abundantly sustained by a long and unshaken series of authorities in ancient and modern times, and by none more strongly and fully than by this court, in the case referred to in Martin's & Yerger's Reports. Whatever ethical philosophy may make of the matter, such probably for stern reasons of policy and necessity, will ever remain the doctrine of criminal courts. But although drunkenness, in point of law, constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made to depend by law, upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. The question in such case is, what is the mental status? Is it one of self-possession favorable to the formation of a fixed purpose, by deliberation and premeditation, or did the act spring from existing passion excited by inadequate provocation, acting, it may be, on a peculiar temperament, or upon one already excited by ardent spirits. In such case it matters not that the provocation was inadequate, or the spirits voluntarily drank; the question is, did the act proceed from sudden passion, or from deliberation or premeditation. What was the mental status at the time of the act, and with reference to the act? To regard the fact of intoxication as meriting consideration in such a case, is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes, has been in point of fact committed. If the mental status required by law to constitute crime be one of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by drunkenness or such other cause, but has not in fact been committed."

This reasoning is alone applicable to cases of murder under our act of 1829,[1] which provides "that all murder committed by means of poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree." Now this is draw-

[1] chap. 23.

Drunkenness, when Relevant.

ing a distinction unknown to the common law, solely with a view to the punishment; murder in the first degree being punishable with death, and murder in the second degree by confinement in the penitentiary. In order to inflict the punishment of death, the murder must have been committed wilfully, deliberately, maliciously, and premeditatedly; this state of mind is conclusively proven when the death has been inflicted by poison, or by lying in wait for that purpose; but if neither of these concomitants attend the killing, then the state of mind necessary to constitute murder in the first degree, by the wilfulness, the deliberation, the maliciousness, the premeditation, if it exist, must be otherwise proven; and if it appear that there was sudden provocation, though not of such a character as at common law, to mitigate the offence to manslaughter, and the killing thereupon takes place by sudden heat and passion, and without deliberation and premeditation, although the common law would presume malice, yet it is under the statute murder in the second degree, and not to be punished by death.

Then it will frequently happen necessarily, when the killing is of such a character as the common law designated as murder, and it has not been perpetrated by means of poison, or by lying in wait, that it will be a vexed question whether the killing has been the result of sudden passion, produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, if it be really the true cause of excitement, or whether it has been the result of deliberation and premeditation; and in all such cases whatever fact is calculated to cast light upon the mental status of the offender is legitimate proof; and, among others, the fact that he was at the time drunk, not that this will excuse or mitigate the offence if it were done wilfully, deliberately, maliciously, and premeditatedly (which it might well be, though the perpetrator was drunk at the time); but to show that the killing did not spring from a premeditated purpose, but sudden passion excited by inadequate provocation, such as might reasonably be expected to arouse passion and heat to the point of taking life, without premeditation and deliberation. This distinction never can exist except between murder in the first and murder in the second degree under our statute. It is upon such distinction the remarks of the judge in the case of *Swan* v. *State* are based, and by it they are to be confined. Thus far we recognize their justness, but can extend them no further.

If a drunken man commit wilful, deliberate, malicious, and premeditated murder, he is in legal estimation guilty as if he were sober. If he do it by means of poison knowingly administered, or by lying in wait, these facts are as conclusive evidence against him as if he had been sober. If from the proof, in absence of such lying in wait, or

administering the poison, it shall appear that the killing was wilful, deliberate, malicious, and premeditated, he is guilty as though he was sober. But in ascertaining the fact of such intention, all the concomitant circumstances shall be heard, in order to enable the jury to judge whether such deliberate, wilful, malicious, and premeditated design existed, or whether the killing was not the result of sudden heat and passion, produced by a sudden and unexpected controversy between parties, but of such a character as not to mitigate the slaying to manslaughter. As between the two offences of murder in the second degree, and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing being voluntary, the offence is necessarily murder in the second degree, unless the provocation were of such a character as would at common law constitute it manslaughter, and for which latter offence a drunken man is equally responsible as a sober one.

We think that the circuit judge committed no error in his charge to the jury in this case, and affirm the judgment.

DRUNKENNESS—DEGREES OF MURDER—DELIBERATION AND PREMEDITATION.

Cartwright *v.* State.

[8 Lea, 377.]

In the Supreme Court of Tennessee, December Term, 1881.

Hon. James W. Deaderick, *Chief Justice.*

" Peter Turney,
" Robert McFarland,
" William F. Cooper,
" Thomas J. Freeman, } *Judges.*

Drunkenness — Degrees of Murder — Deliberation and Premeditation. —If a person is so drunk as to be incapable of forming a premeditated and deliberate intent to kill, he cannot be guilty of murder in the first degree. But where drunkenness does not exist to this extent, the jury may consider it with all the other facts to see (1) whether the purpose to kill was formed in passion produced by a cause operating upon a mind excited with liquor — not such adequate provocation as to reduce the crime to manslaughter, — but it may reduce it to murder in the second degree; (2) whether the purpose was formed with deliberation and premeditation, for a drunken man may be guilty of murder in the first degree.

Appeal in Error from the Circuit Court of Macon County. N. W. McConnell, J.

The Facts in the Case.

J. L. Roach, and *J. C. Guild*, for Cartwright.

Attorney-General *Lea*, for the State.

McFARLAND, J., delivered the opinion of the court.

The prisoner appeals to this court from a judgment of death pronounced against him by the Circuit Court of Macon County for the murder of Hugh Sanders.

The prisoner was indicted in said court in January, 1879, for stealing a demijohn of wine from a church, was tried and acquitted, in April, 1879; the deceased was a witness against him on the trial. Out of this affair the animosity between the parties probably originated. They were both young men, the prisoner living in the town of Lafayette — the deceased within a mile or two of the town. Sometime after the trial — precisely how long is not shown — the prisoner left the county and remained away until a short time before the killing. It is claimed for the defence that he left from fear of the deceased. There is proof by several witnesses, that from the time of the trial until shortly before the killing the deceased made threats against the prisoner on several occasions. In only one instance does it appear that the threat was communicated to the prisoner,— this was before he left the county. The threats in some instances were in substance that the deceased had heard that the prisoner was going to charge the stealing the wine on him, and if he did he would kill him. On other occasions, he said they could not both live in the same county; that he expected a difficulty with him and he would be ready for him. One threat was proven to have been made the day before the killing; but as already stated, there is no proof that any of these threats were communicated to the prisoner except in the one instance. One witness proves that a week or ten days before the killing they met at a spring in Lafayette, when the deceased made some hostile demonstration, and as the witness thought, was about to draw a knife, and intimated that he would see the prisoner again.

The killing occurred on the 13th of October, 1880, in the town of Lafayette. An hour or two before the killing, several young men, including the prisoner and deceased, were in front of Johnson's hotel. They were engaged in playful conversation. The prisoner had a gun, and in the language of the witnesses "was drinking" or had been drinking. One of the young men asked him "if carrying a gun made him drunk, if it did he would get him one," and deceased said, "if it makes you drunk, pass it around and we will all take a spree" The prisoner did not seem to take offence at the language. The company separated, the prisoner and deceased going in different directions. Within an hour or two, deceased and two other young men returned,

and with Johnson, the proprietor of the house, were on the pavement in front of the hotel, the deceased sitting in a chair leaning back against the house. The prisoner was seen coming towards them, still carrying the gun. Johnson asked deceased if he was not uneasy for fear the prisoner would attack him, he said: "No, we had been at outs, but we have agreed to drop it, and we speak when we pass." Prisoner came up, when near where the parties were sitting, turned a little off the pavement and came around directly in front of the deceased, brought down his gun, and said, "G—d d——n you, I suppose you have got something against me," and instantly fired and shot the deceased through the body, from the effects of which he died in a few hours. It is fully proven by the three witnesses present that the deceased was unarmed and making no demonstration whatever, — the gun was very close to him when fired. The prisoner walked a short distance, then started to run across a field but was captured and brought back. It was proven by nearly all the witnesses that the prisoner was in the habit of drinking too much. The father, mother and sister of the prisoner prove that he had been drinking for perhaps three years, and their testimony indicates that at times he was subject to delirium tremens. They express the opinion that he was not of sound mind; but the effect of their testimony is that he at times had delirium tremens from the use of ardent spirits. The other witnesses say he was sane on the day of the killing, and in fact was sane at all times. His father says he was wild and very drunk, and out of his mind on the day of the killing, — worse than he had seen him for months. The mother says he at times seemed very much depressed, and said deceased, "charging him with stealing the wine, had put him below the respect of decent people." The witnesses pretty much all agree that the prisoner "was drinking" the day of the homicide, but to what extent he was under the influence of liquor their testimony differs somewhat. The witnesses for the State pretty generally say that he was "drinking, but not drunk;" but that he was to some extent under the influence of liquor fully appears. Prisoner's father, who was postmaster, proves that shortly before the killing the deceased came into his office, and asked for a letter, had his hands in his pockets, looked all around and walked hurriedly off. In a few moments prisoner came in, witness told him that deceased had been in, had his hands in his pockets, that he did not like his conduct, and feared mischief, and told prisoner that he had better go home; he said he would as soon as he saw Willie Claiborne. He went out and shortly afterwards the killing occurred. A very short

Charge of the Court

time before the killing, prisoner was seen looking in at Claiborne's store, as if looking for some one.

This is a sufficient outline of the case for a proper understanding of the questions presented for our decision.

Upon the subject of drunkenness the court charged the jury as follows: "Voluntary drunkenness is no excuse for the commission of a crime, but it may be looked to to ascertain whether the offence has been committed or not. We have seen that to commit murder in the first degree the killing must be done wilfully, deliberately, premeditately, and with malice aforethought. This requires certain states of the mind, and the question of the intoxication of the prisoner may be looked to, to see whether at the time of the killing he had these states of mind. Was he so intoxicated that he was incapable of giving the consent of his will to the killing, or of deliberating and premeditating the deed; if he was, then he cannot be guilty of murder in the first degree. But if he was capable of willing, deliberating and premeditating the deed then he is capable of committing murder in the first degree, notwithstanding his intoxication, and it can be no excuse for him. The only effect that voluntary drunkenness can have in any event, is to reduce the crime from murder in the first to murder in the second degree. It is never ground of entire justification, except it amounts to insanity, as will hereafter be explained to you."

Again the judge says: "If you believe, beyond a reasonable doubt, he (the prisoner) shot Sanders in malice, not intending to kill him but did do it, or if you find he was so intoxicated that he was not capable of that deliberation or premeditation necessary to make murder in the first degree, or you have a reasonable doubt how this is, you should find him guilty of murder in the second degree." This is the entire charge upon this subject.

In the case of *Haile* v. *State*,[1] the charge was as follows: "Voluntary drunkenness is no excuse for the commission of crime, on the contrary it is considered by our law as rather an aggravation. Yet if the defendant was so deeply intoxicated by spirituous liquors at the time of the killing as to be incapable of forming in his own mind a design, deliberately and premeditately to do the act, the killing under such a state of intoxication would only be murder in the second degree."

Upon a conviction for murder in the first degree the above charge was held to be erroneous. Judge Green in delivering the opinion of the court, quotes from Judge Reese in *Swan* v. *State*,[2] as follows: "But al-

[1] 11 Humph. 154.

[2] 4 Humph. 136.

though drunkenness in point of law constitutes no excuse or justification for crime, still when the nature and essence of the crime is made to depend by law upon a peculiar state and condition of a criminal's mind at the time with reference to the act done, drunkenness as a matter of fact affecting such state and condition of mind, is a proper subject for consideration and inquiry by the jury. The question in such case is what is the mental status? Is it one of self-possession favorable to fixed purpose of deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation acting it may be on a peculiar temperament or upon one already excited by ardent spirits? In such case, it matters not that the provocation was inadequate, or the spirits voluntarily drank; the question is did the act proceed from sudden passion or from deliberation or premeditation, what was the mental status at the time of the act and with reference to the act? To regard the fact of drunkenness as meriting consideration in such a case is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes has been in fact committed." Judge GREEN says: "In these remarks the court intended to be understood as distinctly indicating that a degree of drunkenness by which the party was greatly excited, and which produced a state of mind unfavorable to deliberation and premeditation although not so excessive as to render the party absolutely incapable of forming a deliberate purpose, might be taken into consideration by a jury in determining whether the killing was done with deliberation or premeditation." Judge GREEN also quotes from Judge TURLEY, in *Pirtle* v. *State*,[1] to the effect that it will often be a question "whether the killing has been the result of sudden passion excited by a cause inadequate to reduce it to manslaughter, but still sufficient to mitigate it to murder in the second degree. * * * In such cases, whatever will throw light upon the mental status of the offender is legitimate, and among other things the fact that he was drunk; not that this will excuse or mitigate the offence, if it was done wilfully, deliberately, maliciously and premeditatedly (which it might well be though the perpetrator was drunk), but to show that the killing did not spring from a premeditated purpose, but sudden passion excited by inadequate provocation such as might reasonably be expected to arouse sudden passion and heat to the point of taking life without premeditation and deliberation." Judge GREEN, in commenting on the above extract, in substance and effect says "the degree of drunkenness which will shed light on the mental status of the offender, is not alone that excessive

[1] 9 Humph.

state of intoxication which deprives the party of the capacity to frame in his mind a design deliberately and premeditatedly to do an act, but in addition any degree of intoxication that may exist, in order that the jury may judge in view of such intoxication, in connection with all the facts and circumstances, whether the act was premeditatedly and deliberately done." Following these authorities is the case of *Lancaster* v. *State*,[1] which was an indictment for an assault to commit murder in the first degree, this court held the following charge to be erroneous, to wit: "If defendant had been drinking much or little it would be a circumstance for the jury to look to for the purpose of ascertaining whether the defendant's mind was so influenced by liquor as to incapacitate him from forming a deliberate and premeditated design, that is, his mind so much influenced by liquor as to be incapable of contemplating the result of his acts, and if this was the condition of his mind he could not be convicted of an assault with intent to commit murder in the first degree; but if his mind was not in that condition and was not so much influenced by liquor to as to prevent him from forming a deliberate and premeditated design, drunkenness would then be no excuse and would not lessen the crime.

The rule to be abstracted from these cases is about this: if drunkenness exists to such an extent as to render the defendant incapable of forming a premeditated and deliberate design to kill, then of course he cannot be guilty of murder in the first degree; still, if the drunkenness be not of this extent, nevertheless the jury may consider this drunkenness in connection with all the facts, to see whether the purpose to kill was formed in passion produced by a cause operating upon a mind excited with liquor — not such adequate cause as would reduce the killing to manslaughter — but nevertheless such as produced passion in fact, and reduce the killing to murder in the second degree; or whether, notwithstanding the drunkenness, the purpose to kill was formed with deliberation and premeditation, for a drunken man may be guilty of murder in the first degree if the drunkenness be not to such an extent as to render his mind incapable of deliberation and premeditation. The conviction for murder in the first degree was affirmed in *Swan's Case*,[2] although he was intoxicated at the time.

We are constrained to hold upon the rule as thus established by these authorities, that the portion of his Honor's charge above set forth is erroneous. The jury were correctly told that if the prisoner was so intoxicated as to be incapable of deliberating and premeditating the deed

[1] 2 Lea, 573. [2] 4 Humph. 136.

he could not be guilty of murder in the first degree; on the other hand, if, notwithstanding his intoxication, he was capable of deliberation and premeditation, then he might be found guilty of murder in the first degree. This was all well enough; but the error is in making the whole effect of the prisoner's intoxication in reducing the killing to murder in the second degree depend upon whether the drunkenness was to such an extent as to render the prisoner incapable of deliberation and premeditation; whereas as we have seen a degree of intoxication short of this may, when taken in connection with the other facts, show that the killing resulted from a purpose formed in passion, and not deliberately and premeditatedly; and although there be no adequate provocation to reduce the offence to manslaughter, yet if in this mode the want of deliberation and premeditation appear, it may be reduced to murder in the second degree.

In a case involving life we do not feel at liberty to overlook this error, whatever we might think of the facts. The prisoner is entitled to a correct exposition of the law.

The judgment must therefore be reversed, and the case remanded for a new trial.

DRUNKENNESS — DEGREES OF MURDER — NEED NOT BE "EXCESSIVE" TO BE AN EXCUSE.

Lancaster *v.* State.

[2 Lea, 575.]

In the Supreme Court of Tennessee, April Term, 1879.

Hon. James W. Deaderick, *Chief Justice.*
" Peter Turney, }
" Robert McFarland, } *Judges.*
" William F. Cooper, }
" Thomas J. Freeman, }

Drunkenness — Need not be Excessive to be an Excuse. — Upon a trial for murder in the first degree or an assault with intent to commit murder in the first degree, drunkenness to any extent is relevant. Though it may not be so excessive as to render the prisoner incapable of deliberating, yet it may have excited him and produced a state of mind unfavorable to premeditation and deliberation.

Appeal from the Circuit Court of Henderson County.

E. L. Bullock, for Lancaster.

Attorney-General *Lee*, for the State.

Deaderick, C. J., delivered the opinion of the court.

The defendant was convicted for assault with intent to commit murder in the first degree, and sentenced to fifteen years' imprisonment in the penitentiary. He has appealed from the judgment, and assigns error in the charge of the court.

The evidence shows that the prisoner was under the influence of liquor when the offence was committed. The circuit judge charged the jury: "If defendant had been drinking, much or little, it would be a circumstance for the jury to look to for the purpose of ascertaining whether the defendant's mind was so influenced by liquor as to incapacitate him from forming a deliberate and premeditated design, that is, his mind was so much influenced by liquor as to be incapable of contemplating the result of his acts, and if this was the condition of his mind, he could not be convicted of an assault with intent to commit murder in the first degree; but if his mind was not in that condition, and was not so much influenced by liquor as to prevent him from forming a deliberate and premeditated design, drunkenness would then be no excuse and would not lessen the crime."

In *Swan* v. *State*,[1] Judge Reese, while very strongly stating the doctrine that "drunkenness is no excuse for crime," adds that "when the nature and essence of a crime is made by law to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, is a proper subject for consideration and inquiry by the jury. The question in such case is, what is the mental status? Is it one of self-possession, favorable to the formation of a fixed purpose by deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation, it may be, on a peculiar temperament, or upon one already excited by ardent spirits?"

In 9 Humphrey,[2] the conviction was for murder in the second degree, and it was held that the drunkenness of the offender in the case of murder in the second degree, or manslaughter, can form no matter of legitimate inquiry, but that it is material where the inquiry is whether the acts were done with deliberation or premeditation. In the case of *Haile* v. *State*,[3] a charge very similar to the one in this case was held erroneous. The circuit judge had instructed the jury: "If defendant was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditately to kill," this would reduce the killing to murder in the second degree.

[1] 4 Humph. 136. [2] Pirtle *v.* State, 663. [3] 11 Humph. 154.

Judge GREEN, in commenting on the opinion of Judge REESE in the case in 4 Humph., says: "The court intended to be understood as distinctly indicating that a degree of drunkenness by which the party was greatly excited, and which produced a state of mind unfavorable to deliberation and premeditation, although not so excessive as to render the party absolutely incapable of forming a deliberate purpose, might be taken into consideration by a jury in determining whether the killing were done with premeditation and deliberation." In that case, as in this, the Circuit Court told the jury that intoxication could not thus reduce the offence, unless it existed to such a degree as to render the offender absolutely incapable of forming such a design.

All the cases cited hold that a drunken man may premeditate and deliberate, yet they hold that the evidence of the fact of intoxication is proper to go to the jury, when they are to find whether the act in question was done with deliberation and premeditation, and that the jury may determine whether the act is the result of deliberation and premeditation, or of passion aroused by inadequate provocation.

We are of opinion that the charge was erroneous in the particular indicated and the judgment will be reversed.

INTOXICATION — WHEN NOT RELEVANT ON DEGREE OF CRIME

STATE *v.* TATRO.

[50 Vt. 483.]

In the Supreme Court of Vermont, January Term, 1878.

Hon. HOMER E. ROYCE,
" TIMOTHY P. REDFIELD,
" JONATHAN ROSE,
" WALTER C. DUNTON, } *Judges.*

Intoxication — When not Relevant on Degree of Crime. — Where a murder is done by some kind of wilful, deliberate and premeditated killing other than by means of poison or lying in wait, the degree of the offence is not lessened by proof that at the time it was committed the prisoner was intoxicated, any more than it would be if it had been perpetrated by means of poison or by lying in wait.

The prisoner was indicted and convicted of the murder of Alice Butler. He appealed.

The English Cases.

G. A. Ballard, *William Farrington* and *F. W. McGettrick*, for the prisoner.

H. R. Start, and *H. S. Royce*, for the State.

REDFIELD, J.:

(Omitting other questions.)

The more important question arises upon the charge of the court upon the effect of intoxication upon the grade of the offence. The court charged the jury that voluntary intoxication could neither excuse nor mitigate the offence. There is, perhaps, no principle or maxim of the common law of England more uniformly adhered to than that voluntary drunkenness does not excuse or palliate crime. Lord Coke, in his Institutes, declares that "whatever hurt or ill he doth, his drunkenness doth aggravate it."[1] And in his Reports,[2] he says: "Although he that is drunk is for the time *non compos mentis*, yet his drunkenness doth not extenuate his act or offence, nor turn to his avail." And Sir Matthew Hale, eminent alike for his humanity and learning, says of drunkenness, which he calls *dementia affectata:* "This vice doth deprive men of the use of reason, and puts many men in a perfect but temporary frenzy; * * * but by the laws of England, such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses. And Lord Bacon, in his "Maxims of the Law,"[3] in that comprehensive language which clearly defines, and gives the reasons for the rule of law, thus asserts the doctrine: "If a madman commits a felony, he shall not lose his life for it because his infirmity came by act of God; but if a drunken man commit a felony he shall not be excused, because the imperfection came by his own default." In *Burrow's Case*,[4] HOLROYD, J., thus defines the rule: "It is a maxim in the law that if a man gets himself intoxicated he is answerable to the consequences, and is not excusable on account of any crime he may commit when infuriated with liquor, provided he was previously in a fit state of reason to know right from wrong." And the cases of *Rex* v. *Grindley* and *Rex* v. *Meakin*[5] show the uniformity of this rule in the courts of England. In the case of *People* v. *Rogers*[6] the Supreme Court had reversed the conviction of Rogers, on the ground that the court had excluded the evidence of the respondent's drunkenness, as affecting the criminal intent. But the case was, by writ of error, carried to the Court of Appeals and the whole law upon that subject was reviewed and canvassed with great learning and ability by

[1] 3 Thomas' Coke Lit. 46.
[2] Beverley's Case, 4 Coke, 123 *b*, 125 *a*.
[3] Rule 5.
[4] 1 Lewin, 75, A. D. 1823.
[5] 7 C. & P. 297.
[6] 18 N. Y. 9.

Chief Justice DENIO and HARRIS, J. HARRIS, J., says: "The Supreme Court seem to have understood that in all cases where without it the law would impute to the act a criminal intent, drunkenness would be available to disprove such intent. I am not aware that such a doctrine has before been asserted. It is certainly not sound. The adjudications upon the subject, both in England and in this country, are numerous and characterized by a singular uniformity of language and doctrine. They all agree that where the act of killing is unequivocal and unprovoked the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime." But it is insisted that under the statute which makes "degrees" of murder, drunkenness qualifies and mitigates the higher offence. The statute declares that "all murder which shall be perpetrated by means of poison, or by lying in wait, or any other kind of deliberate and premeditated killing, shall be deemed murder in the first degree." The same or similar statute has been enacted in most of the States. And many courts have allowed drunkenness to be shown in mitigation of the higher offence. In the case of *State* v. *Johnson*,[1] the court held that intoxication, as tending to show that the prisoner was incapable of deliberation, might be given in evidence. Chief Justice SEYMOUR dissented, and FOSTER, J , who tried the case below, did not sit, so that the four judges constituting the court were, in fact, equally divided. The same case came before that court again,[2] and the opinion was delivered by the same judge. The court were hard pressed with the former opinion in the same case, and that it had taken a departure from the common law. But the court repelled the intimation, and declared that "we have enunciated no such doctrine," but held "on a trial for murder in the first degree, which, under our statute, requires actual express notice, the jury might and should take into consideration the fact of intoxication, as tending to show that such malice did not exist." And in the same opinion, the judge says: "Malice may be implied from the circumstances of the homicide. If a drunken man takes the life of another, unaccompanied with circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though no express malice is proved. Intoxication, which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and all together afford sufficient grounds for implying malice. Intoxication, therefore, so far from disproving malice, is itself a circumstance from

[1] 40 Conn. 136. [2] 41 Conn. 584.

Evidence of Drunkenness Irrelevant.

which malice may be implied. We wish, therefore, to reiterate the doctrine emphatically, that drunkenness is no excuse for crime, and we trust it will be a long time before the contrary doctrine, which will be so convenient to criminals and evil disposed persons, will receive the sanction of this court." This reasoning seems to us both illogical and incongruous. To constitute murder of the first degree the act must, indeed, be done with malice aforethought, and that malice must be actual, not constructive. At common law, if the accused shoot his neighbor's fowls, and by accident kill the owner, he is guilty of murder, yet he did not intend to murder, but to steal. Such cases are excluded by the statute from the definition of murder in the first degree. But "where the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural and probable effect of any act deliberately done was intended by its actor,[1] and intent for an instant before the blow, is sufficient to constitute malice." [2] It will be admitted that if the respondent had killed his victim "by poison or lying in wait" the act would have been murder in the first degree, and the fact that he was intoxicated could not have been admitted to excuse or palliate the crime. Yet it is claimed that if the circumstances show that the murder was deliberately planned, and executed with fiendish barbarity and malice, drunkenness may come in to palliate the crime.

This, we think, is making a distinction without a difference. Chief Justice Hornblower,[3] speaking of the New Jersey statute, which is like ours, says: "This statute, in my opinion, does not alter the law of murder in the least respect. What was murder before its passage is murder now — what is murder now was murder before that statute was passed. It has only changed the punishment of murder in certain cases; or rather, it prescribes that, in certain specified modes of committing murder, the punishment shall be death, and in all other kinds of murder, the convict shall be punished by imprisonment."

The evidence, so far as detailed in this case, if believed, shows a murder most fiendish and shocking. He destroyed the last resisting vitality of this woman, struggling for her life, with an axe, which shows malice and malignity of purpose. The language of Chief Justice McKay, while discussing a like statute in Pennsylvania, and in a case quite similar to this, is fitting and sensible. He says: "It has been objected that the amendment of our penal code renders premeditation

[1] 2 Am. Com. Law, 944. [2] *Ib.* 948. [3] 1 Am. Crim. Law, sect. 1103.

an indisputable ingredient to constitute murder in the first degree. But still it must be allowed that the intention remains, as much as ever, the true criterion of crime, in law as well as in ethics; and the intention of the party can only be collected from his words and actions. * * * But let it be supposed that a man without uttering a word should strike another on the head with an axe, it must, on every principle by which we can judge of human actions be deemed a premeditated violence." The statute has in no degree altered the common-law definition of murder. But the killing of a human being by poison, or lying in wait, or by purposely using a deadly weapon to that end is murder in the first degree; and the purpose and intent to kill must be determined by the circumstances that surround each case; for the murderer takes with him no witnesses, and does not often avow his purpose. Where the requisite proof is adduced to show a wicked, intentional murder, he is not permitted to show a voluntary and temporary intoxication in extenuation of his crime.

The respondent takes nothing by his exceptions.

INTOXICATION—DEGREES OF MURDER.

HOPT *v.* PEOPLE.

[104 U. S. 631.]

In the Supreme Court of the United States, October Term, 1881.

Hon. MORRISON R. WAITE, *Chief Justice.*
" SAMUEL MILLER,
" JOSEPH P. BRADLEY,
" STEPHEN J. FIELD,
" JOHN M. HARLAN,
" WILLIAM B. WOODS,
" HORACE GRAY,
" SAMUEL BLATCHFORD,
" STANLEY MATTHEWS.
} *Associate Justices*

Under a statute establishing degrees of the crime of murder, and providing that wilful, deliberate, malicious, and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation.

IN ERROR to the Supreme Court of the Territory of Utah. The opinion states the case.

Exception to Charge.

Mr. Justice GRAY, delivered the opinion of the court.

The plaintiff in error was indicted, convicted, and sentenced for the crime of murder in the first degree in the District Court of the Third Judicial District of the Territory of Utah, and presented a bill of exceptions, which was allowed by the presiding judge, and from his judgment and sentence appealed to the Supreme Court of the Territory, and that court having affirmed the judgment and sentence he sued out a writ of error from this court. Of the various errors assigned we have found it necessary to consider two only.

The Penal Code of Utah contains the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." [1] "Every person guilty of murder in the first degree shall suffer death, or upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." [2]

By the Utah Code of Criminal Procedure, the charge of the judge to the jury at the trial "must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally," [3] the jury, upon retiring for deliberation, may take with them the written instructions given,[4] and "when written charges have been presented, given, or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." [5]

[1] Sect. 89.

[2] Sect. 90, Comp. Laws of Utah of 1876, pp. 585, 586.

[3] Sect. 257, cl. 7.

[4] Sect. 289.

[5] Sect. 315, Laws of Utah of 1878, pp. 115, 121, 126.

Hopt *v.* People.

It appears by the bill of exceptions that evidence was introduced at the trial tending to show that the defendant was intoxicated at the time of the alleged homicide.

The defendant's fifth request for instructions, which was indorsed, "refused" by the judge, was as follows: "Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary. The degree of the offence depends entirely upon the question whether the killing was wilful, deliberate, and premeditated, and upon that question it is proper for the jury to consider evidence of intoxication if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation, which, according as they are absent or present, determine the degree of the crime."

Upon this subject the judge gave only the following written instruction: "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognized it as an excuse for crime."

The instruction requested and refused, and the instruction given, being matter of record and subjects of appeal under the provision of the Utah Code of Criminal Procedure,[1] above quoted, their correctness is clearly open to consideration in this court.[2]

At common law, indeed as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence.[3] But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute

[1] Sect 315.

[2] Young *v.* Martin, 8 Wall. 354.

[3] United States *v.* Drew, 5 Mason, 28; United States *v.* McGlue, 1 Curt. 1; Commonwealth *v.* Hawkins, 3 Gray, 463; People *v.* Rogers, 18 N. Y. 9.

murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points.[1] And the same rule is expressly enacted in the Penal Code of Utah:[2] "No act committed by a person while in a state of volutionary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."[3]

The instruction requested by the defendant clearly and accurately stated the law applicable to the case, and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.

[Omitting a point of practice.]

For these reasons the judgment must be reversed, and the case remanded with instructions to set aside the verdict and order a new trial.

INTOXICATION — NOT RELEVANT ON QUESTION OF MALICE.

NICOLS *v.* STATE.

[8 Ohio St. 435.]

In the Supreme Court of Ohio, December Term, 1858.

Hon. THOMAS W. BARTLEY, *Chief Justice.*
" JOSEPH R. SWAN,
" JACOB BRINKERHOFF,
" JOSIAH SCOTT,
" MILTON SUTLIFF,
Judges.

Intoxication — Malice. — On an indictment for maliciously stabbing with intent to kill, it was in evidence that the prisoner was intoxicated at the time of the act. The judge

1 Commonwealth *v.* Dorsey, 103 Mass. 412; and in well considered cases in courts of other States. Pirtle *v.* State, 9 Humph. 663; Haile *v.* State, 11 *Id.* 154; Kelly *v.* Commonwealth, 1 Grant (Penn.), 484; Keenan *v.* Commonwealth, 44 Pa. St. 55; Jones *v.* Commonwealth, 75 *Id.* 403; People *v.* Belencia, 21 Cal. 544; People *v.* Williams, 43 *Id.* 344; State *v.* Johnson, 40 Conn. 136, and 41. *Id.* 584; Pigman *v.* State, 14 Ohio, 555, 557.

2 Sect. 20.

3 Comp. Laws of Utah of 1876, pp. 568, 569.

refused to charge the jury that intoxication "is a circumstance proper to be taken into consideration by them, and should have its just weight in determining the malicious intent." *Held*, not error.

Caleb Nichols was indicted in the Common Pleas of Muskingum County, for maliciously stabbing with intent to kill one Zachariah Riley. He was found guilty and appealed.

Charles C. Goddard and *J. Q. Lane*, for the prisoner.

John C. Hazlett, prosecuting attorney for the State.

BRINKERHOFF, J.

[After disposing of another point.]

Did the court below err in holding, as it did substantially, that, in a case of this kind, the intoxication of the accused had nothing to do with the question of malice?

This is a question much more serious and difficult than the preceding, and in respect to which our minds have not been free from doubt; but, after a long and somewhat anxious deliberation, we have unanimously come to the conclusion that there was no error in the charge of the court below on this point.

All the authorities agree that drunkenness is no excuse for crime. Crime, when all the acts of hand and mind which constitute it actually exist, is not the less criminal when committed by a person intoxicated. A drunken malice is as dangerous, and may be quite as wicked, as sober malice; and it is a sorry consolation to a sufferer from a murderous stab, and to a community which is responsible for his protection, to be told that the act was done by a man who was bound in morals to keep sober, and who had the power to keep sober, but had become voluntarily drunk. Nevertheless, it has been held, in this State, that where a peculiar knowledge was an element of the guilty act, requiring nice discrimination and judgment, as in passing a counterfeited bank-bill, knowing it to be counterfeited, and where deliberation and premeditation are necessary ingredients of the crime, as in murder in the first degree, evidence of intoxication is admissible, and proper to be taken into consideration by the jury, in determining the question as to the guilty knowledge in one case, and as to the deliberation and premeditation in the other. So, if the accused was so drunk as not to know what he was doing, the fact of intoxication may doubtless be given in evidence for what it is worth for the purpose of showing that he did not intend at the time to do what he in fact did do. So far as we are advised, there is no reported case in Ohio requiring us to go beyond this; and to this extent, on a fair construction of the language of the

[1] Pigman v. State, 14 Ohio 555.

Not Relevant on Question of Malice.

court below in charging the jury, the prisoner, in the case before us, had the benefit of the evidence in regard to his state of intoxication. And this, too, seems to be the full extent to which we are led by the general current of authorities in other States.

We will not say but that, admitting the correctness of these decisions, a refined and rigid logical theory might not require us to go further. But here the authorities authorize us to stop; and here we think a proper regard to the public safety in the practical administration of criminal justice requires that we should stop. This kind of evidence is at best, and in any case, of dangerous tendency in its practical application. Intoxication is easily simulated. It is often voluntarily induced for the sole purpose of nerving a wicked heart to the firmness requisite for the commission of a crime soberly premeditated, or as an excuse for such crime. Yet these pre-existing dispositions may be difficult or impossible to prove. And when we admit evidence of intoxication to rebut a guilty knowledge requiring nice discrimination and judgment, to rebut a charge of deliberation or premeditation, and to show that the accused did not at the time intend to do the act which he did do, we think we have gone far enough; and that, looking to the practical administration of the criminal law, a due regard to the public safety requires that the mere question of malice should be determined by the circumstances of the case, aside from the fact of intoxication, as in other cases.

Motion overruled.

Swan, C. J., and Scott, Sutliff, and Peck, JJ., concurred.

INTOXICATION — WHEN AN EXCUSE — BURDEN OF PROOF — RATIONAL DOUBT — MORAL INSANITY — TEST.

Smith *v.* Commonwealth.

[1 Duv. 224.]

In the Court of Appeals of Kentucky, Summer Term, 1864.

Hon. Joshua F. Bullitt, *Chief Justice*
" Belvard J. Peters, }
" Rufus K. Williams, } *Judges.*
" George Robertson. }

Intoxication — When an Excuse. — A person who designing a homicide drinks to excess, and then commits it, is guilty of murder. But drunkenness brought on by sensual

[1] Com. *v.* Jones, 1 Leigh, 612; Com. *v.* Haggerty, 4 Clark, 187; Pirtle *v.* State, 9 Humph. 664; Swan *v.* State, 4 Humph. 136; Haile *v.* State, 11 Humph. 154; People *v.* Robinson, 2 Park. 223-235.

or social gratification with no criminal intent may reduce an unprovoked homicide from murder to manslaughter.

2. **Burden of Proof — Rational Doubt.** — An instruction that, where the jury, from the evidence, entertain a rational doubt on the question of insanity, they should always find in favor of sanity, is erroneous.

3. **Moral insanity** is now as well understood and established as intellectual insanity.

4. **Test of Responsibility.** — The 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.

APPEAL from Jefferson Circuit Court.

G. I. and *I. Caldwell*, with *W. F. Bullock* and *H. Pope*, for the appellant.

John M. Harlan, Attorney-General, for the Commonwealth.

Judge ROBERTSON delivered the opinion of the court.

Robert Smith, convicted by the verdict of a jury and sentenced by the Circuit Court, to be hung on an indictment charging him with the murder of Frederick Landaur, appeals to this court for a reversal, on the ground that the indictment is insufficient, and that the circuit judge erred in giving and in withholdings instructions on the trial.

[Omitting the question as to the indictment.]

The court also instructed the jury "that in case of homicide, without any provocation, the fact of drunkenness is entitled to no consideration," and that "temporary insanity, which has followed as the immediate result of voluntary drinking to intoxication, is no excuse for crime." In all this we cannot concur. If a man designing a homicide, drink to intoxication, either to incite his animal courage, or prepare some excuse, the killing will be murder. But if sensual gratification or social hilarity, without any premeditated crime, induced the drinking, surely his condition may be such as to reduce even an unprovoked homicide from murder to manslaughter. And, if transient insanity ensue, although it should not altogether excuse, yet it should mitigate the crime of the inevitable act. There was some testimony in this case tending to show that the appellant, when he killed Landaur, was intoxicated, and also that such a condition superinduced moral insanity, and the jury had a right to weigh that testimony and determine, not only the fact of intoxication, but its actual effect on the mind and will, and consequently on the conduct of the appellant. Had they believed that it was neither simulated nor malicious, but, without even producing momentary insanity, prompted a homicide which otherwise would not have been perpetrated, they had a right to decide that the act was not so criminal as murder; and if, especially, they had been satisfied that the act was the offspring of momentary insanity, they could not as con-

scientious triers have doomed such a victim to the gallows. The instruction tacitly concedes that permanent insanity produced by drunkenness, may excuse a homicide, and this contrary to the ancient doctrine, is now universally conceded to be American law. And why is it law? Only because no insane man is responsible for insane acts. And why should an insane act, prompted by transient insanity, have no exculpatory or mitigating effect on the question of crime or of its grade? In Lord COKE's day a man could not avoid a contract on a plea of insanity or incapacitating drunkenness. That absurdity has been long exploded. And why should its spurious twin — that drunkenness, whatever may be its effect, is no excuse for crime — be still recognized as law in this improved age of a more enlightened and homogeneous jurisprudence? We conclude that this instruction did not clearly and distinctly embody the true modern law, and may have been, therefore, prejudicial to the appellant.

4. The next instruction we shall consider is the following, as given to the jury: "When the jury, from the evidence, entertain a rational doubt on the question of insanity, they should always find in favor of sanity." This, too, is not now, either altogether or always, a consistent and true doctrine. Can it be possible, that here and now, a jury is bound to hang a man for murder when they naturally and strongly doubt his capacity to commit any crime?

The "rational doubt," which should result in an acquittal, lest an innocent man might be unjustly punished, is a doubt as to all or any one of the constituent elements essential to legal responsibility or punishable guilt; and unless they all concur, acquittal is the legal consequence. As a sound and responsible mind is indispensable to such guilt, why should not a strong and rational doubt of the capacity to commit the imputed crime favor the acquittal of the accused? It is true that *prima facie*, every man is presumed to be sane, and therefore, the burden of proof to rebut this presumption devolves on the party claiming the benefit of the plea of insanity. But so, too, in like manner, every man charged with crime is presumed innocent, and will be so held until the Commonwealth shall rebut that presumption. But if the testimony for rebutting it should leave room for a rational doubt of guilt, "not guilty" is the verdict of the law. Why, if the evidence of insanity is strongly preponderating, should not the presumption of sanity be rebutted, and why should the jury be bound to find sanity merely because insanity has not been proved with such absolute certainty as to exclude a rational doubt? If this be their duty, then in all cases of partial insanity a case could be scarcely imagined, and perhaps may

never arise, in which a plea of insanity can be made available. A doubt of sanity is essentially different from a doubt of insanity — the former should always avail, the latter never. When the proof of insanity is ever so strong, there may, and generally will be, a doubt whether, nevertheless, the accused was not sane; this is a doubt of sanity which should never convict, but should always acquit. "Belief" is of different degrees of certainty and assurance. On such a metaphysical question as that of partial insanity no proof of it can impress the jury with moral certainty. The preponderating probability of insanity may be as assuring as that on which they individually act in the affairs of ordinary life; and therefore, they may be said to "believe" the alleged insanity, and yet may feel some rational doubt of it. Such a doubt in such belief may compel a rational doubt of responsible sanity. And so doubting, the jury ought not to convict. But when the evidence strongly preponderates in favor of sanity, a doubt whether, nevertheless, the accused was not insane, should never acquit. And that is what we mean by a doubt of insanity. The instruction does not discriminate between the two classes of cases, but compounds them; and it was therefore misleading. And this conclusion is not at all inconsistent with the principle of the case of *Graham* v. *Commonwealth*.[1] In that case the instructions adjudged indefensible, assumed the sufficiency of a doubt of insanity, not of sanity, and the decision of the question thus propounded was all that was judicial in the case.

The last instruction we shall notice is in the following words: "To establish a defence on the ground of insanity, the accused must prove that at the time of the killing, he was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, he did not know he was doing wrong."

All this may be true in most cases of intellectual insanity. This species of insanity, as first defined by Erskine and illustrated by the sustained verdict in *Hadfield's Case* is "delusion," arising from a partial eclipse of the reason, or from a morbid perversion of the percipient faculties, which present to the abnormal mind, as accredited realities, images of objects that have no actual existence, or a false and distorted aspect of existing objects. Whether the true theory of the human mind be psychological or only physiological, spiritual or material, man is certainly so constituted as to be compelled to believe the testimony of his own senses. This is the ultimate test of all human knowledge, and necessarily has the force and certainty of intuition, which no reasoning

[1] 16 B. Mon. 591.

can overcome or impair. The intellectual monomaniac may reason logically, but he reasons from false premises which his morbid mind assumes, with intuitive confidence, to be undoubtedly true. His false conclusion may result, not from "defect of reason," as assumed in the instruction, but from an insane assumption of false premises. To punish a homicide, committed by the insane victim of such delusion, and under its resistless influence, would be punishing for what every other man in the same condition would ever do in defiance of all penal consequences; and, therefore, such punishment would be useless, and inconsistent with the preventive aim of all criminal jurisprudence.

Although he had an abstract knowledge of "right and wrong," and knew that crime is justly punishable, nevertheless he did not know that his act was criminal, but felt sure that it was lawful and righteous. But if he knew that he was doing wrong, he was not impelled by delusion, and his act was criminal. As the intellectual was the only species of monomania recognized for many years after the trial of *Hadfield*, the doctrine repeated in this instruction, excepting only the "defect of reason" which it seems to presuppose was established as applicable to all pleas of insanity in criminal cases; and until lately it had been applied to a class of cases which are not within the scope of its philosophy.

Moral insanity is now as well understood by medico-jurists, and almost as well established by judicial recognition as the intellectual form. Mentally, man is a dualism consisting of an intellectual and a moral nature. It is this peculiar nature that exalts him above the animal, and makes him legally and morally a responsible being. The animal has neither reason to guide, nor a moral will to control its passions. Passion governs and instinct alone guides its conduct. It is therefore not responsible to the criminal law. But a proper man, in a sound and moral state, with "*a mens sano in corpore sano*," has peculiarly and pre-eminently the light of reason to guide him in his pathway of duty, and also has a free and rational presiding will to enable him, if he so choose, to keep that way in defiance of all passion and temptation. It is this intellectual and moral nature alone that makes him, in the probationary sense, a man, and holds him responsible for his voluntary conduct. And it would be as useless and cruel to hold him accountable, either criminally or morally, for an act done without a free, rational and concurrent will, as it would be, if his reason had been in total eclipse.

The common law progresses with all other sciences with which it is affiliated as a growing and consistent whole. And consequently, as the science of man's moral nature has developed the phenomenon of in-

sane affections, emotions, and passions, which either neutralize or subjugate the will, medical jurisprudence recognizes this morbid and overwhelming influence as moral insanity, and pronounces it as exculpatory as the other form called intellectual insanity. No enlightened jurist now doubts the existence of such a type of moral, contradistinguished from intellectual, insanity as homicidal mania or morbid and uncontrollable appetite for man-killing; and pyromania, or the like passion for house burning; and kleptomania, or an irresistible inclination to steal. In each of these cases, and others of a kindred character, whether the unnatural passion be congenital or only the offspring of some supervenient cause, moral unhingement and a subjugated or subsidized will, are the invariable characteristics. This is disease, and the man thus doomed to the anarchy of morbid and ungovernable passions is, in law as well as in fact, insane, and to the extent of the operation of that blind and brutal influence, he may be no more responsible than a tiger or other brute. But if his insanity extend no further than a morbid perversion and preternatural power of insane passion or emotion, he not only "knows right from wrong," but knows also that the act he is impelled to do, is forbidden both by moral and human law. Yet, nevertheless, his will being paralyzed or subordinated, the uncontrollable appetite necessitates an act which he knows to be wrong and justly punishable. But as he was a helpless puppet in the hands of Briarean passions he is no more a fit subject of punishment than an animal without a controlling will, or than he, himself, would have been, had he never been blessed with that moral pilot of the passions. The instruction as given excluded any such insanity from the jury. The instruction given by the circuit judge in the case of *Graham* v. *Commonwealth* was much more comprehensive, and as nearly right as any we have seen on that subject in any case. It was as follows: "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."

The instruction we have been considering in this case was, therefore, not only inapplicable to the species of insanity relied on by the appellant, but was radically defective in principle.

Deeming further amplitude unnecessary, and, therefore, unbefitting, we conclude that, for the foregoing errors, the verdict and judgment in this case ought not to stand.

Wherefore, the judgment is reversed, the verdict set aside, and the cause remanded for a new trial.

DRUNKENNESS MAY REDUCE GRADE OF CRIME.

BLIMM *v.* COMMONWEALTH.

[7 Bush, 320.]

In the Court of Appeals of Kentucky, Summer Term, 1870.

Hon. GEORGE ROBERTSON, *Chief Justice.*
" MORDECAI HARDIN, }
" BELVARD J. PETERS, } *Judges*
" WILLIAM LINDSAY, }

Drunkenness may, under peculiar circumstances repelling malice, reduce the grade of the crime from murder to manslaughter.

APPEAL from Boone Circuit Court.

S. A. Hagerty, *George C. Drane* and *John L. Scott*, for appellant.

John Rodman, Attorney-General, for appellee.

Chief-Justice ROBERTSON delivered the opinion of the court.

The appellant, Peter Blimm, charged with the wanton murder of a little white boy, without any known provocation or apparent motive, was indicted, tried and sentenced to the gallows at a special term of the Boone Circuit Court, ordered only a few days after the homicide and commencing on the eighth day after the order was made in vacation.

(Omitting an exception taken on a question of jurisdiction.)

The only contestable question in the record within the range of our appellate power is involved in instructions, and that is confined to the hypothesis assumed in the testimony that when the homicide was perpetrated the appellant was drunk, which fact, according to the case of *Smith* v. *Commonwealth*,[1] to which we adhere, may, under peculiar circumstances repelling malice, reduce the grade of the crime from murder to manslaughter. But this mitigating tendency of intoxication is not allowable when that condition of mind has been produced for the purpose of stimulating a meditated felony, or even when it is known to excite homicidal or other destructive passions, because such an inebriate, *hostis humani generis*, evinces express malice. But when, in the absence of any such aggravating circumstances, a responsible being, drunk from accident or mere sensuality, takes human life without rational motive, and which he never would have attempted, but always would have revolted at, when sober and self-poised, the principle of the decision in *Smith* v. *Commonwealth*, allows the jury to consider the ab-

[1] 1 Duv. 224.

normal condition of the mind and passions so superinduced as a circumstance which, while it should not excuse, may tend to repel the implication of malice essential to the crime of murder.

In this case it appears that the appellant, on the day of the homicide, had gone to Burlington, and there, drinking much liquor and trying to buy the tincture of cantharides, he acted and talked strangely; and, returning homeward, cut the boy's throat, without any imaginable motive, unless he killed him to conceal a meditated crime on another. But there is now nothing sufficient in the evidence to allow the imputation of such a horrible motive. Proof that he was drunk was pertinent, in this state of case, as a circumstance helping to account for an act otherwise mysteriously inexplicable; and the jury had a right to weigh that fact and give it its proper effect on the question of motive.

If the jury, on all the facts, had believed that when he killed the boy the appellant had no actual motive; and also, that without knowing or having from experience cause to apprehend that what he drank that day might instantly produce delirium, or so inflame the passions or unhinge the mind as to jeopard human life, which would have been in no danger from his hand had he been perfectly sober and self-possessed; and also that he drank the intoxicating liquor merely for sensual gratification or exhilaration, and not for stimulating some meditated crime, then they might, and, perhaps, ought to have found, that there was no implied motive, and that, therefore, the appellant was not guilty of murder for which he should be hung, but of manslaughter only, for which he should be sent to the penitentiary.

This we consider both sound philosophy and good law, and when prudently applied, illustrates the general principle recognized in *Smith* v. *Commonwealth*.

On the trial several witnesses testified that when much excited by liquor the appellant became partially delirious, gave way to violent passions and insane delusions, often imagining that "somebody was after him," and twice attempting suicide.

On the foregoing facts, combined with strong proof of the homicide by the appellant, the Circuit Court by its instructions accurately defined murder, and exculpating insanity without any definition of manslaughter, or any other allusion to the appellant's mental condition, than that implied by the instruction on insanity as an excuse for homicide, and which was more favorable in one aspect than the appellant was entitled to expect on the facts and the law; for transient insanity produced by his voluntary act would not, as the instructions implied, excuse, but at the utmost only extenuate the homicide from murder to manslaughter.

May Reduce Grade of Crime

Proof of his being drunk could be available to him only for such extenuation, whether his intoxication caused temporary delirium or not. Without resulting in technical insanity, it might, however, have been such as to reduce the grade of a crime so unaccountable by helping to repel implied malice. What he needed most, therefore, was a specific and full instruction on the subject of mitigation, and not of excuse. But the instructions as given excluded from the jury any consideration of that subject, and consequently the court's pretermission of it was misleading, and the verdict as rendered was the inevitable consequence, unless he was insane.

According to the Criminal Code, the presiding judge should, when asked for instructions, give the whole law applicable to all the facts; and this was peculiarly proper in a case so sudden and hurried, and especially as the court, having appointed counsel to defend, should have presented, *sua sponte*, to the jury all the law to which the appellant was entitled. But though the argument in this court has not discussed the mitigating principle, nevertheless the appointed counsel offered on the trial the following instruction: "The jury are instructed that if they believe from the evidence, beyond a reasonable doubt, that the prisoner did the killing charged, yet if they believe that he was drunk at the time, they may mitigate the offence from murder to manslaughter.

That proposition might have been misunderstood or misapplied without some qualification as to the degree of drunkenness, and also as to the counteracting hypothesis of getting drunk to stimulate crime, or of the appellant's knowledge of the probability that delirium or destructive passion would be the consequence. But the court rejected it without suggesting any modification or giving any other instruction on that subject. In this there was an inadvertent omission which may have been prejudicial to the appellant.

When intoxicating liquor inflames and perverts the passions, and blinds the reason, as it often does, a good man may without provocation be unconsciously precipitated into a crime which he had never meditated, and which he never could have attempted when properly sober and self-possessed. To hang him would be a cruel penalty for being drunk — to excuse him would be to encourage vice and disturb social order and security. He should be punished, but not as the secret assassin or highway robber. The crime in that case, by whomsoever perpetrated, was signally monstrous and mysterious. The perpetrator may have been unconscious of the act, or of its guilt, or it may have been prompted by momentary illusion or blind passion beyond control. Why else was the brutal act done? And if so done, the gallows is not, but imprisonment is, the legal retribution.

Then we think that the Circuit Court ought to have defined malice express and implied, and discriminating between murder and manslaughter; and then instructed the jury, in substance and effect, that if the accused cut the boy's throat, his being drunk at the time is no legal excuse, nor even mitigating circumstance, if that condition, however stultifying, was the offspring of meditated crime, or was known to be the parent of passions or delusions dangerous to the lives of other persons; and also that, if not so intended or so known, then if the jury should believe that it was the cause of the homicide, which otherwise would not have been perpetrated, they might consider it, with all the other facts conducing to show the existence or non-existence of malice, or fixing the grade of the crime; and that if they should then rationally doubt the imputed malice, they should convict of manslaughter, and fix the period of confinement in the penitentiary.

If thus substantially instructed, the verdict, whatever it may have been, would have been more satisfactory to all concerned, and far more assuring that justice had been fairly and fully done according to the law of the land.

Whatever he may be, or whatever shall or ought to be his doom, it is the duty of this court, as the last judicial resort, to take care, in defiance of all contingent consequences, that he shall have a fair and deliberate trial according to law.

The Commonwealth wants no more; her interest requires that much, and our duty to her, as well as to him, demands it.

Wherefore the judgment of conviction is reversed, and the cause remanded for a new trial.

INTENT—DRUNKENNESS RELEVANT ON PROSECUTION FOR ASSAULT WITH INTENT TO COMMIT RAPE — ERRONEOUS INSTRUCTIONS.

State v. Donovan.

[16 N. W. Rep. 206.]

In the Supreme Court of Iowa, June, 1883.

1. **Drunkenness — Offer of Evidence — Remarks of Judge.** — On an offer to prove the prisoner's intoxication at the time of the commission of the alleged crime, the court remarked: "If you offer it as a defence I think it is immaterial, because I shall instruct the jury that drunkenness is more of an aggravation than an excuse." *Held*, error.

2. **An instruction which** states that there was *some* evidence tending to show that the defendant was drunk is misleading.

3. **On a trial for assault with intent to commit rape,** if the prisoner was so drunk as to be incapable of forming an intent to ravish, he should be acquitted.

Relevant on Question of Intent.

Appeal from Hardin District Court.

The defendant was convicted of an assault with intent to commit a rape, and appealed.

J. H. Scales and *J. S. Roberts*, for appellant.

McPherson, Attorney-General, for the State.

Beck, J. — 1. The evidence clearly shows the assault committed by the defendant upon the prosecutrix. But there was evidence tending to show that defendant was drunk at the time. During the trial, upon an offer of evidence tending to show defendant's condition, the court remarked in the presence of the jury, referring to the evidence: "If you offer it as a defence, I think it immaterial, because I shall tell the jury that drunkenness is more of an aggravation than an excuse." No explanation of the remark was made to the jury. We think it ought not to have been made, and was prejudicial to defendant. The error was not cured by an instruction given to the jury which we will now proceed to consider.

2. In the seventh instruction the court declares that "there is some evidence tending to show that defendant was drunk." This language, we are constrained to believe, would be understood as expressing the opinion of the court as to the quantity and weight of the evidence on the question of defendant's drunkenness, which was unfavorable to him. Indeed, the expression will hardly bear any other interpretation. Without the qualifying word "some" the expression would have been free from objection.

3. In the same instruction the court directs the jury that drunkenness is no excuse for the perpetration of a crime. But the jury are informed that the drunkenness of defendant may be considered in order to determine his intent. The following language is used in expressing this discretion. "Whether defendant at the time of the assault was too drunk to be capable of exercising his will, and forming in his mind a purpose to ravish the girl — in short, to distinguish between right and wrong — is a question of fact for you to determine from all the facts and circumstances disclosed by the evidence." The instruction thus calls the attention of the jury to certain facts and circumstances to be considered by them, and directs the jury that if defendant "was in too imbecile a condition to form a design or purpose to ravish the girl," they could not find him guilty. We think the jury were unnecessarily sent into the uncertain field of inquiry relating to the capacity of defendant to exercise his will and "to distinguish between right and wrong," and that the jury may have been tempted into the region of speculation rather than directed to con-

clusions to be drawn from the facts by the aid of common sense and the obligations of every-day life. The jury should have been plainly told that if they found from the evidence that defendant was so drunk that he was incapable of forming an intent to ravish the prosecutrix they should find him not guilty."

[Omitting rulings on other questions.]

Reversed.

LARCENY — INTENT — DRUNKENNESS

Wood *v.* State.

[34 Ark. 341; 36 Am. Rep. 13.]

In the Supreme Court of Arkansas, November Term, 1879.

Hon. E. H English, *Chief Justice.*
" W. H. Harrison, } *Judges.*
" John R. Eakin, }

One wrongfully taking the property of another, but too drunk to entertain a felonious intent, cannot be convicted of larceny.

Conviction of larceny. The opinion states the case.

Henderson, Attorney-General, for the State.

Harrison, J.— The appellant was tried and convicted of the crime of grand larceny in stealing a pistol, the property of one Cheek.

The pistol, which was of the value of $8, was taken from the room of the owner, at a hotel, and out of a coat pocket, on the night of the fifth of August, 1879, and was, on the fifteenth of the same month, found in the defendant's possession.

The defendant, a lawyer, had been for three or four years very intemperate, and for several weeks before he was found with the pistol in his possession, almost continuously drunk. On the night of the fifteenth of August he was very drunk — according to one of the witnesses, crazy drunk — and the constable, learning that he had a pistol, to prevent his doing harm, took it from him, when it was found to be the pistol that had been taken from Cheek's room. When it was taken from the defendant, he said it had been given him by one Hamp. Lane, who had then — as was proven at the trial — left the county. Several witnesses testified that the defendant's conduct during his spree, or drunkenness,

Drunkenness may Prevent Intent.

was strange and unnatural — quite different as is the effect of ordinary drunkenness — and that he appeared demented to some degree. One of them, a physician, who had known him two or three years, said that there were times during his spree when he thought he did not know what he was about, and he believed his mind, by long and excessive indulgence in ardent spirits, had become impaired; and another physician, who was called to see him on the seventeenth day of August, the day after his arrest, said he found him suffering with symptoms of *mania a potu*, and that the functions of the brain were partially paralyzed.

It was proven that the defendant had previously borne a good character for honesty and integrity.

The court was asked to instruct the jury for the defendant, that if they believed from the evidence, the defendant took the pistol, but that at the time he was so under the influence of intoxicating liquor that a felonious intent could not have been formed in his mind, they should find him not guilty; which instruction the court refused to give.

As a general doctrine voluntary intoxication furnishes no excuse for crime, even when the intoxication is so extreme as to make the person unconscious of what he is doing. "Perhaps no better illustration of the doctrine," says Mr. Bishop, "can be given than to state its application in ordinary cases of homicide. The common law divides all indictable homicides into murder and manslaughter; but the specific intent to kill is not necessary in either. A man may be guilty of murder without intending to take life. He may be guilty of manslaughter without so intending; or he may intend to take life, yet not commit any crime in taking it. Now, the doctrine of the courts is, that the intention to drink may fully supply the place of malice aforethought; so that if one voluntarily becomes so drunk as not to know what he is about, and then with a deadly weapon kills a man, the killing will be murder, the same as if he were sober. In other words, the mere fact of drunkenness will not alone reduce to manslaughter a homicide which would otherwise be murder, much less extract from it altogether its indictable quality." [1] But he says that "in cases where the law requires not general malevolence, but a specific intent to commit the particular act, which intent must concur with the act in point of time, in order to constitute the offence charged against a prisoner, he cannot be guilty, if at the time when the act transpired he was so drunk as to be incapable of entertaining such intent." [2]

"Intoxication is no excuse for crime," said Judge Baldwin in *U. S.* v. *Roudenbush*,[3] "when the offence consists merely in doing a crim-

[1] 1 Bish. Crim. Law, sect. 401. [2] *Id.* sect. 408. [3] 1 Baldw. 517.

inal act, without regarding intention. But when the act done is innocent in itself, and criminal only when done with a corrupt or malicious motive, a jury may, from intoxication, presume that there was a want of criminal intention; that the reasoning faculty, the power of discrimination between right and wrong, was lost in the excitement of the occasion. But if the mind still acts; if its reasoning and discriminating faculty remain, a state of partial intoxication affords no ground of a favorable presumption in favor of an honest or innocent intention in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same act when sober."

In larceny there must be a concurrence with the act — an intent to do it — and also a felonious intent; and the same author we have quoted says: "A bare intentional trespass not being larceny, but the specific intent to steal being necessary, also, if one who is too drunk to entertain this specific intent takes property, relinquishing it before the intent could arise in his mind, there is no larceny."

The instruction should have been given.

[Omitting minor matters.]

The judgment is reversed, and the cause remanded, with instructions to grant the defendant a new trial.

Judgment reversed and cause remanded.

DRUNKENNESS — ADMISSIBLE ON QUESTION OF INTENT.

STATE *v.* BELL.

[29 Iowa, 316.]

In the Supreme Court of Iowa, June Term, 1870.

Hon. CHESTER C. COLE, *Chief Justice.*
" GEORGE G. WRIGHT, }
" JOSEPH M. BECK, } *Judges.*
" ELIAS H. WILLIAMS, }

Drunkenness — Intent. — In a prosecution for breaking and entering a dwelling house with intent to commit larceny, the drunkenness of the prisoner at the time is admissible in evidence on the question of intent.

APPEAL from Des Moines District Court.

[1] *Id.*, sect. 411; Wenz *v.* State 1 Tex. App. 36; Johnson *v.* State, *Id.* 146; Loza *v.* State, *Id.* 488.

Intent Material to the Crime.

The indictment charges the crime of entering, on the night of, etc., the house of, etc., with intent to commit the crime of larceny. There was testimony tending to show that defendant was a man of good moral character and had never before been charged with crime; that on the evening before the alleged burglary — New Year's eve — he went with some friends and acquaintances and drank with them until about eleven o'clock, and was drunk when found in the house, where he was arrested and taken to jail.

The court instructed the jury, that, "if defendant entered the house with intent to commit the crime of larceny, it makes no difference in law whether, when he so entered he was drunk or sober. Drunkenness is no excuse for the commission of crime, unless it has been of so long duration as to amount to a fixed insanity, or to such an extent as to render the party accused incapable of acting or thinking for himself."

This instruction, asked by defendant, was refused: "If you find from the evidence that at the time defendant was found in the house he was drunk, and got in there through drunkenness, without knowing where he was, and with no intent to steal or commit crime then you should acquit."

To reverse the conviction following this instruction and refusal, defendant prosecutes this appeal.

Hall and *Baldwin* for the appellant.

H. O'Connor, Attorney-General, for the State.

WRIGHT, J. — The offence here charged is defined by the statute to be the entering, without breaking, a dwelling-house, in the night time, *with intent* to commit a felony.[1] The *intent* to commit a felony is, then, one essential element, and without it the offence would not be complete. Starting with this fundamental position, it seems to us, in view of the instructions given and refused, that his conviction cannot be sustained. That given, — though, perhaps, abstractly correct, — was scarcely just to defendant, and was calculated to mislead, — and especially so after the refusal of that asked by defendant, inasmuch as it, in effect, treats as unimportant, or fails to present in its proper and appropriate place, the material fact upon which defendant relied for his exculpation. To say, that if the *intent* existed, it would make no difference whether the accused was drunk or sober is correct enough; and yet, the true inquiry was, whether, under the circumstances, *there could have been the criminal intent.* This intent, it is granted, may exist in the mind of one under the influence of intoxicating liquor, and if so,

[1] Rev. Par. 4232.

intoxication is no excuse. But, instead of thus presenting the case to the jury, they were left to deduce, as a *conclusion of law*, not as a *fact* to be found, that which constitutes the whole crime. If defendant's drunkenness was such as take from his act the criminal *intent*, then the act was, as to this offence, not criminal and the jury should have been so told.

If, however, this instruction could be overlooked as possibly not prejudicing defendant's rights, there still remains that refused, which, in our opinion, asserts the law, was applicable to the facts, and under the circumstances should have been given.

Without the felonious intent, as already suggested, the crime charged was not complete; and if defendant was so drunk — there being no prior criminal intent — as not to know where he was and with no intent to commit a felony, he was not guilty. If, under such circumstances, he has taken the property of another, there being the absence of the requisite specific legal intent to steal, it could not have been larceny; and if not, neither would the entering be burglarious within the meaning of the statute. From the very nature of the offence, there must be the criminal intent, and this cannot exist in the mind of one who is too drunk to entertain a specific intent of any kind. The doctrine as thus stated, we do not understand to be controverted by the State, the issue being as to its applicability, or whether the refusal could possibly have worked prejudice to defendant's rights.

In our opinion, the instruction was applicable, and the principle involved was not covered by the instructions in chief. Of course, we are not holding that defendant would be excused if he was capable of and did conceive the design to commit this offence or, as the same thought is sometimes expressed, he would not be exculpated if he was possessed of his reason, and capable of knowing and determining whether his act was criminal or otherwise. If, too, the drunkenness was voluntary and defendant had in view this, or any other felony, he would not be protected. The drunkenness, however, is a proper circumstance and should be weighed by the jury in determining whether there existed the specific intent to commit the felony charged. Whether he had the intent charged, whether he was capable of conceiving it, or whether he was so completely overcome by his debauch as to be incapable of forming any purpose, were questions for the jury. If, as claimed by defendant, he blundered into his house through a drunken mistake, under such circumstances as to show an entire absence of reason, or such as would indicate the inability to form any definite purpose, and especially of committing a larceny, then there was no

Aliter where Intent must be Proved.

guilt, at least not the offence here charged. The accused may have been guilty of a very great *fault*, but there is in reason and law a very clear distinction between this and the *intentional* injury or crime contemplated by the statute.[1]

The general doctrine is, of course, conceded, that voluntary intoxication furnishes no excuse for crime committed under its influence. And the rule is just as reasonable, and by no means in conflict with that stated, which declares that if an offence, from its peculiar nature, is only committed when the act is joined with the intent, then if by one without the intent, who by drink is incapable of entertaining it, and never yields thereto the sanction of his will, the particular offence is not committed; for of whatever defendant is guilty, he is not of this, because of the absence of an essential ingredient. Or, as the same doctrine, general and special, is stated elsewhere: "Intoxication is no excuse for crime, when the offence consists merely in doing a criminal act, without regarding intention. But when an act done is innocent in itself, and criminal only when done with a corrupt or malicious motive, a jury may, from intoxication, presume there was a want of criminal intention."[2] Or, as in another case, "where the nature and essence of a crime are made by law to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state and condition of the mind, is a proper subject for consideration by the jury. The question in such a case is, what is the mental status?"[3]

The law does not imply the intent in cases of the kind, from the breaking and entering, or entering without breaking. If life, however, be taken, by the use of a deadly weapon, the law implies malice, and there would hence be murder, though the perpetrator was drunk. This is the more evident when we know that one may be guilty of murder without intending to take life, as he may in other cases intend to take life and yet not commit a crime. Or, still again, drunkenness may quite supply the place of malice aforethought, which may be general, not special; but it cannot that of a specific intent.[4] We confess that the doctrine touching cases of this character is not placed upon the clearest ground in the books. Looking at the question, however, from the standpoint of reason and principle, unassisted by authority, we believe the instruction should have been given, and the judgment below is, hence,

Reversed.

[1] Ray's Med. Jur. of Ins., ch. 25, and see sects. 453, 455, 456.

[2] United States *v.* Rondenbush, 1 Bald. 514.

[3] Swan *v.* State, 4 Humph. 136.

[4] Bishop's Cr. Law, vol. 1, paragraphs 389, 490, 491; notes and cases there cited.

Scott *v.* State.

DRUNKENNESS — RELEVANT ON QUESTION WHETHER CRIME WAS COMMITTED.

Scott *v.* State.

[12 Tex. (App.) 31.]

In the Court of Appeals of Texas, 1882.

Hon. John P. White, *Presiding Judge.*
" Clinton M. Winkler, } *Judges.*
" James M. Hurt, }

Drunkenness cannot excuse or justify crime, but it may be shown in order to determine whether any crime or a particular crime has been committed at all.

Appeal from the District Court of Dallas.

Tried before Hon. George N. Aldrich.

Crawford & Smith, *W. B. Gano* and *J. H. Skiles*, for appellant.

H. Chillton Assistant Attorney-General for the State.

Hurt, J. — The appellant was convicted for an assault with intent to rob. There was evidence tending to show that Scott was drunk at the time of the assault.

Upon this subject the court below charged as follows: " Voluntary drunkenness furnishes no excuse or justification for crime. However, if you find that defendant did make the assault as charged in the indictment, and if you find that when he so made said assault, he was so drunk that he did not know what he was doing, and was unable to form the criminal intent necessary to commit the crime charged, then you will acquit him. But any amount of voluntary drunkenness which does not reach the *status* above indicated, would not furnish any excuse or justification for the commission of it."

The learned counsel for appellant, in the brief and argument, insists that this charge is not the law, and that therefore the judgment should be reversed. We listened with attention and great pleasure to the argument of counsel for defendant, but are forced to the conclusion that this charge is not obnoxious to the objections urged against it.

The main attack is made upon this part of the charge: " If you find that when he so made the assault he was so drunk that he did not know what he was doing." This, we think is correct; for if he knew what he was doing he knew that he was trying to rob (the converse of the proposition), and in law and in morals he should be held culpable. But this part of the charge should not be detached from that which is directly connected with it. It proceeds, " and was unable to form the criminal

Drunkenness to be Looked To.

intent necessary to commit the crime charged, then you will acquit him." The court below admitted evidence of drunkenness, and applied the true principles of law thereto by instructing the jury in effect, that drunkenness could be looked to in passing upon the ability to form the *criminal intent*. For this purpose, and this alone, can drunkenness be shown in a case like this.

Drunkenness can be looked to in passing upon the *status* of mind in murder trials. Where the question is whether the mind was sufficiently calm and sedate to form the desire to kill, and to properly comprehend the consequences of the act; the *status* of the mind being the test by which the character of homicide is determined, whether murder of the first or second degree. We are not aware of any case decided by *our* appellate courts in which it is held that drunkenness will excuse or justify crime. To thus hold would be a solecism; for, if in fact a crime is committed we are not aware of any fact which can excuse or justify its commission. The law knows no excuse or justification of crime. If the acts which constitute the crime are excused or justified by law, they are not criminal. Whilst drunkenness cannot excuse or justify crime, it however may be shown in order to determine whether any crime, or a particular crime has been committed at all; but, if committed, though the party be ever so drunk, there can in the very nature of things be no excuse or justification.

We have examined all of the other errors complained of, but find no errors in fact — that is, such error, over which we have revisory power, as will require a reversal of the judgment of the court below. The judgment is affirmed.

Affirmed.

INTOXICATION — INTENT — INSANITY.

Roberts *v.* People.

[19 Mich. 401.]

In the Supreme Court of Michigan, January Term, 1870.

Hon. James V. Campbell, *Chief Justice.*
" Isaac Christiancy, }
" Benjamin F. Graves, } *Associate Justices*
" Thomas M. Cooley, }

1. **Intoxication — Intent.**— Voluntary intoxication will not excuse acts which constitute an offence. Where, however, the offence charged is an act combined with an intent to

commit an offence not actually committed, if the prisoner was rendered by intoxication incapable of entertaining the intent, he is not responsible.

2. **Same.** — If a person has the capacity to form the intent to kill by the means used, his voluntary intoxication will be no protection, although his mental faculties were thereby so obscured as to make him incapable of judging between right and wrong.

3. **Insanity occasioned by voluntary** intoxication will not excuse where the person is aware of his liability to insanity from the cause, and has sufficient mental capacity to form an intent.

4. **Insanity Resulting from Intoxication.** — But insanity (of which a person is ignorant) resulting from voluntary intoxication will render a person not responsible where he does not know what he is doing or why he is doing the act, or if conscious of this, he is not conscious of any object in doing it, or if the diseased mind has so perverted his reason that he does not know that what he is doing is wrong.

ERROR to Calhoun Circuit Court.

D. D. Hughes, for plaintiff in error.

Dwight May, Attorney-General, and *J. G. Lodge*, for the People.

CHRISTIANCY, J. — The defendant was tried in the Circuit Court for the County of Calhoun, upon an information charging him with assaulting with intent to murder one Charles E. Greble, by shooting at him with a loaded pistol. Exceptions were taken to several requests to charge and to the charge given. To take up the several exceptions separately, many of which embrace similar propositions in different forms, would lead to prolixity and be less intelligible than to consider the several questions really raised by the exceptions. And as the bill of exceptions, including the evidence, will accompany the report, it is unnecessary to report them here.

The first question presented by the record is, whether, under this information, the jury could properly find the defendant guilty of the assault with the intent charged, without finding, as matter of fact, that the defendant entertained that particular intent?

We think the general rule is well settled, to which there are few if any exceptions, that when a statute makes an offence to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury, as matter of fact, before a conviction can be had. But especially, when the offence created by the statute, consisting of the act and the intent, constitutes as in the present case, substantially an attempt to commit some higher offence than that which the defendant has succeeded in accomplishing by it; we are aware of no well founded exceptions to the rule above stated. And in all such cases the particular intent charged must be proved to the satisfaction of the jury; and no intent in law, or mere legal presumption, differing from the intent in fact, can be allowed to supply

the place of the latter.[1] This case, so far as regards the intention to kill, is not identical with murder. To find the defendant guilty of the whole charge, it is true, the jury must find the intent to kill under circumstances which would have made the killing murder — and it is not denied that had death ensued in the present case, it would have been murder. But the converse of the proposition does not necessarily follow: that because the killing would have been murder, therefore there must have been an intention to kill. Murder may be and often is committed without any specific or actual intention to kill. See instances stated in 1 Bish. Cr. Law.[2] And no such specific intent is therefore necessary to be found. This difference was recognized in *Maher* v. *People*, above cited.

By saying, however, that the specific intent to murder, or (which, under the circumstances of the case, would be the same thing), the intent to kill, must be proved, we do not intend to say it must be proved by direct, positive, independent evidence; but as very properly remarked by my brother Campbell in *People* v. *Scott*,[3] the jury "may draw the inference, as they draw all other inferences, from any facts in evidence which, to their minds, fairly prove its existence." And in considering the question, they may and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made.

The principle which we have thus endeavored to explain, seems to have been overlooked by the court. And taking the whole charge (given in the record), together, we think the jury were in effect told, that if they should find the defendant made the assault alleged, in the manner and with the instrument charged in the information, the law inferred the intent charged, and they were at liberty to find the defendant guilty, whether they were satisfied of the intent or not, as a matter of fact — unless they should find "that the defendant was laboring under such a defect of reason from disease of the mind, as not to know the nature

[1] Rex *v.* Thomas, 1 East P. C. 417; 1 Leach, 330; Rex *v.* Holt, 7 C. & P. 518; Cruse's Case, 8 C. & P. 541; Rex *v.* Jones, 9 *Id.* 258; Regina *v.* Ryan, 2 Mood. & R. 213; Rex *v.* Duffin, Russ. & R. 364; Ogiltree *v.* State, 28 Ala. 693; Maher *v.* People, 10 Mich. 212; People *v.* Scott, 6 Mich. 296 (per Campbell, J.); Roscoe Cr. Ev. 775, 790; Bish. Cr. L. sects. 666, 667).

[2] Sects. 412 and 667.

[3] 6 Mich. 296.

and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong."

The second question raised by the exceptions, is whether the voluntary drunkenness of the defendant, immediately prior to, and at the time of the assault, to a degree that would render him incapable of entertaining, in fact, the intention charged, would constitute a valid defence, so far as related to the intent, and leave the defendant liable only for what he actually did — the assault without the aggravation of he intent.

It was very properly admitted by the defendant's counsel in his request to charge, that if the defendant had formed the intent, while in possession of his mental faculties, and entertained it before and at the time he became intoxicated, his subsequent voluntary intoxication to whatever extent, would not shield him from a conviction of the offence charged, including the intent, nor even for murder, had death ensued from the assault. And the principle laid down by Mr. Bishop in his work on Criminal Law,[1] was also expressly admitted, that "when a man voluntarily becomes drunk, there is a wrongful intent; and if, while too far gone to have any further intent, he does a wrongful act, the intent to drink coalesces with the act done, while drunk, and for this combination of act and intent he is criminally liable." But it was insisted that the application of this case would be that the drunkenness is no excuse for the assault, but being charged with the particular intent accompanying the assault, this could not exist, if he was too drunk to entertain it. That the wrongful intent in drinking does not supply or aid the proof of an intent to kill.

The correctness of the principle laid down by this court in *People* v. *Garbutt*,[2] is not denied, that "a man who voluntarily puts himself into a condition to have no control of his actions, must be held to intend the consequences." But this, it is insisted, includes only the consequences which do actually ensue — the crime actually committed; and not in this case, the intent charged, if the defendant was at the time incapable of entertaining it, and did not in fact entertain it.

We think this reasoning is entirely sound, and it is well supported by authority.[3]

[1] Vol. 1, sect. 489.

[2] 17 Mich. 9–19.

[3] See Reg. *v.* Cruise, 8 C. & P. 541; Reg. *v.* Moore, 3 C. & K. 319; Pigman *v.* State, 14 Ohio, 555; United States *v.* Rondenbush, 1 Bald. 514; Pirtle *v.* State, 9 Humph. 663; Haile *v.* State, 11 Humph. 154; Swan *v.* State, 4 *Id.* 136; Mooney *v.* State, 33 Ala. 419; Kelly *v.* State, 3 S. & M. 518; People *v.* Robinson, 2 Park. 235; People *v.* Hammill, 2 *Id.* 223; Keenan *v.* Com., 44 Pa. St., 55; People *v.* Belencia, 21 Cal. 544; and see 1 Bish. Cr. L., sects. 490, 492.

Evidence of Drunkenness Relevant.

In determining the question whether the assault was committed with the intent charged, it was therefore material to inquire whether the defendant's mental faculties were so far overcome by the effect of intoxication as to render him incapable of entertaining the intent. And for this purpose, it was the right and duty of the jury — as upon the question of intent of which this forms a part — to take into consideration the nature and circumstances of the assault, the actions, conduct, and demeanor of the defendant, and his declaration before, at the time, and after the assault; and especially to consider the nature of the intent and what degree of mental capacity was necessary to enable him to entertain the simple intent to kill, under the circumstances of the case — or, which is the same thing, how far the mental faculties must be obscured by intoxication to render him incapable of entertaining that particular intent. This last question involves, as I think, in connection with the evidence, a principle of law which I shall presently notice. Some intents, such as that to defraud, when the result intended is more indirect and remote, or only to be brought about by a series or combination of causes and effects, would naturally involve a greater number of ideas, and require a more complicated mental process, than the simple intent to kill by the discharge of a loaded pistol. The question we are now considering relates solely to the capacity of the defendant to entertain this particular intent. It is a question rather of the exercise of the will than of reasoning powers. And as a matter of law, I think the jury should have been instructed, that if his mental faculties were so far overcome by the intoxication, that he was not conscious of what he was doing, or if he did know what he was doing, but did not know why he was doing it, or that his actions and the means he was using were naturally adapted or calculated to endanger life or produce death; then he had not sufficient capacity to entertain the intent, and in that event they could not infer that intent from his acts. But if he knew what he was doing, why he was doing it, and that his actions with the means he was using were naturally adapted or likely to kill, then the intent to kill should be inferred from his acts, in the same manner and to the same extent as if he was sober. But that, on the other hand, to be capable of entertaining the intent, it was not necessary that he should so far have the possession of his mental faculties as to be capable of appreciating the moral qualities of his actions, or of any intended result, as being right or wrong. He must be presumed to have intended the obscuration and perversion of his faculties which followed from his voluntary intoxication. He must be held to have purposely blinded his moral perceptions, and set his will free from the control of reason — to

have suppressed the guards and invited the mutiny, and should, therefore, be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting. There is no ground upon which a distinction can safely be made in such cases, between the acts of his hands and those of his will, which have set in motion and directed the hands. He must, therefore, be held equally responsible for the will or intention, as for the act resulting from it.

But he is not to be held responsible for the intent, if he was too drunk for a conscious exercise of the will to the particular end, or, in other words, too drunk to entertain the intent, and did not entertain it in fact. If he did entertain it in fact, though but for the intoxication he would not have done so, he is responsible for the intent as well as the acts.

When the question is one rather of guilty knowledge than of a particular intent (as in *United States* v. *Rondenbush* and *Pigman* v. *State*, above cited), there may be more reason for holding that a defendant, in such cases, should be capable of appreciating the moral quality of his actions to render him responsible; and so, possibly, when the act done is innocent in itself, or only becomes at all criminal by reason of the particular intent charged; upon such cases I express no opinion. But where, as in this case, the act committed is itself criminal, without the particular intent, and especially when the manner in which the act was committed and the means and instruments used are naturally and obviously adapted to produce death, and dangerous to others, whether he intended to kill or not; a rule which should hold him incapable of entertaining the intent, unless he was at the same time cognizant of the moral quality of his actions, would be just as dangerous as if the same rule was applied to acts committed under the influence of intoxication, and would practically render intoxication a substantial protection to crime.

But the Circuit Court held in effect that no extent of intoxication could have the effect to disprove the intent, treating the intent as an inference of law for the court rather than a question of fact for the jury. In this we think there was error.

Thus far we have considered the question of intent, as affected by the voluntary intoxication alone. But the question of insanity, as affecting the intent, was also raised, and this upon the evidence is proper to be considered under three aspects.

There was evidence tending to show that the mother of the defendant, who was living, was insane, with lucid intervals, and had been so for the preceding five years; that in her lucid intervals she was a kind

Intoxication.

and quiet woman, but that paroxysms of insanity were brought on by any excitement, and that she was then very violent towards her family and friends, and that defendant's maternal grandmother had died insane. There was also evidence tending to show that the disease of insanity was hereditary, and that in families where it was hereditary it might lie dormant in the individual member of the family for years and then manifest itself; and that intoxicating drinks and exciting altercations were prominent and usual causes of its development, and that it was more likely to be hereditary on the maternal than paternal side.

But there was no evidence tending to prove that the defendant himself had ever previously exhibited any indication or symptoms of insanity, except what might or might not be inferred from the effects produced upon him, on a single occasion of intoxication, or the drinking of intoxicating liquors, when two ordinary doses or drinks of whiskey had been administered to him for neuralgia, by which he was deprived of the use of his mental faculties and became ungovernable, insisting that he must go to the State of New York immediately, where he had formerly lived, although he had not contemplated going there before he took the whiskey.

Nor was there any evidence tending to show any form or degree of insanity, distinct from and independent of the effects of intoxication, on the day of, or after, the assault, unless the high degree of excitement and vindictiveness aroused by the verbal altercation with Greble before the intoxication, can be considered as such evidence. But if the manifestations of mental disturbance from drinking the whiskey on a former occasion alluded to, can be considered as tending to show anything more than the effects of intoxication upon a sane mind somewhat easily affected, in one among the almost infinite varieties of form, in which those effects exhibit themselves in men of different mental and physical organizations, whose minds are otherwise sane — if it can be considered as tending to show that, above and beyond the effects of intoxication upon a sane mind, a dormant tendency to insanity had been aroused into action, it would still tend, in this case only to show — not the effect of insanity alone, as independent of or contra-distinguished from intoxication, but the effect of some unknown degree of insanity combined with and produced by the intoxication and disappearing with it, and which but for that intoxication would not have occurred.

If, therefore, the intoxication was voluntary on his part, as all the evidence tended to show, unless he had become insane before he resorted to drinking, as presently explained — any degree of insanity thus pro-

duced would be a part of the consequences of such voluntary intoxication. And if from his past experience or information, he had, while sane and before drinking, on that day, good reason to believe that, owing to a dormant tendency to insanity, intoxication would be likely to produce an extraordinary degree of mental derangement beyond the effects likely to be produced upon persons clear of any such tendency, he must be held to have intended the extraordinary derangement, as well as the intoxication and the other results produced by it. And the same degree of mental incompetency would be required to render him incapable of entertaining the intent, whether caused by the intoxication combined with the insanity thus produced or by the intoxication alone. And the same principle already laid down in reference to the question of capacity, as affected by intoxication alone, would apply with equal force to this aspect of the case.

But if he was ignorant that he had any such tendency to insanity, and had no reason from his past experience, or from information derived from others, to believe that such extraordinary effects were likely to result from the intoxication; then he ought not to be held responsible for such extraordinary effects; and so far as the jury should believe that his actions resulted from these, and not from the natural effects of drunkenness or from previously formed intentions; the same degree of competency should be required to render him capable of entertaining or responsible for the intent, as when the question is one of insanity alone, which I now proceed to consider.

If it should be found from the evidence that the defendant inherited a peculiar tendency to insanity, which was liable to be aroused by slight causes, and that in consequence of this, and before he resorted to drinking on that day, the verbal altercation he had with Greble in the forenoon had aroused this diseased action of his mental faculties, to such an extent that he did not know what he was doing, or, if conscious of this, he yet was not conscious of any object in doing it; or, if he did not know that what he was doing, or the means he was using were adapted or likely to kill; or, though conscious of all these, yet if the diseased action of his mind had so far overcome or perverted his reason that he did not know that what he was doing was wrong; then he was not responsible either for the intoxication or its consequences. And if he continued thus incapable up to the time of the assault, either from this cause alone, or combined with the supervening intoxication, he was neither morally nor criminally responsible for his acts or intentions.

The other justices concurred.

A new trial must be awarded.

INTOXICATION — INTENT — LARCENY — INSTRUCTIONS.

People *v.* Cummins.

[47 Mich. 334.]

In the Supreme Court of Michigan, January Term, 1882.

Hon. Isaac Marston, *Chief Justice.*
" Benjamin F. Graves, }
" Thomas M. Cooley, } *Associate Justices.*
" James V. Campbell, }

1. **Larceny — Intent — Sanity.** — A person cannot be guilty of larceny whose mind cannot comprehend all the essential ingredients of the offence, and recognize their existence. Therefore an instruction that one who knows he has been taking property not his own is sane enough to commit the crime of larceny is error.
2. **Duty of Court to Instruct.** — A prisoner on trial is entitled to have the theory of his defence clearly recognized in the charge of the court.
3. **Drunkenness — Temporary Insanity — Injury to Brain — Instructions.** — Where the defence of temporary insanity proceeds upon the theory that it was induced by the operation of strong drink upon a mind rendered unsound by an injury to the brain, it is error to leave the question of criminal responsibility to be determined upon the facts of injury and mental unsoundness alone, or upon the effect of intoxicating liquors apart from the other facts.

Exceptions from the Recorder's Court of Detroit.

Van Riper, Attorney-General, for the People.

Brennan and *Donnelly*, for the prisoner.

Graves, J. — Cummins was convicted in the Recorder's Court of Detroit on a charge of larceny from the person and he comes here for a review on exceptions.

* * * * * * * * * *

The point seriously controverted was the defendant's criminal capacity, and the ground was taken by testimony tending to prove it, that some years prior to the act in question the defendant's brain had suffered injury, which made him subject to spells of strange and painful feelings in his head, and moreover rendered him liable on drinking liquor, which he sometimes did, to become temporarily insane, and that having been drinking on this occasion, it had produced this crazing effect, and to such extent that he was not conscious of any thievish purpose and was not able to form one. When the court came to deal with this question of criminal responsibility, he instructed the jury, as the

record tells us, that if the defendant "knew he had been taking property that did not belong to him, he was sane enough to commit this offence." By this instruction the defendant's legal accountability was made to depend on his having seen and understood that the property he took was not his own; and certainly such is not the law.

Where the case depends on the sanity of the accused he cannot be convicted of larceny unless the jury are satisfied that his mind was sufficient to see all the essential ingredients of the offence, and acknowledge their existence, and the bare recognition of the one fact that the property belonged to another, would be only one among several such ingredients. No enumeration of the required constituents is needful. The text books will supply the information.

The remaining consideration is more general. On taking into view what instructions were denied and what were given there is reason to apprehend the jury were led to suppose that the question of criminal responsibility was to be solved by looking at the question of mental soundness and brain injury, and the question of the effect of liquor and intoxication as separate and unconnected factors. But it was not the theory of the defence that either the injury or mental infirmity on the one hand, or the drinking and intoxication on the other, distinctly and separately considered, brought about the alleged incapacity. The position of the defence was that the alleged state of insanity and incapacity was superinduced through the conjoint but consequential operation of the liquor and the brain disorder. And the defendant was entitled to have this theory clearly recognized in the charge.

I think the court should be advised to set aside the conviction and order a new trial.

Campbell, J., concurred.

Cooley, J.— The record in this case is very confused, and I am not certain that we understand the Recorder's charge as printed in it as it was understood by the Recorder himself and the jury. But if, as the record seems to say, he instructed the jury that the plaintiff in error could be guilty of larceny in taking the property of another when he was so insane as not to know what he was about, he was clearly in error. Larceny implies a taking with felonious intent; and when that intent is impossible the crime is impossible.

The other justices concurred.

INTOXICATION — VOTING TWICE AT ELECTION — INTENT — DRUNKENNESS NO EXCUSE.

STATE *v.* WELCH.

[21 Minn. 22.]

In the Supreme Court of Minnesota, August, 1874.

Hon. S. J. R. McMILLAN, *Chief Justice.*
" JOHN M. BERRY, } *Judges.*
" GEORGE B. YOUNG, }

Voting Twice at Election — Intent — Intoxication no Defence. — It is no defence to an indictment for illegally voting more than once at the same election that the prisoner was so drunk when he gave his second vote that he did not know what he was doing and did not know that he had already voted.

The prisoner was convicted in the District Court of Washington County, and sentenced to hard labor in the State prison for six months. He appealed.

James N. Castle, for appellant.

George P. Wilson, Attorney-General, for the State.

YOUNG, J. — The indictment charges the defendant with the crime of voting more than once at the general municipal election of the city of Stillwater, held April 1, 1873 — the defendant's first vote being cast in the First Ward of which he was a resident, and the second in the second Ward.

* * * * * * * * * * * * *

At the trial the prisoner testified: "I drank considerably during the day of the election. I don't recollect voting at any of the polls that day. I might have voted three times and not known it. I must have been very drunk. Don't recollect what occurred after morning." Other evidence was introduced, tending to show that the defendant was much intoxicated at the time of the second voting. Evidence was offered, and excluded as immaterial, tending to show that defendant was a lumberman, and on the election day had just returned from a six months' absence in the woods; that he did not know that more than one polling place had been provided; that he did not know who were the candidates to be voted for, was not a partisan, and took no part in the election, except by voting. The exceptions taken to the exclusion of this evidence, and to the refusal of the court to give the third, sixth, and seventh instructions asked by the defendant, present the same

question under two aspects. The defendant's intoxication is relied on as a defence, first, as rendering the defendant incapable of forming the intent to commit a crime; second, as rendering him ignorant of the fact that he was doing the act for which he is indicted.

His counsel insists that "the essence of an offence is the wrongful intent, without which crime cannot exist." This is true; but in cases like the present, where the law declares the act done by the defendant to be a crime, the only question is, did the defendant intend to do the act which the law has forbidden? He does not appear to have cast his vote by accident, or under the constraint of superior force. His act was and must have been wholly voluntary. Every man is conclusively presumed to intend his own voluntary acts. As the defendant must have intended to cast the second ballot, he must have intended to commit the offence charged.

The cases cited by his counsel, except one in California, are cases where the crime of which the prisoner was accused, consisted not merely in the doing of an act, with intent simply to do that act, but in the doing of an act, with intent thereby and by means thereof to compass a criminal end, to accomplish an unlawful purpose. Thus, in prosecutions for larceny, the act of the prisoner — the mere taking — does not constitute the offence, but the act coupled with the intent to steal; and the question is not, did the prisoner take and intend to take the goods? But, did he take them *animo furandi?* So, in trials for murder in the first degree, the question is not merely did the prisoner intend to inflict the blow (or do any other act), which resulted in death? But, had he a premeditated design to effect the death by means of the act done? And in *State* v. *Garvey*,[1] the question was not, did the prisoner intend to make the assault? but, did he also intend to do great bodily harm? In such cases, where the crime consists not alone in the act done, and intended to be done, but also in the intent of the prisoner to effect certain results by means of the act, courts have sometimes admitted evidence of the prisoner's intoxication, as affecting his mental condition and the possibility or probability of his forming a premeditated design, or even an intention, to perpetrate, by means of the act done, the crime wherewith he is charged.[2] So, in another class of cases — for instance, prosecutions for passing counterfeit money — where the prisoner's knowledge of its falsity is the essence of the offence, he has been permitted to

[1] 11 Minn. 154.

[2] Swan *v.* State, 4 Humph. 136; Pirtle *v.* State, 9 Humph. 663; State *v.* Schingen, 20 Wis. 74; State *v.* Bell, 29 Iowa, 316; Roberts *v.* People, 19 Mich. 417, where many cases are collected. And see State *v.* Gut, 13 Minn. 361.

Drunkenness no Defence.

show that, when he uttered the money, he was so drunk as not to know that it was counterfeit.[1]

But it is obvious that such cases have no analogy to the case at bar. This defendant's motive and purpose in voting are alike immaterial. His offence is the same, although his two votes were cast for opposing candidates, so that the second neutralized the first. Here, the only question is, did the defendant, having voted in the First Ward, intend to vote a second time at the same election? In no case can a defendant, by proof of intoxication, rebut the legal presumption that he knows and intends his voluntary acts. In the instances above cited, the prisoner cannot show that, by reason of intoxication, he did not intend to take the goods he is charged with stealing; to strike the blow which resulted in death; to pass the money which proved to be counterfeit; nor can he show that, by reason of his intoxication, he did not know that he took the goods, struck the blow, or passed the money.

It is claimed that the defendant was so drunk when he voted the second time that he did not remember that he had already voted, and that the act was innocent, because done in ignorance of this material fact. But this plea of want of memory is like those of want of intent and want of knowledge. The defendant had first cast his vote but a few hours before. In the ordinary course of things, had he remained sober, it would be no excuse for his offence, that he had forgotten, at three o'clock in the afternoon, that he had voted in the morning. It is not pretended that he is not a man of ordinary memory, and he must be held to the reasonable exercise of the power of memory that he possesses. A man is not the less responsible for the reasonable exercise of his understanding, memory and will, because he has enfeebled his memory, perverted his will, and clouded his understanding, by voluntary indulgence in strong drink. A drunken man, equally with a sober man, is presumed to know and intend the acts which he does, and to remember the acts which he has done. There is, accordingly, no reason why this case should form an exception to the general rule of the criminal law, that "an intoxicated man shall have no privilege by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses."[2]

In *People* v. *Harris*,[3] cited by the defendant's counsel, the prisoner was indicted, under a statute similar to our own, for the offence of which this defendant stands convicted. It was held that evidence of

[1] Pigman *v.* State, 14 Ohio, 555.

[2] Hale P. C. 32; 1 Bish. Cr. Law, sect. 489, and cases cited; People *v.* Garbutt, 17 Mich. 9.

[3] 29 Cal. 678.

his intoxication could be admitted upon the question of his intent to commit a crime, and whether a crime had in fact been committed; but the opinion was strongly expressed, and often reiterated, that "a state of intoxication can be of no avail as an excuse for crime." It seems to us that a prisoner would have no need for an excuse for an act which his intoxication made innocent, and no crime. There can be no practical difference in the result between holding that intoxication is an excuse for crime, and holding that the acts of a man sufficiently intoxicated cannot be criminal. In either case, a man would be exempted from criminal responsibility for acts done in a state of voluntary intoxication. This doctrine is novel, anomalous and startling. It is a dangerous innovation upon the well established principles of the criminal law, and we have no hesitation in rejecting it.

The tenth charge of the court is taken from 1 Bishop Cr. Law.[1] The same doctrine, as stated in almost the same words in the following section, was admitted to be the law in *Roberts* v. *People*.[2] The correctness of the author's theory of the rule, by which drunken men are held to intend their criminal acts, is immaterial. The rule itself is correctly stated.

There was no practical error in the eleventh instruction, viz.: "The defendant is equally guilty whether he intended the act complained of or not. The only *fact* for the jury to find in this case is, whether or not the defendant deposited a ballot both at the First and Second Wards of this city, on the occasion of the city election, held April 1, 1873. And if you find that he did so deposit the two ballots, you will find him guilty, in manner and form as charged in the indictment."

The language of this instruction is not happily chosen, and cases might easily be supposed where such a charge would unduly restrict the province of the jury, and mislead them into an erroneous verdict. But, as we have already shown, the present case falls within the general rule, that men are presumed to intend their voluntary acts; and it was the duty of the jury, upon satisfactory proof of the acts done, to find the intent in accordance with the legal presumption. The instruction, in its application to the facts of this case, was therefore substantially correct.

The judgment and the orders appealed from are affirmed, and it is directed that the sentence pronounced by the District Court be executed.

[1] Sect. 488. [2] 19 Mich. 417.

VOTING TWICE AT ELECTION — INTENT — DRUNKENNESS RELEVANT.

People *v.* Harris.

[29 Cal. 678.]

In the Supreme Court of California, April, 1866.

Hon. Silas W. Sanderson, *Chief Justice.*
" John Currey,
" Lorenzo Sawyer,
" Augustus L. Rhodes, } *Assistant Justices.*
" Oscar L. Shafter,

Voting Twice at Election — Intent — Drunkenness. — The act of voting more than once at the same election is not a crime unless done knowingly and with wrong intent. Therefore a person charged with this crime may show that he was intoxicated at the time he committed the act, not as an excuse for the crime, but to enable the jury to determine whether his mental condition was such that he knew he was committing an offence.

Appeal from the County Court, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Alexander Campbell, for appellant.

J. G. McCullough, Attorney-General, for the People.

By the court, Currey, C. J. — The defendant was indicted for voting twice at the general election held on the 6th of September, 1865. To the indictment he pleaded not guilty. Upon the trial he was found guilty, and sentenced to be imprisoned in the State prison for one year.

It is provided by statute that any person who shall vote more than once at any election shall be deemed guilty of a felony, and, upon conviction, shall be imprisoned in the State prison for a term not less than one year nor more than five years.[1]

The evidence shows that the defendant voted at the election polls of the Fifth District of San Francisco at about ten o'clock in the forenoon of the day above mentioned, when his right to vote was challenged on the ground that he was not a resident of the district. The challenge being withdrawn, the defendant voted. About two or three o'clock in the afternoon the defendant returned to the same polls very much intoxicated and again offered to vote. The same person who had challenged his right to vote at that place in the morning informed him that he had voted before, and that he would get himself in trouble if he

[1] Laws 1858, pp. 165, 166.

voted again. The defendant, in reply, vehemently protested that he had not voted, and declared his willingness to so make oath. The oath prescribed by the statute was then administered to him by the proper officer, to which he responded in the affirmative, and then voted the second time.

When the cause was submitted to the jury, the court charged them as follows: "The indictment charges that the defendant, at an election for members for the State Senate and Assembly, held on the sixth day of September, 1865, in the Fifth Election District of this city and county, did, knowingly, unlawfully and feloniously, vote more than once at the same election. The language of the statute upon which the indictment is framed is, 'any person who shall vote more than once at any election. * * * shall be deemed guilty of a felony.' The word *knowingly* is not in the statute, and although used in the indictment, yet it may be rejected as surplusage, for the State is not bound to support by proof the allegation in the indictment, that the act of double voting was knowingly done. The statute makes the act of voting more than once at the same election, and not the act of voting knowingly more than once at any election, a crime. If, therefore, you are satisfied from the testimony in the case that the defendant, at an election for members of the State Senate and Assembly, held on the sixth day of September, 1865, in the Fifth Election District in this city and county, voted twice, then, although the defendant may at the time have been under the influence of intoxicating liquors, it is your duty to bring in a verdict of guilty against him; for drunkenness is no excuse or justification for the commission of a criminal act, and evidence of voluntary intoxication is properly admissible as affecting crime only in those cases in which it is necessary to ascertain whether the accused was in a mental condition which enabled him to form a deliberately premeditated purpose, and this is not one of those cases. The counsel for the defendant requests me to charge you that every crime involves a union of act and intent or criminal negligence. This is true. The law does not punish a man for his intention, nor for his act disconnected from his intention, but act and intent must unite to constitute a crime."

At the conclusion of the charge the counsel for the defendant requested the court to withdraw that portion of it which stated that the act of double voting need not be knowingly done, which the court declined to do.

The defendant's counsel excepted to each and every portion of the charge except that given at the request of the defendant's counsel, and

Act and Intent must Unite.

also excepted to the refusal of the court to withdraw the portion of the charge which stated that the act of double voting need not be knowingly done.

The defendant's counsel asks for a reversal of the judgment, on the ground that the jury were misdirected by the court in relation to the knowledge which it was necessary the defendant should have as to what he had done and was doing when he voted the second time, and he insists that the error of the charge was not cured by the instructions given at the defendant's request, "that every crime involves a union of act and intent or criminal negligence."

The theory upon which it was sought to exculpate the defendant of criminality was, that he was in such a condition mentally when he voted the second time as not to know that he had already voted, but, on the contrary, believed that he had not done so. It is laid down in the books on the subject that it is a universal doctrine that to constitute what the law deems a crime, there must concur both an evil act and an evil intent. *Actus non facit reum nisi mens sit rea.*[1] Therefore the intent with which the unlawful act was done must be proved as well as the other material facts stated in the indictment; which may be by evidence either direct or indirect tending to establish the fact, or by inference of law from other facts proved. When the act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption.[2] Now, when the statute declares the act of voting more than once at the same election by the same person to be a felony, it must be understood as implying that the interdicted act must be done with a criminal intention, or under circumstances from which such intention may be inferred. The defendant's counsel at the trial seems to have apprehended the true rule of law on the subject, and to have regarded the burden as on the defendant to show by evidence that the act of his voting the second time was not criminal, and for this purpose evidence of his intoxicated and excited condition was submitted to the jury, in order that they might determine under the rules of law governing in such cases whether the defendant was conscious at the time of having voted before at the same election. The question was fairly before the jury whether the defendant knew what he was about when he voted the second time. From the evidence

[1] 1 Bish. Cr. Law, sects. 227, 229; 3 Greenl. Ev., sect. 13.

[2] 3 Greenl. on Ev., sects. 13, 14, 18.

in the case it appears he was very much intoxicated, but whether to a degree sufficient to deprive him of all knowledge of having already voted was for the jury to decide.

The law does not excuse a person of a crime committed while in a state of voluntary intoxication. In *Rex* v. *Thomas*,[1] PARKE, B., said to the jury: "I must tell you that if a man makes himself voluntarily drunk, it is no excuse for any crime he may commit whilst he is so; he takes the consequences of his own voluntary act, or most crimes would go unpunished;" and to the same effect is the language of ALDERSON, B., in *Rex* v. *Meakin;*[2] and in harmony with this doctrine is the whole current of English authority.[3] Mr. Wharton says that in this country the same position has been taken with marked uniformity, it being invariably held that voluntary drunkenness is no defence to the *factum* of guilt; the only point about which there has been any fluctuation being the extent to which evidence of drunkenness is receivable to determine the exactness of the intent or extent of deliberation."[4] In *Pigman* v. *State*,[5] it was held that a man who passes counterfeit money is not criminally liable if he is so drunk as to be incapable of knowing that it is counterfeit, and consequently of entertaining the intention to defraud, provided there was no ground to suppose he knew the money to be counterfeit before then; and in *Swan* v. *State*,[6] the Supreme Court of Tennessee said: "Although drunkenness, in point of law, constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made by law to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness as a matter of fact affecting such state and condition of the mind is a proper subject for consideration and inquiry by the jury. The question in such case is what is the mental *status?*"

In *Reg.* v. *Moore*,[7] the defendant was indicted for an attempt to commit suicide by drowning, and in defence it was alleged she was unconscious from drunkenness at the time of the nature of the act. The court was of the opinion that if she was so drunk as not to know what she was about, the jury could not find that she intended to destroy herself.[8]

While the condition of the accused, caused by drunkenness, may be taken into consideration by the jury with the other facts of the case, to

[1] 7 C. & P. 817.
[2] 7 C. & P. 297.
[3] 1 Whart. Cr. Law, sect. 39.
[4] *Id.*, sect. 40.
[5] 14 Ohio, 555.
[6] 4 Humph. 136, 141.
[7] 3 C. & K. 319.
[8] Reg. *v.* Cruise, 8 C. & P. 546; United States *v.* Rondenbush, 1 Baldw. 517; Kelly *v.* State, 3 Sm. & M. 518; Pirtle *v.* State, 9 Humph. 663; Haile *v.* State, 11 Humph. 154.

Not an Excuse for Crime.

enable them to decide in respect to the question of intent, it is proper to observe that drunkenness will not excuse crime.[1] The inquiry to be made is whether the crime which the defendant is accused of having committed *has in point of fact been committed*, and for this purpose whatever will fairly and legitimately lead to the discovery of the mental condition and *status* of the accused at the time may be given in evidence to the jury, and may be considered by them in determining whether the defendant was in fact guilty of the crime charged against him. Great caution is necessary in the application of this doctrine, and those whose province it is to decide in such cases should be satisfied beyond a reasonable doubt, from all the facts and circumstances before them, that the unlawful act was committed by the accused when his mental condition was such that he did not know that he was committing a crime, and also that no design existed on his part to do the wrong before he became thus incapable of knowing what he was doing.

We have said more respecting the character of the defence or excuse imposed than would have been necessary, but for the reason that it is important that those who may be guilty of violating the law may understand that a state of intoxication can be of no avail as an excuse for crime.

The court told the jury, as we have seen, that the statute makes the act of voting more than once at the same election, and not the act of voting knowingly — that is, intentionally — more than once at any one election, a crime. The court further charged the jury, in substance, that evidence of voluntary intoxication is properly admissible as affecting crime only in those cases in which it is necessary to ascertain whether the accused was in a mental condition which enabled him to form a deliberate premeditated purpose to commit the offence; but in the same connection the jury were told in effect that the case before them was not one of those cases in which the defendant could interpose the defence that he was intoxicated to a degree rendering him unconscious of what he had done and of the wrong which he was doing. The court then instructed the jury, at the request of the defendant's counsel, that every crime involves a union of act and intent or criminal negligence. That the law does not punish a man for his intention, but that act and intent must unite to constitute a crime; but at the same time the court refused to modify in any degree the charge already given, though specially requested so to do.

1 People *v.* King, 27 Cal. 514.

Taking these two portions of the charge together we may understand the court as declaring: —

First. That a crime is constituted by the commission of a forbidden act, united with a felonious intent on the part of him who does the act or caused it to be done.

Second. That the act of voting more than once at the same election was a crime, even though not done with knowledge, on the part of him who so votes, that he was voting the second time.

Third. That the case before the jury was not one in which the defendant could show that by reason of his intoxicated condition he did not know what he was doing when he voted the second time.

We do not see how these charges, involving the question of felonious knowledge or intention can be harmonized. The second and third stand in direct antagonism to the first, and the greater prominence was given to the one of which the defendant complains, and which we think to be erroneous. We are of the opinion the court erred also in excluding from the jury any consideration of the mental *status* of the defendant by reason of his intoxicated condition when he voted the second time.

The judgment is reversed and a new trial ordered.

Mr. Justice Sawyer expressed no opinion.

INTOXICATION — RELEVANT ON QUESTION OF INTENT AND MALICE.

Kelly and Little *v.* State.

[3 S. & M. 518]

In the High Court of Errors and Appeals of Mississippi, November Term, 1844.

Hon. William L. Sharkey, *Chief Justice.*
" Alexander Clayton, } *Judges.*
" J. S. B. Thacher, }

Mere intoxication is no extenuation or excuse for crime; but it may be considered by the jury upon the question of intent or malice.

In error from the Circuit Court of Smith County.

At the April term, 1844, of the said court, Archibald Kelly and Archibald Little were indicted jointly for the murder of one Jack, a

negro man, the slave of the said Archibald Kelly. On the 16th of April, 1844, the prisoners were arraigned and pleaded "not guilty," and on the 26th of April were convicted by the finding of the jury of manslaughter in the first degree, and were sentenced to confinement to the penitentiary for seven years.

Foote and *Swan*, for the prisoners.

Mr. Justice THACHER delivered the opinion of the court.

(After passing on other questions raised on the appeal.)

The court below declined to charge the jury as follows: "In determining whether the act of killing was or was not murder, if the jury find, from the evidence, that the defendants were in a state of serious intoxication, they are entitled to regard this fact as elucidatory of the point of intention, as evidence, more or less strong, according to their view of the real circumstances of the case, as proof of the absence of that premeditated design, required by our statute in its first description of murder, as an indispensable ingredient of murder."

As, in this case, the finding of the jury was manslaughter, no injury accrued to the prisoners from the denial of the charge by the court. It is true that our statute[1] has enacted that no person can be punished for an offence committed in a state of insanity; but, in doing so, it has done no more, as all writers on criminal law show, than to re-enact the common law. It is to be noticed that the instruction under review has reference only to a single instance of intoxication, and has no reference to well-defined and unmistakable insanity, produced by a long-continued or excessive use of intoxicating stimulants. Legal writers, from the earliest times to the present, agree that mere drunkenness is no extenuation or excuse for crime in the view of the law. "He who is guilty of any crime whatever, through drunkenness, shall be punished for it as much as if he had been sober."[2] "A drunkard," says Lord Coke, "is *voluntarius dæmon*, and hath no privilege thereby." Judge STORY, commenting on the same subject says: "If persons wilfully deprive themselves of reason, they ought not to be excused one crime by the voluntary perpetration of another."

In this connection it is insisted by counsel that, as our statute in one of its definitions of murder, declares that it must be perpetrated from "a premeditated design to effect the death of the person killed, or some other person," and as intoxication "steals away the brain," such is a circumstance to infer the want or absence of a premeditated design to commit a felonious act. The fact of the party being intoxicated has,

[1] H. & H. 722, paragraph 2. [2] 1 Hawk. P. C. 3.

indeed, been holden to be a circumstance proper to be taken into consideration where the sole question is, whether an act was premeditated or done with only sudden heat and impulse. The same may as truly be said of the passion of anger, or any other excitement arising from sudden provocation or peculiar circumstances. But how slight that consideration should be in the instance of intoxication, is readily conceived from the as equally just presumption that the design to commit a crime may have previously existed or been contemplated, and the intoxication have been employed "to screw the courage to the sticking-place." Hence it is that the law discriminates between the delusion of intoxication and the insanity which it may ultimately produce. For, if the mere fit of drunkenness is always to be held as an excuse for crime, there is at once established a complete emancipation from criminal justice. And, generally, to sustain a defence on the ground of insanity, a comparison of the best authorities concludes that it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did understand them, that he did not know he was doing what was wrong.

Judgment reversed on another ground.

INTOXICATION — INTENT — LARCENY.

Wenz *v.* State.

In the Court of Appeals of Texas, 1876.

[1 Tex. (App.) 36.]

Hon. M. D. Ector, *Presiding Judge.*
" C. M. Winkler, } *Judges.*
" John P. White, }

Drunkenness — Intent. — In cases which involve intention, as well as acts (as theft, etc.), evidence of the drunkenness of the prisoner at the time of the commission of the crime is relevant.

Appeal from the District Court of Bexar County. Before Hon. George H. Noonan.

C. K. Breneman, for appellant.

A. J. Peeler, Assistant Attorney-General, for the State.

Facts of the Case.

WINKLER, J. — The appellant was tried and convicted in the district court of Bexar County on an indictment charging that he "unlawfully, fraudulently, and feloniously did steal, take, and carry away from the house of Juan Flores, and from the possesssion of Juan Flores, one shawl, of the value of three dollars, the property of Juan Flores, without the consent of said Juan Flores, and with the fraudulent and felonious intent to deprive the said Juan Flores of the value of said shawl, and to appropriate said shawl to the use of him, the said Jacob Wenz, contrary," etc. On the trial the accused requested certain charges to be given to the jury, which were refused.

A motion was made for a new trial, on the part of the defendant, in which two grounds are alleged as a reason why the motion should be sustained. "1st. The court erred in refusing to charge the jury as to the law applicable to the case, as requested by the defendant in the charge upon file, and part of the record herein. 2d. The verdict is contrary to law and evidence." The motion for a new trial was overruled, and the defendant in open court gave notice of appeal.

The appellant assigns as error the refusal of the judge to give the charge requested by him on the trial; that the court erred in refusing to charge the law applicable to the case, and also in overruling the defendant's motion for a new trial.

It appears from the transcript that the parties and their attorneys failed to agree upon a statement of facts, and that the evidence was made up and certified by the judge who presided at the trial. After stating the evidence of the State's witness, Juan Flores, on direct and cross-examination, and the defendant's witnesses, Jose Wells, Billy Menger, and Ferdinand Hahn, and in rebuttal the State's witness, H. D. Bonnet, the statement of facts may be summarized as follows: —

The defendant went to the store of one Harder; it was apparent when he came there that he had been drinking. He called for beer, and drank eight glasses in succession. He then went out of Harder's store, and across the street to the store of a person named Smith. Miss Smith, a young lady, was in the store at the time defendant came in and asked her for beer; she said she had no beer. He then asked her for whiskey, she said she had no whiskey, and told him he had better leave the store pretty quickly. He then ran out of the store, down the street, and into the house of a Mexican named Juan Flores. He took down a shawl that was hanging on a peg in the wall, worth $2, and ran out of the door, across an open lot. The Mexican, who happened to be in the house at the time, upon being told by a little boy, who stood near the door by which the defendant entered and left the house, that a man had taken

the shawl, started in pursuit of the defendant, and caught him before he had got more than three hundred yards away from the house. The defendant at once gave up the shawl, and Flores marched him off to a police officer. The defendant made no resistance, and was very drunk. He had been employed in the city as a baker, but had been discharged by various employers for drunkenness. It appeared also that he had been sent to the penitentiary for attempting to rob a safe, or something of the kind, and that he had been pardoned out. The State's witness, Juan Flores, proves the time of the alleged taking as on the morning of the 10th day of May, 1875, just after breakfast; the ownership of the shawl and house, and that the defendant did not have permission to enter his house and take the shawl; that there was no person in the house when the defendant took the shawl. He proved the venue as in Bexar County, and he stated that *the door was partially closed.* On this statement of the facts, was the charge asked by the defendant a proper one to have been given to the jury?

From the evidence introduced on the trial, and the charges refused, it seems that the theory of the defence was that, at the time the house was entered and the shawl taken, the defendant was too drunk to know what he was doing. It is not contended by the counsel that drunkenness is an excuse for crime; but that, inasmuch as the question of intent is necessarily an ingredient of the crime of theft, if the defendant, at the time he entered the house and took the shawl, was too drunk to know what he was doing, he had not sufficient mental capacity to form a felonious intent to take the property of its owner and appropriate it to his own use.

To what extent one accused of crime may screen himself from the penalty attached to the crime alleged, by the plea of drunkenness, appears not to be laid down in our system of criminal procedure, and, in fact, ought not to be prescribed. Should such a thing be attempted, the vicious would doubtless take advantage of it to screen themselves from the just consequences of their crimes. Our own laws being silent on a given subject, we are required to go to the common law for a rule by which to be governed.[1]

When we go to the common law, as treated by Lord Coke and Sir William Blackstone, we are met at the very threshold of investigation by such expressions as the following: "As to artificial madness, voluntarily contracted by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, our own law looks

[1] See art. 27 of the Penal Code; Pasc. Dig., art. 2493; and Calvin *v.* State, 25 Tex. 795.

upon this as an aggravation of the offence, rather than an excuse for any criminal misbehavior."[1] "A drunkard, who is *voluntarious dæmon*, hath no privilege thereby; but what hurt or ill soever he doeth, his drunkenness doth aggravate it."[2] Yet, notwithstanding these strong expressions of the authors quoted, and which go to the foundation of the generally received opinion that drunkenness will not, *per se*, excuse the commission of crime, we are not prepared to say that, in a charge involving act and intention both, as is the crime of theft, there are not cases in which it may be proper to inquire into the mental condition of the accused in order to test his capacity to distinguish between right and wrong.[3]

It should be borne in mind, however, that the learned judge who delivered the opinion in *Carter* v. *State* did not decide, but merely discussed, the question.

From the investigation we have been able to give the subject, and without intending to lay down as a rule as to how far the condition of drunkenness may be inquired into, as tending to show the mental condition of a person accused of crime at the time the act was committed, we are of the opinion that these are matters which ought to be submitted to the jury under proper instructions; and that the propriety of giving or refusing charges asked on the proposition must necessarily depend upon the peculiar circumstances attending each particular case, as developed by the evidence adduced on the trial.

We are also of the opinion that, testing this case by the light afforded in the statement of facts, the court, in favor of liberty, might with propriety have submitted to the jury the question of the capacity of the accused to judge between right and wrong at the time he took the shawl, as asked in the charge refused; or, if the charge asked did not, in the mind of the judge, express the law applicable to the facts, that he should have made the proper qualification, thus calling attention to this point.[4]

We are of opinion the court erred in refusing to charge the jury on this proposition, and in overruling the defendant's motion for a new trial; and for these errors the judgment is reversed and the cause remanded.

Reversed and remanded.

[1] 4 Bl. Com. 256
[2] 1 Inst. 247.
[3] Ferrell *v.* State, 43 Tex. 503; Carter *v.* State, 12 Tex. 500.
[4] Pasc. Dig., art. 3061.

INTOXICATION — RELEVANT ON CAPACITY TO COMMIT LARCENY.

INGALLS *v.* STATE

[48 Wis. 647.]

In the Supreme Court of Wisconsin, August Term, 1879.

Hon. EDWARD G. RYAN, *Chief Justice*
" ORSAMUS COLE,
" WILLIAM P. LYON,
" DAVID TAYLOR,
" HARLOW S. ORTON, } *Judges.*

Intoxication — Burglary — Capacity to Commit. — It is competent to show as a defence to a crime that the prisoner was in such a physical condition as to render it improbable that he committed it; as for example that he was too drunk to have carried out a carefully executed larceny.

ERROR to the Circuit Court of Polk County.

The prisoner was indicted and convicted of the larceny of goods from a shop.

"The evidence on the part of the State showed that a hole had been cut in the upper part of a pane of glass in the lower sash, large enough to permit the insertion of a man's hand and arm; and that a nail which fastened the lower sash had been removed, the window then opened and the goods removed, without any disturbance or confusion of the goods in the shop which were not taken. The plaintiff in error had sworn that he had been drinking very often, on the night the larceny was committed, of both whiskey and beer; and that he had left Janesville before the larceny was committed, and knew nothing about it. He then called as a witness one Albert Jones, who had seen the plaintiff in error in the evening, before the larceny had been committed. The witness was asked the following question: 'Where and in what condition was he?' The question was objected to by the district attorney as incompetent, and thereupon the following colloquy took place between the learned circuit judge and the counsel for the defendant: —

"*Judge:* 'The testimony of the defendant here indicates, not only the possession of his faculties, but a distinct remembrance of what took place at the time; and I don't see the propriety of taking up the time to show his condition. The only question is, whether he was so under the influence of liquor that he did not know what he was doing. He has stated himself that he was at various places, and what he was doing.'

Physical Incapacity to Commit Crime.

Counsel: 'We desire to show that he was in such a condition that he could not have done this job as neatly as it was done.' *Judge:* 'I don't understand you are entitled to show that. The evidence is only admissible for the purpose of showing that the person was so under the influence of liquor that he did not comprehend what he was doing.' *Counsel:* 'We offer the evidence for the purpose of showing that the defendant was physically and mentally incapable of committing the burglary as it is shown to have been done.' *Court:* 'If that is the purpose, I will exclude it. It is only admissible for the purpose I have indicated, and not for any other.''

The defendant duly excepted to the ruling of the judge excluding the evidence. Afterwards, in his instructions to the jury, the learned circuit judge reiterated the same idea as to the purposes for which the intoxication of the accused could be considered by the jury, and said: "One cannot shield himself under the plea of intoxication to justify the commission of any act; and the only way that intoxication becomes admissible in evidence at all, is to show that when the act complained of was committed, the party was so intoxicated as to be beside himself, was not in his right mind, and if that mental condition was produced by temporary intoxication, why intoxication may be shown. But the testimony shows that the person was not so far gone, his mental faculties were not so impaired by intoxication as to deprive him of reason and put him in a condition where he didn't know what he was doing; it don't go as a defence at all. It is only when it tends to show that the person who committed the act, by reason of intoxication, was not in his right mind, that it is a defence.'" This instruction was also excepted to by the defendant.

Taylor, J. — We are strongly impressed with the idea that the learned judge did not fully understand the object of the offer to show the condition of the defendant as to drunkenness at or about the time the larceny was committed. As we understand the offer, it was not to show that the accused was in such a mental condition as would excuse the commission of an act which would constitute the crime of larceny if committed by a sober man. It was not offered as an excuse or defence for a larceny committed, but for the purpose of showing that it was highly improbable that the accused did in fact commit the acts complained of, viz.: the entering of the shop, and removing the goods therefrom; not as a defence for want of mental capacity, but as evidence tending to show that the acts which constituted the offence were not done by the accused. This object of the evidence seems to have been sufficiently indicated by the learned counsel for the defendant;

and for the purpose so indicated we are of the opinion the evidence was clearly competent.

The authorities cited in the brief of the learned counsel for the plaintiff in error indicate in what cases it is competent to show the intoxication of the accused upon the question of the particular intent with which an unlawful or wrongful act was done, when such intent is necessary to constitute the offence charged. None of the cases cited, however, have a direct bearing upon the point made in this case. It would seem, however, that there can be no doubt as to the right of a person accused of crime to show that at the time of its commission he was physically incapable of committing it. There can be no doubt of the right of the accused to show that he was at the time prostrated by a disease which rendered it highly improbable that he could have endured the exertion and labor necessary to commit the crime. And so we think if, in this case, the evidence had shown that within a few hours of the time this larceny must have been committed, the accused had been temporarily prostrated by drunkenness, so as to render it highly improbable that he could have been present at the place where the crime was committed, or, if able to be present, that he could have done what the evidence shows was done by those who committed the larceny, he is equally entitled to show that fact. In such case the intoxication is not shown for the purpose of excuse or mitigation of the offence charged, but as evidence tending to show that he was not present and did not commit the acts constituting the offence. Evidence of this kind would have but little weight against direct evidence showing the actual presence of the accused at the time and place when and where the crime was committed; but, certainly in the absence of any such direct evidence, the accused may give in evidence any fact, which would have a natural tendency to render it improbable that he was there and did the acts complained of, and the fact that drunkenness was the thing which tended to prove such improbability, can make no difference. If a man by voluntary drunkenness renders himself incapable of walking for a limited time, it is just as competent evidence to show that he did not walk during the time he was so incapable, as though he had been so rendered incapable by paralysis of his limbs from some cause over which he had no control. The cause of the incapacity in such case is immaterial; the material question is, was he in fact incapable of doing the acts charged? We cannot speculate upon the effect which the evidence, if admitted, would have had upon the verdict of the jury in this case. It was offered, apparently in good faith, as evidence tending to show that the accused could not have committed the offence. Had the drunkenness been proved so com-

plete as to have destroyed his powers of locomotion, or so as to have destroyed the steady use of his limbs, it would have had a tendency to disprove the charge made against him. The evidence being material, it should have been admitted, and its rejection was an error for which this court is compelled to reverse the judgment.

[Omitting other points.]

Judgment reversed.

INTOXICATION — PROVOCATION — DEGREE OF CRIME.

KEENAN *v.* COMMONWEALTH.

[44 Pa. St. 55.]

In the Supreme Court of Pennsylvania, 1862.

Hon. WALTER H. LOWRIE, *Chief Justice.*
" GEORGE W. WOODWARD,
" JAMES THOMPSON,
" WILLIAM STRONG,
" JOHN M. READ, } *Justices*

Intoxication — Provocation — Degree of Crime. — On a charge of murder, the fact that the prisoner was intoxicated will not make an inadequate provocation an adequate one, unless it was sufficient to render him unable to form a wilful, deliberate and premeditated design to kill or incapable of judging of his acts and their legitimate consequences.

ERROR to the court of Oyer and Terminer of Allegheny County.

This was an indictment against Thomas B. Keenan, for the murder of John A. Obey, on the 5th day of July, 1862.

Obey was conductor on one of the cars of the Citizen's Passenger Railway Company, running to Lawrenceville. The defendant, with some seven others, entered the car, all more or less intoxicated. They were noisy and boisterous in the car, sitting on each others knees, talking loudly, and using improper language. The conductor admonished them to be quiet " as there were ladies in the car ; " but they continued on as before. Several persons left the car in consequence of the bad conduct of the party, and walked on the pavement. After twice advising defendant to be quiet, without effect, save to elicit threatening replies, the conductor took hold of him to put him out. The defendant struck the conductor and was struck in return, and then in the scuffle

which followed drew a knife and stabbed the conductor three or four times, which caused his death soon after.

Immediately after the stabbing the defendant was arrested, and taken before a magistrate. No knife was found upon his person, nor did any witness present at the trial testify as to his being intoxicated. Some days afterwards, a knife answering the description of the one seen in his hand when the act was committed was found in or near the cushion of the car in which the parties were at the time. Under the ruling of court below (STERRETT, P. J.) the defendant was convicted of murder in the first degree. The case was, thereupon, removed into this court, where the answers of the court below to certain points which had been propounded by the counsel for the defendant were assigned for error, all which are sufficiently presented in the opinion of this court.

The case was argued by *Swartzwalder* and *Marshall*, for the defendant, and by *Miller*, *Hampton* and *Howard*, for the Commonwealth.

LOWRIE, C. J. — Our statute adopts the common law definition of murder, and then distinguishes it of two degrees, defining the first degree specially by certain enumerated cases, and generally by the words, "another kind of wilful, deliberate and premeditated killing." It is this general part of the definition that we have to apply in the present case.

A careful study of our jurisprudence on this subject clearly reveals the fact that such terms as a deliberate purpose or a deliberate and premeditated intent to kill, or a specific intent to take life, are sometimes substituted for the words of the statute; yet our reported jurisprudence is very uniform in holding that the true criterion of the first degree is the intent to take life. The deliberation and premeditation required by the statute are not upon the intent, but upon the killing. It is deliberation and premeditation enough to form the intent to kill and not upon the intent after it has been formed. An intent distinctly formed even "for a moment" before it is carried into act is enough.

What the definition requires, therefore, is a distinctly formed intent to kill, not in self-defence, and without adequate provocation. It requires the malice prepense or aforethought of the common-law definition of murder to be, not a general malice but a special malice that aims at the life of a person. This distinctly formed intent to take life is easily distinguished, in general, from the instinctive and spontaneous reaction of mind and body against insult and injury, which is often the result of no distinctly formed intention; and also from those cases of previous and deliberate intention to kill, which may override even what, without it, would be adequate provocation given at the time of the killing.

Intoxication.

Keeping this common understanding of the definition in mind, we shall also get clear of the influence of the cases in other States, where the terms deliberate and premeditated are applied to the malice or intent, and not to the act, and thus seem to acquire a purpose brooded over, formed and matured before the occasion at which it is carried into act. Under such a definition of the intention, all our jurisprudence by which malice and intent are implied from the character of the act, and from the deadly nature of the weapon used, would be set aside; for we could not, from these, imply such a previous and deliberate, but only a distinctly formed intent, and this involves deliberation and premeditation though they may be very brief. We should therefore blot out all our law relative to implied intent or malice, and require it to be always proved as express. And this would be a most disastrous result; for the most deliberate murderers are usually those who know how to conceal their intent until the occasion arises for the execution of it.

And still keeping in mind our usual understanding of this general part of the definition of murder in the first degree, we are further prepared for an intelligent appreciation of the influence which the fact of intoxication may legitimately have on the degree of criminality and in the formation of the intent to kill, and in the ascertainment of it.

The learned judge of Oyer and Terminer charged the jury that the prisoner's intoxication was not such an excuse as would allow a less than ordinarily adequate provocation to palliate the offence, unless it was so great as to render him "unable to form a wilful, deliberate, and premeditated design to kill," or as he afterwards expressed the thought "of judging of his acts and their deliberate consequences." The first of these expressions had already been very correctly and adequately explained to the jury, and the second plainly means that, in using a deadly weapon in a deadly way, the prisoner is charged with the ordinary consequences of his acts; if he was not so drunk as to be unable to judge that such would ordinarily be the consequence of such acts. The two forms of expression are therefore the same in their meaning.

We discover no error in this instruction, and think it is in substantial accordance with all the best considered judicial precedents, and if we keep clear of the peculiarities found in other States, arising either from misapprehension or from a differently worded statute, we shall have little difficulty in recognizing its correctness.

No one pretends that intoxication is, of itself, an excuse or palliation of a crime. If it were, all crimes would, in a great measure, depend for their criminality on the pleasure of their perpetrators, since they may pass into that state when they will. But it is argued that, because

intoxication produces a state of mind that is easily excited by provocation, therefore the crimes committed under such intoxication and provocation are less criminal than when committed in a state of sobriety under the same provocation. We are very sure that no statute will ever announce such a rule, and that we are not authorized to announce it in interpreting this statute.

Stated in its most general form, it amounts to this: that because the mind usually receives provocation with an intensity proportioned to its own excitement or excitability, therefore the act of provocation must be measured, not by its own character and its ordinary effect, but by the state and habit of the mind that receives it. Then measured by this rule, the crimes of a proud, or captious, or selfish, or habitually ill-natured man, or of one who eats or fasts too much, or of one who is habitually quarrelsome, covetous, dishonest, or thievish, or who by any sort of indulgence, fault or vice renders himself very easily excitable, or very subject to temptation, are much less criminal than those of a moderate, well-tempered and orderly citizen, because to the former a very small provocation or temptation becomes adequate to excuse or palliate any crime. If such were the rule, a defendant would be much more liable to injure than benefit his case, by showing a good character, and the law would present no inducement to men to try to rise to the standard of even ordinary social morality.

Of course it is impossible that such a principle can be a rule of law. If it were admitted, it could not be administered, for no judicial tribunal can have time or competence for such a thorough investigation of the special character or state of each individual mind as the rule requires, and therefore it would necessarily jump to a conclusion such as the caprice, or prejudice, or other influence of the moment would dictate.

Indeed, if we admit the principle, and carry it out logically, we shall abolish law entirely as a compulsory rule of civil conduct; for we shall measure all crime and all duty by the conscience of the individual, and not by the social conscience, and no contract could be binding, no debt collected, no duty enforced, and no crime punished, unless where the defendant's conscience feels that it ought to be, and thus courts would be useless, and social organization impossible. No such principles can stand before man's natural tendency to social organization, or before the power and right of an organized society. Individual or even social charity may often act upon the principle, but law excludes it from its sphere. Very few persons practically admit it. Even those individuals, sects and factions that are most zealous for the rights of the individual conscience, have very often been the least respectful of the rights of

conscience of any other society or faction than their own, and of the conscience of other persons, and the most inclined to exert moral and physical force, in order to impress their opinions and rules of action upon others, and thus the extreme of individualism runs into tyranny or despotism.

In most matters what is usual and ordinary in any given society is the law of that society. All, therefore, must come up to the standard of the usual and ordinary or take the consequences. Those who in their conduct fall below the standard must, to that extent, submit to the condemnation of society, either legally or morally, according as rules transgressed are civil or only moral. And those whose conduct rises above that standard and yet harmonizes with it must always be accepted as highly meritorious citizens. And this principle applies here; for men who degrade themselves below the ordinary level of social morality, by bad conduct or habits, do not thereby relieve themselves from having their acts and duties judged by the ordinary rules of social action. They cannot set up their own vices as a reason for being set into a special class that is to be judged more favorably than other persons.

The prisoner was somewhat intoxicated when, with six or seven companions, he entered the passenger car, and he and they seem to have behaved badly and noisily, and used very profane language there, so that several persons preferred walking and left the car. Though they were twice requested by the conductor to be quiet, the prisoner used abusive and threatening language in reply, and his companions and he persisted in their ill-conduct, and he expressed his determination to remain. Then the conductor took him by the lapel of his coat, and was proceeding to put him out, when he struck the conductor, and was struck in return, and then his companions joined in the scuffle, and he drew a knife, and by several strokes of it, mortally wounded the conductor. It is to such evidence as this that the judge's charge relates, and it seems to be entirely relevant, adequate and correct, and free from any invasions of the functions of the jury. And we say this with special reference to those parts of the charge which say that the prisoner ought to be taken to have intended the natural and usual consequences of the act of using the knife in the way he did; that a conductor had a right to put out a passenger so misbehaving; that the prisoner's resistance and the blow struck by him were his own provocation of the struggle, in which he used the knife, and neither the struggle nor the blow received in return can be any excuse for its use. None of the other points need any special notice. Nor do we find any error in impanelling the jury or in the admission or rejection of evidence. We

have considered the prisoner's case with all the caution and concern which its terrible penalties are calculated to inspire, and it is with much sorrow on his account, that we are compelled to say that we discover no valid ground for granting him a new trial.

Sentence affirmed, and record remitted

DRUNKENNESS — PASSING COUNTERFEIT BILL — KNOWLEDGE.

PIGMAN *v.* STATE.

In the Supreme Court of Ohio, January Term, 1846.

[14 Ohio, 555.]

Hon. REUBEN WOOD, *Chief Justice.*
" MATTHEW BIRCHARD, }
" NATHANIEL C. READ, } *Judges.*
" PETER HITCHCOCK, }

Drunkenness of the accused, at the time of passing the alleged counterfeit bill, is a circumstance proper to be submitted to the consideration of the jury, and should have its just weight in determining whether the accused knew the bill to be counterfeit.

This is a writ of error to the Court of Common Pleas of Marion County.

The plaintiff in error was indicted for uttering, publishing, bartering, and disposing of counterfeit bank bills. The proof was the passing of a counterfeit bank bill of twenty dollars. A verdict of guilty was found by the jury, and the plaintiff was sentenced to four years' imprisonment in the penitentiary. A number of errors are assigned. But the one chiefly relied upon, or at all available, as disclosed in the bill of exceptions, is that the court ruled out evidence offered by the accused, to show that he was drunk at the time he passed the bill, and therefore did not know what he was doing, or that the bill was counterfeit.

The case was argued for the defendant by *James H. Godman.* No argument was submitted for the plaintiff.

READ, J. — Drunkenness is no excuse for crime; yet, in that class of crimes and offences which depend upon guilty knowledge, or the coolness and deliberation with which they shall have been perpetrated, to constitute their commission, or fix the degree of guilt, it should be submitted to the consideration of the jury. If this act is of that nature that

Relevant On Question of Knowledge.

the law requires it should be done with guilty knowledge, or the degree of guilt depends upon the calm and deliberate state of the mind at the time of the commission of the act, it is proper to show any state or condition of the person that is adverse to the proper exercise of the mind, and the undisturbed possession of the faculties. The older writers regarded drunkenness as an aggravation of the offence, and excluded it for any purpose. It is a high crime against one's self, and offensive to society and good morals; yet every man knows that acts may be committed in a fit of intoxication that would be abhorred in sober moments. And it seems strange that any one should ever have imagined that a person who committed an act from the effect of drink, which he would not have done if sober, is worse than the man who commits it from sober and deliberate intent. The law regards an act done in sudden heat, in a moment of frenzy, when passion has dethroned his reason, as less criminal than the same act when performed in the cool and undisturbed possession of all the faculties. There is nothing the law so much abhors as the cool, deliberate, and settled purpose to do mischief. That is the quality of a demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication, although, to be punished, may, to some extent, be softened and set down to the infirmities of human nature. Hence — not regarding it as an aggravation — drunkenness, as anything else showing the state of mind or degree of knowledge, should go to the jury. Upon this principle, in modern cases, it has been permitted to be shown that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of the mind, necessary to constitute murder in the first degree. The principle is undoubtedly right. So, on a charge of passing counterfeit money; if the person was so drunk that he actually did not know that he had passed a bill that was counterfeit, he is not guilty. It oftentimes requires much skill to detect a counterfeit. The crime of passing counterfeit money, consists of knowingly passing it. To rebut that knowledge, or to enable the jury to judge rightly of the matter, it is competent for the person charged to show that he was drunk at the time he passed the bill. It is a circumstance, among others, entitled to its just weight.

Judgment reversed and cause remanded.

DRUNKENNESS — PROVOCATION — WHEN EVIDENCE OF INTOXICATION TO BE CONSIDERED.

State v. McCants.

[1 Spears, 384.]

In the Court of Appeals of South Carolina, May, 1843.

Hon. J. S. Richardson,
" J. B. O'Neall,
" J. J. Evans,
" B. J. Earle,
" A. P. Butler,
" D. L. Wardlaw,
} *Judges.*

1. **One in a State of Voluntary Intoxication** is subject to the same rules of conduct and the same legal inferences as a sober man.

2. **Provocation — Evidences of Drunkenness Relevant.**—But where a provocation has been received which if acted upon instantly would mitigate the offence of a sober man, and the question in the case of a drunken man is whether that provocation was in truth acted on, evidence of intoxication may be considered.

Tried before Wardlaw, J. at Charleston, May term, 1842.

The indictment charged Thomas N. McCants with having murdered William Ladd, on 19th of March, 1842, by stabbing him to the heart with a pocket knife. There was evidence that the prisoner was drunk at the time.

Leaving to the jury the evidence as to prisoner's being drunk, the court instructed them that upon the question whether the prisoner acted from a former grudge, or from sudden heat upon new provocation, his intoxication might be considered as a condition frequently predisposing to forgetfulness of former injuries and susceptibility of new offence; but that in deciding the question whether there was reasonable time for cooling, drunkenness was not to be considered. For the law has no more tenderness for the frenzy of the voluntary demon than for the diabolical malignity of temper, which never cools in its thirst for revenge; and that in fine if the jury took the view which the court did of the previous threat and of the first fight, then the questions were, did the prisoner cool, or was there time for a reasonable man to have cooled? In considering these questions, the presiding judge exhorted the jury to give the prisoner the benefit of all rational doubts; I pointed out (said the court) the blood trickling from his face after the first fight — the violence then exhibited by both parties, and the struggling between the prisoner

Drunkenness not Relevant.

and Driggers; and I dwelt less than my subsequent reflections have done upon his pursuing with a drawn knife for two hundred and twenty-five yards an unarmed foe, after the fight was stayed by his cry for separation.

The jury found a verdict of "guilty," but recommended to executive clemency.

The defendant appealed on the following grounds: —

1. Because the fatal blow was given in heat and passion, reasonably excited during a sudden affray, and therefore the killing was only manslaughter.

2. Because his Honor charged the jury that the material question for them, was, whether the interval between the first and second combat afforded time for a reasonable man to cool, whereas, it is respectfully submitted, the jury should have been charged to inquire whether the suspension of reason, arising from sudden passion excited during the affray, continued down to the time of the mortal stroke given, or whether there were any such marks of deliberation as showed that the prisoner did cool before giving the mortal stroke.

3. Because his Honor charged the jury, that upon a charge of murder, where the material question is whether the act was premeditated, or done with sudden heat and impulse, the fact of the party being intoxicated was not a circumstance proper to be taken into consideration, with a view to determine whether the prisoner was actuated by passion or by malice.

Kunhardt, *Thompson & Porter*, for the motion.

Bailey, Attorney-General, *contra*.

Wardlaw, J., delivered the opinion of the court.

[After passing on the first and second grounds.]

In all cases where the time of cooling may be considered, whether the time be regarded as evidence of the fact of cooling, or as constituting, of itself, when reasonable, legal deliberation, the whole circumstances are to be taken into the estimate in determining whether the time be reasonable. The nature of the provocation, the prisoner's physical and mental constitution, his condition in life and peculiar situation at the time of the affair, his education and habits (not of themselves voluntary preparations for crime), his conduct, manner and conversation throughout the transaction — in a word, all pertinent circumstances — may be considered, and the time in which an ordinary man, in like circumstances, would have cooled, is the reasonable time. But shall his drunkenness be considered? So far as previous habits of drunkenness may have wrought a permanent influence upon the constitution, such in-

fluence will be involved in the consideration of the other circumstances, but the direct effect of existing intoxication, however maddening or stupefying, must be laid out of view. The question is, was there time for a reasonable man, in like circumstances, to have cooled, not a drunkard or a madman? and it is to this view that the third ground of appeal excepts, for the report shows that whilst the intoxication, if found to be proved, was submitted as a matter fit for consideration, upon the question whether the prisoner acted from a former grudge or in a sudden heat of new provocation, it was declared to be unfit for consideration in deciding whether there was reasonable time for cooling.

A portion of this court is of opinion that instructions to the jury exactly in the form assumed by the third ground would have been correct; and that the prisoner has therefore,no reason to complain that his intoxication was permitted to enter into the consideration of only part of the case, when it should have been excluded from the whole. Old as the common law, and, of necessity, in almost all civilized nations, is the doctrine, founded upon obvious considerations, that drunkenness shall be no excuse for crime. The text of Russ. on Cr.[1] contains this passage: "Though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is whether an act was premeditated, or done only with sudden heat and impulse, the fact of a party being intoxicated has been holden to be a circumstance to be taken into consideration." Reference is made to the MS. case of *Rex* v. *Grindley*, before Holroyd, J., at the Worcester assizes in 1819. And the American editor has added a reference to *Pennsylvania* v. *McFall*.[2] In the case of *Rex* v. *Carroll*,[3] Justice Park, sitting with Justice Littledale and the recorder, in the Central Criminal Court, read the case decided by Justice Holroyd, which had been cited to them, and observed: —

"Highly as I respect that late excellent judge I differ from him and my brother Littledale agrees with me. He once acted upon that case, but afterwards retracted his opinion, and there is no doubt that that case is not law. I think that there would be no safety for human life if it were to be considered as law." The authority cited by Russell is thus overthrown. In the case cited by the American editor, McFall being indicted for a homicide, committed whilst he was drunk, his counsel contended that he could not be guilty of murder in the first degree, which, under the Pennsylvania law, is premeditated, because by his drunkenness he was incapacitated to form any previous purpose of mal-

[1] p. 8.
[2] Add. 257.
[3] 7 C. & P. 146; 32 E. C. L. R. 471.

ice, but could only be guilty of murder in the second degree — a killing in passion, and not of malice. ADDISON, president of the courts in the Fifth Circuit, held that "drunkenness does not incapacitate a man from forming a premeditated design of murder, but frequently suggests it; that a drunk man may certainly be guilty of murder, but as drunkenness clouds the understanding and excites passion, it may be evidence of passion only and of want of malice and design." This was left to the jury, who found a verdict of murder in the first degree, and the prisoner was hanged.

Our own cases of *State* v. *Toohey*[1] and *State* v. *Ferguson*,[2] are strong authorities to sustain the liability of the drunken man for murders committed in his state of voluntary madness. It is a doctrine essential to the safety of society, and entirely reconcilable with the ordinary principles of punishment administered by human tribunals, when the consequences, as well as the motives of acts, must be regarded, and the punishment of two offenders be made widely to differ, because of different results by accident, although both may have intended, and, so far as they could control results, actually have perpetrated like offences.

In the case of *Rex.* v. *Meakin*,[3] which was an indictment for stabbing, with intent to murder, Baron ALDERSON, at the Worcester assizes, in 1836, in summing up said: "It is my duty to tell you that the prisoner's being intoxicated does not alter the nature of the offence. If a man chooses to get drunk, it is his own voluntary act; it is very different from a madness which is not caused by any act of his. That voluntary species of madness, which it is in a party's power to abstain from, he must answer for. However, with regard to intention, drunkenness may perhaps be adverted to, according to the nature of the instrument used. If the man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but when a dangerous instrument is used, which if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party." The observations here made, as to the influence of drunkenness upon the question of intention, where a stick or weapon not dangerous, has been used, were wholly extra-judicial, the instrument proved in that case having been a deadly one. But from these observations it may be collected, that at

[1] MS., 2 Rice's Dig. 105.
[2] 2 Hill, 619.
[3] 7 C. & P. 297, (32 E. C. L. R. 514).

the moment there was a doubt in the Baron's mind whether, in the case of what may be called involuntary homicide, when death has ensued from blows without a legal provocation, but the want of intention to do serious bodily harm may be collected from the nature of the instrument, and the manner of its use, drunkenness might not be urged as an excuse for a more intemperate use of the instrument than would seem proper in a sober man; a doctrine which, in its application, would probably lead to most dangerous indulgencies of brutal feeling excited by liquor, and which should not be readily admitted. In the case of *Rex.* v. *John Thomas*,[1] before Baron PARKE, at the ——— assizes, in 1837, upon an indictment for malicious stabbing, the Baron used the following language: "I must also tell you, that if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit whilst he is so; he must take the consequences of his own voluntary act, or most crimes would otherwise be unpunished. But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation; and that passion is more easily excitable in a person when in a state of intoxication, than when he is sober. So when the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded, for it would furnish no excuse." This doctrine seems to me the same as that laid down in Russell;[2] if by "sudden heat," as used in Russell, be understood such heat as the law notices, heat excited by a legal provocation; and to the doctrine I subscribe, understanding by it that he who is in a state of voluntary intoxication shall be subject to the same rules of conduct, and the same legal influences as the sober man; but that where a provocation has been received, which, if acted on instantly, would mitigate the offence of a sober man, and the question in the case of a drunken man is, whether that provocation was in truth acted upon, evidence of intoxication may be considered in deciding that question.

The law infers malice against the drunkard who, in his frenzy, shoots into a crowd and kills he knows not whom, no less than against a sober man for like conduct. And it would be jeopardizing the peace and

[1] 7 C. & P. 753 (32 E. C. L. R. 751). [2] p. 8.

Notes.

safety of society to say that he who, by half a dozen glasses, is habitually rendered irritable and fierce, shall be looked upon with more indulgence when he has barbarously resented a trivial affront, because he had taken the quantity of liquor requisite to make him a savage; or that he who has never been known to grow cool after a transport of wrath excited when he was in a state of intoxication, until sleep had sobered him, shall, in the application of the circumstances to determine what time for cooling is reasonable, be allowed a longer time, because, on the occasion in question, he had voluntarily encountered the hazard which drinking was known to bring upon himself and all around him.

(Omitting a ruling on other grounds.)

RICHARDSON, O'NEALL, EVANS and BUTLER, J J., concurred.

NOTES.

§ 59. **Drunkenness no Excuse for Crime.**—It is a well-settled rule of the common law that voluntary drunkenness does not excuse a crime committed while in that state.[1]

[1] State *v.* Keath, 83 N. C. 626 (1880); Cornwell *v.* State, Mart. & Y. 147 (1827); State *v.* McCants, 1 Spears, 393 (1843); U. S. *v.* McGlue, 1 Curt. C. C. 1 (1851); U. S. *v.* Drew, Baldw. 28 (1828); Boswell *v.* Com., 20 Gratt. 860 (1871); State *v.* Mullen, 14 La. Ann. 590 (1859); Rafferty *v.* People, 66 Ill. 118 (1872); McKenzie *v.* State, 23 Ark. 335 (1870); People *v.* Williams, 43 Cal. 344 (1872); State *v.* Hurley, 1 Houst. Cr. Cas. 28 (1858); Mercer *v.* State, 17 Ga. 146 (1854); Shannahan *v.* Com., 8 Bush, 463; 8 Am. Rep. 465 (1871); Schaller *v.* State, 14 Mo. 502 (1851); State *v.* Harlow, 21 Mo. 446 (1855); People *v.* Cummins, 47 Mich. 334 (1882); State *v.* Grear, 28 Minn. 426 (1881); Kelly *v.* State, 3 S. & M. 518 (1844); Kenny *v.* People, 27 How. Pr. 202; 18 Abb. Pr. 9; 31 N.Y. 330; O'Brien *v.* People, 48 Barb. 274 (1867); 36 N.Y. 280; People *v.* Rogers, 18 N.Y. 9 (1858); People *v.* Garbutt, 17 Mich. 9 (1868); Golden *v.* State, 25 Ga. 527; State *v.* Paulk, 18 S. C. 314 (1882); State *v.* Grear, 29 Minn. 221 (1882); Scott *v.* State, 12 Tex. (App.) 31 (1882). In Kenny *v.* People, 18 Abb. Pr. 91; 27 How. Pr. 202 (1863). It was laid down that intoxication was no excuse for crime. In the Court of Appeals this ruling was affirmed. Kenny *v.* People, 31 N. Y. 330 (1865). The same was subsequently held in People *v.* O'Connell, 62 How. Pr. 436 (1881); affirmed by the Court of Appeals in the next year, O'Connell *v.* People, 87 N. Y. 377 (1882); People *v.* Rogers, 18 N. Y. 9 (1858); reversed in the decision of the Supreme Court in the same case, in which it had been held that the trial judge had erred in not instructing on the defence of drunkenness, as requested by the prisoner's counsel. Reported as Rogers *v.* People, 3 Park. 632 (1858). That drunkenness may reduce a killing from murder to manslaughter, was held in Kentucky in Blimm *v.* Com., 7 Bush. 325 (1870), and Smith *v.* Com., 1 Duv. 224 (1864); but these cases were partially overruled in the latter case of Shannahan *v.* Com., 8 Bush, 464. In Tyra *v.* Com., 2 Metc. (Ky.) 1 (1859), it is said: "The instruction given by the court to the effect that drunkenness, or the temporary insanity occasioned by the act of the defendant in getting drunk, constituted no justification or excuse for the commission of crime, was, we think, entirely unobjectionable, in view of the facts of the case. Such is the well settled principle upon this subject. Any other doctrine would result in consequences fatal to the peace and safety of society."

Notes.

In *Respublica* v. *Weidle* it was said: "Drunkenness is no justification or excuse for committing the offence (treason); to allow it as such would open the door for the practice of the greatest enormities with impunity."[1] In *U. S.* v. *Claypool*[2] it was said: "Drunkenness is no excuse for crime, and in the instances in which it is resorted to to blunt moral responsibility it heightens the culpability of the offender."

In *Com.* v. *Hart* it was said: "Intoxication is rather an aggravation of than an excuse for crime. If recognized as a defence, all men intending to perpetrate crime could readily shield themselves from punishment by simply becoming inebriated. When reason is destroyed, when a man has not the power to distinguish right from wrong, or lacks the power to adhere to the right and to abstain from wrong, he is not accountable to the criminal laws."[3] In *Commonwealth* v. *Dougherty*, the court said: "Previously to saying anything on the general facts or on the law, suffer us to remark that the intoxication of the prisoner at the time he killed the deceased and the subsequent expressions of sorrow for his conduct are not, in the eye of the law, the slightest excuse or palliation of his crime. It would seem, indeed, as if all ages and nations concurred in the sentiment. It is recorded in history that Alexander the Great killed his friend Clitus in a fit of passion and drunkenness, yet Alexander has always been supposed guilty of murder. Historians, therefore, when they relate this event, uniformly speak of it as the murder of Clitus by Alexander the Great."[4] In *U. S.* v. *Forbes*,[5] it was said by RANDALL, J., in charging the jury: "The artificial voluntarily contracted and temporary madness produced by drunkenness is rather an aggravation of than an apology for a crime committed during that state. A drunkard is a voluntary demon, and his intoxication gives him no privilege. If, however, an habitual or fixed frenzy is produced by this practice, though such madness is contracted by the vice and will of the party, it places the man in the same condition as if it were contracted at first involuntarily. The wisdom of the law in refusing to recognize drunkenness as an excuse for crime is plain; nothing is more easily counterfeited, no state so irregular in its operation." In *Com.* v. *Hawkins*,[6] the chief justice instructed the jury thus: "The rule of law is that although the use of intoxicating liquors does to some extent blind the reason, and exasperate the passions, yet as a man voluntarily brings it upon himself he cannot use it as an excuse or justification or extenuation of crime. A man because he is intoxicated is not deprived of any legal advantage or protection; but he cannot avail himself of his intoxication to exempt him from any legal responsibility which would attach to him if sober." In *State* v. *Bowen*, it was held that the trial court having left the question to the jury on all the evidence in the case, the appellate court will not, after conviction of murder in the first degree, set aside the verdict and grant a new trial, because the jury were not instructed that if they believed that at the time of committing the act the prisoner was so much intoxicated as to produce a state of mind unfavorable to deliberation or premeditation, it would reduce the grade of the offence from murder

[1] Respublica *v.* Weidle, 2 Dall. 88 (1781).
[2] 14 Fed. Rep. 127 (1882).
[3] Com. *v.* Hart, 2 Brewst. 546 (1868).
[4] Com. *v.* Dougherty, 1 Browne XX. (1807).
[5] Crabbe, 559 (1845).
[6] 3 Gray, 463 (1855).

In People *v.* Fuller; Marshall *v.* State; Estes *v.* State.

in the first to murder in the second degree under the statute.[1] In *People* v. *Fuller*,[2] tried in New York in 1823, the prisoner was indicted for the murder of Andrew Fish. On the trial "the counsel for the prisoner offered to prove that he was intoxicated at the time of the commission of the offence. The court decided that the evidence was improper; that intoxication was a voluntary deprivatiou of reason; that if a person under the influence of liquor does an act which would be a crime if he were sober, the intoxication is an aggravation of the offence, and cannot be given in evidence in mitigation of the guilt of the prisoner." In *Marshall* v. *State*,[3] the prisoner had shot the deceased without provocation. The prisoner had been drinking during the day (the homicide took place about eleven at night) and in the afternoon was in a long drunken sleep. After getting up from that the evidence indicated that he was not deeply intoxicated. Shortly before the homicide he appeared to be drinking, but was not very drunk. He outran a person who pursued him, and his running was pretty straight. He was convicted of murder. The Supreme Court in affirming the judgment said: "The degree of drunkenness shown by the evidence as existing at the time of the homicide was not great. But had it been the utmost possible degree consistent with the power of discharging a pistol, the law of the transaction would have been the same. A man who can voluntarily shoot is capable of malice unless he can plead some infirmity besides drunkenness. To be too drunk to form the intent to kill, he must be too drunk to form the intent to shoot. An intent to kill is the only necessary ingredient of legal malice when neither justification nor adequate provocation is made to appear. Moreover, the presumption that a man intends not only the deed he does, but the natural and proximate consequences of the deed is, in criminal law, as applicable to the drunk man as to the sober man." In *Estes State*,[4] JACKSON, J., said: "The defendant shot Williams without the slightest provocation, and whilst he was drinking considerably, he was sober enough to intend to shoot, and he did shoot and hit him in the face, and the ball is lodged there, just under the brain, inflicting a permanent and dangerous wound — such a wound that excitement will endanger him for life, in the opinion of the physicians who examined him. He was sober enough too to get off rapidly from the place of the shooting, nor is there any motive suggested by the proof to rebut the idea of a malicious intent, a careless disregard of human life. * * * For myself I think that a man cannot voluntarily make himself so drunk, as if he shoot and kill another without provocation the crime will be graded or reduced from murder to manslaughter; or if he shoot at another without provocation, the crime can be made by drunkenness, less than assault with intent to murder. The statute is plain that voluntary drunkenness shall be no excuse, and if it be made to lower or grade the crime, to lessen it in any case whatever, it is thereby made some excuse, and that *pro tanto* fritters away the solidity and power of the statute. * * * My brethren agree with me that drunkenness is no excuse for crime, and that the court did not err in so charging, and that the court was right in this case in refusing the request asked

[1] State *v.* Bowen, 1 Houst. Cr. Cas. 91 (1859).

[2] 2 Park. 16 (1823).

[3] 59 Ga. 154 1877).

[4] 55 Ga. 30 (1875.)

Notes.

for;[1] but we did not consult and agree as to the effect of voluntary drunkenness upon intention in any case, or its effect in reducing or palliating crime under our statute in any case." In *State* v. *Turner*,[2] which was tried in Ohio in 1831, WRIGHT, J., in charging the jury said: "Much has been said to you about the drunkenness of the prisoner as conducing to show that he was of unsound mind. No reliance can be placed upon drunkenness, as establishing the insanity of a person which excuses him from accountability for crime. The habit of intoxication is highly immoral and vicious, tending to the destruction of the best interests of society — the severance of the dearest relations of life. He who takes an intoxicating draught voluntarily makes himself mad, and the law, by reason of such madness will not excuse him from responsibility for crimes committed under its influence. If it were otherwise, the most hardened criminal would escape punishment, and the corrupt and profligate and revengeful would only have to intoxicate themselves to be exonerated from liability for crime, and to acquire the right to commit any act, however shocking and horrid, with impunity. In our opinion the law does not afford to bad men such protection." In *State* v. *Bullock*,[3] on an indictment for assault with intent to kill, the trial judge was requested to charge that although drunkenness did not incapacitate a man from forming a premeditated design of murder, yet as drunkenness clouds the understanding, and excites passion it might be evidence of passion only, and of a want of malice and design. The refusal to so charge was upheld by the Supreme Court. "The rule," said CHILTON, J., "that drunkenness shall not excuse or even palliate crime, has not, so far as we are advised, been departed from. It is insisted by the prisoner's counsel, that although drunkenness does not excuse or justify the offence, yet it may be evidence of passion only, and want of malice. It is certainly true that there must be malice, either express or implied, to constitute the offence charged in the indictment, and any circumstances calculated to disprove its existence was proper to be considered by the jury. Malice may be inferred from the deadly character of the weapon used in the commission of the act. Would the legal presumption deducible from the use of such weapon, be rebutted by the fact that the party was intoxicated? Suppose the prisoner in a state of intoxication, with a large knife, such as was calculated to produce death, had without provocation assaulted and slain his victim, would it at common law have been a sufficient plea to an indictment for murder, that he was drunk? If so, then drunkenness would excuse the crime of murder. But we have seen that it is no excuse for crime." The judge then goes on to distinguish such cases as *Pennsylvania* v. *McFall*,[4] and *Swan* v. *State*,[5] from the one at bar, on the ground that in those it was important to ascertain of what degree of murder the prisoner was guilty, and concludes: "The mental state required by the statute to constitute the crime was one of deliberation and

[1] Which was "that the jury may take into consideration the fact of defendant's drunkenness to grade the offence, and may look to the fact in determining the intent, and that if the jury should find that he was not conscious of what he was doing, the jury might take that fact into consideration, in determining whether he intended, with malice aforethought, to kill at the time he shot."

[2] Wright, 20 (1831); and see State *v.* Thompson, Wright, 622 (1834).

[3] 13 Ala. 413 (1848).

[4] Add. 257.

[5] 4 Humph. 136.

premeditation, hence drunkenness which excluded such condition of the mind as was necessary to constitute the statutory offence was allowed to be considered by the jury not as an excuse for the crime, but to show it had not been committed. * * * Whether the offence committed was the result of a preconceived determination to kill and murder or was induced by the voluntary intoxication of the prisoner, he is nevertheless guilty, and must suffer the penalty denounced by the statute against such as violate its provisions."

In *Tidwell* v. *State*,[1] the following instruction was asked and refused: "If the jury though believing beyond a reasonable doubt that one or more of the defendants killed said Ford, still believe from the evidence that it is probable that the parties doing the killing were so drunk as to be incapable of forming an intent or design of committing murder, then the defendant must be acquitted." On appeal the ruling was sustained. "Drunkenness of itself," said the Supreme Court, "when voluntarily produced does not excuse or palliate an offence. In cases of homicide it may be material in determining the degree — whether it is murder in the first or murder in the second degree. Wilfulness, premeditation and deliberation must concur with malice to constitute murder in the first degree. These involve an inquiry into the state of mind of the accused at the time of the killing; and of consequence it is proper to inquire whether he was then drunk or sober; and if drunk whether the intoxication rendered him incapable of premeditation and deliberation. Mere drunkenness, a mere temporary fit of intoxication, cannot excuse a homicide. The vice of the charge requested, in reference to the drunkenness, is apparent. If given, it would have authorized an acquittal, though the jury may have been satisfied the homicide was malicious and voluntary."

In *Cross* v. *State*,[2] the prisoner was indicted for assault with intent to murder. The trial judge said to the jury: "As you have heard stated and read from books, drunkenness is no excuse for crime." On appeal it was said by the Supreme Court: "This certainly has been very often said by the most learned jurists, and has received the sanction of the highest and most learned courts. But it is urged by the learned counsel for the plaintiff in error, that although drunkenness is no excuse for crime, the fact that the accused was in a state of intoxication at the time may be considered by the jury in determining whether the accused intended to commit the crime with which he is charged, and that this is especially so where he is charged with an assault with intent to murder or commit some other felony. For this purpose most courts have held that the fact that the accused was drunk at the time of the commission of the act with which he is charged is admissible evidence. This rule is not inconsistent with the one stated by the court, 'that drunkenness is no excuse for crime.' The evidence when admitted is not admitted as an excuse for the crime but as tending to show that the accused did not commit the crime charged. In this case the court permitted the accused to show that he had been drinking intoxicating liquors at the time and was to some extent intoxicated. The learned judge also charged the jury that if they believed the accused was frenzied from the use of liquor, so that he was incapable of knowing what he was doing, they would be justified in acquitting him. 'You are to take all the circumstances together and see whether he has acted with deliberation.' If the counsel desired any more definite instructions as to

[1] 70 Ala. 33 (1881). [2] 55 Wis. 261 (1882).

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what force should be given to the fact of the drunkenness of the defendant at the time of the shooting, he should have called the attention of the court to it by a request to instruct more fully and particularly upon the subject. The instruction given submitted the fact of the drunkenness of the defendant in general terms to the jury as a fact which they might consider in determining the question of the coolness and deliberation of the defendant's acts; and it cannot be alleged as error that he did not instruct them more at length on the subject, unless he was requested so to do."

(*a*) **Intoxication no Excuse — Friery v. People.** — In *Friery* v. *People*,[1] the prisoner was tried for the murder of one Henry Lazarus while drunk. The following charge of the trial judge on the subject was approved on appeal. "In regard to intoxication I shall not attempt to lay down any new law or state any views of my own, because it is settled in this State, as it is in Pennsylvania. I shall content myself by reading you the law as stated by the courts. In the case of *People* v. *Rogers*,[2] it was said: 'We must lay out of view, as inapplicable, the case of a person who had become insensible from intoxication, and who was performing an act unaccompanied by volition. It is not claimed in this case that the prisoner at the bar was a person who had become insensible from intoxication, and who was performing an act unaccompanied by volition; therefore you must look at the prisoner, not as a man in that state, but merely as one who was more or less under the influence of liquor. The degree of intoxication you may determine in your own mind, if you can. If you consider him as a man who was intoxicated, but yet sensible and able to do an act in accordance with his will, the law is very plain. The courts have laid down this rule. No rule is more familiar than that intoxication is never an excuse for crime. There is no judge who has been engaged in the administration of criminal law who has not had occasion to assert it. Even where intent is a necessary ingredient in the crime charged, so long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his own act. Thus, if a man, without provocation, shoot another, or cleave him down with an axe, no degree of intoxication, short of that which shows that he was at the time utterly incapable of acting from motive, will shield him from conviction. In this case the defendant had struck the blow which caused the death, and to this act the law, without further proof, would impute guilty design. If the perpetrator would escape the consequences of the act thus committed, it was incumbent on him to show either that he was incapable of entertaining such a purpose, or that the act was committed under provocation. The adjudications upon the question, both in England and this country, are very numerous, and are characterized by a singular uniformity of language and doctrine. They all agree that, where the killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated, can not be allowed to affect the legal character of the crime.' There is nothing in our statute, gentlemen, which gives us reason to say that the Legislature intended to be understood as altering the rule laid down by the court in the case of *People* v. *Rogers:* nothing to lead us to believe that the Legislature meant

[1] 54 Barb. 319 (1865); 2 Keyes, 424 (1866). [2] 18 N. Y. 9.

to say that, because a man was intoxicated when he designedly took the life of another, his crime was to be reduced to murder in the second degree. In the recent case in Pennsylvania, the same doctrine is substantially laid down, where the court says: 'No one pretends that intoxication is of itself an excuse or palliation of a crime. If it were, all crimes would, in a great measure, depend for their criminality on the pleasure of their perpetrators, since they may pass into that state when they will. But it is argued that, because intoxication produces a state of mind that is excited by provocation, therefore the crimes committed under the influence of such intoxication and provocation are less criminal than when committed in a state of sobriety under the same provocation. We are very sure that no statute will ever announce such a rule, and we are not authorized to announce it in interpreting the statute.' The courts allow evidence of intoxication to be given to the jury, and the reason is very well stated by the court in case of the *People* v. *Rogers*, and has been very well stated by the counsel here to-day. It is proper for the consideration of the jury in several aspects: First, as bearing upon the question of intent. A man may be so drunk as to be incapable of forming any intent. That may be the case. What would be the law in such a case is unnecessary to discuss any further than I have done. Evidence in regard to intoxication is admitted for the purpose of giving the jury an opportunity to say how much weight is to be attached to expressions made immediately before and after the occurrence. The evidence of this man's intoxication is material, in determining what weight or importance is to be attached to the act of sticking the knife in the counter and the declaration accompanying it, or the expression used in the sleigh, 'the man is dead anyhow,' or to the expression used by him, 'I will dance at the wake.' Such expressions would have more force with the jury if made by a sober than by an intoxicated man. Courts allow such evidence to come in and to be considered by a jury; but although they allow it to be considered, they declare intoxication is no excuse for crime, unless it exists in the degree before mentioned. Now, gentlemen, among the various propositions which have been submitted by the counsel for the prisoner, I find one or more to this effect, — that to convict the prisoner of murder in the first degree, it is necessary for the prosecution to show affirmatively, beyond reasonable doubt, that the prisoner had an intent to kill the deceased. Of course that is so, and I have so charged. It must be shown beyond a reasonable doubt that he intended to kill, but if the intention exists a moment before the blow is struck, as I have already told you, it is enough. The other proposition, 'that the prosecution must affirmatively prove that the prisoner's mind was in a condition to form the intent,' is involved in the general propositions which I have submitted to you. The other propositions in regard to intoxication, and in regard to the purpose for which evidence of intoxication is allowed to go the jury, also in regard to the presumptions of the law, and the general proposition that the prisoner is entitled to every reasonable doubt, I have already charged."

(*b*) **Drunkenness — Homicide — Insanity — People v. Robinson — In the Trial Court.** — In *People* v. *Robinson*,[1] the prisoner, Henrietta Robinson, was charged with murder by poisoning. She was tried in the Court of Oyer and

[1] 1 Park. 649 (1854).

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Terminer for Rensselaer County, New York, and the judge charged the jury as follows: —

"Timothy Lanagan died on the 25th day of May, 1853; he died of poison; was this poison administered by the accused? This is the first question which will require your attention. If the evidence fails to satisfy you of this fact, your duty will here terminate. You will pronounce your verdict of acquittal without reference to the other questions in the case. But I have not understood the counsel for the defence as contending that the evidence justifies such conclusion. The accused was in possession of the article which, upon *post mortem* examination, was found in the stomach of Lanagan. Some ten days or a fortnight before she had purchased of Mr. Ostrom, the druggist, two ounces of arsenic. About one o'clock on the day of the death, she went into Lanagan's house, where she found the family, Lanagan, his wife, and Catharine Lubee, at dinner. She sat down, upon invitation, to eat an egg and a potato. Soon after Lanagan left the table and went into the grocery in the front room of the house. The accused then proposed to Mrs. Lanagan and Miss Lubee, to use the expression of the witness herself, that they should drink beer from her. They at first declined, but being urged they at length consented. She then proposed, in order to make the beer more palatable, to put sugar in it, and requested Mrs. Lanagan to procure it. Mrs. Lanagan, yielding to her request, procured from the grocery some fine white sugar in a saucer; she then went back to get the beer, leaving the accused and Miss Lubee in the room. When she returned she found the accused walking the room with the saucer of sugar in her hand, and she also says she observed that she held in her thumb and finger a small white paper folded. Two glasses were provided and the beer poured out. There was not enough to fill them. The accused insisted that they should be full. Mrs. Lanagan returned to the grocery for more beer. When she went back the accused was putting the sugar into the glasses. They were filled, and Mrs. Lanagan and Miss Lubee sat down at the table to drink. Mrs. Lanagan says she observed upon the surface of the beer a white scum, and thinking it might be dust that had fallen upon the sugar while standing in an open box in the store, she took a teaspoon to remove it; that while in the act of so doing, the accused, who was standing by, arrested her hand, and took the teaspoon from her, saying that was the best part of it, and that it would do her good. At that moment Mrs. Lanagan was called to the grocery by her husband. She remained there, but her husband came, and he and Miss Lubee drank the beer. He died at seven o'clock the same evening, and Miss Lubee died at four o'clock the next morning.

"This branch of the case depends entirely upon the testimony of Mrs. Lanagan. From the nature of the case there could be no other evidence. Had she imbibed the fatal draught instead of her husband, as was at first intended, there would have been no one left to detail the circumstances. The credibility of Mrs. Lanagan has not been questioned. If her story is to be believed, it would seem to leave no room for doubt. You cannot hesitate, however painful it may be, to come to the conclusion that it was the accused, and no one else, who administered the arsenic which produced the death of Lanagan.

"Assuming that your mind will be brought to this conclusion, I proceed to bring your attention to another important inquiry — an inquiry which, from its very nature, is far more difficult. The inquiry is, whether at the time she committed

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the act, the accused was in a condition to render her legally responsible for crime? — and this depends upon the question whether, at the time, she was in a state of mind which enabled her to know that what she did was wrong. If at the moment of mingling that cup she knew that she was doing wrong, and deserved to be punished for it, then, whatever else there may be in the case, before the law, she is answerable for the act as a crime. The evidence of her conduct before and after is of no importance, except as it reflects light upon her condition at the fatal hour when she committed the deed for which she is now before you to answer.

"It seems that about the period in question, the accused had indulged very freely in the use of intoxicating drink. Mr. Ostrom says that when she was at his store on Saturday evening, which must have been the 21st of May, she was quite intoxicated. Mr. Brownell says that when she came to his office in the early part of May, he thought her the worse for liquor. Mr. Cox says she frequently purchased liquor at his store, sometimes taking it there, and sometimes taking it home with her. Mrs. Lanagan says that, early in the morning of the 25th of May, she came to the grocery and procured a quart of beer which she took home with her, and as the deceased was living alone, it may be presumed that she applied it to her own personal use. At eight o'clock she sent old Mr. Haley to borrow $2 of Mrs. Lanagan, and before he left, she came herself. About eleven o'clock she was there again. It is not proved that she drank then, but she went into the room back of the grocery, where there were several men, and engaged in noisy, boisterous conversation. The fact that she was found in such a place, and in such company, furnishes some ground for the belief that she was then under the influence of liquor. Mrs. Lanagan says that, perceiving the noise, she went into the room and told her to go home — that it was no place for her to be there among such a set of men. At one o'clock she came again, and then the poison was mingled with the beer. Shortly after she left, she sent Haley for Mrs. Lanagan to come to her house. It is the theory of the prosecution that, having failed in procuring Mrs. Lanagan to drink the poison, it was her object to get her over to her house, so that she might yet execute her purpose. But of this, of course, there is no proof. About three o'clock she was at the grocery again, and asked for beer. Mrs. Lanagan says she told her she did not need any, and declined to let her have it. The answer and the conduct of Mrs. Lanagan at this time, indicate pretty strongly, I think, the condition in which she was at the time; or, at least, what Mrs. Lanagan thought of her condition. While there, Lanagan came home sick, and Miss Lubee had already taken to her bed.

"Upon this state of facts, the question presents itself whether at the time she committed the fatal deed, the accused was intoxicated? That she was greatly excited there is no reason to doubt. This is sufficiently evident from the fact of her having visited the grocery so frequently. That she drank freely is, I think, also evident. Was she, then, intoxicated?

"It is my duty to say to you, gentlemen, that if she was intoxicated, even to such an extent that she was unconscious of what she was doing, still the law holds her responsible for the act. It is true to constitute the crime of murder there must be killing of a human being with a premeditated design to effect death. But this design need not be proved. Where the act is committed, the law im-

putes the design. It proceeds upon the sensible principle that a man may reasonably be presumed to intend to do what in fact he does. Thus, if a man will draw from his pocket a pistol and deliberately shoot down a fellow-man, the law, without further proof, adjudges that it was in his heart to kill him. If he would excuse himself he must show affirmatively that he had no such guilty purpose. Then, and then only, can he be exonerated from guilt. If it appear that by the inscrutable visitation of Providence the faculties of his mind had become so disordered, that he was no longer capable of discriminating between right and wrong in respect to the act he has committed, then the law, in its justice, pronounces him innocent of the crime. But if his derangement is voluntary; if his madness be self-invited, the law will not hear him when he makes his intoxication his plea to excuse him from punishment.

"If, then, the accused mingled poison in the beer that was drank by Lanagan, the law charges her with a design to kill him, and though she may have been excited by drink at the time, even to such an extent as not to know what she was doing, she must answer for the consequences. Her self-inflicted insanity must not be allowed to avail her for defence. The law imputes to her still a murderer's intent.

"But it is urged, in behalf of the defence, that the accused was not merely intoxicated; that she was insane. If this be so — if by the visitation of God she was bereft of reason as to be unconscious of the character of the act she was committing, there is an end of her accountability. But before you can allow this ground of defence to prevail, you must be satisfied of its existence by affirmative proof. Every person is presumed to be sane; when the contrary is asserted it must be proved. The presumption of sanity must be overcome by satisfactory countervailing evidence.

"Upon this branch of the case it is your duty to examine the facts in the case with the most diligent care, and here the question of motive may well be considered. It has been urged by the counsel for the defence that there could have been no possible motive for destroying the lives of Lanagan and Miss Lubee; and that the absence of motive furnishes a strong ground for inferring that the act must have been committed in a state of insanity. The existence or want of motive is always a legitimate subject of inquiry. In cases depending upon circumstantial evidence it is sometimes of vital importance. But it is never indispensable to a conviction that a motive for the commission of the crime should appear. The law imputes malice to the act so that the very proof of the killing furnishes also presumptive evidence of malice. And yet, while the prosecution is relieved, by this legal presumption, from proving an actual motive for the commission of the offence, the absence of such proof is often an important consideration for the jury in determining the effect to be given to the other evidence in the case. But it is contended, on the part of the prosecution, that there is proof of a state of feeling which, considered in connection with the state of mind exhibited by the accused at about the period in question, relieves the case of this objection. It appears that sometime during the spring there had been a dance at Lanagan's. Though not one of the party, the accused went there and became engaged in an altercation with one Smith, and angry words and loud conversation ensued. If it be true, as has been assumed throughout the trial, that the accused is of gentle birth, and had once moved in the higher and more

refined walks of life, what a painful illustration she presents of the rapid descent which a woman makes to the lowest depths of degradation and vice, when she once consents to take leave of virtue and innocence! Here we have this fallen woman, who is described to us as possessing high accomplishments and ladylike manners, voluntarily mingling with the parties to a grocery dance, engaging in a brawl with one of the party, and carrying the quarrel so far as to present her revolver and threaten to shoot him. To quell the disturbance she was requested to leave the house, and finally Mrs. Lanagan led her home. This occurrence seems to have stung her pride, for, one or two mornings after, we find her returning to the grocery, before Lanagan was out of bed, and she then, as Mrs. Lanagan says, commenced abusing her, saying she was a very mean woman to keep a set of rowdies about her house to insult her when she came there. Her language was so loud and violent that Lanagan got up, and coming into the grocery, ordered her to leave, which she refused to do, until Mrs. Lanagan again interfered and induced her to go home. The result of this quarrel was, that she did not again return to Lanagan's for some three weeks, after which she again renewed her visits. It is the theory of the prosecution that these occurrences left a sting rankling in the bosom of this woman, which needed but the excitement, of which she was the subject on the 25th of May, to arouse her to such a degree as to make her resolve upon the destruction of those who had become the subjects of her resentment. Certainly, these circumstances would furnish to a sound mind but a slight motive for the commission of such a crime. How far they would operate on an irascible temperament like hers, when greatly excited by stimulants, and perhaps other vitiating causes, it is for you, gentlemen, to judge.

"There is another feature of this case which may have some bearing upon the question under consideration, to which I would direct your attention. It is the manner in which the deed was accomplished. We see no outburst of passion, but every thing is apparently cool and orderly. First, the proposition to drink the beer, and that insisted on; then, obtaining the sugar, the arrangements to mix the poison with it, while the glasses were being filled; then the refusal of the accused herself to drink, and her effort to prevent any of the contents of the glass from being removed. These are characteristics which may, perhaps, shed more light upon the state of this woman's mind at the time.

"There is another class of evidence bearing upon the question of insanity to which you will not fail to give the attention which you think it deserves. I allude to the conversation of the accused a short time previous to the 25th of May. This evidence is found chiefly in the testimony of the young sewing girl, Mary Jane Dillon, who became acquainted with her in March previous. The testimony of Anthony Goodspeed belongs to the same class. I will not recapitulate this evidence. It cannot but be fresh in your memories. There certainly must have been in the statements made to Miss Dillon, a strange commingling of truth and falsehood; the latter predominating. Whether the tales she told were the vagaries of a distempered imagination, or the inventions of her fancy, designed to amuse her youthful and newly acquired friend, it is for you to inquire. There was, too, something exceedingly strange at times in her conduct, especially when in the morning she came in her night clothes to the residence of Miss

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Dillon and borrowed her dress. It will be your duty to satisfy yourselves as to the state of mind to which this conduct is to be attributed.

"It certainly was not strange that the accused and this young girl should be mutually pleased with each other. The accused, with an ardent temperament which demanded society, was so situated that she was compelled to live alone; she had sought companionship among those who had no tastes or sympathies with her own, and whom she regarded, probably with contempt. It was a relief to her solitariness, therefore, to meet with Miss Dillon; a young witless, imaginative girl, with whom she could at least talk. There was much, too, in the air and manner and romantic stories of the accused, to please the taste for romance which this young girl seems to have possessed. She says she was pleased with her conversation, though she admits that her ear was sometimes offended by expressions both of profanity and obscenity. How far the testimony of this girl tends to establish the defence, it is for you to consider. It is upon this testimony, supported, as it is, by some other kindred but less important evidence, that the counsel for the defence chiefly rely.

"The theory of the defence is, that the accused had become apprehensive that she was about to be abandoned by one who had been her friend and supporter, and that this apprehension operating on her nervous, excitable temperament, with the recollection of her own former position, from which she had so sadly fallen, had unhinged her mind, and that the eccentricities which marked her conduct about the period to which our inquiries relate, were but the outbursts of incipient madness. To sustain this theory the testimony of Mr. Brownell was introduced, to whom it seems, early in May, the accused had described her griefs and apprehensions.

"Thus far I have only noticed the testimony which relates to occurrences which happened before the arrest of the accused. What her conduct was afterwards is only important as it sheds light on her previous condition. Her conduct after she was committed to prison was indeed strange. How far this conduct was produced by the enormity of the charge preferred against her, and a sense of the condition in which she found herself; and how far by being suddenly deprived of the stimulants in which she had evidently been indulging so freely; or how far by disordered intellect; are questions which I suggest for your consideration. In this connection, too, it will be proper to consider the opinions of the two physicians who had the opportunity of seeing her in jail, and who say that, in their opinion, she was not rational. Such opinions are allowed to be given in evidence not as by any means controlling your own opinions, but to be considered by the jury, who are to give them such weight, as in their judgment, having regard to the experience, and opportunities for observation which those who express the opinions have enjoyed, such opinions deserve.

"And now, gentlemen, I have noticed what I regard as the principal points and features of the case before us. I have not thought it fit to review at length the evidence presented, as I am sure that it is all fully within your recollection.

"Here my duty ends, and yours begins. I am conscious how imperfectly I have discharged my duty, and yet it has been my single aim to administer the law with a steady and unswerving hand. In the discharge of your duty be faithful to your own high obligations. Deal justly with this poor, unhappy woman, whose destiny is now committed to your hands. Deal mercifully with her, too. This

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is your privilege. The law allows every well-grounded doubt to avail for her acquittal. If after a full consideration of all facts in the case no such doubt rests upon your minds, you must not hesitate, though it be with anguish of heart, to pronounce her guilty. But if you can, after all, say that you are not satisfied of her guilt, it will be your agreeable duty to pronounce a verdict of acquittal."

The jury found the prisoner guilty.

(*c*) **Drunkenness — Homicide — Insanity — People v. Robinson, on Appeal.** — Convicted below, Henrietta Robinson appealed to the Supreme Court, alleging, among other things, error in the instructions of the trial court on the subjects of drunkenness and insanity. But the judgment was affirmed by the Supreme Court.[1] "In charging the jury," said PARKER, P. J., "the learned judge made use of the following expression: 'It is my duty to say to you, gentlemen, that if she (the prisoner) was intoxicated to such an extent that she was unconscious of what she was doing, still the law holds her responsible for her act.' And afterwards in other portions of the charge the judge said: 'Though the prisoner may have been excited by strong drink at the time of the alleged offence, even to such an extent as not to know what she was doing, she must answer for the consequences; her self-inflicted insanity must not be allowed to avail her for her defence. The law still imputes to her a murderous intent.' Exceptions were taken by the prisoner's counsel to each of these parts of the charge, and their alleged erroneousness constitutes the first ground on which they now rely for a reversal of the proceedings of the Oyer and Terminer.

"If the proposition that the law would hold the prisoner responsible for her act, though she was intoxicated to such an extent that she was unconscious of what she was doing, stood alone and unexplained by the context, so as to be distinctly presented for adjudication, I should have no hesitation in saying that it could not be sustained, for by conceding the unconsciousness of the prisoner it contains within itself a relinquishment of the legal presumption, that the prisoner must have intended the natural consequences of her own acts. It would, therefore, condemn the act as the result of premeditated design, when it concedes on its face that none existed. The proposition standing by itself, would apply to a person reduced by intoxication to a state of insensibility; and would impute to him a premeditated design to take life, if he should by chance kill a person by stumbling against him or by rolling against him in a gutter. It would convict of murder a drunken mother, who should smother her infant in her embrace or by overlying it in bed, however strong might have been her affection for her offspring. It is hardly necessary to say, that no sound legal construction could bring such a transaction within the statute definition of murder, which requires, in all cases, like that now before us, a premeditated design to effect death.[2] But it is apparent that it was not the intention of the judge to lay down any such proposition. The portion of the charge excepted to must be considered with reference to the facts of the case, and in connection with other facts of the charge which are necessary to a proper understanding of its import and meaning. The offence charged was that of murder by administering poison, the de-

[1] People *v.* Robinson, 2 Park. 235 (1855). [2] 2 R. S. 657, sect. 5.

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fence principally relied upon was insanity. It was not claimed, nor was there any evidence to warrant a claim, that the prisoner was so much intoxicated as to be bereft of her senses or unconscious of what she was doing. On the contrary, design was apparent throughout the whole transaction. Whether that design was conceived and entertained by a mind, sober or excited by strong drink, was not material, and whether by a mind sane or insane, was a proper subject for the consideration of the jury. The whole charge taken together shows, I think, that when the judge said the law would still hold the prisoner responsible for her act, though she was intoxicated to such an extent as to be unconscious of what she was doing, he had reference, not to a state of insensibility, but to a state of excitement or madness, the immediate consequence of indulgence in strong drinks. For after putting a case by way of illustration, inconsistent with the construction claimed by the prisoner's counsel, and then stating that if it appeared that by the inscrutable visitation of Providence the faculties of a man had become so disordered that he was no longer capable of discriminating between right and wrong in respect to the act he had committed, then the law would pronounce him innocent of crime, he added: 'But if his derangement be voluntary — if his madness be self-invited — the law will not hear him when he makes his intoxication his plea to excuse him from punishment.' The whole of this charge taken together and the explanation contained in the other part of the charge excepted to show very satisfactorily that the judge intended to charge, that self-inflicted insanity, the immediate consequence of drink, would constitute no defence; and it could, I think, have been understood by the jury in no other sense.

"To that extent the rule has been long established at common law. 'A drunkard,' says Lord Coke, 'hath no privilege thereby; but what hurt or ill soever he doeth, his drunkenness doth aggravate.'[2] Russell says,[3] with respect to a person *non compos mentis* from drunkenness, a species of madness which has been termed *dementia affectata*, it is a settled rule, that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime, but, on the contrary, must be considered an aggravation of whatever he does amiss.' '*Nam omne crimen ebrietas incendit et detegit*,' has become a maxim of the law.[4] The rule is otherwise when the drunkenness is not voluntary; as if a person by the unskilfulness of his physician, or by the contrivance of others, and without any volition on his own part, eat or drink such a thing as causes frenzy, this puts him in the same condition as other insane persons, and equally excuses him,[5] and in cases of delirium tremens, or mania potu, the insanity excuses the act, the frenzy being, not the immediate effect of indulgence in strong drink, but a remote consequence superinduced by antecedent drunkenness.[6] These general principles are fully recognized in the modern English cases,[7] and also in decis-

[1] 4 Coke, 125; 1 Co. Litt., 247; 1 Hale, 31; 4 Black. Com. 26.
[2] Co. Litt. 247.
[3] 1 Russ. on Cr. 7.
[4] 4 Black. Com. 26.
[5] Barb. Cr. L. 268.
[6] Barb. Cr. L. 268; Dean's Med. Jur. 581; 3 Am. Jur. 5, 20.
[7] Rex *v.* Patrick, 7 C. & P. 145; R. *v.* Meakin, *Id.* 297; Burrow's Case, 1 Lewin C. C. 75; Rennie's Case, *Id.* 76; R. *v.* Thomas, 7 C. & P. 820.

ions in this country.[1] In the latter case Mr. Judge STORY reiterates and approves all the rules above quoted at common law, therefore, there can be no doubt of the correctness of the charge on this point.

"But it is supposed our statute has so far changed the common-law definition of murder as to be inconsistent with the proposition, that drunkenness does not excuse, but aggravates the crime.

"In those States in which murder has been divided by statute into degrees, it has been held, that if the accused was intoxicated to such an extent as to deprive him of the power to form a design, the offence would be no more than murder in the second degree. In Pennsylvania, murder in the first degree, is where the offence is perpetrated by means of poison, or by lying in wait; or in perpetrating or attempting to perpetrate any arson, rape, robbery or burglary, or by any other wilful, deliberate and premeditated killing, and is punishable with death. Murder in the second degree, in that State embraces 'all other kinds of murder,' and is punishable by solitary confinement, at labor in the penitentiary.[2] In that State it was held in the case of *Haggerty*, tried at the Lancaster Oyer and Terminer in 1847, that the prisoner could not be convicted in the first degree, if deprived by voluntary intoxication of the power to form a deliberate design to perpetrate the act. The very able charge of the learned president judge in that case will be found reported at length in Lewis' U. S. Cr. Law.[3] A similar opinion was expressed by Mr. Justice DANIEL in *Commonwealth* v. *Jones*,[4] the statute of Virginia, on the subject of murder being substantially like that of Pennsylvania.[5] In Tennessee also, where a like division of murder into degrees is made by statute, it was held in *Haile* v. *State*,[6] that in all cases where the question is between murder in the first degree, and murder in the second degree, the fact of drunkenness may be proved, to shed light upon the state of mind of the defendant, so as to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by adequate provocation; and the degree of drunkenness need not be such that it deprives the defendant of the capacity to form a deliberate and premeditated design to take life. All these cases proceed upon the principle expressly declared by Judge REESE in *Swan* v. *State*,[7] that although drunkenness, in point of law, constitutes no excuse or justification for crime, still when the nature and essence of a crime are made to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness may be a proper subject for the consideration of the jury.

"All these decisions to which I have referred, as being made in States, where, by statute, murder is divided into two degrees, were made in cases where death was caused by violence and where it became necessary to ascertain whether the

[1] McDonough's Case, Ryan Med. Jur. 294; cases cited in 1 Beck's Med. Jur. 627; Bennett *v.* State, Mart. & Yerg. 133; Cornwell *v.* State, *Id.* 147; Schaller *v.* State, 14 Mo. 502; 6 Law Rep. (N. S.) 563; 1 Wright's Ohio Rep. 30; 8 Ired. 330; Wilson's Case and Birdsall's Case, reported in Ray's Med. Jur., sects. 405, 406; Kelly *v.* State, 3 Smed. & M. 518; U. S. *v.* Clarke, 2 Cranch C. C. 158; U. S. *v.* McGlue, 1 Curt. C. C. 1; State *v.* John, 9 Ired. 330; U. S. *v.* Drew, 5 Mason, 28.

[2] Penn. Stat. 1784.

[3] p. 402.

[4] 1 Leigh, 612.

[5] Virginia Stat. 1796.

[6] 11 Humph. 154.

[7] 4 Humph. 136.

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act was deliberate and premeditated, so as to fall within the first degree. I am by no means prepared to hold that it might not be proper under our own statute to show the degree of drunkenness of the accused for the purpose of ascertaining whether he had the power to premeditate the act, though in the case of *Haggerty* above cited, LEWIS, J., expresses the opinion that it is only in those States where murder is divided into degrees, that drunkenness can be set up as a defence.[1] Our statute has not divided the crime of murder into degrees, but it has limited and defined the offence; and a case cannot be brought within the first subdivision of the section unless there be a premeditated design, in fact, to effect the death of the person killed or of some human being. The proposition laid down in *Swan* v. *State* seems to me to be incontrovertible and to be universally applicable, viz.: that where the nature and essence of the crime are made by law to depend upon the peculiar state and condition of the criminal's mind at the time with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to excuse or mitigate the offence, but to show that it was not committed. There are many cases recognizing this distinction.[2]

"But it is only in cases where death is caused by personal violence that it becomes necessary even in those States where murder is divided into degrees to inquire whether the act was deliberate and premeditated, for the purpose of ascertaining the degree. For in all these States "poisoning" is specially placed under the head of murder in the first degree. Even in Pennsylvania, Virginia, and Tennessee, the defence of drunkenness could not, if proved, reduce the offence to murder in the second degree. The very term "poisoning" implies design, and could not be criminally committed by a person in such a state of mind as to preclude premeditation. No case could possibly occur in which the act could be perpetrated by a person in a state of insensibility from intoxication; and the degree of drunkenness, if less than that, would not be a material subject for inquiry, for if there were enough mind left to conceive and perpetrate the act, there would be enough to subject the offender to legal responsibility. If, in the case before us, the prisoner mingled arsenic with the drink of Lanagan for the purpose of effecting his death, or the death of any other person, she was guilty of murder, though excited, no matter to what degree, by intoxication at the time. There was no pretence that the mingling of the poison was the result of accident, but the most satisfactory evidence to the contrary. A person, stimulated even to the highest pitch of frenzy by strong drink, may still be capable of planning and executing a criminal design, and in such case, it is quite clear, that neither under our statute, any more than at common law, can drunkenness be alleged as an excuse for the act.

"If I am right therefore in the construction I have put upon the language of the charge, no error was committed." The judgment was affirmed.

1 Lewis Cr. L. 405.

2 Rex *v.* Grindley, 1 Russ. on Cr. 7, subsequently questioned in Rex *v.* Carroll, 7 C. & P. 145; Reg. *v.* Moore, cited 6 Law Rep. (N. S.) 561; Marshall's Case, 1 Lewin. C. C. 76; Reg. *v.* Cruise, 8 C. & P. 541; Pigman *v.* State, 14 Ohio, 555; Rex *v.* Thomas, 7 C. & P. 817; Rex *v.* Meakin, *Ib.* 297; Pirtle *v.* State, 9 Humph. 663; Pennsylvania *v.* McFall, Add. 257; Wharton's Law of Homicide, 369; Wharton's Cr. L. 92.

State *v.* Thompson.

(*d*) **Voluntary Intoxication — State v. Thompson.** — In *State* v. *Thompson*,[1] the defendant was convicted of murder in the first degree in killing one William McRavy and appealed to the Supreme Court. The opinion of LEONARD, J., who delivered the opinion affirming the judgment below, is as follows: "Appellant next urges that the verdict was contrary to the evidence. There was testimony tending to show not only that defendant committed the homicide at the time and place stated in the indictment, but also that he committed it with premeditation and deliberation. An effort was made by the defence to show that deceased committed suicide; that defendant was insane, and that he was drunk at the time. There was no proof tending to establish the fact of suicide; none to show insanity at the time, beyond that which is the immediate effect of excessive drinking. On the contrary, there was the testimony of many witnesses who saw the defendant for days prior to the homicide, establishing the fact that he was at all times conscious of his acts, and knew good from evil. Under such circumstances we need not repeat what has been so often decided by this court, that upon this ground the judgment of the court below will not be reversed. Third. Appellant claims that the court misinstructed the jury in a matter of law in this: At the instance of defendant's attorney, the court instructed the jury as follows: 'In every crime or public offence there must be a union or joint operation of act and intention or criminal negligence. That intention is manifested by the circumstances connected with the perpetration of the offence and the sound mind and discretion of the person accused. A person shall be considered of sound mind who is neither an idiot nor a lunatic, or affected with insanity, and who hath arrived at the age of fourteen years, or before that age, if he knows the distinction between good and evil. Drunkenness shall not be an excuse for any crime, unless such drunkenness be occasioned by the fraud, contrivance or force of some other person or persons, for the purpose of causing the perpetration of an offence.' At the instance of the district attorney, the court gave the following instruction to the jury: —

"'It is a well settled rule of law that drunkenness is no excuse for the commission of a crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defence whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, and for this purpose it must be received with caution.' Counsel for appellant urge that the last instruction conflicts with the former upon the question of insanity. We do not think so. The first treats of settled insanity, the last of temporary insanity, produced immediately by intoxication.

"An eminent writer upon criminal law thus states the established principles upon this subject: —

"'Settled insanity, produced by intoxication, affects the responsibility in the same way as insanity produced by any other cause. Temporary insanity, pro-

[1] 12 Nev. 140 (1877).

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duced immediately by intoxication, does not destroy responsibility where the patient, when sane and responsible, made himself voluntarily intoxicated. While intoxication *per se* is no defence to the fact of guilt, yet, when the question of intent or premeditation is concerned, evidence of it is material for the purpose of determining the precise degree.' [1]

"Another author says: 'When a man voluntarily becomes drunk, there is the wrongful intent; and if while too far gone to have any further intent, he does a wrongful act, the intent to drink coalesces with the act done while drunk, and for this combination of act and intent he is liable criminally. It is, therefore, a legal doctrine, applicable in ordinary cases, that voluntary intoxication furnishes no excuse for crime committed under its influence. It is so, even, when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity.'[2]

"In *United States* v. *McGlue*,[3] the court says: 'If a person suffering under delirium tremens is so far insane as I have described to be necessary to render him irresponsible, the law does not punish him for any crime he may commit. But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been.' [4]

"The testimony in this case shows that appellant, prior to January 2, 1877, drank very considerably, and sometimes excessively for several years; that a year or two before that time he had the delirium tremens. But there is no testimony tending to show that he was so afflicted at the time of, or within two years before the death of McRavy. All the testimony shows that he drank so much as to be under the influence of liquor for several days prior to January 2. And on that day he was so affected. The testimony further shows, that prior to the homicide he was conscious of what he did, although under the influence of liquor. Under such circumstances, any instruction upon insanity, beyond that which is the immediate effect of intoxication, would have been improper, and would have been harmless had it been given, because there was no evidence to which it could have applied.

"Temporary insanity produced by intoxication does not destroy responsibility if the party when sane and responsible made himself voluntarily intoxicated. We are satisfied the jury must have understood the instruction in that sense, and that under the testimony it made no difference if they did not.

"This instruction was copied verbatim from one given in the case of *People* v. *Lewis*,[5] and also in *People* v. *Williams*,[6] and it was declared correct in each case.

"We think the instructions taken together fairly present the law of the case."

(*e*) **Perjury — Intoxication no Defence — People v. Willey.** — In *People* v. *Willey*,[7] tried in New York in 1823, the prisoner was charged with perjury in swearing out a warrant. His counsel offered to prove that he was intoxicated at the time he came before the magistrate, and obtained the warrant and stated that such a defence had been admitted by Chief Justice SPENCER in a case of perjury. WALWORTH, Circuit Judge: "It is a general rule in criminal prosecu-

[1] Wharton on Homicide, sect. 587, *et seq.*
[2] Bishop's Crim. Law, sect. 400.
[3] 1 Curtis, C. C. 13.
[4] Cornwell *v.* State, Mart. & Yerg. 147.
[5] 36 Cal. 531.
[6] 43 Cal. 345.
[7] 2 Park. 19.

tions that the intoxication of the accused is no defence and forms no excuse for the commission of a crime. It has been frequently so decided even in the case of murder, though Judge VAN NESS once permitted the fact of intoxication to be proved to rebut the presumption of malice where a man had been killed in a sudden affray, and to show that the act was the effect of sudden passion and not of premeditation. But the correctness of that decision has been much doubted. This can be nothing in a case of barefaced perjury like the present to take it out of the general rule. There must be some mistake about the case said to have been decided by Chief Justice SPENCER. But even if he did so decide, it was contrary to the uniform decisions of courts in relation to such a defence and therefore cannot be the law." The prisoner was convicted.

(*f*) **Blasphemy — Intoxication no Defence — People v. Porter.** — In *People* v. *Porter*,[1] the prisoner was indicted in New York for blasphemy. His counsel offered to prove that he was so beastly drunk that he did not know what he said: WALWORTH, J.—"That is no excuse, and only aggravates the offence."

(*g*) **Arson — Intoxication no Defence — People v. Jones.** — In *People* v. *Jones*[2] the prisoner was indicted for arson. In charging the jury the Judge said: "It was urged and was attempted to be proved that at the time he was too drunk to know what he was about. Now, though the rule is well established that intoxication voluntarily imposed is no excuse for or extenuation of crime, yet it is proper to consider it in cases where the intention is the main element of the offense, as in homicide, whether there is an intention to kill, and in passing counterfeit money whether it was known to be counterfeit. In such cases, it may with great propriety be asked whether the mind was in a condition to have the requisite intention or knowledge? But there was no such element in this case, for when it was clearly made out, as it was here, that the firing the house was wilfully done, it was of no consequence what was the motive for, or the intention of the act, nor was it even necessary to prove that the prisoner knew that the building was inhabited. The fact that it was so was all that the law required to be made out. The motive of the prisoner then for perpetrating the offense, or his condition of intoxication, were alike excluded from consideration by the language of the statute defining the crime. How far it might be just or wise to establish so severe a rule was not for the court or jury to determine; it was enough for them that the law, which it was their duty to administer was thus written."

§ 60. **Does Drunkenness Aggravate an Offence.**— There are some judicial *dicta* in the reports that drunkenness is an aggravation of an offence.[3] In *McIntyre* v. *People*,[4] the court said to the jury: "Drunkenness is no excuse for crime, but rather an aggravation of it." In passing upon this instruction the Supreme court said: "We are aware that text-writers frequently say that drunkenness is no excuse for crime, but rather an aggravation of the offence. That it is no excuse is cer-

[1] 2 Park. 14 (1823).

[2] 2 Edm. Sel. Cas. 88 (1849).

[3] Com. *v.* Hart. 2 Brewst. 546 (1868). U. S. *v.* Forbes, Crabbe, 559 (1845); U. S. *v.* Claypool, 14 Fed. Rep. 127 (1882) and cases *passim*.

[4] 38 Ill. 515 (1865).

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tainly true, but that it should be held in law to aggravate crime is not, we conceive, a correct proposition. In ethics it is no doubt true, but how it can aggravate a wilful, deliberate murder perpetrated with malice preconceived, and deliberately perpetrated, we are unable to comprehend. Or that it will aggravate what, in law, is only manslaughter, if perpetrated by a sober man, into murder if committed by a drunken man, is not, we conceive, true. Or that it increases a minor offence to one of a higher grade is not true. Whilst it is not ground for reversing a judgment, it is perhaps calculated to prejudice the defendant's case, and a court might well omit to give it, or at least to modify it before it should be given." In *Ferrell* v. *State*,[1] it was said: "The counsel for appellant asked of the court the following instructions, viz.: 'While intoxication is no excuse for crime, yet the jury must, in this case, take into consideration the intoxication of the defendant in determining whether he was in a condition to entertain a malicious design.' And also: "In considering the attack (if you find that any was made by the defendant on Scroggins), you will take into consideration the physical condition of the defendant, and whether from that consideration he was physically unable to use the hoe handle in a dangerous manner.' Both of which the court refused, without pausing to determine whether these instructions were in all respects strictly accurate, or whether they should have been given in the precise form in which they were asked; for be this as it may, we think they were entirely sufficient to call the attention of the court to the phase of the case suggested by them; and if they should not have been given in the precise form in which they were drawn, to which, however, we see no serious objection, such instructions as were appropriate and suitable to the aspect of the case suggested by them should have been given. This, however, was not done. The court not only refused to give the charges asked, but instead thereof instructed the jury, 'that drunkenness is no excuse or justification, or even palliation for crime, but must be considered rather an aggravation of the offence, and you will apply this principle of law to this case.'

"The erroneous instruction given by the court, to which we have heretofore referred, confounding to a great extent the distinction between the offences of murder in the first and murder in the second degree, rendered it still more essential, in view of the facts before the jury, that they should have been correctly instructed upon the points suggested in these charges asked by appellant. But as we have said, the court, instead of doing this, told the jury that the condition of the defendant at the time of the homicide, the result of intoxication, was an aggravation of the offence, and should be regarded by the jury — thus in effect telling them if the defendant was intoxicated he might properly be convicted of a higher grade of offence, than the facts otherwise required; for it will be observed it is the offence and not its penalty which the court tells the jury is aggravated by appellant's intoxication. It is needless for us to say that the law of this State gives no warrant for any such doctrine. While intoxication is certainly no excuse, much less justification for crime, it is a startling idea that the bare fact of one being in this condition when the homicide is committed converts murder in the second into murder in the first degree, or will authorize if not require the jury to impose the penalty of death or confinement for life instead

[1] 43 Tex. 503 (1875).

of a term of years. This would be directly the reverse of the rule laid down by the Code, and would make the fact that the homicide was committed when the perpetrator was incapable of a deliberate intention and formed design to take life, or do other serious bodily injury for want of a sedate mind, an aggravation instead of a mitigation of the heinousness of the offence.

"The correct rule upon the subject is that, although drunkenness neither aggravates nor excuses an act done by a party while under its influence, still it is a fact which may affect both physical ability and mental condition, and may be essential in determining the nature and character of the acts of the defendant as well as the purpose and intent with which they are done. Evidently, therefore, the fact of intoxication at the time the matter in question occurs may be a fact of little or no significance, or of the utmost importance, as it may connect itself with or be shown by the other facts to bear upon or enter into the case. As mere drunkenness does not relieve a party from responsibility for crime, when the nature and degree of it does not depend upon the state and condition of the mind at the time of its perpetration, the fact of intoxication is of little or no importance in cases of this kind.

"But in the class of offences in which criminality depends solely or to a certain degree upon the state and condition of the mind at the time the wrongful act is done, evidence of the state and condition of the mind, showing ability or inability of the mind to form or entertain a sedate and ordinate criminal design, is certainly of the most vital importance [1]

If the testimony shows the killing is upon an antecedent grudge or pre-existing malice; that it is the result of a sedate, deliberate mind and formed design, not engendered in an intellect clouded and confused by the fumes of liquor, or where the deceased, though slain by his assailant while the latter is under the influence of liquor, if it appear that it was taken merely to nerve himself to carry into execution his preconceived purpose, the fact of intoxication is of no importance, unless it aids to show more fully and distinctly the pre-existing design in furtherance of which it has been used. But where there is no evidence of premeditation, or any reason to suppose that the act done is not the result of design formed, as far as the mind may be capable of forming a design while in a state of intoxication to such an extent as to be incapable of cool reflection, the fact of intoxication is then of the utmost importance: for if it is clearly shown that the purpose to take life had its inception and was carried into effect while the defendant is in a state of mental confusion, whether from drink or other cause, which renders him incapable of calm reflection or of forming a deliberate design to take life, the offence committed cannot be murder in the first degree."

§ 61. **Exceptions to this Rule.** — To the general rule that voluntary drunkenness cannot excuse or palliate a crime, and evidence that the prisoner was intoxicated at the time is therefore irrelevant, there are several exceptions, viz.: —

§ 62. **Insanity Produced by Intoxication.** — Where the habit of intoxication though voluntary, has been long continued, and has produced disease which has

[1] People *v.* Eastwood, 4 Kern. 392; Bishop's Cr. Law, 300, *et seq.*

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perverted or destroyed the mental faculties of the accused so that he is incapable at the time of the commission of the alleged crime, on account of the disease, of acting from motive, or distinguishing right from wrong, when sober — in short, insane — he will not be held accountable for the act charged as a crime committed while in such condition.[1] In a Delaware case it was said: "The frenzy of drunkenness is no excuse, but there is a disease of insanity called *mania a potu* which may be the result of a condition of the system produced by habitual intoxication, and yet is not the frenzy of drunkenness. The condition of insanity must be taken with this qualification, that if there be a partial degree of reason, a competent use of it to restrain the passions which produced the crime, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then the party is responsible for his actions. The question must always be, did he or did he not know at the time he committed the act that he was doing an immoral and unlawful act?"[2] In another case in the same State, the judge said to the jury: "This brings us to what was said by the counsel for the prisoner in regard to his defence on the ground of *mania a potu*, and on that subject the court would say to the jury that if they were satisfied and believed from the evidence which they heard that the prisoner was at the time he committed the act affected with, and laboring under an attack of that disease or malady, and a brief and temporary madness or insanity, the result of protracted hard drinking of spirituous liquors for several weeks immediately preceding the commission of the act, and that he was thereby rendered positively unconscious of what he was doing, and incapable of distinguishing between right and wrong with reference to the act he was then committing, it would constitute in law a complete and entire defence to the whole prosecution and he should be absolutely acquitted. But that was a matter of defence not to be presumed, but must be proved like any other matter of defence in this case to the satisfaction of the jury; otherwise, it could be of no avail to the prisoner."[3] And in a later case in the same State it was said: "The rule of law being that drunkenness or intoxication is no excuse for crime, unless it is so great as to render the party unconscious of what he is doing at the time."[4]

In *Burrow's Case*,[5] tried at the York assizes of 1823, the prisoner being indicted for rape, urged that he was drunk. Holroyd, J., charged the jury as follows: "It is a maxim of law that if a man gets himself intoxicated, he is liable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong. If, indeed, the infuriated state at which he arrives should continue and become a lasting malady, then he is not amenable."

In *Rennie's Case*,[6] the prisoner was indicted for burglary, and urged in mitigation that he was drunk. Holroyd, J., to the jury: "Drunkenness is not insanity, nor does it answer to what is termed an unsound mind, unless the

[1] Fisher *v.* State, 64 Ind. 435 (1878); Bradley *v.* State, 31 Ind. 492 (1869); Cluck *v.* State, 40 Ind. 263 (1872); Carter *v.* State, 12 Tex. 500; Beasley *v.* State, 50 Ala. 149 (1873); O'Brien *v.* People, 48 Barb. 274 (1867); Erwin *v.* State, 10 Tex. (App.) 700 (1881); and see *post*, pp. 873, 874.

[2] State *v.* Dillahunt, 3 Harr. (Del.) 551 (1840).

[3] State *v.* Hurley, 1 Houst. Cr. Cas. 28 (1858).

[4] State *v.* Till, 1 Houst. Cr. Cas. 233 (1867).

[5] Lewin, 75.

[6] Lewin, 76 (1825).

The English Cases.

derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong."

In *Reg.* v. *Dixon*,[1] on an indictment for murder, it being proved that the prisoner, a soldier, shot his officer through the head, the only evidence for the defence being that the act was sudden, without apparent motive, and that he had been addicted to drink, and had been suffering under depression, SMITH, J., charged the jury that there was no evidence of insanity, and the prisoner was convicted and sentenced to death.

In *Reg.* v. *Leigh*,[2] tried before ERLE, C. J., in 1866, the prisoner was indicted for the murder of Harriet Harton. It appeared that he had been engaged in some service in China, and on his return home had married the sister of the deceased, and kept a public house. He was a young man of intemperate and irregular habits, and he had entered upon a course of senseless extravagance and dissipation, accompanied with a great degree of eccentricity and absurdity, but with no lack of sense or intelligence when he chose to exercise his faculties, and though he drank excessively it did not appear to affect his head at all. He rapidly ran through his business and was sentenced to imprisonment for wilful injury to his house. When he came out of prison a ruined man, he went down with his wife to Brighton to see his sister-in-law, the deceased, and it appeared pretty plainly from the sequel that his wife had complained to her sister of the prisoner's conduct, for on his appearance at the house of his sister-in-law, she showed the strongest aversion to admit him, an aversion mixed with apprehension. She knew that he went about armed, and she evidently regarded him as a dangerous character, for it appeared that on the day but one before the murder, he and his sister-in-law were heard talking together, and she was heard to say: "You shan't come in unless you are searched, for you have fire-arms about you;" to this he replied: "What is that to you, if I choose to carry them to protect myself?" She said to him: "You shan't come in here; you are a thief, a pirate, and a murderer." Upon this the prisoner turned to his wife, who was present, and said angrily: "Who told your sister, but you?" It was plain, therefore, that the deceased, at this time, regarded him with aversion and apprehension, and it appeared that it was in this spirit they parted. This was on the Tuesday, the 30th of January, and on the night of the 1st of February, shortly after midnight, the prisoner went to the house with a loaded pistol or revolver, and at once going up to his sister-in-law, standing within two feet of her, he fired at her through the body. She cried: "Save me, save me! I am killed!" he fired at her again and shot her in the body. His victim fell mortally wounded and died the next day; the prisoner, after his victim had fallen, left the house, and shortly after, two of the chambers of the revolver being still loaded, he resisted apprehension in the most determined manner, and attempted to shoot the police officer by whom he was arrested. In speaking to the police, he avowed premeditation. For the defence, insanity was set up; no medical witnesses were called to support it, and all the evidence to sustain it was that of one or two witnesses, who had known the prisoner for some years, and who spoke to senseless and eccentric extravagances of conduct, pulling his house to pieces, putting his horse in

[1] 11 Cox, 341 (1869). [2] 4 F. & F. 915.

Notes.

it (there being no stabling), and the like. But this evidence rather showed excesses, the result of self-indulgence, than any natural defect of intelligence, and for some of them, for instance, his pulling the house to pieces, he was prosecuted and punished. These acts, indeed, were mostly committed when he was drunk; and although an attempt was made to show that by drink he brought on fits of delirium tremens, the evidence failed to show either that this was permanent, or that there was a fit at the time. On the contrary, the medical evidence for the prosecution showed the prisoner's brain was not weakened, and expressions were proved to have been uttered by him which proved premeditation and design, and the medical officer of the government proved that while he was in jail he had shown no symptoms of insanity.

ERLE, C. J., thus summed up the case to the jury. "This," he said, "was an indictment for wilful murder, and the prosecution had called before them all the eye-witnesses of the fact, whose evidence clearly proved the commission of the crime, and our law was, that, if a person did an act which amounted to that offence, it was the duty of the jury to find a verdict of guilty, unless the prisoner could show that the crime was not one of murder. The evidence of the eye-witnesses clearly established that while the deceased woman, Mrs. Harton, was on her own premises, the prisoner went close up to her and twice fired at her, causing her death. The defence set up on the part of the prisoner was, that at the time of the fatal act, he was in a state of mind which prevented him from being responsible for his acts. Our law was, that a man was responsible for his acts, unless his mind was in a state which prevented him from being responsible for his acts. If he was conscious that he was doing wrong at the time when he committed the act, then he was responsible, The point was, the state of his mind at the time when he committed the act.

"Now, no doubt there was evidence of extraordinary conduct some months previous to the time of committing the act, and if he had done it when his conduct was of that kind, it would have been far more material for consideration; but no one was called to prove that after his confinement in the house of correction, he was subject to any fits of insanity. There was some evidence of fits, but there was nothing to show of what nature they were. There was evidence of drinking, but it did not make him drunk. There was extravagance of conduct, no doubt, but not of a mind so diseased as to be incapable of distinguishing right from wrong. He did no wrong to any one up to the time in question. He was his own enemy; his own enemy in respect to money and the management of his own affairs, and the destroying of his health. But there is nothing to show that he did not know all this to be wrong. The jury must all have met with persons who were unaccountably imprudent in their conduct, but who were well aware that the course they were pursuing was wrong and criminally wrong. The evidence to the conversation two days before the act in question, was worthy of consideration, as showing a probable motive for the act.

"The words then used were strong and powerful, and such as might raise ill-feeling; the evidence of the conduct before the fatal act, showed perfect sobriety, and apparent possession of sense. The evidence of the police inspector as to what occurred immediately after the fatal act, showed a consciousness of an act criminally wrong, for the prisoner was trying to resist arrest, showing that he was well aware that he had committed an act which in law was criminal. Then

there was the evidence of the police, which was very remarkable, and tended to show on the one hand, premeditation and consciousness of an act criminally wrong. Then the medical officer of the gaol gave most important evidence as to the state of the prisoner while he observed him, and stated that he had seen no traces of insanity. Supposing the prisoner's brain to have become weakened by repeated attacks of delirium tremens, he would be more liable to insanity. But the prisoner's brain had not, it appeared, become weakened; and on the contrary he was clear-minded, sensible, and intelligent. Such was the evidence, and he repeated that unless it was made out that the prisoner was not in such a state of mind as to be responsible for his acts, the duty of the jury, was to find him guilty of the act he committed.

"The question was, whether he was or was not responsible when he committed the act — not whether he was not guilty on the ground of insanity, that was an issue far too vague, indefinite, and undefined. The issue was, whether or not when he did the act, he was legally responsible; in other words, whether he knew its nature, and knew that it was wrong. The distance, indeed, between the extreme points of manifest mania and perfect sense was great, but they approach by gradual steps and slow degree. The law, however, did not say that when any degree of insanity existed the party was not responsible, but that when he was in a state of mind to know the distinction between right and wrong, and the nature of the act he committed, he was responsible."

Verdict, guilty — Sentence, death.

In *Maconnehey* v. *State*,[1] decided in Ohio in 1855, the indictment was for shooting with intent to kill, and in his defence the prisoner gave evidence tending to prove that at the time he did the act charged he was laboring under an attack of *delirium tremens*, and asked the court to charge that *delirium tremens*, although a consequence superinduced by antecedent continued drunkenness, is a diseased state of the mind, and exempts the subject from responsibility for crime, like insanity produced by any other cause. The court refused to so charge, and the prisoner was convicted. On appeal to the Supreme Court the judgment was reversed. "While drunkenness creates no exemption from criminal responsibility," said BARTLEY, J., "and may even exaggerate the turpitude of guilt in some cases, *delirium tremens*, although the result or consequence of continued intoxication, is *insanity* or a diseased state of mind which affects responsibility for crime, in the same way as insanity produced from any other cause. The reason that intoxication creates no exemption from criminal responsibility does not apply to delirium tremens which, although like many other kinds of mania, the result of prior vicious indulgence, is always shunned rather than courted by the patient, and is not voluntarily assumed either as a cloak for guilt or to nerve the perpetrator to the commission of crime."

In *United States* v. *Clarke*,[2] tried in 1818 before the United States Circuit Court sitting at Washington, D. C., the prisoner was indicted for the murder of his wife by shooting her with a musket upon her return home in the evening from church. The court instructed the jury that if they should be satisfied that the prisoner at the time of committing the act charged in the indictment was in such a state of mental insanity, not produced by the immediate effects of intoxi-

[1] 5 Ohio St. 77. [2] 2 Cranch C. C. 158.

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cating drinks, as not to have been conscious of the moral turpitude of the act, they should find him not guilty. The jury found him guilty, and he was sentenced to death.

In *Golliher* v. *Commonwealth*,[1] it was said: "The seventh instruction that 'drunkenness can never be received as a ground to excuse or palliate a crime' was according to the doctrine recognized by this court in the case of *Smith* v. *Commonwealth*,[2] delusive and erroneous. Intoxication may stultify and partially demonize its victim, dethroning reason, rousing volcanic passions, and either paralyzing or perverting the will; and therefore unless brought on for a malicious purpose it may be when disabling entitled to some influence on the questions of malice and free volition. When and how far it should have any such influence must depend on its motive, its degree, and its effect on the mind and the passions. This qualified doctrine seems to us to be dictated by policy and humanity, and sanctioned by reason and modern authority, and was, accordingly, adjudged to be the law in the case just cited."

In *State* v. *McGonigal*,[3] the prisoner was indicted for larceny, the defence being that he was so drunk as to render him irresponsible. WOOTTEN, J., charged the jury "that drunkenness was no excuse or palliation for a crime; but drunkenness long continued produces the disease of *mania a potu*, which deprives the party of reason and incapacitates him from distinguishing between right and wrong. In this stage, it becomes a kind of insanity. The jury would have to distinguish between the mere frenzy of drunkenness, and the fixed insanity produced by continued dissipation. If the prisoner was in the latter condition, he could not be held responsible, otherwise he ought to be convicted." The prisoner was acquitted.

In *Real* v. *People*,[4] the prisoner being indicted for the murder of John Smedick, evidence was offered at the trial on the part of the defence to show a habit of excessive drinking by Real for days continuously, followed by periods of delirium and sanity, — a condition of mind consequent upon drunkenness. The trial judge ruled that *delirium tremens* at or about the time of the homicide, might be proved, but not the general habit of drunkenness or its consequences, to which ruling the prisoner's counsel excepted. On appeal this ruling was affirmed. 'There was no error," said the Court of Appeals, "in excluding proof that the accused was in the habit at times of drinking to excess, and of the effect upon his mind at times produced by this habit. The evidence in this respect was properly confined within a period of a few days of the transaction. Within this period the accused was permitted to give evidence tending to show that his mind was temporarily unsound, or that he was delirious from this cause."

"In *Schlenker* v. *State*,[5] the following instruction given by the court on the trial was complained of on appeal: "Settled insanity, produced by intoxication, affects the responsibility in the same way as insanity produced by any other cause. But insanity immediately produced by intoxication does not destroy responsibility where the patient, when sane and responsible, made himself voluntarily intoxicated." This instruction was unanimously approved on appeal.

"In the case of *State* v. *Hundley*,"[6] said the court, "it appears that the court

[1] 2 Duv. 163 (1865).
[2] 1 Duv. 224.
[3] 5 Harr. 510.
[4] 42 N. Y. 270 (1870).
[5] 9 Neb. 241 (1879).
[6] 46 Mo. 414.

The American Cases.

had instructed the jury 'that if they believed from the evidence that the defendant was laboring under a temporary frenzy or insanity at the time of the killing of Boyer, which was the immediate result of intoxicating liquors or narcotics, he was guilty.' And the court, commenting upon this instruction, said: 'This instruction was unobjectionable, for, as we have already seen, temporary insanity, produced immediately by intoxication, does not destroy responsibility where the accused, when sane and responsible, made himself voluntarily drunk. But the crime to be punishable under such circumstances must take place and be the immediate result of a fit of intoxication, and while it lasts, and not the result of insanity remotely occasioned by previous bad habits.' The only substantial difference between the law as thus pronounced and the instruction complained of is in the omission from the latter of the qualifying clause limiting responsibility to cases of temporary insanity or frenzy; but while under different circumstances this omission might have been a serious matter, it certainly was of no consequence under the testimony in this case. There was not a syllable of evidence of the existence of settled insanity. The utmost that was claimed, or that there was the least testimony to establish, was a mere temporary frenzy or condition of irresponsibility on the part of the prisoner. There is, therefore, in this matter no ground of complaint. Error is also alleged because of the refusal of the court to give several instructions to the jury requested on behalf of the prisoner. By the first of these it was sought to make his voluntary intoxication, under certain circumstances, a complete excuse for the homicide. There was no error in this refusal, for the court, as we have already seen, had already charged upon this point, and laid down the law correctly, recognizing the well known and salutary maxims of our laws, that crimes, committed under the influence of intoxication, do not excuse the perpetrator from punishment." [1]

In *Bailey* v. *State*,[2] the prisoner was indicted for grand larceny. The following instruction was given on the trial: "It is a settled principle that voluntary drunkenness is not an excuse for a criminal act committed while the intoxication lasts, and being its immediate result. Such drunkenness is, in itself, a wrongful act, for the immediate consequences of which the law will hold the party by construction guilty of such intent. This principle applies even to a case where the party is so besotted by liquor as to be irrational at the time of the commission of the crime. But when the act is performed by an insane, but not at the time an intoxicated person, which if committed by a sane person would be a crime, such act of the insane person is not held to be a crime, though the insanity was remotely produced by previous habits of gross intemperance." On appeal this was held wrong. "The law, as it was evidently intended to be stated by this instruction to the jury," said the court, "is in full accord with the rulings of this court, and with the weight of authority; but we fear that in the case under consideration the jury may have been misled by an inapt use of words in the latter part of the instruction. The bill of exceptions states that 'there was evidence before the jury tending to show that the defendant was, at the time of the commission of the offence, intoxicated, and his mental faculties seriously impaired by a long and habitual course of intoxication and drunkenness.' If from this evidence the jury found that the defendant's mind was so far destroyed by his long continued

[1] Beck's Med. Juris., vol. 1, p. 333. [2] 26 Ind. 422 (1866).

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habit of drunkenness as to render him mentally incompetent, intentionally and knowingly to commit the larceny, then the defendant should have been acquitted, although he was intoxicated at the time he took the property. The present intoxication must not be the cause of the mental incapacity; but if that mental incapacity already exists present intoxication will not render the person liable. We are not clear that the language inadvertently used by the court may not admit of a different construction, and it may, therefore, have misled the jury."

§ 63. **Degrees of Murder — Premeditation and Deliberation.** — Where the crime of murder is divided by statute into degrees, the higher degree requiring proof of deliberation and premeditation, evidence of intoxication is held admissible upon the question whether the act was committed with these requisites.[1]

In *Lanergan* v. *People*,[2] the prisoner was indicted and convicted of the murder of his wife. On appeal to the Supreme Court it was said: "The remaining request is in reference to the mental condition of the prisoner arising from his intoxication, which the Recorder was requested to instruct the jury might take into consideration in determining whether he was able to form an intent to kill, or a premeditated design to effect death. The evidence established that the prisoner had been drinking intoxicating liquors for some days; and that he was very much intoxicated at one o'clock, some four or five hours before the probable time when the killing occurred. Carron, one of the witnesses, saw him go out of the house, leaving his wife there dead from violonce which he had inflicted, and he required no assistance to walk; neither doing anything to call for a remark, so far as it appears from the evidence, nor making any observation; but knowing sufficient to conceal his crime for several hours, and until her death was discovered, and the alarm given, at or about ten o'clock in the evening. After passing the evening at different public houses from the time he left his own rooms after the murder (between six and seven o'clock), until ten o'clock, he went to the residence of the sister of his deceased wife, and informed her that his wife was dead. He then returned to his own rooms, and neither did nor said anything tending to show any want of his usual intelligence or understanding, so far as appears from the evidence. There are few instances of persons who have, in a state of intoxication, taken the life of another who could refrain from saying or doing something which would tend to inculpation for nearly four hours after the commission of the act. There is no evidence tending to establish the existence of any mental disorder or aberration at the time of the offence committed. There was no evidence to show that the will of the prisoner was not entirely the regulator of his conduct. The rule appears to be that drunkenness is no excuse for crime, and that the person who is voluntarily in that condition must take the

[1] Jones *v.* State, 29 Ga. 594 (1860); Hopt *v.* People, 104 U. S. 631; State *v.* Johnson, 40 Conn. 136 (1873); People *v.* Lewis, 36 Cal. 521 (1869); People *v.* Nichol, 34 Cal. 212 (1867); People *v.* King, 27 Cal. 507 (1865); People *v.* Williams, 43 Cal. 344 (1872); People *v.* Belencia, 21 Cal. 544 (1863); Curry *v.* Com., 2 Bush, 67 (1867); Swan *v.* State, 4 Humph. 136; Pirtle *v.* State, 9 Humph. 663 (1849); Haile *v.* State, 11 Humph. 156 (1850); Cartwright *v.* State, 8 Lea, 376 (1881); Lancaster *v.* State, 2 Lea, 576 (1879); Schlencker *v.* State, 9 Neb. 241 (1879); Kelly *v.* Com., 1 Grant's Cas. 484 (1858); Keenan *v.* Com., 44 Pa. St. 55 (1862); Jones *v.* Com., 75 Pa. St. 403 (1874); Colbath *v.* State, 2 Tex. (App.) 391 (1877); People *v.* Odell, 1 Dakota, 197 (1875); see *post*. pp. 873, 874.

[2] 6 Park. 209; 50 Barb. 266 (1867).

consequences of his own acts.[1] It appears, too, from the same case, that intoxication may be adverted to where 'you would infer a malicious intent,' or where the accused has been aggravated by the conduct of the deceased, but not where the killing was caused by the use of a dangerous instrument. The evidence of intoxication is admissible in every trial for murder, because it may tend to cast light upon the acts, observations, or circumstances attending the killing. Intoxication must result in a fixed mental disease of some continuance or duration before it will take effect to relieve from responsibility for crime. There was no error in refusing to charge as requested upon the subject of intoxication."

In *People* v. *Batting*,[2] tried in New York, in 1875, the prisoner was indicted for murder. His intoxication at the time being urged as an excuse, WESTBROOK, J., after reading to the jury extracts from the earlier cases of *People* v. *Rogers*,[3] and *Kenny* v. *People*,[4] charged them as follows: "It is said in his behalf that he was not conscious of what he did do; that his mind had become crazed, and the brain, which ordinarily directed and controlled all his movements was fired by rum, so that he is not responsible for the act he did do. However strong the argument may be in the forum of conscience, in the dispensation of criminal justice it can find no place. It would not do to expose society to a doctrine so pernicious as this. It would never answer for us to say, that a party who, in a drunken freak comes into your house and murders you whilst you are harmless and inoffensive should go free and unpunished. Life is too sacred and too dear, too valuable a gift from the Father and Source of all life to be taken in this manner. The books contain but one rule upon this question from the earliest time down to the present, and that is, if a person voluntarily becomes drunk he shall be accountable for what he does while in that condition. This is for the purpose of preventing men from becoming drunk; from putting themselves in a condition where they shall be like beasts preying upon society. Human safety, human life, and the protection of the citizen requires this rule. Without this, society could not exist."

After reading an extract from *People* v. *Rogers*, the judge continued: —

"In the good sense of all this which has been said by our highest court, the judgment and conscience of every right-minded man must concur. It would never do to proclaim from this court-room, that he who voluntarily takes that which deprives him of reason, and makes him a wild beast, shall, if he violates the law whilst in that condition, suffer none of the consequences of his crime. Such a person has first broken the obligation which he owes to his fellows in becoming drunk, and when in that state he perpetrates a crime, it is no excuse but rather an aggravation of the offence. That is the law. It should be heeded here and by all the public upon whose ears these words shall fall. At common-law, then, if you found these facts as I have detailed them, and if you found the intent as the law requires you to find it, this man would have been pronounced guilty of murder, and his life would have paid the forfeit of the crime which he has committed. More recently, however, in this State, and in the year 1873, the Legislature have seen fit to divide the crime of murder into two degrees, the

[1] People v. Rogers, 18 N. Y.. 9.
[2] 49 How. Pr. 392.
[3] 18 N. Y. 9.
[4] 31 N. Y. 330.

one where the intent to take life was deliberate intent; the other, when there is a single intent without the deliberation and coolness which now marks the former, and which is the element making the crime of murder in the first degree. For example if a man deliberately, plans the death of a fellow-being, and lays in wait for him, and when the person comes along, suddenly springs upon and kills him; or where it is effected by poison given by degrees at different times and on different occasions, you can readily see the difference between such a case and that of a person who under the intent of an excitement strikes a blow. You can at once see, there is a wide moral difference between these two classes of crimes. The law has now marked and defined the two by a different species of punishment. I will read you our present statute."

Judge WESTBROOK, read the statute as follows: "When perpetrated from a deliberate and premeditated design to effect the death of the person killed or of any human being." The charge continued: "That is to say not only must the homicide be premeditated, but it must be deliberately premeditated. In the coolness of the blood, in the exercise of the judgment and the reason the slayer should plan and determine, if the act is to be declared murder in the first degree.

"In other words, to convict now of the crime of murder, in the first degree, to the element of intent must be added that of deliberation, and when this is wanting the highest grade of the crime has not been attained. Where the intent to slay is present, but the "deliberate and premeditated design" is absent, the crime is only murder in the second degree. This is the change our statute has made. Formerly, in every case of homicide, where the intent to kill was present, and there were no circumstances rendering the killing justifiable, the crime was murder, of which there was but a single grade, and but one penalty — death. Now the grade of crime which forfeits the life of the slayer, has only been reached where the jury find that the intent is the result of deliberation and premeditation.

"In fixing the grade of crime of which the prisoner is guilty, the evidence of his intoxication becomes very important, and is to be carefully weighed. While the law justly holds the offender responsible for the crime of murder, though he was drunk when the act was committed, it will not be guilty of the injustice of saying that when he was crazed, furious and wild from intoxicating drink, and the act was committed under the influence of a drunken frenzy, that it was deliberate as well as premeditated. The coolness of the intellect is gone, and a person in that state, ordinarily, is not capable of the deliberation which must mark this crime. In other words, it is the premeditation of excitement and not that of deliberation. I will read to you again, to give my views more fully, from Wharton's American Law of Homicide:—[1]

"'Intoxication when existing to a sufficient extent to prevent deliberation, lowers the offence to the second degree excepting the case of murder which happens in consequence of actual or attempted arson, rape, robbery, or burglary. Says Judge LEWIS, now of the Supreme Court of Pennsylvania, a deliberate intention to kill is the essential feature of murder in the first degree. When this ingredient is absent, where the mind from intoxication, or any other cause, is deprived of its power to form a design with deliberation and premeditation, the offence is stripped of the malignant features required by the statute to place it

[1] p. 369.

The Missouri Doctrine.

on the list of capital crimes; and neither courts nor juries can lawfully dispense with what the act of Assembly requires.'"

Judge WESTBROOK continued: "I charge you that to be the law of this case. Whilst you cannot receive the evidence of drunkenness to excuse the crime or to make it less than murder in the second degree, yet you can receive it for the purpose of showing that the party did not deliberately premeditate. Now, what is the evidence upon this question? It would seem that the day previous to this occasion the prisoner had been at work for Mr. Hasbrouck. On his way home he took probably his first glass of liquor. The next morning at eight o'clock he was in a nervous condition, sitting in the bar-room, at Steen's, and from that hour through the entire day, he seems not to have been about his ordinary business, but simply upon 'a spree;' he became wild, furious, nervous, active, so drunk that he staggered against the fence, and at the time he was leaving the Saxton House, for the purpose of getting the weapon, he was so much under the influence of liquor that he could scarcely walk. After obtaining the weapon he went to the Shaffer House, and from his conduct and actions there I leave it to you to say whether he was or was not in a condition of mind or body during which he could deliberate and premeditate. And whilst this is a question of fact, which you must decide, I submit to you, nevertheless, the proposition whether the undisputed evidence in this case does not clearly mark this offence as one of murder in the second degree only. Of course, the whole question is with you.

The prisoner was found guilty of murder in the second degree.

In *Norfleet* v. *State*,[1] the court instructed the jury that drunkenness might be considered by them "for the purpose of determining whether the killing is reduced from murder in the first degree to murder in the second degree, but it cannot be so considered by the jury to determine whether the killing be reduced below murder in the second degree, or from that to manslaughter." In the Supreme Court it was said: "The principle as here stated, with reference to the facts of this case is correct, and in strict accordance with the doctrine of the case of *Pirtle* v. *State*,[2] which is so full and explicit upon this general subject that nothing more can be added."

In Missouri intoxication or drunkenness can neither excuse nor extenuate a crime, and cannot be taken into consideration by a jury for either of such purposes. "However differently the question may have been elsewhere determined we are not disposed to overthrow the rule thus established in this State, believing it to rest upon reason and authority, and that any departure from it would neither be in the interest of a higher civilization, nor promotive of the best interests of society, nor conducive to the ends of justice."[3] Therefore, drunkenness will not repel any inference of malice and premeditation arising from other facts in the case, or mitigate the offence to a crime of a less degree.[4]

In *Rex* v. *Grindley*,[5] which was tried before HOLROYD, J., at the Worcester summer assizes in 1819, the learned judge said that "though voluntary drunk-

[1] 4 Sneed, 345 (1857).

[2] 9 Humph. 663.

[3] State *v.* Edwards, 71 Mo. 324 (1879), citing State *v.* Harlow, 21 Mo. 446; State *v.* Cross, 27 Mo. 332; State *v.* Hundley, 46 Mo. 416; State *v.* Dearing, 65 Mo. 530.

[4] State *v.* Dearing, 65 Mo. 530 (1877).

[5] MS. opinion cited in 1 Russell on Crimes, 12.

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enness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated is a circumstance proper to be taken into consideration." Sixteen years later this ruling was cited to PARK, J., by the counsel for the prisoner in *Rex* v. *Carroll*.[1] There the prisoner was indicted for the murder of Elizabeth Browning. PARK, J., in instructing the jury, referring to the ruling of HOLROYD, J., in *Rex* v. *Grindley*, said: "Highly as I respect that late excellent judge, I differ from him, and my brother LITTLEDALE agrees with me. He once acted upon that case, but afterwards retracted his opinion, and there is no doubt that that case is not law. I think that there would be no safety for human life if it were to be considered as law." The prisoner was found guilty and executed.

In Connecticut it is held that intoxication does not as a matter of law disprove the existence of malice; but it is evidence to show that such malice did not exist. In the case of murder in the second degree, which rests on implied malice, the jury may find the existence of malice, though the prisoner's condition at the time disproves express malice.[2]

It is held in Illinois that as it belongs to the jury in that State to fix the punishment for murder which may be either death by hanging or imprisonment for life, it is competent to prove at the trial that the accused was intoxicated at the time of the homicide. "It is important," said the court, "that all the concomitant circumstances of the act committed — the condition of the prisoner at the time among the rest, as tending to give character to his conduct, so far as they may be regarded as part of the *res gestæ*, should be laid before the jury that as near as may be they may see the crime as it is — the precise complexion of it — in order that they may intelligently graduate the punishment. But proof of intoxication at other times is properly rejected."[3]

§ 64. **Relevant on Question of Intent.** — So evidence of intoxication is relevant on the question of intent.[4] "Drunkenness certainly does not excuse or palliate any offence. But it may produce a state of mind in which the accused would be totally incapable of entertaining or forming the positive and particular intent requisite to make out the offence. In such a case, the accused is entitled to an acquittal of the felony, not because of his drunkenness, but because he was in a state of mind resulting from drunkenness, which affords a negation of one of the facts necessary to his conviction.[5] If at the time of taking property, a person is so under the influence of intoxicating liquor that he is unable to form

[1] 7 C. & P. 145 (1835).

[2] State *v.* Johnson, 41 Conn. 584 (1874).

[3] Rafferty *v.* People, 66 Ill. 118 (1872).

[4] Roberts *v.* People, 19 Mich. 401 (1870); State *v.* Bell, 29 Iowa, 316 (1870); State *v.* Maxwell, 42 Iowa, 208 (1875); Wenz *v.* State, 1 Tex. (App.) 36 (1876); Loza *v.* State, 1 Tex. (App.) 488 (1877); U. S. *v.* Bowen, 4 Cranch C. C. 604 (1835); State *v.* Coleman, 27 La. Ann. 691 (1875); State *v.* Trivas, 32 La. Ann. 1086 (36 Am. Rep. 293) (1880). *Contra*, O'Herrin *v.* State, 14 Ind. 420 (1860); Dawson *v.* State 16 Ind. 428 (1861). As to the relevancy of drunkenness on the question of malice see *Id.*; Nichols *v.* State, 8 Ohio St. 435 (1858); Shannahan *v.* Com., 8 Bush, 463; 8 Am. Rep. 465 (1871); and see *post*, p. 874.

[5] Mooney *v.* State, 33 Ala. 419 (1859), citing Swan *v.* State, 4 Humph. 136; Pirtle *v.* State, 9 Humph. 663; Pigman *v.* State, 14 Ohio, 555; U. S. *v.* Rondenbush, Baldw. 514; Pennsylvania *v.* McFall, Add. 255 (1797).

a felonious intent, he cannot be guilty of larceny.[1] And where a person is indicted for voting twice at an election, his drunkenness is relevant on the question of intent."[2]

In *State* v. *Schingen*,[3] the prisoner was convicted of stealing property from his master. In the Supreme Court it was said: "There was some evidence which tended to show that the defendant was intoxicated at Oshkosh, where he offered the property for sale. And the court was asked to charge the jury, if they found that he was sober at the time the property was delivered to him and that he then had no intention to convert it to his own use, but afterwards became so intoxicated that he did not know the consequences of his acts, and while in this condition disposed of, or offered to dispose of the property, that they should find him not guilty. The court refused to give this instruction, but charged the jury that the intention of the defendant in the commission of the act was the gist of the crime of larceny, and that a person who, from drunkenness or other causes, may have lost his understanding, cannot in contemplation of law be accountable for his intention; that although drunkenness was no excuse for the commission of many crimes, yet it was of great importance as affecting the question of intention, and therefore, if they should find that the defendant was so drunk as to be unable to form any intention at the time he offered to dispose of the property, he should be acquitted, unless they were satisfied of the further fact that he had formed the intention to steal while in the possession of his reasoning powers. We are satisfied that the Circuit Court charged the jury upon the point of drunkenness quite as favorably to the defendant as the law would allow. The jury were told that if the defendant, at the time he offered the property for sale, was so drunk as not to know what he was doing, then he should be acquitted, unless the evidence showed that the felonious intent existed when he was in the full and undisturbed possession of his mental faculties. We certainly think there was nothing in all this of which the defendant can complain."

In *Henslee* v. *State*,[4] where the charge was larceny in stealing a gun, the jury were instructed that "if the defendant was so much under the influence of whisky as not to be conscious of what he was doing when he took the gun, then he would not be in a condition of mind to be guilty of larceny. This charge was said by the Supreme Court to be more favorable to the prisoner than he was entitled to, in view of the fact that he was voluntarily intoxicated, and there being nothing to show that he suffered from delirium tremens or other mental incapacity."

In *State* v. *Garvey*,[5] the defendant's counsel requested the court to charge that "if Garvey was in such a state of mind from any cause that he did not know what he was doing" they could not convict. The instruction was given with the qualification that "if the defendant did not know what he was doing from being in a state of insensibility, the jury could not convict, but otherwise, if from excitement or madness, the immediate consequence of indulgence in strong drink." On appeal this was held to be error. "It does not appear," said Wilson, C. J., who delivered the opinion, "that Garvey became intoxicated with a view to the commission of the crime, or that before his intoxication he had any

[1] Wood *v.* State, 34 Ark. 341 (1879).

[2] People *v.* Harris, 29 Cal. 678 (1866). But see State *v.* Welch, 21 Minn. 22 (1874).

[3] 20 Wis. 74 (1865).

[4] 3 Heisk. 202 (1871).

[5] 11 Minn. 154 (1866).

intention of committing such crime. The existence or non-existence of the malicious and felonious intent charged was the principal question to be passed upon by the jury. If Garvey was so drunk *as not to know what he was doing* then he had no intention; he was incapable of forming an intention, and any evidence showing this fact should have been admitted by this court. Such intention must, in fact, exist to justify a conviction under the statute of 1864. The charge of the court in this respect was, therefore, we think, erroneous. It is not pretended that intoxication is in any case an excuse for crime, but when the *intention* of the party is an element of the crime, insanity of any kind or from any cause which renders the party incapable of forming any intention, and which is not voluntarily induced with a view to the commission of a crime while in that state, may be given in evidence to show that he is not guilty of the specific crime with which he is charged. It would not follow because the accused was, in this case, intoxicated, that he did not intend great bodily harm to Callman; he may have been intoxicated and still acted with this criminal intent. This was for the jury to decide from all the evidence in the case."

In *People* v. *Hammill*,[1] the prisoner was indicted for the murder of his wife, and it appeared that he was in the habit of using intoxicating liquors, and was under their influence at the time. The court charged the jury as follows: —

"The case now to be committed to your hands is an unusually painful one. The prisoner is not a man who has been familiar with vice or hardened by crime. Though in the humble walks of life he is proved by men of the highest standing who have known him well, to have sustained the most irreproachable character for honesty, integrity, and industry, and on all occasions, except when infuriated by intoxication, for kindness and attention and affection to all his family. With that single exception, no better character in all these respects, or for quietness and unobtrusiveness of manners, could have been shown than has been established for him. But he stands before you now charged with the murder of his wife. So clear is the proof that she died by violence, and that violence inflicted by the prisoner, that his counsel does not insist on the contrary, but urges that the crime is less in degree than that of murder.

"This is a question for you. Your duties are first to determine whether the deceased came to her death by violence. If so, then next whether it was inflicted by the prisoner. If you find in the affirmative on both of these questions, your next inquiry will be whether these acts of violence were, in the language of the statute, 'perpetrated from a premeditated design to effect the death of the person killed.' If so, then the prisoner is guilty of the crime of murder.

"The important question for you to determine, if you find that the prisoner caused this death, will be the intent with which he did this violence. What did he intend? What did he design should be the result of his acts? Did he mean to kill? Was that idea in his mind as he gave the blows? If so, the crime is complete, and your verdict must pronounce it murder.

"And it matters not what was his state as respects sobriety or intoxication at the time, provided you find he gave the blows with the design to kill; for, if he

[1] 2 Park. 223 (1855).

meant that, then whether at the time he was drunk or sober, in either case, his crime is murder.

"Whether he was intoxicated or otherwise, the question will still be: What was his intent? Was it to kill, or only to wound and bruise? On the solution of that question rests your verdict, for intoxication is no excuse for crime. For an act designedly perpetrated, although done when drunk, the law holds the perpetrator to the same responsibility as if done when sober.

"But while intoxication does not excuse crime, in other words, does not excuse a party from the consequences of acts which he purposely perpetrates, although drunk at the time, nevertheless the jury may always take into consideration the fact of the intoxication of the accused just so far as it will aid them in determining with what intent the act was done. We do not always attribute the same motives or intentions to the acts of a drunken man, that we do to those of a sober man. We act upon this rule in every day life, and we act upon it because our experience teaches its correctness.

"A familiar example from such scenes as you have, probably all of you, witnessed, will illustrate my meaning.

"A person in a state of intoxication approaches us in a rude or boisterous, or in an unduly familiar manner. Do we not often feel, and, indeed, we know that in all this there is an entire absence of the remotest idea of insulting or offending? That such conduct results from an impaired judgment or power of discrimination, or sense of propriety caused by the state of inebriety in which we see him. Yet the same acts perpetrated by the same person in a state of sobriety would lead us to no other inference than that insult and outrage were intended. Intoxication partially impairs the judgment, as is exemplified when we see a man in his cups sometimes give blows which in their effects are far more severe than he intends or is conscious of. It arises from his inability to measure the strength he is putting forth with the same accuracy he does when sober. All these things in every day life we consider when determining how far a party has intended the full effect produced by his acts.

"In so far, then, as this man's intoxication may aid you in solving the question whether, when he gave his wife these blows, he only intended to hurt, to bruise, or meant that they should kill, you are at liberty to consider it, but not otherwise. In looking in upon his mind, in analyzing its secret workings, motives and intent, during that fatal hour, this fact may throw some light upon what he meant should be the consequences of his brutality and violence. So far, and with that view, you may consider it, but no further.

"It is an old and salutary general rule of the common law that a man is held to intend that which in the ordinary course of things would be the natural result of his acts.

"This rule is based upon sound reason and universal experience. Thus, if one raises his rifle and deliberately fires its contents into the bosom of another, or by a blow with an axe which might fell an ox, buries it in the brain of another, the inference from the act is irresistible that death was meant, and so the law presumes.

"The inferences of the mind, which are equally presumptions of law, are certain and conclusive in proportion as the acts, from their nature and character, are certain to result in death.

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"Thus, the plunging of a poniard into the heart of another, we do not doubt, was intended to kill, but if aimed only at the arm or leg, though death may be the result, yet the mere fact of giving such a blow, so long as that is the only criterion by which we judge, renders the intent more doubtful and the inference less strong. So, if one beat a full-grown man with his fist, and death ensues, we would ordinarily feel far more doubt that death was intended than if it had been produced by the use of a dangerous weapon. So, too, regard may be had to the relative strength and powers of endurance of the parties, as well as to the mode in which the violence is applied.

"A powerful blow given by the fist alone (but not repeated) upon the head of a full-grown man would not ordinarily be regarded as intended to produce death; but what else could be inferred if the same blow were planted upon the temple of an infant child?

"In many cases the inference that death is intended is as strong when the act is perpetrated by a drunken as when perpetrated by a sober man. Thus, if by a deadly weapon, as by a rifle or a bowie-knife, a bullet or blow is sent directly or designedly to some vital spot, we should infer that death was intended with almost equal certainty, whether the perpetrator were drunk or sober. So, too, when death is produced by poison, and we see in the mode of its administration stealthy calculation, we would infer that death was intended, whether he who administered the poison was in a state of sobriety or intoxication, since in the very character of the act we could read design.

"But we also know that intoxication produces more effect upon the nervous system of some than of others. It clouds and obscures the judgment of one more than it does another. It produces greater extravagance of exertion and action in some than it does in others, and sometimes consequences result from such extravagant exertion and action of which the party himself had no idea. All these things are to be considered by this jury when determining upon this question of intent.

"Had this prisoner, in a state of entire sobriety, thus deliberately kicked and stamped upon his wife, and for that length of time which the mutilations of her person showed must have been the case, this jury might not have hesitated in believing that such brutality so long continued was the prompting of a murderous mind.

"If, however, you find that he was in a state of intoxication which was affecting his whole nervous organization; that in consequence his judgment was impaired and to such an extent that he was in a measure incapable of knowing the degree of violence he was perpetrating, or of properly and accurately calculating its effects to their full extent, all this the jury may take into consideration so far as it enables them to judge whether at the time of the violence, he meant only to beat or kill. If he perfectly understood what he was doing, and either designed her death, or if he well knew that such was likely to be the consequence of his acts, and yet kept on, neither considering nor caring what the result of his violence might be, his crime is that of murder. But if his judgment was in part obscured and his only intention was to severely beat his wife, but with no thoughts that death was either certain or possible, then the jury must convict of a less offence. His crime would be then of that species which the statute defines as the 'killing of a human being without a design to effect death, in a heat

of passion, but in a cruel and unusual manner.' The prisoner has proved an excellent previous character. In many cases this is of great importance, in others none whatever.

"Where the intent to kill is clearly proved, if this is the only question, then character avails nothing in defence. Wanton killing is as much murder in the virtuous as in the vicious. But where the intent is not certain, where the minds of the jury feel that the scales are nearly poised, then the jury may do that which the prisoner humbly asks them to do here, throw the weight of his good character into the scales and thus secure a preponderance in his favor. In cases not free from doubt, the law allows it. The prisoner may, if you are not entirely satisfied by the testimony, point to his past life. And urging the fact with all the force to which it is entitled, say I have been of peace and quiet, not of turbulence and blood; I have been uniformly honest, faithful and industrious, kind and affectionate in my family, attentive to all their wants and reputable and respectable in society.

"He asks you to remember all these, and then to say whether he has from 'premeditated design' killed the wife of his youth and the mother of his children. If he has, it is murder, and on your oaths you must so pronounce it. If you find otherwise, but are still satisfied that she has died by his violence, you may find a verdict of manslaughter in the second degree."

The jury found a verdict of manslaughter in the second degree.

In *State* v. *Avery*,[1] the defendant was convicted of cruelty to animals. On appeal, the Supreme Court said: "The court we think was right in declining to instruct the jury as requested by the defendant, that if intoxicated the respondent could not have the wilful, malicious intent which is essential to the commission of the offence charged. Whether he had such an intent or not was a question for the jury, and was rightfully left to them upon all the evidence; and the judge was right in saying that the evidence was not necessarily weakened by showing that he was drunk. There may be cases where the intoxication of the respondent may be weighed, in determining whether the malicious intent existed as in *Rex* v. *Thomas;*[2] but no case goes the length of what was requested in this case. But here the request was to instruct the jury, as matter of course, that the respondent, if intoxicated, could not have the wilful and malicious intent essential to the commission of the offence."

In *Reg.* v. *Monkhouse*,[3] tried before COLERIDGE, J., and ROLFE, B., in 1849, the prisoner was indicted for feloniously discharging a loaded pistol at another with intent to murder him. Several witnesses deposed to his being in a state of intoxication shortly before the time the act was committed. COLERIDGE, J. (to the jury): "There are two points for your consideration,—first, as to the act; second, as to the intent. With regard to the latter, the allegation respecting it in the indictment must, no doubt, be proved to your satisfaction before you can find the prisoner guilty upon the full charge. The inquiry as to intent is far less simple than that as to whether an act has been committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does

[1] 44 N. H. 392 (1862).
[2] 7 C. & P. 817.
[3] 4 Cox. 55.

or says, and if he says nothing then his acts alone must guide you to your decision. It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol while he knew it to be loaded to another's head, and fire it off, without intending to kill him; but even then the state of mind of the party is most material to be considered. For instance, if such an act were to be done by a born idiot, the intent to kill could not be inferred from the act. So, if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, Was he rendered by intoxication entirely incapable of forming the intent charged? The case cited is one of great authority, from the eminence of the judge who decided it. The only difficulty is, in knowing whether we get the exact words of the judge from the case quoted; and even if we do, whether all the facts are stated which induced him to lay down the particular rule. Although I agree with the substance of what my brother Patteson is reported to have said,[1] I am not so clear as to the propriety of adopting the very words. If he said that the jury could not find the intent without being satisfied it existed, I shall so lay it down to you; the only difference between us is as to the amount and nature of the proof sufficient to justify you in coming to such a conclusion. Under such circumstances as these when the act is unambiguous, if the defendant was sober, I should have no difficulty in directing you that he had the intent to take away life, where, if death had ensued, the crime would have been murder. Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent him from restraining himself from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may no doubt exist. To ascertain whether or not it did exist in this instance, you must take into consideration the quantity of spirit he had taken, as well as his previous conduct. His conduct subsequently is of less importance, because the consciousness (if he had any) of what he had done might itself beget considerable excitement. You must not find him guilty of one of these intents on mere guess; but, on the other hand, I am bound to tell you that if you think one or all of them existed, there is evidence sufficient, in point of law, to justify you in saying so."

The prisoner was found guilty on the count charging an intent to do grievous bodily harm.

In *Rex* v. *Meakin*,[2] the prisoner was indicted for stabbing with intent to kill. He was proved to have been "something the worse for liquor" at the time. ALDERSON, B., charged the jury thus: "It is my duty to tell you that the prisoner's being intoxicated does not alter the nature of the offence. If a man chooses to get drunk, it is his own voluntary act; it is very different from a madness which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for. However, with regard to the intention, drunkenness may perhaps be adverted to according to

[1] In R. *v.* Cruise, 8 C. & P. 546. [2] 7 C. & P. 297 (1836).

the nature of the instrument used. If a man uses a stick you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm drunkenness can have no effect on the consideration of the malicious intent of the party." *Verdict guilty.*

In *Reg.* v. *Cruise*,[1] the prisoner and his wife were tried, in 1838, before PATTESON, J., for the murder of a natural child. It appeared that they were both drunk at the time. The judge in charging the jury said: "Although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering this child, you may still find them guilty of an assault." The prisoners were convicted of assault.

It has been held in England that a person who at the time was so drunk as not to know what she was about could not be convicted of an attempt to commit suicide.[2]

That a person was intoxicated when he made a confession goes only to the weight of the confession and not to its admissibility.[3]

§ 65. **Drunkenness — Knowledge.** — On an indictment for passing a counterfeit bill, the drunkenness of a prisoner is relevant on the question of knowledge.[4] In *U. S.* v. *Rondenbush*,[5] the prisoner was indicted for passing counterfeit money. It appeared that he had previously sustained a good character and at the time of the offence was on a carouse. BALDWIN, J., said to the jury on this point: "It is alleged that the defendant was on a frolic and intoxicated at the time of receiving the counterfeit notes at Shive's. Intoxication is no excuse for crime, when the offence consists merely in doing a criminal act without regarding intention. But when the act done is innocent in itself, and criminal only when done with a corrupt or malicious motive, a jury may, from intoxication, presume that there was a want of criminal intention; that the reasoning faculty, the power of discrimination between right and wrong was lost in the excitement of the occasion. But if the mind still acts, if its reasoning and discriminating faculty remains, a state of partial intoxication affords no ground of a favorable presumption in favor of an honest or innocent intention, in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same act when sober. The simple question is, Did he know what he was about? The law depends on the answer to this question.

"The offence charged against Mr. Rondenbush is not for dishonestly receiving, but for dishonestly passing counterfeit notes. If he received these notes, believing them to be genuine, you must be satisfied that he passed them as true, knowing them to be false. But if he received them as counterfeits, then the act of passing them as true completes the offence without further evidence. If you

[1] 8 C. & P. 546 (1838).
[2] R. v. Moore, 3 C. & K. 319 (1852).
[3] State v. Grear, 28 Minn. 426 (1881); Com. v. Howe, 9 Gray, 110 (1857).
[4] Pigman v. State, 14 Ohio, 556 (1846).
[5] Baldw. 514 (1832).

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shall believe that when he received these notes at Shive's he was in such a state of intoxication as not to know what he was giving or what he was receiving in exchange, then you may say that he did not receive them as known counterfeits; and before you can find him guilty will require, besides proof of his passing them as true, proof of his knowledge that they were false. This would be going to the utmost extent which the law would warrant or reason justify, but putting him on the footing of a sober man who innocently should receive forged paper. The defendant's counsel could not ask you to go further in any case of the highest degree of intoxication. You will decide whether, from the circumstances of this case, you will feel justified in going so far. Should you be of opinion, that either from intoxication, ignorance, or the imposition practised on him by artful villainy, he received the notes as good, or not knowing them to be bad, and thus make every possible allowance in favor of the accused; you cannot extend that allowance to the passing of the notes, when intoxication has ceased, and imposition could no longer be practised upon his ignorance, if he then knew them to be forged."

§ 66. **Drunkenness — Relevant to Explain Threats.** — In *Rex* v. *Thomas*[1] it was said by PARKE, B.: "Where the question is whether words have been uttered with a deliberate purpose or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse." In a Delaware case, the judge, in explaining the exceptions to the rule that evidence of intoxication is not admissible on the question of the guilt of a crime, said: "The other is when antecedent threats, menaces, or malicious and revengeful expressions are proved to have been uttered by the accused when drunk or intoxicated, and when it always becomes a legitimate matter for the grave consideration of the jury whether they are but the idle and unmeaning declarations and denunciations of an angry and drunken man merely, or are properly to be regarded as of graver and more serious and sober import, denoting an actual intent to do what he threatens, for the law presumes a drunken man to be capable of conceiving and entertaining even express malice aforethought and perpetrating with premeditation and design murder in the first degree under the statute."[2] In *Eastwood* v. *People*[3] it was said: "That it was of great importance for the jury to know whether the prisoner was or was not intoxicated is obvious. It clearly did not necessarily follow because the prisoner used the expressions which I have referred to that he really entertained the design which the words import. It not unfrequently happens that when men are wrought up to a pitch of frenzied excitement by intoxication or by passion their language assumes a degree of violence far beyond any deliberate purpose which they have formed. Instances of this kind must have come under the observation of every man of experience."

[1] 7 C. & P. 817 (1837).

[2] State *v.* Hurley, 1 Houst. Cr. Cas. 28 (1858); see *post*, p. 874.

[3] 3 Park. 25 (1855).

Drunkenness Relevant.

§ 67. **Drunkenness — Relevant on Question of Provocation — Rex v. Thomas.** — In *Rex* v. *Thomas*,[1] PARK, B., said to the jury: "I must also tell you that if a man makes himself voluntarily drunk, that it is no excuse for any crime he may commit whilst he is so; he must take the consequences of his own voluntary act, or most crimes would otherwise be unpunished. But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober."

In a Delaware case it was said: "When it was proved to the satisfaction of the jury that the crime was committed by the accused in a state of intoxication or drunkenness and upon a certain provocation given him by the party killed, and when a smaller provocation may be allowed to alleviate the offence, and reduce it from murder in the first to murder in the second degree, under the statute, owing to the well known fact that a person in that condition is more liable to be suddenly heated and blinded to a higher degree by angry passions than a sober man would be under the same or a similar provocation." [2]

In *Jones* v. *State*,[3] it was held that the jury may consider the drunkenness of the accused at the time of the killing not to excuse or mitigate or extenuate his crime, but to assist them in deciding when there was a provocation, whether the intention to kill preceded the provocation or was produced by it.

§ 68. **Drunkenness — Relevant on Question of Self-Defence — Marshall's Case.** — In *Marshall's Case*,[4] tried before PARK, J., in 1830, on an indictment for stabbing, the judge told the jury that they might take into consideration, the fact of the prisoner being drunk at the time, in order to determine whether he acted under a *bona fide* apprehension that his person or property was about to be attacked.[5]

To justify taking life in self-defence the circumstances must be such as to excite the fears of a reasonable man. The law makes no discrimination in favor of a drunkard. Therefore, in a Georgia case, it was held that it was proper to refuse a charge in these words: "If the jury believe from the evidence that the prisoner was very drunk * * * and that being in a state of intoxication, and very drunk, killed J., through cowardice, alarm, or fear that a great bodily injury was about to be inflicted upon him, then he is not guilty of murder." [6] In *Reg.* v. *Gamlen*,[7] the prisoner was indicted for assault. The charge arose out of an affray at a fair, and there was ground for supposing that he acted under apprehension of an assault upon himself. All concerned were drunk. CROWDER, J., charged the jury that "Drunkenness is no excuse for crime, but in considering whether the prisoner apprehended an assault on himself you may take into account the state in which he was." He was acquitted.

[1] 7 C. & P. 817 (1837).

[2] State *v.* Hurley, 1 Houst. Cr. Cas. 28 (1858); State *v.* McCants, *ante*, p. 722.

[3] 29 Ga. 607 (1860).

[4] Lewin, 76.

[5] In Goodier's Case, 1 York Summer Assizes, 1831, Park, J., directed the jury to the same effect.

[6] Golden *v.* State, 25 Ga. 527 (1858).

[7] 1 F. & F. 90 (1858).

Notes.

§ 69. **Drunkenness Created by Another to Cause Prisoner to Perpetrate the Crime.**—In *Bartholomew* v. *People*,[1] it was said: "Plaintiff in error was convicted by the judgment of the court below of the crime of larceny. It was not seriously contested that a larceny was committed, or that plaintiff in error was connected therewith — the property stolen being found in his possession. The defence was, at the time of the taking, and for some hours afterward, plaintiff in error was under the influence of intoxication caused by the fraud or contrivance of another person for the purpose of inducing him to commit, or to aid in committing, the larceny. Our statute provides: 'Drunkenness shall not be an excuse for any crime or misdemeanor unless such drunkenness be occasioned by the fraud, contrivance or force of some other person for the purpose of causing the perpetration of an offence.'[2] At common law where it required a particular intent in the doing of an act to constitute crime — as, for instance, larceny, where the intent to steal must accompany the act of taking, it is held it may be shown in defence that the party charged was intoxicated to that degree that he was incapable of entertaining the intent to steal, and that he neither then nor afterwards yielded it the sanction of his will. It was, therefore, competent to make the defence relied upon."

[1] 104 Ill. 605 (1882).

[2] R. S. 1874, b. 395, § 19.

CHAPTER IV.

KLEPTOMANIA AND SOMNAMBULISM.

KLEPTOMANIA — CHARGE MUST BE SPECIALLY DIRECTED TO DEFENCE MADE.

LOONEY *v.* STATE.

[10 Tex. (App.) 520.]

Court of Appeals of Texas, 1881.

Hon. JOHN P. WHITE, *Presiding Justice.*
" C. M. WINKLER, } *Judges.*
" JAMES M. HURT, }

1. **Kleptomania is a recognized symptom of insanity.**

2. **Jury should be Specially Charged as To.** — On a trial for theft, the defence being the propensity to steal known as kleptomania, and there being evidence tending to sustain it, the court should charge the jury specifically on this point. A submission of the usual test of the prisoner's ability to distinguish between right and wrong is insufficient.

APPEAL from the District Court of Montgomery County. Tried before Hon. JAMES MASTERSON.

Looney was indicted for the theft of clothes and other wearing apparel and other articles from the store of W. T. Nobles. On being apprehended he had confessed his guilt, saying in explanation that from his boyhood he had been afflicted with an ungovernable habit of appropriating articles of property belonging to others, many of them articles for which he could have no possible use, such as photographs of entire strangers, combs, brushes, books, etc. He could not tell how, when or where he came into possession of them. Several witnesses testified that he was not of strong mind, and was, in their opinion, incapable of distinguishing between right and wrong. The court instructed the jury (1) that the prisoner could not be convicted if he was unable to distinguish between right and wrong; (2) that if the prisoner did " take the goods of W. T. Nobles, at the time and in the

manner charged, but at the time of committing the act was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that he was doing wrong, then you will acquit."

The jury found the prisoner guilty and assessed his punishment at a term of two years in the penitentiary.

J. R. Peel, for the appellant.

H. Chilton, Assistant Attorney-General, for the State.

WINKLER, J. — This appeal is from a judgment of conviction of theft of property over the value of twenty dollars. From the evidence and the charges of the court, given and refused, we are led to conclude that the only defence relied on in the court below was kleptomania, and if there was error in the charge of the court, and prejudicial to the rights of the defendant, under this defence and the testimony on that subject, such error is to be found in applying the facts to the general subject of insanity rather than in applying it directly and specifically to the peculiar condition of the defendant's mind, developed by the proofs; and in this respect we incline to the opinion that the charge, taken as a whole, was defective, in not giving to the jury a special charge on the subject of this peculiar symptom as it relates to the general subject of insanity.

It is said that kleptomania occurs not unfrequently as a symptom in mania and the mental confusion incidental to it, and in depression and delirium, in which its consideration involves less difficulty. But where it occurs in cases of concealed insanity, its discovery is not easy.[1] To our minds, what has been said by Ellinger, and quoted in the authority just cited, in the nature of practical directions, may well be considered in connection with the case and the subject under consideration, not as law, but as illustrating the propriety, if not the necessity, of a charge to the jury on this peculiar feature of the case, as follows: 1. In the earlier developments of mania, kleptomania is an important symptom; it will, however, be found accompanied more or less by other symptoms of incipient derangement, such as a general alteration in the accustomed mode of feeling, thinking, occupation and life of the individual, a disposition to scold, dispute and quarrel, to drink, and to wander about busily, doing nothing, and the bodily signs of excitement (restlessness, want of sleep, rapid pulse, etc.). 2. Kleptomania continues after the disease, to all external appearances, has ceased. Here the disease also has not yet terminated, which can only be indicated by a

[1] Wharton & Stille's Med. Jur., sect. 192.

return of the original state of thought and feelings. (This calls for a continued course of observation by the examining physician.) 3. There are distinct but occult hallucinations at work. These are to be assumed, the more readily, the more bizarre and exclusive is the desire to steal, and the more the objects to which it is confined are out of proportion to the property of the thief; and particular attention should be paid to the existence, present and past, of other symptoms of insanity." An instance of this inordinate propensity to steal is cited in this connection from Dr. Rush, who says: "In one instance a woman was exemplary in her obedience to every command of the moral law, except one — she could not refrain from stealing." We make these further quotations from this authority as indicative of this peculiar symptom of insanity: "It would be difficult to prove directly that this propensity, continuing as it does through a whole life, and in a state of apparently perfect health, is, notwithstanding, a consequence of diseased or abnormal action in the brain, but the presumptive evidence in favor of this explanation is certainly strong. First, it is very often observed in abnormal conformations of the head, and accompanied by an imbecile condition of the understanding. * * * An instructive case has been lately recorded, in which this propensity seems to be the result of a rickety and scrofulous constitution."

We mention these peculiarities in order to show the fact that kleptomania is a recognized symptom of mania, in some of its recognized forms at least, and to illustrate the importance — this being the peculiar defence — of embracing in a general charge on the subject of insanity, this peculiar symptom — a feature of the present case to which proper attention seems not to have been paid, on the trial below, and which in our opinion would have been more fully developed if the attention of the jury had been called more pointedly to this feature of the defence.

Other questions are presented by the record and have been discussed in argument, but are not considered by this court, not that they are unimportant or immaterial, but because if they are errors they are susceptible of easy correction on another trial. Because of what we deem a material defect in the charge, as above indicated, the judgment will be reversed, and the cause remanded for a new trial.

Reversed and remanded.

SOMNAMBULISM -- HOMICIDE — RESPONSIBILITY FOR UNCONSCIOUS ACT.

Fain *v.* Commonwealth.

[78 Ky. 183.]

In the Court of Appeals of Kentucky, September Term, 1879.

Hon. Martin F. Cofer, *Chief Justice.*
" Thomas F. Hargis, } *Associate Judges.*
" Thomas H. Hines, }
" William S. Prior, }

Somnambulism — Murder Committed While in a State of — Responsibility for Unconscious Act.—F. and W. entered together at night a public room of a hotel, sat down and went to sleep. W. awoke shortly after and called to S. one of the porters, for a bed for himself and F. W. then attempted to awaken F. by shaking him, but failing, asked S. to wake him up. S. thereupon shook F. with great force and succeeded in awakening him. While S. was holding him by the coat collar, and telling him to go to bed, F. drew a pistol from his pocket and shot S., killing him. F. then went out of the room with the pistol in his hand, his manner being that of a frightened man, saying that he had shot some one but did not know whom. F. did not know nor had he ever seen S. before. On his trial for the murder of S., F. offered to prove that he had been a sleep-walker from infancy; that he had to be watched to prevent injury to himself; that frequently when aroused from sleep, he seemed frightened, and attempted violence as if resisting an assault, and for some minutes seemed unconscious of what he did or what went on around him; that sometimes when partly asleep, he resisted the servant who slept in the room with him as if he supposed the servant was assaulting him. He also offered to prove by medical experts that persons asleep sometimes act as if awake. He likewise offered to prove that his life had been threatened by a person living near where he had been on business during the day, and that he had on that morning borrowed the pistol with which he shot the deceased and had stated at the time that he was required to go near to where the person lived who had threatened him, and he wanted the pistol to defend himself in case he was attacked. The court rejected all this proffered evidence, and the prisoner excepted. *Held*, error. If the prisoner, when he shot the deceased, was unconscious, or so nearly so that he did not comprehend his own situation and the circumstances surrounding him, or that he supposed he was being assailed, and that he was merely resisting an attempt to take his life or do him great bodily injury, he should be acquitted.

Appeal from Jessamine Circuit Court.

H. A. Anderson and *Breckenridge* and *Shelby*, for appellant.

Judge Cofer delivered the opinion of the Court.

The appellant was indicted and tried for the murder of Henry Smith, a porter at the Veranda Hotel at Nicholasville. He was found guilty of manslaughter, and sentenced to confinement in the penitentiary for two years. From that judgment he prosecuted this appeal.

The prisoner and his friend George Welch went to the Veranda Hotel after dark on an evening in February. The weather was cold, and

Facts of the Case.

there was snow upon the ground. They sat down in the public room and went to sleep. In a short time Welch awoke, and finding the deceased at the barber's shop in the next room, called for a bed for himself and the prisoner, to pay for which he handed the deceased a bill. Welch attempted to awaken the prisoner by shaking him, but failed. He then told the deceased to wake him up. The deceased shook him for some time and failing to wake him, said he believed he was dead. Welch said: "No, he is not; wake him up." The deceased shook him harder and harder until the prisoner looked up and asked him what he wanted. The deceased said he wanted him to go to bed. The prisoner said he would not and told the deceased to go away and let him alone. The deceased said it was getting late and he wanted to close the house, and still holding the prisoner by the coat the latter either raised or was lifted up, and as he arose he threw his hand to his side as if to draw a weapon. A bystander said to him, "Don't shoot;" but without noticing or giving any sign that he heard what was said, he drew a pistol and fired. The deceased instantly grappled him to prevent him from shooting again; but a second shot was fired almost immediately, and a third soon followed. After the third shot was fired the prisoner was thrown down and held down by the deceased. The prisoner, while being held on the floor, hallooed *hoo-wee* very loud two or three times, and called for Welch. He asked the deceased to let him get up, but the deceased said: "If I do you will shoot me again." The prisoner said he would not and the deceased released his hold and allowed him to get up. Upon getting up the prisoner went out of the room with his pistol in his hand. His manner was that of a frightened man. He said to a witness, "Take my pistol and defend me;" said he had shot some one, but did not know who it was, and upon being told who it was, expressed sorrow for what he had done.

It did not appear that the prisoner knew or had ever seen the deceased before. There was not the slightest evidence of a motive on his part to injure the deceased, nor does there appear to have been anything in what the deceased did or the manner of doing it which, the facts being understood, was calculated to excite anger, much less a desire to kill him. At that time the prisoner was about thirty-three years of age, and he introduced evidence to show that he had been a man of good character, and of peaceable and orderly habits.

He also offered to prove that he had been a sleep-walker from his infancy; that he had to be watched to prevent injury to himself; that he was put to sleep in a lower room, near that of his parent, and a servant-man was required to sleep in the room to watch him; that frequently,

when aroused from sleep, he seemed frightened, and attempted violence, as if resisting an assault, and for some minutes seemed unconscious of what he did, or what went on around him; that sometimes, when partly asleep, he resisted the servant who slept in the room with him, as if he supposed the servant was assaulting him. He also offered to prove by medical experts that persons asleep sometimes act as if awake; that they walk, talk, answer questions, and do many other things, and yet are unconscious of what they do; that with many persons there is a period between sleeping and waking in which they are unconscious, though they seem to be awake; that loss of sleep, and other causes which produce nervous depression or mental anxiety, may produce such a state of unconsciousness between sleep and waking; and that for some days previous his children had been afflicted with a dangerous disease, and he had, in consequence, lost much sleep. He likewise offered to prove that his life had been threatened by a person living near where he had been on business during the day, and that he had on that morning borrowed the pistol with which he shot the deceased, and had stated at the time that he was required to go near to where the person lived who had threatened him, and he wanted the pistol to defend himself in case he was attacked.

The court rejected all this proffered evidence, and the prisoner excepted.

All the modern medico-legal writers to whose writings we have had access, recognize a species of mental unsoundness connected with sleep, which they commonly treat of under the general head of somnambulism. In speaking of this peculiar affection, Dr. Ray says: "Not only is the power of locomotion enjoyed as the etymology of the term signifies, but the voluntary muscles are capable of executing motions of the most delicate kind. Thus the somnambulist will walk securely on the edge of a precipice, saddle his horse, and ride off at a gallop; walk on stilts over a swollen torrent; practice airs on a musical instrument; in short, he may read, write, run, leap, climb, and swim, as well as, and sometimes even better, than when fully awake."[1] Wharton & Stille, Taylor and Brown announce similar views.[2] Under the general head of mental unsoundness connected with sleep, Wharton & Stille group *somnolentia*, somnambulism, and nightmare. They define *somnolentia*, "to be the lapping over of a profound sleep into the domain of appar-

[1] Ray's Med. Jur., sect. 495.

[2] Wharton & Stille on Med. Jur., sect. 149, *et seq.*; Taylor's Med. Jur., 176; Med. Jur. of Insanity, sect. 328, *et seq.*

The Opinion of the Medical Writers.

ent wakefulness," and say that it produces a state of involuntary intoxication, which for the time destroys moral agency." [1]

The writings of medical and medico-legal authors contain accounts of many well authenticated cases in which homicides have been committed while the perpetrator was either asleep or just being aroused from sleep, and in commenting on these cases, Brown, in his Medical Jurisprudence of Insanity, uses this language: "Indeed, there are many cases in which the confused thoughts of awakening consciousness have led to disastrous consequences. And this is to be accounted for by the fact that there is a state between sleeping and waking when the thoughts of the dreamer have as much reality as the facts he is assured of by his senses." [2] Taylor recognizes the existence in many persons of a half conscious state, when suddenly aroused from sleep, and says there is no doubt, the mind is at such a time subject to hallucinations and illusions, but seems to doubt whether such a state of the mind can continue long enough for the commission of a homicide. The authorities, corroborated as they are by common observation, are sufficient to prove that it is possible for one, either in sleep or between sleeping and waking, to commit homicide, either unconsciously or under the influence of hallucination or illusion resulting from an abnormal condition of the physical system. Ray says: "As the somnambulist does not enjoy the free and rational exercise of his understanding, and is more or less unconscious of his outward relations, none of his acts during the paroxysms can rightfully be imputed to him as crimes." [3] Brown, and Wharton & Stille express substantially the same views.

But we are not under the necessity of relying wholly upon writers on medical jurisprudence as authority upon this point. It is one of the fundamental principles of the criminal law that there can be no criminality in the absence of criminal intention; and when we ascertain from medical experts or otherwise that there is such a thing in nature as somnolentia and somnambulism, the task of the jurist is ended, so far as relates to the right of one accused of crime to offer evidence conducing to prove that he committed the act imputed to him as a crime while in a paroxysm of *somnolentia* or somnambulism. In criminal trials the jury must try every pertinent question of fact the evidence conduces to prove. When evidence is offered, the sole question for the court is, will it conduce to prove any fact material in the case? And if the law gives an affirmative response the evidence must be admitted. If, as claimed, the appellant was unconscious when he fired the first shot, it

[1] Med. Jur., sect. 151.
[2] Sect. 338.
[3] Med. Jur., sect. 508.

cannot be imputed to him as a crime. Nor is he guilty, if partially conscious, if, upon being partially awakened, and finding the deceased had hold of him and was shaking him, he imagined he was being attacked, and believed himself in danger of losing his life or of sustaining great bodily injury at the hands of his assailant, he shot in good faith, believing it necessary to preserve his life or his person from great harm. In such circumstances, it does not matter whether he had reasonable grounds for his belief or not. He had been asleep, and could know nothing of the surrounding circumstances. In his condition he may have supposed he was assailed for a deadly purpose, and if he did, he is not to be punished because his half awakened consciousness deceived him as to the real facts, any more than if, being awake, the deceased had presented a pistol to his head with the apparent intention to shoot him, when in fact he was only jesting, or if the supposed pistol, though sufficiently resembling a deadly weapon to be readily mistaken for one, was but an inoffensive toy.

The evidence conducing to prove that the appellant's children had been sick, and that he had recently lost considerable sleep, should have been admitted, as conducing to show that, at the moment of being aroused, he may have been unconscious, or partly so, and therefore, unable readily to understand the real circumstances of his situation. The physicians introduced would have proved, as the appellant avowed, that loss of sleep and mental anxiety each has a tendency to develop a predisposition to *somnolentia*, or sleep drunkenness, as it is otherwise called, and in this they would but corroborate the opinions of medical jurists.

We are also of the opinion that the offered evidence in regard to the alleged threats against the prisoner should have been admitted.

The central position of the defence was, that the prisoner fired the fatal shots while partially or wholly unconscious, under the false impression that he was being assaulted by the deceased. His effort was to show that he was subject to a peculiar affection which made him imagine, when suddenly aroused from sleep, that he was being assaulted by the person arousing him, and that under that impression he was accustomed to make unconsciously violent resistance; that at such times he mistook the mere creatures of his imagination for real facts and circumstances. If he had been threatened, it was natural, or at least not unnatural, especially while near to the person who had threatened him, that the threat should make such an impression on his mind as would contribute to develop with more than ordinary force the pre-

disposition to imagine himself assaulted and to make resistance, and particularly so when on being aroused, he found himself in the hands of a stranger, by whom he was being persistently and violently shaken.

We do not see any legitimate bearing the fact that he borrowed the pistol could have upon any of the issues in the case, and what he said was not admissible to prove that he had been threatened.

As the case must go back for a new trial, and it is, in some of its features, one of first impression, we will, at the risk of being prolix, consider the law applicable to it somewhat in detail.

There are several phases in which the case presents itself, all of which should be submitted to the jury.

1. If the prisoner, when he shot the deceased, was unconscious, or so nearly so that he did not comprehend his own situation and the circumstances surrounding him, or that he supposed he was being assailed, and that he was merely resisting an attempt to take his life or to do him great bodily injury he should be acquitted — in one case because he was not legally responsible for any act done while in that condition, and in the other, because he is excusable on the ground of self-defence; for although it is clear that he was not in danger, and had no reasonable grounds to believe he was, yet if, through derangement of his perceptive faculties, it appeared to him that he was in danger, he is as free from punishable guilt as if the facts had been as he supposed them to be.

2. If he was so far unconscious when he fired the first shot, or the first and second that he supposed he was defending himself against a dangerous assault, and regained consciousness before the second or third shot, the question of guilt or innocence will depend upon whether he then believed in good faith that he was in danger of losing his life or of sustaining great bodily injury.

It was not necessary, under the circumstances, that he should have reasonable grounds to believe he was in danger. In the view we are now taking of the case, we are supposing he was unconscious or partly so when he fired the first shot. If so, when he regained consciousness and found himself seized and held by a stranger who was struggling to overpower him, it would be unreasonable to expect him to wait until he could discover the purpose or apparent purpose of his antagonist, as it might have appeared to those, who in the full possession of their faculties and senses had witnessed the whole affair. But if after he fired, he became conscious, and did not at the time, in good faith, believe he

was in danger of loss of life or great personal injury, he is guilty of either murder or manslaughter, — murder if he was actuated by malice, manslaughter, if he acted without malice.

3. Although he may have been so far conscious when he fired the first shot, as to understand what he was doing, yet if he did not understand the purpose of his assailant, and believed he was attempting to inflict on him great personal injury, he should be acquitted, for as already remarked, if in consequence of a derangement of his perceptive faculties, or from being suddenly aroused from sleep, and finding the deceased holding him and shaking him, he believed he was in great danger of losing his life or suffering great personal injury, although there was in fact no danger, and those who had witnessed the affair had no reason to apprehend danger, he is no more guilty than if there had been actual danger. Such a case admits of no other test than the good faith of the prisoner, to be judged of by the jury.

4. If the prisoner was conscious of what he was himself doing, and that the purpose of the deceased was merely to wake him up, and the prisoner shot him simply because he did so, he is guilty of either murder or manslaughter; murder if the shooting was malicious, manslaughter if without malice.

If the prisoner is, and has been afflicted in the manner claimed, and knew, as he no doubt did, his propensity to do acts of violence when aroused from sleep, he was guilty of a grave breach of social duty in going to sleep in the public room of a hotel with a deadly weapon on his person, and merits, for that reckless disregard of the safety of others, some degree of punishment, but we know of no law under which he can be punished. Our law only punishes for overt acts done by responsible moral agents. If the prisoner was unconscious when he killed the deceased, he cannot be punished for that act, and as the mere fact that he had the weapon on his person and went to sleep with it there did no injury to any one, he cannot be punished for that.

Instructions two and three, given by the court, are inconsistent with the foregoing views, and should not have been given.

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

Kleptomania — Stealing Shoes.

NOTES.

§ 70. **Monomania — Kleptomania — Stealing Shoes — Test of Insanity.** — In *People* v. *Charles Sprague*,[1] tried in the Kings County Oyer and Terminer, in 1849, it was laid down: 1. It is a defence to an indictment for crime, that the act complained of was done under an insane impulse, which at the time, destroyed the capacity to distinguish between right and wrong. 2. On the trial of an indictment for robbing a female of her shoe, in daylight, in the public street of a city, it being proved that the accused had been, for several years, and ever since an injury to his head, which it was supposed had affected his brain, in the habit of taking the shoes of females, wherever he could find them, and secreting them without any apparent object for so doing, and that insanity was a hereditary disease in the family of the prisoner, on the side of his mother, with other circumstances tending to establish monomania, he was acquitted on the ground of insanity. The facts were these: —

The prisoner was indicted for robbery, alleged to have been committed upon the 18th of August, 1849, and was tried at the Oyer and Terminer for Kings County, on the 10th of October following. Sarah Watson testified that about eight o'clock on the morning of the 18th of August, she was walking along Pearl Street, in the city of Brooklyn, and hearing some person behind her, looked around and saw the prisoner, who immediately seized her, threw her down, and took a shoe from one of her feet, and ran away. She testified that at the time she had a gold chain upon her person, but that it could not be seen by the prisoner. She also stated that there was a man near by, who was unknown to her, but who hallooed at the prisoner and gave chase to him, but that the prisoner outran him and escaped. It was admitted by the prisoner's counsel, that the shoe of Miss Watson was found in the prisoner's overcoat pocket, about ten o'clock of the same day, at the printing office of the Long Island *Star*. It was proved that the prisoner was a printer by trade, and was then employed as a journeyman in the office of the *Star;* that he came to the office upon that morning at his usual time, hung up his overcoat and went to his work as he had done before. One of the proprietors of the *Star*, hearing of the circumstances of the outrage upon Miss Watson, and her description of its perpetrator, suspected the prisoner, and demanded of him the shoe he had taken from the foot of a young lady. The prisoner replied, "It is in my overcoat pocket." The shoe was taken from the pocket of the prisoner's overcoat, and afterwards identified by Miss Watson as the one taken from her in the street. The prisoner made no attempt at concealment or explanation.

The counsel for the prisoner admitted that if the prisoner was sane, he was guilty of the crime for which he was on trial. The prisoner's counsel called the Rev. Isaac N. Sprague, father of the prisoner, a highly respectable Congregational minister, who testified that the prisoner's age was twenty-five years; that

[1] 2 Park. 43 (1849).

Notes.

he had generally resided in the family of the witness, but had spent a year with a brother at Hartford, Connecticut, where he went about four years before; that since his return from Hartford, the prisoner had lived with the witness; that the prisoner was married in the year 1847, and was, with his wife, living at the house of the witness at the time of the assault upon Miss Watson; that the prisoner had at different times received wounds and bruises upon the head; that when quite young he was struck with a hoe near the crown of the head, producing an open wound, which after some time closed and healed up; that when about twelve years old, the prisoner fell from a cherry tree, striking upon his head; that witness, with his family, moved to Hartford in 1837 or 1838, and soon after the prisoner fell from the balcony of a second story, and was brought home insensible; that no immediate effect seemed to be produced upon the prisoner's mind by this accident, but that soon after his conduct became strange. He testified that his (witness's) mother had been insane for eight years, and some part of the time in an insane hospital; that a brother of his mother became insane and hung himself; that two sisters of his mother were occasionally insane; that his grandmother on his mother's side was also insane. He stated that he and his wife had always known the mind of the prisoner to be not so strong as the minds of their other children; that after the fall from the balcony the prisoner was more carefully watched and kept in, and some painful indications were developed in the prisoner — as at times a remarkable prominence of the eye, and a dullness which appeared to increase, and a physician was consulted. An effort was made to educate the prisoner for college, but found that could not be done. About this time a shoe of some female member of the family would be missing, and when found would frequently be wet and crumpled up; that a girl named Almira Godfrey, who was living in witness's family at the time, was at first suspected, but at length one of her shoes was missing, and when found was also wet and crumpled like the others. The family then suspected Charley (prisoner) and soon found it was he who took away the shoes. When a shoe was missing, it would be found sometimes under his pillow, sometimes between the straw and feather bed, sometimes in his trunk, and sometimes in his pocket, generally with his clothes wound round the shoe, as if to conceal it. That the prisoner before his fall from the balcony, had been truthful, and of a frank and open demeanor, and willing to acknowledge the truth, though to his own disadvantage. After it was found he took the shoes, whenever one was missed, and I spoke about it, he would hang his head and say he did not know, but that the shoe would be found somewhere secreted. On some occasions when a shoe had been missed and found under his pillow, his mother would say to him, "Charley, another shoe gone," to which he would reply, "I'm sure I didn't do it." His mother would say, "I found it under your pillow," then he would admit it. He seemed not to have a memory of the fact. I punished him for taking shoes, but I soon thought I could recognize the features of insanity in his conduct. Pains were taken to keep shoes out of his way, and they were put in drawers, and he would take them out of the drawers in the night. At times the prisoner had fullness of eyes, a vacancy of the eye was frequently apparent. We kept him in evenings and away from exciting amusements. About the time of the affair for which prisoner is on trial, he had complained a good deal of headache; that wit-

Stealing Shoes.

ness had sometimes sent Charles (the prisoner) to the country. He was once away for about two years. His practice of taking and secreting shoes has been continued down to the present time, although it has intermitted. I went to board with him last May. His wife would miss her shoes occasionally, and they would be found where the prisoner had secreted them. On cross-examination, this witness said that he saw the wound from the hoe; that he did not see the wound caused by the prisoner's fall from the cherry tree, which took place in Vermont. That he saw the wound occasioned by the fall from the balcony; that all apprehension passed away in a day or two after the fall from the balcony, but soon after came the protruding and glassiness of the eye; that he was then between twelve and fourteen years old, and went to school; that his moral sense seemed to be somewhat blunted; that he was not as truthful as before.

There was also read in defence the deposition of Thomas Sprague, of Michigan (a brother of prisoner), and of Mary E., his wife, and of Julia A. Hyde, a sister of prisoner's father, and of Oliver Hyde, her husband; of Rebecca Freeman and Maria King, all witnesses living out of the State. The deposition of Thomas Sprague and wife were principally to the habit of the prisoner while living with them, to take shoes of ladies and secrete them. Some of the depositions spoke of the fact of the fall from the cherry tree in Vermont, and some of them proved the insanity of the relatives of the prisoner, in corroboration of the statement of the prisoner's father.

Charles H. Nichols, M. D., testified that he was twenty-nine years of age; that from May, 1847, to March, 1849, he was at the State Insane Asylum at Utica, and in April, 1849, came to the asylum at Bloomingdale, of which he had the charge since. That while he was at Utica, there were about eight hundred patients in the asylum, and about one hundred and fifty at Bloomingdale. This witness testified that from the testimony in the case, he was clearly of opinion that the prisoner was laboring under derangement of mind; that the act charged appeared to him to be an insane act; that it was not uncommon for monomaniacs to secrete, and to endeavor to escape; that cases of strict monomania were very rare, but do exist, and in such cases all conduct not affected by the peculiar delusion, may be perfectly rational. The cases of insane impulse are more frequent than those of monomania; acts done under insane impulse are more likely to be remembered than those done under the influence of monomania. Theodore L. Mason, M. D., testified that insanity is the genus, monomania a species, and that the impulsive characteristic may be common to both general and partial insanity. He was partially insane, and that the act for which he was on trial was done from an insane impulse. The evidence being closed, the case was submitted under the charge of the court.

The Presiding Judge charged the jury, that there was no question made, that the prisoner had done the act alleged in the indictment, and that the only question for them to decide was whether the prisoner at the time of the act done, was a responsible moral agent. That if at the time he did the act the prisoner was of sound mind, and capable of judging between right and wrong, then he was guilty of the crime charged upon him, but if he was of unsound mind, and acting under an impulse which, at the time, overthrew or obscured his knowledge or capacity to judge of right and wrong, then he was not capable of committing a

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crime, and must be pronounced not guilty. That it seemed quite unnecessary to go into any consideration of the question of general insanity, as the whole defence had been put upon the ground, that the prisoner was partially insane, and that the peculiarity of his insanity, consisted in what appears to the sane mind an objectless desire to possess himself of the shoes of females, and to hide and spoil them. That insanity, as a defence, was an affirmative matter; and in order to be allowed, must be proved beyond all reasonable doubt. If they were satisfied beyond reasonable doubt that the prisoner did the act charged in the indictment under an insane impulse, being at the time, incapable of knowing right from wrong, it would be their duty to return a verdict of not guilty; but if they were not satisfied of the prisoner's insanity, it would be their duty to give a verdict of guilty. After a short absence the jury returned with a verdict of not guilty.

Kleptomania, it was held in a Texas case is a recognized form of insanity.[1]

§ 71. **Somnambulism.**— An act done in a state of somnambulism is innocent.

§ 72. **Use of Opium.** — In *Rogers* v. *State*,[3] on a trial for larceny, it appeared from the evidence that the prisoner was addicted to the habitual and excessive use of opium in some of its forms, and there was evidence from which it might be inferred that at the time of the larceny he had been deprived of his accustomed supply of the drug. He sought to show the effect of such deprivation upon his mental condition, but the trial judge refused to allow him. On appeal this ruling was reversed. "We think," said the Supreme Court, "the evidence was competent, as tending to show whether or not he was at the time in a condition mentally such as to be able to commit a larceny."

§ 73. **Erotomania.** — On an indictment for the murder of a man, evidence that the prisoner was the subject of erotomania, defined to be a morbid sexual desire, is inadmissible.[4]

§ 74. **Person of Low Mental Capacity.** — In *Patterson* v. *People*,[5] evidence that the prisoner was of low mental capacity was rejected. "The offer was," said the court in the words of the counsel, "not for the purpose of proving him *non compos mentis*, but the measure of his intellectual capacity. The law recognizes no standard of unaccountability less than that which the offer disclaimed any attempt to establish. If a low order of intellect and great ignorance arising either from slowness of apprehension or a neglected education are to excuse a homicide, we shall have a rule which will give far greater impunity to crime than it now possesses. Every man must be held accountable for the consequences of his acts, consciously and deliberately performed, unless he can show that he is in that condition which stamps him as an irresponsible being, and the proof indicated in the offer made no approach to this."

1 Looney *v.* State, 10 Tex. (App.) 520 (1881)
2 See Fain *v.* Com., 78 Ky. 183 (1879).
3 33 Ind. 543 (1870).
4 State *v.* Simms, 71 Mo. 538 (1880).
5 46 Barb. 625 (1866).

U. S. *v.* Hewson — R. *v.* Vyse.

As to what degree of mental incapacity constitutes *dementia*, and renders a person not criminally responsible for acts otherwise criminal, see *State* v. *Richards*.[1]

§ 75. **Other Cases.** — In *United States* v. *Catherine Hewson*,[2] the prisoner was indicted for the murder of her child by throwing it overboard from a steamboat. She had confessed to throwing it over, but said that it died in a fit, using language indicating an unsound mind. It appeared from the evidence of physicians that she had been subject to puerperal fever, and that the tendency of that disease was to produce temporary alienation of mind and derangement of the natural affections. Judge STORY instructed the jury that they ought to find her insane, which was done.

In *Reg.* v. *Vyse*,[3] tried before WIGHTMAN, J., in 1862, a married woman, fondly attached to her children and apparently happy in her family, had poisoned two of them with deliberation and design. It appeared that there was insanity in the family, and from her demeanor before and after the act, and from the presence of certain exciting causes of insanity, the experts were of opinion that she was laboring under actual cerebral disease, and that she was in a paroxysm of insanity at the time of the act. She was acquitted.

[1] 39 Conn. 591 (1873).
[2] 7 Law Rep. 361 (1844).
[3] 3 F. & F. 247.

CHAPTER V.

EVIDENCE AND PRACTICE

INSANITY MUST BE CLEARLY SHOWN — EVIDENCE OF EXCITEMENT.

STATE *v.* GRAVIOTTE.

[22 La. Ann. 587.]

In the Supreme Court of Louisiana, November, 1879.

Hon. JOHN T. LUDELING, *Chief Justice.*
" J. G. TALIAFERRO, }
" R. K. HOWELL, } *Associate Justices.*
" W. G. WYLY, }
" W. W. HOWE, }

Insanity must be Clearly Shown. — Insanity, when pleaded in defence of a criminal act, such as homicide, must be clearly shown to have existed at the time of the commission of the act. Therefore, evidence of a witness to show a state of mental excitement in the accused, produced by the insulting language and threats used towards him by the deceased, his wife's paramour, at the time of the killing, is not admissible to show insanity.

APPEAL from the First District Court, Parish of Orleans. ABELL, J.

Simeon Belden, Attorney-General, for the State.

A. A. Atocha, for defendant and appellant.

TALIAFERRO, J.— The defendant, being indicted for murder, was found guilty of manslaughter, and sentenced to hard labor in the penitentiary for the term of two years and six months. He has appealed from the judgment.

The plea set up in his behalf on the trial was that of insanity. A bill of exceptions to the ruling of the court excluding evidence offered to sustain the plea of insanity embraces the grounds upon which the plea was taken. The defendant offered to prove, by a witness introduced

on the part of the defence, that on the night previous to the commismission of the homicide, the witness and the accused saw improper conduct between the wife of the latter and a man who was with her in the house of the accused. The character of this alleged misconduct was sought to be elicited by a question put to the witness. The evidence was offered to show such a state of mental excitement in the defendant, produced by what he had witnessed, and the insulting language used towards him by his wife's paramour, as might become a predisposing cause of insanity. The evidence was objected to on the part of the State, and rejected by the court as irrelevant and inadmissible to prove insanity. We think the ruling correct. Insanity, when pleaded in defence of a criminal act, must be clearly shown to have existed at the time of the commission of the act. Vague conjectures as to a probable existence of mental aberration from supposed predisposing causes are quite too sublimated to possess weight in the inquiry as to the sanity or insanity of an accused party.

The counsel of the defendant further asked the courrt to chage the jury as follows: *First.* There is no presumption of malice in this case, if any proof of alleviation or excuse arise out of the evidence. *Second.* The existence of malice is not presumable in this case, if, on any theory consistent with the evidence, the homicide was excusable. *Third.* If, on the whole evidence presented, there is any hypothesis, consistent with the conclusion that the homicide was excusable, the accused cannot be convicted.

The fourth and fifth points are mere reiterations of the grounds upon which the testimony was offered to show insanity and which was rejected by the court.

To these requirements, in their order, the judge charged the jury: 1. That if there was alleviation or excuse, there could be no murder; the offence would, at most, be only manslaughter. 2. The court declined to give the charge required under this head, because it could only do so by referring to the evidence, which it has no right to do. 3. The jury was charged expressly, that if the homicide were excusable, they must acquit.

We find no error in the charges given to the jury. The defendant has failed to present a case requiring this court to grant relief.

It is therefore ordered, adjudged, and decreed that the judgment of the District Court be affirmed.

ADULTERY OF WIFE — WHEN EVIDENCE INADMISSIBLE — DRUNKENNESS — INSANE DELUSIONS — DECLARATIONS.

State *v.* John.

[8 Ired. (L.) 330; 49 Am. Dec. 396.]

In the Supreme Court of North Carolina, June Term, 1848.

Hon. Thomas Ruffin, *Chief Justice.*
" Frederick Nash, } *Judges.*
" William H. Battle, }

1. **Adultery of Wife — Evidence of, not Admissible, when,** — On an indictment for murder, evidence that the prisoner's wife had been in the habit of committing adultery with the deceased is inadmissible. Nothing but finding a man in the very act can mitigate the homicide from murder to manslaughter.
2. **Voluntary Drunkenness** will not mitigate a crime.
3. **Declarations of Prisoner, when** admissible on question of his insanity.
4. **Insane Delusions.** — When is a criminal act done under an insane delusion, not punishable, *quære?*

Appeal from the Superior Court of Craven County, Spring Term, 1848.

The prisoner was indicted for the murder of Ben Shipman, a slave. Verdict of guilty and sentence of death pronounced. The prisoner appealed.

The *Attorney-General*, for the State.

J. H. Bryan, for the prisoner.

Battle, J. — We have considered the questions presented by the counsel for the prisoner, in his bill of exceptions, with all that care and anxiety for a right decision which their importance, both to the prisoner and to the State, imperatively demanded. We have, nevertheless, been unable to find in the errors assigned any thing of which the prisoner has a right to complain. The first exception is, that the court erred in rejecting "the evidence offered to prove the adultery of the prisoner's wife with the deceased." This testimony was offered to prove, not that the deceased was found by the prisoner in the act of adultery with his wife at the time when the homicide was committed, but that "an adulterous intercourse has been, for some time preceding the homicide, carried on between them;" and the counsel insisted that a knowledge, or even belief, of such adulterous intercourse by the prisoner would mitigate the crime from murder to manslaughter. No authority has been produced in support of this position, and, so far as we can learn,

all the authorities are directly against it. Hale, Foster, East and Russell all agree in stating that, to extenuate the offence, the husband must find the deceased in the very act of adultery with his wife. And so it must be upon principle. The law extends its indulgence to a transport of passion, justly excited, and acting before reason has time to subdue it, but not to a settled purpose of vengeance, no matter how great the injury or gross the insult which first gave it origin. A belief — nay, a knowledge — by the prisoner that the deceased had been carrying on an adulterous intercourse with his wife cannot change the character of the homicide. The law on this subject is laid down with much clearness and force by Foster in his Crown Law,[1] and with him all the other writers substantially agree: "A husband, finding a man in the act of adultery with his wife, and, in the first transport of passion, killeth him, this is no more than manslaughter. But had he killed the adulterer deliberately and upon revenge, after the fact and sufficient cooling time, it had been undoubtedly murder. For, let it be observed, that in all possible cases deliberate homicide, upon a principle of revenge, is murder." As, then, the evidence which was offered to show the adulterous intercourse between the prisoner's wife and the deceased could not, if received, have changed the nature of the offence, the court did not err in rejecting it. But it is argued here that the prisoner had just reasons for believing that the deceased was engaged in the act of adultery with his wife at the very time when he broke into the house of the deceased and killed him. It may well be doubted whether the testimony given on the trial supports this view of the case; but if it were admitted that it did, it could be of no avail to the prisoner. It is the sudden fury, excited by finding a man in the very act of shame with his wife, which mitigates the offence of the husband, who kills his wrong-doer at the instant; but to the offence of one who kills upon passion, excited by a less cause — by a mere belief of the act — the law allows of no mitigation.

The second exception is "for misdirection of the court on the subject of drunkenness." All the writers on the criminal law, from the most ancient to the most recent, so far as we are aware, declare that voluntary drunkenness will not excuse a crime committed by a man, otherwise sane, whilst acting under its influence. Even the cases relied upon by the counsel for the prisoner[2] all acknowledge the general rule, but they say that, when a legal provocation is proved, intoxication may

[1] p. 296.

[2] Rex v. Meakin, 7 C. & P. 297 (32 Eng. C. L. 514); Rex v. Thomas, *Id.* 817, 750; 1 Russ. on Cr. 8.

Adultery of Wife.

be taken into consideration to ascertain whether the slayer acted from malice or from sudden passion, excited by the provocation. Whether the distinction is a proper one or not, we do not pretend to say. It has been doubted in England, and it is a dangerous one, and ought to be received with great caution. But whether admitted or not, it has no bearing upon the present case. There is not a particle of testimony to show that the prisoner was acting, or can be supposed to have been acting, under a legal provocation; and there was, therefore, no cause for the application of the principle for which the counsel contends.

The third exception is "because the court rejected a part of the evidence tending to show that the prisoner was laboring under monomania on the subject of his wife's adultery with the deceased." The testimony offered and rejected was "the declarations of the prisoner, made some time before the homicide." We are not sure that we correctly understand this exception in the connection in which it is made. One of the grounds of defence taken by the prisoner was that he was insane at the time when he committed the homicide, and, so far as we can discover, he was allowed to introduce all the testimony in his power to sustain it. Of that, and of the charge of the judge in relation to it, no complaint is, or can, be made by the prisoner. Monomania is one among the various forms of insanity, it is a partial insanity upon one particular subject. As a species of insanity, it was competent for the prisoner to have proved it, and he was not restricted in his proof of it, so long as he insisted on it under the defence of insanity. It was not until after he had closed his testimony on that subject, and also on the subject of drunkenness, that he offered the testimony which was rejected. We do not well see how the one could be separated from the other. The declarations, too, what were they? Were they statements of facts, by the prisoner offered as evidence of those facts? If so, they were clearly inadmissible. Were they wild, incoherent and disjointed exclamations in relation to his wife's adultery, evincing that they proceeded from an unsound mind? If so, the prisoner should have offered them as proof under his defence of insanity, and they would doubtless have been received. If we are to judge of their nature from the declarations which were received, as having been made on the night of the homicide, and proved by the witness Dausey, then they ought to have been rejected as the mere idle ravings of a drunken man. Our difficulty in understanding the exception is still further increased by the apparently inconsistent grounds of defence assumed for the pris-

1 Rex *v.* Carroll, 7 C. & P. 145 (32 Eng. C. L. 417).

oner. One ground, which we have already considered, is that his wife was actually guilty of adultery with the deceased. Now, if by monomania on that subject is meant that the prisoner was laboring under mental delusion that his wife was guilty, when in truth she was innocent, then the fact of her innocence is directly opposed to what was asserted and offered to be proved by the prisoner's counsel. But if the prisoner's wife was guilty, and the insane delusion of his mind was that he had the right to kill her paramour, then it would raise a most important and interesting question whether insanity to that extent only would render him irresponsible for crime. It seems to be settled by the highest authority in England that it would not.[1] But we do not wish to express an opinion upon it until the question is brought directly before us. In this case we are compelled to decide against the prisoner, because he has not shown us that he has been deprived of any benefit or advantage to which by law he was entitled.

Judgment affirmed.

EVIDENCE — ADULTERY OF WIFE OF PRISONER — INSANITY SHOULD NOT BE INFERRED — CAUTION TO JURY.

Sawyer v. State.

[35 Ind. 80.]

In the Supreme Court of Indiana, May Term, 1871.

Hon. Alexander C. Downey, *Chief Justice.*
" John Pettit,
" James L. Worden,
" Samuel H. Buskirk, } *Judges.*

1. **Evidence — Irrelevant on Question of Sanity.** — S. was indicted for the murder of his wife. On the trial he offered evidence that she had for a long time been having an adulterous intercourse with one B. and others, of which S. had for a long time been cognizant. *Held*, inadmissible, both on the question of heat of passion and of insanity.
2. **Insanity Should Not be Inferred.** — A jury is not authorized to find a prisoner insane because some cause existed which might tend to produce insanity.
3. **Instructions — Caution to Jury.** — It is proper for the court to direct the attention of the jury to the defence of insanity, and instruct them that it should be carefully and and intelligently scrutinized.

1 Stark on Non Compos, 66; note to Reg. v. Higginson, 1 C. & K., and 47 Eng. C. L. 130.

Facts in the Case.

Appeal from the Vanderburg Criminal Circuit Court.

T. L. Davis and *J. G. Hollingsworth*, for appellant.

W. P. Hargrave and *B. W. Hanna*, Attorney-General, for the State.

Worden, J. — The appellant was indicted for, and tried, and convicted of, the murder of his wife, Lizzie Sawyer, and sentenced to be executed. The case made against the accused by the evidence is, in substance, as follows: —

The deceased, at the time of the homicide, was employed as chambermaid on the steamboat G. W. Thomas, which was then lying at the wharf in the city of Evansville, in Vanderburg County, in this State. On the evening of the 2d of February, 1871, one Delia Wilson, an acquaintance of the deceased, went on board the boat to see her. Soon after Delia went on board, the accused went on board the boat, and went to that part of the boat where the deceased and Delia Wilson were. The witness to this part of the transaction, Delia Wilson, says that the accused did not seem to be angry, but spoke to her and the deceased very pleasantly, and inquired after their health, and sat down by a table where deceased was ironing. All three of the parties talked and laughed together for a while. After some casual conversation, the accused asked the deceased if she would go and live with him if he would get a house off Water Street. The deceased made him no answer. The witness, Wilson, asked her why she did not answer him. The deceased replied that the accused always came to her drunk, and that was the reason she wouldn't talk to him. The accused then asked the deceased, addressing her as "baby," if she would go and live with him if he would get a house in another portion of the city, to which she replied that he knew her mind was made up; that she had told him when the boat was in port on the last trip what she was going to do; that she then told him she never intended to live with him again. In the meantime the accused had got up from where he had been sitting, and moved two or three steps, taking a seat near where the smoothing irons, which the deceased was using, were sitting. At the point of the conversation above stated, the appellant seized one of the irons, weighing between four and five pounds, and struck the deceased on the head therewith. He struck her twice before she fell, but kept on striking after she had fallen, as the witness says, as much as two dozen times. The witness became frightened, and ran into the pantry of the boat, and fastened the door, but she heard the deceased screaming for a minute or two after that, and then she ceased. When the witness came out of the pantry, she saw the appellant jumping from the boat to the river bank, with the smoothing iron in his hand. This witness also tes-

tifies that on the day before the murder she talked with the appellant when, as she says, he seemed to think the deceased "had been spending his money on another man." The deceased had been on the boat about a month.

Edward Green, the cabin-boy of the boat, heard screams of murder from the direction of the stern of the boat, and ran and opened the door leading from the ladies' cabin to the washing and ironing room, and there saw the prisoner have the deceased down on the floor, with his knees on her breast, striking her on the head with the smoothing iron. When the witness opened the door, the prisoner ran at him and told him to get out or he would kill him. The witness ran out, when the accused shut the door and bolted it, and then began beating the deceased again. The porter of the boat came and broke the door open, at which time some six persons had gathered around, and the appellant, swearing he would kill all of them if they did not get out of the way, ran down on deck, and jumped off the boat. When the appellant left the boat, the parties went to where the deceased was lying, and found she was dead. Her head was brutally and horribly mangled.

After the appellant left the boat, it appears that he ran about two miles from town, but then returned and surrendered himself up to the officer, saying that he had concluded to come back and surrender himself up because he knew he would be pursued and taken. He said at different times after the murder, that if he had not killed the deceased, he had failed to do what he intended; that he killed her because she had been sleeping with one Bibbs, and others, and that he only regretted that he could not kill Bibbs also. He also said he was now satisfied, and they might hang him, shoot him, or do what they pleased with him.

It was proved by another witness, who had some acquaintance with the appellant and his wife, that she did not know why the deceased left home to go on the boat, but that she was kept by another man by the name of Bibbs. On one occasion the appellant came home and after talking with the deceased a while about her conduct with other men, he said to her that if she did not quit running with other men he would smother her in her heart's blood, to which she replied, "Well, then, you can kill me," and left the room. On another occasion, about three weeks before the murder, appellant said to the deceased, that if she did not behave herself and quit running with other men, he would kill her.

It appears by the evidence that the appellant is below the average of mankind in point of mental capacity and intelligence, but he appears to us to have had abundant mind to be in every way responsible for his

conduct; and we may add that, although there was evidence given to show, in the language of the bill of exceptions, "the causes that tend to produce temporary insanity," there was nothing in the case that shows any mental derangement on the part of the accused.

The appellant offered to prove "that the deceased, Lizzie Sawyer, had for a long time previous been having adulterous intercourse with a man by the name of Bibbs, and others, of which adulterous conduct the defendant had for a long time been cognizant." This evidence was rejected, on objection made by the State, and the defendant excepted. This evidence, offered with a view to justify, or in any way palliate, the offence, was utterly incompetent, and correctly rejected. It assumes that the defendant had "for a long time," been cognizant of his wife's adultery. If he had been thus for a long time apprised of her guilt in that respect, there had been an abundance of time for the ebullition of passion, which might be supposed to arise on being first apprised of the fact, to subside. After the lapse of time sufficient for the passions to cool, and for reason to resume her sway, the killing was just as criminal and indefensible as if the deceased had never been guilty of conjugal infidelity. We do not determine what might have been the effect of the adultery of the deceased had the homicide been perpetrated by the appellant immediately upon discovering the fact. It is sufficient to say that if the facts offered to be proven were established, they would, in no way, excuse or mitigate the offence.[1] There might be numerous authorities cited upon the point, both ancient and modern, but it is deemed unnecessary.

It is claimed, however, that the evidence should have been permitted to go to the jury, on the ground that it tended to establish the insanity of the accused. It appears to us that the appellant had the full benefit, on the trial, of the fact that he believed that the deceased had been guilty of continued adultery, if that belief had any tendency to produce mental derangement. His statements, before and after the murder, show that he entertained that belief, or perhaps we should say, that he knew the fact. But the evidence, as offered, was incompetent for that purpose.

It was testified by a physician, that "any excitement, an impression that a great wrong has been inflicted upon a man, protracted thought upon any subject, and others that might be enumerated," are causes that tend to produce temporary moral insanity. It is claimed, as we understand the argument, that inasmuch as the infidelity of the de-

1 State *v.* Samuel, 3 Jones (N. C.) 74; State *v.* John, 8 Ired. 330.

ceased was a great wrong inflicted upon the defendant, and inasmuch as his mind would protractedly dwell upon the subject, the evidence was competent, as tending to show the existence of an exciting cause of insanity.

This argument assumes that a jury may infer the existence of insanity from proof merely of the existence of a cause that may tend to produce it, without any proof whatever that the effect followed the cause. If it were a case where a given effect *must* follow the cause, there would be force in the argument, because proof of the cause would be proof of the effect. But we know that the various causes that may tend to produce insanity very frequently fail to produce any such effect; and it seems to us that it is not competent to prove the existence of such exciting cause unaccompanied with some proof that the effect followed the cause. Indeed, a jury would not be authorized to find a man to be insane, without proof on the subject other than the fact that a cause existed that tended to produce insanity. Thus in the case of *Bradley* v. *State*,[1] the court below charged the jury, that "if it had been proved that the mother of the defendant was insane, and that insanity in the mother raises a strong presumption that it is transmitted to the offspring, yet it rests upon the defendant to prove that he was insane at the time the act was committed. The facts that the mother was insane, that the twin brother of the mother was also insane, and that a cousin was insane, if proved, would not be sufficient, of themselves, to show insanity in the defendant, but are facts strongly tending to show hereditary insanity in the family, and proper for you to consider with the other testimony in the case, to aid you in determining whether the defendant was insane or not, when the act was committed." This charge was held to be correct.

The evidence offered was not accompanied with any offer of evidence to prove the actual insanity of the defendant, nor was there any evidence introduced that had any legitimate tendency to prove insanity; and whatever might have been the law of the case had evidence been introduced or offered, in connection with that rejected, tending to prove the defendant's insanity, we think the evidence as offered, was rightly rejected.

The appellant moved for a new trial, upon the ground, amongst other things, that the court erred in giving the first, second, third, fourth, and eighth instructions to the jury.

[1] 31 Ind. 492.

Charge of the Court.

The charges given to the jury are too long to be here set out in full, but we find no error in them. They place the whole law of the case before the jury in quite as favorable a light as the appellant could ask. No objection is pointed out in the brief of counsel for appellant to any of the charges except the second, which is as follows: "If you shall find from the evidence that the prisoner, Sawyer, did the killing as charged in the indictment, then the next question for you to determine is, was the prisoner justifiable or excusable to any extent upon any of the grounds mentioned? The ground relied upon by the defence in this case to overcome this presumption of malice (the presumption arising from the use of a deadly weapon, as explained in a previous charge), is that of insanity. In other words, it is argued in behalf of the prisoner that at the time of the commission of the act alleged in the indictment, he was not of sound mind, and, therefore, not responsible for the acts committed by him. This defence is one very frequently made in cases of this kind, and it is one which, I may say to you, should be very carefully scrutinized by the jury. The evidence to this point should be carefully considered and weighed by the jury, for the reason that if the accused were in truth insane at the time of the commission of the alleged acts, then he ought not to be punished for such acts. The evidence on this question of insanity ought to be carefully considered by the jury for another reason, and that is, because a due regard for the ends of justice and the peace and welfare of society demands it, to the end that parties charged with crime may not make use of the plea of insanity as a means to defeat the ends of justice, and a shield to protect them from criminal responsibility in case of violation of law. It is not every slight aberration of the mind, not every case of slight mental derangement that will excuse a person for the commission of an act in violation of law. The great difficulty is to determine, in cases where insanity is urged as a defence, the degree of insanity that will excuse a person for an act, which, if committed by a sane person, would be criminal, and would subject the offender to punishment. If you believe from the evidence that at the time of the alleged killing (if you shall find from the evidence that there was a killing as alleged in the indictment), the prisoner, Sawyer, was so far insane as not to be able to distinguish between right and wrong with respect to the act in question; or if you shall find from the evidence that he was urged to the commission of the act by an insane impulse so powerful as to overcome his will and judgment, so powerful that he was unable to resist it, even though he might know and feel that the act he was committing was wrong and a violation of law, no matter whether such insane impulse arose from

mental or physical causes, or both, provided they were not voluntarily induced by himself; or, if you should find from the evidence, that the prisoner was insane on any subject, no matter upon what, provided you find the insane impulse to do the act charged in the indictment arose from such insanity, then, in contemplation of law, he would be insane, and you should acquit him."

It is objected to that portion of the charge which informs the jury that "the ground relied upon by the defence in this case to overcome the presumption of malice is that of insanity," that it diverted the minds of the jurors from the other grounds relied upon to overcome the presumption of malice, and was calculated to confuse and mislead them. Looking at the case as it appears to us from the evidence, and considering the circumstances and character of the homicide, and the instrument with which, and the manner in which, it was perpetrated, it is difficult to conceive of anything that would overcome the presumption of malice, unless it be a disordered and shattered intellect. But we do not think the court erred to the injury of the accused in giving undue prominence to the defence of insanity. In the series of charges, including that above set out, the whole case was fully and very fairly placed before the jury, and the prisoner had the full benefit of the law as applicable to his case. It may be further observed that in that portion of the charge above objected to, the court was but stating the case as it was argued to the jury by the counsel for the defendant, for the charge immediately proceeds as follows: "In other words, it is argued on behalf of the prisoner that at the time of the commission of the act alleged in the indictment, he was not of sound mind," etc. We cannot say that the court misstated the positions of counsel or gave more prominence in the charge to the question of insanity than the counsel did in the argument.

It is also objected to the charge that it was calculated to prejudice the jury against the defence of insanity; that the jury were unduly cautioned to carefully scrutinize the evidence on that subject.

The observations of the court in that respect meet our unqualified approval. As stated by the court, where the defence of insanity is interposed to a criminal prosecution, the evidence relating to it should be carefully and intelligently scrutinized and considered, for the double reason that a really insane person should not be convicted, and a really sane one should not be acquitted and suffered to go unpunished for his crimes, on the false theory of insanity.

Previous and Subsequent Insanity.

We find no error in the case, either in relation to the evidence or the charge of the court, and are satisfied from the evidence that the verdict and judgment are in all respects right.

The judgment below is affirmed, with costs.

EVIDENCE — ACTS AND DECLARATIONS OF PRISONER — INSANITY MUST EXIST AT TIME OF ACT.

STATE *v.* HAYS.

[22 La. Ann. 39.]

In the Supreme Court of Louisiana, January, 1870.

Hon. JOHN T. LUDELING, *Chief Justice.*
" J. G. TALIAFERRO
" R. K. HOWELL,
" W. G. WYLY,
" W. W. HOWE, } *Associate Justices.*

1. **Evidence — Acts and Declarations of Prisoner.** — In a criminal prosecution for the crime of murder, the witnesses for the accused may, under the plea of insanity, be permitted to give to the jury the acts, declarations, conversations and exclamations, they saw, had with, and heard the accused make at any time shortly before, at the time of, or after the killing. The objections to such testimony go to its effect.

2. **Previous or Subsequent Insanity** will not discharge the accused. It must be shown to exist at the time the deed was done.

APPEAL from the First District Court of New Orleans, before ABELL, J.

L. Belden, Attorney-General, for the State.

McCay, *Levy* and *J. B. Colton*, for defendant and appellant.

HOWE, J. — The defendant was tried for murder, found guilty without capital punishment, and sentenced to imprisonment in the State penitentiary for life. From this judgment he has appealed.

It appears by a bill of exceptions that the defendant placed on the stand certain witnesses, and asked each of them *seriatim*, " to state the acts, declarations and conversations and exclamations, they saw, had with and heard the prisoner make, at any time shortly before, at the time of, or after the killing of Sinnott tending to show the condition of his mind; which question and answer was objected to by the Attorney-

General of the State, on the ground that his (the prisoner's) statements, declarations and conversations were inadmissible, and were illegal. The court sustained the objection to the question and answer, in so far as to limit the same to the acts and the exclamations of the prisoner a short time previous to and at the time of the killing, and to the acts after the occurrence."

In signing the bill the judge adds: "Every conversation for two or three months previous to the homicide, accompanying any act indicating unusual excitement was admitted; other conversations were excluded."

The defence in this case was insanity. In the solution of the question presented by this bill of exceptions, it becomes necessary, therefore, to inquire what scope is allowed the prisoner in establishing such a defence by the enlightened spirit of modern jurisprudence.

Insanity is a disease. It has its pathology and its symptoms, and it would seem that its existence can be determined only by a careful scrutiny of those symptoms. The tree is to be known by its fruits; the condition of the hidden mechanism is to be ascertained by those communicated movements which are external and apparent. To this end the usual expressions of a mental state are original and competent evidence. If they are the natural language of mental alienation, they furnish satisfactory and sometimes the only proof of its existence. It is true, that such expressions may be feigned, and often are; but whether they were real or feigned is for the jury to determine. Hence the rule prevails that as *indicia* of the mental condition, not only the acts, but the conversations, exclamations and declarations of the person may be shown. Of course this rule should not be extended beyond the necessity on which it is founded — mere narration or statement by the accused, as that at a certain time he said or did something, or that at a certain time he was insane, must be excluded; but testimony of such deportment, action, complaints, exclamations, declarations, and expressions, as usually and naturally accompany and furnish proof of an existing malady, ought to be freely admitted.

We think it equally well settled that all such *indicia* occurring after the commission of the offence, may be shown, and that the judge therefore erred in confining the testimony to *acts* done after the homicide. It is true that mania is often simulated, and it is quite likely, that the danger of simulation may increase after the commission of a homicide; but this consideration relates rather to the effect of the testimony than to its admissibility. It may have little weight; but such as it has the jury must estimate. Previous or subsequent in-

sanity in itself is no matter of excuse; the mania must have existed at the time the act was done; yet, evidence of the presence of the malady either before or after the act, is proper to be weighed by the jury, for the purpose of forming a conclusion whether insanity existed at the time the alleged crime was committed. And this evidence, we apprehend, may be identical in character with that which is admitted to establish mental unsoundness prior to the act.[1]

For the reasons given, it is ordered that the judgment appealed from be avoided, and the verdict of the jury set aside, and that the cause be remanded for a new trial, according to law.

Chief Justice LUDELING and Justice HOWELL absent.

EVIDENCE OF SUBSEQUENT ACTS AND CONDUCT.

COMMONWEALTH *v.* POMEROY.

[117 Mass. 143.]

In the Supreme Judicial Court of Massachusetts, February, 1875.

Hon. HORACE GRAY, *Chief Justice.*
" JOHN WELLS,
" JAMES D. COLT,
" SETH AMES, } *Judges.*
" MARCUS MORTON,
" WILLIAM C. ENDICOTT,
" CHARLES DEVENS, JR.,

Evidence of Subsequent Acts and Conduct. — Where insanity is relied on as a defence to crime, evidence of acts and conduct of the prisoner subsequent to its commission is not admissible to prove his condition at the time of the offence, unless they are so connected with evidence of a previous state of mental disorder as to strengthen the presumption of its continuance at the time of the crime, or when they indicate permanent unsoundness, which must necessarily relate back.

Indictment for murder. Tried before GRAY, C. J., and MORTON, J., who allowed a bill of exceptions, in substance as follows: —

The defendant, a boy of the age of fourteen years and five months at the time of the offence, was tried on an indictment for the murder of

1 Grant *v.* Thompson, 4 Conn. 203; Kinne *v.* Kinne, 9 Conn. 102; Dickinson *v.* Barber. 9 Mass. 225; Norwood *v.* Marrow, 4 Dev. & B. 442; McLean *v.* State, 16 Ala. 672; McAllister *v.* State, 17 Ala. 434; Bacon *v.* Charleton, 7 Cush. 581.

Horace R. Millen, a child four years old, committed at Boston on April 22, 1874. The prisoner was arrested on the evening of the same day. On the next day he was taken by the officer to view the body of his victim and admitted having killed the deceased; and on the afternoon of that day one of the trustees of the State Reform School talked with him privately at the station-house. On April 24, he was taken before the coroner's jury, where he testified, and denied that he killed the child; and afterwards, on the same day, he had an interview with two lawyers, one of whom was counsel for him at his trial. He was committed to the jail on May 1, where he remained until the time of his trial. The defence set up was the insanity of the prisoner.

The defendant called George B. Munroe, an officer of the jail, and also offered to call other officers at the jail for the purpose of showing the acts, conduct, and habits of the prisoner on and after May 1, as bearing upon the question of his sanity at the time of the homicide. The court, in its discretion, excluded the testimony, as relating to a time too long after the homicide and arrest to be material. The defendant seasonably objected to this ruling.

Wells, J., delivered the opinion of the court.

Upon the question of sanity at the time of committing an offence, the acts, conduct, and habits of the prisoner at a subsequent time may be competent as evidence in his favor. But they are not admissible as of course. When admissible at all, it is upon the ground either that they are so connected with or correspond to evidence of disordered or weakened mental condition, preceding the time of the offence, as to strengthen the inference of continuance, and carry it by the time to which the inquiry relates, and thus establish its existence at that time; or else that they are of such a character as of themselves to indicate unsoundness to such a degree or of so permanent a nature as to have required a longer period then the interval for its production or development.

The interval is to be measured, not merely by length of time, but also with reference to intervening events. These may be such as to account for the peculiarities manifested either by showing a sufficient originating cause, or by furnishing other explanations.

It is for the court or judge presiding at the trial to determine, in the first instance, whether the facts offered to be proved would, if established, fairly justify any inference relating back to the time of the alleged offence. This inquiry always and necessarily involves not only the question of intervening time and occurrences, but also the character of the manifestations and circumstances under which they were observed. It is, in a measure, a matter of judicial discretion;

inasmuch, at least, that great weight and consideration will be accorded to the judge whose decision is brought up for revision.[1] It is for the party offering such evidence to establish its competency against the double, and, in this case, triple objection: 1st, that it is subsequent in point of time; 2d, that it is the party's own conduct offered in his favor; and, 3d, that it is his conduct while under arrest charged with the offence. The defendant fails to show, upon his bill of exceptions, that the evidence offered and rejected was competent upon either of the two grounds defined in the first paragraph of this opinion.

If the ruling at the trial had been based solely upon the length of time that had elapsed, there would be ground for an argument, assuming the evidence to have been in other respects competent, that the period of only eight or ten days was too short a limitation of its admission to be a reasonable exercise of the discretion which rests with the court. But the question does not admit of separation in that mode. The ruling as to the time necessarily had reference also to the other considerations which affected the competency and materiality of the evidence as a basis from which to infer unsoundness of mind at the time of the homicide. That the prisoner had been under arrest upon the charge for more than a week and had had interviews with counsel and others, appears from the bill of exceptions. That the acts, conduct and habits of which proof was offered, were of any special significance as indicating mental disease, does not appear, and is not to be assumed against the ruling.

In a case of such vital consequence to the party excepting, we should be unwilling that any right should be lost to him by reason merely of an omission to state in detail the evidence which was offered; we have accordingly permitted the prisoner's counsel at the argument to make such statement of the evidence as he deemed necessary in order to present the whole question before us, with the view to allow an application to have the exceptions amended if the case should appear to require it. But we are satisfied that any such amendment would not avail him.

The evidence offered and rejected was, in substance, that the prisoner ate with a hearty appetite, slept soundly and quietly, and in conversation and manner evinced no remorse, or sense of guilt. In the evidence relied on to show the mental condition of the defendant prior to the homicide, it is not contended that there was any marked indications of the existence of actual insanity, nor that, with the exception

[1] Shaller *v.* Bumstead, 99 Mass. 112, 130; Commonwealth *v.* Coe, 115 Mass. 418, 505.

of an apparent absence of moral susceptibility, or want of moral sense, there was any relation or correspondence between the evidence preceding and that subsequent to the homicide, which gave to the latter any especial significance. We do not think, therefore, that a disclosure of the whole evidence would show that there was error of law or of judicial discretion, in limiting the evidence of subsequent conduct on the part of the defendant, offered in his favor.

* * * * * * * * * * *

Exceptions overruled.

EVIDENCE—TEMPER OF PRISONER—FITS OF PASSION—ECCENTRICITIES — CONDUCT OF TRIAL — REMARKS OF JUDGE.

Sindram *v.* People.

[88 N. Y. 196.]

In the Court of Appeals of New York, February, 1882.

Hon. Charles Andrews, *Chief Judge.*
" Charles A. Rapallo,
" Theodore Miller.
" Robert Earl,
" George F. Danforth, } *Associate Judges.*
" Francis M. Finch,
" Benjamin F. Tracy.

1. **Temper of Prisoner — Fits of Passion.** — Where a homicide is done with premeditation and deliberation, evidence that the prisoner had an irascible temper or was subject to fits of passion for slight causes is incompetent.

2. **Evidence — Eccentricities of Prisoner Inadmissible.** — Evidence not offered to prove insanity, but solely as bearing on the question of intent, deliberation, and premeditation, that the conduct of the prisoner prior to the homicide was characterized by eccentricities and peculiarities causing criticism with reference to his mental capacity, is inadmissible.

3. **Conduct of Trial — Remarks of Judge.** — On a trial for murder, certain letters written by the prisoner after the homicide were introduced in evidence, in commenting upon which in his charge the court said: " They exhibit a reckless depravity of nature, destitute of remorse or regret, the reckless spirit of a desperado." Subsequently the court told the jury to disregard what had been said about the letters and to form their own conclusions. *Held*, no error. The court also said that these letters exhibited a " high order of intelligence," but afterwards withdrew the words "high order of." *Held*, no error.

Error to the general term of the Supreme Court in the First Judicial Department to review a judgment affirming a judgment convicting the

plaintiff in error of the crime of murder in the first degree. The facts are stated in the opinion.

James D. McClelland and *William F. Kintzing* for the plaintiff in error.

John Vincent, Assistant District Attorney, for the People.

RAPALLO, J.— The exception which the counsel for the plaintiff in error has mainly urged upon the argument of this cause is that taken by him to the exclusion of the evidence of David Weil, as to peculiarities and eccentricities in the conduct of the prisoner. This evidence was not offered with the view of proving insanity or as an excuse or defence, but solely as bearing upon the question of intent, and deliberation and premeditation, and thus affecting the degree of the crime. The counsel for the prisoner offered to prove that for a number of years past the prisoner had been characterized by peculiarities and eccentricities of conduct which had caused criticism with reference to his mental capacity. Also that he was a person who had been known to be the victim of inordinate passion, giving expression to it in various ways and at various times; and this offer was stated to have been made for the purpose of enabling the jury to consider the character, the mental condition of the prisoner, prior to and in view of the circumstances of the killing, in order that they might be enabled to pass upon the grade of homicide, whether murder in the first or second degree or manslaughter in the third degree.

From the discussion between counsel and the court at the trial it appears that the evidence was claimed to be admissible, upon two grounds: *First*, as bearing upon the question whether the prisoner's act was the result of impulse and anger, or a deliberate and premeditated design to effect death; and *secondly*, upon the question, whether the prisoner had a mind which, under the circumstances detailed in the case, could have formed a deliberate and premeditated design to inflict death; it being at the same time avowed that the evidence offered did not amount to proof of insanity.

In considering the first ground upon which the evidence offered was claimed to be admissible, it is necessary to look at the circumstances of the homicide, as developed by the evidence which was before the court at the time the offer was made, for the purpose of ascertaining whether there was any evidence that the shooting was the result of sudden anger or impulse existing at the time, and whether the question whether the homicide was committed in the heat of passion, fairly arose in the case upon the evidence already in. We do not intend now to decide that even if that question had been presented by the evidence, proof of the description offerred would have been admissible, but we are clearly of opinion that if

the evidence disclosed no circumstances indicating that the homicide was committed under the influence of provocation at the time, or sudden anger, evidence that the prisoner had an irascible temper or was subject to fits of passion from slight causes was not admissible. Such proof would not of itself have authorized an inference that he committed the act under a sudden impulse, attributable to the eccentricities of his character, in the absence of any circumstance occurring at the time which tended to excite his passion.

At the time the evidence was offered the prosecution had just closed its testimony, and the witness Weil, was the first witness called for the defence. The evidence on the part of the prosecution was to the effect that on the day preceding the killing, the prisoner who had up to that time, been a lodger in the house of the deceased and her husband, had received notice to quit, and had left in the evening, using angry expressions concerning the deceased and threatening to return the next day and make a bloody row. At about ten o'clock the following morning he came to the house and entered with a pass-key, and was accosted in the hall by Henrietta Crave, a step-daughter of the deceased. She testified that he then appeared angry and excited. He said to her that he wanted to see her mother; she asked "What for?" and he replied, "Never mind, I want to see your mother." The deceased, who was upstairs, heard the sounds and hallooed down, "Henrietta, who is that down there?" and witness answered, "Mamma, just think; it is that Willie Sindram." Deceased said, "What does he want in the house now? He has no right in the house now." The prisoner then said: "Come down here and I will show you what I want," speaking as the witness expressed herself very saucy, crossly, angrily; witness then went part of the way upstairs and looking back, saw the prisoner pulling out a pistol from his pocket slowly, witness then called out, "Mamma, run; he has got a pistol; he is going to kill you." Deceased then opened a window which was in a landing at the head of the first flight of stairs, and called "Watch, police," out of the window; the witness was at that time part of the way up the stairs, and the prisoner ran up the stairs, pushing her on one side and fired at deceased as she was calling out of the window. The ball went through one of the panes of the window. Deceased then crouched in the corner and the prisoner advanced upon her, and putting the muzzle of the pistol within three inches of her head, fired the second shot, which proved fatal. On cross-examination the witness testified that no words passed between deceased and prisoner except as before stated, and except that when witness hallooed to deceased that the prisoner had a pistol and was going to kill her, deceased said to him, "What do you

want to do anything to me for, I never did anything to you." Emeline Smith, another witness on the part of the prosecution testified that she was upstairs and heard the conversation in the hall, between Henrietta Crave and the prisoner, on the morning of the killing. All this witness heard deceased say, was, "What do you want with me." She did not hear the prisoner say anything in reply. She saw the shooting and confirmed the testimony of Henrietta as to the circumstances.

This was all the testimony in the case relating to the circumstances of the killing, at the time the prisoner's counsel offered to prove his eccentricities, and his passionate character. From these circumstances it appeared that whatever passion the prisoner was laboring under he brought with him to the house; and that it was not excited by anything that occurred there. His violent temper could not, legitimately, be taken into consideration by the jury for the purpose of reducing the grade of his offence, when the provocation, if any there was, had occurred the day before the killing. If his acts were such as to satisfy the jury that the killing was with premeditation and deliberation, his bad temper or eccentricities of character, not amounting to insanity, could not detract from the effect of his acts, or shield him from responsibility therefore; and we concur with the learned judge who delivered the opinion at general term, that there was no legitimate connection between the eccentricities and peculiarities of character sought to be shown, and the deed of the prisoner, as the evidence stood when the offer was made. The declarations of the prisoner in respect to his provocation came in at a later stage of the case.

The second ground upon which the offer is attempted to be sustained is equally untenable. The counsel for the prisoner, while conceding that his offer was not to prove insanity, claimed that the evidence bore upon the question whether the prisoner had a mind which, under the circumstances, could have formed a deliberate and premeditated design to inflict death. That is, that although the prisoner was a sane man, and capable of committing manslaughter, or murder in the second degree, he was under the circumstances incapable of committing murder in the first degree. The novelty of the proposition is admitted by counsel, but the argument in its favor is based upon the introduction into the statute defining the offence of murder in the first degree, of a new element, viz.: Deliberation, in addition to premeditation. And it is contended that this change in the statute opens the door to proof of the description offered, for the purpose of showing that the accused was so far the victim of bad temper and inordinate passion, that when angered he was incapable of deliberation. We cannot adopt the view of

the learned counsel. To do so would be not only an innovation upon the law, but one of a most mischievous tendency. It would afford a shield to the most dangerous classes of the community, and those most prone to commit the crime of murder. The violence of their passions, and their wicked impulses which it is the object of the law and its punishments to restrain, would be made to paliate their offences, and the more violent the character of an offender, the surer would be his immunity from the extreme penalty. The facts of premeditation and deliberation in a case of murder must be found by the jury, from the evidence of the acts and deliberations of the criminal, or the circumstances of the case, and the theory that eccentricities of character and inordinate passion can render a sane man incapable of committing an offence which involves deliberation is wholly inadmissible.

Some exceptions were taken to the charge of the judge to the jury. Counsel excepted to the expression of the judge, "there is no doubt about the assassination." The judge explained this by stating that he meant there was no doubt about the killing, and on referring to the portion of the charge where the expression was used, it appears that it was so explained at the time; what the judge said was, "there is no doubt about the assassination, that the deceased person was killed; there is no doubt either that she was killed by the prisoner." An exception was also taken to a statement in the charge, "the testimony seems to be overwhelming in favor of his having uttered it — that he would return on Wednesday and make a bloody row." On his attention being called to this part of the charge the learned judge stated to the jury that he changed that phraseology, and said that he thought the testimony was preponderating to that effect, but that he was only expressing an opinion, and that he left all the questions of fact to the jury; that there was to be no thirteenth juror in the box. Certain letters of the prisoner, written after the shooting had been put in evidence, and in commenting on these the judge said that "they exhibited a reckless depravity of nature, destitute of remorse or regret, the reckless spirit of a desperado, who, looking upon his life with indifference, could meet apparently any doom for the gratification of a malignant passion." These letters were before the jury, and they could put their own construction upon them. No one can read them without feeling that they fully warranted the comments of the judge. But on exception being taken to his remarks he instructed the jury to disregard what he said about the letters, and form their own judgment. The statement in the charge that these letters indicated a high order of intelligence was also

Jury May not Consider.

modified by the judge, by withdrawing the words "high order of," and saying that they indicated intelligence.

We find no legal error in any of the portions of the charge excepted to. Comments upon the testimony, so long as the judge leaves all the questions of fact to the jury and instructs them that they are the sole judges of matters of fact, are not the subject of legal exception. It is desirable that the court should refrain, as far as possible, from saying anything to the jury which may influence them either way in passing upon controverted questions of fact, and perhaps comments on the evidence might be carried so far as to afford ground for assigning error. But in the present case, whenever its attention was called by the prisoner's counsel to any part of the charge which he considered as an infringement upon the province of the jury, the court promptly and clearly withdrew the remarks objected to, and emphatically reminded the jury that they alone had the right to determine the facts.

The judgment should be affirmed.

All concur.

Judgment affirmed.

RIGHT OF JURY TO CONSIDER PRISONER'S APPEARANCE ON THE TRIAL.

BOWDEN *v.* PEOPLE.

[12 Hun, 85.]

In the Supreme Court of New York (First Department), October Term, 1877.

Hon. NOAH DAVIS, *Presiding Judge*
" JOHN R. BRADY, } *Judges.*
" CHARLES DANIELS. }

Right of Jury to Consider Prisoner's Appearance at Trial. — The plaintiff in error was tried and convicted for falsely swearing to his qualification as bail in a criminal case. Upon the trial the prisoner claimed that he was at the time of the commission of the offence, some six months previous to the trial, insane from delirium tremens. The judge charged the jury that, in deciding upon his insanity, they might take into account his physique and apparent age, and consider his conduct upon the trial. There was no evidence tending to show that his physical appearance, six months after the disease, would be affected thereby. *Held*, that the charge was erroneous.

WRIT OF ERROR to the Court of General Sessions of the City and County of New York to review the conviction and sentence of the plaintiff in error of the crime of perjury.

Charles W. Brooke, for the plaintiff in error.

B. K. Phelps, for the defendant in error.

DAVIS, P. J. — The plaintiff was indicted and tried for perjury in swearing to his qualifications as bail in a criminal case. Abundant evidence was given to justify his conviction. He alleged, as part of his defence, that at the time of swearing to his qualifications he was so insane from delirium tremens as not to be responsible for his acts. Upon this alleged defence, some evidence was given, and so much that the court submitted the question, as was its duty, to the jury.

In charging upon that branch of the case the learned Recorder, amongst other things, said: "I ask you, gentlemen, to look at the physique of that prisoner and his apparent age, and consider his conduct, if you please, during this trial, and tell me whether you believe such a man was suffering, or is suffering from delirium tremens, or any attack of it. You have to judge from all the evidence and from the appearance of this prisoner."

After the charge was concluded, the counsel for the prisoner, amongst other things, excepted as follows: "I also except to that portion of your honor's charge in which you said to the jury to regard the prisoner, his apparent age, and his demeanor during the trial, and his appearance, and say whether he had delirium tremens, or not, upon the occasion when he signed this bond and did know what he was doing." To this exception the Recorder said: "I did not say so; I said let that enter into your examination whether you think a man of his physical appearance, and his manner here was, at the time, a man so deprived of reason that he was unable to know what he was doing."

To the charge, as thus explained, the counsel for the prisoner also excepted.

It appears that the offence was committed some six months before the trial. The effect of the charge, was, therefore, that the jury might judge from his physical appearance and manner on the trial, whether the prisoner could have been at the time of becoming bail and taking the oath, six months previous to the trial, so far affected by delirium tremens, as to be so far deprived of reason that he was unable to know what he was doing.

This was submitting to the jury an inquiry altogether beyond their province. It carried them into a region of the merest speculation. It would, probably, have been impossible for the ablest expert to have said from the prisoner's physical appearance and manner at the trial whether or not, he had had delirium tremens six months previously. There was no proof that that disorder leaves any infallible mark of its existence,

from which jurors or any other person can say six months, or any other period afterwards, that a person had been its victim, nor was there any proof of the absence or presence of any indications in the "physical appearance" of the prisoner that would show that he had had, or had not had, the delirium tremens at any time. The charge was, therefore, open to the criticism and objection that it left to the jury to infer from the present physical appearance of the prisoner whether he could have been *non compos mentis* from a disease which he was alleged to have had six months before, without the slightest proof that his physical appearance would have been so affected by the disease, as to disclose or disprove the fact of its having existed at any time after the disease itself had passed away. We venture to say that no precedent can be found for such a charge, and none ought to be established.

It is quite impossible for us to say that no harm was done to the prisoner by this charge. It may have controlled the jury (as it seems to have impressed the court), in disposing of the prisoner's only possible defence against an otherwise clearly established offence. We are compelled, therefore, to reverse the judgment and order a new trial, under the well established rules governing the review of criminal trials.

DANIELS, J., concurred

Conviction reversed and new trial ordered.

EVIDENCE — IRRELEVANT ON QUESTION OF RESPONSIBILITY — DECLARATIONS OF DECEASED — DRUNKENNESS — DELIBERATION.

WARREN *v.* COMMONWEALTH.

[37 Pa. St. 45.]

In the Supreme Court of Pennsylvania, 1860.

Hon. WALTER H. LOWRIE, *Chief Justice.*
" GEORGE W. WOODWARD,
" JAMES THOMPSON,
" WILLIAM STRONG,
" JOHN M. READ,
} *Justices.*

1. **Evidence — Irrelevant on Question of Responsibility.** — On an indictment for murder, evidence that the prisoner was or was not generally drunk when out of work, whether he did not move more quickly when drunk than sober, is not relevant where there is no proof of actual intoxication, or that he was out of work at the time.

2. **— Declarations of Deceased.** — The prisoner being indicted for the murder of his wife, evidence of her acts and declarations on the same day are irrelevant.

3. **Deliberation** as affected by drunkenness.

Warren *v.* Commonwealth.

John Warren at the August, 1860, term of the Court of Oyer and Terminer for the county of Berks, was charged with the murder of a woman who was unknown to the jury. He was convicted of murder in the first degree, and appealed.

John S. Richards, *A. L. Hennershortz* and *C. P. Muhlenburg*, for the prisoner.

James B. Bechtel and *Samuel L. Young*, for the Commonwealth.

THOMPSON, J. —

[After passing on question as to challenge.]

The third, fourth, fifth, sixth, and seventh errors may be considered together. They all relate to offers of evidence of the same general character, overruled by the court and excepted to on the part of the prisoner. They may be stated, in short, to be the rejection of the following questions: First — "Whether the prisoner was not generally drunk when out of work?" Secondly — "Did he not move quicker when drunk than sober?" with a view to follow it with proof that he did move quickly on the occasion of the killing. Thirdly — "To prove that his wife went to Kalbach's on the morning of the day on which the killing took place and forbade him from selling Warren liquor, saying 'that he was drunk and abused her.'" Fourthly — "That Mrs. Warren had pledged a watch some time before for liquor; that Warren got more on account of it — took it out in liquor?" And, fifthly, "To show the effect liquor had on Warren, beginning several years back, in making him wicked and crazy, and that it had a peculiar effect on his constitution and brain."

The object of all this testimony was, of course, to raise an inference that the crime was committed under the influence of intoxication, and to such an extent as to deprive the prisoner of the capacity to deliberate, which the court throughout properly conceded was an essential ingredient in the crime of murder in the first degree. To reduce the grade of the crime, therefore, when the evidence on the part of the Commonwealth was such as to make out a *prima facie* case of murder in the first degree, evidence showing want of deliberation, or, which is the same thing, an incapacity to deliberate, is of course proper to be received. But it behooves the prisoner, in a case where death is produced by repeated brutal assaults on a helpless person, at considerable intervals of time, resulting at last in death, to meet the question of premeditation by competent evidence, and which would serve to show a condition and state of mind in which it was at least improbable that deliberation could have directed his acts. Unexplained, the case here was such that a jury could scarcely have failed, if they regarded their oaths,

to find it a case of wilful and premeditated killing. There was no attempt to prove actual intoxication at the time. Could it have been inferred from the testimony offered?

That he generally got drunk when out of work was a matter of habit, not of fact. It did not prove either the fact of being drunk at the time, or that he had no work. It was the fact that was wanted — from that the inference of want of deliberation might have been drawn. But it was asked here to infer that he was out of work, and, therefore, drunk, because he was generally so when out of work, and hence to infer from the inferred drunkenness that he could not act deliberately. This mode of proof the law will not sanction, and we need only state the proposition to demonstrate the fallacy of the attempt.

Again, that his habits of motion were quicker when drunk than when sober. This is of the same character as the last, and subject to the same objection. What his wife said or did was not evidence in favor of the prisoner. It was hearsay; and her acts were irrelevant. This is sufficient answer to the offer in evidence in regard to what she said at Kalbach's and as to her acts in pledging the watch.

The last of these offers was to prove the effect liquor had on the prisoner, beginning several years back; that it made him violent and crazy and quarrelsome with his friends. Had this been preceded or followed by proof of intoxication at the moment of the commission of the crime, it might have been proper. But it seems to us not to be distinguished in principle from the questions already disposed of. It was an effort to raise an inference of intoxication from the violent acts of the prisoner in consummating his crime, unaided by proof that it was the impelling cause to its commission. Of what avail would it be to show the effect of intoxicating liquors on the prisoner, and that, when taken to excess, it rendered him crazy, violent and unmanageable, unless it had been shown that he had partaken of it in sufficient quantities to produce the effect? The consequences flowing from the ordinary use of intoxicating liquors amounted to nothing unless it was shown that they were the cause that produced the effect. The proof offered was intended to establish a certain relation between cause and effect. The effect of intoxication might have been established by well known theory, but it was put upon experience in regard to the prisoner — that it usually produced certain results upon him. It was not shown to have produced that effect in the case in hand. The effect was offered as a substitute for both cause and effect. There was no proof of intoxication, excepting as inferential from his acts proved. But if allowed to be proved in this way, it could always be, by violent acts, in any one. This is not

to be thought of. When the prisoner was arrested, a few hours after the commission of the crime, not a single witness spoke of him as intoxicated. In the absence of proof of this kind, the testimony, the substance of this bill of exception, was irrelevant, and properly overruled by the court.

We have carefully scrutinized the answer of the learned judge to the points put on the trial by the prisoner's counsel, and we discover no error whatever in them. They were clear, and presented the law of the case broadly and fairly. To the argument that the manner of killing was evidence of intoxication or insanity from "some other cause," while the court very properly told the jury that "barbarity, indifference to consequences, and a life of drunkenness, it seems to us, are not elements from which a jury could safely draw so grave a conclusion as that the prisoner, from 'some other cause,' was unable to form a wilful, deliberate and premeditated design to take the life of the deceased," yet he added: "It is for the jury to draw conclusions for themselves. The facts are for the jury, absolutely and conclusively." This gave the prisoner a full and fair chance under the arguments of counsel, which would, no doubt, have been effectual to have saved him if there had been ground from which to infer insanity from any cause.

We need not notice at length the answers to any of the other points, further than to say we have carefully examined them, and find nothing wrong in them. We will briefly notice the answer to the eighth point.

It would have been error to have answered that point in the affirmative, for the reason given by the court. It assumed that there was proof of provocation, and that "acting on a mind shattered by dissipation," says the point, and "long-continued indulgence in strong drink, to such an extent as to render the prisoner unable to master himself, and form a cool and deliberate purpose to kill;" then it concluded with a prayer to charge that "the prisoner cannot be convicted of murder in the first degree." "If any doubts," it further adds, "are in the minds of the jury as to the fact, then their verdict must be for the lighter grade." This was an assumption of a state of the case that did not exist under the proof, and it would have been wrong to have affirmed the point. For this reason we need not discuss the merits of the proposition, but we must say that the doctrine that if "any doubts" are in the mind of the jury on the point of deliberation, their verdict should be for murder in the second degree, is going a step beyond the rule. If reasonable doubts exist, this should be so. It is not every doubt, however slight, that is to have this effect. Nor was there any proof of provocation, to

operate as stated in the point, and we think the learned judge dealt with it properly in declining to affirm it.

From a careful scrutiny of the whole case, we are constrained to say that we see no error in the record, and that we have no power to save the prisoner from the legal consequences of his acts.

But we cannot dismiss the case without expressing astonishment at the criminal apathy on the part of a number of persons, men and women, who witnessed the assaults of the prisoner on the deceased, which resulted in death, without an effort to save her. This is as unusual amongst our people as it is unaccountable in this instance. We notice it to condemn it, not through any apprehensions that the example is likely ever to be followed. Our people, with this exception, have too much generosity and courage for this.

Judgment affirmed and record remitted.

EVIDENCE OF ACTS SHOWING SANITY.

United States *v.* Shults.

[6 McLean, 121.]

United States Circuit Court, Ohio, October Term, 1854.

Before Hon. John McLean, Associate Justice of the Supreme Court of the United States.

1. **Insanity — Test of Punishability.** — An individual is liable to punishment when he can discriminate a right from a wrong act.
2. **—— Evidence of Acts Showing Sanity.** — When insanity is set up as a defence, his liability to punishment is best ascertained by considering his acts. Thus, when a person is charged with theft of money, evidence of his concealment of the offence, his endeavors to elude the officers of justice, and his use of the money stolen, goes far to show that he is sane, and to contradict contrary theories as to the state of his mind.

This is an indictment against the defendant, charging him, while employed in carrying the mail of the United States, on a horse route, with the abstraction of certain letters, which contained bank-notes and other articles of value. Plea not guilty — jury sworn.

John Keller, who is postmaster at Mount Ephraim post-office, Noble county, in Ohio, states that the defendant carried the mail from Sarahville, in Noble County, to Washington, in Guernsey County, a distance of twenty miles. In June, latter part, or first of July, witness mailed

two letters for California, which were forwarded to the distributing office at Wheeling or Cleveland, directed to Nicewall. The envelope was returned to witness as being found in the road more than a month after it was mailed. The second letter was reported to have been found on defendant's route. Another letter was found on the same route, which had been mailed on the 6th or 7th of June.

Mr. Chance says there must have been two violations of the mail while defendant carried it, which was about a week. Witness found a letter on the route on Friday after defendant commenced carrying the mail on the route. Another letter was found on the route which must have passed through the office of witness. Mr. Forman is postmaster at Senecaville. He designates a letter picked up on the route; another letter found on the road must have been a letter forwarded in the mail. Other witnesses proved that other letters were found on the route, which had been mailed by the postmasters on the route, and which, from their face, purported to have contained money.

William Young saw defendant first of June, and received from him a debt of sixty or seventy dollars. He had a watch, and witness asked him how he got so much money; he replied that he had sold a colt for $60. Witness exchanged with him $10, giving silver for paper; next day he came and bought $30 in gold from witness. Mr. Renderneck arrested the defendant near Marietta, in a wood boat, at which time he admitted that he had taken from the mail $76.

Several witnesses were examined to show mental imbecility in the defendant, so as to be incapable of committing a crime; and his defence rested on this ground. Several medical gentlemen were examined, who differed somewhat in their opinions, some of them stating that in their view he was not a proper subject of punishment.

In the charge to the jury, the Court (McLean, J.,) said: There seems to be no doubt that during the short time the defendant carried the mail he repeatedly violated it by abstracting letters from it. This is established by the numerous letters picked up on or near the route, which had been mailed at one of the post-offices on the route, or were carried on it; and by the confession of the defendant that he had taken from the mail $76. He was destitute of money before he was employed as carrier, after which it appears he had money to a considerable amount. All this evidence is uncontradicted, and the only ground of defence is mental imbecility.

This defence has often been made, and much has been said and written upon the subject. Nothing is more common than for medical men to differ as to the fact of insanity, which should exculpate an individual

Relevant to show Sanity.

from punishment. Where the insanity is in a degree which destroys the reasoning faculty, there can be no difference of opinion amongst professional men or jurors. But where the individual is subject to occasional aberrations of mind, or where the mind seems to be under peculiar excitement and error on a particular subject, as is often the case, and rational on other subjects, or where the individual reasons illogically and strangely, which brings him to results in action which violate the law; in all these cases, and others which might be enumerated, a close investigation is required, and a wise discrimination should be exercised.

In such cases, the important fact to be ascertained is, whether the person charged can discriminate between right and wrong. If he be unable to do this, he is not a proper subject of punishment. And this fact can be best ascertained, not by any medical theory, but by acts of the individual himself. Every person who commits a crime reasons badly. The propensity to steal in some persons is hard to resist. Where the moral development is weak and the passion of acquisitiveness strong, it will often prevail. This, in one sense, may be evidence of a partial insanity, but still the person is a proper subject of punishment. And there is no other test on this point, except the knowledge of the individual between right and wrong. And this knowledge is best ascertained by the acts of the individual in the commission of the offence, and subsequently.

Does the individual commit the offence by embracing the most favorable opportunity, in the absence of witnesses, and under circumstances likely to avoid detection? And if he steal money does he account for the possession of it in an honest way? And does he, under an apprehension of an arrest, endeavor to elude the officers of the law? All this conduced to show a knowledge that he had not only done wrong, but that he was liable to punishment.

The defendant in this case accounted for the amount of money he had in possession by saying he received it as the price of a colt. He changed the notes he had for gold and silver, knowing that the notes might not be current at the place to which he might go. Or he might fear that the notes might be identified by those who forwarded them in the mail. On either supposition it showed a sound reflection on the consequence of his acts should he be arrested. He absconded, and was arrested several miles from home, on his way to the West. He was found in a close room of a boat, the door of which was locked; and it is proved that when he came to the boat the previous evening, he engaged the room and requested that the door should not be opened to any

one. This shows an apprehension that he would be pursued, and a desire to escape the pursuit.

These acts would seem to be unmistakable evidence of a sense of guilt, and a desire to escape punishment. He acted under a motive which usually influences culprits. When carrying the mail, on a suggestion being made to him that he might steal from the mail, the penitentiary immediately occurred to his mind. He bought and sold articles, and evidenced in such matters no deficiency of mind. He knew the value of money, and understood the matter of exchange, and the uncurrency in remote parts of bank notes.

Upon the whole, gentlemen, if you think from the evidence in the case that the defendant in violating the mail knew he was doing wrong, and that he was liable to be punished for the act, he is a proper subject for punishment. It is true he did not conceal the letters he took from the mail, but left many of them scattered along the road he travelled, which shows a great want of caution, still, if the other qualities of his mind were in such rational exercise as to enable him to discriminate right from wrong, you will find him guilty.

The jury found the defendant guilty, and the court sentenced him to ten years in the penitentiary.

DELIRIUM TREMENS — TEMPORARY INSANITY — NO PRESUMPTION OF CONTINUANCE — TEST.

STATE *v.* SEWELL.

[3 Jones (L.), 245.]

In the Supreme Court of North Carolina, December Term, 1855.

Hon. FREDERICK NASH, *Chief Justice.*
" RICHMOND M. PEARSON, } *Judges.*
" WILLIAM H. BATTLE, }

1. **Delirium Tremens — Temporary Insanity — No Presumption of Continuance.** — Delirium tremens to be available as a defence must be shown to exist at the time the act was done. In the case of temporary insanity there is no presumption of continuance.

2. **The Capacity to Distinguish between the Right and Wrong of the Act is the** test of unpunishable insanity.

Indictment for murder; tried before his Honor Judge SAUNDERS, at the fall term, 1855, of Perquimons Superior Court.

Evidence in the Case.

The circumstances of this case disclosed the fact that the prisoner had shot an old free negro woman (aged about 60) in the eyes and face with a pistol; that about an hour afterwards, he was found on a pallet with her, and there were indications that he had ravished her as she lay insensible. There was a jug of liquor on the same pallet.

There was no question in this court as to the fact of the killing, and therefore the voluminous and minute evidence sent up as part of the case in relation to the transactions connected with the crime is not reported. The defence of the prisoner was insanity, and upon this point the evidence was as follows: David Beach swore he saw the prisoner on the Wednesday morning before the act, which was done on the following Friday night. He came on the morning previous, and stopped a the hotel where witness lived; he seemed very tremulous, could not use one hand, and had to be helped at the supper table. The next morning, just before the prisoner left, while the witness was at breakfast, he came up behind him stealthily, seized his cup of coffee, and drank it. Witness did not think the prisoner was in his right mind. He had no other reason for coming to that conclusion, except his taking the coffee in the manner he described, his tremulousness, and the wildness of his eyes; but from these things, he did think so. Several witnesses testified that on the way to the jail, he begged the persons about him not to hurt him, or that he should not be hurt. At other times he asked them to hang him. Dr. Parker testified that he resided at the South Mills in Camden County; that he was called to attend the prisoner about two weeks before the homicide; that the prisoner had been drinking very hard, and had delirium tremens and inflammation of the stomach; that he talked incoherently, gave inconsistent answers to his questions, and made foolish remarks. The witness gave it as his opinion that the prisoner was then insane. The prisoner got better in three or four days, and left the house, being driven off by the landlord. When he left the prisoner, he advised him to desist from drinking, for that a very little indulgence would bring back the same results. He stated that, generally, insanity from this cause was of short duration, but not always so. Thomas Garret testified that in January or February preceding the homicide, which was on the 13th of April, the prisoner came to his house in Camden County, apparently intoxicated; he had been drinking very freely, and was so tremulous that he could not clean some furniture which he undertook to clean and which was his occupation. Witness saw him catching at something near the fire, on one occasion, and asked him what he meant; to which he replied that his jaws were locked, and he wanted to get the tongs to unfasten them. One Wigginston stated

that he had known the prisoner in Currituck County; that in the fall of 1854, he was at his house, and acted so violently as to make witness afraid to trust him alone. He was confined at witness' house for several days, and acted irrationally. Witness thought he was quite out of his mind. Prisoner had been drinking freely. He stated that before he began to drink, prisoner's behavior had been good. C. B. Brothers stated that he was the jailor to whose custody the prisoner was committed on the night of the homicide; that he was perfectly rational that night; but that next day, and for several days, he was out of his mind; that he talked strangely and incoherently. After a few days he became better and continued quite rational.

The State in reply introduced the opinions of several witnesses, that at the time he was taken, the prisoner was quite sane; and many conversations were proved to show the fact. On the Sunday before, it was proved that he was rational.

It was insisted by the prisoner's counsel, that the presumption of sanity did not arise in this state of the facts; but that the prisoner was entitled to the contrary presumption of insanity; and that it devolved on the State to show that the prisoner was sane when the act was done.

Upon this point his honor charged the jury "that to hold the prisoner responsible for his act, it should appear that at the time of its perpetration, he was sufficiently rational to distinguish right from wrong, and to know that what he was doing was in violation of the laws of God and man. "That the general presumption is that all persons are sane, until something is shown to the contrary. When derangement or partial insanity is shown, and there are lucid intervals, it is still necessary for one relying on insanity to show that the act charged was done during this paroxysm of insanity." To this instruction the prisoner's counsel excepted.

There was a verdict finding the prisoner guilty of murder. Judgment of the court was pronounced, and an appeal to this court taken by the defendant.

The *Attorney-General*, for the State.

J. P. Jordan, for the defendant.

NASH, C. J. — The efficacy of a plea of insanity in shielding from punishment for crime; the necessity of drawing the dark picture of such a state of mind, and tracing out the minute and delicate shades of this sorest affliction to which humanity is subject, is not required at our hands at this time. It is not denied that insanity, to protect from punishment, must exist at the time the act is perpetrated. This is indeed the very substance of the defence; for however great the disease, and

Does not Apply to Temporary Insanity.

in whatever form, if at the time the prisoner commits the act his mind is then capable of distinguishing between moral right and wrong, he is an accountable being, and comes within the operation of the law. The prisoner, a fortnight before the perpetration of the offence, had been in a state of delirium tremens, from which he was relieved by his physician, who cautioned him against indulging in the use of spirits. After that, he was proved to have been in his right mind; but a few days before on that which the transaction occurred, one witness thought he was not in his right mind. His honor instructed the jury as follows: "The general presumption is that all persons are sane until something is shown to the contrary. When derangement or partial insanity is shown, and there are lucid intervals, it is still necessary for one relying on insanity to show that the act was done when he was laboring under this paroxysm of insanity." His honor then proceeds to apply these general principles to the case before him, stating the grounds upon which the State relied, and those upon which the prisoner rested his defence, and winds up by leaving the question of sanity or insanity of the prisoner at the time of committing the act to the jury.

This case is not one of permanent insanity, nor is it one of lunacy. Mr. Russell[1] defines a lunatic to be one laboring under a species of *dementia accidentalis vel adventitia*, but distinguishable in this, that he is afflicted by his disorder, only at certain periods or vicissitudes, having intervals of reason.

It more properly ranges itself under the class of partial insanity, though strictly not so. Partial insanity imports that the person is insane on one or more particular subjects.[2] This species of insanity is termed monomania. The derangement of the prisoner was neither a permanent one, nor lunacy, nor strictly partial, but a temporary one arising from the too free use of ardent spirits. It was temporary, for it lasted only during the time the effects of the spirits were upon him. It had not in his case reached that period when the mind becomes entirely destroyed. His physician cured him of the attack of delirium tremens, and stated that in most cases the alienation of mind was but temporary. It was shown that after that attack, and before the act was committed, he was restored to his understanding, and there was no evidence that delirium tremens existed after the time first spoken of. It was insisted by the prisoner's counsel, that the presumption of sanity, in favor of the State, did not arise; but that the presumption of insanity did on behalf of the prisoner; and that sanity must be shown by the

1 Russ. Cr. Law, 7.

2 Shelford on Lunatics, p. 6.

State; at least that the presumption was not in favor of the State. This principle, if true, does not apply to this case. Here was no lunacy; no recurrence of the disease at certain periods; but a temporary insanity, brought on by the prisoner's own procurement, and in general, disappearing when the immediate cause was removed. Drunkenness, in general, is no excuse for crime. When it is carried so far as to cause delirium tremens, any act perpetrated under the delirium is excused, though the disease is but temporary; and when continued so far as to dethrone reason altogether, the presumption of law is removed; because the disease is then permanent; the law looks only to the state of the mind, and not to the cause producing it.

His honor is sustained in his general proposition by Lord Hale.[1] He lays down the doctrine more strongly than it is done here; and although we find it nowhere stated in the same terms, we find it nowhere contradicted in our elementary works on crimes.

In this case, the general presumption of law was not removed, and it was incumbent on the prisoner to show that at the time of perpetrating the offence. he was insane.

After his honor had closed his remarks, particular instructions were asked, as set forth in the case. His honor had already given the instructions required. There is no error.

Per curiam. *Judgment affirmed.*

HEREDITARY INSANITY — EVIDENCE MUST BE NOTORIOUS.

State *v.* Christmas.

[6 Jones (L.), 471.]

In the Supreme Court of North Carolina, June Term, 1859.

Hon. Richmond M. Pearson, *Chief Justice.*
" William H. Battle, } *Judges.*
" Thomas Ruffin. }

Where Hereditary Insanity is offered as an excuse for crime, it must appear that the insanity actually exists in the prisoner; that it is not temporary, but notorious, and of the same species as other members of the family have been afflicted with.

Indictment for murder tried before Caldwell, J., at the last Superior Court of Orange.

[1] P. C., vol. I, 34.

Evidence of Insanity.

One ground of defence set up by the prisoner was insanity, and for the purpose of showing that it was a malady hereditary in his family, he offered to prove by a witness that an uncle and brother were both insane. The State objected, and the evidence was rejected. The prisoner's counsel excepted.

The mother of the prisoner was introduced to prove insanity, and she testified that three weeks before the homicide, she was sent for by the prisoner's wife and went to aid in taking care of him. She said she found him laboring under derangement of the mind; that she remained with him for two weeks, and during that time he often endeavored to throw himself into the fire; that he several times tried to strip himself naked; that he tried to shoot himself; that he would run as though some one was pursuing him, and exclaimed that some one was pursuing him. She stated that he was always weak of mind. She further stated that while she was there, he occasionally went into the neighborhood and staid all night; that she left him eight days before the homicide, and he then appeared composed, and had been so a day or two. She also testified, that these fits recurred at periods for the last two years, and she did not trust him to manage her business, though he and his family lived on her land, where she worked slaves. A witness testified that her character was good.

Several witnesses were called by the State, who testified that they had known the prisoner for eleven, twelve, and thirteen years; some for a shorter time, and they concurred in the statement that he was addicted to intoxication, but they all believed him to be of sound mind. The court, in charging the jury, said in relation to the mother's testimony, that where near relatives were witnesses, as in the case of a mother deposing for her son, the law regarded such testimony with a jealous eye, and called on jurors to weigh it with many grains of allowance. The prisoner's counsel again excepted. The jury retired and remained out several hours. They came to the court-room at a late hour of the night, and made known that they could not agree upon a verdict, and asked for further instructions. Thereupon, the court said to them, that if they differed in their understanding of the law as given them in charge, the court would re-charge them; but if they differed about the facts of the case, the court could not aid them. One of the jurors responded, that their difference was about the question of insanity, and whether or not they should believe the prisoner's mother; whereupon the court repeated the charge above set out on that part of the case, and told the jury they were to judge of her evidence for themselves.

The prisoner's counsel then requested the court to charge the jury, that in passing on the mother's testimony, they had a right to consider her demeanor on the stand, the consistency of her statements, and the fact that she had proved a good character and might be believed. The court then said to the jury, that they were not bound to believe a witness, whose character was proved to be good, or disbelieve one whose character was assailed, but that they were the constituted judges of how far a witness was to be believed. Defendant again excepted.

To this statement, which is copied almost literally from the record sent to this court, is appended the following explanatory note: "It is perhaps due to the court to say, that if the charge is not in response to the instructions prayed, it was because the counsel who prayed the instructions, and who spoke in a low tone of voice, was not understood by the court." The prisoner was found guilty of murder, and upon judgment being pronounced upon him, appealed.

The *Attorney-General*, for the State.

Miller and *B. F. Moore*, for the defendant.

PEARSON, C. J.— No one can read the record in this case without receiving the impression, that the instructions given by his Honor do not put the prisoner's case to the jury in as favorable a light, as through his counsel he requested, and had a right to request, of the court. After the jury returned and made known that the case turned upon the degree of credit to which the testimony of the mother of the prisoner was entitled, his counsel requested the court to instruct them that in passing on her testimony, they had the right to consider her demeanor on the stand, the consistency of her statements, and the fact that she had proved a good chaarcter. This to say the least was not given, — in effect was refused, and we have the question: a proper instruction is prayed for and refused. There is error. The personal explanation which his Honor adds at the foot of the record, can have no bearing upon the legal rights of the prisoner.

We deem it unnecessary to notice the other parts of the charge which is excepted to, except to say the expression to "weigh with many grains of allowance," is a figure of speech, and seems to have been used in the sense of receiving with caution, or as his Honor says, with "a jealous eye;" and not in the sense that some abatement or deduction was necessarily to be made.

The statement of the case is made up in a manner so unsatisfactory that we are unwilling to express an opinion upon the admissibility of proof that an uncle and a brother of the prisoner were insane, which

Evidence Must Be Notorious.

was offered to show an hereditary malady, as a circumstance tending to prove the allegation that the prisoner was himself insane. It is a lamentable fact, admitted by every one, that such maladies are hereditary; and it would seem that proof of the fact that members of the family, so related as to have the same blood, are or have been afflicted with a like malady, is admissible as a circumstance, which aided by other circumstances and proofs, would go to show the insanity of the prisoner, although, of course, evidence of such hereditary taint in the blood would only be one link in the chain, and would not, hence, establish the fact; but the question, as to the policy or expediency of admitting such evidence in legal investigations presents many and very great difficulties; it is wrong to exclude what may lead to truth, and yet such evidence would in numberless cases lead to falsehood, and screen the guilty, in defiance of truth. On this account, we find it in some degree, an open question in the legal authorities. Thus far the way seems to be clear; in order to render it admissible, the species of insanity alleged, and that which is offered to be proved in respect to the members of the family, must be of the same character; and the instances to be proven, must have been notorious, so as to be capable of being established by general reputation, and not left to depend upon particular facts and proof, about which witnesses may differ, and the consequences of which would be to run off into numberless and endless collateral issues; so that in trying the question of the insanity of one, the supposed insanity of a half dozen would be drawn in. In this case, the testimony of the prisoner's mother, in regard to his alleged insanity, is very vague and unsatisfactory, so far as it tends to show the character and kind of insanity with which she supposed her son to be afflicted. Was it temporary in its nature, like *mania a potu?* or fixed derangement? So is the evidence which was offered as to the uncle and brother. Was that notorious, or only supposed to exist by a few? Was it *mania a potu*, or of a permanent type; and of the like character, so as to tend to show an hereditary taint? On account of this vagueness we forbear to express an opinion.

Per Curiam. *Judgment reversed.*

EVIDENCE — MURDER BY POISON — PRESENT INSANITY — JURY TRIAL NOT OF RIGHT.

Laros *v.* Commonwealth.

[84 Pa. St. 200.]

In the Supreme Court of Pennsylvania, 1877.

Hon. Daniel Agnew, *Chief Justice.*
" George Sharswood,
" Ulysses Mercur,
" Isaac G. Gordon,
" Edward M. Paxson,
" Warren J. Woodward,
" James P. Sterrett.
} *Judges.*

1. **Evidence — Insanity of Relatives.** — Until there is some evidence of the prisoner's insanity, the court is not obliged to hear evidence of the insanity of his relatives.
2. **Murder by Poisoning — Evidence.** — On a trial for murder by poisoning, the defence being insanity, the court submitted to the jury the fact of the sanity or insanity of the prisoner on the day he purchased the poison as well as on the day it was administered. *Held*, proper.
3. **The Terrible Nature of the Crime** is no evidence of insanity.
4. **Present Insanity — Jury Trial not of Right.** — Where the jury have found that the prisoner was not insane at the time of the act, and after verdict present insanity is alleged, the trial of this plea by a jury is not of right, but rests in the discretion of the court.

Indictment of Allen C. Laros for the murder of his father Martin Laros.

At the trial before Meyers, P. J., it appeared from the evidence that on the 31st of May, 1876, the family of the deceased, consisting of himself, his wife Mary, his children, Irvin, Alvin, Clara, Alice, the prisoner Allen, a grandchild, Flora, and a man named Moses Schug, who boarded with the family, all sat down to take supper; shortly thereafter one after another of those at the table, in quick succession, were taken suddenly and violently ill. The symptoms of all were alike, differing, however, in degree, the mother, father, and Schug being most violently affected, and the small child, Flora, and the prisoner the least. All the family were compelled to leave the table. This sudden attack of sickness was followed almost immediately with vomiting and purging, griping pains, cold and clammy skin, and excessive prostration. From the effect of this sickness, Mary Ann Laros, the wife of Martin Laros, died at seven o'clock on the following morning, Martin Laros about one in

The Facts of the Case.

the afternoon, and Moses Schug on the following day in the afternoon. Two of the family testified as to the peppery taste on their lips and tongues and burning sensation in the throat produced by drinking the coffee at the supper, and two testified to a like sensation experienced from actual experiment with white arsenic in solution. It was in evidence that all partook of the coffee except, perhaps, the prisoner. A *post mortem* examination discovered traces of arsenic in the stomach of the deceased. In the coffee pot, which had been used by the family, a white sediment was found, which, upon analysis, was discovered to be arsenic, and from appearances, about four ounces and a half had been deposited therein. The analysis was made by Dr. McIntyre, a reputable physician of Easton, and Mr. Davidson, of Lafayette College, according to the most approved scientific tests, and both pronounced the sediment to be arsenic. It was shown that the prisoner, a day or two before the poisoning, had purchased in a drug store in Easton, of Dr. Voorhees, about four and a half ounces of arsenic for the purpose, as he alleged, of killing rats, and that at the same time he had bought a bottle of Brown's Camphorated Dentrifice. The prisoner, subsequent to the poisoning, made declarations to witnesses about having made such a purchase of the dentrifice about the time named, and the bottle was found in the house of the deceased. He also made certain declarations about the concealment of money belonging to the deceased and Moses Schug, and money was found at the place indicated. William Schug testified, that in reply to a question as to what he meant by doing a deed of that kind, alluding to the poisoning, the prisoner said: "Bill, I don't know why I done it; I had no cause to do it, and I am sorry it is the way it is; but it is too late." It appeared that the prisoner was at home an hour or two previous to the supper, and could have had an opportunity to have deposited the poison in the coffee pot.

The defence was that the prisoner at the time he committed the act, was insane, and therefore not criminally responsible, and much testimony was given in regard to his being subject to epileptic fits, and the effects therefrom on the mind of the prisoner. It was also attempted to be shown that there was an hereditary tendency to insanity in the family of the prisoner. The assignments of error were thirty-three in number, but those only are noted here which are passed upon by this court.

The seventh assignment was that the court errred in permitting Dr. Green to testify as to the knowledge and qualifications of Dr. McIntyre to make a chemical analysis.

The eighth, in permitting Dr. Green to testify to the correctness of the tests made by Dr. McIntyre.

The ninth, in permitting Dr. Green, to testify whether the methods used by Mr. Davidson to ascertain the existence of arsenic, were scientifically correct.

The tenth, in permitting Dr. Voorhees to testify that the prisoner, before the coroner's inquest, when under oath and suspected of the murder, admitted to him or in his presence that he had purchased a bottle of " Brown's Dentrifice " from him in Easton, similar to the one then produced.

The eleventh in permitting the Commonwealth to prove by William Bitters, the deputy constable, certain admissions of the prisoner relating to the concealment of money belonging to his father and Moses Schug.

The assignments from the thirteenth to the nineteenth, inclusive, embraced the following offers of evidence, which the court refused. To prove by the brother of the prisoner that the paternal grandfather of the prisoner acted in a manner indicating unsoundness of mind; to show while the prisoner was a member of his father's family how his father educated and brought up his family with reference to religious and moral instruction and conduct; to show whether the treatment of the prisoner by the father and the rest of the family was kind or not; to prove that the brother of the prisoner committed suicide by hanging himself, without any apparent cause; to prove that the uncle of the mother of the prisoner is insane, and has been for years; to prove that the brother of the prisoner's grandmother on his father's side committed suicide by hanging himself, without any known motive — all these offers as evidence for the jury upon the question of the insanity of the prisoner.

The twentieth, that the court erred in refusing the defendant's third point, which was as follows: —

3. That the case of the Commonwealth, being one of circumstantial testimony, it must to a moral certainty exclude every other hypothesis but the one of the death of the deceased by arsenious acid through the criminal agency of the defendant.

The twenty-first was the answer to the fourth point, which was as follows: —

4. If the jury find, beyond a reasonable doubt, that Martin Laros was poisoned by the defendant, and further find by the weight of the evidence that at the time the act was committed the prisoner was incapable of judging whether or not the particular act which occasioned death was criminal, or if he knew it was criminal, but was impelled to the consequences, which he saw and understood, but could not avoid, and was placed under a coercion from mental disease, which, while the results of the act were clearly perceived, he was incapable of resisting,

Instructions Refused.

the verdict must be, "Not guilty by reason of insanity." Answer: "So much of the point ending with the word 'criminal' in the seventh line is affirmed. The remaining part of the point is not affirmed, as the evidence submitted to the jury is not applicable to the legal principle (if true) contained in the part of the point."

The assignments from the twenty-second to the twenty-sixth, inclusive, were the refusals by the court of the following points of defendant: —

5. That murder by poison is only presumptive murder in the first degree, and if, upon the whole of the evidence, the jury are not satisfied beyond a reasonable doubt that the mind of the prisoner at the time of the act was so free from mental disease as to allow him to deliberately premeditate the death of the deceased, and they are satisfied beyond a reasonable doubt of the poisoning of Martin Laros by the defendant, the verdict must be guilty of murder in the second degree, if they should not find him not guilty by reason of insanity.

8. If, from the evidence in the case, the jury should find, beyond a reasonable doubt, that Martin Laros died of poison administered by the defendant, but should have a reasonable doubt as to the sanity or insanity of the prisoner at the time of the commission of the alleged act of poisoning, it is their duty to convict of murder in the second degree.

9. The ability to distinguish between right and wrong in the particular act is not the sole test of criminal responsibility, and if the fact of poisoning having been found beyond a reasonable doubt, the jury are satisfied by the preponderance of evidence in the case that the prisoner, although cognizant of the moral quality of the act at the time, was not able to resist the impulse to commit the act by reason of mental derangement, it is their duty to render a verdict of not guilty, by reason of insanity.

11. If the jury are satisfied by the weight of the evidence that at the time of the commission of the alleged act of poisoning the prisoner was laboring under mental derangement, whether partial or general, of a degree sufficient to have controlled his will, and to have taken from him freedom of moral action, the verdict of the jury should be not guilty, by reason of insanity.

12. If, by reason of mental derangement existing at the time, the defendant had not power to control the disposition to commit the particular act, he is not responsible therefor, and the verdict must be not guilty, by reason of insanity.

The twenty-seventh assignment was the following portion of the general charge: —

"There is no evidence in the case showing that if even Allen C.

Laros was at the time laboring under a general or partial insanity, he was ever subject to delusions or to homicidal mania, or that in consequence of such delusion or homicidal mania he committed the act with which he is charged. The only and remaining question is, was Allen C. Laros, at the time of committing the act, laboring under such a defect of reason from disease of the mind, as not to know the nature or quality of the act he was doing or if he did know it that he did not know he was doing wrong."

The twenty-eighth assignment was the portion of the general charge following in brackets: —

"We have already stated to you that the defendant is presumed to be sane. And the burden is on him to prove to your satisfaction that he was insane. [You cannot, however, infer insanity from the heinous and atrocious character of the crime, or to constitute it as an element in the proof of actual insanity.]"

The thirtieth was the portion of the general charge following in brackets: —

"In either event, whether you find that the prisoner had or had not epilepsy, it will be your duty to examine all the testimony carefully, in all its details, to ascertain the condition of Allen C. Laros' mind from 1872 up to the 31st of May, 1876. You will ascertain how many attacks of convulsions he had, their force, character and duration, whether he had any stupor or disorder of the mind immediately preceding or succeeding each convulsion, as well as their character and duration. You will ascertain what effect these convulsions had upon his mind, health, disposition, and temper. You will examine into all his acts and conversations as detailed by the witnesses, whether in the school-room, at home, in the highways, or wherever the witnesses placed him, up to the 31st of May last and immediately afterwards. [You will compare the testimony of witnesses as to sanity or insanity, carefully scrutinizing the facts upon which they were found, and after having exhausted all the evidence bearing upon the question of sanity and insanity, it will be for you to say whether or not Allen C. Laros has satisfied you by the weight of the evidence that on the evening of the 31st of May, as well as on the day it is alleged that he purchased the white arsenic, he was insane and not criminally responsible for the commission of the crime charged against him.]"

The jury rendered a verdict of murder in the first degree. When the prisoner was called for sentence, his counsel filed the following plea, in bar of sentence: —

"Now, the 30th day of October, A. D. 1876, the defendant being

present in court, and being now asked here what he has to say for himself why the court should not proceed to judgment and execution upon the verdict of the jury for murder in the first degree, he by his counsel for plea in bar of the sentence of the court, saith that since the commission of the offence for which the defendant was indicted, and since the verdict aforesaid, he has become, and is now insane, and this he is ready to verify and prove. Whereupon he prays judgment," etc.

The district attorney filed the following replication: —

"And now, October 30th, 1876, the Commonwealth, by John C. Merrill, district attorney, for answer to the plea of the defendant why sentence should not be pronounced upon him, says that the said defendant has not become and is not now insane, and the said Commonwealth, therefore, prays that the judgment of the law be pronounced by the court upon the said defendant."

To this replication the defendant's counsel demurred, on the grounds,—

1. That the district attorney touches no issue by his replication and no mode of trial.

2. That the replication should tender a trial by the country, being a traverse of matter of fact.

3. That it prays judgment of the court upon the question as a matter of law.

4. That the said replication is, in other respects, uncertain, informal, and insufficient.

The court overruled this demurrer.

The prisoner's counsel on the same day filed another plea in bar of sentence, which averred at the time of the charge of the court to the jury and at the delivery of the verdict the said defendant was laboring under temporary insanity, produced by epilepsy or some other nervous disease, and was totally incapable of understanding and was actually unconscious of the proceedings attending the charge of the court, and the rendition of the verdict, and this he is ready to verify and prove; wherefore, he prays judgment, etc.

The district attorney moved that this plea be stricken off, for the reason that the matters therein alleged cannot now be heard, as they are without the jurisdiction of the court, which motion the court sustained.

The prisoner was then called by the court, who proceeded to interrogate him for the purpose of testing the question of his insanity.

They then sentenced the prisoner to be hanged.

The defendant then took this writ, the assignments of error being those heretofore noted, and the following relative to the proceedings subsequent to the verdict.

31. The court erred in overruling the demurrer of the defendant to the replication by the Commonwealth to the prisoner's plea in bar of the sentence filed October 30th, 1876.

32. In proceeding to sentence the prisoner without directing a trial of the question of his insanity, as raised by his plea in bar of the sentence, before a jury.

33. In interrogating the prisoner for the purpose of trying the question of insanity, as raised by his plea in bar of sentence.

W. S. Kirkpatrick and *Henry W. Scott*, for the plaintiff in error.

J. C. Merril. District Attorney, and *Edward J. Fox*, for the Commonwealth.

Chief Justice AGNEW delivered the opinion of the court.

On reading these assignments of error the first impression is that some of them must be sustained.

But a careful review of the testimony, running in its current and along with the bills of exceptions as they were taken, discloses that they are groundless. The case was carefully tried, and the rulings fair and substantially correct. In such a case as this slight inaccuracies doing no substantial hurt to the prisoner, ought not to turn aside the course of justice. The desperate condition of offenders often leads to many shifts to escape. Insanity is a common resort, but the burden of its proof lies on the prisoner, and it is not every proposition he makes must be allowed, especially when it tends to mislead the jury.

Some of the assignments were not proper and others pressed are not tenable. The objection to the question to Dr. Green as to his knowledge of Dr. McIntire's learning in the science of chemistry and his qualification to make an analysis quantitative and qualitative is not sustained. Dr. McIntire had testified to his own knowledge and competency and the testimony offered was only confirmatory. The question related to Dr. Green's knowledge, as a matter of fact, derived from observation. It was not a question of mere reputation, but of Dr. Green's own knowledge, acquired from full opportunity of observation. If I have seen a workman doing his work frequently, and know his skill myself, surely, if I am myself a judge of such work, I can testify to his skill.

The eighth and ninth assignments have even less ground of support. Dr. Green being himself a skilful expert, it was competent for him to

testify to the correctness of the tests used by Dr. McIntire, as stated by him in his testimony.

The tenth assignment is unsubstantial. It is needless to inquire into the competency of the testimony of the prisoner, before the coroner's inquest, when Dr. Voorhees himself testified to the fact admitted by the prisoner. The doctor sold him the bottle of dentrifice when he sold him the arsenic and identified the prisoner as the purchaser. Nor is it necessary to inquire into the competency of the confession made to Wiiliam Bitters, relative to the concealment of the money, referred to in the eleventh assignment, when it is proved that in consequence of the information, search was made at the place described by the prisoner, and the money found there. And admission not competent as a confession is admissible when its truth is proved by the revelation of the fact by search.

The assignments of error from the thirteenth to the ninteenth inclusive may all be disposed of in a breath. They were all offers collateral or secondary to the proof of insanity, and were not admissible until direct evidence of the prisoner's insanity had been given. A court is not bound to hear evidence of the insanity of a man's relatives, or evidence of his proper instruction in morals and religion, or of the kind treatment of his relatives and friends, as grounds of a presumption of possible insanity, until some evidence has been given that the prisoner himself has shown signs of his own insanity. Now when these offers were made, no evidence of his own insanity had been given. That he had at long intervals before the week of the murder suffered spasms or fits of some kind affecting him bodily is all that had been proved, but no mental unsoundness has been shown. These offers were not renewed after evidence was given of an affection resembling epilepsy and a possible epileptic insanity. Indeed the evidence of a possible epileptic insanity was so weak it would scarcely have been substantial error to reject the evidence a second time. It must not be forgotten that according to the evidence, or even according to common observation, epilepsy is not commonly followed by insanity, until after a long time from the first attack, and that the proof of epilepsy furnishes no immediate presumption of insanity. There was no error in the rejection of these offers when made.

The twentieth assignment is not supported by the fact asserted in the point. The case was not one wholly of circumstantial evidence. There was the prisoner's admission of his act made to William Schug. In answer to Schug's question, what he meant by doing a deed of that kind, he said: "Bill, I don't know why I done it. I had no cause to

do it, and I am sorry it is the way it is; but it is too late." The circumstances themselves were very strong. The purchase of the poison, its quantity, the quantity found in the coffee-pot and the facts attending the poison were very direct.

The assignments from the twenty-first to the twenty-seventh inclusive are subject to the same infirmity; the insufficiency of the evidence of insanity. The only possible question was that of epileptic insanity, and this the court submitted to the jury very fairly. It may be said of all these points in view of the evidence, they were abstract and unsubstantial.

The twenty-eighth assignment presents an apparent difficulty. Standing isolated from the charge, it seems to be unsound. But taken in its proper connection and according to the meaning of the court, the latter branch of the sentence which contains the alleged error is not justly chargeable with error. The court had said, the only remaining question is upon the insanity of the prisoner, that he is presumed to be sane, and the burden is on him to prove to your satisfaction that he is insane. Then the objected sentence follows: "You cannot, however, infer insanity from the heinous and atrocious character of the crime, or to constitute it as an element in the proof of actual insanity." The court did not mean to say that when proof of insanity is given, the horrid and unnatural character of the crime will lend no weight to the proof; but meant only that the terrible nature of the crime will not stand as the proof itself, or an element in the proof of the fact of insanity. There is a manifest difference between that which is actual evidence of a fact, and that which merely lends weight to the evidence which constitutes the proof. This is all the court meant. That part of the charge contained in the thirtieth assignment is not objectional when read with its context, and properly understood. The court did not say that the jury must find insanity on the day of the purchase of the poison in order to acquit. On the contrary, the jury were instructed in several parts of the charge that the insanity must have existed at the time of the commission of the offence. The paragraph containing the sentence objected to was employed in presenting the matters of fact relied upon by both sides as evidence upon the question of epileptic insanity previous to the time of the poisoning. The fact of sanity or insanity on the day of the purchase of the poison had a very direct bearing on the fact of insanity when the poison was administered. Hence the court properly submitted the fact of sanity or insanity on both days as bearing directly upon the issue, but not as both necessary to an acquittal.

The last three assignments of error raise a single question upon the power of the court to inquire by inspection and *per testes* into the insanity of the prisoner since verdict. We have no precedents in this State, known to us, how the inquiry shall be conducted when such a plea in bar of sentence is put in. It seems to us, however, that no right of trial by jury is involved in the question: A jury having found a verdict against the plea of insanity when set up as a defence to conviction, subsequent insanity cannot be set up in disproof of the conviction. The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, as a merciful dispensation.

The rights of the prisoner as an offender on trial for an offence are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity. If the right of trial by jury exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of justice. There must be a sound discretion to be exercised by the court. If a case of real doubt arise a just judge will not fail to relieve his own conscience by submitting the fact to a jury.

The sentence of the Court of Oyer and Terminer is affirmed, and the record is ordered to be remitted, for the purpose of carrying the sentence into execution according to law.

EVIDENCE — MENTAL CONDITION OF RELATIVES.

Hagan *v.* State.

[5 Baxt. 615.]

In the Supreme Court of Tennessee, December Term, 1875.

Hon. James W. Deaderick, *Chief Justice.*
" Peter Turney,
" Robert McFarland,
" William F. Cooper,
" Thomas J. Freeman, } *Judges.*

Evidence of Mental Condition of Relatives. — On the question of the prisoner's insanity, it was error to refuse to permit an inquiry into the mental condition of any of his immediate relatives.

Hagan *v.* State.

Appeal from the Criminal Court of Davidson County.

Attorney-General *Heiskell*, for the State.

Bate & Williams, for the prisoner.

Lea, Special Judge, delivered the opinion of the court.

The plaintiff in error was indicted in the Criminal Court of Davidson County for the murder of R. M. Richards, the seducer of his sister. He was convicted of voluntary manslaughter and sentenced to two years in the penitentiary, from which judgment he has appealed to this court, and assigns several causes of error for reversal.

Upon the trial there was an attempt to show, and there was some evidence to show, the insanity of the plaintiff in error at the time of the killing, and Capt. Wm. Stockell, a witness for the plaintiff in error, after stating that he was well acquainted with the family of the prisoner, was asked to state what he knew in regard to the sanity or insanity of a brother of the prisoner. To this question the Attorney-General objected, and the court sustained the objection. If medical science has determined any one question more clearly than another, it is that insanity is hereditary. Ray, in his work on the Medical Jurisprudence of Insanity,[1] says, "that the hereditary character of insanity has long since passed into the category of established things." Blanford, in his treatise on Insanity,[2] says "the first tendency which demands your attention is hereditary transmission, for it is of all the most potent, and ought always to be kept in view by those aware of its existence, whether medical men, parents, or guardians. Here is a cause of insanity which cannot be got rid of — a part and parcel of the individual's constitution and being."

If medical men, in determining the sanity or insanity of a party, inquire minutely into the mental condition of his immediate family, why is it that a court, seeking after the truth of the sanity or insanity of a party, refuses to inquire after the mental condition of his ancestry or immediate family. While the science of law is hoary with age, yet that its great object and aim, it has never refused to avail itself of all the means and aids which any modern science has demonstrated to be available in the investigation of truth.

The question of the prisoner's insanity being before the court, it was therefore error to refuse to permit the inquiry into the mental condition of any of his immediate family.

[Omitting a ruling on another question.]

Reversed.

[1] Sect. 155.

[2] p. 133.

SPECIAL CHARGE — BURDEN OF PROOF — EXPERTS — NEW TRIAL.

Webb *v.* State.

[9 Tex. (App.) 491.]

In the Court of Appeals of Texas, 1880.

Hon. John P. White, *Presiding Judge.*
" C. M. Winkler, } *Judges.*
" James P. Hurt, }

1. **Insanity — Special Charge as to Reasonable Doubt not Required.** — Where the court instructs the jury on the general issue of guilt that the prisoner is entitled to the benefit of any reasonable doubt, it is not error to refuse to charge as to reasonable doubt specially with regard to the issue of his sanity.
2. **Quantum of Proof.** — The evidence of insanity to warrant an acquittal should be sufficiently clear to convince the minds and consciences of the jury.
3. **Medical Experts** who have heard the whole of the evidence, or to whom the whole of the evidence has been hypothetically stated, may give an opinion as to the sanity of the prisoner at the time in question; but they cannot predicate an opinion on anything less than the entire evidence whether actually or hypothetically presented.
4. **New Trial — Surprise.** — That an expert witness by the defence has testified contrary to expectation is no reason for a new trial on the ground of surprise.

Appeal from the District Court of Fort Bend.

Hon. W. H. Buckhart, presiding.

The indictment charged the appellant with the murder of Charles R. Foster, in Galveston County on September 2, 1876. He was convicted of murder in the second degree, and sentenced to forty years' imprisonment in the penitentiary, but the conviction was set aside on appeal.[1] On the case being remanded he was again put on trial. His defence was insanity, to support which several witnesses testified. Verdict, guilty. Appeal.

Arthur P. Bagby, for appellant.

W. B. Dunham, for the State.

White, P. J. —

[Omitting a point of practice.]

Two questions are submitted, by bills of exception, with reference to the expert testimony introduced on the trial. Dr. Stone, a medical expert, who was present and heard the testimony of the other witnesses, was introduced and examined by defendant upon the subjeet of insanity, the principal defence relied on. On his cross-examination he was asked by the prosecution: "From the testimony of Frank Pool, was the

condition of defendant's mind such that he could not distinguish right from wrong?" to which he answered, over objection of defendant, "I do not think it was." Defendant asked that the answer be withdrawn from the consideration of the jury, which was also refused, the court stating that "the defendant might ask the doctor's opinion, based upon the entire case if he saw fit."

Mr. Wharton in his work on Criminal Evidence states the rule thus: "When insanity is set up by a defendant and denied by the prosecution, an expert cannot be asked his opinion as to the evidence in the case as rendered, not only because this puts the expert in the place of the jury, in determining as to the credibility of the facts in evidence, but because the assistance thus afforded is in most trials illusory, experts being usually in conflict, and the duty devolving on the court and jury of supervising the reasoning of experts being one which can rarely be escaped. It has been said, however, that when the facts are undisputed, the opinion of an expert can be asked as to the conclusions to be drawn from them, *and as to the conclusions to be drawn from the testimony of a particular witness*, and it is settled, that experts of all classes may be asked as to a hypothetical case. But if the facts on which the hypothesis is based fall, the answer falls also. Nor can an expert be asked as to an hypothesis having no foundation in the evidence in the case, or resting in statements made to him by persons out of court." [1]

In *People* v. *Thurston*, we find a number of authorities collated and cited upon this subject, which as there given we reproduce. It is there said: "The general rule laid down by Phillips [2] is, 'The opinion of medical men is evidence as to the state of a patient whom they have seen. Even in cases where they have not seen the patient, but have heard the symptoms and particulars of his case described by other witnesses at the trial, their opinion on the nature of such symptoms has been properly admitted. Thus on a question of insanity medical men have been permitted to form their judgment upon the representations which witnesses upon the trial have given of the conduct, manner, and general appearance exhibited by the patient.' Upon the discussion which took place in the English House of Lords in 1843, in consequence of the acquittal of McNaghten for the murder of Mr. Drummond, the following question amongst others, was propounded to the judges in relation to the defence of insanity, viz.: Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, *but who was present during the whole trial and the examination of all the*

[1] Whar. Cr. Ev., sect. 418. [2] 1 Ph. on Ev. 290.

witnesses, be asked his opinion as to the state of the prisoner's mind at the commission of the alleged offence, etc.? To this question an affirmative answer was given.[1] The form of the question above given clearly indicates that the medical witness must hear the whole evidence in order to qualify him to give an opinion. So, in *Rex* v. *Searle*,[2] it was held that a medical man *who had heard the trial* may be asked whether the facts proved show symptoms of insanity. Here again the medical witness must have heard the whole of the evidence."

So in *McNaghten's Case*,[3] it was held that a medical man *who had been present in court and heard* the evidence may be asked whether *the facts stated by the witnesses*, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong. Here again, it is quite apparent that the witness heard the whole of the evidence tending to prove insanity. So, in Chitty's Medical Jurisprudence,[4] the rule is laid down thus: "The opinion of medical witnesses who have seen the alleged lunatic, is unquestionably admissible, and though they have not seen the lunatic, yet their opinion, *after hearing all the evidence*, whether or not a person having so acted, and evinced such delusions, ought to be deemed a lunatic, it seems, is admissible." The conclusion is thus summed up: "It would seem to be a just inference from the reason of the rule that the medical witness should be in possession of all those facts tending to prove insanity before he should give an opinion negativing insanity. His opinion on half the facts of the case on which the jury are to decide the cause must be utterly worthless, for it may well be that the same witness, with all the facts before him, would pronounce a very different opinion."[5]

In *Lake* v. *People*,[6] it is said: "Although the opinions of experts are admissible evidence, yet it must be on a given statement of facts; and the facts on which the opinion must be admitted must be *all* the facts relied upon to establish the theory which it is supposed these facts sustain. Every witness would otherwise come to a different conclusion, and the same witness, testifying on one-half the facts, might give as his opinion that they indicated sanity, while the other half would satisfy him of the prisoner's madness."

We think the true rule is as summed up in Sharswood's note 1 to p. 27,[7] of Russell on Crimes: "As to medical experts, they may state their opinion upon the whole evidence, if they have heard it all, or upon a

[1] 47 Eng. Com. Law, 29.
[2] 1 M. & R. 75.
[3] 10 Cl. & Fin. 200.
[4] p. 356.
[5] People v. Thurston, 2 Park. Cr. 134, 135.
[6] 1 Park. Cr. 557.
[7] 9th ed.

hypothetical statement which is in conformity with the whole evidence." All authorities agree that it is inadmissible to permit an expert to give his opinion upon anything *short of the whole evidence in the case*, whether he has personally heard it or it is stated to him hypothetically.[1] "The proper mode of eliciting this opinion is, in substance, this: Premising that the expert shall have attended the whole trial, and shall have heard *all* the testimony as to the facts and circumstances of the case, and that he is not to judge of the credit of the witnesses or of the truth of the facts testified by others (which are questions for the jury), the proper question is this: 'If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, whether in his opinion the party was insane?'"[2]

We find Dr. Stone's evidence set out in the statement of facts as follows: "Dr. Stone, for defence (expert), testified that he had heard all the testimony in the case, and said that, not being a juror, he asked the court to excuse him from replying to the question whether the testimony established in his mind the sanity or insanity of the accused at the time he killed Foster; and the court excused him from answering. That he had heard no evidence of the insanity of the accused that could not be explained by other causes, such as indulgence in drink or debauchery. From the evidence of Pool alone, he would not have considered Webb insane. He believed the mind of Webb, at the time the particular offence charged was committed, to have been more or less distracted from some cause, but not to that extent as to relieve him entirely from responsibility."

The witness *had heard all the testimony in the case*, and did not believe defendant insane. This opinion, founded upon the whole testimony, must have included, and did include, the evidence of the witness Pool. If it did, then how could any injury result to defendant by asking — and that, too, upon cross-examination — the opinion of the witness upon the testimony of Pool alone? We confess we cannot conceive. It would have been otherwise if the expert had not heard and formed his opinion upon the whole case, for in that case the question and answer would have been not only improper, but illegal and inadmissible.

One of the grounds of the motion for new trial was that defendant was misled and taken by surprise at the testimony of Dr. Stone; because after all the testimony of the witnesses who were examined was heard, defendant's counsel withdrew with the experts, Dr. Stone

[1] See also Redfield's addition to sect 5, 3 Greenl. on Ev.

[2] See the editor's note to Bovard v. State, 1 Morriss' Cr. Cas. 630, with authorities.

amongst them, to ascertain their views on the question of sanity from this evidence, and whether there was occasion to introduce other evidence which they had on the subject, and that Dr. Stone, with the others, expressing himself satisfied from the evidence adduced that defendant was insane, they did not introduce such other testimony. This ground of the motion is supported by affidavits. The court did not err in overruling this ground of the motion. It is not shown that any application was made to the court for permission to introduce these witnesses after Dr. Stone had testified, which could and would have been permitted by the court in case it had been made to appear that it was necessary to the due administration of justice.[1] Nor is the motion strengthened by the allegation that upon a new trial the defendant will be able to procure other eminent scientific medical experts whose opinion upon the evidence will be different from that of Dr. Stone. Being surprised at the testimony of his own witness, defendant should have invoked the aid of the statute, which provides that "a continuance may be granted on the application of the State or defendant after the trial has commenced, where it is made to appear to the satisfaction of the court that, by some unexpected occurrence since the trial commenced, which no reasonable diligence could have anticipated, the appellant is so taken by surprise that a fair trial cannot be had; or the trial may be postponed to a subsequent day of the term."[2] "Surprise is not one of the grounds for a new trial in felony cases, all of which grounds are prescribed by the statute."[3]

The most formidable question in the case under consideration grows out of the refusal of the court to give in charge to the jury a special instruction requested as follows: "That if the jury entertain a reasonable doubt of the sanity of the accused at the time he shot Charles Foster, they should acquit him." Upon the issues of sanity and insanity the general charge given followed almost literally the law enunciated in *Webb* v. *State*,[4] and which was but a reproduction of the doctrine upon that subject, as declared in 2 Greenleaf on Evidence.[5] After making an appropriate application of these rules of law to the facts, the jury were further charged: "It is your province to determine, from all the evidence in the case, whether the defendant was sane or insane. Every defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence, beyond any reasonable doubt,

[1] Code Cr. Proc., Cart. 661.
[2] *Id.*, art. 568.
[3] *Id.*, art. 777; Walker *v.* State, 7 Tex. (App.) 262; Higginbotham *v.* State, 3 Tex. (App.) 447.
[4] 5 Tex. (App.) 596.
[5] Sects. 372, 373.

and in a case of a reasonable doubt as to his guilt he is entitled to be acquitted. Therefore, if you have any reasonable doubt of the guilt of the defendant, under the evidence in the case and the law as herein given you, you will acquit him." Here it will be seen that the court had charged the reasonable doubt fully with regard to the whole case made by the evidence. Was the defendant entitled to, and was it incumbent upon the court to further charge, in addition, the reasonable doubt, specially with regard to the issue of his sanity?

In this State this question has never heretofore, so far as we are aware, been directly adjudicated. If we look to the English decisions, or the decisions of the other State courts, we find much contrariety of opinion upon the subject; some courts holding that the burden of proving his insanity rests upon the defendant who interposes it, and that he is in duty bound to establish it as an independent fact, beyond all reasonable doubt; others hold that the fact must be established by defendant, but need only be shown by a preponderance of evidence as in civil cases, sufficient to overcome the presumption of sanity, and not necessarily to the exclusion of the reasonable doubt; whilst others again — and these may be classed as of the modern, or progressive school — insist that, inasmuch as the burden of proof never shifts from the State in any criminal case, but rests upon her to establish every element necessary to constitute the crime alleged, and inasmuch as the question of a defendant's sanity enters into and tends to controvert the most important constituent of crime, to wit, the criminal intent, — that, therefore the State must affirmatively establish the fact of sanity beyond a reasonable doubt. Those curious to investigate these different theories and grounds upon which they rest, will find the authorities collated and discussed in *Bovard* v. *State*, and the editor's notes to the case,[1] and in 2 Bishop's Criminal Procedure,[1] and Wharton's Criminal Evidence.[3]

Our own State, in the plentitude of her mercy and humanity, following the generous dictates of all human and divine law, declares that "no act done in a state of insanity can be punished as an offence,"[4] and in the definition of murder provides that it must be the act of one "of sound memory and discretion." These two principles are, however, subordinate to another, which is a postulate in estimating all human action from a legal standpoint, and that is that every man is presumed to be sane until the contrary is made to appear. This presumption of sanity is one of the maxims of the law. To such an extent

[1] 1 Morris' Cr. Cas. 818.
[2] (3d. ed.) sects. 669 to 673, inclusive.
[3] (8th ed.) sect. 335, *et seq.*
[4] Penal Code, art. 39.

is it indulged, even in cases of murder, that "the indictment makes no mention, that the accused is of sound mind, even when drawn on a statute which has the words 'of sound memory and discretion.' For, though sanity is essential to crime, it is sufficiently charged in the allegation of the criminal act, being the *prima facie* condition of mankind." [1] And so also "the authorities agree and properly, that in some way the presumption of sanity attends the proven acts of the prisoner, operating with sufficient force to create against him a *prima facie* case." [2] Such a case is more than a *prima facie;* it is a positive case.

To us it appears needless to dispute as to how or in what manner this presumption is to be rebutted and overcome. It is self-evident that if no issue at all of sanity is raised by the evidence introduced by the State, nor by that produced in behalf of the defendant, then the positive case (*prima facie*, as it is called by Mr. Bishop), established by the State, should and will rightfully carry conviction with it by virtue of the presumption. But if beyond this presumption of sanity — if beyond the positive, not alone *prima facie*, case attending the proven acts constituting the crime — it still devolves upon the State to show affirmatively the existence of sanity beyond a reasonable doubt, then it seems to us that it necessarily follows that this proof must be made in all cases, irrespective of whether the issue grows out of the evidence or not, and consequently that the virtue of the presumption becomes a delusion, and a *prima facie* case without this proof an utter impossibility. The folly of such an argument is its own most appropriate answer.

Suppose, however, that the sanity of the defendant does become a question — whether from the evidence of the State or that adduced by the defendant — should the State show the sanity or the defendant the insanity beyond a reasonable doubt? Admit, for the sake of the argument, that the duty devolves upon the State, how is the judge to charge fully the law applicable to the subject? In terse, plain and comprehensive terms he could not, perhaps, better express it than in the following language, viz.: "The law presumes every man to be sane until his sanity is established beyond a reasonable doubt." This, it may be said, is an absurdity. Grant it, and yet the absurdity will rest where it properly belongs, with those maintaining the proposition that the State shall prove sanity beyond a reasonable doubt.

We do not deem it necessary or incumbent upon us to unravel or attempt to answer the misty mazes and the metaphysical disquisitions indulged in by the opposing theorists about sanity being essential to

[1] 2 Bish. Cr. Pr. (3d ed.), sect. 669. [2] *Id.*, sect. 672.

criminal intent, and criminal intent being essential to punishable crime, nor their equally abstruse and obscure views as to which side has the burden of proof when the sanity of the defendant, from whatever cause, acquires a *status* in the case. The attempt would be as useless as profitless in our view of the question. We are free to admit that the defendant is not bound to plead his insanity specially, nor that he may not show it under "a plea of not guilty;" still this does not settle it that the burden of proof is either on the State or the defendant. Until the Legislature definitely declares a rule, the question will still, perhaps, remain in doubt as to where the burden of proof rests. We think it is unnecessary that we should determine it. Oftentimes it occurs in law, as in ordinary human transactions, that between opposing theories and opinions there is a middle ground, which, once attained, will lead to safe and satisfactory results. "*In medio tutissimus ibis.*" And so, in our opinion, in regard to this question of sanity in criminal cases. Mr. Bishop states this middle ground. He says: "The doctrine of principle sustained by a large part of our courts, and rapidly becoming general, is that, as the pleadings inform us, insanity is not an issue, by itself, to be passed on separately from the other issues; but, like any other matter in rebuttal, it is involved in the plea of not guilty, upon which the burden of proof is on the prosecuting power, the jury to convict or not, according as, on the whole showing, they are satisfied or not, beyond a reasonable doubt, of the defendant's guilt." [1] And Mr. Wharton says: "At the same time, if the defence goes to negative malice, and malice is an essential part of the case of the prosecution, then, if on the whole evidence, there be a reasonable doubt as to malice, there should be an acquittal." [2]

It is a noticeable fact that those who insist that the doctrine of reasonable doubt applies to the question of sanity, because insanity is an attack upon the integrity of the criminal intent which the State is always bound to show affirmatively are also forced into the position that it is not a distinct substantive issue upon which the defendant has the burden of proof. In other words, they claim that it is a part and parcel of the whole case made by the State; one which she is bound to establish beyond a reasonable doubt, and one which, when she has established it on the whole case beyond a reasonable doubt, is not sufficient, because she has not established it beyond a reasonable doubt when applied to the question of sanity separately and alone. The inconsistency is in giving to a part a prominence sufficient to defeat the whole of which it

[1] 2 Bish. Cr. Pr., sect. 673 [2] Whart. Cr. Ev., sect. 335.

Rule in Texas.

is but a part, and in insisting that a part shall control the whole instead of being only considered with and included in it. It will not do to say that the reasonable doubt, independent of the whole case, applies and must be given to each and every element going to make up the *corpus* of the crime, and failing to do so that the charge would be insufficient; because such a rule would lead to unnecessary and perhaps interminable confusion, and in a case of circumstantial evidence, for instance, it would be necessary to charge it with reference to each isolated fact in a chain of facts essential to the existence of the main fact. No one, we suppose, will contend that this is requisite. Speaking of the defence of an *alibi* in the case of *Walker* v. *State*, Chief Justice ROBERTS says: "It is not a defence at all in any other sense than as rebutting evidence tending to disprove the fact alleged in the indictment, that Walker killed Butler, the burden of proving which allegation rests on the State throughout the whole trial." And again: "The rule of law is that such evidence of an *alibi* should only be of such weight as to produce upon the minds of the jury a reasonable doubt of the fact affirmed by the State, that Walker was the man who shot Butler." [1] In the case at bar, the evidence of insanity was no defence, save as it tended to rebut or destroy the criminal intent with which Webb shot and killed Foster, and it should only be given such weight as would produce upon the minds of the jury a reasonable doubt, not of Webb's sanity, but of the fact affirmed by the State, which was that Webb killed Foster with criminal intent, and under circumstances constituting the crime murder.

In a general view of the case, we think that, no matter upon whom the burden rests or how the proof is adduced, the evidence of insanity, to warrant an acquittal, should be sufficiently clear to convince the minds and consciences of the jury; because the law requires that, "when the defendant is acquitted upon the ground of insanity, the jury shall so state in their verdict." [2]

Our conclusion of the whole matter is that the charge of the court was a sufficient exposition of the law of insanity, and that, having fully charged the law of reasonable doubt, as to the whole case, the court did not err in refusing the special requested instruction.

We have been unable to see any error in the proceedings had on the trial which requires a reversal of the case, and the judgment is therefore affirmed.

Affirmed.

[1] 42 Tex. 360.

[2] Code Cr. Pr. Art. 722.

Webb *v.* State.

HURT, J., dissents upon the proposition that no error was committed in refusing the special instruction, and refers to his view in the case of *King* v. *State*, decided at the present term, *post.*[1]

[1] At the same term with *Webb* v. *State*, the case of *King* v. *State*, 9 Tex. (App.) 515 (1880), was considered. In *King* v. *State* the prisoner was indicted for shooting H. W. Harrington, on March 22, 1880. The defence was insanity, but he was convicted of murder in the first degree and sentenced to death. The charge of the court presented the law of insanity as follows: "You have seen from the definition of murder, in a former part of this charge, that one of the ingredients of this crime is that the person guilty of the homicide must be of 'sound mind and discretion.' The law is that no act done in a state of insanity can be punished as an offence. On the trial of every criminal action, when the facts have been proved which constitute the offence, it devolves upon the defendant to establish the facts or circumstances on which he relies to excuse or justify the act charged against him. Every person charged with crime is presumed to be sane — that is, of sound memory and discretion. If, under the law of this charge and the testimony of the witnesses, the guilt of the defendant has been established beyond a reasonable doubt, it devolves on the defendant to establish his sanity at the time of committing the act, in order to excuse himself from legal responsibility.

"That is to say, the burden of proof to establish his plea of insanity devolves upon the defendant, as every person is presumed to be of sound mind until the contrary is shown by proof. If the State has, as before explained, proved the facts which constitute the offence charged in the bill of indictment, your next inquiry will be, has the defendant established by proof his plea of insanity, or has it been established by proof from any source? If he has, the law excuses him from criminal liability, and you should acquit him. The question of insanity of the defendant has exclusive reference to the act with which he is charged, and the time of the commission of the same. If he was sane at the time of the commission of the crime, he is amenable to the law. As to his mental condition, with reference at the time to the crime charged, it is peculiarly a question of fact, to be decided by you, from all the evidence in the case, before the act, at the time, and after. A learned judge has laid down a rule which I give you in charge; that is, he says: 'A safe and reasonable test in all cases would be, that whenever it should appear, from all the evidence, that at the time of doing the act the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted.' For, in such a case, reason would be at the time dethroned, and the power to exercise judgment would be wanting. But this unsoundness of mind or affection of insanity must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment and obliterating the sense of right and wrong, and depriving the accused of the power of choosing between right and wrong as to the particular act done. Whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great as to have controlled the will of the accused and to have taken from him the freedom of moral action. When reason ceases to have dominion over a mind proven to be diseased, it then reaches the degree of insanity where criminal responsibility ceases, and accountability to the law, for the purpose of punishment, no longer exists. Whether that degree of insanity existed at the time of the alleged homicide, with the defendant, is the important question on this issne for your consideration and decision; it being purely a question of fact, to be determined by you from the testimony. If it was true that the defendant took the life of the deceased, and at the time the mental and physical machine had slipped the control of the defendant, or if some controlling mental or physical disease was in truth the acting power within him, which he could not resist, and he was impelled without intent, reason or purpose, he would not be accountable to the law. If, on the other hand, he was of sound mind, capable of reasoning and knowing the act he was committing to be unlawful and wrong, and knowing the consequences of the act, and had the mental power to resist and refrain from evil, his pleas of insanity would not avail him as a defence. You will remember, in the definition of murder in the first part

CHARGE MUST BE SPECIALLY DIRECTED TO DEFENCE MADE — DELIRIUM TREMENS — TEST.

Erwin *v.* State.

[10 Tex. (App.) 700].

In the Court of Appeals of Texas, 1881.

Hon. John P. White, *Chief Justice.*
" C. M. Winkler } *Judges.*
" James M. Hurt, }

1. **Delirium Tremens** is a species of insanity.
2. **Delirium Tremens** is usually the result of a disuse of intoxicants by an habitual drunkard, but it may ensue from casual drunkenness.
3. —— **Court Should Charge Specially as to this Defence.** — The defence being delirium tremens, and there being evidence tending to establish it, the court should charge specially the principles of law applicable to this defence.
4. —— **Particular Right and Wrong Test.** — A charge which makes the test of insanity depend upon whether the prisoner knew right from wrong generally instead of with respect to the act for which he is indicted, is erroneous.
5. **Slight Evidence.** — However slightly the evidence may tend to establish a defence, the court should charge the law applicable to that defence.

Appeal from the District Court of Tarrant County. Tried before Hon. A. J. Hood.

of this charge, it is made an essential ingredient of murder that the person, to be guilty of that crime, must be one of 'sound mind and discretion;' the meaning of which is, that he must have capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing. Although a man may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, and mind sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for his criminal acts. But if the mind was in a diseased and unsound state to such a high degree that for the time being it overwhelmed the reason, conscience and judgment, and the defendant, in committing the homicide, acted from an irresistible and uncontrollable impulse, then it would be the act of the body, without the concurrence of the mind. In such a case there would be wanting the necessary ingredient of every crime — the intent and purpose to commit it. As before stated, every person charged with crime is presumed to be sane, and the burden of proof, to establish the defence of insanity, devolveson the defendant. It is not necessary that the insanity of the defendant should be established beyond a reasonable doubt; it is sufficient if it be established to your satisfaction, by the weight or preponderance of evidence, — such and so much proof as reasonably satisfies you of the existence of insanity at the time. To ascertain the condition of the defendant's mind at the time of the killing, you should look to the condition of his mind before that time — his conduct, acts and all the surroundings — ascertain, if possible, whether his mental condition was such as to enable him to know he was doing a wrongful and unlawful act. Look to his acts, conduct, and movements on the day, before, and on the occasion of the killing; his conduct, acts and movements after the killing, and all other facts in the case, to

Erwin *v.* State.

The indictment charged the appellant with an assault with intent to kill and murder W. T. Whitlow, in Tarrant County, Texas, on the first day of November, 1880. His trial resulted in his conviction of the

reach a correct conclusion as to whether the defendant was of sound mind or not."

The prisoner appealed. HURT, J., delivered a lengthy opinion, which includes the reasons for his dissent in *Webb* v. *State*. The other judges concurred in reversing the case, but refused to give their assent to the views of HURT, J. on the question of insanity, adhering to their opinion as expressed in *Webb* v. *State*. HURT, J.'s, opinion was as follows: —

Dissenting Opinion of Hurt, J., in King v. State. — HURT, J. — The appellant was convicted of murder in the first degree, with the death penalty affixed as the punishment. The record presents three questions for our solution: —

1. When the plea of insanity is interposed, is the burden of proof on the State to show sanity, or is it on the defendant to prove insanity?

2. If the jury have a reasonable doubt of the sanity of the defendant, should they acquit or convict, sanity being the only question in the case?

3. Can the proof be so plenary on one side as to justify the court below in the rejection of legitimate and proper testimony in behalf of the other side?

First proposition: When the plea of insanity is interposed, is the burden of proof on the State to show sanity, or is it on the defendant to prove insanity? Brush from this question the dust from ancient days, separate it from its old companions, and its solution is perfectly simple. Before entering upon an analysis of this subject, permit us to allude to some very strange and inconsistent expressions used by the learned judges in treating of this question. The following are of the number alluded to: "As *insanity excuses the commission of crime*, on the ground that the actor is not a responsible being," etc. "The *onus* of proving the defence of insanity, or, in the case of lunacy, of showing that the *offence* was committed when the prisoner was in a state of *lunacy*, lies upon the prisoner." "It is rather in the nature of a *plea to the jurisdiction*, or a motion to *change the venue*. The defendant, through his counsel and friends, comes in and says that he is not *amenable* to penal jurisdiction." A very respectable volume could be made of such remarks, but those cited will suffice for our purpose.

Let us take a steady look for a moment at these propositions. For example, take the first. What sane mind can comprehend the possibility of a *crime* being committed by an *insane* person? If the prisoner is insane, there is no *crime*. If there be *crime*, there is no *insanity*. Insanity cannot *excuse* crime, from the fact that, if *insane, there is no crime to be excused*. These observations apply to the second. Now to the third: "Plea in the nature of a plea to the jurisdiction." This plea never draws in issue the *guilt* of the prisoner. Under this plea, sanity or insanity *would* be the issue, separate and independent from the question of guilt, to be determined. But the court *has jurisdiction of the crime*, if any has been committed; and how are we to sever the one from the other? Shall we first try the question of sanity and then that of guilt? Not so, for on the threshold we are met with the fact that under the plea of not guilty, evidence on the question of sanity can be introduced. Behold what darkness and confusion surround the question of sanity — a subject around which gather more vagaries and inconsistencies than infest any other question in the whole range of criminal jurisprudence.

But what shall be said upon the proposition that the plea is "in the nature of a motion to change the venue?" If there is the faintest, the most remote, analogy existing between the plea and a motion to change the venue of a case, we frankly confess our inability to trace it. We had thought the object of a motion to change the venue was to remove a cause from the county in which the indictment was found to some other one for trial, and that the ground for removal was based upon the fact that an impartial trial could not be had in the proper county — that in which the indictment was found. To what court or county shall it be taken? Will not the same reasons for the change be found in the court or county to which it is transferred? Most unquestionably they will. These conclusions being true, the case could only find a court of last resort in the tribunal of heaven. This would defeat the ends of human justice, since the

offence charged against him, and two years in the penitentiary was the punishment awarded him.

The substance of the evidence for the prosecution was that, on the morning of November 1st, 1880, at about half-past seven o'clock,

primal idea upon which it is based carries with it the further idea of *human expiation for human wrong.*

These strange and inconsistent expressions, which we find in the writings of eminent text authors, are the legitimate offspring of fundamental error which underlies their treatment of this entire subject, and we merely allude to them here to intensify and concentrate attention upon this parent error, from whose fruitful loins have sprung all of these ill-considered statements upon this question of sanity. In jurisprudence nothing can be more valuable than these statements of principle. On the other hand, hastily conceived and unhappily worded enunciations not infrequently open the flood-gates of litigation, with its vast attendant expense, and lead to judicial murder under all the forms and solemnities of the law.

The fallacy of this fundamental error can be made more fully to appear by comparing two propositions: —

1. *Sanity is an inherent, intrinsic element of crime.*

2. Sanity is not an inherent and intrinsic element, but is extrinsic and independent of the crime.

The last proposition contains a monstrous fallacy, the fruits of which are visible in so many of the text-books, and which are followed out in many of the enunciations in the adjudicated cases. If *sanity* is an *inherent* element of crime, no well-ordered mind can stop short of the conclusion that the State must carry its burden and prove it. Feeling the force of this, writers have treated it as an *extrinsic* matter, separate and distinct from the question of guilt, and hence those strange and incomprehensible expressions above referred to.

Let us pay our respects to this last proposition, and see if from a bare touch it will not crumble to dust. "Sanity is *extrinsic.*" Therefore the prisoner is to be tried for the *act*, and the question of *intent* or *malice* is not drawn in issue. This for the simple reason that an issue formed upon the question of intent or malice irresistibly includes that of sanity; for *there can be no intent or malice without sanity.* Therefore it follows, from this erroneous position, that the jury, in viewing the act sought to be punished, must strip it of the intent which prompted it, and look alone to the *act.* To this we enter our solemn protest.

We now invite attention to what we believe to be the true position, which is that *sanity is an inherent, intrinsic and necessary element of crime.* Is this a correct proposition? Is it not a self-evident proposition? If murder can be committed without intent or malice, then the proposition is false; if not, it is true. But we do know, if it be possible to know anything, that, to constitute murder, the act of killing must be attended, not only with the *intent* to kill, but with *malice;* and we also know, with the same degree of certainty, that there can be no intent or malice without *sanity.* It therefore follows, beyond any shadow of doubt, that sanity is an inherent, intrinsic and necessary ingredient of crime.

We now return to the first proposition stated at the beginning of this opinion, which is as follows: "When the plea of insanity is interposed, is the burden of proof on the State to show sanity, or is it on the defendant to prove insanity?" We have thus stated the proposition because we find it *so* stated in the books, but it is not a practical one. There is no such plea known to our Code as applicable to a trial of a criminal cause. We have four pleas — two special, and the pleas of "guilty" and "not guilty" — and this plea of "not guilty" is a denial of every material allegation in the indictment. Under it evidence to establish the insanity of the defendant, and every fact whatever tending to acquit him, may be introduced. It follows that under this plea the defendant denies every constituent element of the offence charged, and this plea of "not guilty" is the same as if the defendant had denied specifically each element of the crime charged.

This leads us to the consideration of the charge in this case, which is murder, and is defined thus: "Every person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being, within this State, with malice aforethought, either express or implied, shall be deemed

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Whitlow, the injured man, was standing in the door of a saloon, in which he was employed, in Fort Worth, when he was approached by the appellant, who asked him for a drink of whiskey. Whitlow refused him the whiskey, telling him that he had drunk enough. Continuing

guilty of murder." From this definition it follows that, to constitute the offence, the slayer must be "of sound mind and discretion;" a "reasonable creature" must be slain, and the slayer must be actuated by "malice." We have then, first, "sound memory" in the slayer; second, a "reasonable creature" slain; and the slayer prompted by "malice." These constitute *murder*, and nothing less than all of these can constitute murder. By what principle of logic, reason or justice can either of these elements be eliminated from the offence? From this it follows that an indictment charging this offence embraces all the above elements, whether specifically named or not; and though the indictment omits to charge that the defendant was of "sound memory," yet charging "malice," *sanity* is necessarily included. The problem which equals murder is composed of three members: First, "sound memory" of slayer; second, "reasonable creature" slain; and, third, "malice" in the slayer.

Let us see if we can eliminate from this problem one of these members, and leave every element of the offence in the problem. There can be no *malice* without *sanity*; hence, "malice" includes *sanity*. We therefore have first, a "reasonable creature" slain; second, a malicious slayer — murder. Hence, the charge in the indictment, that the killing was with "malice aforethought," charges the slayer to be of "sound memory and discretion." If this conclusion is not correct, we most unhesitatingly assert that the indictment is worthless; for we have found, under our Code, *sanity* to be an element of *murder*, and, by well settled rules of criminal pleading, an indictment which fails to embrace in its allegations all of the constituent elements of the offence is fatally defective. The authorities approach nearer to unanimity upon this question than any other known to us.

If the above analysis be correct — and we think it is — it devolves upon the State to prove every *inherent* element of the offence; and as we have found *sanity* to be such an element, it rests upon the State to prove *sanity*. Still holding with a firm grasp the proposition that sanity is an *inherent* element of the offence, and as there is no such thing in law as separating the *elements* of an offence so as to cast the burden of a *part* upon the State, and, *as to the rest*, to require the defendant to take the burden of proving a negative, it follows that the existence of each element is an *affirmative* proposition, the proof of which rests with the State. The idea that the burden of proof shifts is in direct conflict with the philosophy of criminal jurisprudence, and at war with fundamental principles; for we hold that, with regard to necessary ingredients, it never shifts. If two or more elements constitute an offence, which of these elements must be proven by the State, and which must be proven *not* to exist by the defendant? If *elements*, do they not all stand upon the same plane, or are there some which prove themselves? If there are, they are not *elements*. Are we to require the defendant to prove the non-existence of that element — sanity — upon which *intent* and *malice* depend, and yet hold the State to prove *intent* and *malice*? To us it is impossible to harmonize, logically, these positions.

We are now led to meet the most plausible, difficult, and potent position which can be assumed upon the other side. And we here concede that it is supported by the weight of authority; but we do not think it is founded in principle, and if not founded in principle, to follow would be dangerous. It is this: The fact of killing being admitted, and that beyond doubt the prisoner did the killing, and sanity being the normal condition of all persons, the law presumes the prisoner sane until he shows to the contrary; and therefore the burden of proving *insanity* rests with the prisoner. It will be seen at once that the struggle is with this presumption of sanity.

Let us move quietly but closely up to this gentleman and try to see who he is. The name of this witness is *presumption*. He is a remarkable gentleman. He was contemporary with the first-born principles of enlightened jurisprudence. For truth and integrity he has never been excelled by any witness. His means of knowledge are unsurpassed, having for a foundation the laws of nature, and the truth of his evidence is

the conversation, Whitlow told him that if he did not quit drinking he, Whitlow, would report him, and his dismissal from the night-watch force, on which he was employed, would follow. About this time Capt. Paddock came up, and entered into a conversation with Whitlow.

corroborated by the experience of man through all ages. The effect of his evidence is the production of not only a mere *prima facie* case, but full and complete conviction when not opposed. Upon this evidence alone, when not contradicted, sanity being the only issue, man has been made to expiate the violated law with his life. When he speaks to the sanity of the prisoner, his evidence meets with an approving response in the mind of every intelligent and honest juror, for their experience corroborates his testimony. But he is not infallible. He never testifies to the sanity of any *particular individual*. His is never *positive*, but always *presumptive*, evidence. Sanity being the normal condition of man, he *presumes* that to be the condition of the prisoner. With the parents or relatives of the prisoner he is not acquainted. He is not aware of the fact that perhaps some of the prisoner's blood-relatives are now inmates of an asylum for the insane. Though his locks are bleached by the winters of ages; though he has never been charged with prejudice, and though his evidence is supported by the laws of nature and corroborated by the experience of man, yet he is somewhat *arbitrary*. He places the prisoner in the normal condition of man, which is *sanity*, and demands of him the same conduct whether sane or insane. He *never heard of insanity*, because he speaks alone from the laws of *nature*, and *insanity* being an *exception* to the natural rule, they are unacquainted. With the prisoner's language, conduct or misfortunes he has nothing to do, and of them he is entirely ignorant. Yet he holds himself with an iron grasp to the laws of nature and the experience of man. Is he omnipotent? How many witnesses are necessary to measure arms with this Titan? Does he partake of the kingly character, and can "he do no wrong?" Upon the testimony of one witness alone, the prisoner may be legally convicted and executed. Can this gentleman's evidence accomplish more? In no case can he accomplish more than can be effected by the evidence of one witness. We do not mean the evidence of *any witness*. Can the evidence of one witness ever be an over-match for him? In some cases it legally and justly can; in others the testimony of scores will not suffice, this depending always upon the character of the witnesses, their means of knowledge, and the *facts sworn to*.

Having endeavored to become somewhat acquainted with the witness *presumption*, we now desire to call special attention to a very remarkable feature of his character. It is conceded by all that his evidence is relied upon, and is absolutely necessary to convict, in a great many cases in which the *question* of *sanity* is *not* involved. It is also conceded, under our decisions, that in *these very cases* the burden of proof *does not shift*, but remains with the State throughout. Now, upon what principle of logic or justice can we give to this *presumption* so much power in a case involving the question of *sanity* as to *shift* the *burden* to the *prisoner*, and in the other cases hold that it does *not shift*?

In *Ake* v. *State*, 6 Tex. (App.) 398, Judge White makes an extract from the opinion of Judge Bigelow in the case of *Commonwealth* v. *McKee*, 1 Gray, 61. From it we give the following: "The general rule as to the burden of proof in criminal cases is sufficiently familiar. It requires the Government to prove, beyond a reasonable doubt, the offence charged in the indictment, and if the proof fails to establish any of the *essential ingredients necessary to constitute the crime*, the defendant is entitled to an acquittal. This results not only from the well-established principle that the presumption of innocence is to stand until it is overcome by proof, but also from the *form of the issue* in all criminal cases tried on the merits, which, being always a general denial of the crime charged, necessarily imposes on the Government the burden of showing affirmatively the existence of every material ingredient which the law requires in order to constitute the offence. If the act charged is justifiable or excusable, no criminal act has been committed, and the allegations in the indictment are not proved. This makes a broad distinction in the application of the rule as to the burden of proof in civil and criminal cases. In the former, matters of justification or excuse must be specifically pleaded in order to be shown in evidence,

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While Whitlow and Paddock were talking, the appellant asked Whitlow: "Are you going to give me that drink?" to which question Whitlow answered, "No!" Appellant drew his pistol, and said: "G—d d—n you, you have been back-capping me all the time, and I'll give it to you

and the defendant is therefore, by the form of his plea, obliged to aver an affirmative, and thereby to assume the burden of establishing it by proof; while in the latter all such matters are open under the general issue, and the affirmative — viz., proof of the crime charged — *remains, in all stages of the case,* upon the Government."

The quotation being ended, Judge White proceeds: "As thus enunciated, we believe the doctrine to be correctly asserted, and we know of no decision of any of the courts in this State which has ever contradicted or contravened it."

We ask special attention to the *doctrine* enunciated by Judge Bigelow, and which is affirmed by our own judge in the opinion above quoted from, which is as follows: "The burden of proving *every essential element necessary* to *constitute* the offence is with the Government, and this *remains, in all stages* of the case, upon the Government." This rule applies only to the burden of proof of the *necessary ingredients* of the offence, and, as Judge White further and properly states, "when *distinct substantive* matter is relied upon by the defendant to *exempt him from punishment* and *absolve him from liability*, then that is *matter foreign* to the issue as made by the State in her charge against him, and the burden of proving it, in reason, common sense, and law, should be upon the defendant." The italics are ours.

From the above we deduce these rules: —

1. The *State must prove every necessary ingredient* of the *offence*, and, so far as they (the ingredients) are concerned, the *burden* of proof *never shifts.*

2. When distinct, extrinsic matter is relied on by the defendant, the burden is on him to prove it to the satisfaction of the jury.

To these rules we give our hearty assent. But the grand, fundamental question here again presents itself: "Is sanity a *necessary element* of crime?" We have said all we desire to say on this question.

We now propose to return to that plausible position of the other side: "The evidence showing the act to have been done by the defendant, and sanity being presumed by the law, the burden shifts to the defendant." Those who occupy the other side plant themselves upon this proposition, and ask with plausibility and a great show of victory: "Will not the prisoner be convicted if he fail to introduce evidence of his insanity?" We admit that he will, and justly. But suppose the evidence shows that the defendant killed the deceased intentionally, with a deadly weapon, and here closes. Will not the prisoner be convicted if he fail to introduce evidence in *excuse or justification?* Let us take another case: The State proves by a number of unimpeachable witnesses that the deceased was brutally murdered by some one in the perpetration of rape, and witness after witness has sworn to the identity of the prisoner as being the perpetrator of the foul deed, and, in addition to all this, the State proves, by a number of witnesses, facts strongly tending to prove the presence and guilt of the prisoner. If the case closed here, *would not the prisoner be in very great danger of losing his life?* Can *presumption* make a *stronger case than this?* Bear in mind that the above facts constitute *the case* before the court, and the judge should charge the law applicable to *the case* as made by the facts. Now suppose, in this case, the State having closed, the prisoner proves, by a number of his neighbors, that he was at another place at the time the offence was committed, and adds fact upon fact in support of their evidence in favor of an *alibi.* This would be quite a *different case* from the first, but *the case.* Now, suppose the judge should *split* the last case just where the State closed (notwithstanding *the case* as made by all the evidence), and charge that the burden of proof shifted to the prisoner to prove his *alibi.* Would that be held sound law in this State? By no means, and for the simple reason that if the prisoner *was not there* he is not guilty. An *alibi* strikes at the very heart of the proposition of guilt, and every particle of evidence in its support, though negative in its character, is a direct attack upon the theory of his presence at the place of the crime; and, if not there, he is not guilty. And here we would call attention to another source of confusion (in our judgment), which is that many judges fall into the error of viewing

now," and immediately fired the ball, striking Whitlow in the arm, from which wound he was confined to his bed for two weeks. Paddock started to appellant, but the latter presented his pistol and held him at bay. The city marshal approaching about this time, the appellant left,

the case, not *as a whole*, but in its different *stages*, and apply the law in their charges to these stages. This *splitting up* of a case into several parts, and, by the charge, shifting the burden first upon the one and then upon the other party, is against law and principle. In every criminal prosecution the *guilt* of the prisoner is the *objective point*, and every step, every move, every element of the offence, and any fact which is necessary to arrive at that point is *affirmative* in its very nature; and, as to any of these, the burden *never* shifts.

We have found, in this supposed case of murder, that if the defendant failed to introduce evidence he would likely forfeit his life; but *we have also found that the burden in that case did not shift.* Now, suppose the State proves that the prisoner deliberately, and with a deadly weapon, kills the deceased, and here the evidence closes. Must the State go further, and prove sanity, by introducing a witness to that point? By no means, for *sanity* is not in *the case.* But suppose the prisoner piles fact upon fact tending to show insanity, must the court charge that the burden in this case is on the prisoner?

Is this a stranger case than the one above put? We think not. Then, can any sound, logical reason be given for shifting the burden in the last and not in the first case? Most unquestionably not. We have found that proof of an *alibi* is a direct attack upon the theory of the defendant's presence at the place of the crime. Proof of insanity is, therefore, an attack upon sanity, and if this is gone, there is no intent, no malice; and if these are wanting, there is no murder, no crime. If there is a mistake in these conclusions, we are not capable of reasoning upon any subject, for these are our settled and honest convictions.

We therefore conclude that, since *sanity* is an *essential, inherent element* of *murder*, and since the State must prove all of the necessary ingredients of the offence charged, we cannot escape the conclusion that the State must prove sanity; and as we have found that the burden of proof does not shift in regard to necessary *ingredients* of the offence, and as sanity is such an ingredient, it also follows that the burden of proof is upon the State to show *sanity*, and not upon the defendant to prove *insanity*—a negative. This rule has no application to cases in which the question of sanity is not raised; nor do the rules applicable to *alibi* in all cases, good faith and mistake in theft, etc., have any application in cases in which the *facts do not call for them.*

Now, let us see if we can put these principles into active operation; for, unless practical, they are valueless. The jury is sworn, and the plea of "not guilty" entered by the prisoner. The charge is murder. The burden is on the State to prove guilt. The State proves the killing by the defendant with a deadly weapon; the wound was mortal, the act deliberate, and not attended with any circumstances of mitigation, extenuation or justification. But here we are met with the objection that there is no proof of sanity. Not so; for the State has the evidence of that venerable and impartial witness, the truth of whose statements is corroborated by the laws of nature and the experience of man. He is the first witness in every case, and at the very threshold proclaims the sanity of all persons. He not only proclaims sanity, but when certain facts are proved, he swears to the existence of malice. Not only so, but when an injury is inflicted, he testifies to the fact that the party inflicting the injury intended so to do. Take the above case with the testimony of this witness *presumption* in connection with the other facts, and if the evidence closes there, the defendant would and should be convicted. But, the State having closed, the defendant proves fact after fact tending to show the want of sanity. Shall we try him by the presumption or by the facts on the *question of sanity*, or by both the presumption and the facts? If this witness is infallible; if he cannot err; if his evidence is conclusive on the question of sanity, then we should try him by the *presumption*, which would be no trial at all. But, as he knows nothing of *this* case, and since his evidence is not conclusive when opposed by other evidence, but very powerful, and conveying evidence of a presumptive character, we should try the defendant

paying no attention to the marshal's order to halt. Two witnesses for the State testified that while the appellant appeared to be drinking somewhat, he did not appear to be deprived of his reason, and in their opinion he knew what he was doing.

by *both*. The trial proceeds; the defendant proves fact after fact tending to show the want of sanity; but there is the evidence of that old, hoary-headed witness, who is without partiality or prejudice; who is not related to either of the parties, and who is incorruptible, proclaiming the sanity of the defendant. The jury draw upon an experience which corroborates the truth of his evidence; but, as he knows nothing of the sanity of this particular prisoner, his evidence being of a presumptive character, and not conclusive, the struggle throughout the trial is between his evidence and that of the defendant. The defendant closes, and the old witness *presumption* appears to be crushed; but in comes the State with the evidence of witness after witness swearing to facts tending to show sanity, thus corroborating this witness presumption; and thus the jury try the case by the evidence of this witness presumption, in connection with *all* the evidence on the question of sanity, giving to each witness and all the evidence their due and proper weight, just as in other cases in which the question of sanity is involved. It will be seen, therefore, that the evidence of this witness presumption is to be taken in connection with all of the other evidence, he being treated as a witness in the case.

By a careful survey of the above positions it will be perceived that the burden of proof is quite a different thing from the means or instruments of proof. We have not time here to elaborate this position. We have now said all we desire to say upon the burden of proof, concluding that it never shifts in regard to the necessary ingredients of the offence.

The court below charged the jury that the burden of proving insanity was upon the defendant. This, we think, was error. 17 Mich. 111; 16 N. Y. 68; 2 Metc. 240; 1 Gray, 61; 7 Metc. 500; 31 Ill. 385; State *v.* Crawford, 14 Am. L. Reg. (N. S.) 23; 43 N. H. 224; 19 Ind. 170; United States *v.* McGlue, 7 Law Rep. (N. S.) 439.

The next proposition is: "Must the State prove sanity beyond a reasonable doubt?" If sanity is a necessary ingredient of crime, and if it be necessary to prove the ingredients of crime beyond a reasonable doubt, the conclusion that it (sanity) must be proved beyond a reasonable doubt cannot be resisted. Hence the settlement of the first proposition — viz., that sanity is an inherent, intrinsic, necessary element of crime — conclusively settles the last proposition, if the *doubt can be applied to the necessary ingredients*. To illustrate: The *defence* is the *want* of sanity, or *alibi*, or good faith, or mistake, or any other matter which will defeat guilt; now, is it proper to specifically apply the doubt to either of these grounds? Take, for example, the *fraudulent* intent in theft, and assume that the facts are of such a character as to make this the only question. Upon this the defendant makes his contest. Would it be *wrong* for the court to apply the doubt *directly* to this part? We think not. Then, if the doubt can properly and justly be specifically applied to *one* ingredient of an offence, why not to others, if they are made prominent by the situation of *the case*. If the court, by its charge, calls special attention to the defence or defences urged by defendant, and then applies the doubt to the whole case, we are not to be understood as holding that this would be error. But suppose the defendant asked that the doubt be pointedly and directly applied to his defence or defences, would it be right or wrong for the court to thus apply it? This brings to the front the *right* or *wrong* of the principle.

Now, it is conceded by all that if there be a doubt of the guilt of the defendant the jury must acquit, and as there can be no guilt without *sanity*, a doubt of *sanity* would therefore be a doubt of guilt. If it be proper to acquit upon doubt of guilt, how can it be wrong to acquit upon a doubt of sanity, upon which guilt necessarily depends? Would an honest and just man convict, if he had a well-founded and reasonable doubt of the prisoner's sanity? We think not. Would justice demand his conviction, or would not reason, humanity, and justice imperatively require his acquittal? Then, if upon a well-founded, reasonable doubt of *sanity*, *justice demands his acquittal*, is it wrong for the court to so state in its charge? Must *justice be put to shame, driven to the rear*, and *forced*

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A number of witnesses for the defence testified that at the time of, and for some time previous to the shooting, the appellant had been drinking to great excess. They declared their belief in his insanity resulting therefrom, and that he did not know right from wrong at the time, nor what he was doing. Upon this testimony the appellant rested his defence.

to ensconce herself behind some other proposition? Has not the prisoner the right to have her brought to the front, face to face with the jury, and the jury to be made to pass upon her merits? In every trial, justice should be kept in the front rank, and not driven to the rear with the stragglers and camp-followers. We therefore conclude that, when requested by the prisoner, the court should charge the jury that if they have a reasonable doubt as to the sanity of the prisoner they should acquit him. Hatch *v.* State, 6 Tex. (App.) 384; Robinson *v.* State, 5 Tex. (App.) 519; Kay *v.* State, 40 Tex. 29. This charge was asked and refused in the Webb Case, decided at this term (*ante*, p. 490), in which action of the court we think there was error.

From the statement of facts in this case, it will be found that the defendant stated that he was compelled to kill deceased; that he had taken supper at his sister's, near Hilliard's, and on his way home was passing Dr. Harrington's, when he got after him with a pistol and ran him down, when he wheeled and shot him. The State introduced these statements. It further appears from the horse-tracks, that deceased was running his horse along the road in the direction of the person who shot him, and also that the deceased fell in the road, and that his pistol was lying by him. The killing was in the night, and was not seen by any person. Under these facts, defendant proposed to show that just before, or a short time before the killing, deceased threatened to kill the defendant. This being objected to by the State, the court sustained the objection; to which the defendant excepted, and reserved a proper bill of exceptions. It is conceded by the assistant attorney-general that this evidence was admissible, but contended that the defendant is not injured by its rejection, because the facts establish overwhelmingly that defendant was waylaying the deceased, and that the right of self-defence was thereby forfeited. It will be seen that, under this state of case, our third proposition is found, viz.: "Can the proof be so plenary on one side as to justify the court below in the rejection of legitimate and proper evidence in behalf of the other side?" To this proposition our answer must be in the negative. To hold the contrary would make the court the judge of the weight of the evidence and the credibility of the witnesses, which is imperatively and invariably the province of the jury. There can be no *case* until the evidence is closed on both sides, and then, and not till then, can it be properly termed *the case*. This evidence, which legally and justly constituted a part of *the case*, being rejected, the jury passes upon a part, and not the whole case, which must, of necessity, result in injury to the defendant.

When the court charged the burden to be on the defendant to show insanity, we think there was error, and that the rejection of evidence of threats was also error. For these the judgment must be reversed and the cause remanded.

WHITE, P. J., and WINKLER, J.—We concur in the above opinion reversing the judgment, but cannot give our assent to the views or conclusions expressed with regard to the question of insanity. Our views upon this subject will be found in the opinion in the case of *Webb* v. *State*, *ante*, p. 835, recently decided by this court.

The law presumes every man to be sane, and that presumption alone will of itself sustain the burden of proof which is devolved upon the State in every criminal case, so far as sanity is involved, until it is rebutted and overcome by satisfactory evidence to the contrary. Naturally, and in fact, the burden to rebut this presumption rests with and is upon the defendant; and he should be able to show his insanity clearly, and to that extent that the minds and consciences of the jury can say that on account of his insanity he was guiltless of entertaining the criminal intent essential to responsibility for the crime charged. This is not only required by the general rule of

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Ball & McCart, for the appellant.

H. Chilton, Assistant Attorney-General, for the State.

HURT, J. — Erwin, the appellant, was convicted of the offence of assault with intent to murder. His defence was that he was insane at the time of the assault; that he was suffering under a species of insanity known as delirium tremens. The evidence raises the issue as to whether the defendant was, at the time of the assault, in a drunken frenzy, or laboring under the disease known as delirium tremens. If, therefore, delirium tremens is such imbecility of mind as will excuse the defendant, or, to speak more in accord with legal principles, defeat guilt, then it was the duty of the court below to charge the jury thereon in a clear and pointed manner.

That it is a species of insanity rendering the party incapable of the commission of crime, there is no longer any doubt. Messrs. Wharton & Stille, in their admirable work on Medical Jurisprudence, are very clear and emphatic on this point. They say: "If a man who, laboring under delirium tremens, kills another, is made responsible, there is scarcely any species of insanity which, on like principles, would not be subjected to the severest penalties of criminal law." [1]

A party laboring under this species of insanity, not being responsible for his acts committed while thus diseased, and the evidence in this case tending to form this issue, it was the duty of the learned judge, in his charge, to have clearly and pertinently set forth the principles of law applicable to this defence. This was not done in that clear and distinct manner required by the now well settled principles of law.[2]

The charge of the court upon the only issue in this case, that upon which the defendant relied for an acquittal, to wit, insanity, is as follows: "You are further instructed that where a defendant is accused of crime, placed on trial, and the plea of insanity is interposed, the inquiry the

law, but is implied in the statute, which requires that "when the defendant is acquitted on the ground of insanity, the jury shall so state in their verdict." Code Cr. Prac., art. 722. It is unnecessary to determine whether the defendant shall establish his insanity beyond a reasonable doubt or by a preponderance of testimony; all that is required is, that he shall establish it to the satisfaction of the jury, who are the judges of the fact. Commonwealth *v.* Eddy, 7 Gray, 583; Ortwein *v.* Commonwealth, 76 Pa. St. 414; 1 Hawley's Am. Cr. Law, 283, 297; Lynch *v.* Commonwealth, 77 Pa. St. 205.

As to reasonable doubt, if the charge applies this to the whole case, this will satisfy the demands of the law.

Reversed and remanded.

1 Wharton & Stille's Med. Juris., vol. 1, p. 202.

2 Burrell *v.* State, 18 Tex. 713; Marshall *v.* State, 40 Tex. 200; Lindsay *v.* State, 1 Tex. (App.) 327; Lopez *v.* State, 42 Tex. 298; Sutton *v.* State, 41 Tex. 513; Miles *v.* State, 1 Tex. (App.) 510; Pugh *v.* State, 2 Tex. (App.) 539; Richardson *v.* State, 7 Tex. (App.) 486; Francis *v.* State, 7 Tex. (App.) 501; O'Connell *v.* State, 18 Tex. 343; Vincent *v.* State, 9 Tex. (App.) 203; Whaley *v.* State, 9 Tex. (App.) 305; Henry *v.* State, 9 Tex. (App.) 358.

law requires in such cases is not as to the amount of intellectual capacity of the accused, or in other words, the law does not look to or inquire whether an accused party is possessed of a little or a great mind. It is the quality and not the quantity of the mind that the law looks to. If a man is in possession of a sound mind, has merely sufficient mental capacity to know right from wrong, to know and comprehend the nature and consequence of his own acts, the law holds such party accountable. On the other hand a man may be in the possession ordinarily of that which would be termed a great mind, still if such person, during a period of actual insanity, violate the law, such person would in law not be a subject for punishment, and in such case it is in law immaterial what the cause of said insanity may have been. But in law insanity and mere drunkenness are two things distinct one from the other. While insanity exonerates from all punishment, mere drunkenness neither mitigates nor justifies. If a man of his own volition voluntarily becomes drunk, and during a fit or spell of even very great intoxication, does an act, he cannot in such case plead drunkenness as an excuse. The law will not allow a sane man to shield himself from the consequences of his own acts on the ground that such sane man, of his own accord and of his own will, chose to become even beastily drunk. No mere temporary condition of the mind, brought about by a fit or mere spell of drunkenness, however great such drunkenness may be, is in law an exoneration or excuse for crime."

This charge, so far as the defence of the defendant is concerned, is negative in its character. There is no direct, affirmative application of the law to his theory of defence. It is true that the jury are told that if they believe that the defendant is *actually insane*, he would not be amenable. This is very general, including every species of insanity. The evidence tending, whether strongly or otherwise, to establish delirium tremens, the charge should have explained that species, and applied the legal principles thereto. This should have been done clearly, distinctly and affirmatively. Again, the charge makes the test of insanity depend upon whether the defendant knew right from wrong generally. The test is now settled to be whether the defendant knew the act charged to be wrong; if so, he is punishable.

There is another objection to the charge. It proceeds upon the idea that no temporary condition of the mind produced by drunkenness can avail. This is a correct assumption if delirium tremens can never result directly and immediately from drunkenness. This, however, is not the case. Though usually occurring in habitual drinkers after a few

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day's total abstinence from spirituous liquors, it may be the immediate effect.[1]

For the errors above pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTES.

§ 76. **Barbarity of Crime does not Raise a Presumption of Insanity.** — The barbarity or enormity of the act raises no legal presumption of insanity.[2]

In *Lake* v. *People*,[3] tried in New York in 1854, it was said by the judge in charging the jury: "It is contended that the fact of the prisoner killing the woman with whom he cohabited and his own children, is in itself, evidence of insanity. This argument evidences not only a want of knowledge of human nature and of the springs of human action, but the grossest ignorance of the history of mankind. For, from the time Cain slew his brother, down to this day, when almost every newspaper brings tidings of a wife killed by her husband, or children by their parents, all experience shows that no ties, however strong, no relation, however sacred, not even the bonds of affinity and consanguinity, could withstand the wrath of an exasperated man; and, indeed, when carefully and closely considered, the domestic relationship, so far from being a barrier against violence, invites to its commission, by the opportunity it offers, and the helplessness of a portion of its inmates. Those who are constantly together have such abundant means of discovering the offensive traits in each other's disposition, that love not unfrequently degenerates into hatred, and the intimacy of the family circle, which should lead to peace and happiness, too often furnishes the occasion for angry irritations and collisions which ultimately terminate in violence and bloodshed. And when we consider, in addition to this, the numerous evil minded persons, their ungoverned passions, the artificial excitements to which they resort, we can hardly be surprised that a very large portion of the homicides occur amongst those who are connected by the ties of family or blood. Indeed, it is well known, historically, that infanticide, or the murder of one's own children, is the prevalent crime in some countries, and there is too much reason to believe that it is too frequent in this. Perhaps my views may be colored by personal observation. The last case of murder tried in this court room was that of a woman for poisoning her husband; the other one tried in the same court, was that of a man for killing the child of his wife; both of them were executed in July of last year. In June last a man was tried before me in Brooklyn for beating his wife to death, and in December of the

[1] Wharton & Stille's Med. Jur., vol. 1, sect. 202; Ray's Med. Jur. 238.

[2] State *v.* Stark, 1 Strobh. 479 (1847); Laros *v.* Com., 84 Pa. St. 200 (1877); Holsenbake *v.* State, 45 Ga. 43 (1872); Ball's Case, 2 City Hall Rec. 85 (1817); Pienovi's Case, 3 City Hall Rec. 123 (1818).

[3] 1 Park. 495; *s. c.*, People *v.* Lake, 12 N. Y. 358 (1855).

year before last, a man was tried before me in Brooklyn, who stabbed his wife, his mother and his sister, all the persons present. The wife and mother were killed on the spot; the sister, though dangerously wounded, survived to tell the story on the witness stand. It was done in broad daylight, and the culprit immediately walked out of the house and surrendered himself up, declaring his readiness to suffer the penalty of his crimes. No insanity appeared in the case and he was executed in January, 1852. To say, therefore, that a man will not kill his relations unless he is insane, is equivalent to saying that he will not commit crime unless he is insane; or in other words, that there is no such thing as crime, inasmuch as its wickedness proves its innocency; it is hardly necessary to add that such a doctrine is subversive of all order and safety, and does away with the whole administration of criminal justice, and is just worthy of the source whence it originated, namely, among French infidels, and German metaphysicians and transcendentalists."

§ 77. **Evidence of Wife's Adultery Relevant, When.** — Evidence of information to the prisoner of his wife's adultery is admissible to show that he committed a murder in a state of frenzy, only where it is shown that the information was given so near the time of committing the crime that the court can see that there was not a sufficient period for the passion, it would naturally excite, to abate.[1] In *Sawyer* v. *State*[2] evidence that the deceased (the prisoner's wife) had for a long time been having criminal intercourse with other persons, and that the prisoner had for a long time been cognizant of this, was held inadmissible by itself as tending to show insanity. In *Guetig* v. *State*[3] the judge instructed the jury in these words: "If the jury should find from the evidence that there is a reasonable doubt whether the defendant has been subject to attacks of epilepsy, and if this fact (if so found) has been supplemented by testimony of expert witnesses establishing to the satisfaction of the jury (evidence raising a reasonable doubt being sufficient) that epilepsy is a disease which tends to produce insanity, *this evidence would not be sufficient to raise a reasonable doubt of his sanity at the time* of the alleged commission of the homicide. There must be sufficient evidence to raise a reasonable doubt of actual insanity at the time of the alleged commission of the offence." This instruction was held to be erroneous. Referring to the ruling in *Sawyer* v. *State*, the court said: "There are some important distinctions between this case and the one before us. It is clear that the fact that Sawyer's wife had been committing adultery with Bibbs and other men, and that Sawyer knew the fact, would not tend to produce the disease of insanity in Sawyer. It might very much enrage or distract him temporarily, but would not tend to produce insanity as a disease. This is a very different statement from the facts supposed in the instruction we are considering, namely, that Guetig had attacks of epilepsy, and that epilepsy tended to prove insanity. Besides, in the *Sawyer Case* the question was one upon the admissibility of evidence, which is solely for the court to decide. The question in the present case is one upon the

1 Sanchez *v.* People, 22 N. Y. 147 (1860), affirming on this point Sanchez *v.* People, 4 Park. 535, reported sub. nom. People *v.* Sanchez, 18 How Pr. 72 (1859); Cole's Trial, 7 Abb. Pr. (N. S.) 321 (1868); State *v.* John, 8 Ired. (L.) 330 (1848).

2 35 Ind. 80 (1871).

3 63 Ind. 278 (1878).

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insufficiency of the evidence to prove a given fact, which is solely for the jury to decide. * * * The instruction complained of, compactly stated, plainly means that if the appellant has been subject to attacks of epilepsy, and epilepsy is a disease which tends to produce insanity, these facts are not sufficient to raise a reasonable doubt of his sanity at the time of the alleged commission of the homicide. It is not clear in the statement of the time of the attack of the epilepsy in relation to the time of the commission of the offence. For aught that the instruction says in words it might be understood to mean that if the appellant had attacks of epilepsy on the day the deed was done (a fact, indeed, which the evidence tends to prove), or an hour before, or even at the time it still would not be sufficient to raise a reasonable doubt of his sanity at the time, the homicide was committed. Such a view would be plainly erroneous. The instruction is also erroneous, because it directly states that certain evidence which is legitimately before the jury is not sufficient to prove a certain fact or to raise a reasonable doubt of a certain fact.' "[1]

§ 78. **Declarations not Res Gestæ Inadmissible.** — The declarations of the prisoner unless *res gestæ* are inadmissible. So it was held in *State* v. *Scott*[2] that where a prisoner had committed homicide at ten o'clock at night evidence of what he said next morning was inadmissible to prove his insanity. "We understand the rule to be," it was said in a subsequent case in the same State, "that a party charged with a crime can never put in evidence in his own behalf any declarations of his after its commission, not even in support of insanity as a defence, unless as a part of the *res gestæ* to some act which is admitted in evidence."[3] The prisoner's declarations made after the commission of the crime that he was sane when he committed it are admissible against him.[4] Declarations of the deceased that the prisoner was insane are irrelevant.[5] In a Pennsylvania case it was held not error to refuse evidence that the deceased had said: "My husband shot me, but I don't want him punished," for the purpose of showing that she believed him insane and not accountable for his actions.[6]

§ 79. **Confidential Communications Between Husband and Wife — Testimony as to Insanity not within the Rule.** — In *United States* v. *Guiteau*,[7] a Mrs. Dunmore, who had been married to the prisoner in July, 1869, and was his wife for four years, but at the time of the crime and the trial was divorced from him and married to another man, was called as a witness for the prosecution, and asked whether in her association with the prisoner she had ever seen anything that would indicate that he was insane. It was objected that her answer would infringe the rule regarding confidential communications between husband and wife. The court allowed the question and the witness answered that she never had. On appeal the ruling was affirmed. "The question," said the Supreme Court, "called for the witness' observation of the defendant's sound-

[1] The court is not bound to hear evidence upon which to ground a presumption of the possible insanity of the prisoner, until direct evidence of the prisoner's insanity has been given. Laros *v.* Com. 84 Pa. St. 200 (1877).

[2] 1 Hawks. 24, (1820).

[3] State *v.* Vann, 82 N. C. 631 (1880).

[4] State *v.* Kring, 74 Mo. 612 (1881); Guiteau's Case, ante.

[5] State *v.* Spencer, 21 N. J. (L) 196 (1846).

[6] Sayres *v.* Com., 88 Pa. St. 291 (1879).

[7] 1 Mackey.

ness or unsoundness of mind, and the objection goes partly on the ground that, notwithstanding the ruling of the court that confidential communications between the husband and wife were protected, she may have included, as a part of the bias of her answer, what are understood as *communications* from her former husband. We think that the exhibition of sanity or insanity is not a communication at all, in the sense of the rule which protects the privacy and confidence of the marriage relation, any more than the height or color, or blindness, or the loss of an arm of one of the parties is a communication. The rule which is supposed to have been violated was established in order that the conduct, the voluntary conduct, of married life might rest secure upon a basis of peace and trust, and relates to matters which the parties may elect to disclose or not disclose. It was provided in order that matters should not come to the light, which would not do so at all without a disturbance and disregard of the bond of peace and confidence between the married pair. Therefore it has not been applied to any matter which the husband, for example, has elected to make public, by doing or saying it in the presence of third persons along with his wife; and it cannot be applied to that which, whether he will or no, he inevitably exhibits to the world as well as to his wife. Some diseases a husband may conceal, and he may choose whether to reveal them or not. If he should reveal the existence of such a disease to his wife, in the privacy of their relation, she may never disclose that communication, even after the relation between them has ceased. But sanity or insanity are conditions which are not of choice, and when the disease of insanity exists, the exhibition of it is neither a matter of voluntarily confidence nor capable of being one of the secrets of the marriage relation. The fact that there are instances of cunning concealment for a time, does not affect the general truth that insanity reveals itself, whether the sufferer will or no, to friends and acquaintances as well as to the wife. In short, the law cannot regard it or protect it as one of the peculiar confidences of a particular relation. It may be added that it is difficult to perceive, in any view of this subject, how the witness' denial that she had seen indications of insanity can be said to reveal any fact which her husband had communicated to her. If our opinion that sanity or insanity cannot be a communication within the meaning of the rule should be wrong, it must be remembered that *sanity* is a presumption of law, and that the wife would seem to reveal nothing to the world, unless she should say that the existence of *insanity* in her husband had been communicated to her by his conduct during their connection. We are of opinion that no error was committed in receiving this evidence."

§ 80. **Evidence of Acts and Conduct at other Times.** — The prisoner's acts and conduct at times other than that at which the crime was committed are receivable in evidence.[1] Where the sanity of a prisoner is at issue, a letter written by him, prior to the commission of the alleged offence is admissible in evidence to throw light on the condition of his intellect at the time of the act charged. If destroyed, secondary evidence of its contents may be given.[2] In a Georgia case it was held that evidence of a conversation subsequent to the act

1 Com. *v.* Pomeroy, 117 Mass. 143 (1875); State *v.* Kelly, 57 N. H. 549 (1876); Guiteau's Case, 10 Fed. Rep. 161; State *v.* Hays, 22 La. Ann. 39 (1870); U. S. *v.* Holmes, 1 Cliff. 98 (1858).

2 State *v.* Kring, 64 Mo. 591 (1877), overruling on this point State *v.* Kring, 1 Mo. (App.) 438 (1876).

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charged was inadmissible to prove the defendant's insanity; and so are tests made by one not an expert at the time.[1] In a Delaware case, an odd collection of various articles of no novelty or value, even as curiosities, which the prisoner had made from time to time, and had long preserved, with a view of starting a museum, were allowed under the plea of insanity to be produced and shown to the jury.[2] Where the defence was that the homicide charged had been committed by the prisoner under the insane delusion that the deceased and others were engaged in a conspiracy against him, expressions of hostile feelings toward the prisoner made by the deceased, though not shown to have been made in the defendant's presence, nor to have come to his knowledge, were held admissible for the purpose of showing the state of mind of the deceased toward the prisoner at the time, and this tendency to show some real ground for the prisoner's feeling toward the deceased.[3] Preparations made by a person to commit the crime are relevant on the question of sanity and premeditation.[4] But omitting to attempt to escape after a crime is not conclusive evidence of insanity.[5]

§ 81. **Insanity cannot be Proved by Reputation.** — The insanity of the prisoner cannot be proved by the testimony of witnesses that he was generally regarded as a man of unsound mind, and that his reputation was that of a person of unsound mind before the commission of the alleged offence.[6] Therefore evidence offered by the accused that "his father was reputed in the neighborhood where he dwelt to be at times insane" is properly rejected.[7]

§ 82. **Previous and Subsequent Insanity.** — The insanity must be shown to exist at the time the deed was done — previous or subsequent insanity is no excuse.[8] But it is obvious that in very many cases the insanity of the prisoner at the instant of the commission of the offence can only be established by evidence tending to prove that he was insane at some period before or afterward. Therefore evidence of the mental condition of the prisoner both before and after the act is admissible.[10] "Previous or subsequent insanity is no defence, unless it existed at the time the act was done. Yet we cannot reject evidence to prove insanity either before or after the act, for such evidence is proper to be weighed by the jury in coming to a conclusion whether insanity existed at the time the act was done."[11]

In *Vance* v. *Commonwealth*,[12] it was held that where a prisoner's defence is insanity, evidence to prove insanity *before* the act was committed is proper without first proving the insanity *at the time* of the commission.

Where there is a question of the prisoner's sanity at the time of the trial, which is submitted to the jury, who find him sane, when he is afterwards put on trial for the crime, all evidence as to his sanity at the time of the trial is inadmissible which does not go to prove his insanity at the time of the commission

[1] Choice v. State, 31 Ga. 424 (1860).
[2] State *v.* West, 1 Houst. Cr. Cas. 371 (1873).
[3] Com. *v.* Wilson, 1 Gray, 337 (1854).
[4] Cole's Trial, 7 Abb. Pr. (N. S.) 321 (1868).
[5] Lake *v.* People, 1 Park. 495 (1854).
[6] Brinkley *v.* State, 58 Ga. 296 (1867); Choice *v.* State, 31 Ga. 424 (1860).
[7] State *v.* Hoyt, 47 Conn. 518 (1880).
[8] State *v.* Hays, 22 La. Ann. 39 (1870).
[9] People *v.* March, 6 Cal. 543 (1856).
[10] Russell *v.* State, 53 Miss. 367 (1876); State *v.* Felter, 25 Iowa, 67 (1868).
[11] McAllister *v.* State, 17 Ala. 434 (1850); McLean *v.* State, 16 Ala. 672 (1849).
[12] 2 Va. Cas. 132 (1818).

of the crime.[1] It has been held that it is competent for the *prosecution, against the prisoner's objection*, to introduce evidence that he was intoxicated a short time previous to the commission of the offence charged, provided such testimony makes it probable that the intoxication continued and existed at the time the alleged criminal act was done.[2]

In *Warren* v. *State*,[3] the prisoner was on trial for murder, the defence relied on being insanity and mental hallucinations and delusions. The court charged the jury almost in the language of Mr. Greenleaf.[4] This charge the Court of Appeals approved. But the trial court refused to give this instruction which was asked by the defendant. "That in determining the insanity of the defendant at the time of the killing of M. (if the defendant did kill M.), the jury are authorized to look at all the facts and circumstances in evidence before them relating to the question of defendant's sanity — that is, all the facts and circumstances relating to the defendant's mental condition *after and since* the killing, as well as the facts and circumstances relating to defendant's mental condition before the killing." On appeal, it was held that this instruction should have been given. "Testimony," said WHITE, C. J., "that defendant had exhibited evidences of insanity since the homicide and up to the time of trial, as well as before the killing, had been adduced and properly laid before the jury, and the jury should have been instructed that they were to consider it, along and in connection with the other testimony, in arriving at their conclusion, for it is a rule of law, that evidence of the state of the mind of the party both before and after the act done is admissible in determining the question of sanity."

In *Sullivan* v. *People*,[5] the prisoner had confessed to the crime charged, but an effort was made to avoid the force of the confession by showing that he was insane when he made it, though sane when the crime alleged was committed. In the Supreme Court the record stated simply that there was evidence that he was insane some thirty-six or forty-eight hours after the time of the confession, and other evidence that he was not insane. It was held in the Supreme Court that as there was no evidence that he was insane at the time of the confession, the rulings of the trial court on the question of such insanity, the burden of proof, and the nature of the evidence on the subject, were immaterial and could not be assigned for error.

It is error for the court to instruct the jury to take into consideration the physical appearance of the prisoner at the trial in deciding as to his sanity at the time of the crime.[6]

§ 82 *a*. **Continuance of Insanity — Presumption.** — Insanity once proved to exist, is presumed to continue until a lucid interval is shown.[7] In *State* v. *Vann*,[8] it was conceded that the prisoner was violently insane shortly before the homicide, and was then of unsound mind, but it was insisted that at the time

1 Shultz *v.* State, 13 Tex. 401 (1855).

2 Pierce *v.* State, 53 Ga. 365 (1874).

3 9 Tex. (App.) 619 (1880).

4 2 Greenl. on Ev., sect. 372.

5 31 Mich. 1 (1875); A confession made when insane is no evidence of guilt. People *v.* Wreden, 59 Cal. 341 (1881).

6 Bowden *v.* People, 12 Hun, 85 (1877).

7 State *v.* Spencer, 21 N. J. (L.) 196 (1846); Hadfield's Case. State *v.* Johnson, 40 Conn. 136 (1873); State *v.* Brown, 1 Houst. Cr. Cas. 539 (1878); but see People *v.* Smith, 57 Cal. 130 (1880).

8 82 N. C. 631 (1880).

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of the commission of the offence, he had a lucid interval and was responsible for his acts. The prisoner asked the following instruction: "If the insanity of the prisoner shortly before the homicide, be admitted or found by the jury, before the jury can convict the State must prove beyond a reasonable doubt that at the time of the homicide the prisoner had a lucid interval, and was in such a mental condition as to make him responsible for his acts." This the court refused, but told the jury that if the insanity of the prisoner shortly before the crime were found by them, then it was the duty of the State to show not beyond a reasonable doubt, nor by a preponderance of evidence but to the satisfaction of the jury that at the time of the homicide he had such a lucid interval. On appeal this ruling was approved: "In an indictment for murder," said DILLARD, J., "the two constituents of the crime, to-wit, a voluntary killing and malice aforethought, must be proved by the State, as it makes the charge; and as the accused is presumed to be innocent until the contrary is shown, both of these elements must be proved. The killing being shown, then the other ingredient, malice, is also proved as a fact in the eyes of the law, not by evidence adduced, but by a presumption that the law makes from the fact of the killing, and these two essential facts being thus established, the legal conclusion thereon is, that the offence charged is murder.[1] But the implication of malice made by the law and taken as a fact, is not conclusive on the party accused, but may be rebutted. He may show, if he can, by his proofs, that there was no malice prepense, and thereby extenuate to manslaughter, or make a case of justifiable or excusable homicide, or a case of no criminality at all by proof of insanity at the time of the act committed, disabling him to know right from wrong.[2] The burden lies on the accused to make these proofs, if he can; otherwise the conclusion of murder, on a malice implied, will continue against him and will call for, and in law, oblige a conviction by the jury. And in the making of such extenuating or acquitting proofs, the law puts on him the onus to do so, not excluding all reasonable doubts, but merely to the extent of satisfying the jury. There are respectable authorities which hold that mental competency of the accused is one of the constituent elements of the crime imputed, and that when that is controverted, it must be shown beyond a reasonable doubt in the minds of the jury. But such is not the law of this State. The doctrine with us is well established, that when there is a voluntary killing as is admitted in this case, the law presumes malice, and makes the crime murder, unless as above explained, the accused can and does repel the same by evidence of his own or by legal inferences from the surrounding and attending circumstances. By your decisions, matters of extenuation and excuse, or discharge by reason of insanity, must be shown by him who sets it up; otherwise the implied malice continues, and the case remains in the judgment of the law a case of murder. This case (Willis') was carefully considered, and in view of our own decisions and the crown law of England, and after commenting on *Commonwealth* v. *York*,[4] and the dissenting opinion therein of WILDE, J., a conclusion is reached, in

[1] Foster's Crown Law, 255; East P. C. 224; State *v.* Willis, 63 N. C. 26.

[2] See Foster and other authorities, *supra*.

[3] State *v.* Willis, *supra*.

[4] 9 Metc. 93.

harmony with previous rulings in this court, that matters of mitigation, excuse, or justification must always come from him who claims the benefit thereof, and must be proved not beyond a reasonable doubt, but only to the satisfaction of a jury; and to this case we assent, as controlling the case under consideration. Applying the principle above enunciated and established by *Willis' Case*, the prisoner, by the voluntary killing of Gatling, admitted by himself, and the consequent implied malice, went to trial with the legal conclusion of murder against him; and to have acquitted himself it would have been incumbent on him to have proved an habitual or permanent insanity before the homicide, and if the fact of its existence originally, or its presumed continuance at the time of the killing, was controverted by the evidence of the State, he would have had to show, and that by evidence satisfactory to the jury, at least, the fact of a continuance of insanity at the time he slew the deceased; or failing so to do the legal conclusion from malice implied would have still remained and his offence would still have been murder. Now on the trial, the State dispensed with proof by the prisoner of insanity at a day anterior to the homicide by admitting that much for him, and thereby the issue was reduced to the single fact of the existence or non-existence of prisoner's insanity at the time of the killing. Upon that point, evidence was introduced by the State tending to show the non-existence of insanity, and the prisoner did or might have introduced testimony in aid of the presumption already in his favor from the admission of insanity before the homicide, in order to satisfy the jury of the existence of his insanity at the time of the killing, and the prisoner failing to satisfy the jury of the truth of his defence, there remained then the fact of the voluntary act of killing and with malice implied, and this in point of law, made the crime murder.[1] After a careful investigation of the several exceptions taken by the prisoner, we are unable to discern any error of law on the trial, and we must so declare, and this will be certified, to the end that the sentence of the law may be executed."

It is only habitual insanity, which once proved to exist, the law presumes to continue; the presumption does not apply to a temporary insanity resulting from some transient cause[2] or drunkenness.[3] If a person be proved to have had on a particular occasion a paroxysm of *mania a potu*, or delirium caused by fever, or by sudden and severe mental agony, there would be no presumption that the same state of mind continued after the exciting cause was removed. On the contrary the presumption would be that the mind was restored to its normal condition when the disturbing element had ceased to operate. In *People* v. *Francis*,[4] the defendant asked the court to instruct the jury that "insanity once shown to exist was presumed to continue until the contrary was shown." In the Supreme Court it was said: "If the term insanity, as employed in these instructions is to be construed as referring to a general unsoundness of the mind, and not to an aberration of a temporary nature proceeding from some transient cause, then the instructions correctly state the law. * * * The vice of these instructions is that they state the proposition too broadly.

1 State *v.* Willis, *supra;* Com. *v.* Eddy, 7 Gray, 583.

2 State *v.* Sewell, 3 Jones (L.), 245 (1855); State *v.* Reddick, 7 Kas. 144 (1871).

3 *Id.*

4 38 Cal. 183 (1869).

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As we have shown, every species of insanity is not presumed to continue until the contrary is shown, but only a general habitual insanity, not proceeding from a transient cause, and if the instructions had been properly qualified in this respect they ought to have been given. But in the form in which they were offered, they were properly refused."

§ 83. **Evidence of Insanity in Relatives.** — Where the defence is hereditary insanity, the mental condition of the prisoner's immediate relatives is relevant:[1] *e. g.*, that his mother, or aunt,[2] his brothers or sisters,[3] or his father, was insane.[4] But insanity in the prisoner's family is irrelevant where there is no evidence that he himself is insane.[5] Where there is no evidence that a prisoner ever exhibited any signs of insanity, evidence that some of his uncles and aunts were insane is inadmissible.[6] Evidence of the insanity of the mother and uncle or other relatives of the prisoner must be disregarded, if there is no other evidence tending to show that he was himself insane at the time he did the act charged.[7]

In *State* v. *Simms*,[8] the defendant was indicted for the murder of James Reese, the defence being insanity. On the trial the court instructed the jury that the fact that some or all of a person's ancestors have been insane does not of itself prove that person insane, "and if there is no direct and preponderating evidence of insanity of defendant at the time he killed Reese, the jury cannot justify or excuse the killing on that plea." On appeal this was held erroneous. "The vice of that instruction is," said HENRY, J., "that it requires direct proof of insanity. What is meant by the term 'direct' in that connection I cannot tell, but it was calculated to make an impression on the minds of the jury that evidence of the insanity of one of defendant's aunts and two of his sisters, which was proved, was not worthy of much consideration; but the evidence must be *direct* that defendant was insane. Direct evidence would be that of medical experts that they had examined the defendant and found him insane, or of persons who had been familiar with him, and from their personal observation believed him insane. If the instruction means anything it was intended to exclude from the consideration of the jury all other evidence of insanity. An act which would not indicate the insanity of a person in whose family there had been no case of insanity might be a very strong circumstance to prove insane a person whose aunt had died in a mad-house." And the court held that this erroneous instruction was not cured by another to the effect that the fact of the prisoner's insanity might be established by facts and circumstances as well as by direct evidence.

In a Connecticut case, the prisoner having introduced evidence to prove that his sister had been insane about six years, the court permitted the prosecution to inquire, on cross-examination, what caused the insanity, for the purpose of showing that it was not hereditary. On appeal, this was held proper. "Obvi-

[1] Hagan *v.* State, 5 Baxt. 615 (1875); U. S. *v.* Holmes, 1 Cliff. 98 (1858); Guiteau's Case, 10 Fed. Rep. 161.

[2] People *v.* Smith, 31 Cal. 466 (1866),

[3] People *v.* Garbutt, 17 Mich. 9 (1868).

[4] State *v.* Felter, 25 Iowa, 67 (1868).

[5] Cole's Trial, 7 Abb. Pr. (N. S.) 321 (1868).

[6] State *v.* Cunningham, 72 N. C. 469 (1875).

[7] Bradley *v.* State, 31 Ind. 492 (1869).

[8] 68 Mo. 305 (1878).

ously," said LOOMIS, J., "one of several children might be insane from many causes that could not possibly affect the others. If, therefore, the testimony in chief was relevant at all, which is doubtful, there is no possible ground for its admissibility, unless it tended to show a taint of insanity descending with the parental blood. So that the cross-examination was strictly legitimate, as calculated to furnish an instant and perfect test of the value of the testimony."[1]

§ 84. **Character.**—Where the plea is insanity, evidence of the prisoner's previous good character is relevant.[2] In *Johnson* v. *State*, the prisoner being indicted for burglary pleaded as a defence that at the time of the commission of the crime his mind was so beclouded by the excessive use of intoxicating liquors as to rendered him incapable of forming a felonious intent, and he offered to prove his general character for many weeks previous to the time of the crime. The rejection of this evidence was held to be error. "It must be supposed," said the Court of Appeals, "that the offer to prove the general character of the accused was made with reference to the matter undergoing investigation, and that he either sought to establish a character for honesty or it was his intention to confine the inquiry to his general condition for several weeks previous to the alleged commission of the offence charged, as bearing on his mental capacity at the time it is alleged the offence was committed."

§ 85. **Specific Acts of Insanity Need Not be Shown.**— In *People* v. *Tripler*,[4] the prisoner, Eliza Tripler, was charged with stealing five silver spoons from the house of Mr. Stonehale. Mr. Stonehale missed the spoons, and immediately went to the silversmiths in the neighborhood and gave them a description of the articles stolen. The prisoner offered them for sale, and was detected, taken to the police, examined and committed for trial. The spoons were proved to be the property of the prosecutor, and these facts were made out to the satisfaction of the court and jury. The defence set up was that the prisoner was at times insane; her sister testified that she had a fall some years ago, "that affected her head." The prosecutor himself thought "her conduct was strange," but none of the witnesses testified to any act or acts of mental derangement, or pointed out any particular manner of conduct to show it. By the Court: "Although the defence has not been satisfactorily made out, yet there was quite enough made out to raise a doubt in the mind of the court of the prisoner's being a person of sound mind, and where a doubt exists, it would always be the safest way to acquit. Insanity itself is calamity enough without inflicting the pain of a conviction and its consequences. The witnesses have not shown any particular act whereby we could discover derangement, yet it is sufficient to say that a doubt has been raised, and that doubt ought to operate in favor of the prisoner." The jury returned a verdict in favor of the prisoner, without leaving the box.

§ 86. **Proof of Other Crimes.** — As a general rule where a man is accused and on trial for one crime, the fact that he has committed another crime is not relevant. But it has been held that where the defence to a charge of murder is insanity,

[1] State *v.* Hoyt, 47 Conn. 518 (1880).
[2] Hopps *v.* People, 31 Ill. 385 (1863).
[3] 1 Tex. (App.) 146 (1876).
[4] 1 Wheeler, Cr. Cas. 49 (1822).

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and the coolness and unconcern of the prisoner at the time he committed the homicide are relied on as justifying inferences favorable to the plea, it is competent to show that the prisoner had been in his early life engaged in the perilous calling of smuggling, as tending to rebut the presumption that his deportment on the occasion of the act for which he is charged was attributable to insanity.[1]

§ 87. **Testimony on Former Trial.** — Where a witness becomes insane, his testimony on a former trial is admissible.[2]

The record of proceedings on another trial in which one of two defendants who are jointly indicted is adjudged insane, is not evidence against his co-defendant of the fact of such insanity on a trial under the indictment.[3]

§ 88. **Pleading — Trial.** — Under a plea of "not guilty," the prisoner is entitled to show his insanity at the time the crime was committed.[4] Insanity is a question of fact to be decided by the jury.[5] The New York statute authorizing the court to appoint a commissioner to pass upon the prisoner's sanity, does not take away from him the right to have the question of his sanity decided by a jury under a plea of not guilty.[6]

§ 89. **Right to Open and Close.** — The plea of not guilty and defence of insanity thereunder does not give the defendant the right to open and close.[7]

§ 90. **Judge need not Specially Define the Various Types of Insanity.** — In *Stuart* v. *State*,[8] it is said by the Supreme Court: "It is earnestly argued that the law applicable to this defence was not properly submitted to the jury. The charge, in substance, was that the law presumed the prisoner, if over fourteen years of age, to be of sound mind, and the burden was upon him to introduce proof to show his want of sanity, or to create a reasonable and well-founded doubt of his sanity, to entitle him to an acquittal. The judge, in his charge, does not use the words *mania a potu*, delirium tremens, or other similar language, but uses the words, "unsoundness of mind," or insanity; the jury were instructed that to relieve the prisoner it was sufficient to show the unsoundness of mind, or create a reasonable doubt of the prisoner's sanity; and this was sufficient, whether the disease be permanent or temporary, and whether caused by the voluntary use of ardent spirits or otherwise. We do not think it essential that the judge should have specially defined the various classes or types of insanity. It is the unsoundness of mind that excuses the act. According to the proof, *mania a potu* is a disease in which the mind is unsound. The language of the charge is comprehensive enough to embrace the particular classes of insanity indicated by the proof. It says: The 'unsoundness of mind may be temporary, caused by the use of ardent spirits.' This is what physicians call *mania a potu*, or delirium tremens, and if the proof made out a case of *mania a potu*, it made out a case of mental unsoundness. We think in this there was no error."

[1] Hopps *v.* People, 31 Ill. 385 (1863)
[2] Marler *v.* State, 67 Ala. 55 (1880).
[3] Marler *v.* State, 67 Ala. 55 (1880).
[4] People *v.* Olwell, 28 Cal. 456 (1865).
[5] State *v.* Holme, 54 Mo. 153 (1873), citing State *v.* Hundley, 64 Mo. 414 (1864); State *v.* Kring, 64 Mo. 591 (1877).
[6] Ostrander *v.* People, 28 Hun, 38 (1882).
[7] Loeffner *v.* State, 10 Ohio St. 598 (1857); State *v.* Felter, 32 Iowa, 49 (1871).
[8] 1 Baxt. 180 (1873).

Jury may be Cautioned as to Defence.

§ 91. **Duty to Instruct on Insanity Plea.** — In Texas it is held that the court should charge specially on the defence of insanity, however slight the evidence adduced,[1] or whether asked or not.[2] Evidence that the accused is of a lower order of intellect than other members of his family is not, of itself, sufficient to impose upon the court the duty of charging the jury on the subject of insanity.[3]

§ 92. **Jury May be Cautioned as to Insanity Plea.** — The jury may be instructed that the evidence relating to insanity should be carefully and intelligently scrutinized;[4] that no pretended case of insanity should be allowed to shield a man from the consequences of his own acts, they, at the same time, being told also that if one has really committed an act which is the result of a diseased or unsound mind, the defence of of insanity would be a good one, and the prisoner should have the benefit of it.[5]

In a California case the judge said to the jury: "In prosecutions for crimes, the defence of insanity is often interposed, and thereby becomes a subject of permanent importance in criminal jurisprudence. A due regard for the ends of justice and the peace and welfare of society, no less than mercy for the accused, require that it should be thoroughly and carefully weighed. It is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, therefore, it ought to be received, as a not less full and complete, than it is a humane, defence when satisfactorily established, it yet should be examined into with great care lest an ingenious counterfeit of the malady furnish protection to guilt." This was approved in the Supreme Court.[6] In another case the court said to the jury: "Insanity is a defence often resorted to, and in most cases, when every other ground of defence has failed. From its nature it ought to be received in all cases by jurors with the greatest degree of caution and circumspection."[7]

In *McKee* v *People*,[8] it was held proper for the trial judge to say to the jury: "If you find the prisoner, at the time Dr. Bennett was observing him through the hole in the wall, as described by the witnesses, was watching to see whether he was observed, and was regulating his conduct accordingly, it would raise a very strong presumption that the prisoner was feigning insanity, and, indeed, such evidence of design and calculation on his part, as to be, in my opinion, entirely fatal to this defence of insanity."

"A reference to Dr. Bennett's testimony," said the court, "will show the circumstances under which he watched the prisoner, and were important to determine whether the insanity imputed to the prisoner was feigned or real. The doctor said he was looking through the hole prepared so that he might observe the prisoner, and was looking through the hole when the prisoner was put into the west side of the jail. As soon as the sheriff closed the door, the prisoner walked through the hall, going through the same motions as he had been be-

[1] Erwin *v.* State, 10 Tex. (App.) 700 (1881); Looney *v.* State, 10 Tex. (App.) 520 (1881).
[2] Thomas *v.* State, 40 Tex. 60 (1874).
[3] Powell *v.* State, 37 Tex. 348 (1872).
[4] Sawyer *v.* State, 35 Ind. 80 (1871); Guetig *v.* State, 63 Ind. 278 (1878).
[5] People *v.* Bumberger, 45 Cal. 650 (1873).
[6] People *v.* Dennis, 39 Cal. 625 (1870).
[7] Sellick's Case, 1 City Hall Rec. 185 (1816).
[8] 36 N. Y. 113 (1867).

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fore. He then walked back toward the hole, and as he did so the witness noticed his eyes directed towards the aperture. It could be seen from the inside. He did it two or three times. He came near the aperture, passed to one side and stood still a moment. He then crossed directly in front of the aperture to the other side. He then appeared to bend forward, and looked into the hole and dodged back. The conduct of the prisoner, as thus detailed, if he was watching to see whether he was observed, and was regulating his conduct accordingly, was most important for the consideration of the jury on the issue whether the insanity claimed for the prisoner was real or feigned. If the jury came to the conclusion that the prisoner was watching to see if he was observed, and believed he was, then his conduct clearly evinced such evidence of calculation and design as conclusively showed that he was not at that time, at least, insane. It certainly tended strongly to show that the defence of insanity was not founded in fact, and the expression of the opinion of the judge that it was fatal to the defence of insanity is not a matter of exception."

§ 93. **Insanity—Finding of Jury Conclusive.**—In *Johnson* v. *State*,[1] the prisoner was indicted for assault with intent to kill. The defence was mental imbecility, but he was convicted. On appeal, the Court of Appeals said, WHITE, P. J. delivering the opinion: "The defence relied on was not so much insanity as mental imbecility, or incapacity to distinguish right from wrong. Upon this point the testimony is conflicting. Dr. Keating is the only witness who believes that the defendant is not a reasonable creature, but insane; the other witnesses believe him capable of distinguishing right from wrong, and accountable for his acts when not under the influence of some powerful emotion of mind. The witness King, who knew him well and lived in his immediate neighborhood, said he was a man of good sense — had sense enough to attend to his own business and make a good farm hand, and that he had never seen anything wrong with him. The charge of the court upon this branch of the case presented the law in explicit and ample terms, as now understood in this State, and the jury were fully apprised of their duty in the premises. The evidence, under such proper instructions as to the law, has failed to satisfy them that defendant's mental incapacity was such as to render him irresponsible for his acts. To support a plea of insanity the evidence must be such as to satisfy the minds and consciences of the jury to the extent that they can say he should be and is acquitted upon that ground.[2] Should it fail so to satisfy them, their finding is conclusive and will in no case be reversed, unless the finding is most clearly and directly against the evidence."

In a Georgia court it was said: "There seems to be no evidence of insanity. The rambling statement of the prisoner is, it is true, very incoherent, but it would be rather dangerous to give much weight to an evidence of insanity so liable to imposition as this. The wickedness of the crime and the want of apparent motive would be equally dangerous. Motives are generally hard to discover, and wickedness is unfortunately incident to human nature, even in sane people. We are free to say that we are not disposed to look kindly on pleas of

[1] 10 Tex. (App.) 571.

[2] Webb *v.* State, 9 Tex. (App.) 490; King *v.* State, 9 Tex. (App.) 57.

insanity that have their strongest evidence in the enormity of the crime, and they are not thought of until it becomes important to excuse a violator of the law. So far as appears from the record in this case there was no other evidence of insanity, but the enormity of the crime and the incoherence of the prisoner's statement to the jury, and even if we were satisfied that the charge of the judge to the effect that they must be satisfied of the insanity of the prisoner before they can find him not guilty on that ground, we would not grant a new trial, simply because there was no evidence of insanity.[1] In *Russell* v. *State*, it was said: [2] "We will remark that in taking leave of the points arising on the plea of insanity that an attentive perusal of the testimony fully satisfies us of the correctness of the finding of the jury on this subject. Apart from the fact that the prisoner had been some years before, and also in early childhood subject to attacks of epilepsy, there is nothing to support the idea that he was insane, save the unprovoked and cold-blooded murder of which he was guilty and this, we fear, proceeded only from the madness of passion or from a wretchedly inadequate conception of the sanctity of human life." In *Fisher* v. *State*,[3] it was said: "In the case before us the evidence satisfactorily proved that the appellant was intoxicated when he committed the offence with which he was charged in the indictment; that he was an habitual drunkard; but we cannot say after the verdict of the jury that continuous excessive use of liquor had caused disease, producing insanity or idiocy, as a mental condition of that permanency which would render him unaccountable for crime by him committed. We know as a matter of general knowledge that such mental condition is not the necessary result of such drunkenness," and the verdict of guilty and judgment thereon were affirmed.

§ 94. **New Trial — Newly Discovered Evidence — Cumulative Evidence.** — Though a new trial is not granted on the ground of newly discovered evidence, where the evidence might have been discovered and used on the trial by the exercise of reasonable diligence, nor where the evidence is simply cumulative,[4] yet in a capital case, where the defence is insanity, a more liberal construction is given to the rule — in the first case because negligence in an insane man may be overlooked, especially where he is defended by young or inexperienced counsel, and in the next because unsoundness of mind is best proven by a series of facts and conduct extending over a considerable period.[5]

§ 95. **Refusal of Application for Continuance — Evidence Not Cumulative.** — In *Webb* v. *State*,[6] it was held error for the court below to refuse an application for a continuance based on the absence of six witnesses who would testify to the prisoner's insanity. The Court of Appeals in passing upon the question laid down the general rules on the subject of insanity as follows: WHITE, J. "It is a wise as well as most humane provision of our law that 'no act done in a state of insanity can be punished as an offence.'[7] With regard to murder, it is specially declared a part of the definition of the crime that it is the act of 'a

1 Holsenbake *v.* State, 45 Ga. 55 (1872).
2 53 Miss. 367 (1876).
3 64 Ind. 435 (1878).
4 State *v.* Redemeier, 71 Mo. 173 (1879).
5 Anderson *v.* State, 43 Conn. 514 (1876).
6 5 Tex. (App.) 596 (1879).
7 Pasc. Dig., art. 1643.

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person with a sound memory and discretion.' On the other hand, it is equally as well settled, both in law and in reason, that every man is presumed to be of sane mind until the contrary is shown.[1] 'In criminal cases, in order to absolve the party from guilt, a higher degree of insanity must be shown than would be sufficient to discharge him from the obligations of his contracts.'[2] 'In all such cases the jury are to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not deemed so accurate when put generally and in the abstract as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged.'[3] Mr. Bishop says: "The inquiry is directed to the particular thing done, and not to any other; because, as we have seen, a man may be responsible for some things while not for others. Of course, also, it has reference to the time of the transaction, not to any other time. The reader, however, should distinguish these questions from questions concerning the proof; for, to ascertain the state of the mind at a particular period we may inquire into its condition both before and after in relation to a particular subject, its condition as to other subjects."[4] Evidence of the state of the mind of the party both before and after the act done is admissible in determining the question of sanity.[5] Another rule, equally well settled, seems to be that 'if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental, being caused by the violence of a disease. But this presumption is rather matter of fact than law, or, at most, partly of law and partly of fact.'[6] Whatever may have been the rules of evidence heretofore with regard to the character of proof admissible on the subject of insanity, the doctrine that non-professional witnesses should be allowed to state their opinion as to the sanity of the party, derived from their acquaintance with and observation of his conduct, appearance, and actions, has become too well settled to admit of doubt or controversy at this time.[7] We are aware that in *Gehrke* v. *State* our Supreme Court, following in the wake of the decisions in Massachusetts and New Hampshire, held otherwise.[8] The subject has, however, of late years been more thoroughly examined and discussed; and in New Hampshire particularly, in the recent case of *Hardy* v. *Merrill*, FOSTER, C. J., of the Circuit Court, in a most elaborate opinion, concurred

[1] 1 Greenl. on Ev., sect. 42.

[2] *Id.*, sect. 372.

[3] 2 Greenl. on Ev., sec. 373; Carter *v.* State, 12 Tex. 500; 1 Whart. Cr. Law (6th ed.), sects. 15, 16.

[4] 1 Bish. Cr. Law, (4th ed.), sect. 476.

[5] 2 Greenl. on Ev., sect. 371.

[6] 1 Greenl. on Ev., sect. 42.

[7] Holcomb *v.* State, 41 Tex. 125; McClackey *v.* State, decided by this court at the Tyler term, 1878.

[8] 13 Tex. 568.

in by the Supreme Court, reviews the previous decisions and overrules them, which places that court in full accord with the English and American doctrine as it now generally obtains on that subject.[1] The case of *Gehrke* v. *State*[2] has been practically, as we have seen, and will hereafter be considered as overruled on this point. Now, from what has been stated above, it necessarily follows that there are no definite limits within which the evidence can be restricted on an inquiry of this sort. Nor is the investigation one in which the judge could well say that additional evidence would be but cumulative of like testimony already adduced; for the greater the number of witnesses who would depose to the opinion that a party was insane, the more likely would the jury, we apprehend, be inclined so to believe and become satisfied of the fact. In the case at bar, the defence was insanity. An application for continuance was made on account of the absence of six of defendant's witnesses, all of whom had been duly attached, and were under bond to appear and testify. The facts to which they would depose are fully set out in the application, and it contained the opinions of those witnesses as to the insanity of the defendant, gathered from their associations with him, and their observations of his conduct, language, and appearance for some weeks prior and down to and including the very day of the killing, both before and after the act. This application was, moreover, in strict compliance with the requirements of the statute. No reason is given by the court for its action in overruling it, and we are left to infer that it was upon the ground that the evidence was deemed immaterial or inadmissible. We do not think so; on the contrary, it appears to us both material, admissible, and pertinent to the issue to be decided; and its materiality becomes much more apparent when we consider it in connection with the evidence actually adduced for the defendant on the trial. How far these witnesses can be relied upon for the truth, or how far their testimony might have influenced the action of the jury in finding their verdict, it is impossible for us to say. As presented to us, the application for continuance was sufficient, and should have been granted." The case was reversed and remanded.

§ 96. **Evidence — Affidavit of Defendant for Continuance not Admissible on Trial.** — In *Farrell* v. *People*,[3] the prisoner was indicted for assault with intent to commit murder, and the sole defence at the trial was insanity. Before the trial he moved to continue the cause, on account of the absence of a material witness, and in his affidavit in support of the motion he deposed that he could prove by the absent witness that he did not fire the shot which constituted the alleged murderous assault, and that what he could so prove was true. On the trial, and after the prosecution had given to the jury all their evidence in rebuttal of the evidence of the prisoner on the question of insanity, the prosecuting attorney was allowed to read this affidavit in evidence to the jury. In the Supreme Court this was held erroneous. "It is patent," said SCHOLFIELD, J., "that it was utterly irrelevant to the issue being tried. It did not tend to prove a single fact which it was incumbent on the People to prove or to disprove any thing which the plaintiff in error had attempted to prove. Of course the affidavit of the party is competent evidence against himself when it is relevant to the

[1] 56 N. H. 227. [2] 13 Tex. 568. [3] 103 Ill. 17 (1882).

issue. It stands on the same footing as any other declaration made by him under oath. But who would pretend that it would be relevant on the question of insanity to prove that a party had before that time declared his innocence of any participation in the act alleged to be criminal, and had sworn to this declaration? The affidavit may be untrue and the plaintiff in error may have also been insane. If he was in fact insane, he may have had no recollection of the transaction or no capacity to reason in regard to it. In any view what he swore to in his affidavit cannot have a tendency to enlighten the question whether he was affected with insanity at the time he committed the assault. The improper effect of the affidavit on the minds of the jury may have been either in producing the belief that the defence of insanity was an afterthought, and so not urged in good faith, or that plaintiff in error had committed perjury in making the affidavit, for which he deserved punishment. If he was really insane when he committed the assault, it could legally make no difference when the defence was first interposed. He would not himself be a competent judge of his mental *status*, and the more certain his insanity, the more certain it would be that his affidavit ought not to be regarded for any purpose. But the proof that he committed the assault being conclusive, the jury, without reflecting whether sane or insane, might conclude he is clearly guilty of perjury, and use the fact of that guilt not only as a make-weight in determining his guilt of the specific offence charged, but also in fixing the amount of his punishment for that offence. If it be true that he committed perjury in the affidavit, he cannot be punished for that offence in this trial. These principles are obvious and can require no elaboration."

§ 97. **Misconduct of Jury — Reading Newspaper Accounts of Insanity as a Defence.** — In *State* v. *Robinson*,[1] the prisoner was on trial for murder, the defence being insanity. During the deliberations of the jury copies of the Washington *Post* containing an account of the trial of Guiteau for the murder of President Garfield, which was then going on, were received and read by them. In one of the copies of the *Post* read by the jury was a report of the examination of Dr. John Gray, Superintendent of the Lunatic Asylum at Utica, N. Y., who was called by the prosecution, and a part of his cross-examination, as follows:—

Question. "What is kleptomania?"

Answer. "A word used to express thieving. I don't believe in it. I don't believe in any of the so-called moral insanities. I believe they are crimes."

Question. "What do you mean by dypsomania?"

Answer. "Some call such a tendency a habit of drinking. I call it drunkenness. I don't call it insanity."

Question. "What do you mean by pyromania?"

Answer. "The burning of houses. I call it incendiarism. I call it a crime."

In another of the papers it appeared that Dr. Gray testified that he was medical superintendent of the New York State Asylum. He did not believe in moral insanity and had not for years. That term was intended to signify a perversion of the moral character, leaving the intellectual character still sound. He was, according to the newspaper, examined generally upon the subject of insanity, and in the course of his examination he expressed the opinion very decidedly that

[1] 20 W. Va. 745 (1882).

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Guiteau was sane. In the Supreme Court this was held to be such error as to require a new trial. "The main defence," said JOHNSON, P., "relied on by counsel for Robinson was insanity. The only defence relied on in Guiteau's case was insanity. The expert, Dr. Gray, was examined at length on the subject of insanity, and his opinions on that subject as reported in newspapers were read by the jury, and from what was read the jury might well infer that the distinguished Dr. Gray believed that insanity was sometimes feigned. Again Dr. Gray ridiculed the idea of 'moral insanity,' declaring that 'dypsomania' was not 'insanity' but 'drunkenness.' It was claimed in this case that Robinson was insane from previous habits of intoxication; that he had been so long addicted to the use of intoxicating liquors; that insanity was superinduced thereby. The statement of Dr. Gray was calculated to shake the belief of the jury, if any such they had, that by the long continued use of intoxicating liquors a man might become insane. We have seen that a verdict was set aside because a jury got hold of a work on criminal law and read from it while they were trying a man for murder. It is certainly more dangerous for them to read from a newspaper what purports to be the testimony of an expert on the subject of insanity when that is the very subject which they are considering. We think the reading of the newspaper account of the expert testimony on the subject of insanity in the *Guiteau Case* was calculated to prejudice the case of the prisoner; and the court erred in refusing to set aside the verdict for this reason."[1]

[1] This case of *State* v. *Robinson* would have been printed in this work in full, had it been reported in time. It did not, however, appear in the reports until this collection was in plates. The following rulings on the subject of insanity in the case of *State* v. *Robinson*, are here noted, in connection with other cases, reported too late to appear in this collection in their proper places. 1. Permanent insanity produced by habitual drunkenness is an excuse for crime. 2. Insanity when relied on as a defence must be proved to the satisfaction of the jury in order to entitle the prisoner to an acquittal. If upon the whole evidence the jury believe that the prisoner was insane when he committed the deed, they will acquit him on that ground, but not on the fanciful ground that though they believe he was then sane, yet as there may be a reasonable doubt of such sanity, he is therefore entitled to an acquittal. 3. A person, though drunk, may be capable of deliberation and premeditation, and if the jury believe that he wilfully, maliciously, deliberately and premeditatedly killed the deceased, they should find him guilty of murder in the first degree, though he was intoxicated at the time of the killing. 4. If a person who has formed a wilful, deliberate and premeditated design to kill another, in pursuance of such design makes himself drunk in order to nerve himself to the deed, and then meets the subject of his malice, when he is so drunk as not to be able to deliberate on and premeditate the murder, and kills him, he is guilty of murder in the first degree. 5. A person, whether an habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does; and yet he is responsible. He may be incapable of express malice; but the law implies malice in such cases from the nature of the instrument used, the absence of provocation, and other circumstances under which the act is done. 6. If a person kills another without provocation and through reckless wickedness of heart, but at the time of so doing his condition from intoxication is such as to render him incapable of doing a wilful, deliberate and premeditated act, he is guilty of murder in the second degree. 7. Where a statute establishes degrees of murder, evidence of drunkenness is relevant. 8. As between the two offences of murder in the second degree and manslaughter, the drunkenness of the offender is not relevant; the killing being voluntary, the offence is necessarily murder in the second degree, unless the provocation was of such a character as would at common

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§ 98. **Habeas Corpus — Bail.** — In *United States* v. *Lawrence*,[1] the prisoner, having been committed for trial for an assault with intent to kill the President of the United States (General Jackson), the court refused to issue a *habeas cor-*

1 4 Cranch C. C. 518 (1835).

law reduce the crime to manslaughter; for which latter offence a drunken man is as responsible as a sober one.

In *State* v. *Smith*, 49 Conn. 376 (1881), the following points were determined: 1. It is no error to refuse to charge that in murder in the first degree, the jury must find that the act was done while the prisoner was in full possession of his reasoning powers, unimpaired by anything affecting his mental condition. A lower condition of the mental faculties would be sufficient. 2. It is wholly a question of fact for the jury whether intoxication existed to such a degree as to incapacitate the prisoner for conceiving and executing a wilful, deliberate and premeditated intent to kill. 3. It is not error for the court, having instructed the jury that intoxication might destroy the mental capacity to form a specific intent to kill, to refuse to instruct them that if the prisoner was so intoxicated that his drunken condition was observable, it was a matter of "extreme importance" on the question of his capacity to form such an intent. 4. It is no error for the court to refuse to charge that threats made by an intoxicated person are entitled to very little consideration in determining the question of his intent. It is wholly a matter for the jury, and the court is not bound to say any thing about it.

In *Hart* v. *People*, decided in the Supreme Court of Nebraska, in 1883, it was said: "The better rule we think, and the one adopted by this court in the case of Wright *v.* People, 4 Neb. 407, is in effect that if one accused of crime has the mental capacity to distinguish right from wrong in *respect to the particular act charged*, he is responsible." Hart *v.* People, 14 Neb. 375 (1883).

In *Ford* v. *State*, decided by the Supreme Court of Alabama in 1883 (16 Rep. 647), it was held that where insanity is interposed as a defence in criminal cases, it must be established to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal.

In *Carter* v. *State*, decided by the Supreme Court of Georgia in 1876, it was held that the presumption of sanity must be overcome by a preponderance of the evidence. Carter *v.* State, 56 Ga. 463 (1876).

In *Reg.* v. *Davis*, 14 Cox C. C. 563, tried before STEPHEN, J., in April, 1881, the rule that insanity resulting from drunkenness may be a defence was recognized. The prisoner (who had previously been drinking heavily but was then sober) made an attack upon his sister-in-law, Mrs. Davis, threw her down and attempted to cut her throat with a knife. Ordinarily he was a peaceable and good-natured man, and on friendly terms with her. At the police station after his arrest he said: "The man in the moon told me to do it. I will have to commit murder as I must be hanged." He was examined by two medical men who found him suffering from delirium tremens, resulting from over indulgence in drink. According to their evidence he would know what he was doing, but his actions would not be under his control. In their judgment neither fear of punishment nor legal nor moral considerations would have deterred him — nothing short of actual physical restraint would have prevented him acting as he did. He was disordered in his senses and would not be able to distinguish between moral right and wrong at the time he committed the act. Under proper care and treatment he recovered in a week, and was then perfectly sensible. For the defence it was submitted that he was of unsound mind at the time of the commission of the act, and was not responsible. STEPHEN, J., charged the jury as follows: "The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last with intent to murder her. You will have to consider whether he was in such a state of mind as to be thoroughly responsible for his actions. And with regard to that I must explain to you what is the kind or degree of insanity which relieves a man from responsibility. Nobody must suppose — and I hope no one will be led for one moment to suppose — that drunkenness is any kind of excuse for crime. If this man had been raging drunk, and had stabbed his sister-in-law and killed her, he would have stood at the bar guilty of murder, beyond all doubt or question. But drunkenness is one thing, and the dis-

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pus for the purpose of inquiring as to his sanity, and for that cause "to discharge him from imprisonment in the common gaol and to secure the public peace by proper restraint." In *Zembrod* v. *State*,[1] the prisoner was charged

1 25 Tex. 519 (1860).

eases to which drunkenness leads are different things, and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary. If you think he was so insane — that if his insanity had been produced by other causes he would not be responsible for his actions — then the mere fact that it was caused by drunkenness will not prevent it having the effect which otherwise it would have had of excusing him from punishment. Drunkenness is no excuse, but *delirium tremens* caused by drunkenness may be an excuse if you think it produces such a state of mind as would otherwise relieve him from responsibility. A person may be both insane and responsible for his actions, and the great test laid down in McNaghten's Case was whether he did or did not know at the time that the act he was committing was wrong. If he did, even though he were mad — he must be responsible; but if his madness prevented that then he was to be excused. As I understand the law any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action — any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason, may be fairly said to prevent a man from knowing that what he did was wrong. *Delirium tremens* is not the primary but the secondary consequence of drinking, and both the doctors agree that the prisoner was unable to control his conduct and that nothing short of actual physical restraint would have deterred him from the commission of the act. If you think there was a distinct disease caused by drinking, but differing from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity; but if you are not satisfied with that, you must find him guilty either of stabbing with intent to murder, or to do grievous bodily harm."

The jury returned a verdict of not guilty on the ground of insanity, and he was ordered to be detained during the Queen's pleasure.

The ruling in Webb *v.* State, 9 Tex. (App.) 490, and King *v.* State, *Id.*, 515, on the legal test of insanity was affirmed by the Court of Appeals of Texas in the case of *King* v. *State*, 13 Tex. (App.) 283, decided in 1882.

In *People* v. *Carnel*, 2 Edm. Sel. Cas. 200 (1851), EDMONDS, J., charged the jury that "the insanity which was to excuse crime must be not the mere impulse of passion, an idle, frantic humor, or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind. To warrant a conviction the jury must be satisfied that the prisoner had the capacity to form an intention, and devise the means of executing it." And see People *v.* Russ, 2 Edm. Sel. Cas. 420 (1847). This second volume of Judge EDMONDS' decisions was not published till the fall of 1883.

In *McDougal v. State*, 88 Ind. 24, decided by the Supreme Court of Indiana in 1883, it was held: 1. The presumption of sanity operates as evidence in behalf of the State, and, if the other evidence on the part of the State does not overthrow it, the State may rest upon it as sufficient. 2. When the plea of insanity is in, the question of sanity or insanity is before the jury and is to be passed upon by them whether the defendant has introduced any evidence upon the subject or not.

ZOLLARS, J., delivered the opinion of the court as follows: Upon an indictment charging murder in the first degree, appellant was tried, convicted and sentenced to suffer death. The facts in the case, as shown by the evidence on the part of the State, are substantially as follows: —

Appellant, with his wife and children, resided in Jeffersonville on the —— day of September, 1882; the wife of appellant was away from home at work. Having been absent for awhile in the evening, appellant returned at about eight o'clock, brought an axe in the house, and holding it up said to his daughter, a girl of fourteen, "Look at this;

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with murder. The killing was proved. On an application for bail a number of witnesses testified to acts and declarations of his, indicative of insanity. In the Supreme Court it was said: "The appellant may be guilty of a capital offence

this is what I am going to kill your mother with when she comes home." He had been making threats that he would kill his wife for four or five years. He left the axe in the house and was absent again until nine o'clock. Upon his return, the daughter having retired, he spent an hour in conversation with her. Nothing seems to have been said in this conversation in relation to his wife. She returned home at about ten o'clock. Upon her return, appellant asked her why she had not waited for him to accompany her to Townsville. She answered: "I did wait until six o'clock, and thought you was not coming." He said, "You were ashamed to go with me." To this she answered, "Any one would be ashamed to go with you in those rags." This conversation was heard by a person in another part of the house, who states that immediately thereafter he heard a blow. The daughter seemed to have been asleep when the mother returned. When she awoke, the mother was sitting upon a chair near her bed. Appellant said to her, "Shut your mouth." The wife answered, "I won't do it until you shut yours." He replied, "I'll make you." Upon saying this he got the axe and struck the wife a blow upon the head. The daughter tried to get the axe from him, but did not succeed. He struck the wife with it again before the daughter ran into the yard. Persons from another portion of the house arrived at the door in a short time and saw him inflicting additional blows. He met them at the door and told them that he had killed his wife with an axe, and invited them to see for themselves. Afterwards he went into the yard with one of his small children and tried to quiet it. He asked those present to cut his head off with the axe and bury him beside his wife. After a short time he sent for a policeman, waited until he arrived, and told him that he wanted to die as soon as possible. On the following morning he told a policeman at the jail that he had killed his wife, and where the axe would be found.

Under proper pleas, as required by sects. 1763 and 1764, Rev. Stat. 1881, the defence was based upon the alleged insanity of the appellant. Two physicians were called by appellant to testify upon this question. One of these testified that he could not say that appellant was of unsound mind, but could say that he has but very little intellect. The other testified that in his opinion appellant was of unsound mind. Appellant was a witness in his own behalf, and testified that he and his wife had been slaves; were married soon after they became free; that they had no quarrels, and that no jealousy existed on the part of either; that he did not recollect distinctly what took place on the night his wife died; that he was not afraid to die, and thought he would go to a better world.

The error assigned in the court is the overruling of a motion for a new trial. The serious question presented by the record is the giving of the seventeenth instruction by the court. The portion of which complaint is made is as follows: —

"The law presumes sanity in all cases, and the burden of overthrowing the presumption is upon the person who alleges insanity, but it is not necessary that such presumption should be overthrown by a preponderance of evidence. And in this case if the evidence given by defendant has been sufficient to raise in the minds of the jury a reasonable doubt of his sanity, then the general question is presented to the jury whether or not the crime was committed by him while responsible for his acts, and then upon the whole evidence in the case, as introduced by both the defendant and State, if a reasonable doubt exists as to defendant's sanity at the time he committed the act, he is entitled to the benefit of the doubt."

This instruction starts out with the proposition, substantially, that unless the defendant had, by affirmative evidence, created a reasonable doubt as to his sanity at the time the crime charged was committed, that question was not before the jury for consideration. This we think was erroneous. One of the averments, and one of the essential elements in the offence of murder, is malice. Murder is said to be committed when a person of sound mind and discretion unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either expressed or implied. 3 Coke Just. 47; 4 Bl. Com. 195; 2 Chit. Cr. L. 724. Malice is just as essential to the offence as is the killing, and the State is called upon to

Cases too Recent to Report.

as charged. The testimony of the witnesses upon the subject of his insanity, as presented in the record before us, is of a character to induce the belief that it is not a case in which the proof is evident or presumption great. Therefore it is determined that he is entitled to bail."

prove the one as clearly as the other. It is not always possible or necessary to prove malice by the same kind of evidence. It may often be inferred from the killing and surrounding circumstances, in which case it is said to be implied, but it is nevertheless proven. There can be no criminal intent when the mental condition of the accused is such that he is incapable of forming one. And hence it must appear from the evidence, beyond a reasonable doubt, that at the time of the commission of the offence charged, the mental condition of the defendant was such that he was capable of forming an intent.

There is a legal presumption that all persons are sane. In a case like this that presumption operates as evidence in behalf of the State, and if the other evidence on the part of the State does not overthrow it, the State may rest upon it as sufficient. The defendant may overthrow the evidence on the part of the State, or so weaken it by counter proof, that upon the whole evidence the issue may not be established in favor of the State, beyond a reasonable doubt. Polk *v.* State, 19 Ind. 170; Bradley *v.* State, 31 Ind. 492; Snyder *v.* State, 39 Ind. 105; People *v.* Garbutt, 17 Mich. 9; State *v.* Bartlett, 43 N. H. 224; Ogletree *v.* State, 28 Ala. 701; State *v.* Crawford, 11 Kan. 32. In a case like this, when the plea of insanity is in, the question of the sanity or insanity of the accused is before the jury, and is to be passed upon by them, whether the defendant has introduced evidence upon the subject or not. It is the duty of the jury to consider not only the evidence directed specially to the question of the mental condition of the accused, but also all circumstances developed by the evidence bearing upon the question. In some cases the circumstances attending the killing, and the whole evidence on the part of the State, may be such as to completely overthrow the presumption of sanity without any evidence at all on the part of the defendant. How much weight the conduct of the accused, and the circumstances attending the killing, should have, as bearing upon the question of his sanity, we do not decide; but we think they were such that he had the right to have them considered by the jury, whether he introduced any evidence or not. We cannot know what weight the jury may have given to the testimony on the part of the defendant. Unless they regarded it as sufficient of itself to raise a reasonable doubt of his sanity, they could not, under this instruction, consider that question.

Other instructions, perhaps, stated the law upon the subject correctly, but the seventeenth was not withdrawn, and taken together they would tend to mislead rather than to enlighten the jury. Any erroneous instruction in a criminal case cannot be corrected by another which states the law correctly, unless the erroneous instruction in a criminal case cannot be corrected by another which states the law correctly, unless the erroneous instruction be thereby plainly withdrawn from the jury. Kingens *v.* State, 45 Ind. 51; Howard *v.* State, 50 Ind. 190.

If instructions are inconsistent with each other, so that the jury are left in doubt or uncertainty as to the law applicable to the facts of the case, the judgment will be reversed. Kirland *v.* State, 43 Ind. 146.

As the judgment must be reversed on account of error in giving the seventeenth instruction, we will not consider other questions discussed by counsel. The judgment is reversed, with instructions to the court below to grant a new trial.

In *State* v. *Jones*, 17 N. W. Rep. 911, decided by the Supreme Court of Iowa in December, 1883, the prisoner being indicted for murder in the first degree set up as a defence that he was insane. Two errors on the trial were noticed by the Supreme Court and the conviction reversed. They are fully set out in the opinion of ADAMS, J., who said: "The court gave an instruction in these words: "You have evidence of the conduct, language, and appearance of the accused during the time of the alleged killing, during which time it is alleged that he was insane. You are to consider all the facts which you find to be established by the evidence, and which relate to the conduct, language, and appearance of the defendant during that time; and you should consider them for the double purpose of testing the value of the opinions of such witnesses as have given opinions on the question of the defendant's insanity, based upon such facts, and of determining

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§ 99. **Appeal.** — The trial on the main charge in the indictment will not be postponed because of an appeal to the Supreme Court from a preliminary finding of a jury against him on a plea of insanity at the trial.[1]

1 People *v.* Moice, 15 Cal. 329 (1860).

whether the fact of insanity is established independent of such opinions." The defendant assigns the giving of this instruction as error. The objection urged is that the jury was told in substance that if they found the defendant insane they must so find from facts independent of opinions. We hardly think that the instruction, even when taken by itself, is susceptible of such construction. But the jury was expressly told, in another instruction, that they were to determine what weight and credit should be given to the opinions of witnesses upon the question of insanity. The jury, we think, could not have been misled in the way which the defendant claims. While we say this, we ought, perhaps, to say that we do not regard the question as to whether insanity was fully established by facts independent of opinions necessary to be considered. It is true that the facts, as the court said, were to be considered for a double purpose. But, in defining the double purpose, we should have been better pleased if the court had said that they might be considered for the purpose of testing the value of the opinions, and upon the question as to how far they tended to establish the fact of insanity independent of the opinions. We make this criticism the more freely because we have reached the conclusion that for errors to be pointed out hereafter the case must be reversed and remanded for another trial. The instruction above set out in our opinion contains error. The jury was directed to consider the facts relating to the conduct, language, and appearance of the defendant *during the time of the alleged killing*. Now, while it is true that it was not material whether the defendant was insane at any other time, if he was sane at that time, yet his conduct, language and appearance at other times were not to be excluded. There was no evidence whatever as to the conduct, language and appearance of the defendant at the precise time when Roberts was killed. He was seen by others on that day, but the evidence of insanity pertains to other days. The evidence showed that he was insane in early life, and had not fully recovered when he came to Western Iowa. There was evidence tending to show that from the time of his first insanity "any trouble" (to use the language of the witness) "would throw him off his balance." Four relatives of the defendant testified to his changed mental condition from the time his trouble with Roberts commenced, and they gave their opinion that he was insane. Two others, who do not appear to be relatives, testified to strange conduct of the defendant, and gave their opinion that he was insane. In addition to that, one physician testified that he made an examination of him, and regarded him as insane. While the court did not say that the jury should not consider the conduct, language and appearance of the defendant at times other than that of the alleged killing, the tendency of the instruction was to confine, by implication, the attention of the jury to that time. In this it appears to us there was error.

The court gave an instruction in these words: "The burden is on the defendant to establish by a preponderance of evidence that at the time of the killing of Roberts, if he did kill him, he was in such a state of insanity as not to be accountable for the act; and if the evidence goes no further than to show that such a state of mind was possible or *merely probable*, it is not sufficient, but it must go further and overcome the presumption of sanity, and fairly satisfy you that he was not sane." The giving of this instruction is assigned as error. In our opinion the instruction cannot be sustained. If it was made *probable* to the jury that the defendant was so far insane as not to be accountable for his acts, we think that he should have been acquitted. Worcester defines *probable* as "having more evidence than the contrary." Webster defines it as "having more evidence for than against." We think that it was sufficient if the evidence of insanity preponderated. The idea of the court seems to have been that as the presumption of sanity counts for something, it cannot be said to be overcome by a bare preponderance of evidence. There is a course of reasoning which might, perhaps, seem to support this view. The difference between a bare preponderance of evidence and that which is next less might be said to be infinitely small, and that what is infinitely small cannot be weighed or appreciated. But such considerations are too refined.

Experts and Ordinary Witnesses.

§ 100. **Opinions on Insanity—Experts.**— The sanity or insanity of the prisoner is proved by the evidence of persons acquainted with him or of medical experts whose opinions are founded on observation, or examination, or upon a hypothetical case stated to them in court.[1] For the rules on this subject see my book on Expert and Opinion Evidence.[2]

The rule as to the presumption of sanity has its practical application in imposing the burden of proof upon him who sets up insanity. This is all. The presumption is not to be weighed against any measurable amount of evidence. The judgment, we think, must be reversed and the case remanded for another trial.

SEEVERS, J., filed the following dissent from the opinion of the court on these points: 1. I do not believe the instruction set out in the fourth paragraph of the foregoing opinion is erroneous. The material inquiry was whether the defendant was insane at the time the homicide was committed. His acts and conduct at that time, therefore, were material as bearing on this question. It is immaterial whether defendant was insane prior to the homicide if he was not insane then. The acts and conduct of the defendant prior to the homicide, bearing on the question of his insanity at the time of the homicide, are not excluded from the consideration of the jury, unless it can be said to have been done by implication. But if this is so, the instruction is not, therefore, erroneous. But in my opinion no such implication can be drawn. 2. This court has held, in more than one adjudged case, that when the defense is insanity the burden is on the defendant to establish such defense by a preponderance of the evidence; and this, and no more, is the thought of the instruction set out in the sixth paragraph of the foregoing opinion. By the use of the word 'probable' the court meant this, and no more, and so the jury, I think, understood the instruction. It seems to me that the reasoning of the foregoing opinion upon the points above mentioned is refined, technical, and without substantial merit. The court plainly stated that insanity must be established by a preponderance of the evidence, and they could not have understood that any other rule was announced in the instruction. I think it is unfair to the conrt, and not required by the case, to resort to dictionaries for a definition of the word 'probable,' when the connection in which the word is used is taken into consideration. When the instruction as a whole is considered, I am unable to conclude that the word in question as used was prejudicial. ROTHROCK, J., concurred in this dissent.

In *Flanigan* v. *People*, 86 N. Y. 554, it was held that voluntary drunkenness was no defence to a crime.

1 Holcomb *v.* State, 41 Tex. 125 (1874); McClackey *v.* State, 5 Tex. (App.) 320 (1878); Gehrke *v.* State, 13 Tex. 568 (1855); McAllister *v.* State, 17 Ala. 434 (1850); Armour *v.* State, 63 Ala. 173 (1879); People *v.* Thurston, 2 Park. 49 (1852); R. *v.* Francis, 4 Cox, 57; R. *v.* Searle 1 M. & Rob. 75 (1831); R. *v.* Wright, Russ. & Ry. 456 (1821); Clark *v.* State, 12 Ohio, 483; 40 Am. Dec. 481 (1843); Pigg *v.* State, 43 Tex, 108 (1878); Webb *v.* State, 5 Tex. (App.) 596.

2 The Law of Expert and Opinion Evidence Reduced to Rules. By John D. Lawson. St. Louis: F. H. Thomas & Co. 1883.

CHAPTER VI.

INSANITY AT TRIAL OR AFTER CONVICTION.

INSANITY AT TRIAL — VERDICT OF JURY THAT PRISONER IS UNABLE TO PLEAD — PRACTICE.

COMMONWEALTH *v.* BRALEY.

[1 Mass. 103.]

In the Supreme Judicial Court of Massachusetts, October Term, 1804.

HON. FRANCIS DANA, *Chief Justice.*
" SIMEON STRONG,
" THEODORE SEDGWICK,
" SAMUEL SEWELL,
" GEORGE THACHER, } *Judges.*

On an Indictment for a Capital Crime if the jury find that the prisoner neglects to plead by the act of God, the court will not try him upon the indictment.

The prisoner was indicted for the murder of his wife. On Tuesday, the third day of this term, he was set to the bar and the indictment was read to him. Upon being asked the usual question whether he was guilty or not guilty, the prisoner in a voice scarcely audible, said he did not know what to say; that it appeared to him she was still alive; it seemed to him he had seen her since. The court told him he must say guilty or not guilty, upon which he made nearly the same answer as before. After a few moments had elapsed the court asked him whether he was *now* disposed to plead, and told him he was charged with killing his wife. He again answered as he had before and added that he was guilty of what he had done, but did not know what he had done. The court then informed him that he should have time till the next day to consider of the charge and remanded him to prison. On the next day he was again set to the bar, and arraigned on the indictment, when he said he was guilty of all he had done, he must confess; but no direct or positive answer could be obtained from him.

From the appearance and conduct of the prisoner at the several times he was arraigned, the court were inclined to believe that he was in a

state of mental derangement, and it also appearing that soon after the supposed murder of his wife, he had cut his own throat in such a manner as to endanger his life, a jury was immediately empanelled and sworn "well and truly to try between the Commonwealth and the prisoner at the bar whether he neglected or refused to plead to the indictment against him for murder, of his free will and malice, or whether he did so neglect by the act of God."

The jury found that he did so neglect by the act of God.

Whereupon the prisoner was remanded to jail.

INSANITY AT TRIAL — TEST OF INSANITY — SUBSEQUENT INSANITY — EVIDENCE.

Freeman *v.* People.

[4 Denio, 9; 47 Am. Dec. 216.]

In the Supreme Court of New York, January, 1847.

Hon. Greene C. Bronson, *Chief Justice.*
" Samuel Beardsley, } *Justices.*
" Freeborn G. Jewett, }

1. **A Person while he Continues Insane** cannot be tried or punished: *aliter*, if he be capable of comprehending his position and of making his defence, though on some subjects his mind may be deranged.
2. **Insanity at the Trial** should be tried by a jury; but other methods may be adopted by the court in its discretion.
3. **Test of Insanity.** — The test of insanity, when alleged as a defence to an indictment, is whether, at the time of committing the act, the prisoner was laboring under such mental disease as not to know the nature and quality of the act he was doing, or that it was wrong.
4. **On a Trial of Present Insanity** the prisoner is not entitled to peremptory challenges. The right to peremptory challenges exists only as to the trial on the indictment and not on the trial of preliminary or collateral issues.
5. **Evidence of Subsequent Insanity.** — On the trial of an indictment for murder the court refused to permit evidence to be given that the prisoner was insane at any time after the finding of the verdict on the preliminary issue of insanity at the trial. *Held*, error.
6. **Same.** — Where the prisoner was tried for murder, four months after the crime was committed, evidence that he was insane at the time of the trial was relevant on the question of his insanity four months before.

Error to the Cayuga Court of Oyer and Terminer.

Statement of Case.

Indictment was found against Freeman for the murder of John G. Van Nest, on March 12, 1846. On June 1st of the same year, when the accused was about to be arraigned, his counsel pleaded that he was then insane. The prisoner was then remanded; but on June 24th was brought into court, and a jury was impanelled to ascertain whether he was sufficiently sane "to be required to plead to, and to be tried upon said indictment." The verdict of the jury was: "We find the prisoner sufficienty sane in mind and memory to distinguish between right and wrong." The verdict was excepted to, and the court was asked to instruct the jury to find whether the prisoner was sane or insane. This request was denied. On the sixth day of July the prisoner was arraigned. His counsel objected on the ground that the verdict was defective. The objection being overruled, he excepted. The defence was to the effect that the defendant was insane or idiotic. The proceedings upon the trial sufficiently appear in the opinion. Verdict of guilty was rendered and the prisoner sentenced to be executed.

W. H. Seward, for the prisoner.

L. Sherwood, District Attorney, and *J. Van Buren*, Attorney-General, for the People.

Beardsley, J. — The prisoner was tried at a Court of Oyer and Terminer, held for the County of Cayuga, and found guilty of the crime of murder, upon which verdict sentence of death was pronounced. In the course of the trials, preliminary and final, a multitude of exceptions were taken by the prisoner's counsel, which, with the record of the conviction and sentence, have been brought into this court by writ of error. These exceptions, or such of them as the counsel for the prisoner supposed to be available, were argued at the last term of this court, and having since been examined and considered with care and deliberation, we are now prepared to dispose of them by rendering judgment on the case before us.

When the prisoner was brought before the Court of Oyer and Terminer, to be arraigned on the indictment, a plea that he was then insane was interposed by counsel on his behalf, which, being denied by the public prosecutor, a jury was impanelled to try the issue so joined. On the trial of this issue various objections were made and exceptions taken by the prisoner's counsel, and the first question to be decided is, whether these exceptions can be re-examined on a writ of error.

The statute declares that "no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state."[1] This, although new as a legislative enactment in

[1] 2 R. S., p. 697, sect. 2.

this State,[1] was not introductory of a new rule, for it is in strict conformity with the common law on the subject. "If a man," says Sir William Blackstone, "in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment should not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed, for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed," it is added, "in the bloody reign of Henry the Eighth a statute was made which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute of 1 and 2 Ph. & M.[2] For, as is observed by Sir Edward Coke, 'the execution of an offender is, for example, *ut pœna ad paucos, metus ad omnes, perveneat;* but so it is not when a madman is executed, but should be a miserable spectacle, both against law and of extreme inhumanity and cruelty, and can be no example to others.'"[3]

The true reason why an insane person should not be tried, is, that he is disabled by an act of God to make a just defence, if he have one. As is said in 4 Harg. State Trials:[4] "There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence." The most distinguished writers on criminal jurisprudence concur in these humane views, and all agree that no person, in a state of insanity, should ever be put upon his trial for an alleged crime, or be made to suffer the judgment of the law. A madman cannot make a rational defence, and as to punishment, *furiosus solo furore puniter.*[5]

The statute is explicit that "no insane person can be tried," but it does not state in what manner the fact of insanity shall be ascertained. That is left as at common law, and although in the discretion of the court other modes than that of a trial by a jury may be resorted

[1] 3 *Id.*, 832.
[2] c. 10.
[3] 4 Bla. Com. 24.
[4] p. 205.
[5] 1 Hale P. C. 34, 35; 4 Bl. Com. 395-6; 1 Chit. Cr. L. (ed. 1841), p. 761; 1 Russ. on Cr. (ed. 1845), p. 14; Shelf. on Lunacy, 467—8; Stock. on Non. Comp. 35—6.

to, still, in important cases, that is regarded as the most discreet and proper course to be adopted.[1]

At common law the only regular mode of redress for errors occurring on criminal trials was by motion for a new trial, in the court where the trial was had, unless the error was in some matter which formed a part of the record, when it might be reviewed, after judgment, by writ of error. Bills of exception, by which questions of law, made and decided on such trials, may be brought up and reviewed in a higher court, were unknown to the common law, although now allowed by a statute of this State. But the statute is limited to exceptions taken on the trial of the main issue, and does not reach such as are made on the trial of a preliminary or collateral question. The words are "on the trial of any indictment, exceptions to any decision of the court may be made by the defendant, in the same cases and manner provided by law in civil cases."[2] A trial of the question of present insanity is not a trial of the indictment, but is preliminary to such trial. The object in such a case, is simply to determine whether the person charged with an offence and alleged to be insane, shall be required to plead and proceed to the trial of the main issue of guilty or not guilty. The statute does not authorize exceptions to be taken on such preliminary trial; and if errors occur, they must be corrected, if at all as at common law, by the court which committed them. For this reason, none of the exceptions taken by the prisoner's counsel on the trial of the preliminary issue in this case can be regarded as regularly before us; nor could they, if held to be well taken, constitute a ground for reversing the judgment of the court below.

This part of the case might here be dismissed; but I choose not to do so lest an implication should be supposed to arise that in the opinion of this court the preliminary trial was conducted throughout with regularity and according to law.

On the preliminary trial the counsel for the prisoner claimed the right to challenge jurors peremptorily, as it is conceded to exist on the trial of the main issue. This the court refused to allow, and, it seems to me, correctly. Peremptory challenges are allowed *in favorem vitæ*, and at common law are restricted to the main issue, in which the life of the party is in jeopardy, and cannot be made on the trial of any collateral issue whatever.[3] To the like effect is the statute, which secures to "every person arraigned and put on his trial for any offence punishable

[1] See the authorities last referred to. Also 1 Hawk P. C. by Curwood, p. 3, and note, Steph. Cr. L. 3, 4, 280, 334.

[2] 2 R. S. 736, § 21. See also 3 *Id.*, 849.

[3] 2 Hale's P. C. 267, c. 35; Bac. Abr., Juries, E. 9; Foster's Cr. L., 42; 4 Bl. Com. 353, 396; Co. Lit. 156 b.; King *v.* Radcliffe, 1 W. Bl. 3, 6.

with death, or with imprisonment in a State prison ten years or any longer time," the right, "peremptorily to challenge twenty of the persons drawn as jurors for such trial." [1] This preliminary trial was not a "trial for any offence" whatever, and there was no error in refusing to allow peremptory challenges to be made. Challenges for cause are allowable on the trial of preliminary as well as final issues. This was conceded, and several of this description were interposed on behalf of the prisoner. I pass by these without particular examination, as this class of challenges will again be presented for consideration before the case is closed, when such suggestions will be made as are deemed pertinent to this, as well as other parts of the case.

An objection was made to the oath as administered to some of the triers of challenges to jurors drawn for this preliminary trial. The oath was thus: "You do solemnly swear that you will well and truly try and well and truly find, whether the juror is indifferent between the People of the State of New York and the prisoner at the bar, upon the issue joined." This form of oath was not administered in every instance, the qualification at its close, made by the words "upon the issue joined," being sometimes omitted, as it should have been throughout. The oath as given in books of approved credit and authority contains no such limitation, but requires the triers to find whether the juror is or is not indifferent between the parties to the controversy.[2] And jurors should be so. It is not enough that they are indifferent upon the particular issue to be tried. An actual and thorough impartiality in regard to the parties is required; for no one who labors under prejudice, malice, or ill-will towards another can be in a fit frame of mind to act impartially where his rights are in question.

In *Brittain* v. *Allen*,[3] the defendant challenged a juror for cause, to wit, hostility between the juror and the party challenging. The challenge was overruled and the juror was sworn. On a motion for a new trial, HENDERSON, C. J., said: "It seems that the judge disregarded all kinds of hostility but that which related to the particular suit then to be tried. I think that the law is otherwise. The juror should be perfectly impartial and indifferent; causes apparently very slight are good causes of challenge, and that which is good cause for quashing the array, is good cause of challenge to the polls. I mention this, as most, at least many of the cases, are challenges to the array. If the sheriff be liable to

[1] 2 R. S. 734, sect. 9.

[2] Tr. Per. Pais, 205; 1 Chit. Cr. L. 549; Bac. Abr., Juries, E. 12, note; Clark *v.* Ostrander, 1 Cow. 441, note (13 Am. Dec. 546); *Anonymous*, 1 Salk. 152.

[3] 2 Dev. 120.

the distress of either party, or if he be his servant or counsellor, or if he has been godfather to a child of either of the parties, or either of them to his; or if an action which implies malice as assault and battery, slander, or the like, is depending between them, these all are causes of principal challenge.[1] From these cases, particularly the one which states a suit pending which implies malice, it appears that general hostility, by which I mean that which is not confined to the particular suit, is cause of challenge. From these causes, the law of itself implies a want of indifference, which the defendant offered to show. I think he ought to have been permitted to do so, and if he succeeded, that the juror should not have been sworn. For this cause, and for this only, there should have been a new trial," So in the case at bar, the oath only required the triers to find indifference between the parties "upon the issue" then to be decided. In other respects, if the clause is susceptible of any meaning, the juror, although a sworn enemy of the prisoner, might still be found by the triers to be a competent and proper person to pass upon the question then to be decided. This would be intolerable, and an oath which requires, or will admit of such a construction, cannot be correct. There is no precedent for one in this form; as will be seen on looking at the authorities already referred to. At the very best, the clause objected to is unmeaning or ambiguous. But an oath should be plain, explicit, and free from all ambiguity. If this clause does not necessarily affix an improper limitation to the obligation which the law seeks to cast upon the trier by the oath administered to him, it is very liable so to be construed and understood as to have that effect.

In charging the jury on the preliminary issue, which, we have seen was on the fact of present insanity, the court said, "The main question with the jury was to decide whether the prisoner knew right from wrong; if he did, then he was to be considered sane."

The statute before cited is emphatic that "no insane person can be tried." In its terms the prohibition is broad enough to reach every possible state of insanity, so that if the words are to be taken literally, no person while laboring under insanity in any form, however partial and limited it may be, can be put upon his trial. But this the legislature could not have intended; for although a person totally bereft of reason cannot be a fit subject for trial or punishment, it by no means follows, that one whose insanity is limited to some particular object or conceit, his mind in other respects being free from disease, can justly claim the like exemption. This clause of the statute should receive a

[1] Bac. Abr., Juries, E. 1.

reasonable interpretation, avoiding on the one hand what would tend to give impunity to crime, and on the other seeking to attain the humane object of the Legislature in its enactment. The common law, equally with this statute, forbids the trial of any person in a state of insanity. This is clearly shown by authorities which have been referred to, and which also show the reason for the rule, to wit, the incapacity of one who is insane to make a rational defence. The statute is in affirmance of this common law principle, and the reason on which the rule rests, furnishes a key to what must have been the intention of the Legislature. If, therefore, a person arraigned for a crime is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defence in a rational manner, he is, for the purpose of being tired, to be deemed sane, although on some other subjects his mind may be deranged or unsound. This, as it seems to me, is the true meaning of the statute; and such is the construction put by the English courts, on a similar clause in an act of Parliament.

By the 39 and 40 George III.[1] it is enacted that "if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment, it shall be lawful for the court before whom any such person shall be brought to be arraigned to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody till his majesty's pleasure shall be known."[2] The question upon this statute is the same as upon ours, that is, is the alleged offender insane. Russell says:[3] "If a prisoner have not at the time of the trial, from the defect of his faculties, sufficient intelligence to understand the nature of the proceedings against him the jury ought to find that he is not sane, and upon such finding, he may be ordered to be kept in custody under this act." For this he refers to the case of *Rex* v. *Dyson*,[4] before Mr. Justice PARKE, in 1831. In that case the prisoner was indicted for murder, and on being arraigned stood mute; a jury was then impanelled to try whether she did so by malice or by the visitation of God, and they found she did so by the visitation of God. The judge thereupon examined on oath a witness who was acquainted with the prisoner, and who swore that she could be made to understand some things by signs, and could give her answers by signs. The witness was then sworn to interpret and make

[1] Ch. 94, sect. 2.
[2] 1 Russ. on Cr. 15
[3] p. 15.
[4] 7 C. & P. 305, *s. c.* 1 Lewin's C. C. 64.

Test in such Cases.

known to the prisoner the indictment and charge against her, and to the court her plea and answer thereto. The witness explained to her by signs what she was charged with, and she made signs which imported a denial of the charge; whereupon the judge directed a plea of not guilty to be recorded. The witness by direction of the court, then stated to her that she was to be tried by a jury, and that she might object to such as she pleased; but he testified that it was impossible to make her comprehend a matter of that nature, although she might understand subjects of daily occurrence which she had been in the habit of seeing. A jury was thereupon "impanelled and sworn to try whether she was sane or not," and proof was given of "her incapacity at that time to understand the mode of her trial, or to conduct her defence." The judge "told the jury, that if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane." The jury so found, and the prisoner was detained in close custody as the statute directs. A similar case occurred in 1836, which was disposed of in the same way. ALDERSON, B., said to the jury: "The question is whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge." [1] Both these prisoners had been at all times deaf and dumb. In presumption of law, such persons are always idiots or madmen, although it may be shown that they have the use of understanding and are capable of committing crimes, for which, in that event, they should be punished. [2]

In the case of *Queen* v. *Goode*,[3] which occurred in 1837, the prisoner was brought into the Court of Queen's Bench and arraigned on an indictment for a misdemeanor. As he showed clear symptoms of insanity a jury was immediately impanelled to try whether he was then insane or not; and upon evidence given, as well as upon his appearance in court, the jury found that he was insane. The prisoner was thereupon detained in custody under the statute.

In *Ley's Case*,[4] on the trial of a similar question, HULLOCK, B., said to the jury: "If there be a doubt as to the prisoner's sanity, and the surgeon says that it is doubtful, you cannot say that he is in a fit state to be put upon his trial."

The course at common law was much the same. In *Frith's Case*,[5] which preceded the act of 39 and 40 Geo. III. to which reference has been made, the prisoner was arraigned for high treason, and a jury sworn to

[1] Rex *v.* Pritchard, 7 C. & P. 303.
[2] 1 Russ. on Cr. 6; Shelf. on Lunacy, 3.
[3] 7 A. & E. 536.
[4] 1 Lewin C. C. 239.
[5] 22 How. St. Tr. 307, 318.

inquire whether he was of sound mind and understanding or not. Lord Kenyon, Chief Justice of the Court of King's bench, presided at the trial, assisted by one of the judges of the Court of Common Pleas and one of the barons of the Court of Exchequer. It was observed by the court to the jury that the inquiry was not whether the prisoner was insane when the alleged crime was committed, nor was it necessary to inquire at all what effect his present state of mind might have been when that question came to be discussed; but the humanity of the law of England had prescribed that no man should be called upon to make his defence at a time when his mind was in such a situation that he appeared incapable of doing so; that however guilty he might be, the trial must be postponed to a time when by collecting together his intellects, and having them entire, he should be able so to model his defence, if he had one, as to ward off the punishment of the law; and it was for the jury to determine whether the prisoner was then in that state of mind.[1]

With these lights before us, the construction of the statute which forbids the trial of any insane person, cannot be attended with much difficulty. A state of general insanity, the mental powers being wholly perverted or obliterated, would necessarily preclude a trial; for a being in that deplorable condition can make no defence whatever. Not so, however, where the disease is partial, and confined to some subject other than the imputed crime, and the contemplated trial. A person in this condition may be fully competent to understand his situation in respect to the alleged offence, and to conduct his defence with discretion and reason. Of this the jury must judge; and they should be instructed that if such is found to be his condition, it will be their duty to pronounce him sane. In the case at bar the court professed to furnish a single criterion of sanity; that is, a capacity to distinguish between right and wrong. This as a test of insanity is by no means invariably correct; for while a person has a very just perception of the moral qualities of most actions, he may, at the same time, as to some one in particular, be absolutely insane, and consequently, as to this, be incapable of judging accurately between right and wrong. If the delusion extends to the alleged crime, or the contemplated trial, the party manifestly is not in a fit condition to make his defence, however sound his mind may in other respects be. Still the insanity of such a person being only partial, not general, a jury, under a charge like that given in this case, might find the prisoner sane; for in most respects he would be capable of distinguishing between right and wrong. Had the in-

[1] Shelf. 468.

struction been that the prisoner was to be deemed sane if he had a knowledge of right and wrong in respect to the crime with which he stood charged, there would have been but little fear that the jury could be misled, for a person, who justly apprehends the nature of a charge made against him, can hardly be supposed incapable of defending himself in regard to it in a rational way. At the same time, it would be well to impress distinctly on the minds of jurors, that they are to gauge the mental capacity of the prisoner in order to determine whether he is so far sane as to be competent in mind to make his defence if he has one, for unless his faculties are equal to that task he is not in a fit condition to be put on his trial. For the purpose of such a question the aw regards a person thus disabled by disease, as *non compos mentis*, and he should be pronounced unhesitatingly to be insane within the true intent and meaning of this statute.

Where insanity is interposed as a defence to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time when the act was done. In such cases, the jury should be instructed that "it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode, of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury is not deemed so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged." [1] This is the rule laid down by all the English judges but one, in the late case of *McNaghten*, while pending in the House of Lords. The case is reported in 10 Clark & Fin.[2] and the opinion of the judges may be found in a note to the section of Greenleaf's Evidence referred to. In *Reg.* v. *Oxford*,[3] Lord Denman, C. J., charged the jury in this manner: "The question is whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequences of the act he was committing, or in other words whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime."

[1] 2 Greenl. Ev., sect. 373. [3] 9 C. & P. 525. [2] p. 200.

The insanity must be such as to deprive the party charged with crime of the use of reason in regard to the act done. He may be deranged on other subjects, but if capable of distinguishing between right and wrong in the particular act done by him, he is justly liable to be punished as a criminal.

Such is the undoubted rule of the common law on this subject. Partial insanity is not, by that law, necessarily an excuse for crime, and can only be so where it deprives the party of his reason in regard to the act charged to be criminal. Nor in my judgment was the statute on this subject intended to abrogate or qualify the common-law rule. The words of the statute are, "No act done by a person in a state of insanity can be punished as an offence." [1]

The clause is very comprehensive in its terms, and at first blush, might seem to exempt from punishment every act done by a person who is insane upon any subject whatever. This would, indeed, be a mighty change in the law, as it would afford absolute impunity to every person in an insane state, although his disease might be confined to a single and isolated subject. If this is the meaning of the statute, jurors are no longer to inquire whether the party was insane "in respect to the very act with which he is charged," but whether he was insane in regard to any act or subject whatever; and if they find such to have been his condition, render a verdict of not guilty. But the statute is not so understood by me. I interpret it as I should have done if the words had been "no act done by a person in a state of insanity, in respect to such act, can be punished as an offence."

The act, in my judgment, must be an insane act, and not merely the act of an insane person. This was plainly the rule of law before the statute was passed, and although that took place more than sixteen years since, I am not aware that it has, at any time, been held or intimated by any judicial tribunal, that the statute had abrogated or in any respect modified this principle of the common law.

But to return to the trial of the preliminary question in the present case. The jury found, not as the issue required them to do, that the prisoner was or was not insane, but that he was "sufficiently sane in mind and memory to distinguish between right and wrong." This verdict was defective; it did not directly find anything, and certainly not the point in issue, but evaded it by an argumentative finding. At the utmost the jury only made an approach towards the point to be decided but failed to reach it. They should have been required to pass directly on the question of insanity, and should not have been allowed to evade

[1] 2 R. S. 697, sect. 2.

it by an argumentative verdict of any sort. Such a finding as this would be objectionable in a civil proceeding, and in a criminal case, should not be allowed.[1]

The preliminary trial being closed, a plea of not guilty was entered for the prisoner, and the court proceeded to the trial of the main issue.

[Omitting another ruling as to challenge of jurors.]

The verdict on the preliminary issue was rendered on the 6th of July. In the course of the trial, and shortly after the 15th of that month, several medical witnesses were sworn and examined on the part of the prisoner, with a view to establish his insanity the preceding March, when the alleged murder was perpetrated. One of these witnesses, Dr. Van Epps, had known the prisoner from his childhood, and had visited and examined him with a view to ascertain his mental condition, both before and after the 6th of July. The others had never seen the prisoner until the 15th of July; but they also had examined him on and after that day in order to be prepared to express an opinion on the question of his sanity or insanity.

That part of the bill of exceptions which states the questions made and exceptions taken, in regard to these witnesses, is perhaps liable to some misapprehension, and it may be that I have not rightly understood what was intended to be decided by the court. I have read this part of the bill of exceptions repeatedly, with an anxious desire to collect its true meaning, and, although I would not affirm positively, that its meaning may not have been misapprehended, I still think no error has been fallen into in regard to the views of the court. As I understood the bill of exceptions, the court held that it was competent for these or other medical witnesses, to express an opinion upon the question of the insanity of the prisoner at the time of the alleged murder, but that such opinion must be formed upon facts and circumstances which occurred, or observations made before the 6th of July, when the verdict on the preliminary issue was rendered, and could in no degree rest upon any thing observed in the appearance, manner, or condition of the prisoner since that time; and that the witnesses could not, with a view to fortify the conclusion of insanity at the time of the homicide, be allowed to express an opinion that he was insane at the trial, or had been at any time since the 6th of July. Nor was it even allowable to say they had examined the prisoner, since that time, with a view to ascertain his mental condition. These restrictions were deemed proper by the court, as I gather from the bill of exceptions, on the ground that the verdict on

1 In the matter of Morgan, a lunatic, 7 Paige, 236.

the preliminary issue had conclusively established for all purposes connected with this trial, the sanity of the prisoner at the time when that verdict was rendered.

I cannot adopt the suggestion made on the argument that the 6th of July may have been taken as a reasonable time by which to bound the inquiries made of these witnesses; on the contrary, I think it quite clear that the court regarded the preliminary verdict as decisive of the question of present insanity, and therefore limited the witnesses to the time when that verdict was rendered. In giving reasons for his opinion that the prisoner was insane, Dr. Van Epps spoke of an interview with him since the 6th of July, when he "was stopped by the court, who then remarked (an objection having been made by the counsel for the People) that the question of present sanity had been tried and a verdict rendered on the 6th of July instant, and that the question of the present sanity could not then be again retried;" that the question now was as to the sanity of the prisoner when the deed was done the preceding March, "and that the evidence of insanity must be confined to facts before and at the time of committing the act, and up to the 6th of July instant, when the verdict of sanity was rendered." Dr. Hun, another of these witnesses, had first seen the prisoner on the 15th of July. The prisoner's counsel "proposed to prove by this witness that, in his opinion, the prisoner is and was insane at the time of the commission of the crime. This was objected to by the counsel for the People, on the ground that the verdict on the preliminary issue, rendered on the sixth day of July instant was and is conclusive that the prisoner was sane on that day; and that the same cannot be contradicted by evidence." The court did not pass directly upon this offer and objection; although the ground stated by the counsel for the People is understood to have been precisely that which the court acted upon. This witness was asked if he had made a personal examination of the prisoner since his arrival at the court, which was on the 15th of July, "with reference to the state of his mind." To this the counsel for the People objected, and the court refused to allow the witness to give an answer. He was then asked if it was his opinion, founded upon personal examination since the 6th of July, that the prisoner was insane on the twelfth of March when the homicide was perpetrated. This was objected to by the counsel for the People, and the court sustained the objection. The witness was then asked his opinion, founded on such examination, as to the prisoner being insane at the time when the question was put. This was also objected to and excluded by the court.

Opinions of Medical Men.

Dr. McNaughton was examined under like restrictions. "The court decided that the witness should not testify as to any examination made by him of the prisoner since the sixth day of July instant," and particularly "instructed the witness that he should, in any future testimony to be given by him upon the trial of this cause, exclude all knowledge or information gained by him of or about the prisoner by or from any personal examination made by him of said prisoner, since the said sixth day of July instant." These references to points decided and views expressed by the court clearly show, in my opinion, that the court regarded the preliminary verdict as absolutely conclusive for all purposes, in this case, that the prisoner on and after the sixth of July was in a sane state.

The views of the court upon this part of the case were, in my opinion clearly erroneous. In strictness the verdict on the preliminary issue was not before the court and jury on the trial of the issue of guilty or not guilty, nor was it, in any respect, material to such trial. But if it should be regarded as a fact in the case, of which the court and jury, while engaged in the trial of the main issue, might take notice, no such consequence as that deduced by the court would follow from it. The only object of the preliminary trial was to ascertain the mental condition of the prisoner, in order to determine whether he should then be tried on the indictment. This, I repeat, was the only object of that trial, and the result at which the first jury arrived could have no possible bearing or just influence upon the trial of the main issue. The indictment was not to be tried piecemeal, but at one time, and by a single jury. If, therefore, the opinion sought to be obtained from these medical witnesses was otherwise competent and proper, and that seems to have been conceded, it is perfectly clear that the preliminary verdict constituted no obstacle to its reception.

I am not about to inquire how far, or under what circumstances, the opinion of medical witnesses may be admissible on the question of insanity, although in general, nothing is better settled than that such evidence is competent.[1] And I entertain no doubt that such a witness should be allowed to express an opinion in regard to the mental condition of a person alleged to be insane in the month of March, although the opinion may have been founded solely on an examination made in the succeeding July. In most cases, undoubtedly the opinion would be more satisfactory and convincing, when based on observations made at or about

[1] 1 Phil. Ev. 290; Shelford on Lun. 62, 67–73; 1 Greenl. Ev., sect. 440.

the time to which the inquiry relates. But this is not decisive against the reception of such evidence, though founded on examinations made at a later period. The competency of the testimony is one question, and its effect another. The first is for the court, and the latter for the jury. It will sometimes, undoubtedly, be found, and perhaps not unfrequently, that the mental malady is such that an examination would disclose beyond all peradventure to a skilful physician, what must have been the condition of the patient for months or years before. The lateness of the time when the examination was made, as well as the character of the malady, are certainly to be considered in determining the degree of consequence which should be given to the opinion of the witness, but unless the intervening time is much greater than from March to July, that can furnish no solid objection to the admissibility of the evidence. If I could, therefore, adopt the suggestion that the sixth of July was taken by the court as a reasonable limitation to inquiries of this description, I should still be unable to agree that the court had a right to impose any such restriction upon the witnesses. It was competent for such witnesses to state what their opinions were, whether founded on examinations before or during the trial; and these opinions might not only extend to the mental condition of the prisoner at the time when the homicide was perpetrated, but they might be brought down to the very time when the witness was speaking. The latter would be admissible, not because the present insanity of the prisoner would necessarily control the verdict, but because it tended to fortify the conclusion that insanity existed in the preceding March. But, although such are my views upon this part of the case, it is not supposed that the court excluded the evidence of the opinion of these witnesses in consequence of the lateness of the period when their examinations had been made. The evidence was shut out, as I understand the case, because the verdict on the preliminary issue was supposed to constitute an insuperable bar to its reception. This, as before said, was, in my judgment, erroneous. Upon the whole case, therefore, I think the judgment of the court below should be reversed, and a new trial ordered.

Whether the prisoner was or was not insane at the time of the homicide or the trial, is not a question before us on this bill of exceptions, and no opinion on that subject is intended to be expressed or intimated.

Judgment reversed.

INSANITY AT TRIAL — INQUIRY — BURDEN OF PROOF — RIGHT TO OPEN AND CLOSE.

United States *v.* Lancaster.

[7 Biss. 440.]

In the United States Circuit Court for the Northern District of Illinois.

Before Hon. Henry W. Blodgett, *District Judge.*

1. **Upon an Inquisition of Insanity** on a motion for a new trial after verdict of guilty of perjury, the question is the same as if raised when the prisoner was called to plead. The question to be decided is, whether the defendant was incapable of comprehending the dangerous position in which he was placed, and of taking intelligent measures to meet it.

2. **Burden of Proof.** — The burden of proof of insanity is upon the defendant, yet he should have the benefit of any reasonable doubt.

3. **Practice — Opening and Closing.** — In an inquisition of insanity the counsel for the prisoner should open and close the case to the jury.

Mark Bangs, United States Attorney, for the United States.
Leonard Swett, for defendant.

Blodgett, J., charged the jury as follows: On the fourteenth of February last, Alvin N. Lancaster was put upon his trial in this court, on an indictment for the crime of perjury. The trial resulted in a verdict of guilty, and a motion was made for a new trial. One of the grounds for this motion was based upon the suggestion that at the time of his trial the defendant was of unsound mind, and therefore unable to properly plead to the charge or conduct his defence. This suggestion was sustained by such affidavits and other proofs as, in my estimation, made it necessary to the ends of justice that the facts should be investigated by a jury. And you have been impanelled to inquire into and pass upon the question.

There is no controverted question of law in the case, and the inquiry involves only a question of fact, of which you are the proper and sole judges. The question is, was the prisoner, at the time of his trial, so far of unsound mind as to be incapable of comprehending the nature of the charge against him, and of properly presenting his defence. The testimony is material to be considered only so far as it tends to throw light on this question, and naturally divides itself into two classes: 1. The testimony of witnesses who have known the prisoner for a longer or shorter time, and have detailed facts in regard to his history, his business enterprises and his domestic and financial troubles. 2. The

testimony of professional men who have given special attention to the investigation of mental and nervous diseases, and who, by reason of their skill and attainments, are deemed in law qualified to give an opinion as experts, or persons of skill upon the question before you.

You have heard from the various witnesses who have known the defendant, some of them for many years, many facts in regard to his previous life; his business, his temperament, and various vicissitudes and incidents in his career; his successes and failures, and the alleged changes which, it is claimed, have taken place in him, and from which you are asked to infer that he has become insane. There are no special contradictions or discrepancies in this testimony. The witnesses who have been called on both sides agree in many of the substantial matters of fact.

It may be considered as conceded that defendant now is about fifty years of age; that for many years previous to 1873 he had been an extensive and successful operator in real estate, and had accumulated a large amount of property, his property being estimated as worth, in 1873, over and above incumbrances, from $150,000 to $250,000; that he possessed unusual capacity as a business man — was prompt and rapid in his conduct of negotiations and business affairs, and always exhibited a quick and irascible temper and a somewhat imperious, jealous and exacting disposition; that in 1869 he lost his wife, and in 1870 his children died, and he showed immediately after his bereavment great grief, and had a very demonstrative way of displaying it. Sometime in the summer of 1873, a Miss Warren, of New York City, brought some suits against him for the collection of about $12,000, which she claimed he owed her. He resisted this claim, and insisted that it was prosecuted for purposes of blackmail, and charged all persons who took part in its prosecution as conspiring against him. And it seems to have become an almost fixed habit to indulge in violent denunciations of, and threats toward, all who had any part in the prosecution of these suits. His property has melted away, and he is now impoverished, and instead of being wealthy, is really a poor man. These facts are admitted, or at least not disputed.

Other facts which may be said to be proved but are not admitted: that his mind is engrossed in trifles; he has become indifferent to business; has acted in a strange and unusual manner; become eccentric in his conduct; and, although indicted for a grave crime, did not appear to realize his danger, and made no preparation for his defence, although often urged to do so by his friends. Eminent medical men,

from examinations and from knowledge of the man, give an opinion, as a matter of skill, that he is insane.

From all this group of facts, you are asked to deduce the conclusion that the prisoner was, at the time of trial, insane, the theory being that the proof shows that since the death of his children, his mind has been giving way, until he is now and was at the time of his trial, actually insane, or so far in the incipient stages of insanity as to render him incapable of properly appreciating and meeting the peril in which he was placed.

On the part of the Government it is contended, and supported by the evidence of eminent medical men, that while they do not deny many of the facts testified to, they deny that they necessarily or fairly establish the allegation of insanity, but insist that all the incidents and facts stated in the testimony, only show him to be a man of violent passions, who has given way in latter years to a sort of ungovernable rage toward those who were endeavoring to enforce the collection of a valid debt from him; that he was always quick tempered and jealous, and has only exhibited to an aggravated degree his natural character toward those whom he disliked, and is simulating or putting on the appearance of insanity to avoid sentence.

The real question, as I have before said is, whether the evidence satisfies you that this man's mind had so far broken down and lost its texture that he was at the time of his trial incapable of comprehending the dangerous predicament in which he was placed, and taking intelligent measures to meet it? Did he realize the gravity of the offence with which he was charged, as he would if in the possession of his ordinary mental faculties? Not that he should have been so much affected by it as some other men would, if he had been in possession of his ordinary mental vigor and coherence of ideas.

All the evidence tends to show that he was at one time, and not many years ago, a man of clear mental perceptions, understood the ordinary obligations which one man owes to another and to society, and while he may have been shrewd and sharp at a bargain, and perhaps exacting in enforcing what he deemed a legal or business advantage over those with whom he was dealing, yet there is no proof but that he recognized the ordinary moral and legal obligations of business, and was as truthful and upright as ordinary men in their dealings. And I think it may be considered as proven, that in the last two or three years, since the loss of his children, to some extent, and since the commencement of his troubles with Miss Warren in a more palpable degree, his most intimate friends have noticed a marked change in his manner, conduct, and habits of thought.

Does the proof satisfy you that the change in the man shows that he has become insane, or so far insane as to be incapable of properly caring for himself? And a single act of eccentricity or of irrational conduct is not evidence of insanity, but a group or series of unnatural acts may properly be considered as tending to prove insanity. Or were these acts the result of his giving way to a naturally violent temper and jealous disposition? Were these exhibitions the result of insanity, or mere neglect to properly rule his own spirit? Has he simulated insanity, or was he in fact insane at the time of his trial?

The name of the disease is not important if the man is really crazy. It makes no difference whether it is called paralysis of the insane, or paresis — or by some other name — if the fact of insanity exists. Doctors may disagree as to a diagnosis of disease, but we have nothing to do with mere names.

While the burden of proof may be said to be on the defendant, to satisfy you that he is in fact insane, yet, if the proof, when all considered together, leaves a reasonable doubt upon your mind of this man's sanity, he should have the benefit of the doubt. That is to say, no man should be considered as a proper subject for criminal prosecution, of whose sanity there is ground for a reasonable doubt.

The question is not as stated by counsel for the prisoner, whether the defendant has had a fair trial, but whether he was in such a mental condition as to be capable of appreciating the exigency and properly preparing for it. If he was sane he ought to have made proper preparations for his trial. If he was so insane as not to comprehend the peril he was in, or the crime he was charged to have committed, then he ought not to have been tried, and if he is still so insane, he ought not to be sentenced for the crime of which he has been found guilty by the jury.

This case should be considered in the same light by you as if it had not been tried.

Suppose his trial was not impending, and his counsel should come into court and suggest that his client was so far insane as that he ought not to be tried, and the court as a preliminary step, had ordered a jury to be impanelled to try the question of his sanity or insanity, the duty of that jury would be precisely what yours is now — that is, to inquire into and find whether the defendant was so far insane as to be incapable of realizing the peril in which he was placed, and taking such steps as a prudent man, under the circumstances, would have taken to prepare for his trial, and whether that insane condition still continues.

If found insane by your verdict, the verdict now standing against him will be set aside.

The jury found the prisoner to have been insane at the time of his trial on the indictment.

On calling the matter for trial, the question arose as to which side should open the case. The court ruled that counsel for the prisoner should open and close the case to the jury.

INSANITY AT TRIAL — PROCEDURE — RIGHT OF PRISONER TO WAIVE QUESTION.

STATE *v.* PATTEN.

[10 La. Ann. 299.]

In the Supreme Court of Louisiana, April, 1855.

Hon. THOMAS SLIDELL, *Chief Justice.*
" C. VOORHIES,
" A. M. BUCHANAN,
" A. N. OGDEN,
" H. M. SPOFFORD, } *Judges.*

1. **Whenever a Prisoner's Sanity at the** time of the offence alleged is in question, the rule that he may control or discharge his counsel at pleasure, should be so far relaxed as to permit them to offer evidence on these points, even against his will.

2. **In a Criminal Case, when after the close** of the testimony in behalf of the State, the counsel of the accused alleged the prisoner's insanity before, at the time of, and since the killing, and offered to introduce testimony in proof of the fact, and thereupon the prisoner arose, and repudiated such defence, and discharged his counsel, and the court gave the case to the jury without further evidence or pleadings on behalf of the prisoner: *Held*, that the court erred in allowing the prisoner, under the circumstances, to discharge his counsel, and erred in not allowing them to offer proofs on the question of insanity.

APPEAL from the First District Court of New Orleans. ROBERTSON, J.

Isaac E. Morse, Attorney-General for the State.

Larue & Whittaker and *A. Hennen*, for defendant and appellant.

SPOFFORD, J. — Upon the trial of James Patten for the murder of Turnbull, the following bill of exceptions was taken by the prisoner's counsel: —

"Be it remembered, that on the trial of this cause on the 20th day of March, 1854, after the evidence on the part of the State was closed, and when the counsel of the prisoner were proceeding to prove, by the evidence of the witnesses, the insanity of said prisoner at the time of the

killing, set forth in the indictment, and a long time before, and even since the said killing, the said prisoner arose and objected to, and repudiated the said defence, and insisted upon discharging his counsel and submitting his case to the jury without any further evidence or action of his counsel in his defence; his counsel opposed, and remonstrated against the prisoner's being permitted to do so, alleging that they were prepared to prove the defence by clear and irresistible testimony; but the court overruled the objection of the said counsel, and permitted the prisoner to discharge his said counsel, and refused to hear them further in his defence, and gave the case to the jury without any further evidence or pleading on his behalf; to all which opinion and ruling of said court, the defendant's said counsel excepts, and prays his exceptions may be signed," etc.

[Signed] JNO. B. ROBERTSON, *Judge.*

There was a verdict of "guilty, without capital punishment," and after his former counsel had, in the quality of *amici curiæ*, attempted to obtain a new trial and an arrest of judgment without success, the prisoner was sentenced to hard labor for life in the penitentiary. From that judgment the present appeal has been taken.

The sanity or insanity of the prisoner is a matter of fact; the admissibility of evidence to establish his insanity, under the circumstances detailed in the bill of exceptions is a matter of law, and the only matter which the constitution authorizes the tribunal to decide.

The case is so extraordinary in its circumstances that we are left without the aid of precedents.

In support of the ruling of the district judge, it has been urged that every man is presumed to be sane until the contrary appears, and that a person on trial for an alleged offence has a constitutional right to discharge his counsel at any moment, to repudiate their action on the spot, and to be heard by himself; hence the inference is deduced that the judge could not have admitted the evidence, against the protest of the prisoner, without reversing the ordinary presumption and presuming insanity.

In criminal trials it is important to keep ever in mind the distinction between law and fact, between the functions of a judge and those of a jury. It was for the jury and the jury alone to determine whether there was insanity or not, after hearing the evidence and the instructions of the court as to the principles of law applicable to the case. By receiving the proffered evidence for what it might be worth, the judge would have decided no question of fact; he would merely have told the jury: "The law permits you to hear and weigh this evidence; whether it prove

anything, it is for you to say." By rejecting it, he deprived the jury of some of the means of arriving at an enlightened conclusion upon a vital point peculiarly within their province, and in effect, decided himself, and without the aid of all the evidence within his reach, that the prisoner was sane.

It is idle to say that the legal presumption and the prisoner's own declarations, appearance, and conduct on the trial established his sanity to the satisfaction of both judge and jury; for presumptions may be overthrown, declarations may be unfounded, and conduct and appearances may be deceitful; and the prisoner's counsel, sworn officers of the court, with their professional character at stake upon the loyalty of their conduct, alleged that they stood there prepared to prove by what they deemed clear and irresistible testimony that the accused was insane at the time of the homicide, long before, and ever since; so that the sole inquiry now is, not whether they or the court were right as to the fact of sanity, upon which we can have no opinion, but whether they should have been allowed to put the testimony they had at hand before the jury, to be weighed with the counter-evidence.

If the prisoner was insane at the time of the trial, as counsel offered to prove, he was incompetent to conduct his own defence unaided, to discharge his counsel, or to waive a right.

Upon the supposition that the counsel were mistaken in regard to the weight of the evidence they wished to offer, as they may have been, still its introduction could do the prisoner no harm, nor could it estop him from any other defence he might choose to make on his own account; neither could it prejudice the State, for it is to be presumed that the jury would have given the testimony its proper weight; if, on the other hand, the counsel were not mistaken as to the legal effect of this evidence, the consequences of its rejection would be deplorable indeed.

The overruling necessity of the case seems to demand that, whenever a prisoner's soundness of mind and consequent accountability for his acts are in question, the rule that he may control or discharge his counsel at pleasure should be so far relaxed as to permit them to offer evidence on those points, even against his will.

Considering, therefore, that it would be more in accordance with the sound legal principles and with the humane spirit which pervades the criminal law, to allow the rejected testimony to go before the jury, the cause must be remanded for that purpose.

It was said in argument, on behalf of the State, that the alleged insanity was, at most, but a monomania upon another topic, which could not exempt the prisoner from responsibility for the homicide.

The judge will instruct the jury in regard to the principles of law which govern this subject, when all the facts shall have been heard. At present the discussion is premature.

It is, therefore, ordered that the judgment of the District Court be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, according to law.

INSANITY AFTER CONVICTION—WHERE JUDGE IS SATISFIED OF SANITY JURY UNNECESSARY.

BONDS *v.* STATE.

[Mart. & Yerg. 143; 17 Am. Dec. 795.]

In the Supreme Court of Tennessee, 1827.

Hon. ROBERT WHYTE,
" JOHN CATRON,
" JACOB PECK,
" HENRY CRABB, } *Judges.*

If a Prisoner after Conviction allege why sentence should not be pronounced that he is a lunatic, but the judge upon his own inspection is satisfied that the plea is false, he may pronounce sentence without calling a jury to try the issue. But *aliter* where the judge has a doubt or the case is one of difficulty.

WHITE, J., delivered the opinion of the court.

Duncan Bonds was indicted in the Circuit Court of the County of Lincoln, at its September term, in the year 1824, for the murder of Felix Crunk. To the indictment, upon his arraignment, he pleaded not guilty, and put himself upon the country, and the attorney-general did the like. The jury found the prisoner guilty of the murder, wherewith he was charged by the bill of indictment, and the Circuit Court passed sentence of death upon him. Whereupon the defendant, by his counsel, entered two bills of exceptions; which being signed and sealed by the court, and made a part of the record, a writ of error was taken to this court.

The first bill of exceptions shows that when the prisoner was led to the bar, and was asked by the court if he had anything to say why sentence of death should not be pronounced upon him, in answer thereto by his counsel, he alleged that he was at that time a lunatic, and that

sentence could not be pronounced upon him; and offered to plead his lunacy in bar of the sentence, and also demanded of the court that a jury be called to try the issue of fact arising from that plea. But the court, upon inspection of the prisoner, and upon consideration of the case, because nothing was shown to render it probable that defendant was a lunatic, or to make that matter doubtful, refused to allow the prisoner his plea aforesaid, and denied him the privilege of a jury at this time, to try the question of his sanity or insanity, and proceeded to pronounce the sentence of death accordingly, the prisoner having nothing further to allege to the contrary.

Upon this bill of exceptions it is contended by the defendant's counsel, that there is error in this; that the Circuit Court refused, upon the allegation by them made, of the lunacy of the prisoner, to receive a plea of lunacy in bar of death being pronounced at that time, and to empanel a jury to try the truth of the plea; and it was urged that this course of proceeding, upon the allegation of lunacy, made by the counsel, on behalf of the prisoner, was not a matter of choice or discretion with the court, but imperative, and that the allegation must be taken as true by the court, unless the fact was submitted for trial to a jury; and 1 Chitty C. L., is cited in support of this position, where it is laid down: "The judge may, if he pleases, swear a jury to inquire *ex officio*, whether the prisoner is really insane, or merely counterfeit; and, if they find the former, he is bound to reprieve him till the ensuing session." The meaning of this passage, giving it a reasonable construction, must be that if upon the question made, the judge is not satisfied, or has doubts, he may call in to his assistance the aid of a jury, and submit the matter to them. The law on this point is more fully stated in 1 Hawk. P. C.,[1] in the notes, where it is said: "Every person of the age of discretion is presumed of sane memory, until the contrary appears, which may be, either by the inspection of the court,[2] by evidence given to the jury, who are charged to try the indictment,[3] or, by being a collateral issue, the fact may be pleaded and replied to one term, and a venire awarded, returnable *instanter* in the nature of an inquest of office;[4] and this method, in cases of importance, doubt, or difficulty, the court will in prudence and discretion adopt.[5] From this it appears that inspection by the court is one of the legal modes of trying the fact of insanity; and nothing appears in the record of this case

[1] p. 3.

[2] 1 Hale, 33; Tr. per pais, 14; O. B. 1724, No. 4.

[3] 3 Ba. Abr. 21; 1 Hale, 33, 35, 36; O. B. 1124, No. 222.

[4] Inst. 46; Keil. 13; 1 Term, 61.

[5] 1 Hale, 35, 50, 56; 1 And. 154.

to show that the discretion[1] of the court, in adopting the mode pursued, was erroneously exercised.

This court, therefore, is of opinion that there is no error in the matter of the first bill of exceptions.

Judgment affirmed.

INSANITY AFTER CONVICTION — EVIDENCE — CERTIORARI.

SPANN *v.* STATE.

[47 Ga. 549.]

In the Supreme Court of Georgia, January Term, 1873.

Hon. HIRAM WARNER, *Chief Justice.*
" H. K. MCCAY, } *Judges.*
" W. W. MONTGOMERY, }

1. **Insanity after Conviction — Evidence.** — In an inquisition to inquire into the sanity of a man convicted of murder and sentenced to be hanged, and whom it is alleged has, after conviction, become insane, evidence of his insanity at times before conviction is only admissible as explanatory of his acts since.

2. **Whether Certiorari will Lie** to review the proceedings before a jury called under the statute to inquire into the sanity of a prisoner alleged to have become insane since his conviction, *quære*

Enoch F. Spann, after his conviction of the crime of murder, and after he had been sentenced to be hung, was alleged to have become insane. The sheriff, with the concurrence and assistance of George W. Davenport, Ordinary of Webster County, under the provisions of section 4572 of the Revised Code, summoned a jury of twelve men to look into such insanity. On the 16th and 17th days of July, 1872, an investigation of this issue was had before the said jury, the said Ordinary presiding. Witnesses were introduced to prove Spann insane at different times before his conviction. The Ordinary excluded all such testimony, and counsel for the prisoner excepted. No evidence of insanity since the conviction was introduced.

The prisoner, by his next friend, W. F. Spann, presented his petition for the writ of *certiorari* to the Honorable JAMES M. CLARK, judge of the Superior Courts of the Southwestern Circuit, alleging the ruling aforesaid as error. The judge refused to sanction the petition upon the grounds that said ruling was right and proper, and that the writ of

[1] p. 145.

certiorari does not lie to a proceeding under section 4572 of the Revised Code. Whereupon the prisoner, by his next friend, excepted and now assigns said ruling as error upon each of the grounds aforesaid.

Hawkins & Guerry, *W. A. Hawkins*, and *Phil Cook*, for plaintiff in error.

C. F. Crisp, Solicitor-General, and *C. T. Goode*, for the State.

McCay, J. — By the laws of England (and, so far as they are not altered by statute or by the nature of our government, those laws would seem to be of force here), one under sentence of death might be reprieved, that is, the execution of the sentence might, for good reasons, be stayed for a time. This is wholly distinct from the pardoning power, which in England was entirely with the crown.[1] A reprieve is technically with the judge. Even where it comes from the king, it comes in the shape of a hint to the judge, who is the actor.[2] Ordinarily, it is a discretionary power with the judge, and is exercised where he is aware of good reason why the prisoner should not be executed, and this action is only to delay the execution until the facts can be looked into.[3] A stay of execution is also granted on satisfying the judge that the convict has become insane, or is quick with child.[4] In the latter case the prisoner might demand the stay as a matter of right, since as another life is in her womb, humanity to that demands the reprieve. But the stay for insanity seems to depend on the discretion of the judge at common law.[5] He may call a jury if he pleases. The whole proceeding is merely a stay of execution, and is based rather upon the public will and a sense of propriety, than on any right in the prisoner.

By our statute, in the case of a convict becoming insane, it is the duty of the sheriff, with the concurrence of the Superior Court, to summon a jury of twelve men to inquire into the insanity. No provision is made for the mode of trial; nothing is said as to who shall preside. The jury are simply to make an inquisition. In the case of a pregnant woman, the sheriff, with the concurrence of the Inferior Court, shall select one or more physicians, who shall make inquisition. In either case, if it appear that the fact exists that the prisoner is insane, or quick with child, the sheriff shall suspend the execution, and report the inquisition and suspension to the judge, who directs the report to be entered on the minutes. The execution is thus suspended until the judge shall order otherwise, and this he must do whenever he has become satisfied that the cause for stay has ceased. In the case of an insane person,

1 4 Bla. Com. 394.
2 2 Hale, 412; 1 Chitty, 758.
3 1 Chitty, 559.
4 3 Inst. Co. 17, 18; 1 Hale, 368; Bla. Com. 395.
5 1 Hale, 370.

he may call an inquisition or not at his pleasure. In the case of a pregnant woman the statute simply says when he is satisfied, "when it shall appear to him."[1] It is rather a perversion of terms to call an inquisition of this kind the act of a court, and to exercise in reference to it the writ of *certiorari*. The whole proceeding is rather an inquiry based on public propriety and decency, than a matter of right, and whilst I do not say that a *certiorari* will not lie at all, yet, for myself I greatly doubt if such was the intent of the law makers. But we see no grounds for *certiorari* in this case. It is not pretended that the verdict does not conclude all inquiry as to the insanity of the prisoner at the time of the act done and at the trial. But it is said that any previous condition of insanity may be used to illustrate his present condition. We agree to this.

If there was any evidence of present insanity, if it were in proof that since his conviction he presented by his acts, words, looks and conduct, evidences of insanity, we see no objection to an inquiry into his past life, to see if he had been insane before; such a fact would tend to explain his present acts. We have looked carefully into the evidence for some circumstances of present insanity. We see little or nothing, except the opinions of the physicians, based on the history of his life and on certain notions they seem to have of moral insanity.

We are not disposed to criticise these gentlemen's opinions. They doubtless know far more of this matter, as a medical question, than we do, and there is doubtless such a form of insanity as moral insanity. But a doctor inquires into the sanity of a man for one reason, and the public for another. If he be diseased in body or mind, he is a subject for medical treatment, and the inquiry of the physician is to ascertain if the case calls for treatment. The public wishes to know if the man be so insane, as that society is called upon to let him go unpunished if he has committed a crime. Under our law, a man is punishable if he knew right from wrong, and this, notwithstanding, he may come within some of the classifications of the medical profession as insane.

We see nothing in this evidence to present a case where it is a violation of a proper sense of propriety or a proper consideration for those on whom God has laid his afflicting hand, to allow the sentence of the law to take its course.

Judgment affirmed.

[1] See Revised Code, sects. 4572 and 4573.

INSANITY AT TIME OF TRIAL — ISSUE — EVIDENCE — PLEA OF NOT GUILTY.

PEOPLE *v.* FARRELL.

[31 Cal. 576.]

In the Supreme Court of California, January, 1867.

Hon. JOHN CURREY, *Chief Justice.*
" LORENZO SAWYER,
" AUGUSTUS L. RHODES,
" OSCAR L. SHAFTER,
" SILAS W. SANDERSON,
Associate Justices

1. **Insanity at Time of Trial — Practice.**—Where it is suggested that a prisoner brought up for trial or judgment is insane, the question of his sanity must be submitted to a jury. The rule is the same where the prisoner has been found to be insane, the trial postponed, and called again at a subsequent term.
2. **On a Second Trial,** the former verdict is admissible on the question of present insanity.
3. **The Verdict of a Jury,** called to examine the sanity of a person at the trial, that he is insane, is conclusive that he was insane when it was rendered, and is admissible in evidence on his trial for the offence, as tending to show that he may have been insane when the offence was committed.
4. **Plea of Not Guilty — Evidence.**—Under a plea of not guilty, evidence of the prisoner's insanity both before and after the commission of the offence is admissible.

APPEAL from the County Court of Placer County.

The defendant was indicted for an assault with intent to commit a rape. The indictment was found December 6th, 1865. When the case was called, April 3, 1866, upon a suggestion that the defendant was then insane, a special jury was empanelled to try that question, who found the defendant was insane at the time. The case was then postponed. The defendant was afterwards arraigned for trial in September, 1866, and convicted. The defendant appealed.

J. Hamilton, for appellant.

J. G. McCullough, Attorney-General, for the People.

SANDERSON, J.— As to the grounds upon which it is claimed that the verdict of the jury, which was called at a previous term of the court to inquire into the sanity of the prisoner for the purpose of determining whether his trial upon the indictment ought to proceed at the term or be postponed, should have been admitted in evidence, the brief of counsel does not seem to be very explicit; but as there is some reason for supposing that the verdict was offered for the purpose of showing that the defendant was still insane and therefore that his trial ought to be fur-

ther postponed, and also for the purpose of showing that he was insane at the time the supposed offence was committed, and therefore not guilty, we shall so assume.

An act done by a person in a state of insanity cannot be punished as a public offence, nor can a person be tried, adjudged to punishment or punished for a public offence while insane.[1] Where a defendant is called or trial, or brought up for judgment, if there is any reason to suppose that he is insane, the question must be submitted to a jury, either of the regular panel or of another to be summoned for that purpose.[2] If the jury find the defendant insane the trial or judgment, as the case may be, must be postponed until he becomes sane.[3] To authorize this proceeding there must be some foundation for supposing that the defendant is insane. Such was not the case here, however, so far as we can learn from the record. There was no suggestion to that effect before the trial was commenced, either by counsel for defendant or for the People. Nor is it suggested that anything occurred subsequently calculated to inspire doubts as to the sanity of the defendant. On the contrary, the record shows that when the case was called at a previous day of the term for the purpose of ascertaining whether it was ready for trial, and for the purpose of appointing a day for trial, the defendant and his counsel being in court, the latter stated that the physical and mental condition of the defendant had so improved as to justify him in proceeding to trial at that term, and that the case was accordingly set for trial. Nothing further seems to have been said or done in relation to the matter until at the trial the verdict in question was offered on behalf of the defendant. As already intimated, the views of counsel in this connection are not very clearly stated in his brief, but from what is said we infer that he intends to claim that it was error for the court to proceed to the trial of the case without having first instituted some sort of judicial inquiry into the present sanity of the defendant, which would have resulted in a formal reversal or vacation of the previous judgment of the court that he was insane; or in other words that the verdict and judgment of the previous term to the effect that the defendant was then insane operated as a bar to any further proceedings until formally vacated upon a further proceeding of some sort confined to the consideration of the same question. If such was the law, the proper time to make the question was before the trial was commenced. But such is not the law. The statute requires no such proceeding.

[1] Sect. 583 of an act concerning proceedings in criminal cases.

[2] Sect. 584.

[3] Sect. 586.

Admission of Verdict on Second Trial.

At the previous term, upon the finding of the jury that the defendant was insane, the court made an order committing him to the custody of the officers of the insane asylum, pursuant to the provisions of section five hundred and eighty-nine. It is provided in the five hundred and ninety-first section that when the defendant has become sane the person or persons to whose custody he may have been committed shall give the sheriff and district attorney of the proper county notice of the fact, and that the sheriff shall thereupon proceed, without delay, to take him from the custody of such persons and place him in the proper custody until he be brought to trial or judgment. Whether this course was pursued in this case the record failed to show, but the presumption is that it was. But whether it was or not is of no consequence, for in either event the result would be the same. When a defendant once proved insane is called for trial a second time, if there is any doubt as to his sanity, and the People demand a trial, the court proceeds as at first, and tries the question of sanity anew, and so on to the end, as often as occasion may require. Of course, at all such trials the question is as to present insanity of the defendant, and at all trials after the first the inquiry may commence with the proposition that he was insane at the time the former verdict was rendered admitted, for of that the verdict is conclusive, or which amounts to the same thing, the former verdict may be given in evidence as tending to prove the present insanity, for having been found insane at the previous trial, the presumption is that he is still insane, unless his insanity was accidental or temporary in its nature, or occasioned by the violence of disease.[1]

But the verdict was competent evidence upon the question whether the defendant was insane at the time of the commission of the supposed offence, especially in view of the statement of counsel, that he proposed to accompany it with other evidence upon that point. In the proof of insanity under a plea of not guilty, though the evidence must relate to the time of the act in question, yet evidence of insanity before and after that time is admissible.[2] The verdict was conclusive that the defendant was insane at the time it was rendered, and therefore admissible as tending to prove that he may have been insane at the time the offence was committed. The verdict was rendered some time after the act was committed, it is true, and may not have been entitled to much weight as evidence; but that is a different question, and no rule can fix, with precision, the limits of time within which evidence of subsequent insanity on the score of competency shall be received and beyond which it

[1] 1 Greenl. on Ev., sect. 42. [2] 2 Greenl. on Ev., sect. 690.

shall be rejected. It appears from the testimony in the case that the defendant is liable to spells of insanity of greater or less duration when under the influence of unusual excitement, arising from injuries to his head, sustained while serving in the army. To prove this condition was to give evidence tending to prove insanity at the time alleged, or at any given time, and for the purpose of proving that condition it was competent to prove periods of insanity at dates remote from each other and from the particular date in question. Where the insanity sought to be proven is of a temporary character or interrupted by lucid intervals, which is apt to be the case where it results from personal injuries acted upon by casual and exciting causes, a wider range on the score of time should be allowed to the testimony than in cases where the insanity is of a more continuous and permanent character, and therefore its periods of commencement and termination more clearly defined and readily ascertained. But from the nature of the case no fixed rules as to the period of time over which an inquiry of this character should be extended, can be established, and hence the particular conditions of each case must be allowed to fix the limits. To allow a wide range is certainly in keeping with the humanity of the law, which always prefers the escape of the guilty to the punishment of the innocent.

[Omitting a ruling on another question.]

Judgment reversed and new trial ordered.

INSANITY AT TRIAL — EFFECT OF DISCHARGING JURY — "ONCE IN JEOPARDY."

GRUBER *v.* STATE.

[3 W. Va. 699.]

In the Court of Appeals of West Virginia, January Term, 1869.

Hon. JAMES H. BROWN, *President*,
" EDWIN MAXWELL, } *Judges.*
" RALPH L. BERKSHIRE, }

1. **Plea of Not Guilty — Evidence of Insanity.** — It is error to exclude from the jury evidence of the prisoner's insanity at the time of the commission of the offence, on the plea of not guilty.

2. **Insanity at Trial.** — If there is reasonable ground to doubt the sanity of the accused at the time of the trial, and after a jury is impanelled, it is the duty of the court to sus-

Syllabus and Facts.

pend the trial and to impanel another jury to inquire into the fact of such sanity. If such jury find the accused to be insane at the time of the trial, it shall then inquire as to his sanity at the time of committing the offence. If such jury find the accused to be insane at the time the offence was committed, that fact is a good defence in bar of further prosecution. If such jury find the accused sane at the time of the trial, then the trial in chief shall proceed.

3. **Discharge of Jury — "Once in Jeopardy"** — If it is not suggested that the accused is insane at the time of the trial, and the jury impanelled for the trial of the cause be discharged, the prisoner is thereby wronged by being prevented from making his proper defence before the jury, and is entitled upon his motion to be discharged from further prosecution of the indictment.

Joseph Gruber was indicted in the Circuit Court of Ohio County, on the 6th day of October, 1868, for grand larceny, and on the 8th day of the same month was arraigned, and pleaded not guilty. A jury was elected, tried and sworn to well and truly try, and true deliverance make between the State and the prisoner.

After the jury was sworn, it appearing to the court that there was question as to the sanity of the accused at the time of the commission of the offence, the court ordered that one of the jurors be withdrawn and the remainder from rendering a verdict be discharged.

A jury was thereupon impanelled to inquire whether or not the prisoner was, on the 17th of August, 1868, the time of the commission of the alleged offence, of sound mind, which jury found that the prisoner was, at the time aforesaid, of sound mind. The cause was continued until the next term of said court, when the prisoner by his counsel moved to be discharged from further prosecution of the indictment; which motion the court overruled. The accused then offered to file a special plea setting up the fact of the discharge of the jury, under the facts above stated, in bar of further prosecution of the indictment against him. This plea the court refused to allow him to file, and he thereupon excepted to the opinion of the court. Another jury was impanelled, and before it, and during the trial, the accused offered a witness who was a physician in good standing, to prove that the prisoner, at the time of the alleged offence was committed, was insane. This evidence the court refused to allow to go before the jury, and the accused again excepted. The jury found the prisoner guilty, and fixed his term of confinement in the penitentiary at four years, and on this verdict the court pronounced sentence.

The defendant obtained a writ of error and *supersedeas* to this court.

R. J. Russell, for the plaintiff in error.

Attorney-General Melvin, for the State, who declined to argue the case.

MAXWELL, J. — The petitioner, Joseph Gruber, was indicted on the 6th day of October, 1868, for grand larceny, and on the 8th day of the

same month was arraigned on the said indictment, to which he pleaded not guilty. A jury was then regularly selected, tried and sworn to well and truly try and true deliverance make between the State and the prisoner.

It appears from the record, that after the jury was sworn, it appearing to the court that there was question as to the sanity of the party at the time of the commission of the offence alleged in the indictment, by order of the court one of the jurors was withdrawn, and the remainder of the jury from rendering a verdict were discharged. A jury was thereupon immediately impanelled to inquire whether the said Gruber, the prisoner at the bar, was of sound mind or not on the 17th day of August, 1868; which jury found that the prisoner was sane on the 17th day of August, 1868, the day on which it is alleged in the indictment the larceny was committed. The cause was then continued until the next term of said court, at which term the defendant, Gruber, by his counsel, moved to be discharged from further prosecution on the indictment aforesaid; but the court overruled the said motion, and refused to discharge the accused. The defendant then offered to file a special plea, setting up the fact of the discharge of the jury under the facts above stated, in bar of the further prosecution of the indictment against him; but the court refused to allow the plea to be filed, and the prisoner excepted. Another jury was then impanelled, which found the prisoner guilty, and ascertained the term of his confinement in the penitentiary at four years, on which verdict the court pronounced sentence.

On the trial of the case before the last named jury, the counsel for the defendant offered a witness, who was a physician in good standing, to prove that the prisoner was insane at the time the offence charged against him was committed; but the court refused to allow the evidence to go to the jury, and the prisoner again excepted to the opinion of the court.

It is claimed here that the prisoner was entitled to be tried by the first jury impanelled in the case, and that the court had no power to discharge that jury from finding a verdict.

It is unnecessary to examine the numerous and conflicting cases reported to ascertain under what circumstances a court may discharge a jury in a criminal case. The Code of Virginia[1] provides, that "if a juror, after he is sworn, be unable from any cause to perform his duty, the court may in its discretion, cause another qualified juror to be sworn in his place. And in any criminal case the court may discharge the jury when it appears they cannot agree in a verdict, or that there is

[1] Edition of 1860, p. 836, sect. 12.

a manifest necessity for such a discharge." This section contains what seems to have been the sum and substance of the divisions of the courts before its enactment.[1]

The jury in the case under consideration was not discharged because it could not agree, but because it appeared to the court that there was question as to the sanity of the party at the time of the commission of the offence alleged in the indictment. The question then is, was there a manifest necessity for the discharge of the jury according to the meaning of the law? What is a case of manifest necessity for the discharge of a jury depends upon the circumstances of the case in which the question is raised. If, for instance, it had been been established in the case under consideration that the accused, after the jury was impanelled, had been discovered to be insane at the time of the trial, it would have been a case of necessity, and mercy to the accused, to have discharged the jury. But it was not even suggested that he was insane at the time of the trial. If there had been reasonable ground to doubt the sanity of the accused at the time of the trial after the jury was impanelled to try the indictment against him, it would have been the duty of the court merely to have suspended the trial and have impanelled another jury to inquire into the fact as to such sanity. And if it had been found that the accused was insane at the time of the trial, the jury impanelled on the question of the sanity of the accused should have inquired whether or not he was insane at the time of the alleged offence. But if the jury had found the accused to be sane at the time of their verdict, then they could make no further inquiry, and the trial in chief should have proceeded. The jury in chief was discharged because it appeared to the court that there was question as to the sanity of the party at the time of the commission of the offence alleged in the indictment, and to try this question, the second jury was impanelled. If the accused was insane at the time the supposed offence was committed, the fact was a good defence in bar of the prosecution to excuse from liability to punishment upon the plea of not guilty. It seems to me, therefore, that there was no manifest necessity for the discharge of the jury, but, on the other hand, that there was a manifest wrong to the accused in discharging it, because he was thereby prevented from making a defence before the jury, which he was entitled to make.

Because of the discharge of the first jury, contrary to law, it seems to me the accused could not be tried before another jury, but was entitled to his discharge.

1 U. S. *v.* Perez; 9 Wheat., 579; Fell's Case, 9 Leigh, 613; Williams' Case, 2 Gratt. 567.

Notes.

The accused being entitled to his discharge, moved the court to discharge him, and upon the motion being overruled by the court offered to file a special plea, setting up the improper discharge of the first jury. This was a case in which the accused should have been discharged on his motion, because the record shows a continuous proceeding against him on but one indictment, and shows with certainty that the Joseph Gruber who made the motion to be discharged, is the same person who was indicted, arraigned, and who pleaded not guilty to the indictment, and the same person whom the jury was impanelled to try. If these things did not all appear from the record, it would have been necessary to have set them up by a special plea.

In this view of the case the question made on the exclusion of the evidence to prove insanity, offered to the jury which convicted the accused, is in no wise material to the case; but as it is made in the assignment of error, it is, perhaps, necessary to decide it.

If the accused was in fact insane at the time the supposed offence was committed by him, he is guilty of no offence, and upon the fact appearing to the jury, it would have been its duty to have found him not guilty. It was, therefore, error in the court to exclude from the jury the evidence offered to prove the prisoner's insanity.

I am of the opinion that the judgment complained of will have to be reversed; and the court proceeding to enter such judgment as the court below ought to have entered, must discharge the accused upon his said motion, from all further proceedings under the indictment.

BERKSHIRE, J., concurred.

Judgment reversed, and the prisoner discharged.

NOTES.

§ 101. **Insane Person Cannot Be Tried.**—Insanity arising after the offence was committed but before trial is no defence to the indictment.[1] But an insane person cannot be tried;[2] and, therefore, if from the appearance or conduct of a prisoner when called on to plead, it appears that he is insane, the court should institute a preliminary inquiry to ascertain his sanity.[3]

[1] Jones *v.* State, 13 Ala. 153 (1848).

[2] Ley's Case, 1 Lewin, 237 (1828).

[3] Jones *v.* State, 13 Ala. 153 (1848); People *v.* Farrell, 31 Cal. 576 (1867); Com. *v.* Braley, 1 Mass. 103 (1804); Freeman *v.* People, 4 Denio, 9; People *v.* Kleim, 1 Edm. Sel. Cas. 13 (1845).

Practice.

No plea of present insanity is required. If at any time during the proceedings in a criminal trial, a doubt arises as to the sanity of the prisoner, it is the duty of the court of its own motion to suspend further proceedings in the case until the question of sanity has been determined. The prisoner's counsel cannot waive such an inquiry, nor on the other hand can he compel the court to enter upon it when no ground for such doubt exists. [1]

Generally, however, this is left to the discretion of the trial court, and if the prisoner pleads to the indictment, the omission of the court to institute the preliminary inquiry cannot be assigned as error, though from the facts as set out in the record, there may be strong grounds for the belief that the prisoner was insane at the time of the trial. [2]

When the judge is satisfied that the plea of insanity at trial is false he may pronounce sentence without empanelling a jury to try the issue. [3]

In Texas when an affidavit is made by a respectable person that the prisoner has become insane, a jury must be empanelled to try this issue, and this, though the party making the affidavit is unknown to those in court.[4] And it is error not to do so, which is not cured by trying the plea of insanity after trial and conviction.

The laws of Iowa provide that when a prisoner appears for arrangement, trial, judgment, or any other occasion, when required, if a reasonable doubt arises as to his sanity, the court shall order a jury to be empanelled to inquire thereof. The proceedings are suspended until this question is determined and if the verdict is in favor of his sanity, the trial proceeds; but if otherwise, the proceedings are further suspended until he becomes sane. "Under this statute," say the Supreme Court, in *State* v. *Arnold*,[5] "the court is to inquire into the prisoner's mental condition at the time he appears for arraignment or on any other occasion when required, and not at the time of the commission of the offence. In determining whether a reasonable doubt exists as to his sanity, before empanelling the jury, the judge is not confined alone to the case made for the prisoner by his counsel, nor to suggestions to that effect made by his relations or other persons for him, but may in his discretion investigate the whole matter thoroughly, take into consideration all the circumstances, obtain all the light reasonably attainable, and from all the facts thus developed, determine whether the necessity exists for the inquiry. The statute was enacted out of abundant and tender regard for the rights of the accused, but the inquiry should not be allowed, if from all the circumstances there is no reason to doubt his sanity. If such doubt does arise the inquiry should be promptly and thoroughly made. And this because it is the dictate of humanity and the command of the law.

"In this case the testimony as to the sanity of the accused is all before us, and after examining it carefully, we are brought to the conclusion that there was no error in refusing the proposed investigation. There is some testimony tending to show that prior to the alleged larceny, he acted strangely; and that since, his manner occasionally indicated mental imbecility. There is none, however, showing insanity at the time he appeared for trial. This was some five months after the commission of the offence. The testimony not only did not show in-

1 People *v.* Ah Ying, 42 Cal. 18 (1871).
2 Jones *v.* State 13 Ala. 153 (1848).
3 Bonds *v.* State, Mart. & Y. 143 (1827).
4 Guagando *v.* State, 41 Tex. 626 (1874).
5 12 Iowa, 479 (1861).

Notes.

sanity, but we can see nothing tending to show it at that time. The legal presumption is that he was sane. This presumption should be rebutted, and the reasonable doubt created by the prisoner, or from a consideration of the testimony and circumstances presented. To do this, evidence of mere incapacity to fully understand and comprehend all his legal rights; and to make known in the most succinct and intelligent manner to his counsel all the facts material to his defence is not sufficient. A doubt must be raised whether at the time there is such mental impairment either under the form of idiocy, intellectual or moral imbecility, or the like, as to render it probable that the prisoner cannot, as far as may devolve upon him, have a full, fair, and impartial trial. If insanity existed at the time of the commission of the offence, of course, it presents a different question, availing as it would the prisoner on his final trial. So if his mental condition has been such in the interim as to prevent the preparation of his defence, it might be a good ground for a continuance. But if there is no room for a reasonable doubt on the subject at the time he is arraigned for trial, or on any other occasion when he is required to appear, he cannot demand the investigation contemplated by the statute."

In *People* v. *Scott*,[1] the prisoner pleaded guilty to an indictment for incest. His present insanity being alleged, a jury was impanelled which found him insane, and he was committed to an asylum. On his discharge, his reason being restored, his case was brought before the court and he was sentenced to ten years' imprisonment. Before judgment he asked to withdraw the plea of "guilty" and plead "not guilty," supporting his application with affidavits that he had been insane for many years. But this the court refused. On appeal it was held that as the evidence raised a doubt of his sanity at the time the plea was interposed, the motion should have been granted.

Where the prisoner at the trial objected to be defended by counsel, but afterwards assented to allowing him, it was held no ground of error that the judge permitted the counsel to conduct the case.[2]

On a trial of present insanity the jury may form their judgment that he is insane, on his appearance before them, without calling witnesses.[3]

In England a grand jury has no right to ignore a bill on the ground of insanity; for this would result in preventing the confinement of the prisoner under the statute.[4]

So one must not be tried when he is so intoxicated as not to appreciate his peril or to act advisedly with his counsel.[5]

§ 102. **Deaf and Dumb Person.** — A prisoner though deaf and dumb may be tried if he can be communicated with by signs.[6] Where it is alleged that prisoner is a deaf mute and cannot understand the trial, the court will empanel a jury to try the truth of this suggestion, and if found to be true will decline to try him.[7] In *Dyson's Case*,[8] the prisoner, a girl deaf and dumb, was indicted for the murder of her infant child. On being called on to plead, an interpreter was unable to

[1] 59 Cal. 341 (1881).
[2] Reg. *v.* Southey, 4 F. & F. 865 (1865).
[3] Queen *v.* Goode, 7 Ad. & El. 536 (1837).
[4] R. *v.* Hodges, 8 C. & P. 195 (1838).
[5] Taffe *v.* State, 23 Ark. 34 (1861).
[6] R. *v.* Jones, 1 Leach, 120 (1773); R. *v.* Steel, 1 Leach, 507 (1785); R. *v.* Whitfield, 3 C. & K. 121 (1850).
[7] State *v.* Harris, 8 Jones (L.) 137, (1860).
[8] 7 C. & P. 305

make her understand. PARKE, J., empanelled a jury to try whether she was insane or not, and witnesses testified that she had not sufficient reason to understand what was going on. PARKE, J., said to the jury: "You are empanelled to try whether the prisoner is sane, not whether she is at this moment laboring under lunacy, but whether she has at this time sufficient reason to understand the nature of this proceeding, so as to be able to conduct her defence with discretion." The jury found that she was insane.

§ 103. **Insanity after Verdict or Judgment.**—If the prisoner, after conviction of a capital felony, suggests insanity, the judgment must be suspended until that fact can be tried by a jury; if after judgment, execution must be likewise stayed.[1] In an inquisition to inquire into the sanity of a man convicted of murder and sentenced to be hanged, but who it is claimed has since become insane, evidence of his insanity before conviction is inadmissible, except where such insane acts are explanatory of insane acts since conviction.[2]

§ 104. **Confinement of Insane Criminals.**—In England, when a prisoner stands mute or exhibits signs of insanity at the trial, a jury is empanelled to try the question, and if they find him insane, he is thereupon ordered to be detained in custody during the Queen's pleasure.[3] In Minnesota it is required by statute that if a prisoner is acquitted on the ground of insanity the jury shall so state in their verdict, and the court may then order the prisoner to be committed as a dangerous person.[4]

In *Commonwealth* v. *Merriam*,[5] where one who had been committed to the house of correction as a person dangerous to go at large was brought from there, and tried and acquitted of a charge of murder under a plea of insanity, he was remanded by the court to the place whence he came.

[1] State *v.* Vann, 84 N. C. 722 (1881); State *v.* Brinyea, 5 Ala. 241 (1843).

[2] Spann *v.* State, 47 Ga. 549 (1873).

[3] Reg. *v.* Davies, 6 Cox. 326; 3 C. & K. 328 (1853). As to the practice under the English statute in this respect, see R. *v.* Dwerryhouse, 2 Cox, 446 (1847); R. *v.* Israel, 2 Cox, 263 (1847); R. *v.* Pritchard, 7 C. & P. 303 (1836).

[4] Bonfanti *v.* State, 2 Minn. 123 (1858). As to the constitutionality of a statute providing for the confinement of insane criminals. Underwood *v.* People, 32 Mich. 1, (1875).

[5] 7 Mass. 168 (1810)

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ACTS AND CONDUCT.

In considering the question of the sanity of a prisoner, the jury may properly be directed to consider his appearance, conduct, and language prior to the time of the commission of the alleged crime. *State* v. *Mewherter* (Ia.), p. 102.

G., being indicted for murder, pleads insanity. The opinion of one who was in the army with G. as to whether G. when in battle was unduly excited, is irrelevant. *People* v. *Garbutt* (Mich.), p. 463.

In a criminal prosecution for the crime of murder, the witnesses for the accused may, under the plea of insanity, be permitted to give to the jury the acts, declarations, conversations and exclamations they saw, had with, and heard the accused make at any time, shortly before, at the time of, or after the killing. The objections to such testimony go to its effect. *State* v. *Hays*, (La.), p. 797.

Where insanity is relied on as a defence to crime, evidence of acts and conduct of the prisoner subsequent to its commission is not admissible to prove his condition at the time of the offence, unless they are so connected with evidence of a previous state of mental disorder as to strengthen the presumption of its continuance at the time of the crime, or when they indicate permanent unsoundness, which must necessarily relate back. *Com.* v. *Pomeroy* (Mass.), p. 799.

The plaintiff in error was tried and convicted for falsely swearing to his qualification as bail in a criminal case. Upon the trial the prisoner claimed that he was at the time of the commission of the offence, some six months previous to the trial, insane from delirium tremens. The judge charged the jury that, in deciding upon his insanity, they might take into account his physique and apparent age, and consider his conduct upon the trial. There was no evidence tending to show that his physical appearance, six months after the disease, would be affected thereby. *Held*, that the charge was erroneous. *Bowden* v. *People* (N. Y.), p. 807.

On an indictment for murder, evidence that the prisoner was or was not generally drunk when out of work, whether he did not move more quickly when drunk than sober, is not relevant where there is no proof of actual intoxication, or that he was out of work at the time. *Warren* v. *Com.* (Pa.), p. 809.

Evidence of acts and conduct at other times, pp. 859, 877.

Specific acts of insanity need not be shown, p. 865.

ADULTERY.

On an indictment for murder, evidence that the prisoner's wife had been in the habit of committing adultery with the deceased is inadmissible. Nothing but finding a man in the very act can mitigate the homicide from murder to manslaughter. *State* v. *John* (N. C.), p. 787.

S. was indicted for the murder of his wife. On the trial he offered evidence that she had for a long time been having an adulterous intercourse with one B. and others, of which S. had for a long time been cognizant. *Held*, inadmissible, both on the question of heat of passion and of insanity. *Sawyer* v. *State* (Ind.), p. 790.

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Where a homicide is done with premeditation and deliberation, evidence that the prisoner had an irascible temper or was subject to fits of passion for slight causes is incompetent. *Sindram* v. *People* (N. Y.), p. 802.

ANOTHER CRIME.

As a general rule, on the trial of one crime, proof that the prisoner had committed another is not permissible. But where the defence is insanity, and the coolness and unconcern of the prisoner at the time are relied on as evidence of it, it is competent to show that the prisoner had in former years been a smuggler, as tending to rebut the impression that his deportment was the result of insanity. *Hopps* v. *People* (Ill.), pp. 444, 865.

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BURDEN OF PROOF.

Defence of insanity must be proved to the reasonable satisfaction of the jury. *State* v. *Erb* (Mo.), p. 11.

Insanity as a defence to crime must be proved to the satisfaction of the jury; it is not necessary that the jury shall be satisfied of the insanity of the prisoner beyond a reasonable doubt. *Dejarnette* v. *Com.* (Va.), p. 18.

The burden of proving sanity does not fall upon the prosecution. The presumption is that every one is sane, and the prisoner must overcome this presumption by satisfactory evidence. If, however, there is reasonable doubt as to the prisoner's sanity, arising upon the evidence in the case, and upon nothing else, the jury should give the accused the benefit of that doubt and acquit him. *Walker* v. *People* (N. Y.), p. 40.

Where the recorder's charge accompanied the foregoing propositions with the instruction that the insanity must be *clearly proven; held*, that the charge was correct. *Id.*, p. 40.

If no evidence is given on the subject of the mental condition of the accused, the presumption is that he is sane. Where evidence on the subject is offered by the defence the prosecutor may produce answering testimony, but he must satisfy the jury on the whole evidence that the prisoner was responsible; for the affirmative of the issue tendered by the indictment remains with the prosecution to the end of the trial. *Id.*, p. 49.

The defence of insanity should not be sustained on vague and shadowy testimony, or mere conjecture. There should be clear and substantial evidence of insanity; but if there is, upon the whole evidence in the case, any reasonable doubt, the accused is entitled to the benefit of that doubt, and to an acquittal. *Id.*

The law does not presume insanity arose from any particular cause; and if the government asserts that the prisoner was guilty, though insane, because his insanity was drunken madness, this allegation must be proved. *U. S.* v. *McGlue* (U. S.), p. 55.

Upon an indictment for murder, where the defence is insanity, the jury should acquit if they entertain a reasonable doubt as to the soundness of mind of the prisoner at the time of the homicide, although they believe he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life. He is as much entitled to the benefit of a doubt on that as any other material fact in the case. *Stevens* v. *State* (Ind.), p. 87.

BURDEN OF PROOF — *Continued.*

Where there is a reasonable doubt of the prisoner's insanity adduced by him, the burden of proving his sanity falls on the State. *Bradley* v. *State* (Ind.), p. 115.

Evidence tending to show the prisoner's insanity does not throw upon the prosecution the burden of overbalancing it, if it does not raise a reasonable doubt. *People* v. *Finley* (Mich.), p. 140.

The burden of proving insanity to the satisfaction of the jury is on the prisoner. *Lynch* v. *Com.* (Pa.), p. 146.

The jurors ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong. *McNaghten's Case* (Eng.), p. 150.

A jury may find a person insane where the preponderance of the evidence is in favor of his insanity. *Com.* v. *Rogers* (Mass.), p. 158.

Where the defence of insanity is set up as an excuse for crime, the burden of proving it is on the person alleging it. The presumption is that he is sane. *U. S.* v. *Guiteau* (U. S.), p. 163.

The defence of insanity must be made out to the satisfaction of the jury. *State* v. *Gut* (Minn.), p. 189.

The prisoner must prove the plea of insanity beyond a reasonable doubt; otherwise the presumption of sanity will remain in full force. *State* v. *Pratt* (Del.), p. 327.

The burden of proof of insanity is on the accused. *State* v. *Spencer* (N. J.), p. 335.

Insanity, when set up as a defence to a crime, must be shown by clear and convincing proof; but if the jury entertain a reasonable doubt of the prisoner's sanity, they should acquit. *State* v. *Marler* (Ala.), p. 346.

The defence of insanity must be proved beyond a reasonable doubt. *State* v. *Brinyea* (Ala.), p. 349.

The burden of proof is on the prisoner to show insanity, and a reasonable doubt of sanity will not authorize an acquittal. *Boswell* v. *State* (Ala.), p. 352.

The defence of insanity must be established by proof satisfactory to the jury. *State* v. *Felter* (Ia.), p. 371.

To authorize an acquittal on the ground of insanity, the jury must be satisfied that the accused was insane. *Graham* v. *Com.* (Ky.), p. 373.

The legal presumption of sanity must be rebutted by satisfactory evidence. A doubt of sanity is not sufficient to justify an acquittal; for the presumption of sanity must be overcome by a preponderance of evidence. *Kriel* v. *Com.* (Ky.), p. 379.

To establish the defence of insanity, the burden is on the defendant to prove by a preponderance of evidence that at the time of committing

BURDEN OF PROOF — *Continued.*

the act he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did, that he did not know he was doing what was wrong. *State* v. *Lawrence* (Me.), p. 386.

Partial insanity, if not to the extent above indicated, will not excuse a criminal act. *Id.*

The prisoner pleading insanity as a defence to crime must establish it to the satisfaction of the jury. *Baldwin* v. *State* (Mo.), p. 395.

The burden of proof is on the defendant to show that he was insane at the time of the commission of the crime charged. *State* v. *McCoy* (Mo.), p. 408.

The burden of establishing the insanity of the prisoner is on the defence. But it is not necessary that it be proved beyond a reasonable doubt; it is sufficient if the jury are satisfied by the weight and preponderance of the evidence that the accused was insane at the time of the commission of the act. *State* v. *Klinger* (Mo.), p. 410.

The burden of proof being on the prisoner to prove his insanity, an instruction that to overthrow the presumption of sanity he must satisfy the jury by "the weight and preponderance" of the testimony that he was insane at the time he committed the crime, is not error. *State* v. *Smith* (Mo.), p. 415.

If the jury have a reasonable doubt of the commission of the crime, on the whole evidence, they should acquit. *Id.*

The burden of proving insanity to the satisfaction of the jury rests upon the defence; but it is not necessary that insanity should be established beyond a reasonable doubt. An instruction, therefore, which requires a *clear preponderance* of the evidence to establish insanity is erroneous. *State* v. *Hundley* (Mo.), p. 418.

The burden of proving insanity as a defence to a criminal charge rests on the prisoner. To establish such a defence, evidence is necessary, such as will reasonably satisfy the jury. *State* v. *Redemeier* (Mo.), p. 424.

The burden of proving the defence of insanity to the satisfaction of the jury rests on the prisoner. *Loeffner* v. *State* (O.), p. 432.

On the trial of an indictment for murder, where the defence is that the prisoner was insane at the time he committed the act, it is not sufficient to raise a doubt in the minds of the jury as to whether the prisoner was sane, but the evidence must be such as satisfies the minds of the jury that he was in fact insane. *Ortwein* v. *Com.* (Pa.), p. 438.

It is error to instruct the jury that insanity must be proved by "clearly preponderating" evidence. It is only necessary that the evidence supporting it should "fairly preponderate." *Coyle* v. *Com.* (Pa.), p. 441.

A prisoner charged with crime, who sets up insanity as a defence, does not thereby assume the burden of proof of such insanity. Such a defence is only a denial of one of the essential allegations to be proved by the State; and therefore, if, on the whole evidence, the jury entertain a reasonable doubt of his sanity, they must acquit. Foster's Case, 23 Ill. 293, overruled. *Hopps* v. *People* (Ill.), p. 444.

BURDEN OF PROOF — *Continued.*

G. was indicted for murder, the defence being insanity. The court instructed the jury that, "the law presumes that a man is of sound mind until there is some evidence to the contrary. * * * An accused is entitled to an acquittal if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offence is charged to have been committed. Evidence tending to rebut the presumption of sanity need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raises in your minds a reasonable doubt." *Held*, correct. *Guetig* v. *State* (Ind.), p. 455.

The defendant under a plea of insanity is not required to establish its truth by a preponderance of the evidence; but if, upon the whole of the evidence introduced on the trial, together with all the legal presumptions applicable to the case under the evidence, there is a reasonable doubt whether he is sane or insane, he must be acquitted. *State* v. *Crawford* (Kas.), p. 459.

Whenever evidence is given which tends to overthrow the presumption of sanity, the burden of proof of sanity is cast upon the prosecution. *People* v. *Garbutt* (Mich.), p. 463.

When any facts are proved which raise a doubt of the sanity of a person accused of crime, it devolves on the State to remove that doubt, and establish the sanity of the prisoner to the satisfaction of the jury beyond all reasonable doubt. *Cunningham* v. *State* (Miss.), p. 470.

Where, in a criminal case, the accused relies upon insanity as a defence, the burden of proof is on the prosecution to show sanity. *Wright* v. *People* (Neb.), p. 477.

In sustaining such a defence, where there is testimony to rebut the legal presumption that the accused was sane, unless the jury are satisfied beyond a reasonable doubt that the act complained of was not produced by mental disease, they must acquit. *Id*

Where insanity is set up as a defence to an indictment, the jury must be satisfied beyond reasonable doubt of the soundness of the prisoner's mind and his capacity to commit the crime, upon all the evidence before them, regardless of the fact whether it be adduced by the prosecution or by the defendant. *State* v. *Bartlett* (N. H.), p. 480.

On a trial for murder, where the defence was insanity, the judge charged the jury that sanity being the normal state of the mind, there is no presumption of insanity; that the burden of proving it is upon the prisoner; that a failure to prove it, like a failure to prove any other fact, is the misfortune of the party attempting the proof, and that they must be satisfied of his insanity beyond a reasonable doubt; otherwise they must convict. *Held*, error. *People* v. *McCann* (N. Y.), p. 490.

The burden of proof is upon the prosecution to show by the whole evidence that a person charged with crime, alleged to have been committed in a state of insanity, is sane. *O'Connell* v. *People* (N. Y.), p. 499.

A charge that "the proof of insanity must be as clear and satisfactory, in order to acquit, as the proof of the crime ought to be to find a sane man guilty;" or to charge that if the jury have a reasonable doubt as

BURDEN OF PROOF — *Continued.*

to the insanity of defendant, they ought to convict, is error. *Dove* v. *State* (Tenn.), p. 502.

The burden of proof is on the prisoner who pleads insanity as a defence; and the jury are the judges of the weight of the testimony adduced thereon. *McKenzie* v. *State* (Ark.), p. 533.

The defence of insanity must be proved to the satisfaction of the jury. *Boswell's Case* (Va.), p. 592.

An instruction that where the jury, from the evidence, entertain a rational doubt on the question of insanity, they should always find in favor of sanity, is erroneous. *Smith* v. *Com.* (Ky.), p. 670.

The evidence of insanity, to warrant an acquittal, should be sufficiently clear to convince the minds and consciences of the jury. *Webb* v. *State* (Tex.), p. 835, and see *King* v. *State* (Tex.), p. 844.

The burden of proof of insanity is upon the defendant, yet he should have the benefit of any reasonable doubt. *U. S.* v. *Lancaster* (U. S.), p. 897.

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New York, p. 529.
Tennessee p. 531.

BURGLARY.

See INTENT; CAPACITY TO COMMIT CRIME.

CALIFORNIA.

Test in, p. 231.

Burden on prisoner, p. 514.

CAPACITY TO COMMIT CRIME.

It is competent to show as a defence to a crime that the prisoner was in such a physical condition as to render it improbable that he committed it; as for example, that he was too drunk to have carried out a carefully executed larceny or burglary. *Ingalls* v. *State* (Wis.), p. 712.

CERTIORARI.

See VERDICT, INSANITY AFTER.

CHALLENGE.

On a trial of present insanity the prisoner is not entitled to peremptory challenges. The right to peremptory challenges exists only as to the trial on the indictment and not on the trial of preliminary or collateral issues. *Freeman* v. *People* (N. Y.), p. 882.

CHARACTER.

Evidence of the uniform good character of the prisoner is admissible where the defence is insanity. *Hopps* v. *People* (Ill.), p. 444, and see p. 865.

CHILD.

A temporary mental derangement produced by drinking intoxicating liquor, under which a boy of thirteen years of age committed a theft, authorizes a jury to acquit him. *Com.* v. *French* (Mass.), p. 581.

The child test, p. 200.

CHILDREN.

See DEMENTIA.

CONFESSION.

When insane no evidence of guilt. p. 861.

CONFIDENTIAL COMMUNICATIONS.

See HUSBAND AND WIFE.

CONFINEMENT.

Of insane criminals, p. 919.

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Moral insanity recognized, p. 270.
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CONSTITUTIONAL LAW.

See "ONCE IN JEOPARDY."

CONTINUANCE.

Refusal of application for, held error; evidence not cumulative. p. 869.
Affidavit of defendant for continuance not admissible on trial. p. 871.

CONTINUANCE OF SANITY OR INSANITY.

See PRESUMPTION.

CONVICTION.

See VERDICT, INSANITY AFTER.

COUNSEL, RIGHTS OF.

See TRIAL, INSANITY AT TIME OF.

DEAF MUTE.

Practice on trial of. p. 918.

DECLARATIONS.

See, also, ACTS AND CONDUCT.

The prisoner's unsworn declarations are not admissible in his favor, though admissible as against him. *U. S.* v. *Guiteau* (U. S.), p. 164.

Declarations of the deceased are no evidence of the insanity of the prisoner. *State* v. *Spencer* (N. J.), p. 335.

Where the defence to an indictment for murder is insanity, evidence of a subsequent conversation with the prisoner, and of the tests made at that time are not admissible to show his insanity. *Choice* v. *State* (Ga.), p. 538.

Of prisoner when admissible. *State* v. *John* (N. C.), p. 787.

The prisoner being indicted for the murder of his wife, evidence of her acts and declarations on the same day are irrelevant. *Warren* v. *Com.* (Pa.), p. 809.

Declarations not *res gestæ* inadmissible, p. 859.

DEGREES OF CRIME.

Though a total want of responsibility on account of insanity be not shown, yet if the prisoner's mind was so far impaired as to render him incapable of a deliberate, premeditated murder, he should be convicted only of murder in the second degree. *Anderson* v. *State* (Conn.), p. 129.

Where there are degrees of murder, the fact of drunkenness is relevant on the question whether the killing sprang from a premeditated purpose, or from passion excited by inadequate provocation. *Haile* v. *State* (Tenn.), p. 573.

Intoxication is relevant on the question of deliberation and premeditation. *Boswell's Case* (Va.), p. 592.

On an indictment under a statute providing that all murder "perpetrated by any kind of wilful, deliberate, and premeditated killing" is murder in the first degree, a state of intoxication or any other fact tending to

DEGREES OF CRIME — *Continued.*

prove that the prisoner was incapable of deliberation may be shown. *State* v. *Johnson* (Conn.), p. 603.

The intoxication of the prisoner is relevant in determining the prisoner's state of mind at the time of the act; and in connection with proof of provocation may tend to show that the act was one of sudden passion and not of premeditation, and that therefore the homicide is manslaughter and not murder. *Id.*, p. 609.

Where the crime was committed after provocation, evidence of intoxication is admissible on the question whether it was done in the heat of passion, and whether threatening words were uttered by the prisoner with deliberate purpose or otherwise. *People* v. *Rogers* (N. Y.), p. 624.

Intoxication is no excuse for crime; but if it deprives the reason of power to think and weigh the nature of the act committed, it may prevent a conviction for murder in the first degree. *Jones* v. *Com.* (Pa.), p. 638.

On the question of the degree of a murder, evidence of the drunkenness of the prisoner is relevant. *Swan* v. *State* (Tenn.), p. 643.

Drunkenness works no mitigation of the grade of the guilt of any one who has committed a criminal offence; yet in a case where, under the act of 1829, ch. 53, sec. 3, there must be a deliberate and premeditated killing to constitute murder in the first degree, proof of drunkenness is admissible, because it may show that the party accused was incapable, by reason of the state of his mind, of forming a deliberate and premeditated design to take life. As between the offence of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate inquiry; the killing voluntary, the offence is necessarily murder in the second degree, unless the provocation were such as to reduce the offence to manslaughter. *Pirtle* v. *State* (Tenn.), p. 645.

If a person is so drunk as to be incapable of forming a premeditated and deliberate intent to kill, he cannot be guilty of murder in the first degree. But where drunkenness does not exist to this extent, the jury may consider it with all the other facts to see (1) whether the purpose to kill was formed in passion produced by a cause operating upon a mind excited by liquor — not such adequate provocation as to reduce the crime to manslaughter, — but it may reduce it to murder in the second degree; (2) whether the purpose was formed with deliberation and premeditation, for a drunken man may be guilty of murder in the first degree. *Cartwright* v. *State* (Tenn.), p. 652.

Upon a trial for murder in the first degree or an assault with intent to commit murder in the first degree, drunkenness to any extent is relevant. Though it may not be so excessive as to render the prisoner incapable of deliberating, yet it may have excited him and produced a state of mind unfavorable to premeditation and deliberation. *Lancaster* v. *State* (Tenn.), p. 658.

Where a murder is done by some kind of wilful, deliberate and premeditated killing other than by means of poison or lying in wait, the degree of the offence is not lessened by proof that at the time it was com-

DEGREES OF CRIME — *Continued.*

mitted the prisoner was intoxicated, any more than it would be if it had been perpetrated by means of poison or by lying in wait. *State* v. *Tatro* (Vt.), p. 660.

Under a statute establishing degrees of the crime of murder, and providing that wilful, deliberate, malicious and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of premeditation. *Hoyt* v. *People* (U. S.), p. 664.

A person who designing a homicide drinks to excess, and then commits it, is guilty of murder. But drunkenness brought on by sensual or social gratification with no criminal intent may reduce an unprovoked homicide from murder to manslaughter. *Smith* v. *Com.* (Ky.), p. 669.

Drunkenness may, under peculiar circumstances repelling malice, reduce the grade of the crime from murder to manslaughter. *Blimm* v. *Com.* (Ky.), p. 675.

Deliberation as affected by drunkenness. *Warren* v. *Com.* (Pa.), p. 809.

DELAWARE.

Test in, p. 231

Burden on Prisoner, p. 514.

DELIBERATION.

See DEGREES OF CRIME.

DELIRIUM TREMENS.

See, also, DRUNKENNESS.

If a person suffering under *delirium tremens*, is so far insane as not to know the nature of his act, etc., he is not punishable. *U. S.* v. *McGlue* (U. S.), p. 55.

Voluntary intoxication does not excuse or palliate a crime, through insanity — mania a potu or delirium tremens may. *Carter* v. *State* (Tex.), p. 588.

Delirium tremens is a species of insanity. *Erwin* v. *State* (Tex.), p. 845.

Delirium tremens is usually the result of a disuse of intoxicants by an habitual drunkard, but it may ensue from casual drunkenness. *Id.*

DELUSIONS.

One who commits a crime under the influence of an insane delusion is punishable, if he knew at the time that he was acting contrary to law. *State* v. *Mewherter* (Ia.), p. 102.

Notwithstanding a party accused did an act which was in itself criminal, under the influence of insane delusion, with a view of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time he was acting contrary to law. *McNaghten's Case* (Eng.), p. 150.

A party laboring under a partial delusion must be considered in the same

DELUSIONS — *Continued.*

situation, as to responsibility, as if the facts, in respect to which the delusion exists, were real. *Id.*

Where the delusion of a person is such that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he does an act which would be justifiable if such fact existed, he is not responsible for such act. *Com.* v. *Rogers* (Mass.), p. 158.

An insane delusion is an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or impossible under the circumstances of the individual. *U. S.* v. *Guiteau* (U. S.), p. 164.

Opinions or beliefs founded on reasoning and reflection are not insane delusions nor within the law regarding them. *Id.*

The court instructed the jury: "If the defendant has an insane delusion upon any one subject, but commits crime upon some other matter not connected with that particular delusion, he is equally guilty as if he had no delusion, and was perfectly sane." *Held*, proper. *State* v. *Gut* (Minn.), p. 189.

The law as to insane delusions. p. 324.

An insane delusion relieves a person from responsibility when, and only when, the fact or state of facts which are believed in under the insane delusion would, if actually existing, have justified the act. *Boswell* v. *State* (Ala.), p. 352.

When is a criminal act done under an insane delusion not punishable. *State* v. *John* (N. C.), p. 787.

DEMENTIA.

See IMBECILE.

DRUNKENNESS.

See, also, KNOWLEDGE; CAPACITY TO COMMIT CRIME; INTENT; DELIRIUM TREMENS; PROVOCATION; DEGREES OF CRIME; MALICE; CHILD.

If a person, while sane and responsible, makes himself intoxicated, and while intoxicated, commits murder by reason of insanity, which was one of the consequences of intoxication, and one of the attendants on that state, he is responsible. *U. S.* v. *McGlue* (U. S.), p. 55.

Voluntary drunkenness is no excuse for crime; but insanity produced by continued intoxication is. *Bradley* v. *State* (Ind.), p. 115.

Where a crime is committed intentionally as a matter of revenge, the intoxication of the prisoner does not change its grade. *State* v. *Gut.* (Minn.), p. 189.

Drunkenness from social hilarity is no excuse for crime. *Kriel* v. *Com.* (Ky.), p. 379.

Temporary insanity resulting immediately from voluntary intoxication is no defence to crime. But insanity remotely occasioned by previous bad habits is entitled to the same consideration as if it arose from any other cause. *State* v. *Hundley* (Mo.), p. 418.

Voluntary drunkenness of whatever degree constitutes no defence to the commission of crime. *People* v. *Garbutt* (Mich.), p. 463.

DRUNKENNESS — *Continued.*

Drunkenness is no excuse for crime. *McKenzie* v. *State* (Ark.), p. 533.

If a man's mind, unexcited by liquor, is capable of distinguishing between right and wrong, and he voluntarily deprives himself of reason by intoxication, such intoxication is no excuse for a crime committed in that condition. *Choice* v. *State* (Ga.), p. 538.

Nor does it make any difference that a man, either by a former injury to the head or brain, or a constitutional infirmity, is more apt to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, he is responsible for his acts while in that condition. *Id.*

An inordinate thirst for liquor, produced by the habit of drinking, is no excuse for the consequences of such indulgences. The disease called *oinomania* questioned. *Id.*

The voluntary drunkenness of a murderer neither excuses the crime nor mitigates the punishment. *Shannahan* v. *Com.* (Ky.), p. 557.

One in a state of voluntary intoxication is subject to the same rules of conduct and principles of law as a sober man, and where a provocation is offered, and the one offering it is killed, if it mitigates the offence of the man drunk, it should mitigate the offence of the man sober. *Id.*

Voluntary intoxication is no defence to crime; so long as the offender is capable of conceiving a design he will be presumed to have intended the natural consequences of his acts. *Kenny* v. *People* (N. Y.), p. 562.

Artificial and temporary madness by drunkenness voluntarily contracted is no defence to the charge of homicide. *Bennett* v. *State* (Tenn.), p. 571.

H. was indicted for murder. It was proved that he was drunk at the time of the offence. The judge charged the jury that drunkenness was an aggravation of the offence, unless the prisoner was so deeply intoxicated as to be incapable of forming a deliberate and premeditated design to do the act. *Held*, error. *Haile* v. *State*, (Tenn.), p. 573.

Drunkenness may produce intoxication or mental unsoundness. So far as it produces the former it is no defence to crime. But mental unsoundness resulting from drunkenness may, if it overthrows the prisoner's sense of right and wrong, be an excuse or palliation for crime. *Beasley* v. *State* (Ala.), p. 577.

Insanity resulting from long continued drunkenness is an excuse for crime; but insanity, the immediate result of intoxication, is not. *Cornwell* v. *State* (Tenn.), p. 583.

Voluntary drunkenness does not excuse a crime, but permanent insanity, like every other kind of insanity, excuses an act which otherwise would be criminal. *Boswell's Case* (Va.), p. 592.

Where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors. But it is otherwise, if he be at the time intoxicated, and his insanity be directly caused by the immediate influence of such liquors. *U. S.* v. *Drew* (U. S.), p. 601.

DRUNKENNESS — *Continued.*

Drunkenness does not mitigate a crime; neither can it be taken into consideration by a jury in determining whether a person committing a homicide acted therein wilfully, deliberately, and premeditatedly, so as to constitute murder in the first degree. *State* v. *Cross* (Mo.), p. 619.

Voluntary intoxication is no excuse for crime. *People* v. *Rogers* (N. Y.), p. 624.

Insanity resulting from habits of intemperance and not directly from the immediate influence of intoxicating liquors, may amount to a defence to crime. *Id.*

On an offer to prove the prisoner's intoxication at the time of the commission of the alleged crime, the court remarked: "If you offer it as a defence I think it is immaterial, because I shall instruct the jury that drunkenness is more of an aggravation than an excuse." *Held*, error. *State* v. *Donovan* (Ia.), p. 678.

Insanity occasioned by voluntary intoxication will not excuse where the person is aware of his liability to insanity from the cause, and has sufficient mental capacity to form an intent. *Roberts* v. *People* (Mich.), p. 687.

But insanity (of which a person is ignorant) resulting from voluntary intoxication will render a person not responsible, where he does not know what he is doing or why he is doing the act, or if conscious of this, he is not conscious of any object in doing it, or if the diseased mind has so perverted his reason that he does not know that what he is doing is wrong. *Id.*

Where the defence of temporary insanity proceeds upon the theory that it was induced by the operation of strong drink upon a mind rendered unsound by an injury to the brain, it is error to leave the question of criminal responsibility to be determined upon the facts of injury and mental unsoundness alone, or upon the effect of intoxicating liquors apart from the other facts. *People* v. *Cummins* (Mich.), p. 695.

One in a state of voluntary intoxication is subject to the same rules of conduct and the same legal inferences, as a sober man. *State* v. *McCants* (S. C.), p. 722.

Voluntary drunkenness will not mitigate a crime. *State* v. *John* (N. C.), p. 787.

Drunkenness is no excuse for crime, pp. 727–744.

No defence to crime of perjury, p. 744.

No defence to crime of blasphemy, p. 745.

No defence to crime of arson, p. 745.

But it does not aggravate the offence, p. 745.

Exceptions to the rule, p. 747.

An excuse if it produces insanity, pp. 747–754, 873, 874.

And it is relevant on the degree of a crime, pp. 754–757, 873, 874.

But not in Missouri, p. 757.

And it is relevant on question of intent, p. 758.

DRUNKENNESS — *Continued.*

An excuse for attempt at suicide, p. 765.

Effect of drunkenness on confessions, p. 765.

Relevant on question of knowledge, p. 765.

Relevant to explain threats, p. 766, 874.

Relevant on question of provocation, p. 767.

Relevant on question of self-defence, p. 767.

Drunkenness created by third party to cause crime, p. 768.

ECCENTRICITIES.

Evidence not offered to prove insanity, but solely as bearing on the question of intent, deliberation, and premeditation, that the conduct of the prisoner prior to the homicide was characterized by eccentricities and peculiarities causing criticism with reference to his mental capacity, is inadmissible. *Sindram* v. *People* (N. Y.), p. 802.

ELECTIONS.

See INTENT.

ENGLAND.

Test of insanity in, p. 219-231.

Burden of proof on prisoner, p. 522.

EROTOMANIA.

Irrelevant on charge of murdering a man, p. 782.

ERSKINE.

His argument in Hadfield's Case, p. 201.

EVIDENCE.

See RELATIVES, INSANITY IN; PRIOR INSANITY; EXPERTS; ACTS AND CONDUCT; HUSBAND AND WIFE; DECLARATIONS.

Irrelevant, confusing, or misleading questions based on the defence of insanity, should not be permitted. *Dejarnette* v. *Com.* (Va.), p. 18.

A jury is not authorized to find a prisoner insane because some cause existed which might tend to produce insanity. *Sawyer* v. *State* (Ind.), p. 790.

EXCITEMENT.

See, also, ADULTERY.

Insanity, when pleaded in defence of a criminal act, such as homicide, must be clearly shown to have existed at the time of the commission of the act. Therefore, evidence of a witness to show a state of mental excitement in the accused, produced by the insulting language and threats used towards him by the deceased, his wife's paramour, at the time of the killing, is not admissible to show insanity. *State* v. *Graviotte* (La.), p. 785.

EXPERTS.

See, also, NEW TRIAL.

Proper form of questions to, p. 26.

EXPERTS — *Continued.*

Experts are not allowed to give their opinions on the case, where its facts are controverted; but counsel may put to them a state of facts, and ask their opinions thereon. *U. S.* v. *McGlue* (U. S.), p. 54.

Medical witnesses who have no personal knowledge of the prisoner cannot be allowed to give an opinion formed from the testimony in the case, and his conduct on the trial, as to his sanity at the time of the act. *State* v. *Felter* (Ia.), p. 92.

Books of science are not admissible in evidence. *Bradley* v. *State* (Ind.), p. 115.

The evidence of an expert should not be discredited merely beeause he expects to have his expenses paid by the party calling him. *Id.*

Where an accused person is supposed to be insane, a medical man, who has been present in court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong. *McNaghten's Case* (Eng.), p. 150.

The opinions of medical men on the state of mind of the prisoner are admissible, though they have not personally examined him. *Com.* v. *Rogers* (Mass.), p. 158.

The weight of such testimony. *Guetig* v. *State* (Ind.), p. 456.

Medical experts who have heard the whole of the evidence, or to whom the whole of the evidence has been hypothetically stated, may give an opinion as to the sanity of the prisoner at the time in question; but they cannot predicate an opinion on anything less than the entire evidence whether actually or hypothetically presented. *Webb* v. *State*, (Tex.), p. 835.

Evidence of experts, p. 879.

FORMER TRIAL.

Where witness becomes insane, his testimony on former trial is admissible. p. 866.

GEORGIA.

Test in, p. 231.

Burden on prisoner, p. 516.

HABEAS CORPUS.

Refusal of, where defence was insanity, p. 874.

HEREDITARY INSANITY.

See, RELATIVES, INSANITY IN.

HUSBAND AND WIFE.

Testimony as to insanity not within rule as to confidential communications, p. 858.

HYPOCONDRIA,

Occasional oddity or hypocondria does not amount to insanity excusing the commission of a criminal offence. Nothing short of the inability to distinguish right from wrong can do so. *Hawe* v. *State* (Neb.), p. 16.

ILLINOIS.

No test in, p. 324.

Burden on prosecution, p. 526.

IMBECILE.

An imbecile ought not to be held responsible criminally unless of capacity of ordinary children under fourteen years of age, *i.e.*, children of humble life and of only ordinary training. *State* v. *Richards* (Conn.), p. 1; and see p. 782.

INDIANA.

Test in, p. 324.

Burden on prosecution, p. 526.

INSANE PERSON.

Acts of not punishable, p. 200.

INSANE OR UNCONTROLLABLE IMPULSE.

See, also, MORAL INSANITY; TEST OF INSANITY.

If an insane impulse leads to the commission or a crime, the actor is not responsible. An instruction that "if the jury believe that the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that such act was one which he ought not to do," he was responsible for his act, is erroneous. *Stevens* v. *State* (Ind.), p. 87.

If a person commit a homicide, knowing it to be wrong, but driven to it by an uncontrollable and irresistible impulse arising not from natural passion, but from an insane condition of the mind, he is not criminally responsible. *State* v. *Felter* (Ia.), p. 92

The uncontrollable impulse which will relieve a person from the consequences of the commission of a crime, must have its origin alone in a diseased mind. *State* v. *Mewherter* (Ia.), p. 102.

"Emotional insanity," *i.e*, "that convenient form of insanity which enables a person who does not choose to bridle his passion to allow it to get and keep the upper hand just long enough to enable him to commit an act of violence and then subside," criticised. *People* v. *Finley* (Mich.), p. 140.

The law does not recognize any moral power compelling a man to do what he knows to be wrong. *State* v. *Brandon* (N. C.), p. 144.

The insanity which takes away the criminnl quality of an act must be such as amounts to a mental disease, and prevents the accused from knowing the nature and quality of the act he was doing. *Id.*

INSTRUCTIONS.

It is error for the court to select certain facts shown by the evidence, and tell the jury what weight should be attached to them. *State* v. *Smith* (Mo.), p. 413; *State* v. *Hundley* (Mo.), p. 418.

An instruction which states that there was *some* evidence tending to show that the defendant was drunk in misleading. *State* v. *Donovan* (Ia.), p. 678.

INSTRUCTIONS — *Continued.*

A prisoner on trial is entitled to have the theory of his defence clearly recognized in the charge of the court. *People* v. *Cummins* (Mich.), p. 695.

On a trial for theft the defence being the propensity to steal known as kleptomania, and there being evidence tending sustain to it, the court should charge the jury specifically on this point. A submission of the usual test of the prisoner's ability to distinguish between right and wrong is insufficient. *Looney* v. *State* (Tex.), p. 769.

It is proper for the court to direct the attention of the jury to the defence of insanity, and instruct them that it should be carefully and intelligently scrutinized. *Sawyer* v. *State* (Ind.), p. 790; and see p. 867.

On a trial for murder certain letters written by the prisoner after the homicide were introduced in evidence, in commenting upon which in his charge the court said: "They exhibit a reckless depravity of nature, destitute of remorse or regret, the reckless spirit of a desperado." Subsequently the court told the jury to disregard what had been said about the letters and to form their own conclusions. *Held*, no error. The court also said that these letters exhibited a "high order of intelligence," but afterwards withdrew the words "high order of." *Held*, no error. *Sindram* v. *People* (N. Y.), p. 802.

Where the court instructs the jury on the general issue of guilt that the prisoner is entitled to the benefit of any reasonable doubt, it is not error to refuse to charge as to reasonable doubt specially with regard to the issue of his sanity. *Webb* v. *State* (Tex.), p. 835.

The defence being delirium tremens, and there being evidence tending to establish it, the court should charge specially the principles of law applicable to this defence. *Irwin* v. *State* (Tex.), p. 845.

However slightly the evidence may tend to establish a defence, the court should charge the law applicable to that defence. *Id.*

Judge need not specially define the various types of insanity, p. 866.

Duty to instruct on insanity plea, p. 867.

INTENT.

On a trial for assault with intent to commit rape, if the prisoner was so drunk as to be incapable of forming an intent to ravish, he should be acquitted. *State* v *Donovan* (Ia.), p. 678.

One wrongfully taking the property of another, but too drunk to entertain a felonious intent, cannot be convicted of larceny. *Wood* v. *State* (Ark.), p. 680.

In a prosecution for breaking and entering a dwelling house with intent to commit larceny, the drunkenness of the prisoner at the time is admissible in evidence on the question of intent. *State* v. *Bell* (Ia.), p. 682.

Drunkenness cannot excuse or justify crime, but it may be shown in order to determine whether any crime or a particular crime has been committed at all. *Scott* v. *State* (Tex.), p. 686.

Voluntary intoxication will not excuse acts which constitute an offence. Where, however, the offence charged is an act combined with an intent

INTENT — *Continued.*

to commit an offence not actually committed, if the prisoner was rendered by intoxication incapable of entertaining the intent, he is not responsible. *Roberts* v. *People* (Mich.), p. 687.

If a person has the capacity to form the intent to kill by the means used his voluntary intoxication will be no protection, although his mental faculties were thereby so obscured as to make him incapable of judging between right and wrong. *Id.*

A person cannot be guilty of larceny whose mind cannot comprehend all the essential ingredients of the offence, and recognize their existence. Therefore an instruction that one who knows he has been taking property not his own is sane enough to commit the crime of larceny is error. *People* v. *Commins* (Mich.), p. 695.

It is no defence to an indictment for illegally voting more than once at the same election that the prisoner was so drunk when he gave his second vote that he did not know what he was doing and did not know that he had already voted. *State* v. *Welch* (Minn.), p. 697.

The act of voting more than once at the same election is not a crime unless done knowingly and with wrong intent. Therefore a person charged with this crime may show that he was intoxicated at the time he committed the act, not as an excuse for the crime, but to enable the jury to determine whether his mental condition was such that he knew he was committing an offence. *People* v. *Harris* (Cal.), p. 701.

Mere intoxication is no extenuation or excuse for crime; but it may be considered by the jury upon the question of intent or malice. *Kelly* v. *State* (Miss.), p. 706.

In cases which involve intention, as well as acts (as theft, etc.), evidence of the drunkenness of the prisoner at the time of the commission of the crime is relevant. *Wenz* v. *State* (Tex.), p. 708.

IOWA.

Burden of proof on prisoner, p. 516.

JURY.

See, also, LAW AND FACT; CHALLENGE.

Misconduct of jury; reading newspaper accounts of insanity as a defence, p. 873.

KANSAS.

Test in, p. 232;

Burden on prosecution, p. 527.

KENTUCKY.

Moral insanity recognized, p. 270.

Burden on prisoner, p. 517.

KLEPTOMANIA.

See, also, INSTRUCTIONS.

Is a recognized symptom of insanity. *Looney* v. *State* (Tex.), p. 769; and see p. 779.

KNOWLEDGE.

Drunkenness of the accused, at the time of passing the alleged counterfeit bill, is a circumstance proper to be submitted to the consideration of the jury, and should have its just weight in determining whether the accused knew the bill to be counterfeit. *Pigman* v. *State* (O.), p. 720.

LARCENY.

See INTENT; CAPACITY TO COMMIT CRIME.

LAW AND FACT.

Insanity a question of fact for jury, p. 866.
Finding of jury conclusive, p. 868.

LOUISIANA.

Burden of proof on prisoner, p. 517.

MAINE.

Test in, p. 232.
Burden on prisoner, p. 517.

MALICE.

On the question of malice, evidence of the prisoner's intoxication is admissible. *Shannahan* v. *Com.* (Ky.), p. 557.

Intoxication does not necessarily disprove the existence of malice in the commission of a criminal act. *State* v. *Johnson* (Conn.), p. 609.

On an indictment for murder in the first degree, which by statute requires the existence of actual malice, the fact that the prisoner was intoxicated at the time is to be considered as tending to prove that such malice did not exist. *Id.*

In murder in the second degree, which rests upon implied malice, the jury may find the existence of malice, although the prisoner's condition at the time of the crime disproves express malice. *Id.*

On an indictment for maliciously stabbing with intent to kill, it was in evidence that the prisoner was intoxicated at the time of the act. The judge refused to charge the jury that intoxication "is a circumstance proper to be taken into consideration by them, and should have its just weight in determining the malicious intent." *Held*, not error. *Nichols* v. *State* (O.), p. 667.

MASSACHUSETTS.

Test in, p. 232.
Burden on prisoner, p. 517.

MICHIGAN.

Test in, p. 233.
Moral insanity disapproved, p. 309.
Burden on State, p. 527.

MINNESOTA.

Test in, p. 233.
Burden on prisoner, p. 518.

MISSISSIPPI.

Test in, p. 233.
Burden on State, p. 527.

MISSOURI.

Test in, p. 233.
Burden on prisoner, p. 518.

MORAL INSANITY.

See, also, INSANE OR UNCONTROLLABLE IMPULSE.

A person who is possessed of a sound mind is liable for a criminal act, though committed under the impulse of passion or revenge which may temporarily dethrone reason and control the will. *State* v. *Stickley* (Ia.), p. 108.

Insanity may destroy either the understanding or the will. An instruction, therefore, which limits the inquiry of the jury to the condition of the power to apprehend by the understanding, is erroneous. *Bradley* v. *State* (Ind.), p. 114.

Moral mania, *i.e.*, the derangement of the moral faculties, where it is proved to exist, should be considered by the jury in determining the degree of a crime. *Anderson* v. *State* (Conn.), p. 129.

Moral insanity existing in such violence as to render it impossible for the party to resist its promptings is an excuse for crime. *Scott* v. *Com.* (Ky.), p. 136.

The court instructed the jury that they should not acquit on the ground of moral insanity "unless it had manifested itself in former acts of similar character or like nature to the offence charged." *Held*, error. *Id.*

Moral Insanity — Irrisistible Impulse, 270;

Doctrine recognized in some States, 270;

Denied in others, 309;

and in England, 309.

Moral insanity, which consists of irrisistible impulse, co-existing with mental sanity, should not be recognized by the law. *Boswell* v. *State* (Ala.), p. 352.

Mental or moral insanity, however recent, to such an extent as to destroy free agency or moral responsibility, on being established by satisfactory evidence, will excuse. *Kriel* v. *Com* .(Ky.), 379.

Moral insanity criticised, *Coyle* v. *Com.* (Pa.), p. 441; *Cunningham* v. *State* (Miss), p. 470.

Moral insanity or irresponsibility for crime from inability to control the will from the habit of indulgence, has no foundation in the law. *Choice* v. *State* (Ga.), 539.

Moral insanity is now as well understood and established as intellectual insanity. *Smith* v. *Com.* (Ky.), p. 670.

MOTIVE.

See PRESUMPTION.

NEBRASKA.

Test in, p. 234.
Burden on State, p. 527.

NEW HAMPSHIRE.

No test in, p. 311.
Burden in State, p. 527.

NEW JERSEY.

Test in, p. 234.
Burden on Prisoner, p. 514.

NEW YORK.

Test in, p. 234.
Burden on prosecution, p. 529.

NEW TRIAL.

See, also, NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted on account of newly discovered evidence which is cumulative. *State* v. *Redemeier* (Mo.), p. 424, and see p. 869

That an expert witness by the defence has testified contrary to expectation is no reason for a new trial on the ground of surprise. *Webb* v. *State* (Tex.), p. 835.

NEWLY DISCOVERED EVIDENCE.

See, also, NEW TRIAL.

A. was indicted for murder in the first degree, and was convicted after offering some evidence of his insanity. A new trial was afterwards asked for on the ground of newly discovered evidence of his insanity. *Held*, that it should be granted. *Anderson* v. *State* (Conn.), p. 129.

NORTH CAROLINA.

Test in, p. 257.
Moral insanity criticised, p. 309.
Burden on prisoner, p. 518.

OHIO.

Test in, p. 257.
Burden on prisoner, 518.

"ONCE IN JEOPARDY."

If it is not suggested that the accused is insane at the time of the trial, and the jury impanelled for the trial of the cause be discharged, the prisoner is thereby wronged by being prevented from making his proper defence before the jury, and is entitled upon his motion to be discharged from further prosecution of the indictment. *Gruber* v. *State* (W. Va.), p. 912.

OPEN AND CLOSE, RIGHT TO.

See, also, TRIAL, INSANITY AT TIME OF.

In a criminal trial, where the defence is insanity, the prisoner is not entitled to open and close. *State* v. *Felter* (Ia.), p. 371.

OPEN AND CLOSE, RIGHT TO — *Continued.*

The defence of insanity under the plea of not guilty does not entitle the defendant to the opening and closing argument to the jury. *Loeffner* v. *State* (O.), p. 432.

Right to open and close, p. 866.

In an inquisition of insanity the counsel for the prisoner should open and close the case to the jury. *U. S.* v. *Lancaster* (U. S.), p. 897.

OPINIONS.

See, also, EXPERTS.

A witness not an expert may give his opinion of a person's insanity, if accompanied with the facts on which it is based. *State* v. *Erb* (Mo.), p. 11.

Of witnesses when admissible. *State* v. *Stickley*, (Ia.), p. 108.

The opinion of an ordinary witness as to a prisoner's sanity are inadmissible. *State* v. *Brinyea* (Ala.), p. 349.

Opinions of witness as to the prisoner's insanity are admissible. *Baldwin* v. *State* (Mo.), p. 395.

Unprofessional witnesses may be asked, after giving the circumstances and conduct of the party, to state their opinion as to his sanity; and the exclusion of such evidence offered by a defendant is error. *Dove* v. *State* (Tenn.), p. 502.

The opinions of persons not experts as to the sanity of the prisoner are admissible, if accompanied by the facts upon which they are founded. *Choice* v. *State* (Pa.), p. 538.

The opinions of witnesses, that the prisoner appeared to be drinking are admissible. *Id.*

The opinions of physicians as to the sanity of the prisoner on facts hypothetically stated are admissible. *Id.*

OPIUM.

Insanity caused by use of, 782.

ORDER OF PROOF.

See OPEN AND CLOSE, RIGHT TO.

It is not error for the court, on a trial for murder, where insanity is set up as a defence, to require the defendant to submit his hypothetical case to his professional witnesses, before the rebutting evidence of the State is heard on the question of insanity. If evidence materially varying the hypothetical case is afterwards introduced, the defendant must ask leave to re-examine as to the new matter. If the new proof does not make any change in the hypothetical case submitted, the defendant would not be injured by the refusal. *Dove* v. *State* (Tenn.), p. 502.

Where the prosecution has proved a homicide, and the prisoner introduces evidence tending to show his insanity, the prosecution may, in rebuttal, offer evidence of express malice. *Choice* v. *State* (Ga.), p. 538.

PASSING COUNTERFEIT MONEY.

See KNOWLEDGE.

PENNSYLVANIA.

Test in, p. 259

Burden on prisoner, p. 520.

PLEA.

It is not error for the court, in its charge, to speak of the defence of insanity set up as a plea of insanity put in. *Dove* v. *State* (Tenn.), p. 502.

In a case where the killing is proved beyond question, for the judge to charge the jury that the plea of insanity put in (the defence of insanity) was an admission of the killing, is not error. *Id.*

Under plea of not guilty, evidence of insanity is admissible, p. 866.

It is error to exclude from the jury evidence of the prisoner's insanity at the time of the commission of the offence, on the plea of not guilty. *Gruber* v. *State* (W. Va.), p. 912.

PREMEDITATION.

See DEGREES OF CRIME.

PRESENT INSANITY.

See TRIAL, INSANITY AT TIME OF; VERDICT, INSANITY AFTER.

PRESUMPTION.

Every one presumed to be sane. *Bovard* v. *State* (Miss.), p. 4; *U. S.* v. *McGlue* (U. S.), p. 54; and see p. 513.

If the homcide charged is proven, in the opinion of the jury, the barbarity of the act affords no legal presumption of insanity in the accused. *Id.*

The enormity of the crime, or the absence of motive is no evidence of insanity. *U. S.* v. *Guiteau* (U. S.), p. 164; *Laros* v. *Com.* (Pa.), p. 824; and see p. 856.

Where a person is sane shortly before and after an act, the presumption is that he was sane at the time. *Lynch* v. *Com.* (Pa.), p. 146.

The continuance of insanity is presumed unless a lucid interval is shown. *State* v. *Spencer* (N. J.), p. 335.

Where it is shown that the prisoner was insane at any time prior to the commission of the crime charged, the law presumes the continuance of such insanity until a lucid interval, or a restoration to reason is proved. *Baldwin* v. *State* (Mo.), p. 395.

Where insanity is shown to exist a short time before the act, the evidence should show insanity at the time or the jury should acquit. *State* v. *Johnson* (Conn.), p. 603.

Delirium tremens to be available as a defence must be shown to exist at the time the act was done. In the case of temporary insanity there is no presumption of continuance. *State* v. *Sewell* (N. C.), p. 817.

Presumption of continuance of insanity, p. 861.

An attempt at suicide raises no presumption of insanity. *Coyle* v. *Com.* (Pa.), p. 441.

PREVIOUS AND SUBSEQUENT CONDITION.

See PRIOR AND SUBSEQUENT INSANITY.

PRIOR AND SUBSEQUENT INSANITY.

See, also, ACTS AND CONDUCT.

On the trial of the sanity of a person, evidence of his previous and subsequent condition is admissible. *U. S.* v. *Guiteau* (U. S.), p. 164.

Evidence that the prisoner had been insane at a period prior to the date of the commission of the act is admissible. *State* v. *Felter* (Ia.), 92.

Previous or subsequent insanity will not discharge the accused. It must be shown to exist at the time the deed was done. *State* v. *Hays* (La.), p. 797.

On a trial for murder by poisoning, the defence being insanity, the court submitted to the jury the fact of the sanity or insanity of the prisoner on the day he purchased the poison as well as on the day it was administered. *Held*, proper. *Laros* v. *Com.* (Pa.), p. 824.

Previous and subsequent insanity, p. 860.

On the trial of an indictment for murder the court refused to permit evidence to be given that the prisoner was insane at any time after the finding of the verdict in the preliminary issue of insanity at the trial. *Held*, error. *Freeman* v. *People* (N. Y.), p. 882.

Where the prisoner was tried for murder, four months after the crime was committed, evidence that he was insane at the time of the trial was relevant on the question of his insanity four months before. *Id.*

Under a plea of not guilty, evidence of the prisoner's insanity both before and after the commission of the offence is admissible. *People* v. *Farrell* (Cal.), p. 909.

PROVOCATION.

In deciding as to the degree of a homicide, the jury may consider the drunkenness of the accused at the time of the killing, not to excuse or mitigate or extenuate his crime, but to assist them in deciding when there was a provocation, whether the intention to kill preceded the provocation, or was produced by it. *Jones* v. *State* (Ga.), p. 612.

On a charge of murder, the fact that the prisoner was intoxicated will not make an inadequate provocation an adequate one, unless it was sufficient to render him unable to form a wilful, deliberate and premeditated design to kill, or incapable of judging of his acts and their legitimate consequences. *Keenan* v. *Com.* (Pa.), p. 715.

Where a provocation has been received which if acted upon instantly would mitigage the offence of a sober man, and the question in the case of a drunken man is whether that provocation was in truth acted on, evidence of intoxication may be considered. *State* v. *McCants* (S. C.), p. 722.

RAPE.

See INTENT.

REASONABLE DOUBT.

See INSTRUCTIONS.

Definition of, p. 115, 140.

RELATIVES, INSANITY IN.

On the defence of insanity in the prisoner, evidence that his father was subject to fits of insanity, is admissible. *State* v *Felter* (Ia.), p. 92.

Where there is no evidence of the prisoner's insanity, evidence of the insanity of his relatives is irrelevant. *Bradley* v. *State* (Ind.), p. 114.

In connection with evidence of his own insanity, testimony showing insanity of his parents or immediate relatives, is relevant. *U. S.* v. *Guiteau* (U. S.), p. 164.

Where there is evidence of the prisoner's insanity, the fact that some of his ancestors were insane is relevant. *Baldwin* v. *State* (Mo.), p. 396.

An hereditary tendency to insanity in the prisoner may be shown. *People* v. *Garbutt* (Mich.), p. 463.

Evidence of mental unsoundness on the part of a brother or sister of the person whose sanity is in question is admissible. *Id.*

Where hereditary insanity is offered as an excuse for crime, it must appear that the insanity actually exists in the prisoner; that it is not temporary, but notorious, and of the same species as other members of the family have been afflicted with. *State* v. *Christmas* (N. C.), p. 821.

Until there is some evidence of the prisoner's insanity, the court is not obliged to hear evidence of the insanity of his relatives. *Laros* v. *Com.*, p. 825.

On the question of the prisoner's insanity, it was error to refuse to permit an inquiry into the mental condition of any of his immediate relatives. *Hagan* v. *State* (Tenn.), p. 833.

Evidence of insanity in relatives, when admissible, p. 865.

REPUTATION.

The insanity of the prisoner cannot be shown by evidence of reputation. *Choice* v. *State* (Ga.), p. 538; and see p. 860.

SLEEPLESSNESS.

Sleeplessness and nervous restlessness are relevant on the question of insanity *vel non*. *Boswell* v. *State* (Ala.), p. 352.

SOMNAMBULISM.

F. and W. entered together at night a public room of a hotel, sat down and went to sleep. W. awoke shortly after and called to S., one of the porters, for a bed for himself and F. W. then attempted to awaken F. by shaking him, but failing, asked S. to wake him up. S. thereupon shook F. with great force and succeeded in awakening him. While S. was holding him by the coat collar, and telling him to go to bed, F. drew a pistol from his pocket and shot S., killing him. F. then went out of the room with the pistol in his hand, his manner being that of a frightened man, saying that he had shot some one but did not know whom. F. did not know nor had he ever seen S. before. On his trial for the mur-

SOMNAMBULISM — *Continued.*

der of S., F. offered to prove that he had been a sleep-walker from infancy; that he had to be watched to prevent injury to himself; that frequently when aroused from sleep, he seemed frightened, and attempted violence as if resisting an assault, and for some minutes seemed unconscious of what he did or what went on around him; that sometimes when partly asleep, he resisted the servant who slept in the room with him as if he supposed the servant was assaulting him. He also offered to prove by medical experts that persons asleep sometimes act as if awake. He likewise offered to prove that his life had been threatened by a person living near where he had been on business during the day, and that he had on that morning borrowed the pistol with which he shot the deceased and had stated at the time that he was required to go near to where the person lived who had threatened him, and he wanted the pistol to defend himself in case he was attacked. The court rejected all this proffered evidence, and the prisoner excepted. *Held*, error. If the prisoner, when he shot the deceased, was unconscious, or so nearly so that he did not comprehend his own situation and the circumstances surrounding him, or that he supposed he was being assailed, and that he was merely resisting an attempt to take his life or do him great bodily injury, he should be acquitted. *Fain* v. *Com.* (Ky.), p. 772.

SUICIDE, ATTEMPT AT.

See PRESUMPTION.

SURPRISE.

See NEW TRIAL.

TENNESSEE.

Test in, p. 269.
Burden on State, p. 531.

TEST OF INSANITY.

See, also, INSANE OR UNCONTROLLABLE IMPULSE; IMBECILE; HYPOCONDRIA.

A charge which makes the test of insanity depend upon whether the prisoner knew right from wrong generally, instead of with respect to the act but which he is indicted, is erroneous. *Erwin* v. *State* (Tex.), p. 845.

If the jury believe from the evidence that the accused killed the deceased with malice and not in necessary self-defence he is guilty of murder, notwithstanding they may believe he was, at the time of committing the deed, laboring under partial insanity, unless he was, from such insanity, incapable of understanding the nature and consequence of his act, and of knowing that it was wrong, and that he would be punished for it. *Bovard* v. *State* (Miss.), p. 5.

Insanity, however produced, constitutes no excuse for crime, unless it be so great as to deprive the party of his power to understand the nature of his act, or of his ability to distinguish between right and wrong, and of his ability to understand that he will be liable to punishment if he commits it. *Id.*

TEST OF INSANITY — *Continued.*

Though a party be partially insane, yet he is responsible for his criminal acts, unless it appear that he was prompted or instigated by his madness to perpetrate such act. *Id.*

To entitle a person charged with homicide to an acquittal on the ground of insanity, it must appear that his mental faculties were, at the time the act was committed, so perverted and deranged as to render him incapable of distinguishing between right and wrong, with respect to that particular act. *State* v. *Erb* (Mo.), p. 10.

The prisoner was indicted for murder, the defence being insanity. The judge charged the jury as follows: "In every case, although the accused may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, and has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge and to know that if he does the act he will do wrong and receive punishment, and possess withal a will sufficient to restrain the impulse that may arise from a diseased mind, such partial insanity is not sufficient to exempt him from responsibility to the law for the crime." *Held*, correct. *Dejarnette* v. *Com.* (Va.), p. 18.

The test of insanity as a defence to crime is whether or not the prisoner was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know, that he did not know he was doing what was wrong. *People* v. *Kleim* (N. Y.), p. 26.

The test of responsibility for a criminal act when unsoundness of mind is set up for a defence is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry. *Flanagan* v. *People* (N. Y.), p. 37.

Where the defence of insanity is interposed to an indictment, the true test of criminal responsibility is, whether the accused had sufficient reason to know right from wrong. If he had sufficient intelligence to know it, whether he had sufficient power to control or govern his actions is a matter of no moment whatever. *Walker* v. *People* (N. Y.), p. 40.

The true test of criminal responsibility where the defence of insanity is interposed to an indictment is, whether the accused had sufficient reason to know the nature and quality of his act, and whether he had sufficient reason to know right from wrong. *Id.*, p. 49.

In his charge the recorder refused to add to this proposition the further one, "and whether or not he (the accused) had sufficient power of control to govern his actions." *Held*, that the refusal was proper, as the recorder had charged that the accused must have sufficient control of his mental faculties to form a criminal intent before he can be held responsible for a criminal act, which was as far as the court should go on the subject of control. *Id.*

It is not every kind or degree of insanity which exempts from punishment. If the accused understood the nature of his act; if he knew it was wrong and deserved punishment, he is responsible. *U. S.* v. *McGlue* (U. S.), p. 54.

TEST OF INSANITY — *Continued.*

There is no legal test of insanity in a criminal case. *State* v. *Jones* (N. H.), p. 64.

On the trial of an indictment for murder, the jury were instructed that if the prisoner committed the act in a manner that would be criminal and unlawful if he was sane, the verdict should be "not guilty by reason of insanity," if the killing were the offspring or product of mental disease in the prisoner. *Held*, correct.

To excuse, the mental disease must be such as to destroy the power to comprehend the nature and consequences of the act, and to overpower the will. *State* v. *Mewherter* (Ia.), p. 102.

If the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to law, he is punishable. *McNaghten's Case* (Eng.), p. 150.

Capacity and reason sufficient to enable one to distinguish between right and wrong, and understand the nature, character, and consequences of his act, with mental power sufficient to apply that knowledge to his own case, furnish the legal test of sanity. *Com.* v. *Rogers* (Mass.), p. 158.

The test of responsibility where the defence of insanity is interposed, is whether the accused had sufficient use of his reason to understand the nature of the act, and that it was wrong for him to commit it. *U. S.* v. *Guiteau* (U. S.), p. 164.

If a man has not reason sufficient to enable him to distinguish between right and wrong in relation to the particular act, he is not punishable. Nor is he where, in consequence of some delusion, the will is overmastered and there is no criminal intent. *Roberts* v. *State* (Ga.), p. 193.

The test of the responsibility or irresponsibility of a person for a criminal act done while in an alleged state of insanity is, was he at the time and as touching that act sane or insane? If he had sufficient mental capacity at the time of committing it, to distinguish between the right and wrong of that particular act, and to know that it was wrong, he is criminally responsible for it. *State* v. *Pratt* (Del.), p. 327.

The test of insanity is whether the accused at the time of the commission of the crime was conscious he was doing what he ought not to do. *State* v. *Spencer* (N. J.), p. 335.

The test of insanity is the ability to distinguish between the right and the wrong of the act charged. *Baldwin* v. *State* (Mo.), p. 396.

To establish insanity as a defence, it must be proved that at the time of committing the offence, the prisoner was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, such as not to know that he was doing wrong. *State* v. *Klinger* (Mo.), p. 410.

The test of the prisoner's responsibility is whether he was capable of distinguishing between right and wrong in respect to the act charged. *State* v. *Redemeier* (Mo.), p. 424.

TEST OF INSANITY — *Continued.*

A person who has reason sufficient to distinguish between right and wrong and to understand the nature of the act is punishable. *Loeffner* v. *State* (O.), p. 432.

Wherever it appears from the evidence that at the time of doing the act charged, the prisoner was affected with insanity, and such affection was the moving cause of the act, without which he would not have done it, he ought to be acquitted. *Hopps* v. *People* (Ill.), p. 444.

Insanity to excuse crime must destroy the power of distinguishing between right and wrong. *Cunningham* v. *State* (Miss.), p. 470.

But the degree of mental unsoundness, in order to exempt a person from punishment, must be such as to create uncontrollable impulse to do the act charged. If it be found insufficient to deprive the accused of ability to distinguish right from wrong, he should be held responsible for the consequences of his acts. *Wright* v. *People* (Neb.) p. 477.

No person can be guilty of murder who has not sufficient discernment to distinguish between good and evil, and who has no consciousness of doing wrong in the act he is committing. *Dove* v. *State* (Tenn.), p. 502.

If a man has capacity enough to distinguish between the right and wrong of his act, he is a subject for punishment. *Choice* v. *State* (Ga.), p. 539.

The test of insanity is the ability to distinguish between right and wrong. In case of partial insanity, the question is whether the prisoner was capable of distinguishing between right and wrong in the particular connection in which the unlawful act was done. *Carter* v. *State* (Tex.), p. 589.

To be criminally responsible a man must have reason enough to be able to judge of the character and consequences of the act committed, and must not be overcome by an irresistible impulse arising from disease. *State* v. *Johnson* (Conn.), p. 603.

The 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. *Smith* v. *Com.* (Ky.), p. 669.

The capacity to distinguish between the right and wrong of the act is the test of unpunishable insanity. *State* v. *Sewell* (N. C.), p. 816.

The test of insanity, when alleged as a defence to an indictment, is whether, at the time of committing the act, the prisoner was laboring under such mental disease as not to know the nature and quality of the act he was doing, or that it was wrong. *Freeman* v. *People*, p. 882.

The child test, p. 200.

The wild beast test, p. 200.

Erskine's argument in Hadfield's Case, p. 201.

Test of knowledge of right and wrong in the abstract, p. 218.

Test of knowledge is applied to particular case, p. 219.

Test in England, pp. 219-231.

Right and wrong test in the American courts, p. 231.

TEST OF INSANITY — *Continued.*

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California, p. 231.
Delaware, p. 231.
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TEXAS.

Test in, p. 269.
Burden on prisoner, p. 532.

TRIAL, INSANITY AT TIME OF.

See, also, CHALLENGE.

The mode of trying present insanity at trial stated. *People* v. *Kleim* (N Y.), p. 26.

The form of oath administered to the jury in such cases. *Id.*

On such inquiry the prisoner holds the affirmative of the issue. *Id.*

On an indictment for a capital crime if the jury find that the prisoner neglects to plead by the act of God, the court will not try him upon the indictment. *Com.* v. *Braley* (Mass.), p. 881.

A person while he continues insane cannot be tried or punished; *aliter*, if he be capable of comprehending his position and of making his defence, though on some subjects his mind may be deranged. *Freeman* v. *People* (N. Y.), p. 882.

Insanity at the trial should be tried by a jury; but other methods may be adopted by the court in its discretion.

Whenever a prisoner's sanity at the time of the offence alleged is in question, the rule that he may control or discharge his counsel at pleasure, should be so far relaxed as to permit them to offer evidence on these points, even against his will. *State* v. *Patten* (La.), p. 901.

TRIAL, INSANITY AT TIME OF — *Continued.*

In a criminal case, when after the close of the testimony in behalf of the State, the counsel of the accused alleged the prisoner's insanity before, at the time of, and since the killing, and offered to introduce testimony in proof of the fact, and thereupon the prisoner arose, and repudiated such defence, and discharged his counsel, and the court gave the case to the jury without further evidence or pleadings on behalf of the prisoner. *Held*, that the court erred in allowing the prisoner, under the circumstances, to discharge his counsel, and erred in not allowing them to offer proofs on the question of insanity. *Id.*

Where it is suggested that a prisoner brought up for trial or judgment is insane, the question of his sanity must be submitted to a jury. The rule is the same where the prisoner has been found to be insane, the trial postponed, and called again at a subsequent term. *People* v. *Farrell* (Cal.), p. 909.

On a second trial, the former verdict is admissible on the question of present insanity. *Id.*

The verdict of a jury, called to examine the sanity of a person at the trial, that he is insane, is conclusive that he was insane when it was rendered, and is admissible in evidence on his trial for the offence, as tending to show that he may have been insane when the offence was committed. *Id.*

If there is reasonable ground to doubt the sanity of the accused at the time of the trial, and after a jury is impanelled, it is the duty of the court to suspend the trial and to impanel another jury to inquire into the fact of such sanity. If such jury find the accused to be insane at the time of the trial, it shall then inquire as to his sanity at the time of committing the offence. If such jury find the accused to be insane at the time the offence was committed, that fact is a good defence in bar of further prosecution. If such jury find the accused sane at the time of the trial, then the trial in chief shall proceed. *Gruber* v. *State* (W. Va.) p. 912.

Insane person cannot be tried, p. 916.

Nor can intoxicated person, p. 918.

UNCONTROLLABLE IMPULSE.

See INSANE IMPULSE.

UNITED STATES.

Tests in Courts of, p. 270.

VERDICT, INSANITY AFTER.

If after verdict, but before sentence, a prisoner becomes insane, it is good ground for staying the sentence; *aliter* where the insanity is the same as has been passed on by the jury. *State* v. *Brinyea* (Ala.), p. 349.

Where the jury have found that the prisoner was not insane at the time of the act, and after verdict present insanity is alleged, the trial of this plea by a jury is not of right, but rests in the discretion of the court. *Laros* v. *Com.* (Pa.), p. 824.

VERDICT, INSANITY AFTER — *Continued.*

Upon an inquisition of insanity on a motion for a new trial after verdict of guilty of perjury, the question is the same as if raised when the prisoner was called to plead. The question to be decided is, whether the defendant was incapable of comprehending the dangerous position in which he was placed, and of taking intelligent measures to meet it. *U. S.* v. *Lancaster* (U. S.), p. 897.

If a prisoner after conviction allege why sentence should not be pronounced that he is a lunatic, but the judge upon his own inspection is satisfied that the plea is false, he may pronounce sentence without calling a jury to try the issue. But *aliter* where the judge has a doubt or the case is one of difficulty. *Bonds* v. *State* (Tenn.), p. 905.

In an inquisition to inquire into the sanity of a man convicted of murder and sentenced to be hanged, and whom it is alleged has, after conviction, become insane, evidence of his insanity at times before conviction is only admissible as explanatory of his acts since. *Spann* v. *State* (Ga.), p. 906.

Whether *certiorari* will lie to review the proceedings before a jury called under the statute to inquire into the sanity of a prisoner alleged to have become insane since his conviction, *quære*. *Id.*

Insanity after verdict or judgment, p. 919.

Test in courts of, p. 270.

VIRGINIA.

Burden of proof on prisoner, p. 521.

VOTING TWICE AT ELECTIONS.

See INTENT.

WEST VIRGINIA.

Burden of proof on prisoner, p. 521.

WILD BEAST.

The wild beast test, p. 200.

WITNESS.

See FORMER TRIAL.

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