

January 1940

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### Recommended Citation

Walter P. Coombs, *Insanity as a Defense in the Criminal Law of Montana*, 1 Mont. L. Rev. (1940).  
Available at: <https://scholarworks.umt.edu/mlr/vol1/iss1/10>

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### INSANITY AS A DEFENSE IN THE CRIMINAL LAW OF MONTANA

One of the most vexing problems facing the criminal lawyer in Montana concerns the attitude of the Supreme Court on the defense of insanity. The net result of the decisions on this question by the Montana Supreme Court appears to be that it has refused to adopt any single test of irresponsibility, but instead, and contrary to most state Courts, it has wavered between the right and wrong test<sup>1</sup>, the irresistible impulse test<sup>2</sup>, and the doctrine known as the New Hampshire rule<sup>3</sup>.

An authority on this subject has stated that the law in the United States generally (except New Hampshire) can be summarized as follows:<sup>4</sup> A person is not criminally responsible for an offense if at the time it is committed he is so mentally un-sound as to lack (1) knowledge that the act is wrong, or, (2) (in seventeen States) will power enough to resist the impulse to commit it. The first part of this summary states the right and wrong test. This is law nearly everywhere. It is the sole test of irresponsibility in England<sup>5</sup> and in twenty-nine American States.<sup>6</sup> The wording of the rule varies considerably; in about half the cases it is stated that, to be excused, a defendant must be so disordered as not to know the nature and quality of the act, or, if he did know it, that he did not know it was wrong. The second test and the one which is considered an alternative or additional one is the irresistible impulse test and is utilized in seventeen States.<sup>7</sup> In these jurisdictions a person is excused if he is incapable of knowing the wrongfulness of the act, or,

<sup>1</sup>The much controverted case known as *McNaughten's Case*, 10 Clark & Fin. 200 (1843), is the forerunner of this doctrine and is the case on which the law of insanity is based. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW*, p. 161, *et. seq.*; Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 724 (1917). The right and wrong test is the sole test in twenty-nine States, including California, Idaho, New York, Minnesota, Washington, Texas, Pennsylvania, Illinois. Recent cases applying the rule are *People v. Keaton*, 211 Cal. 722, 296 Pac. 609 (1931); *State v. Schafer*, 156 Wash. 240, 286 Pac. 833 (1930); *People v. Carlin*, 194 N. Y. 448, 87 N. E. 805 (1909); *People v. Zarl*, 54 Cal. App. 133, 201 Pac. 345 (1921); *State v. Jones*, 191 N. C. 753, 133 S. E. 81 (1926).

<sup>2</sup>Judge Somerville, in *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887), is much quoted by the Courts. Some of the States which follow this doctrine are Massachusetts, Arkansas, Colorado, Michigan, Indiana, Virginia, Utah. E. g., *Davis v. U. S.*, 165 U. S. 373, 41 L. Ed. 750., 17 S. Ct. 360 (1897); *Comm. v. Stewart*, 255 Mass. 9, 151 N. E. 74 (1926); *People v. Durfee* 62 Mich. 487, 29 N. W. 109 (1886).

<sup>3</sup>*State v. Pike*, 49 N. H. 399 (1870); *State v. Jones*, 50 N. H. 369 (1871).

<sup>4</sup>WEIHOFEN, *INSANITY AS A DEFENSE*, pp. 15-16., *et. seq.*

<sup>5</sup>*Rex v. Quarmby*, 15 Crim. App. 163 (1921); *Rex v. True*, 16 C. A. 164 (1922).

<sup>6</sup>For citation of the more important States, see note 1, *supra*.

<sup>7</sup>For example: *Comm. v. Deveraux*, 257 Mass. 391, 153 N. E. 831 (1926), note 2, *supra*.

even though he does know that it is wrong, if he is incapable of controlling the impulse to commit it.<sup>9</sup> In New Hampshire, the Court has rejected both tests and has adopted the rule that there is no legal test, but it is a question of fact in each case whether defendant had a mental disease, and, if so, whether it was of such a character or degree as to take away the capacity to form or entertain a criminal intent.<sup>9</sup>

The New Hampshire rule is clearly inconsistent with the other two rules, for it contemplates treating the question as one solely of fact for the jury. On the other hand, the legal tests require that the jury be instructed as a matter of law as to the degree of insanity which will excuse the defendant. These rules, it must be remembered, are not designed to determine the question of insanity itself, but rather to define to the jury, after all the testimony is in, what degree of mental irresponsibility will relieve the particular defendant from the consequences of his criminal intent.<sup>10</sup>

In Montana the first case to be decided and the one that the Court has cited consistently, if not always correctly, is *State v. Peel*.<sup>11</sup> In that case defendant came upon the deceased and immediately shot and killed him. Chief Justice Brantly, speaking for the Court, approved, as against defendant's protest that it did not give him the benefit of the irresistible impulse de-

<sup>9</sup>This is the way the rule is usually stated. Similar instructions were approved in *Matheson v. U. S.*, 227 U. S. 540, 57 L. Ed. 631, 33 S. Ct. 355 (1912); *Hutsell v. Comm.*, 225 Ky. 492, 9 S. W. (2d) 132 (1928); *Travis v. State*, 160 Ark. 215, 254 S. W. 464 (1923). *King v. Creighton*, 14 Can. Crim. Cas. 349 (1908), contains a statement by Riddell, J., which has been widely quoted as a contrary doctrine: "If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes and perhaps that will help you."

<sup>10</sup>The New Hampshire cases rest the rule on the ground that all arbitrary legal tests of responsibility should be abolished and the question in every case is to be decided by the jury on the basis of the query whether, if the defendant committed the act in question, he had the capacity to have the specific intent necessary. This is the opposite of a legal test and therefore the two are inconsistent.

<sup>11</sup>Admittedly the law has assumed that tests such as the right and wrong test, state a factual basis for establishing sanity or insanity. The confusion as to what part of this problem is one of fact and what part of law is similar to that which has reigned in the law of negligence. There, too, the Court quite generally has left to the jury the question whether the defendant violated a duty which he owed to the particular plaintiff, as a part of the question of causation. Actually the scope of defendant's legal duty is a question of law, in the same manner as is the function of stating at what point the defendant should be relieved of his criminal responsibility because of insanity. WEIHFÖEN, *op. cit.*, pp. 42-43, 417-18; GREEN, *RATIONALE OF PROXIMATE CAUSE*, pp. 56, 62, 66, 122, *et. seq.*; *Palsgraf v. Long Island Ry. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928); Goodhart, *Unforeseen Consequences of a Negligent Act*, 39 YALE LAW JOURNAL 44 (1930). Of course, whether the defendant falls within some of the psychiatrists' categories of insanity is a question of fact.

<sup>12</sup>23 Mont. 358, 59 Pac. 169 (1899).

fense, the instruction to the jury as a matter of law that "criminal responsibility is to be determined solely by the capacity of the defendant to conceive and entertain the intent to commit that crime . . . It follows that one may have the mental capacity and intelligence to distinguish between right and wrong with reference to the act, and to understand the consequences of its commission, and yet be so far deprived of volition by the overwhelming violence of mental disease that he is not capable of voluntary action, and therefore *not able to choose* the right and avoid the wrong."<sup>12</sup> The Chief Justice pointed out that under this instruction the jury might very well have found the defendant excused from the responsibility for his act by reason of an irresistible impulse and that the instruction was correct.<sup>13</sup>

The Court carried on its discussion in *State v. Keertl*<sup>14</sup> where again the defense to homicide was insanity. The Court was not clear as to what test it should follow. The judges seem to have approved of the New Hampshire rule, *viz.*, that there is no test of responsibility except the presence or absence of the necessary criminal intent; at the same time, they upheld instructions to the effect that the test is whether the accused knew the act was wrong and had the capacity to choose to do or not to do it and to govern his conduct in accordance with such choice. At any rate, the Court decided that the question was one for the jury. The majority opinion, prepared by Mr. Commissioner Callaway, declared that the lower Court in giving to the jury instructions based on the right and wrong test and the irresistible impulse test gave instructions based upon different theories, and consequently on different states of fact, and that the two were irreconcilable. This means that the Court recognized both doctrines but took the position that one set of facts cannot support an instruction on each test separately. The case, at the same time, approved the reasoning and result reached in *State v. Peel*, wherein Brantly said such instructions were not contradictory. The majority also made a significant statement when it said that "the question whether the defendant in any case was affected with insanity to such a degree as will excuse him from the commission of an act which would be criminal if done by a sane person is one of *fact*; it certainly is not a question of *law*."<sup>15</sup> Mr. Justice Holloway dissented in this case, saying that inconsistent doctrines on the

<sup>12</sup>It is interesting to note that in the Peel case Brantly states irresistible impulse in terms of criminal intent. He takes the view that "criminal intent" necessarily includes the "will power" factor as well as knowledge of right and wrong. Hence if either is absent, criminal intent is likewise necessarily absent.

<sup>13</sup>The Peel case was reaffirmed by Mr. Justice Brantly in *State v. Colbert*, 58 Mont. 584, 194 Pac. 145 (1920), where essentially these views were restated.

<sup>14</sup>29 Mont. 508, 75 Pac. 362 (1904).

<sup>15</sup>29 Mont. at 522-523.

subject of insanity were announced in *State v. Peel* and that he was unable to reconcile the doctrine announced in the New Hampshire cases with what was said in other portions of the opinion of the majority of the Court in the *Keerl* case.<sup>18</sup> At any rate, inconsistent doctrines were announced in the *Peel* and the *Keerl* cases. The latter clearly held that the question is one of fact for the jury and that the Court should instruct as briefly and as simply as possible. The former appeared to adopt the "legal test" basis for jury instruction.

Mr. Justice Holloway wrote the majority opinion in *State v. Crowe*.<sup>19</sup> He maintained there that instructions based upon the right and wrong test and the irresistible impulse test are not inconsistent and he cited both the *Peel* and the *Keerl* cases as authority. He reinforced his position in favor of the New Hampshire doctrine by implying that the question for the jury is the fact of insanity and that these tests are not legal tests in the sense that they interfere with the jury's consideration of that question.

The Court's most recent declaration came in *State v. Narich*.<sup>20</sup> Through Mr. Justice Galen, it referred to the statement made by Mr. Justice Brantley in the *Colbert*<sup>21</sup> case (*i. e.*, the general doctrine of the *Peel* case allowing the jury to find an irresistible impulse although not specifically instructed on that) and then announced what he believed to be the settled law on the subject. Since, he said, the question is whether the defendant, when he committed the act complained of, had the mental power to entertain a criminal intent, the answer can best be reached by submitting to the jury a test founded solely on the Montana statute on insanity.<sup>22</sup> In other words, said Galen, the jury needs to be told only that what is sought is an answer to the question, whether the defendant, when he committed the act, had the mental power to entertain a criminal intent and did entertain it, *i. e.*, the question for determination being whether defendant, when he committed the act, was insane or sane. The Court said the instructions should be as brief, plain, and simple as possible in order to avoid confusing the jury. The jury is allowed to determine the fact of insanity from the testimony no matter what the character of the insanity may be. This, the Court added, includes insane delusions and insane irresistible impulses. For this viewpoint the Court cited

<sup>18</sup>*Id.*, p. 520. This statement is inconsistent with the idea of a legal test and is more in keeping with the New Hampshire rule.

<sup>19</sup>39 Mont. 174, 183, 102 Pac. 579 (1909).

<sup>20</sup>92 Mont. 17, 9 Pac. (2d) 477 (1932).

<sup>21</sup>Note 13, *supra*.

<sup>22</sup>R. C. M., 1935, Sec. 10726 (intent), 10728 (proof of insanity), 10729 (persons capable of committing crimes). There is no statute establishing a legal test in Montana but many States have adopted the right and wrong test and/or the irresistible impulse test by statute. This form of instruction was first suggested in *State v. Keerl*, *supra*.

the New Hampshire cases. Since this is the culmination of the Court's attitude on insanity, it must be taken as the law.

After concluding that an instruction either on the right and wrong test, or on the irresistible impulse test would be proper but that both cannot be given in the same case, and then deciding that both may be so given, the Court approves a doctrine similar to the New Hampshire rule. One might well question why the Montana Court has used the New Hampshire rule and the legal test rule, which are manifestly inconsistent, in the same case and on the same set of facts. Although the Court is not clear, it seems that by introducing the New Hampshire doctrine into so many of the cases, the judges have attempted to do one of two things, *viz.*, (1) they may have meant to do no more than declare that only simple and short instructions are needed, or (2) they may have meant, as some of the cases seem to indicate, that the jury is to be the final arbiter and that, although instructions taken from other jurisdictions definitely approving the giving of a legal test may be given,<sup>21</sup> the question is primarily one of fact and the instructions at most are merely suggestive to the jury of different factual bases that may be used to establish insanity. If what the court has attempted to do is to suggest that the question of relief from criminal irresponsibility is a jury question, the advisability of such a rule is to be questioned. As pointed out before, the amount or degree of mental incompetency which will relieve a defendant from criminal prosecution depends on public policy. Insofar as it is willing to allow the jury to determine this, the Montana Court would permit that body to decide a question of law, which is surely not the province of the jury.

Only if it is concluded that the criminal law of insanity ought to be tempered with the viewpoint of the public, as represented by the jury, should it be allowed such freedom in determining what this policy should be and even then its competence is questionable. Not only does the Montana Court allow the jury to decide this, but it in reality delegates to the jury the power to consider whether the accused had the requisite "bad" state of mind or intent to commit the crime. But the criminal intent involved in many cases of insanity is not simple. In the criminal law "intent" is a word of art—it has a strictly artificial meaning which could hardly be conveyed to the jury even with the most careful instruction.<sup>22</sup>

<sup>21</sup>Often the Montana Court has approved instructions which were originally taken bodily by the trial Court from jurisdictions employing a legal test and used by it as a charge under the New Hampshire viewpoint. This result is due partially to the misunderstanding of the Court as to the two doctrines and the failure to realize the difference between them.

<sup>22</sup>Does an instruction that the jury is to determine whether the defendant had the capacity to entertain a criminal intent impose a more complex *legal* question upon the jury than one directing that the jury

The Montana Court has not considered these objections to its standard as laid down by the *Peel, Keerl, and Narich* cases. If the conclusions of this comment are accepted it would seem that the law governing the proper instructions on insanity in Montana might well be clarified by a fuller examination of the question with a more precise statement from the Court as to how it intends that these essentially inconsistent doctrines be reconciled in the law, on the one hand, or with the explicit selection of the one or the other as controlling all such instructions, on the other.

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### DURATION OF LIEN OF MORTGAGE

The problem of the duration of the lien of a mortgage under M. R. C., 1921, Sec. 8267, and under that section as amended in 1933, has long been a perplexing one to lawyers practicing in Montana. Cases decided prior to 1939 applied and construed the statute as it existed before the 1933 amendment. The pertinent portion of the statute read:

“Every mortgage of real property, made, acknowledged and recorded as provided by the laws of this State, is thereupon good and valid as against the creditors of the mortgagor or owner of the land mortgaged, or subsequent purchasers or encumbrancers, from the time it is so recorded until eight years after the maturity of the entire debt or obligation secured thereby and no longer unless the mortgagee . . . within sixty days after the expiration of said eight years, . . . file an affidavit setting forth [stated facts].”

The first case construing Sec. 8267 was *Morrison v. Farmers' & Traders State Bank, et al.*<sup>1</sup> In it the Court reached the conclusion that M. R. C., 1921, Sec. 8243, which provided in effect that the lien of a mortgage was good as long as the debt was enforceable, had been amended by Sec. 1, Ch. 27, L. 1913,

is to determine whether the defendant knew the difference between right and wrong? Is the conflict as to whether “irresistible impulse” is a defense, a further example of difference of opinion among the Courts as to the meaning of “criminal intent”? See *supra*, note 12.

<sup>1</sup> A mortgage may be extended under the provisions of R.C.M., 1935, Sec. 8264, which reads, “A mortgage of real property can be created, renewed, or extended, only by writing, with the formalities required in the case of a grant of real property”. This section deals with an agreement by the mortgagor and mortgagee, while under Sec. 8267 the affidavit of renewal is filed by the mortgagee alone.

<sup>2</sup> 70 Mont. 146, 225 Pac. 123 (1924). *Berkin v. Healy*, 52 Mont. 398, 158 Pac. 1020 (1916), held that the statute could not apply to the facts in that case.