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THE BURDEN OF PROOF IN CASES OF INSANITY.

We have read, with some degree of interest, and a sincere desire to arrive at truth, the article in the April number of THE AMERICAN LAW REGISTER, entitled "The burden of proof in cases of Insanity," and believing that some of the conclusions arrived at by the author are not sustained by reason, or by any considerable number of adjudications, we propose briefly to notice the question as it presents itself to us.

The author inquires: "Is the burden of proof—the *onus probandi*—anything more or anything less than the duty of proving any fact substantially in issue? And is not that duty always upon the party who substantially asserts the affirmative of the issue?" We think the question is pretty fairly stated, yet so stated as in some degree to lead the mind from the principle generally understood to be correct by legal writers, and those who have treated of the science of rhetoric.

Writers on rhetoric say the affirmative of every issue is to be proved, but they further say, that it is unnecessary to prove a fact, that may be fairly *presumed*, or taken for granted, until disproved.

The law deals largely in presumptions, and it is right that it should. A person, though charged by indictment with the commission of crime, is presumed to be innocent. No prac-

titioner, who was thorough in his profession, would ever suppose it necessary to sustain the veracity of his witness before his character for truth had been in some way questioned or impeached, because the law presumes that every witness speaks the truth, and the advocate who would attempt to bolster the reputation of a witness before it was assailed would greatly weaken his cause.

Every man is *presumed* to be sane, because sanity is the normal condition of the intellect, and we maintain that under the effect of such presumption, he who would avoid responsibility for an act amounting to an infraction of law, on the plea that he was insane, and hence not responsible, takes upon himself the burden of proving that condition of his mind.

A lucid writer on rhetoric, in treating of this question—"*Onus probandi*," says: "In the interpretation of this principle, it should be borne in mind that the stress is to be laid on the fact of alleging or affirming, not on the form of the proposition itself, as affirmative or negative. The principle is *he who alleges must prove.* If the allegation be in the negative form, it does not shift the burden of proof. The fundamental ground on which the principle rests is, that whatever is new shall be accounted for. He who makes an allegation puts into being a statement that did not exist before. He is properly called upon to account for it, prove it, and thus make it a truth."

In legal investigations the burden of proof is upon him "who alleges the affirmative of a proposition," and "in general, whenever the law presumes the affirmative, it lies on the party who denies the fact to prove the negative."

This principle is asserted by Starkie, Philips, Roscoe, Bulwer, Bouvier and many other authors, including the Justices of the Supreme Courts of most of the States of the Union.

With the few cases where a different principle *seems* to have been asserted, some peculiar circumstances were doubtless connected, which indicated to the minds of the courts the propriety, not of departing from long-settled principles, but of partially relaxing the rules regulating their enforcement, that the persons on trial might the more effectually obtain the bene-

fit of those circumstances which could not have been obtained by a rigid adherence to the letter of the rules.

We do not understand that the courts have, by their rulings, abrogated the principle that the plea of insanity is ordinarily, and generally, but an allegation of matter in defense, and that as such it must, in order to be available, be so sustained by affirmative proof as to create a reasonable doubt of guilt.

The trial of a person indicted for murder is regulated by rules of evidence as old as the common law of England, and we refer to the ordinary progress of such trial to illustrate our views.

Two well established principles of presumption enter into the case. 1st. The prisoner is presumed to be innocent. 2d. He is presumed to be sane; the latter resulting from the fact that he is a man, of whom rationality is an essential attribute. To sustain the prosecution the homicide is proved, and when the facts necessary to constitute the crime are sufficiently proved to warrant a conviction, in the absence of other proof the prosecution may safely rest the case. A case is then made out against the accused, and if, to procure an acquittal, he lies on insanity, he assumes, as to that matter, the burden of proof. He then makes insanity the issue, because it is an allegation of fact in opposition to a presumption of law.

After the government has sustained the indictment, evidence to excuse, justify, reduce, or extenuate, must be offered by the defense.

If the defense be, that the killing, though unlawful, was not in malice, but the result of sudden passion, and such defense be sustained, the crime will be reduced to manslaughter. If, that it was in the necessary self-defense of the accused, the effort will be to prove that he was attacked by his assailant, and in the exercise of sound judgment and discretion was justified in taking the life of his antagonist.—"*Se Defendendo.*"—These defenses must be made out by the evidence upon the entire case, in order that they be available. If the excuse, or extenu ation, rests upon the allegation that the prisoner was insane, and hence not competent to form a wicked motive, or entertain

a malicious purpose, he must, as we understand the principle, make the allegation direct; and, in order that the plea avail him, so far sustain it by proof as to create in the minds of the jurors at least a reasonable doubt of sanity—one of the necessary ingredients in crime—and, in consequence of such doubt, obtain a verdict of acquittal.

Generally, a defense based on insanity is only intended to bring the prisoner within the principles of reasonable doubt, and no greater latitude should be given a defense of that character, unless the accused is either a confirmed idiot or lunatic.

It is not pretended by writers on criminal or medical jurisprudence that even the *monomaniac* is insane, to the extent of destroying his legal accountability. The subject of *monomania* is little understood, and hence difficult to treat on philosophic principles. By reason of these difficulties the subject is approached with diffidence, and the courts, when the question is involved, administer the law with caution. No other course would be safe, and in the exercise of such caution, persons relying on insanity generally get the benefit of it, in the form of a reasonable doubt.

We maintain that the government does not, in criminal prosecutions, by affirming the guilt of the accused, undertake to prove his sanity, because it is never necessary to prove what the law presumes.

The prisoner is not required to prove his innocence, because the law presumes it; and if the prosecution fails to prove his guilt, he may rest content, and *demand* acquittal, upon failure of proof against him. By parity of reasoning, it is wholly unnecessary for the government to prove the sanity of the accused, and if insanity is alleged—affirmed—by him, he thereupon undertakes to sustain it.

The allegation of insanity is as much an affirmative proposition as is that of sanity, and in view of the fact that sanity is the normal condition of the intellect, we think more so.

We allege—affirm—that a man is sane, or we allege—affirm—that he is insane. The strength of the affirmation is the same in both instances, so far as language is concerned. In the former, however, we only affirm what the law presumes,

and hence the affirmation need not be proved. Ordinarily, it is useless and simply idle; but in the latter instance we must make our affirmation good, because it asserts the existence of a fact, in opposition to a presumption of law. It is not idle or senseless, but is real, is of substance, and to be of value must be sustained by proof.

We can conceive of but one state of case in which sanity should be affirmed and proved by the prosecution. If a person who had been, by virtue of a writ, "*de lunatico inquirendo*," found and declared a lunatic, and should afterward commit an act which would amount to a crime, if committed by a sane person, we apprehend it would be proper, on the trial of such person, for the government to prove that the act was committed during a lucid interval, or that since the judgment of lunacy a like inquest had found his mind to have been restored.

A last will, in order to be valid, must have been executed by a person who, at the time, was of sound mind and disposing memory; and it is customary in probating wills to ask the subscribing witnesses, in relation to the capacity of the testator, when the will was executed. The law requires it, yet every practitioner knows, that unless there is a contest in relation to the testator's capacity, such inquiries are merely formal. If there should be a real contest of that character, the issue will be made by a direct allegation of incapacity, on the part of the testator, which the contestants will undertake affirmatively to prove. Wills are most generally executed shortly before dissolution, when the intellectual, as well as the physical system, has been weakened by disease, and when a few moments of time will often suffice to change the condition of the patient from a state of sanity to one of complete mental imbecility. Hence the propriety of the custom and law, requiring inquiry as to the condition of the testator's mind, at the particular time of executing his will. It is, however, never understood that such inquiries are intended to question the sanity of one who may, when in good health. and the full exercise of his faculties, mental and physical have executed a will, by not merely dictating, but in fact writing, sealing and publishing it.

A class of cases is becoming common where the plea of insanity is interposed, and most generally with success. The reader will fully understand to what we allude, and we will not therefore detail the disgusting scenes, often witnessed in courts of justice, upon the trial of those who claim that their honor has been wounded, or their domestic felicity and happiness destroyed.

The law, to be worth anything, must be consistent, and if it should become the settled principle that the government, in criminal prosecutions, must prove sanity, whether it be denied or not, the presumption of sanity in such cases—now a prominent principle of jurisprudence—ought to be abrogated. Do this, and we necessarily assert the counter principle, that he who commits an act which would, in its facts and details, if committed by a sane person, amount to a crime, must be presumed to be insane at the time of the commission of the act. To be further consistent, we must say that any wrong, criminal or civil, is the result of insanity, general or special, on the part of the actor. Hence, he ought not to be punished as a wrong-doer, or held morally responsible, or even legally so, except in being required to restore property, taken by him—not stolen—because he was insane, and could not have a criminal motive.

In the great forum of human conscience, and in view of human accountability to society, to the tribunals of this world, and to that of the world to come, such principles ought not to be permitted to prevail, unless it should be determined that all moral dereliction is the result of insanity; in which event, to be still further consistent, it would become necessary to inaugurate a stupendous system of reform schools and asylnms, in which to restrain and reform the millions of lunatics with which the world abounds.

We think it is for the present, at least, safe to abide the old landmarks requiring the government to make out her case according to established usage; and if a supposed criminal, or his attorney, feels that his defense requires the interposition of a plea of insanity, let the allegation be made affirmatively, and the accused receive the benefit of it, according as the proof may justify. W. B J.