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## Insanity and the Criminal Law in Montana

RUSSELL SMITH\*

Any study of insanity in its relation to the criminal law involves two separate and distinct concepts. The first, that an insane person is not criminally responsible for his act is, as presently treated a moral problem, the solution of which requires an inquiry into the defendant's capacity at the time of the offense to entertain a criminal intent. The second, that a person should not be tried, adjudged or punished while insane, is essentially a question of fair procedure and involves the ability of the accused to understand the nature of the proceedings against him and conduct his defense in a rational manner. These concepts have deep roots in the Anglo-Saxon law and both of them are expressed in the statutes of Montana.<sup>1</sup> The inquiry into the mental capacity of the defendant to be tried for crime is different from the inquiry into his responsibility for it, both as regards the time to which the inquiry is directed and the kind of mental qualities involved. The distinction is well recognized by the courts.<sup>2</sup>

The statutory definitions of insanity in Montana are valueless for any purpose<sup>3</sup> and nowhere in the statutes is any indi-

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<sup>1</sup>R.C.M. 1935, §12213 and §10729.

<sup>2</sup>People v. Perry (1939) 14 Cal. (2d) 387, 94 Pac. (2d) 559; State v. Henke (1933) 196 Wash. 185, 82 Pac. (2d) 544.

<sup>3</sup>R.C.M. 1935, §10729 provides: "All persons are capable of committing crimes except those belonging to the following classes: . . . 2. Idiots. 3. Lunatics and insane persons . . ." R.C.M. 1935, §10727 provides in part: "All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity."

cation given that there is a difference between the kinds of insanity involved in the two concepts mentioned. The Supreme Court has not yet drawn the distinction although when the problem is directly raised it must necessarily do so. The fact that it has not been clearly stated to date has resulted in some unfortunate confusion in the law of Montana.

Some of the problems presented by these concepts will be treated in this article. It may be here said that those surrounding the trial of insane persons are largely procedural in character and can be resolved for the most part by the court while those involved in the determination of criminal responsibility are largely social in character and can be dealt with only by the legislature.

I.

INSANITY AS A DEFENSE

The concept that an insane person is not criminally responsible presents two main problems: First, how should criminal responsibility be measured, and second, what sort of a tribunal should do the measuring? The answer to these problems would not be so difficult if the social function of the criminal law were clear and generally accepted. Unfortunately this is not the case.

The retributive theory is still the dominant one in the Montana scheme of criminal law. The criminal is first determined to be guilty, following which punishment is assessed. The severity of the punishment is gauged by the gravity of the offense committed, although the court may, within limits, exercise some measure of discretion. Other influences have made some impression on Montana law. Where juveniles are concerned the process is almost entirely corrective and the whole parole system indicates some compromise. Nevertheless the primary emphasis is upon punishment. The law of insanity as presently disclosed by the statutes and decisions, is consistent with the whole body of the criminal law.

The present legal definition of insanity in Montana is at least 100 years old, and in its origins much older than that. The philosophy of the Christian church which taught that man was a free moral agent, with full power to accept or reject, to submit to or resist temptation, undoubtedly influenced our law in its beginnings. The doctrine of free will being accepted, persons who violated the generally accepted moral dogmas were properly subject to punishment.

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In the case of insane people, however, the case was different since the insane were afflicted by God and hence were not free moral agents. For the purpose of determining whether in a given case a man was criminally responsible for his acts, it seems almost inevitable that the right and wrong test should have been accepted. If we accept the doctrine of free will, then it can be quite logically said that he who can distinguish between right and wrong is morally responsible, while he who cannot so distinguish is not responsible. At any rate, in the year 1843 in the celebrated *McNaughten* case<sup>4</sup> the justices of England verbalized the right and wrong test, saying in substance, that an accused to establish the defense of insanity must show that he 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 he was doing what was wrong. This view was generally accepted in England and America and today represents the law in Montana.

In this state, the Supreme Court in 1899, in the case of *State v. Peel*<sup>5</sup> announced the definitions of insanity which still measure criminal responsibility where insanity is a defense.<sup>6</sup> The court adopted the general theory of the *McNaughten* case, and said that every crime involves the union of act and intent and that where the defendant lacks the capacity to distinguish between right and wrong there can be no intent. The court went somewhat farther and adopted what it called the more humane and advanced doctrine of "irresistible impulse." Under this rule, even if the defendant had the capacity to distinguish between right and wrong, he still might be found not guilty if he could establish that he acted under an irresistible impulse. The irresistible impulse rule was, however, limited in its application to insane persons, the court specifically saying that the law "makes all sane persons responsible for their impulses." It is not clear from the opinion whether by the application of the right and wrong test, insanity is determined or whether insanity must first be determined and then the right and wrong test applied to measure the degree of insanity which renders a man irresponsible. No general definition of insanity is given apart from the language which measures criminal responsibility in terms of the right and wrong test. It is not clear how a jury can determine whether a man acting under an irresistible im-

<sup>4</sup>(1843) 10 Clark & Fin. 200.

<sup>5</sup>(1899) 23 Mont. 358, 59 Pac. 169.

<sup>6</sup>*State v. Narich* (1932) 92 Mont. 17, 9 Pac. (2d) 477.

pulse is sane. One would normally suppose that by definition, the will would be overcome before there could be an irresistible impulse and that once a jury found that the will had been overcome, there could be no finding of sanity. The court speaks of an irresistible impulse arising from a "disordered mind." Does anything but a disordered mind have an irresistible impulse and is not a disordered mind an insane mind? It may be that the court conceived of the will as a separate compartment of the nervous system which could be overcome without affecting the "mind" which had its existence in some other compartment. Since, when dealing with the irresistible impulse rule, the right and wrong test has already been excluded, it is clear that the jury must find some general insanity or disease of the mind before it can make application of the irresistible impulse rule. There is no guide by which the jury may determine this general insanity. The manner in which the court uses the phrase "disease of the mind" gives the impression of a brain crawling with bacteria. In any event, the language of the *Peel* case leads to a legal *cul de sac*. The difficulties which the Montana Court has had in keeping the various definitions of insanity consistent are pointed out in a comment in the Montana Law Review<sup>7</sup>.

This type of decision has been bitterly denounced by the psychiatrists who say that the legal definitions of insanity are completely meaningless and that the words used by the courts have no relationship to the medical aspects of insanity. They decry the attempt by the courts to measure moral faculty, saying that the concept itself has long since been discarded by students of the mind. These criticisms would be entirely justified were the problem purely medical or psychiatric, but as has been pointed out, it is more complex than that. The problem is, what does a present society, not a more enlightened future society, want to do with the criminally insane. To what extent does society want to relieve the insane defendant from punishments which are visited upon sane ones. So long as the concept of punishment plays a substantial role in our criminal law, the criticisms are not too important.

Under present constitutional provisions<sup>8</sup>, the issue of in-

<sup>7</sup>Volume I, No. 1, p. 69.

<sup>8</sup>MONT. CONST. ART. III, §23. Attempts to divest the jury of the power to determine the insanity issue in criminal cases, in states having constitutional provisions similar to Montana's, have been held unconstitutional. *State v. Lange* (1929) 168 La. 958, 123 So. 639, 67 A.L.R. 1447; *State v. Strasburg* (1910) 60 Wash. 106, 32 L.R.A. (n. s.) 1216, 110 Pac. 1020, Ann. Cas. 1912B, 917.

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sanity must be determined by a jury. The picture presented to a jury in insanity cases where the insanity is not readily apparent is of such character that a jury cannot possibly make any precise evaluation or form any judgments according to narrow definitions. The significant facts in a case history escape the untrained mind. Expert testimony, couched as it is in a strange terminology and sometimes based on premises not generally understood, is necessarily confusing. The opinions of lay witnesses, except in extreme cases, furnish indirect and inconclusive facts, such as "he seemed upset," "he wasn't normal," and "his face was pale and his eyes seemed strange." Where there is a conflict in the evidence the confusion is multiplied. The experts themselves are handicapped by lack of adequate case histories and opportunity to observe and are frustrated by the moulds into which their opinions must fall. Under these circumstances is it possible that the jury can fit the evidence according to any but the roughest of patterns. The capacity of a jury, for obvious reasons, is not a subject which admits of dogmatism because there is no possible method of judging it, but it is inconceivable that the untrained mind can absorb a mass of testimony thrown at it in a short time and then evaluate it according to any precise standards. The average juror probably is not interested in the defendant's capacity to understand the differences between right and wrong, but rather in whether according to his individual standards of right and wrong, the defendant should be punished. To reach his conclusion he views the crime, the manner in which it was committed and the evidence of insanity all together and then reaches a result, based not on instructions defining insanity, but upon his own notions of justice<sup>9</sup>. Given identical evidence of insanity, would not the outraged husband be apt to fare better with a jury than would the lover, in a murder case arising out of the typical triangle? Were the jury instructed that if they found the defendant crazy, "wing-ding" or "loony", they must acquit, the results would

<sup>9</sup>S. Sheldon Glueck, in his work *MENTAL DISORDERS AND THE CRIMINAL LAW* has this to say: "The author has sometimes wondered at the naivete of some writers on the criminal law, who seem to assume that in the vast majority of cases, after listening for days to a mass of conflicting, intricate, and confusing testimony, to a series of hypothetical questions, and a long, frequently confusing, if not contradictory, trial-judge's charge, a jury of untrained laymen can retire to the cloistral calm of a stuffy jury room and contemplate on the judge's words of legal wisdom, deciding the case in strict accordance with the formal tests of criminal irresponsibility applicable to insanity cases." (*MENTAL DISORDERS AND THE CRIMINAL LAW*, p. 108)

vary but little from those now obtained. This, of course, is heresy to a profession which has with relative complacency seen jury verdicts reversed because of faulty definitions of the "reasonable man" and "a reasonable doubt."

It might be urged that for precisely these reasons, the question of insanity should be tried by experts who are capable of evaluating evidence of insanity. Again, however, the problem is what do we want our criminal law to accomplish? If the problem of crime is to remain a moral<sup>10</sup> problem, the jury is quite as able to make the judgment as is the expert, because its reactions to the moral issues are closer to those of society than are those of the expert<sup>11</sup>. A jury verdict would reflect, roughly, the general consensus of public opinion while the experts verdict would reflect the narrow consensus of trained opinion. As a specific example, the psychologist is much more tolerant of abnormal sex crimes than is the layman. He knows that the homo-sexual, because of his nervous make-up cannot satisfy the sex drives as does the hetro-sexual and he appreciates the tensions upon which the homo-sexual lives. To the psychologist, the homo-sexual is a medical problem; to the layman he is a moral problem. Results obtained by a board of experts would be apt to differ widely from those obtained by a layman's jury where sex crimes were concerned, and it is probable that the jury's results would be more acceptable to the public than would the expert's. There is some virtue in a system which accomplishes popular results, since after all the stability of our institutions is to some extent dependent upon public acceptance of them.

For these reasons it is submitted that the present system of trying the insanity issue and the present definitions of insanity are consistent with the dominant philosophy of our criminal law. Certainly there is very little that the courts can

<sup>10</sup>The word "moral" is used throughout in the sense of the difference between right and wrong as expressed by the general body of community opinion. In the average criminal case the word "moral" as here used, is almost synonymous with the word "legal." The difference between the words is found in the fact that a jury may while applying certain community values go beyond the boundaries fixed by the law. Where there is a conviction the error may, if the evidence is not conflicting, be detected. Where there is an acquittal it never is.

<sup>11</sup>J. C. Turner in an essay *THE MENTAL ELEMENT IN CRIMES* published in *THE MODERN APPROACH TO THE CRIMINAL LAW*, McMillan and Co. Ltd. (1945) puts the problem rather interestingly. "In the case of insanity, then, it appears not only that we still retain a moral standard for liability but also that this moral standard is objective in the sense that it is not the actual moral standard of the accused person, but the moral standard of the tribunal by whom he is tried." *THE MENTAL ELEMENT IN CRIMES* at p. 223.

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do about it. In the interests of stability, the Supreme Court should fix upon a definition of insanity and adhere to it. Much more than that it cannot do.

Much could be done by the legislature. The problem of insanity in criminal law is but a small segment of the whole problem of insanity. At present Montana is not equipped to deal with the non-criminally insane. We do not have either the staff or the physical plant to cope with the increasing demands<sup>13</sup>. Until these are provided, the core of the problem as regards either the criminally or non-criminally insane cannot be touched. When sufficient trained personnel have been secured and an adequate physical plant has been built then it would be well to provide for a general screening of all persons accused of crime<sup>14</sup>. Today the emphasis on insanity in the field of criminal law is all too much on the spectacular murder, spiced up with sex, where insanity is raised by the accused as a "last ditch" defense. No attempt is made to discover the psychologically maladjusted persons who, because of their maladjustment, are involved in the less sensational crimes. Many of the garden variety inmates of our jails and penitentiaries could probably be rehabilitated were their conditions known and were adequate treatment available<sup>15</sup>. These are matters for the general public.

In the broader field the work of the criminologists, penologists and sociologists seems to be gaining ground and it is possible that at some future time the "eye for an eye and tooth for a tooth" philosophy will cease to be the primary consideration in criminal matters. When that time comes there will be but one standard for the treatment of the criminal: "How can this man best be treated for the general good of society?". Then the criminal rather than the crime will be judged and the treatment will fit the criminal rather than the crime. Then the psychologist and psychiatrist rather than the judge will play the predominant role. Then at least as much time will be spent on determining what treatment should be used as is spent on finding out whether the accused did the act for which he is charged. These things lie very far in the future.

<sup>13</sup>REPORT NO. 1 OF 'THE GOVERNOR'S COMMITTEE ON REORGANIZATION AND ECONOMY discloses the deficiencies in our State insane Asylum as of August, 1941.

<sup>14</sup>The State of Massachusetts pioneered a law of this type which has been widely praised by students of this subject. ACTS AND RESOLVES, (1921) Ch. 415.

<sup>15</sup>"There are about 100 inmates (in the state prison) who in the opinion of lay persons on the staff are or may be psychotic." REPORT NO. 20. GOVERNOR'S COMMITTEE ON REORGANIZATION AND ECONOMY, p. 20.



II.

PROBLEMS INVOLVED IN THE DETERMINATION OF  
INSANITY AT THE TIME OF TRIAL,  
SENTENCE AND PUNISHMENT.

The general procedure for the trial of the issue of present capacity is outlined by the code and no purpose would be served by the reiteration of the applicable statutes. Hence only the problems raised by them will be dealt with. Some of the general social considerations are mentioned in the sections of this article dealing with the problems of criminal responsibility.

A. THE RIGHT OF THE DEFENDENT TO A JURY TRIAL WHERE  
THE ISSUE IS RAISED DURING THE TRIAL.

When a doubt arises as to the sanity of the defendant during a trial, the court is required to submit the issue to a jury other than the one trying the criminal charge<sup>13</sup>. The determination of whether a doubt has arisen is within the province of the trial judge<sup>14</sup>. The limit of the judge's discretion has not been clearly defined. In all cases where the question has arisen, the Supreme Court has affirmed the refusal of the trial court to submit the question to a jury. In these cases the evidence was very weak so far as can be determined from the court's opinions. The court has indicated that the discretion of the trial court to determine the existence of a doubt is very wide and the language of some of the cases implies that the trial court has a discretion equivalent to that which it exercises when it makes findings of fact on conflicting evidence in civil actions. Thus, in the *Peterson* case the court said:

"But such a doubt does not necessarily present itself by the mere assertion of the defendant that he is insane, or even by introduction of witnesses on the trial who swear they do not believe him to be of sound mind. The question whether

<sup>13</sup>R.C.M. 1935, §12214 provides: "When an action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury, which must be drawn and selected as in other cases; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity."

<sup>14</sup>*State v. Vetter* (1926) 77 Mont. 66, 249 Pac. 666; *State v. Schlaps* (1927) 78 Mont. 560, 254 Pac. 858; *State v. Howard*, (1904) 30 Mont. 518, 77 Pac. 50; *State v. Peterson* (1900) 24 Mont. 81, 60 Pac. 809.

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a doubt exists is one that addresses itself peculiarly to the sound discretion of the trial court. To it must be presented the reasons for asking that such an inquiry be had, or of its own motion the court may institute the investigation, and to its own sound judgment is left the decision of the wisdom of having it."

In the *Howard* case, the following language, which was later used in the *Vettere* case, appears:

"Unless there be a doubt in the mind of the judge *a quo*—a doubt which he must legally determine as he would determine any other matter of grave import before him—he will not be warranted in calling a special jury to try the issue."

Results justifying the use of such language have been reached in other states having similar statutory provisions. Thus, in California, a judge who refused to submit the issue of sanity to the jury was upheld in a case where the evidence before the court showed the defendant to be insane, and the only basis for a contrary conclusion was found in the opportunity which the trial court had to observe the defendant<sup>17</sup>.

In a later case, the trial court's discretion was upheld where the evidence in support of the insanity consisted of affidavits from two physicians and officers working in the jail, while the contrary evidence consisted of counter affidavits, the contents of which are not disclosed in the opinion<sup>18</sup>.

There is, of course, a limit to the trial court's discretion<sup>19</sup>, but even in cases where the trial courts have been held to have abused their discretion, the broad language of the Montana cases is used. In the cases last noted, the evidence of insanity was very strong, there was no evidence offered to contradict it, and it is highly probable that a jury verdict of sanity would not have been affirmed.

Notwithstanding the language used by the courts, it would seem that under the statute there is a substantial difference between the function of the judge and the function of the jury, and that the former was not intended to be coextensive with the latter. Any creditable evidence given by competent witnesses should be sufficient to create a "doubt." Certainly there should be a doubt if, from the evidence presented, a jury could reason-

<sup>17</sup>People v. Kirby (1911) 15 Cal. App. 264, 114 Pac. 794.

<sup>18</sup>People v. Keyes (1918) 178 Cal. 794, 175 Pac. 6.

<sup>19</sup>People v. Vester (1933) 135 Cal. App. 223, 26 Pac. (2d) 685, rehearing denied by the Supreme Court; Fralick v. State, (1923) 25 Ariz. 4, 212 Pac. 377.

ably find that the defendant was insane. Can a judge say that there is no doubt about a defendant's insanity if a competent physician says that there is? Can people trained only in the law say that there is no doubt in a case where competent medical authorities disagree? The decisions indicate that they may.

While this result may be expedient and may prevent useless trials of the insanity question, and while the judge may be quite as competent as the jury to determine the question, nevertheless the statute, vesting the power of decision in the jury, seems to have been emasculated by judicial amendment.

The provision providing for trial of the issue of insanity at the time of judgment is duplicated in the codes.<sup>20</sup> Section 12065 could be construed as requiring a slightly stronger showing than Section 12214 because of the difference in the language employed. It would seem, however, that any attempt to provide a different standard of proof at the time of sentence than is required during the trial would only result in a labyrinth of words.

It is interesting to note that in none of the cases decided by the Montana Supreme Court was the difference between the two basic concepts of insanity, pointed out in the opening paragraphs of this article, suggested by counsel or mentioned by the court.

**B. WHERE THE ISSUE IS RAISED AFTER THE SENTENCE OF DEATH.**

A separate treatment is given the problem of present capacity when raised after the judgment of death.<sup>21</sup> In that case the sheriff, with the concurrence of the judge, may submit the question of defendant's insanity to a jury. While the word "may" is used in Section 12095, it is probable that in view of Section 12213, the sheriff must submit the issue to a jury, and the judge must concur in that submission where there is good reason to suppose that the defendant has become insane. The problem here, however, is similar to the one previously discussed, in that

<sup>20</sup>R.C.M. 1935, §12214 and §12065: The latter section provides in part as follows: "He (the defendant) may show, for cause against the judgment—1. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of insanity must be tried as provided in sections 12213 to 12219 of this code."

<sup>21</sup>R.C.M. 1935, §12095 provides as follows: "If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon from the list of jurors selected for the year, a jury of twelve persons to inquire into the supposed insanity, and must give immediate notice thereof to the county attorney of the county."

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the limit of the discretion to be exercised by the sheriff and the judge has not been defined. The section has not been seriously considered by the Montana Court and only one case has been decided under it.<sup>22</sup> If the same interpretation is given this section as has been given Section 12214, then a defendant under judgment of death must be considered insane by the sheriff, the judge and the jury before judgment can be stayed.

C. THE RIGHT OF THE DEFENDENT TO A JURY TRIAL WHERE THE ISSUE IS RAISED PRIOR TO THE TRIAL.

A substantial procedural problem is created by Section 10728, Revised Codes of Montana, 1935. Prior to 1925, if a defendant introduced a reasonable doubt as to his sanity at the time of the commission of the offense, he was entitled to an acquittal.<sup>23</sup> In 1925, for the primary purpose of requiring the defendant to establish his insanity by a preponderance of the evidence, subdivision 2 of Section 10728 was added. It reads:

*“When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven by the defendant by a preponderance of the testimony; provided, however, that said defendant may have his sanity or insanity determined in the manner provided by law, by requesting the district court to determine the same, at any time before the jury is obtained.”* (Italics supplied.)

It is not clear whether the italicized portion of the quoted subdivision relates to the present insanity of the defendant or to his insanity at the time of the commission of the offense. Since the remaining portion of the subdivision deals with the defense of insanity, that is, the capacity to commit the crime, it might be supposed that the entire subdivision deals with the same subject and that it was the intention of the legislature to require a defendant who wished to defend on the ground of insanity to advise the court of that intention prior to the empaneling of the jury. If this is the meaning of the language in question, then nothing was accomplished by it. The right to defend on the ground of insanity existed prior to 1925 and no new legislation was needed to secure that right to a defendant. On the other hand, if it was intended to require a defendant to announce his intention to plead the defense of insanity, the language of the subdivision does not accomplish this since the words used are entirely permissive and do not even by im-

<sup>22</sup>State v. Vetter, *supra*.

<sup>23</sup>State v. Brooks (1899) 23 Mont. 146, 57 Pac. 1088.

plication indicate that a defendant is barred from the defense if advance notice is not given. Such a purpose could have been accomplished by very explicit language and it is thought that such would have been used had the legislature intended such a radical change in well established rules of criminal procedure.

Because the quoted language, if used in the sense above mentioned, accomplishes very little and because the language "may have his sanity or insanity determined in the manner provided by law" seems to refer to something other than the submission of the capacity to entertain a criminal intent to the trial jury, it is the opinion of the author that the language in question relates to the defendant's capacity to be tried.

If this is the proper construction, still more serious problems remain. Does the defendant have an absolute right to have the jury pass upon the issue of present capacity if a timely request is made? The answer to the question depends upon the construction to be placed upon Sections 10728 and 12214.

The former provides that the court must determine the sanity issue according to law. Section 12213 to 12217 provide the only procedure for the trial of the insanity issue. What then does the word "determination," used in both sections, mean? Does a judge in passing on the question of a doubt determine the issue of insanity? Pragmatically he does under the decisions of our court. Theoretically, however, a judge's function is preliminary and procedural and is limited to the question of whether there is a bona fide issue of insanity which should be determined by a jury. It seems to be the legislative intention that the question of insanity should be passed upon by a jury. Since the issue can be raised at any time, orderly procedure would require that trials be not constantly interrupted by groundless claims of insanity. Hence the court was given the right as a preliminary matter to decide whether there was an issue. This is not a right to determine the issue, but only to determine if there is a bona fide issue which should be submitted to the jury. When the issue arises, i.e., when there is a doubt as to the sanity, the judge theoretically has no power to refuse to submit it to the jury. If this be true, then the words "determined in the manner provided by law" used in Section 10728, mean a determination by a jury since no other method of determination is provided for. This is true, of course, only where a timely request is made, and in other cases, the defendant is required to raise a doubt in the mind of the trial judge.

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Such a construction reaches a workable result, since the orderly processes of trial would not be disrupted if the sanity issue were in all cases submitted to a jury before the trial of the main issue.

## D. THE BURDEN OF PROOF.

The statutes do not allocate the burden of proof nor define it in proceedings to determine the present capacity of the defendant. Section 10728, Subd. 2, which refers to the defense of insanity is not applicable, but it is probable that a similar result would be reached by the application of general principles. The general presumption of sanity<sup>24</sup> is sufficient to place the burden of proof on the defendant. The statutes seem to contemplate this by allowing the defendant to open the case and close the argument.<sup>25</sup>

Since the inquisition into the sanity of the defendant is not at this stage of the proceedings related to his guilt or innocence, the defendant should be required to prove his insanity by a preponderance of the evidence.<sup>26</sup>

## E. CONCURRENCE IN THE VERDICT.

While Section 12215 is quite explicit in some details, it neglects to mention the number of jurors who must concur in a verdict. The question arises whether a concurrence of twelve as in felony cases or eight as in misdemeanor cases is required. The constitution<sup>27</sup> provides no help, since it uses the words "civil actions" and "criminal actions not amounting to a felony", and nowhere mentions this type of proceeding. The provision of the penal code relating to jury verdicts<sup>28</sup> uses similar language. The sections of the Code of Civil Procedure contain no language which throw light upon this problem.<sup>29</sup> One method of resolving the problem is by reference to the common law. At common law the concurrence of twelve jurors was required.<sup>30</sup>

<sup>24</sup>*Sommerville v. Greenwood* (1922) 65 Mont. 101, 210 Pac. 1048; *In re Harper's Estate* (1934) 98 Mont. 356, 40 Pac. (2d) 51; *Hier v. Farmer's Mutual Fire Insurance Company* (1937) 104 Mont. 471, 67 Pac. (2d) 831; *In re Murphy's Estate* (1911) 43 Mont. 353, 116 Pac. 1004.

<sup>25</sup>R.C.M. 1935, §12215.

<sup>26</sup>*U. S. v. Chisolm* (1906) 149 Fed. 284; *Jordan v. State* (1911) 124 Tenn. 81, 135 S.W. 327, 34 L.R.A. (n. s.) 1115.

<sup>27</sup>MONT. CONST. Art. III, §23.

<sup>28</sup>R.C.M. 1935, §11929.

<sup>29</sup>Chapter 19, CODE OF CIVIL PROCEDURE of 1935.

<sup>30</sup>This technique is somewhat analogous to that used in determining kinds of cases in which the right to trial by jury exists as a constitutional right. *Chessman v. Hale* (1905) 31 Mont. 577, 79 Pac. 254; *State ex rel Jackson v. Kennie* (1900) 24 Mont. 45, 60 Pac. 589.