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liability. The rule removes these exceptions to the hearsay rule from the nebulous area of *res gestae* and permits admission of reliable evidence, excluded under the present rule, which may be the best evidence available.

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PROCEDURAL METHODS FOR RAISING INSANITY IN CRIMINAL ACTIONS IN VIRGINIA

Insanity as a criminal defense is frequently used and often abused.[1] The frequency of its use as a defense in criminal cases seems to rise in direct proportion to the severity of the punishment.[2] In 1958, 261 persons were admitted to mental hospitals in Virginia for observation as a result of some alleged crime.[3] The growth and changes this defense has undergone in recent years places great demands on both courts and attorneys; such demands require not only a thorough understanding of the substantive aspect of the defense and its many facets, but also an understanding of the procedural complexities that have naturally evolved from its usage. When may the issue of insanity be used? Who can raise the issue of insanity?

In *McLane v. Commonwealth*[4] the defendant was indicted for first degree murder. At the trial, the defendant called as one of his witnesses a doctor, whose qualifications as an expert on insanity were not challenged even though the doctor was not included in defendant's list of witnesses. After a vigorous cross-examination of the witness, the Commonwealth's attorney in his summation to the jury made remarks discrediting the witness's qualifications. It was made to appear that the defendant was adopting unfair tactics in not disclosing the name of the doctor, and that the prosecution had not had an op-

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[1]10 Michie's Jurisprudence of Va. and W. Va., Insane and Other Incompetent Persons §§ 43-50 (1950); Annot., 142 A.L.R. 961 (1943). See generally Weihofen, Mental Disorder as a Criminal Defense (1954); Flannery, Meeting the Insanity Defense, 51 J. Crim. L., C. & P.S. 309 (1960); 8 Ala. L. Rev. 49 (1955).

[2]To demonstrate that the defense is seldom used except in the more serious crimes, all the Virginia cases cited in the course of this comment have the crime charged in parenthesis after the style of the case.

[3]1958 State Hospital Board Ann. Rep. 63. Of the total admitted for observation 241 were male and 20 were female. According to the alleged crime the total admitted were as follows: Rape, 19 males; Crimes against nature, 6 males; Adultery, 1 male; Murder or Voluntary Manslaughter, 30 males and 9 females; Arson, 7 males; Assault, 44 males and 1 female; Larceny-Robbery-Burglary, 84 males and 1 female; Disorderly Conduct, 14 males; Other crimes, 36 males and 9 females. Id. at 63.

[4]202 Va. 197, 116 S.E.2d 274 (1960) (murder).

portunity to obtain a medical witness of its own in rebuttal. The jury thereupon found the defendant guilty of murder in the second degree. On appeal, the defendant contended that the improper argument of the Commonwealth's attorney in his summation prevented him from having a fair and impartial trial. The Virginia Supreme Court of Appeals reversing the trial court stated: "There was no duty upon defendant to inform the Commonwealth's attorney of the evidence which he would offer in his defense. . . ."[5]

Although the procedure for raising the issue of insanity at the trial arose incidentally[6] in *McLane,* it does present the necessity for an examination of the Virginia procedure, if only to avoid a repetition of the *McLane* problem. Basically there are three opportunities to raise the issue of insanity:[7] (1) before trial; (2) at trial; and (3) after trial.

At various stages prior to the trial the issue of insanity, or mental irresponsibility,[8] may arise. The first of these is at the *preliminary hearing,*[9] since the Virginia Code provisions on insanity apply both to courts of record and those not of record.[10] At this time the mental condition of the accused may be raised by the court or the Commonwealth's attorney.[11] The court can then hear evidence itself, or appoint a commission[12] in its discretion.[13] If it is deemed advisable, the accused

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[5]Id. at 204, 116 S.E.2d at 280.

[6]"Incidentally" in the sense that the argument prevented a fair and impartial trial; however, the comment by the Commonwealth's attorney that the procedure by the defendant was faulty and in bad faith was the cardinal error within the argument.

[7]In Webster's New International Dictionary (2d ed 1950), "issue" is defined as "a point in debate or controversy on which the parties take affirmative and negative positions." For purposes of this comment "issue" is used not only to describe the presentation of the matter as a defense to an alleged crime by the accused, but also to cover the questioning by the prosecution of the mental status of the accused (which the attorney for the accused may or may not wish to dispute).

[8]Perkins, Criminal Law, 740-46 (1957) advocates the use of "mental irresponsibility" or some comparable term in place of insanity. Virginia has recognized the validity of Perkin's suggestion to some extent. The 1950 Amendment to Va. Code §§ 37-99-112 substituted "mentally ill" for "insane" and "mentally deficient" for "feeble minded". Acts of the Gen. Assembly of Va. 1950, ch. 465, p. 899.

[9]Va. Code Ann. §§ 19.1-101-08 (Repl. Vol. 1960).

[10]Va. Code Ann § 19.1-228 (Repl. Vol. 1960).

[11]Ibid. See Day v. Commonwealth, 196 Va. 907, 911, 86 S.E.2d 23, 25 (1955) (robbery, sodomy and attempted rape) for an example of where the procedure was used.

[12]Va. Code Ann. § 19.1-228 (Repl. Vol. 1960) defines a "commission" as "one or more physicians skilled in the diagnosis of insanity."

[13]This section places no obligation upon the court to appoint a commission except where the court or attorney for the commonwealth has reason to believe that

is sent to a state mental hospital for care and observation until sanity is restored.[14] The defendant can also raise the matter at the preliminary hearing, but this is generally thought to be tactically unsound because the Commonwealth would thus be warned and have additional time to prepare its case.[15]

Insanity may be put in issue before the *grand jury*.[16] The court, or the Commonwealth's attorney, can raise the question and have it determined. If the *grand jury* fails to indict for reasons of insanity, the defendant can go free, unless there are proceedings to have him committed as a noncriminal insane person.[17]

The final stage prior to trial where the matter can arise is at *arraignment*.[18] There it can be raised by the court, the Commonwealth's attorney, or the defendant. The defendant can follow one of two courses: first, he can expressly put his mental condition in issue; or secondly, since the defendant is not required to divulge his defenses, he can plead not guilty[19] and this will preserve the question of his mental condition, which he can bring to the court's attention at trial. The latter was the course followed in *McLane*.

At trial the court, upon its own motion, may raise the insanity issue because the Virginia Code provides that when reasonable doubt of sanity exists, the court may suspend the trial and either appoint a commission, hear the evidence itself, or impound a special jury.[20]

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the person to be tried is in such mental condition that his confinement in a hospital for the insane for proper care and observation is necessary to attain the ends of justice. Tilton v. Commonwealth, 196 Va. 774, 778-79, 85 S.E.2d 368, 371 (1955) (murder); Delp v. Commonwealth, 172 Va. 564, 571, 200 S.E. 594, 596 (1939) (murder); Wood v. Commonwealth, 146 Va. 296, 305, 135 S.E. 895, 898 (1926) (attempted rape).

[14]Va. Code Ann. § 19.1-228 (Repl. Vol. 1960).

[15]Although this procedure is not universally followed, it may be advantageous to the defendant. For example, it may be obvious that the accused is insane; then his attorney could bring the matter to the attention of the court so that the accused can be examined at state expense. See note 44 infra. and accompanying text.

[16]Va. Code Ann. §§ 19.1-147-61 (Repl. Vol. 1960).

[17]Virginia has no statute that specifically covers this situation. However, Va. Code Ann. §§ 37-61-65 (1950), which is the commitment statute for insane persons, can generally be used. Eleven states, including West Virginia, W. Va. Code § 6198 (1955), have statutes to meet this eventuality. Weihofen, Mental Disorder as a Criminal Defense 354 (1954).

[18]Va. Code Ann. § 19.1-240 (Repl. Vol. 1960).

[19]Wood v. Commonwealth, 146 Va. 296, 306, 135 S.E. 895, 898 (1926) (attempted rape); Stover v. Commonwealth, 92 Va. 780, 787, 22 S.E. 874, 876 (1895) (petit larceny); Baccigalupo v. Commonwealth, 74 Va. (33 Gratt.) 606, 607 (1880) (felonious stabbing with intent to kill).

[20]Va. Code Ann. § 19.1-229 (Repl. Vol. 1960).

The appropriate body first determines whether the accused is presently insane[21] since one cannot be tried while in such condition.[22] This requirement stems from the common law rule that the accused must be able to comprehend the nature of the proceedings,[23] and the requirement is recognized by implication in Virginia.[24] If the accused is found to be presently sane, the trial will proceed, and the defendant will have to raise the issue under his plea of not guilty.[25] On the other hand, if the jury or the commission finds that the party is presently insane, further inquiry as to his mental state at the time of the alleged crime is made.[26] In determining sanity at the time of the crime Virginia uses two tests since it has not strictly adhered to the "right-wrong" test,[27] but has also recognized the "irresistible impulse" test for many years.[28] Therefore, if the accused is found to be insane at the time of the crime, the court may dismiss the prosecution and order him to the hospital, there to be detained until restored to sanity. If however, the court finds that he was not insane at the time of the crime, but is presently insane, the court will order him to be confined at the proper hospital until he is so restored that he can be placed on trial.[29]

At trial the defendant can raise a question of present insanity or insanity at the time of the crime by a plea of not guilty.[30] The burden of persuasion is then placed on the defendant as to such insanity.[31]

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[21]Va. Code Ann. § 19.1-231 (Repl. Vol. 1960).

[22]Va. Code Ann. § 19.1-227 (Repl. Vol. 1960).

[23]The common law rule is that an accused cannot be tried while so mentally disordered as to be incapable of understanding the proceedings or making a rational defense." 8 Ala. L. Rev. 49, 52 (1955).

[24]In referring to what is now Va. Code Ann. § 19.1-227 (Repl. Vol. 1960) the Virginia Court of Appeals stated that this section "is merely declaratory of the common law." Delp v. Commonwealth, 172 Va. 564, 569, 200 S.E. 594, 596 (1939) (murder).

[25]Va. Code Ann. § 19.1-231 (Repl. Vol. 1960).

[26]Ibid.

[27]"The insane irresistible impulse test ... has never been viewed as a substitute for M'Naghten but only as an additional defense in cases of mental disorder." Perkins, Criminal Law 760 (1957).

[28]Thompson v. Commonwealth, 193 Va. 704, 717-18, 70 S.E.2d 284, 292 (1952) (murder); Thurman v. Commonwealth, 107 Va. 912, 916-17, 60 S.E. 99, 100-01 (1908) (murder).

[29]Va. Code Ann. § 19.1-231 (Repl. Vol. 1960).

[30]See note 19 supra.

[31]Maxwell v. Commonwealth, 165 Va. 860, 865, 183 S.E. 452, 454 (1936) (robbery); Wessells v. Commonwealth, 164 Va. 664, 673-75, 180 S.E. 419, 422-423 (1935) (murder).

Generally it appears Virginia does not look with great favor on this defense. For example in Dejarnette v. Commonwealth, 75 Va. 867 (1881) (murder) the court

Because this plea is an affirmative defense, the accused is given the advantage of bringing the matter to the attention of the court at any stage of the trial proceedings. In Virginia a verdict of guilty establishes sanity.[32] Further, when the accused is acquitted by reason of being insane, "the verdict shall state the fact,"[33] and if the court deems the prisoner dangerous, the court may commit him to a hospital for the insane.[34]

The question of insanity may arise after conviction. The Virginia Code has two provisions in this area, one calling for a determination of sanity after conviction, but before sentence by a commission or special jury.[35] The other section makes the same provision for those already sentenced.[36] Because many previous opportunities were not taken to raise the defense, raising the issue of insanity by collateral attack after conviction is of little value. It has been stated: "After conviction, insanity may offer a last desperate hope.... The hope is a dim one. There are few cases in which a conviction has been upset by collateral attack."[37] Nevertheless, there are several stages where this might possibly be done: on appeal,[38] by a writ of *habeas corpus*,[39] or by a writ of *coram nobis*.[40]

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stated: "Insanity is easily feigned and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence." Id. at 881.

For instruction on insanity and particularly on the burden of proof see Lee, The Criminal Trial in the Virginias §§ 489-508 (2d ed 1940).

[32]Jessup v. Commonwealth, 185 Va. 610, 618, 39 S.E.2d 638, 642 (1946) (housebreaking and grand larceny.)

[33]Va. Code Ann. § 19.1-239 (Repl. Vol. 1960).

[34]Ibid.

[35]Va. Code Ann. § 19.1-234 (Repl. Vol. 1960). The court must have some evidence available after the verdict to authorize this procedure. Stover v. Commonwealth, 92 Va. 780, 787, 22 S.E. 874, 876 (1895) (petit larceny).

[36]Va. Code Ann. § 19.1-235 (Repl. Vol. 1960).

[37]Weihofen, Mental Disorder as a Criminal Defense 384 (1954).

[38]In Tennessee, when incompetency was not pleaded in the lower court, but the appellate court suspects from the record and from the defendant's conduct that he is incompetent, it may make an investigation on its own motion. If it finds him incompetent, it has recommended commutation of the sentence and removal to a mental hospital. Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (1911); Green v. State, 88 Tenn. 634, 14 S.W. 489 (1890). Insanity is not a ground for reversal of appeal in Virginia. 10 Michie's Jurisprudence of Va. and W. Va., Insane & Other Incompetent Persons § 46 (1950).

[39]Va. Code Ann. § 8-596 (1950). The annotation to this section on "habeas corpus" reveals no cases on insanity. Weihofen, Mental Disorder as a Criminal Defense 385 (1954) states "habeas corpus is not available for this purpose, because the contention is merely a matter of defense and does not go to the court's jurisdiction."

[40]Va. Code Ann. § 8-485 (1950). The annotation to this section on "coram nobis"