

NOTES ON THE CONTRACTS AND TORTS OF LUNATICS, WITH SPECIAL REFERENCE TO THE LAW OF MARYLAND.

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The legal status of the insane, with regard to contract and tort, is a branch of the vast law of lunacy. This term is the legal equivalent of the medical word insanity, and unfortunately the law affecting the insane has by its lack of logical basis often shown itself worthy of that unscientific title. My point of view is purely legal. I shall not consider (1) insanity, which is mental unsoundness from the medical point of view, nor (2) medical jurisprudence, which is the application of medical science to the administration of the law, nor (3) that intricate portion of the law of lunacy which deals with the legal commitment and custody of the insane.

The following definition is given by Blackstone (Bk. I, 304): "A lunatic is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. He is indeed properly one that hath lucid intervals, sometimes enjoying his senses and sometimes not, and that frequently depending upon the changes of the moon." These last words explain the origin of the term lunacy. Although absurd on its face, and referring properly to a single phase of mental unsoundness, it has somehow firmly established itself in legal terminology. Both in England and America the word "lunatic" is commonly used, in statutes and by legal writers, as a generic term denoting any person of unsound mind.

To medical men, however, the legal view of insanity appears more unscientific than it really is. The law cannot recognize medical distinctions or classifications. It does not, and need not, ask whether the brain of a given individual is wholly or partially affected, whether the disease is slight or serious, or how it was

caused. The law is confronted by questions such as these: Is a given contract enforceable? Is a given will valid? Was a given criminal responsible for his act? In order to answer those questions it is necessary to ascertain whether the individual, at the moment when he performed the act, was or was not under the control of reason. In cases where a man's lunacy is alleged, the question therefore comes to this: Were his mind and will, at the given time and with respect to the particular transaction, in a rational state and capable of intelligent exercise? As the medical answers to this difficult question are often conflicting, it is not surprising that the law sometimes hesitates or bumbles.

It is only in matters where the will or intent of the individual comes into action, that the special privileges of the lunatic can arise. In other respects the lunatic and the sane man stand upon an equal footing. For instance, a lunatic can be sued, and can have a valid judgment rendered against him, for a debt contracted when he was sane.¹ If that judgment remains unsatisfied, his property can be sold by the sheriff, and the purchaser will get a good title.² Similarly a decree in equity against a lunatic is a valid bar to a bill in equity on the same question instituted by the lunatic's committee.³ And again, an individual who has made an agreement when sane will not be released from performance by subsequently becoming a lunatic. Though he cannot himself perform, the court will appoint a trustee to carry out the contract for him.⁴ In these cases the lunatic is passive, and he is consequently treated as though he were sane.

But where the lunatic performs an act, such as a contract, a tort, a testament or a crime, which, if performed by a sane man, would necessarily involve an exercise of his will, then in respect to that act the sane man and the lunatic must stand in different positions.

The following classification and definition of the various forms of lunacy may be useful, though the terminology of the various cases is by no means exact or consistent:

¹ *Stigers vs. Brent*, 50 Md. 214.

² *Tomlinson vs. Devore*, 1 Gill 345.

³ *Royston vs. Horner*, 75 Md. 557.

⁴ *Owings' case*; 1 Bland Ch. 370, 381.

Unsoundness of mind may be total, as (1) idiocy, in which a man is "a natural fool from his nativity;" or (2) lunacy, in which a man originally sane has lost his reason from disease, grief or accident. This usually denotes complete unsoundness of mind. But the lunatic may have lucid intervals. If there be such intervals, then as long as they last, and unless he has been formally adjudged a lunatic, he returns to the status of the sane.

Or the mental unsoundness may be partial in degree, as (1) dotage, which is the decay of the mental faculties from old age; or (2) imbecility, which is a weakness of mind analogous to dotage. (In both these forms, the sufferer is treated as sane, unless fraud or undue influence has been practised upon him. In the absence of these, his acts are valid); or (3) monomania, which is mental unsoundness in some particulars, accompanied by soundness of mind in all other respects. Of this form kleptomania, pyromania, nymphomania, homicidal mania, are a few among many instances. As to these forms it may be said that the sufferer is legally regarded as sane, unless his monomania directly affects the particular act under consideration.

Or the mental unsoundness may be partial in point of duration, as (1) delirium, which is a temporary loss of reason, produced by disease; or (2) intoxication (if complete, this is treated like lunacy; if only partial, it is treated like dotage or imbecility); or (3) lunacy, with frequent or prolonged lucid intervals.

It will thus be seen that lunacy has many different meanings. I shall here employ the word lunatic as denoting a person of unsound mind, irrespective of duration or degree, because with the exception of the Latin *non compos*, there is no other general term. *Non compos*, though unknown to the classic Roman lawyers, is a very old term, having been used in the statute "de Prerogativa Regis" of 1324, by which lunatics were declared to be under the King's care. It was also the generic term preferred by Sir Edward Coke. But it is too pedantic for everyday use.

The care and custody of lunatics has been dealt with at great length by statute, both in England and in this country. With this, as at first remarked, we are not now concerned. Our present subject, the legal status or civil capacity of the lunatic, is in England and in the United States almost entirely a creation

of the common law. It has been developed by that legislative power which resides in the breasts of our judges, and it has been from time to time promulgated in their decisions. While its piecemeal mode of creation has doubtless been a source of confusion, yet the flexibility thus imparted should make us congratulate ourselves that this branch of the law has not been crystallized into code or statute, and has always remained in a progressive state.

We may consider the question of lunatic status in respect to (1) criminal responsibility or (2) testamentary capacity, or in respect to (3) contracts or (4) torts. Space forbids us at present to consider more than the two latter points.

I. *Contract*.—First. What is the test of lunacy?

If the law of testamentary capacity is examined, we shall find that, in the earlier half of the present century, it was held that any derangement of the mental faculties was fatal to such capacity. If unhinged in one respect, the mind was regarded as unsound for all purposes. Without dwelling here upon the process by which that theory became exploded, it is sufficient to repeat that the present question as to the test of mental unsoundness may be thus put: "Was the person whose act is questioned able at the time to understand its nature and to judge of its consequences, and was he a free agent with regard to that act?"

Second. If the above question has to be answered in the negative, let us see what becomes of a contract made by the person so affected.

The earliest rule of English law as to the contracts of lunatics was based on the maxim of the Institutes: "*Furiosus nullum negotium gerere potest, quia non intelligit quod agit.*" This means that in Roman law all contracts made by lunatics were void. Inasmuch as the essence of contract is *consensus*, or the meeting of two or more minds, it should follow that, when one of the minds is destroyed by insanity, the contract must itself be destroyed. The Roman theory was thus perfectly logical; nevertheless it is not the theory of our common law.

At some time prior to the 15th century the singular rule arose, to which Coke has given great prominence, that "no man shall be allowed to stultify himself by alleging his own incapacity." This was diametrically opposed to the older rule just stated, for

it meant that lunacy was not a good defence to an action on a lunatic's contract, nor a valid reason for setting aside a lunatic's deed. It was justified on three grounds: First, that it was wrong for a man to inflict a blemish upon himself; second, it was dangerous to enable a man to counterfeit insanity and thus to escape from his agreements; third, public policy favored alienations of property, and it was therefore unwise to enable them to be annulled, as they might be if insanity could be pleaded.

To us these reasons do not seem convincing, and Coke's rule has been severely criticised and repeatedly disregarded. But its influence, as we shall see, still remains.

The present rule is, that a lunatic's contract is voidable at his option (but not void), and that such contract is not even voidable, when executed in such a manner that the parties cannot be restored to their previous condition, if the lunacy was not known at the time to the sane contracting party, and if the contract be fair and free from fraud. In other words, when a lunatic is sued on his executed contract, the burden of proof is upon him to show (1) his mental unsoundness at the time of the contract, (2) the fact that his unsoundness was known at that time to his adversary, or (3) the fact that he was imposed upon, either by receiving no consideration, or by deriving from the contract no adequate benefit.

The two leading cases on this subject in England are *Molton vs. Camroux* (4 Exch. 17), decided in 1848, and *Imperial Loan Company vs. Stone* (1 Q. B. 599), decided in 1892, both of which are frequently cited.

In the earlier case a lunatic had paid to an insurance company a considerable sum for the purchase of an annuity, and the annuity was received by him for several years until his death. His executors then brought suit, and tried to recover from the company the amount of the purchase money. They proved that he had been insane at the time of the contract. But they could not show that the insurance company had known this fact, or had dealt with him otherwise than in perfect good faith. It was held that the lunatic's executors could not recover; but the court did not go so far as to say that all his executed contracts bind the lunatic, if the other party be not in fault.

The case of *Imperial Loan Company vs. Stone* took this

further step, by laying down that a lunatic's executed contract, free from fraud, can be avoided only when the lunatic's condition can be shown to have been known to the other party. It also decided that the burden of proof of the knowledge of lunacy is on the party alleging it. We may add, on the authority of a case decided by Judge Redfield in Vermont,⁸ that if the sane party when dealing with the lunatic could with ordinary prudence have ascertained his condition, the knowledge which the sane man ought to have had will be imputed to him, and his contract with the lunatic will be held void.

One of the three elements necessary to sustain the validity of a lunatic's contract is that it should be fair as well as free from fraud. If it be not so, then the sane party has clearly been at fault, and the court will upon the lunatic's application annul the contract, even though the sane party may not have had actual knowledge of the other party's mental condition.

In a case of this kind in Maryland,⁹ where a lunatic had signed a transfer of bank stock without receiving a cent of consideration, he subsequently brought suit against the bank to have the transfer declared void and the stock restored to him. The Court of Appeals, deciding in the lunatic's favor, based their decision upon the distinct ground that he had received no benefit from the transfer and had been deliberately defrauded. The stock-transfer order was therefore void and of no more effect than if it had been forged; and the bank, though perfectly innocent and with no means of ascertaining the plaintiff's incapacity, was obliged to pay to him the full value of his stock.

The very recent case of *Flach vs. Gottschalk Co.*, decided in 1898 (88 Md. 368) is the first complete exposition in this State of the rule as to lunatics' contracts, and fully endorses the doctrine of the English cases above mentioned. The Gottschalk Co. sued Flach, a lunatic, for the value of two barrels of whisky which had been sold to him and used by him in his business. On appeal it was held that, if the Gottschalk Co. was at the time of the sale ignorant of Flach's mental condition, it was entitled to recover on its claim. The court explained as follows the prin-

⁸ *Lincoln vs. Buckmaster*, 32 Vt. 652, 663.

⁹ *Chew vs. Bank*, 14 Md. 299.

ciple on which this decision rests: "It has been said that such a contract is enforced against a party *non compos*, not so much upon the idea that it possesses the legal essential of consent, but rather because, by means of an apparent contract, he has secured an advantage or benefit, which cannot be restored to the other party, and therefore it would be inequitable to permit him, or those in privity with him, to repudiate it."

From the above cases it will be seen how radically the view of lunatics' contracts in our modern law differs from that of the Roman law. There, if the consenting mind was absent, the contract became void, regardless of the loss which might thus be inflicted upon innocent parties dealing with the lunatic in good faith. Whereas now the law ignores the fundamental theory of contract, and asks whether the lunatic has received any benefit for which he ought in fairness to pay, and whether the party dealing with him was honestly ignorant of his condition. If it finds both these facts to exist, the law upholds and enforces the lunatic's contract against him. A contrary doctrine, says Lord Cranworth, "would render all ordinary dealings between man and man unsafe. How is a shop-keeper, who sells his goods, to know whether a customer is or is not of sound mind?"

This view of the lunatic's benefit, as a measure of his liability, is further illustrated by the universal rule that, for necessities supplied to him at fair prices and in kind and quantity suited to his station in life, the lunatic will be responsible, even though the party supplying such necessities is aware of his mental condition. This rule is based upon the obvious expediency of enabling a man to obtain the necessities of life without difficulty, and of not exposing a lunatic to the risk of starvation or want. When the lunatic has had the benefit of such necessities, it is only fair that he should pay for them. Upon the same principle it was held, in a New York case in 1891, that where an attorney has been employed by a lunatic in an unsuccessful attempt to resist a commission of lunacy, if the attempt was founded upon probable cause and was not frivolous or litigious, the attorney may recover compensation for his services from the lunatic's estate, and after the lunatic's death may enforce the claim against his legal representatives. The reason, in this latter case, is that it is obviously necessary for the lunatic, as well as to the interest

of the public, that he shall be able to employ counsel to represent him, when his liberty and property are at stake.

The deeds of lunatics are voidable to the same extent as their contracts, and the test of capacity to make them is the same, *i. e.*, a mind capable at the time of understanding the transaction.⁷ There is, however, this difference, that whereas the invalidity of the contract by reason of lunacy may be shown in the course of any suit or proceeding, where the existence of that contract is material to the issue, a deed, being an act of greater solemnity, cannot, as a rule, be attacked collaterally, and can only be voided by an equity proceeding instituted for that express purpose.⁸

Again, where it is proposed to avoid a deed made by the lunatic, for which he has received a valuable consideration, the rule applicable to contracts that the parties must be restored to their prior condition is invoked, and the courts of a majority of States have held that the consideration must be given back.⁹ In other words, the lunatic cannot "eat his cake and have it too."¹⁰ Some of our State courts have, however, not accepted this view.¹⁰ It is hardly necessary to add that the right, to have a contract or deed declared void, is one which can only be exercised by the lunatic or those in privity with him. A stranger cannot set up the invalidity of the transaction, and still less can the sane contracting party object to it.

In the case of such deeds, which would be voidable as against the grantees, we are met with some doubt as to the right of third parties, who may have purchased in good faith and for value prior to their discovery of the lunacy. This question also arises with regard to the negotiable paper signed by lunatics, when, owing to an absence of consideration or to his knowledge of the lunacy, such paper would be void in the hands of the original holder. What are the rights of innocent third parties, who may have acquired the paper without notice of the maker's incapacity?

In suits on promissory notes, where the lunacy of the maker

⁷ *Key vs. Davis*, 1 Md. 32; *Evans vs. Horan*, 52 Md. 602; *Riley vs. Carter*, 76 Md. 594.

⁸ See *Evans vs. Horan*, 52 Md. 602, 613.

⁹ *Eaton vs. Eaton*, 37 N. J. Law, 108; *Morris vs. Railway Co.*, 67 Minn. 74; *Carr vs. Holliday*, 40 N. C. 167.

¹⁰ *E. g. Rogers vs. Walker*, 6 Pa. St. 371.

was pleaded, it has been held in Pennsylvania, as well as by Lord Tenterden in England," that such a defence was good even against an innocent indorsee; but as regards the deeds of lunatics the rules are conflicting. In New York, Iowa and North Carolina "a *bona-fide* purchaser of lunatic's property is protected against any attempt to hold his conveyance void. Whereas in Maine, Michigan and Indiana "the reverse has been held, and the lunatic has been allowed to get back his land, even as against an innocent purchaser. Since a lunatic's deed like his note can be held void only on one ground, *i. e.*, the lunatic's incapacity to bind himself, it would seem that the deed, like the promissory note, should be void for all purposes, and even though an innocent third party may have purchased the property conveyed by it. He should, on sound principle, acquire no more rights in the property than he would if his title had been derived through a forged or fraudulent conveyance. The doctrine of Maine, Michigan and Indiana seems, therefore, the sounder on this point. In Maryland it is still an open question, though the latter rule appears likely to prevail here."

The contract of marriage entered into by a lunatic differs from his ordinary contracts in three important particulars: (1) Whereas the ordinary contract can be declared void only at the option of the lunatic, or of those in privity with him, a marriage is absolutely void, if either party is incapable of consent, and can be shown to be void by the sane contracting party, by the insane party after recovery, or by any person whose interest it is to have its validity tested." For instance, a brother of an intestate lunatic, who had died leaving children, might prove the lunatic's insanity and legal incapacity to marry, in order to show that those children were illegitimate, and consequently not entitled to inherit the lunatic's property. Marriage being obvi-

¹¹ Moore *vs.* Hershey, 90 Pa. St. 196, 201; Sentance *vs.* Poole, 3 C. & P. 1; McClain *vs.* Davis, 77 Ind. 419.

¹² Valentine *vs.* Lunt, 115 N. Y. 496; Ashcraft *vs.* De Armond, 44 Iowa, 229; Odom *vs.* Riddick, 104 N. C. 515.

¹³ Hovey *vs.* Hobson, 53 Me. 451; Rogers *vs.* Blackwell, 49 Mich. 192; Somers *vs.* Pumphrey, 24 Ind. 231.

¹⁴ See Evans *vs.* Horan, 52 Md. 602, 612.

¹⁵ State *vs.* Setzer, 97 N. C. 252; Browning *vs.* Reane, 2 Phill. E. R. 69.

ously different from ordinary contracts, in that it affects the interest of so many persons besides the contracting parties, this seems a reasonable rule. (2) It follows from this rule that the knowledge by the sane party of the mental condition of the lunatic party is not a material question in cases of marriage, as it is in those of ordinary contract. (3) Marriage not being, like an ordinary contract, voidable for lunacy at the option of the lunatic, it follows that it cannot be ratified by any course of conduct, even in a lucid interval. As was said in a Georgia case, "Marriages of persons of unsound mind are void *ab initio*. The performance of the ceremony, and continual cohabitation till death, with one in that condition will not constitute a legal marriage." Thus the mental capacity to form a marriage contract must exist at the time of the marriage ceremony, for if it be absent then, no subsequent act short of repeating the ceremony will cure the defect.¹⁸

The test of capacity to marry is the same as for other contracts, namely, a mental strength sufficient to understand the nature of the transaction; but this does not require a high degree of mental power, as the following cases will show:

In *Kern vs. Kern* (51 N. J. Eq. 587) a marriage was held to be good, even in the teeth of medical testimony, as to mental unsoundness, upon which the husband had been placed in an asylum. The court said: "A man may be subject to mania and medically of unsound mind, yet if the particular phase of mania had no influence upon the act brought in question, such act is not in the law invalidated. He may be an imbecile and medically of unsound mind, but if he has sufficient reason to understand the act, he is legally competent."

Again, in the famous English case of *Harrod vs. Harrod* (1 K. and J. 14) the vice-chancellor said that all that was required for a valid contract of marriage was that the parties should understand that, by that act, they had agreed to cohabit together and with no other person. He sustained in that case the validity of the marriage of a deaf-and-dumb woman, who could not write or talk; who could only be made to understand anything by

¹⁸ *Crumpp vs. Morgan*, 1 Ire. Eq. 91; *Ward vs. Dulaney*, 23 Miss. 410; but this rule is questioned in 1 Bishop Mar. & Div. Sect. 140.

persons who had known her long and intimately, and who did not know enough about money to give change to her husband's customers. The judge inferred from her conduct, before and after marriage, that she knew the nature of the contract into which she had entered, and was capable of giving the necessary consent. In addition to the degree of understanding here described, it is of course necessary to any valid marriage that there should be absolutely no coercion or undue influence. Capacity to marry, so far as mental soundness is concerned, depends therefore simply on (1) freedom from coercion and (2) sufficient understanding to appreciate the nature of the act.

A few words more must be said as to undue influence. This comes into notice chiefly in connection with those milder forms of mental unsoundness which we describe as dotage or imbecility. As a rule these forms alone will not be regarded as a bar to contractual capacity. And it is only when undue influence can be proved that we hear of them as vitiating contracts.^{16a} The effect of such influence, like that of unfair dealing with the lunatic, is so obviously fatal to the validity of any contract that nothing further needs to be said.

Intoxication is now treated as having the same effect as lunacy, provided it be so complete as to produce what a grandiloquent Western judge has called "complete dethronement of the reason." If only partial, it is placed on the same footing as dotage or imbecility, and is held to avoid a contract only when coercion or undue influence can also be established. Its legal effects may, therefore, be said now-a-days to form a branch of the general law of lunacy; but it is interesting to note that this view is of modern growth.

The old doctrine as to the contracts of the intoxicated was based upon a notion of public policy somewhat similar to that which produced Coke's famous rule as to the contracts of the lunatic. If it was thought impolitic to allow the insane to plead their insanity, much more was it thought unwise to allow drunkards to plead their drunkenness. Sir Joseph Jekyll, Master of the Rolls, thus stated in 1734 the reason for the rule: "The having been in drink is not any reason to relieve a man

^{16a} See *Cherbonnier vs. Evitts*, 56 Md. 576.

against any deed or agreement gained from him when in those circumstances, for this were to encourage drunkenness." And he makes this single exception: "But it will be otherwise, if, through the contrivance of him who gained the deed, the party from whom such deed had been gained was drawn into drink." In other words, during the 18th century it was necessary for a man who wished to set aside an agreement made by him when drunk, to show that the other party had deliberately produced that condition.

Now, however, the deed or contract of a drunken man will be avoided, upon proof either that he was actually imposed upon, or that he was at the time of execution so drunk as not to know what he was doing or the consequences of his own acts.

In practice it seems hard to set aside a deed or contract even under this more liberal rule. For in the last two Maryland cases¹⁷ where it has been attempted to do so, the court has held that the testimony failed to show that the intoxication was so complete as to satisfy the above test of incapacity. It is hardly necessary to say that, in cases involving insanity or drunkenness, the law presumes that sanity or sobriety exists until the contrary is shown. In other words, the burden of proof is always on the lunatic or the drunken man to establish the fact that the requisite degree of incapacity was present at the particular time in question. In the case of serious lunacy this may not be at all difficult to prove. What is difficult for the lunatic's counsel to establish is the fact that the lunacy was known to the other contracting party.

On the whole it may be said that the obstacles placed by our modern law in the path of the lunatic who wishes to avoid his deed or contract, though they promote the general safety of commercial dealings, do bear with considerable harshness on the lunatic himself. While we have abandoned Coke's rule that no man shall stultify himself, we still make it decidedly difficult for the lunatic to undo the effects of his acts, even when those acts may have been performed in a state of total incapacity. We say to the lunatic: "Your contract shall stand, unless you can clearly show that your mental weakness was known to the other

¹⁷ *Johns vs. Fritchey*, 39 Md. 258; *Hewitt's case*, 55 Md. 509.

party." Where there is any loss to be borne and both parties are innocent, we say that the loss should fall upon the party who has received benefit from the contract, or that if he wishes to rescind, he must be compelled to replace the other party in his former position. It thus appears that, while we boast of having repudiated Coke's rule, we now have a rule scarcely less arbitrary than his, and one which is frankly based, as was his rule, not upon the fundamental theory of contract, but upon our notion of what public policy requires. The law applied to lunatics' marriages is, however, more logical, probably because as to them no commercial considerations have affected the law. A marriage, as we have seen, is invalid, if there be a lack of the consenting mind in either party, and the question of knowledge by the other party is immaterial. "No consent, no marriage," is now the rule, just as in Roman law the rule was, "no consent, no contract." Marriage is not, like other contracts, voidable under one set of facts, and binding under another. This great contrast, which it presents to the other contracts of lunatics may perhaps best be accounted for by the historic fact that marriage was for centuries dealt with by the ecclesiastical courts and the canon law, and was thereby brought within Roman influences from which the other contracts remained exempt.

II. *Tort*.—Having thus sketched in outline the law of lunacy and contract, I now turn to that of lunacy and tort. Of this Mr. Justice Holmes has gone so far as to say that "no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions and of being influenced by the motives which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse."¹⁸

The reason for this criticism is that, rightly or wrongly from a logical standpoint, there can be no doubt that the law, as it now stands, does hold the lunatic responsible in damages for most of the torts which he may commit.

A good illustration of this fact is the New Hampshire case of

¹⁸ Common Law, p. 109.

Jewell vs. Colby (66 N. H. 399) in which a lunatic was sued for damages for having in a burst of frenzy killed the mother of the plaintiff. Of course, this lunatic could not be indicted for murder, because the criminal intent was lacking. But since a criminal act of this sort may also be regarded as a civil wrong, or tort, the daughter and husband of the unfortunate woman brought suit for damages against the lunatic. The New Hampshire Supreme Court held that the action would lie, and that damages might be awarded to the extent of compensation, though not punitive damages, owing to the absence of malicious intent. This is a fair instance of the existing law upon this point, and certainly of the law as it exists in Maryland. In *Cross vs. Kent* (32 Md. 581) decided in 1870, a lunatic was found by the jury to have set fire to a barn worth about \$700, which was totally destroyed. The court held that his estate was liable to the plaintiff to the extent of the value of the property destroyed, though not of course to punitive damages. The reasoning upon which such decisions rest is that, since in the great majority of tortious actions the good or bad intent of the person committing them is immaterial, a lunatic, though he cannot be regarded as possessing a malicious intent, should be held as fully liable as the sane person.

A tort such as the one above-mentioned, unaccompanied by bad intent, can in the case of a sane person only occur where the person was performing a negligent or unlawful act. If I discharge a gun in a city, without intention of hurting anybody, and in so doing happen to injure a passer-by, he may sue me for the tort, because while my intention was not bad, my act was unlawful. But if (as occurred in an early Massachusetts case) I raise a stick to separate two dogs engaged in a dog-fight, and in so doing accidentally strike and injure a bystander, he has no right of action against me, because the act was lawful.

Now, in the first of these cases, if we suppose a lunatic to fire a gun at random in a city and to injure a fellow citizen, the law renders that lunatic liable in damages to the extent of what will compensate for the injury committed, on the ground that, if he had been sane, his good or bad intent would not have affected the tortious character of his act, and consequently it still remains a tort, even though he may have been incapable of forming any intent whatever. On this same principle, an exception in favor

of the lunatic is made as to torts in which malicious intent is a necessary ingredient; for as the lunatic is incapable of forming such intent, he cannot commit the tort. To this class belong all injuries to the feelings or reputation, such as libel, slander, and malicious arrest or prosecution. These torts a lunatic is very properly held to be incapable of committing.

So far the law is clear enough; but there has lately appeared a decided tendency on the part of the English and American courts to take the view suggested by Justice Holmes, and by placing all tortious acts of lunatics upon the same footing as those of persons overpowered by superior force, to hold the lunatic exempt from suit.

An illustration of what is meant by superior force, in relation to sanity, is the case of the perfectly sane New Hampshire farmer, whose horses ran away with him and carried the pole of his wagon against a carved stone post on the land of a neighbor. The post was smashed and the neighbor sued the farmer for damages. But the court held he could not recover, because "no one is liable for acts done by superior force overpowering him and using him as an instrument of violence."¹⁹

This principle is good law as applied to the sane, and it seems to be gaining recognition as applied to the lunatic, though at present the weight of the authorities is still on the opposite side. The text-writers, however, like Justice Holmes, and Mr. Wood-Renton, are beginning to attack and undermine the foundations of the present doctrine.

The test of lunacy in tort is the same as that of lunacy in contract, *i. e.*, an utter inability at the time of the act to understand its nature and its consequences, or, in other words, to know whether the act is negligent or unlawful. Is it not then more logical to hold a lunatic, who burns down a barn, exempt from legal liability, because impelled to do the burning by a force over which he has no control, than to say that he should be held liable, because the absence of evil intent in a sane person committing a similar act would not exempt the sane person from civil liability for damages? Where the innocent intent of the tort-feasor is accompanied by the power of reasoning and of self-control, his liability ought surely to be different from that of the

¹⁹ *Brown vs. Collins*, 53 N. H. 442; see *Gault vs. Humes*, 20 Md. 297.

lunatic, whose lack of evil intent arises from his incapacity to restrain his actions or to appreciate their unlawfulness.

In a very recent and fully argued case in New York,²⁰ where the master of a vessel was sued for his negligence in losing her, it appeared that in a terrific storm he had made every effort to save her, but finally, becoming insane by reason of exhaustion, he had allowed the ship to drift ashore and be wrecked. Insanity at the time the wrong was committed was therefore set up as a plea. The lower courts very reluctantly held this plea to be bad. They found that the law, as laid down by the best authorities in that State and in others, held the lunatic liable for his tortious acts of negligence, and they rendered judgment against the unfortunate master. The New York Court of Appeals reversed the judgment, but wisely did not attempt to cite authorities. It based its decision on the broad ground that the law does not expect impossibilities, and that a man insane under those circumstances should be regarded as overpowered by *vis major*, and, therefore, not responsible for the consequences of his action.

A similar view has found favor in England in the recent case of *Hanbury vs. Hanbury* (8 Times L. R. 560), where, in a suit for divorce on the ground of cruelty and desertion, it was pleaded by the defendant that the wrongful acts complained of were committed under the influence of insanity. The judge said that, if the jury found this to be a fact, and did not find those wrongful acts to have been committed in lucid intervals, he would hold the defence good. "Where complete loss of reason," he said, "seizes upon a person, I should hesitate to say that, in regard to an act committed in such a state of insanity, a plea of insanity might not be an answer."

To sum up the condition of the law in a few words: The present rule undoubtedly is that, whenever a person is injured by the act of a lunatic, he may sue and recover damages from the lunatic, unless malicious intent is a necessary ingredient of the tort. But there seems to be a well-marked tendency to depart from the harshness of this rule, and to place the tortious acts of lunatics on the same footing as those of sane persons which occur as the result of inevitable accident.

²⁰ *Williams vs. Hays*, 157 N. Y. 541, reversing 2 N. Y. App. Div. 183, and overruling same case in 143 N. Y. 442.