

nal trial does not have to prove as part of its case in chief that the defendant at the time of the offense was sane. But once the issue of insanity is raised by the defendant the Government must prove sanity beyond a reasonable doubt. How much defense evidence is needed to raise the issue? It has been described as "some," and the decisions of our courts have interpreted this to mean very little. In the case of *Clark v. United States* no mention was made of the mental condition of the defendant until the defendant himself in the course of his testimony said he must have been "insane" when he shot the deceased. This evidence was held sufficient to raise the issue of insanity, and the failure of the defendant's attorney to pursue that defense caused a reversal of the conviction—presumably because the accused was thereby deprived of adequate representation.

The evidence which the defendant must produce to raise the issue of insanity does not have to include proof of causality but only proof of the mental disease. The government then must prove either that the accused did not have a mental disease or defect or that the act was not the product thereof. The United States Attorney has lost prosecutions and abandoned prosecutions because he has not been able to get testimony on this latter point, and he reports that most psychiatrists are reluctant to express an opinion.

Durham and Pre-Durham Compared

Putting aside the validity of the concepts of the Durham rule and the pre-Durham rule, it is a valid theoretical criticism of the Durham rule that it excuses the accused from responsibility for a criminal act which he knew to be wrong when he committed it and which he could have refrained from committing in spite of his mental disease. The pre-Durham test required a disease and disability by reason thereof from knowing that the act was wrong and from being able to refrain from committing the act. Durham requires a disease only and without reference to its great or trivial disabling effect, so long as the act would not have occurred without it.

Durham's Effect in Other Jurisdictions

While the decisions of other federal courts and of state