I recall when that issue was discussed at the meeting of the American Law Institute in 1956—and I have the transcript of the meeting—here in Washington, at the Mayflower Hotel, two alternatives were proposed, each that it should be an affirmative defense.

One group supported the view that the House has adopted, that it be proved by substantial evidence, and the other group voted that it ought to be proved by a preponderance of the evidence.

In my view, the view which the House has taken and which the American Law Institute subsequently adopted, it simply gets us away from the old Tatum rule, which is a very vague quantum of evidence.

It does not necessarily mean that we have abandoned the present situation which requires the government to prove, as part of its case, once substantial evidence is interposed by the defendant, the insanity or the sanity.

The CHAIRMAN. Well, how much evidence is "substantial"?

Do we have case law that says what is substantial and what is preponderance and what is scintilla and what is not?

This is a very difficult area, it seems to me.

Mr. GASCH. It is a very vague area, sir. Let me define some of the cases under the "some" evidence rule.

In *Tatum* the only proof was by a member of the family that Tatum was not like other boys, and that he had some strange characteristics.

It was a very vague statement of evidence.

The CHAIRMAN. This was the insanity testimony that the defendant introduced at his trial, and then upon such testimony being received in evidence the burden of proof shifted to the government?

Mr. GASCH. That is correct.

The CHAIRMAN. Your point is that that is not sufficient?

Mr. GASCH. That is not sufficient.

The CHAIRMAN. All right. How much evidence would be sufficient?

Mr. GASCH. There was one case that I would like to refer to to show how far we have gone in that direction, in my experience.

I do not recall the name of the defendant, but I could get the name for the committee. His defense counsel was a man named Tom Ahern.

He did not believe that there was any insanity defense in the case, but while the defendant was on the stand, in an effort to explain his conduct, he let the words drop "I must have been crazy drunk."

The court of appeals, analyzing that offhand remark, said there should have been instruction on insanity and, absent instruction on insanity, the case had to be reversed.

That was some evidence of insanity as defined in that case by the court of appeals.

The CHAIRMAN. Did the defendant interpose an affirmative defense of insanity in that case?

Mr. GASCH. No, sir; the defendant did not wish to interpose an affirmative defense of insanity.

The CHAIRMAN. It just came up?

Mr. GASCH. It was a colloquial remark that this man made on the stand in an effort to explain his conduct.

The CHAIRMAN. Well, would this be a typical example?

Mr. GASCH. No, sir. This is not a typical example, but I think when we utilize the words "substantial evidence" which to me con-