insanity is raised by the introduction of "some evidence," so that the presumption of sanity is no longer absolute, it is incumbent upon the trier of fact to weigh and consider "the whole evidence, including that supplied by the presumption of sanity * * *" on the issue of "the capacity in law of the accused to commit" the crime.[12] Here, manifestly, the court as the trier of fact did not and could not weigh "the whole evidence," for it found there was "no testimony concerning the mental state" of Durham.

For the foregoing reasons, the judgment is reversed and the case is remanded for a new trial.

II.

It has been ably argued by counsel for Durham that the existing tests in the District of Columbia for determining criminal responsibility, *i. e.*, the so-called right-wrong test supplemented by the irresistible impulse test, are not satisfactory criteria for determining criminal responsibility. We are urged to adopt a different test to be applied on the retrial of this case. This contention has behind it nearly a century of agitation for reform.

A. The right-wrong test, approved in this jurisdiction in 1882,[13] was the exclusive test of criminal responsibility in the District of Columbia until 1929 when we approved the irresistible impulse test as a supplementary test in Smith v. United States.[14] The right-wrong test has its roots in England. There, by the first quarter of the eighteenth century, an accused escaped punishment if he could not distinguish "good and evil," *i. e.*, if he "doth not know what he is doing, no more than * * * a wild beast."[15] Later in the same century, the "wild beast" test was abandoned and "right and wrong" was substituted for "good and evil."[16] And toward the middle of the nineteenth century, the House of Lords in the famous M'Naghten case[17] restated what had become the accepted "right-wrong" test[18] in a form which has since been followed, not only in England[19] but in most American jurisdictions[20] as an exclusive test of criminal responsibility:

> "* * * the jurors ought to be told in all cases that every man is to

12. Davis v. United States, 1895, 160 U.S. 469, 488, 16 S.Ct. 353, 358, 40 L.Ed. 499.

13. 1882, 12 D.C. 498, 550, 1 Mackey 498, 550. The right-wrong test was reaffirmed in United States v. Lee, 1886, 15 D.C. 489, 496, 4 Mackey 489, 496.

14. 1929, 59 App.D.C. 144, 36 F.2d 548, 70 A.L.R. 654.

15. Glueck, Mental Disorder and the Criminal Law 138–39 (1925), citing Rex v. Arnold, 16 How.St.Tr. 695, 764 (1724).

16. Id. at 142–52, citing Earl Ferrer's case, 19 How.St.Tr. 886 (1760). One writer has stated that these tests originated in England in the 13th or 14th century, when the law began to define insanity in terms of intellect for purposes of determining capacity to manage feudal estates. Comment, *Lunacy and Idiocy—The Old Law and Its Incubus*, 18 U. of Chi.L.Rev. 361 (1951).

17. 8 Eng.Rep. 718 (1843).

18. Hall, Principles of Criminal Law 480, n. 6 (1947).

19. Royal Commission on Capital Punishment 1949–1953 Report (Cmd. 8932) 79 (1953) (hereinafter cited as Royal Commission Report).

20. Weihofen, *The M'Naghten Rule in Its Present Day Setting*, Federal Probation 8 (Sept. 1953); Weihofen, Insanity as a Defense in Criminal Law 15, 64–68, 109–47 (1933); Leland v. State of Oregon, 1952, 343 U.S. 790, 800, 72 S.Ct. 1002, 96 L.Ed. 1302.

"In five States the M'Naghten Rules have been in substance re-enacted by statute." Royal Commission Report 409; see, e. g., "Sec. 1120 of the [New York State] Penal Law [McK.Consol. Laws, c. 40] [which] provides that a person is not excused from liability on the grounds of insanity, idiocy or imbecility, except upon proof that at the time of the commission of the criminal act he was laboring under such a defect of reason as (1) not to know the nature and quality of the act he was doing or (2) not to know that the act was wrong." Ploscowe, *Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and*