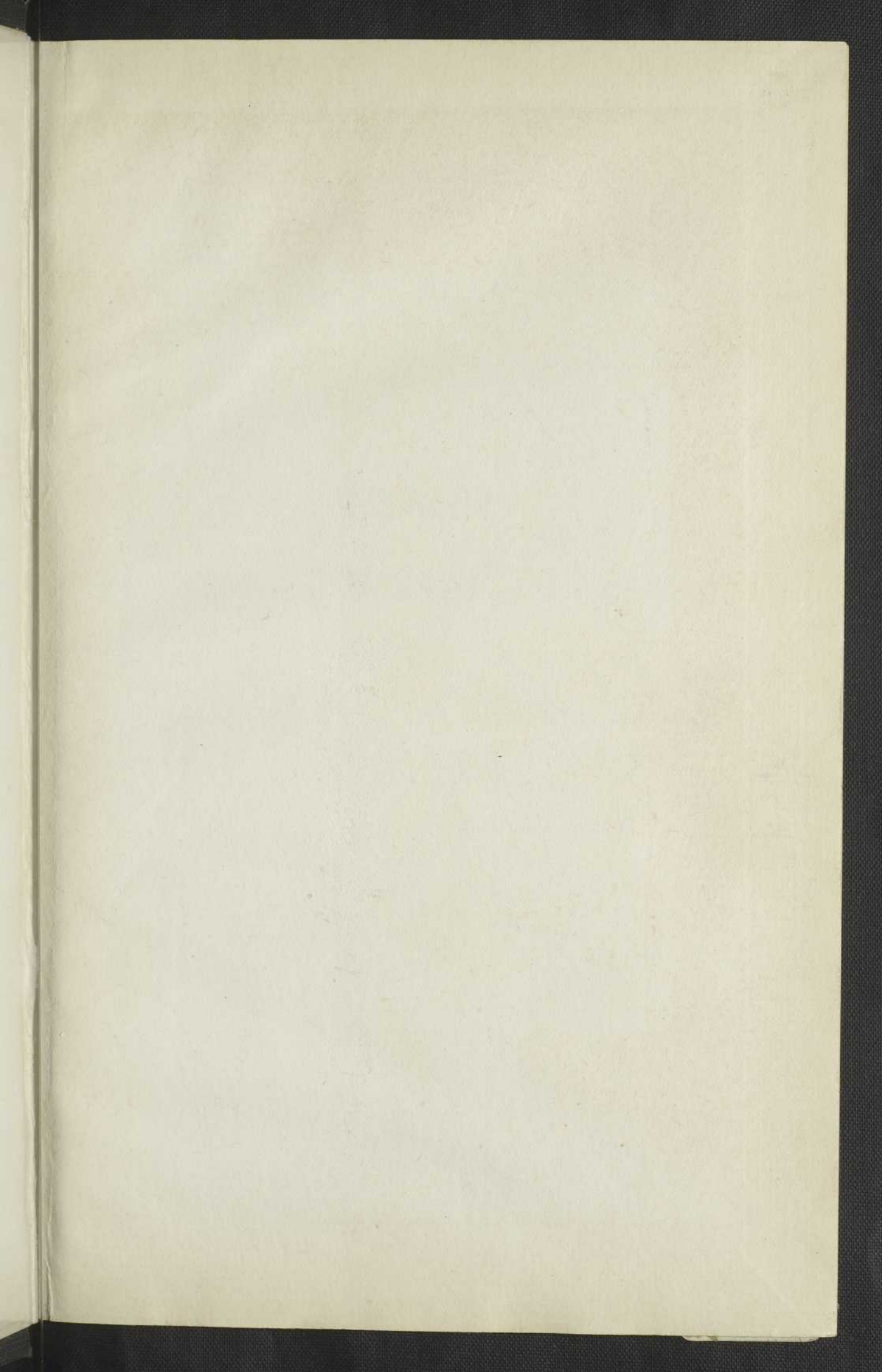
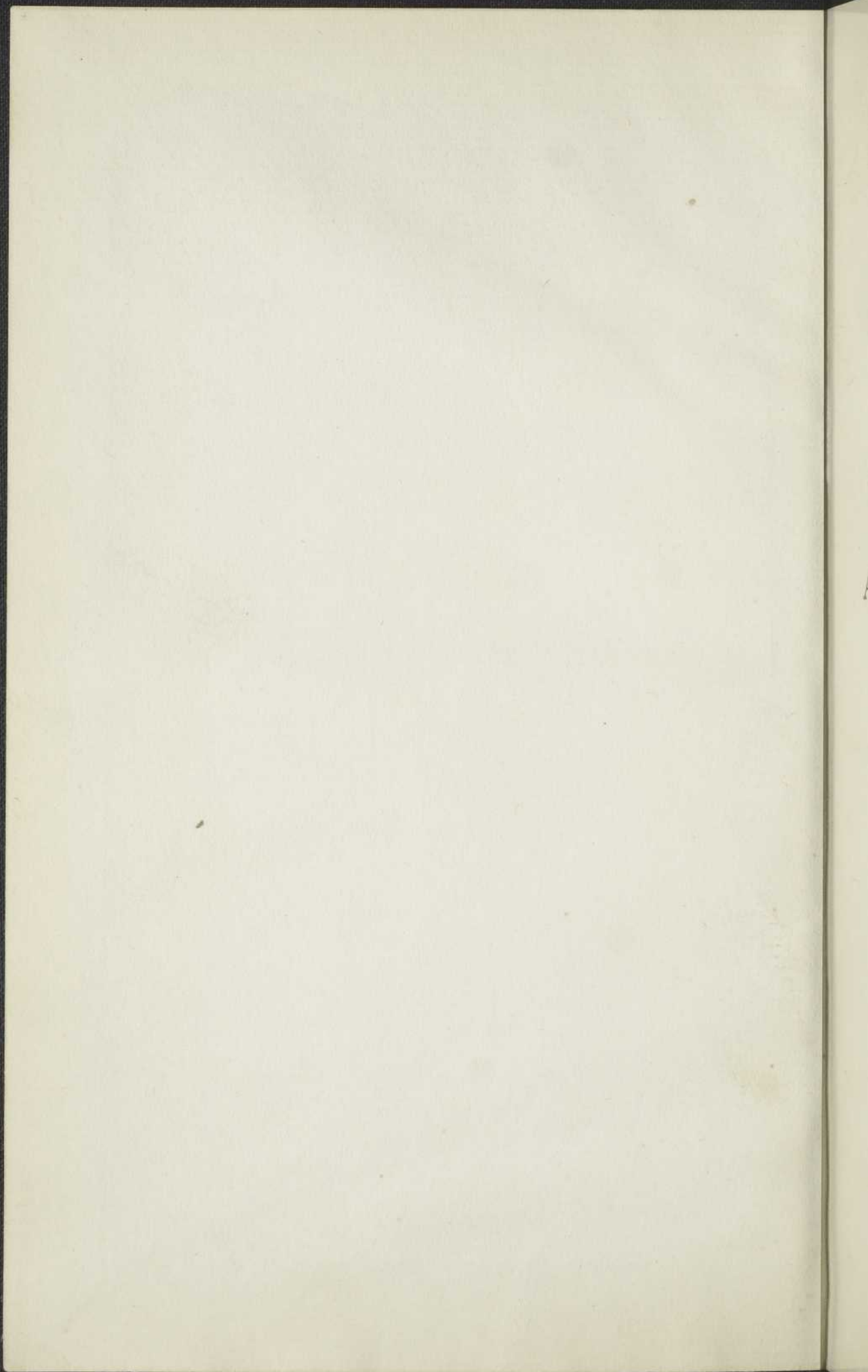


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INSANITY
AS A CRIMINAL DEFENCE

1871
2nd of March

INSANITY
AS A
CRIMINAL DEFENCE

BY
WILLIAM C. J. MEREDITH, M.A.,
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Province of Quebec, Canada.

WITH A FOREWORD BY
The Honourable Chief Justice Greenshields
of the Superior Court, Montreal.

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FOREWORD

By

The Honourable Chief Justice Greenshields

In 1882, the great English Jurist, Sir James Fitzjames Stephen, K.C.S.I., D.C.L., a Judge of the High Court of England, and a prolific writer on Criminal law, wrote these words :

“ No department of law can claim greater moral importance than that which, with the detail and precision necessary for legal purposes, stigmatizes certain kinds of conduct as crimes, the commission of which involves, if detected, indelible infamy and the loss, as the case may be, of life, property or personal liberty. ”

(History of Criminal Law of England
Vol. 1, p. IX).

In referring to what he calls, “ The relation of madness (Insanity) to crime ”, he says in the same book, Vol. 2, p. 124 :

“ I approach the discussion of this subject with considerable distrust of my own power of dealing with it satisfactorily, as it cannot be treated fully without a degree of medical knowledge, to which I make no pretension. Moreover, the subject has excited a controversy between

the medical and the legal professions in which many things have been said which would, I think, have been better unsaid. ”

And he added as he approached the consideration of the matter :

“ Its interest and importance to the public is, however, on a par with its difficulty. ”

What was said by the writer in 1882 might well be said today.

Since a time, “ beyond which the memory of man runneth not to the contrary ”, and in all jurisdictions where Criminal law finds its place as a part of the law of the country, insanity, in its extreme forms, and when satisfactorily established by legal evidence, has been recognized as a defence on a criminal charge. It is true that some confusion has existed as to how this defence should be raised. We constantly hear that an accused has offered a plea of Insanity. There is no such special plea. Under a plea of Not Guilty over the Indictment the accused may offer proof that he was insane at the time the criminal act was committed, and if that fact be established to the satisfaction of the Jury, a verdict of Not Guilty will be sustained. If, in the opinion of the Jury, the defence of Insanity has not, in fact, been proven, but the commission of the offence by the accused has been proven, a verdict of Guilty should follow.

A somewhat unusual case has recently been given considerable publicity and has aroused not a little public interest. At a small resort on the lower St. Lawrence, a highly respected young man was, without warning and without provocation, ruthlessly shot and instantly killed. A lady resident was, at the same time, grievously wounded by the same person. In the cases of both the murdered man and the injured lady, no possible motive was revealed.

On a trial for murder the accused raised the defence of Insanity. The Jury, after much evidence from expert and other witnesses, rejected the defence and found the prisoner Guilty in the "manner and form charged in the Indictment". An appeal by the accused was entered to the Court of King's Bench (Appeal Side) under the Statute. Subsequently the appeal was abandoned and the good offices of the Executive were invoked. Notwithstanding the unanimous finding of the Jurors, the Executive granted a reprieve, having reached the conclusion, in fact, that the condemned man was insane and for that reason the extreme penalty of the law should not be carried out. I make reference to this to emphasize the difficulties and importance of the subject matter of Insanity as a criminal defence.

Difficulties, serious and perplexing, have constantly arisen as to what, in law, constitutes Insanity that would relieve an accused of the

responsibility of an otherwise criminal act. While Insanity is a question of fact for the Jury, nevertheless, Judges presiding in Criminal Courts are constantly called upon to instruct Jurors upon the law relating to the defence of Insanity, or, to use the words of Sir James Stephen, "The relation of madness to crime." In England, under the Common law system, fierce legal battles were for years, and still are, waged with, "Insanity as a criminal defence", as the field of battle.

It is not surprising to find as a result, that even in England, where the doctrine of *Stare decisis* has ever been held in the highest respect, the jurisprudence was and is still to some extent, contradictory. So true was this that nearly three-quarters of a century ago, the House of Lords, as a result of the McNaughton case in 1843, decided, in an endeavor to put the whole question upon a safe and secure foundation, to submit a number of abstract questions to a large number of English Judges. These questions were in due course submitted and were by the Judges answered. Their answers became known as "The McNaughton Rules", and although, perhaps, considered at first as "Rules of practice" they no doubt became "Rules of law." To say that they have without variation been followed, even in England, would be an exaggeration. With the passage of time, the change of conditions, and a marked increase in the number

of mental disorders, which have been called by the name of Insanity, these Rules have been vigorously attacked and have met with criticism by learned and well trained members of the Bench. It is a fact, and was true in the time Stephen wrote, that Insanity, from the viewpoint of the man of Medicine, has not always been in agreement with the mental disorder accepted by the Courts as a defence on a criminal charge. This probably accounts for the statement made by Stephen to which I have already referred.

Today in Courts of criminal jurisdiction, the defence of Insanity is so frequent, and of such wide range, as to include, the raving maniac, the dipso-maniac, the epileptic, the man whose act is committed under what is called an "irresistible impulse", and even a condition which I have seen vaguely, if not elegantly, described as a "brain-storm".

Under all these circumstances it can be easily understood what difficulties the members of the legal profession, members of the Bench and of the Bar, constantly encounter in their endeavor to ascertain and determine the true principle underlying the whole question.

It is strange, but true, that although books without number have been written and published by members of the Medical profession dealing with Insanity, not alone from the viewpoint of

the Medical practitioner, but even from the viewpoint of legal responsibility for crime, few, if any, for many years, have been written and published by members of the legal profession dealing exclusively with this interesting and important subject.

This book, which now goes to the public, will, I am satisfied, supply a long felt need. It will be of great service to the members of the legal profession, and it cannot fail to be of immense interest to the larger reading public, the layman.

An admirable system of arrangement or division of the subject has been followed. In detail the whole subject matter has been covered. With much care the leading cases bearing upon each division of the subject have been carefully and exhaustively collected. The true construction and application of the various and varied judgments of the Courts have been clearly analysed and pointed out. All this adds greatly to the value of the book.

When it is recalled that at the present time expert witnesses in large numbers, in the persons of so-called alienists, are called to testify as to the mental condition of an accused, that the Jury may intelligently decide whether the accused person was at the time of the commission of the criminal act, or is at the time of his trial, insane, and, therefore, in the one case, not responsible for the act, or in the other, unfit to submit to a

trial, the importance of the subject matter of the book must be readily conceded.

To emphasize the change that time has brought about in this particular, not so very long ago, as the years count, a member of the English peerage was charged with the commission of a felony. He was denied (as was then the rule of law) the right to be aided by Counsel on questions of fact, and was, therefore, forced, and did without assistance invoke his own insanity as a matter of defence. So ably did he conduct his defence, and so forcibly did he paint a picture of his mental condition when the act charged against him was committed, that it is said the Jury, without hesitation, came to the conclusion that he was the most sane of all connected with the trial. He was promptly convicted, and with equal promptitude hanged.

R. A. E. GREENSHIELDS

A. C. J. S. C.

Montreal, January 1931.

P R E F A C E

My purpose in writing this book is two-fold. First, I hope it may prove useful to the Practitioner as a reference to leading rules and cases. Secondly, I trust it may be of some interest to the layman. I have not attempted to be original — theories innumerable and conflicting already exist — nor have I tried to delve into the countless intricacies from which the subject is inseparable but I have confined myself for the most part to the rudimentary principles of the law in question. Due partly no doubt to its undefinable nature insanity has long been a popular subject of discussion and investigation. It is probably safe to say that the line between sanity and insanity will never be satisfactorily drawn. The great variety of forms in which the disease may manifest itself and the fact that the so called "border line" in any given individual may change from time to time defy all efforts in that direction. It has been said that one in every three hundred persons is "insane in one way or another" and that the civilized world is full of men and women who are "warped" and in whom a varying degree of mental unsoundness exists.

It is in its relation to the criminal law, however, that the subject of insanity becomes particularly interesting. Without going deeply into the matter, I have tried to explain and illustrate the rules which are followed by the criminal

Courts in determining in what cases a defence founded on insanity can succeed. In so doing I have dealt mainly with the English and Canadian law but I have also made frequent reference to the laws of the United States, and in Chapter XVI I have attempted a brief summary of the jurisprudence in force in several of the States.

I want to express my most sincere thanks and appreciation to the Honourable Chief Justice Greenshields who, in spite of the arduous nature of his official duties, was kind enough to devote some of his valuable time to the reading of my manuscript and to the writing of the Foreword which precedes these remarks.

My appreciation is also due for the help derived from the works of the medical writers I have cited. So also to Mr. Carswell's "Trial of Ronald True" to which I looked for additional detail in connection with the evidence taken in that case; to American authors for helpful information in connection with various State laws, and, last but not least, to the late Professor Kenny of Cambridge University to whose lectures and volume "Outlines of the Criminal Law" I have several times referred in the text.

WILLIAM C. J. MEREDITH.

1228 Pine Avenue, West,

Montreal.

January, 1931.

TABLE OF CONTENTS

	PAGE
FOREWORD BY THE HONOURABLE CHIEF JUSTICE GREENSHIELDS..	i
CHAPTER I.	
THE MENTAL ELEMENT IN CRIME	1
Mens rea and Insanity — Infancy, Necessity and Mistake of Fact.	
CHAPTER II.	
THE MEANING OF INSANITY	5
CHAPTER III.	
THE INFLUENCE OF MEDICAL SCIENCE	7
Early stages of the law — Recognition of partial and temporary insanity.	
CHAPTER IV.	
TYPES OF MENTAL DISEASES	11
Difficulties arising when insanity is pleaded, 15 — Ability of lunatics to conceal their affliction and to appreciate the protection it affords them, 17.	
CHAPTER V.	
THE McNAUGHTON RULES	18
Daniel McNaughton's Case — Origin of the Rules — Questions and Answers — Explanation of terms — Delusions, illusions and hallucinations.	
CHAPTER VI.	
ADOPTION AND CRITICISM OF THE McNAUGHTON RULES	28
Importance of the Rules — Their extra-judicial nature — Treatment of criminal responsibility as a matter of intelligence and not of will and emotions — Irresistible impulse excluded — Liberal construction of Rules — Appeal Court decisions.	

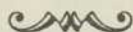
CHAPTER VII.		PAGE
APPLICATION OF THE McNAUGHTON RULES		33
Insanity not always a ground of exemption — George Codere's case, 36 — Ronald True's case, 40 — McNaughton Rules upheld in appeal, 40 — Medical evidence, 46 — Irresistible impulse doctrine supported at trial, 51 — Reprieve, 53.		
CHAPTER VIII.		
DRUNKENNESS		56
Drunkenness and Delirium tremens — Mitigation of sentence — Beard's case — Defence founded on intoxication distinct from insanity defence — Effect of voluntary aggravation of mental disorder by intoxicants.		
CHAPTER IX.		
INSANE IMPULSE		60
Meaning and examples of insane impulse, 60 — Difficulties in the way of allowing it as a defence, 61 — Jessamine's case, 61 — Cases allowing it as a defence, 63 — Lord Atkin's Committee, 64 — Cases disallowing it as a defence, 66 — Opinion of High Court Judges in 1924, 70.		
CHAPTER X.		
PROCEDURE		71
Form of verdict, 71 — Insanity before and during trial, 72 — Custody of criminal lunatics, 73 — Sanity at time of trial of prisoner acquitted on ground of insanity, 74 — Appeal, 74 — Reprieve, 75 — Burden of proof, 76 — Evidence, 78 — Province of Judge and Jury, 80.		
CHAPTER XI.		
MOTIVE		83
Motive not essential to crime — Absence of motive not, by itself, proof of insanity — Motive of lunatic may have no apparent bearing on the crime he commits.		

TABLE OF CONTENTS

xiii

CHAPTER XII.	PAGE
INSANITY IN SUICIDES	86
Verdict of coroners' juries, 86 — Suicidal impulse not restricted to any one form of mental disease, 87 — Delusions, 87 — Irresistible impulse in suicides, 88 — Melancholia, 89.	
CHAPTER XIII.	
EPILEPSY	90
Takes many different forms — Post-epileptic automatism — Epilepsy as a defence — Perry's case — Epilepsy and irresistible impulse.	
CHAPTER XIV.	
SLEEP-WALKING	93
Frequently associated with mental disorder — Fraser's case — Tolson's case.	
CHAPTER XV.	
SEXUAL OFFENCES	96
CHAPTER XVI	
AMERICAN PRACTICE	98
Law relating to insanity as a criminal defence admittedly in a state of confusion, 99 — Oppenheimer's original classification (1909), 100 — States which can now be said to fall approximately within Oppenheimer's groups, 100 — Cunningham's case, 102 — Irresistible impulse; some States demand high degree of proof before admitting it as a defence, 103.	
CHAPTER XVII.	
AMERICAN CRITICISM OF McNAUGHTON RULES	105
Alleged weakness of Judges' answers — Delusions are merely symptoms of mental disease and should not be considered alone — Failure to consider will and emotions — American law as to burden of proof, 106 — Mental Deficiency Act in England, 107 — Mitigation of sentence in cases of mental deficiency and weakened self-control, 108 — Form of verdict, 109.	

CHAPTER XVIII.		PAGE
MEDICAL OPINIONS.....		111
Origin and misleading nature of terms "Medical Insanity" and "Legal Insanity", 111 — Alleged conflict between medical and legal views and opinion expressed thereon by Lord Atkin's Committee, 112 — Further criticism of McNaughton Rules — Contention that Conative form of insanity may compel action irrespective of knowledge of right and wrong, 112.		
APPENDIX I.		
HADFIELD'S CASE.....		116
The facts — Important results of the judgment.		
APPENDIX II.		
REPRIEVE OF LUNATICS UNDER SENTENCE OF DEATH.....		126
APPENDIX III.		
MR. JUSTICE MAULE'S ANSWERS.....		131
APPENDIX IV.		
EARL FERRERS' CASE.....		136
ILLUSTRATIONS.		FACING PAGE
RONALD TRUE.....		40
LIEUT. F. R. HOLT.....		68



INDEX OF CASES CITED

(Case references are given on the pages indicated).

A	PAGE	E	PAGE
Abramovitch, R. <i>vs.</i>	78	Evers <i>vs</i> State	56
Alexander, R. <i>vs.</i>	107		
Anderson, R. <i>vs.</i>	76	F	
Anselmo, State <i>vs.</i>	108	Farmer, R. <i>vs.</i>	84
Arnold, R. <i>vs.</i>	7	Felstead's Case	74
		Ferrers', Earl, Case	19, 136
B		Flanagan <i>vs</i> People	100
Bank <i>vs</i> Goodfellow	10	Flavelle, R. <i>vs.</i>	69, 75
Barton, R. <i>vs.</i>	68	Frances, R. <i>vs.</i>	80
Beard, R. <i>vs.</i>	57, 58	Fraser's Case	94
Bellingham, R. <i>vs.</i>	18, 24		
Bloomfield, R. <i>vs.</i>	34	G	
Brown H. M. Advocate <i>vs.</i>	5, 115	Gill, R. <i>vs.</i>	63
Brush's Case	9	Guiteau, U.S. <i>vs.</i>	35
Burton, R. <i>vs.</i>	67, 80		
		H	
C		Hadfield, R. <i>vs.</i>	10, 18, 116
Choice <i>vs</i> State	59	Hay, R. <i>vs.</i>	64
Clark <i>vs</i> The King	77	Haynes, R. <i>vs.</i>	66, 84
Claypool, U.S. <i>vs.</i>	56	Hitchens, R. <i>vs.</i>	33
Codere, R. <i>vs.</i>	25, 36	Holt, R. <i>vs.</i>	68, 81
Coelho, R. <i>vs.</i>	69, 80		
Creighton, R. <i>vs.</i>	61	J	
Cunningham <i>vs</i> State	102	Jefferson, R. <i>vs.</i>	76
		Jessamine, R. <i>vs.</i>	61
D		Jesshope, R. <i>vs.</i>	75
Dart, R. <i>vs.</i>	78	Jones, State <i>vs.</i>	101
Davis, R. <i>vs.</i>	57	Jordan, R. <i>vs.</i>	63
Davis <i>vs</i> U.S.	77, 104		
Delorme, R. <i>vs.</i>	73	K	
Delorme <i>vs</i> Sisters of Charity	73	Keirstead, R. <i>vs.</i>	78
Doherty <i>vs</i> State	103	King, U.S. <i>vs.</i>	56
Dubois, R. <i>vs.</i>	80	Kopsch, R. <i>vs.</i>	68
In Re Alexandre Duclos	74	Kraemer, State <i>vs.</i>	59

	PAGE		PAGE
L			
Law, R. <i>vs.</i>	74	Perry, R. <i>vs.</i>	81, 91
Layton, R. <i>vs.</i>	76	Pike, State <i>vs.</i>	101
Leigh, R. <i>vs.</i>	35	Richards, State <i>vs.</i>	48
Leopold and Loeb, People <i>vs.</i>	108	Ridgeway, U.S. <i>vs.</i>	26
Lesbini, R. <i>vs.</i>	107	Riel, R. <i>vs.</i>	28
Leys, R. <i>vs.</i>	54	S	
Lloyd, R. <i>vs.</i>	78	Searle, R. <i>vs.</i>	80
Loake, R. <i>vs.</i>	75	Sloane, R. <i>vs.</i>	75
Lumb, R. <i>vs.</i>	75	Smith <i>vs.</i> People	108
M		Smith, R. <i>vs.</i>	80
MacLean, R. <i>vs.</i>	71	Spellman, R. <i>vs.</i>	57
Marsland, R. <i>vs.</i>	80, 81	Studdard, R. <i>vs.</i>	57
McCoskey, R. <i>vs.</i>	80	Stokes, R. <i>vs.</i>	76
McNaughton, R. <i>vs.</i>	19	Swann <i>vs.</i> State	108
McQueen, R. <i>vs.</i>	107	T	
Meagher's Case	56	Taupier, R. <i>vs.</i>	iii, 130
Megill, R. <i>vs.</i>	76	Tellett, R. <i>vs.</i>	75
Molineaux, People <i>vs.</i>	83	Thomas, R. <i>vs.</i>	66
Mordaunt <i>vs.</i> Moncrieffe . . .	72	Tolson, R. <i>vs.</i>	95
Mosler, Commonwealth <i>vs.</i>	103	True, R. <i>vs.</i>	40, 129
Myshrall, R. <i>vs.</i>	76	Turton, R. <i>vs.</i>	76
O		V	
Offord, R. <i>vs.</i>	19	Vyse, R. <i>vs.</i>	84
Oxford, R. <i>vs.</i>	19, 71	W	
P		Williams, R. <i>vs.</i>	72
Pank, R. <i>vs.</i>	25	Wilson, R. <i>vs.</i>	57
Parker, R. <i>vs.</i>	19	Wright's Case	80
Parsons, <i>vs.</i> State	101		
Pate, R. <i>vs.</i>	68		



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CHAPTER I

THE MENTAL ELEMENT IN CRIME.

Any introduction to the subject of insanity as a Criminal Defence must necessarily include an explanation, however short, of the meaning of crime itself and of the mental element which usually accompanies it.

A crime can be roughly defined as an offence against the general community, recognized as such by the law and for which the offender is legally liable to punishment. The offence may consist merely of an omission, i.e., failure to do something which by law one is obliged to do, but in nearly every case it involves some act, (known as "actus reus") — something which is done contrary to the Criminal Law of the Country or State. The act alone, however, no matter how serious its consequences, is not a crime ; it must generally speaking be accompanied by a certain mental condition (known as "mens rea") which we may call a guilty mind or intention ; that is to say, the criminal must be capable of knowing that what he is doing is wrong. For instance, a complete imbecile commits murder ; in so doing he has performed the act but the necessary mental condition has not accompanied it because he was incapable of knowing what he was doing or of knowing that his act was wrong. Such a person is therefore excused and escapes

punishment though, for the protection of the community, he is usually committed to an asylum. But when an ordinary, sane person is accused of crime it is impracticable if not impossible to plunge into a mental analysis in order to determine whether at the time he committed the act he knew that he was doing wrong. As a mediæval Judge once said : "The devil himself knoweth not the thought of man". (1) So what must the Courts do to convince themselves that this guilty intention existed in the prisoner's mind ? Obviously in most cases they can only assume by the circumstances that he knew he was doing wrong, e.g., some crimes are shown by the evidence adduced to have been premeditated or else preceded by certain steps showing that the criminal knew very well what he was about. In any event there is a general rule that "every sane adult is presumed to intend the natural consequences of his conduct", and there is another rule that ignorance of the law is no excuse for crime. So if a sane and grown up person of his own free will commits a crime, the law takes for granted that he committed it with a guilty intention, i.e., that the "mens rea" accompanied the act.

✓ A crime, therefore, involves both an "actus reus" and a "mens rea" — an act accompanied by a guilty mind or intention, and if only one of either of these two conditions exists then there is

(1) Bryan, C.J.

no crime. Our object is to deal with the subject of insanity as being one of those conditions by reason of which a criminal act may be excused because it is unaccompanied by any guilty intention. As, however, there are many different types and degrees of insanity the fact that a person is insane does not always mean that he is incapable of "mens rea" and that his act should therefore be pardoned. Accordingly, it is necessary to consider the rules which are applied by the Courts in determining whether or not the guilty intention existed in the mind of a criminal who pleads that he was insane at the time he committed the crime of which he is accused — in other words, the legal tests of criminal irresponsibility due to insanity. Before embarking on that subject it is well to mention that there are several other cases besides insanity where criminal acts may be excused because they are unaccompanied by any guilty intent. Brief reference to three of such cases may perhaps serve to illustrate what we have already said.

The mind of a child under seven years of age, for instance, is not legally considered to be sufficiently mature for the purpose of "mens rea". A child of that age and under is, therefore, not subject to criminal jurisdiction at all. There may also be an absence of "mens rea" in criminal acts committed by reason of what may be called *Necessity*. For instance, if an armed burglar

enters your house and threatens to shoot you, you are perfectly justified in defending yourself by knocking him unconscious with your stick. In that case you have yourself committed a criminal assault, but as you had no guilty intentions and did it simply to prevent the commission of a more serious offence, the law will excuse you.

Thirdly, although ignorance or mistake of law is no excuse for crime, *Mistake of Fact* may, in some cases, be a good defence because of absence of guilty intention. The mistake, however, must be a reasonable one and must be such that had the supposed circumstances in fact existed then there would have been no crime committed. For example, I may leave my Ford automobile outside a restaurant where several other cars of similar make, design and colour are parked. On leaving the restaurant I take B's Ford by mistake. My mistake in that case is reasonable; I had no guilty intention ("mens rea") and I will therefore be excused for what otherwise might be theft. I would be guilty of that offence, for instance, if I had made up my mind to steal C's car but by mistake took B's.

CHAPTER II

THE MEANING OF INSANITY

There is no satisfactory definition of insanity. (1) It is essentially a comprehensive term including in its general sense every form of mental derangement whatever its source or cause, whether the mental condition is congenital or the result of arrested mental development or accident or caused by physical disease, dissipation, old age, or inherited. In all cases, regardless of its type or degree, insanity is considered a disease of the brain. For that reason it is obviously closely related to the mental element (or "mens rea") which, as already explained, must accompany a wrongful act to make it a punishable crime. In those cases therefore when, because of mental disorder the guilty element is absent, insanity is a good defence to a criminal charge.

(1) Lord Justice Blackburn said before a committee of the House of Commons: "I have read every definition (of insanity) that I could meet with and never was satisfied with one of them; and have endeavoured in vain to make one satisfactory to myself. I verily believe it is not in human power to do it." (Quoted in Church and Petersen's *Nervous and Mental Diseases*, p. 529).

See also Lord Dunedin's statement in *H.M. Advocate vs. Brown* (1907) S.C. 67 at p. 76. 44 S.L.R. 634 at p. 639.

Insanity is defined in Wharton and Stillé's *Medical Jurisprudence* (Vol. 1, p. 475) as "an affection of the brain which is characterized by derangement of the mental faculties".

"Insanity is admittedly incapable of precise definition" — Lord Atkin's Committee 1923. (Referred to later).

But how can it be determined whether or not the guilty element was in fact absent in the mind of a prisoner who pleads insanity? And if only partially absent, then what degree of "mens rea" is necessary to hold him legally responsible for his acts? In other words, how insane must a criminal be at the time of the act before he can successfully plead that he is innocent by reason of his defective mental condition? This is a problem which the legislators and Courts have been called upon to solve and in attempting to do so they have laid down certain rules which are applied as the tests of irresponsibility. It is hoped that the explanations that follow will enable the reader to judge for himself as to the fairness and practicability of these rules.

CHAPTER III

THE INFLUENCE OF MEDICAL SCIENCE

About five hundred years ago it was not uncommon for "lunatics" to be considered as possessed of evil spirits and therefore ipso facto criminals. They were frequently incarcerated in ill kept prisons where the so-called supervision was notoriously cruel, and it was only in the most extreme cases that a defence of insanity could hope to succeed. (1)

As late as 1723 it was held in England that "a prisoner in order to be acquitted on the ground of insanity must be a madman that is totally deprived of his understanding and memory, and doth not know what he is doing no more than an infant, than a brute, or a wild beast". (2)

At that stage the law made no distinction between the different degrees of insanity; it was regarded as a "fixed term having a certain

(1) At the very end of the eighteenth century William Windham, at that time a prominent statesman, advocated in the English House of Commons that even the most insane criminal should be hanged for example's sake. But the English Law had long before recognized that in extreme cases insanity was a possible defence.

(2) Tracy J. in R.v. Arnold, 16 St. Tr. 704, (1724).

meaning" (1). If a man was insane on one subject he was considered to be insane on all subjects. People did not realize that a person might be insane in one particular sense or on one particular subject and yet remain otherwise normal. It was past understanding, for instance, that a man generally recognized as a brilliant orator and genius could be insane and therefore not responsible for a murder committed during a fit of epilepsy or as a result of insane delusion.

This failure to recognize partial or temporary insanity was obviously due to the comparatively unadvanced state of medical science at the time. It was not then realized, as it is now, that the line dividing sanity from insanity is so very fine and variable as to be undefinable. Once the vagueness of this so-called boundary line became recognized it was appreciated that insanity might manifest itself in many different ways apart from the raving of the madman or the senselessness of the complete imbecile. As illustrations the following judicial statements,

(1) It is of interest to note that the Roman law classified two or more different kinds or degrees of insanity (Buckland, Text Book of Roman Law p. 169) and appreciated the possibility of curing the disease (Buckland, Text Book of Roman Law, p. 152). As early as 451 B.C. it was recognized that lunatics were capable of lucid intervals (XII Tables. 451 B.C. approx.). However the law did not provide for different treatments of insane criminals according to their degree of mental incapacity. The principle was that a "lunatic" could not incur any responsibility for crime and the degree of insanity required for exemption was probably very high.

the first made in an American and the second in an English case, may be quoted : —

“ As no chart has yet been made of the shadowy line that lies between the boundaries of sanity and insanity we know nothing positively of its extent or of the fluctuations which its area at times undergoes. A little more or a little less on this side or that may change the entire character of an individual, and convert him from a responsible into an irresponsible being. Like the limits of riparian ownership or turbulent streams, the borders of sanity may be encroached upon by every flood of passion without yet producing mental aberration ; or again they may be undermined by bodily disease, inherited or acquired, until they finally crumble and are swept into the torrent of disorder”. (1)

“ The pathology of mental disease and the experience of insanity in its various forms teach us that while on the one hand all the faculties moral and intellectual may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered while the rest are left unimpaired and undisturbed ; that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the

(1) Brush's case. 3 Abb N Cas. (N.Y.) 225, 227.

common obligations of life, there are often on the other hand delusions which, though the offspring of mental disease and so far contributing insanity, leave the individual in all other respects rational and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality and spring only from a diseased and morbid condition of the mind, to that extent the mind must be necessarily taken to be unsound, just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound though all the other members may be healthy and their parts or functions unimpaired". (1)

So with the advance in medical science it became recognized that insanity was simply a derangement of the brain which could take many other forms besides that of raving lunacy and complete imbecility. Moreover that insane people were to be pitied rather than despised and that they should be protected rather than abused. This more humane outlook on the situation may be said to date from the beginning of the nineteenth century. (2)

(1) *Bank vs. Goodfellow* L.R. 5 Q.B. 549, 560.

(2) For instance the judgment in *R.V. Hadfield* 27, St. Tr. 1281 (1800) and the resultant Act of Parliament (40 Geo. 3, c. 94) which made provision for the detention of criminal lunatics in asylums.

The exposures made by Doctor Philippe Pinel of France of the outrageous treatment of lunatics in madhouses and prisons had received worldwide publicity a few years previously.

CHAPTER IV

TYPES OF MENTAL DISEASES

With the realization that insanity manifested itself in different forms and varied considerably in its nature and intensity different kinds and degrees of mental disease became recognized. Broadly speaking insanity may be total or partial, permanent or temporary in character. While total insanity "completely overwhelms the reason, judgment and all mental faculties" of the patient, partial insanity signifies a "derangement of only one or a few of the faculties of the mind which prevents them from functioning as they should" although the remaining faculties may act normally (e.g. monomania). Temporary insanity (while necessarily a vague term) is often used to denote the mental derangements induced by such conditions as epilepsy, drunkenness, and so-called irresistible impulse.

A sharp distinction is also drawn between *Congenital* insanity where the mental defect has existed from birth, and *Acquired* insanity where the brain was born healthy but has since suffered from "morbid processes affecting it primarily, or from diseased states of the general system implicating it secondarily".

Medical research has resulted in a detailed classification of the various diseases included under the general heading of Insanity. The following may be mentioned as examples : —

1. *Delusional Insanity*, often called monomania, where the patient suffers from insane delusions though in many other respects he may be perfectly normal ;

2. *Periodic Insanity*, often called "circular insanity," which occurs at intervals and is characterized by periods of great exultation followed by melancholy depression which in turn is followed frequently by long intervals of complete sanity. A change in character is one of the primary symptoms of this disease, the patient frequently becoming reckless, extravagant or intemperate. Though hallucinations and delusions sometimes occur it appears that in most cases the mind is capable of reasoning and of discerning right from wrong. The period of any single attack may be anything from one week to three or four years, and is usually followed by extreme mental depression.

A remarkable feature of this form of insanity is that the majority of patients remember all that happened during the attack and bitterly repent their actions. Though the attacks are likely to recur they apparently leave little if any serious mental impairment behind them.

3. *Puerperal Insanity*, which may occur in women at childbirth or immediately afterwards.

4. *Moral or sexual insanity*, which is sometimes called "medical insanity" e.g., sadism which is a mental disease where the sexual instinct is abnormal or perverted.

5. *Dementia*, of which there are various forms, means an extremely low condition of the mental function. The patient is rendered incapable of reasoning in consequence of functional disorder of the brain e.g. (a) *senile dementia* which may come on with old age and which robs the victim of his control and reasoning, and frequently manifests itself in loss of control of sexual desire resulting in indecent assaults, especially on young children ; e.g. (b) *toxic dementia* resulting from gradual poisoning of the system ; e.g. (c) *dementia paralytica* ("general paralysis of the insane" and known amongst doctors as "G.P.I.") which commences with a slight failure of the mind and change of the character in the individual and eventually results in general paralysis. It is in many cases due to syphilitic infection (1).

(1) It is well known that in the early stages of "G.P.I." due to syphilis the intelligence may in many cases act more quickly than normally, but the eventual degeneracy into insanity is only a matter of time.

Both in True's case and Holt's case (referred to later) evidence to the effect that the accused had previously suffered from syphilis was produced in support of the insanity defence.

6. *Mania*, which in its general sense involves many phases of mental disorders, is characterized by an unnatural exultation or depression of the faculties ; " it is a condition in which the perversion of the understanding embraces all kinds of objects ". In its stricter sense it may be divided into *Acute Mania* and *Periodic or Circular Insanity* (which has already been mentioned). The acute type is usually preceded by a long series of preliminary symptoms such as depression, sleeplessness, loss of weight and appetite, finally leading to complete mental confusion and wild excitement.

7. *Kleptomania*, meaning the irresistible impulse to steal, is a form of temporary insanity. Pregnant women are frequently subject to this condition and persist in stealing in spite of all restraint and although they undoubtedly know that what they are doing is wrong.

8. *Irresistible impulse* (see *infra* p. 60).

9. *Epileptic Insanity* (see *infra* p. 90)

10. *Melancholia*, of which the chief symptom is mental depression, may take many forms. In extreme cases it gives rise to hallucinations and sometimes to delusions.

11. *Dipsomania*, which is a form of temporary insanity characterized by periodical craving for intoxicating liquors or narcotics.

12. *Katatonía*, one of the chief symptoms of which is muscular rigidity, causes the patient to suffer from hallucinations, stupor and finally a state of wild excitement which may end in dementia.

The above classification while a very sketchy attempt to enumerate some of the principal mental diseases will, at least, give some idea of the difficulties which necessarily arise in determining whether or not a defence alleging insanity on the part of the accused at the time he committed a crime, should succeed. It will be realized that owing to the many and varied forms the disease may assume an "insane person" may on the one extreme be a raving madman or complete imbecile, while on the other he may be practically (and often apparently) normal. We are not concerned with the case of the complete imbecile or madman for obviously he is incapable of guilty intent. The difficulties arise in cases of temporary and partial insanity. For instance, it is generally recognized that lunatics frequently plan their crimes with care. As already explained, a sane adult is legally responsible for the natural and reasonable consequences of his conduct. Accordingly, in most cases, it is possible to take for granted that if a person premeditated a crime he must have had the necessary guilty intent or "*mens rea*" — the fact of his

making preparation is proof that he knew what he was about. Supposing, however, the criminal is medically pronounced insane, although there is no doubt that he deliberately and cunningly prepared the stage for his crime, is the Court to say to him : "you may be insane but in this case you deliberately planned a murder and if you had sufficient brain power to do that you cannot excuse yourself on the ground of insanity "; or can it say : " You are not a raving lunatic but you have been pronounced insane. Apparently you suffered from an insane delusion that what you were doing in preparing and committing this crime of which you are accused was perfectly legal. You are therefore excused but you must be confined to an asylum " ?

Dr. Kenny has pointed out that the English Criminal Law divides insane persons into two classes — First "those over whom the threats and prohibition of the criminal law would exercise no control, and on whom therefore it would be gratuitous cruelty to inflict its punishments ;" and, Secondly "those whose form of insanity is only such that — to use Lord Bramwell's apt test — ' they would not have yielded to their insanity if a policeman had been at their elbow ' ". (1)

The difficulty, of course, is to draw a boundary line between the two classes. That lunatics are frequently aware of their condition and of

(1) Kenny's *Outlines of Criminal Law* (1929 ed.) p. 52.

the protection it affords them is generally recognized. For instance Doctor John Campbell, in his book entitled "Thirty Years' Experiences of a Medical Officer", says that "lunatic prisoners when guilty of assaulting a prison warden will sometimes say 'you cannot touch me, I am a lunatic'" (1).

(1) "Thirty Years' Experiences of a Medical Officer" p. 92.

The remarkable ability of "lunatics" to *conceal* their affliction when it is in their interests to do so is well illustrated by two cases described by Lord Erskine in his defence of Hadfield (the Hadfield case is referred to later).

In the first case a man had indicted his brother for being instrumental in imprisoning him without cause in a "mad-house". Erskine represented the defendant who as a matter of fact was fond of his brother and in having him confined had done the best thing under the circumstances. Erskine cross-examined the prosecuting brother for the greater part of a day with the object of bringing out some statement which would prove insanity, but all his attempts were foiled; the witness' answers were sane and reasonable and the jury were beginning to believe his sad story of illegal detention. The doctor who was due to give evidence for the defence then appeared in Court and told Erskine that the man believed himself to be the Saviour. Erskine then "affected to lament the indecency" of his "ignorant examination", whereupon the Prosecutor expressed forgiveness and "with the utmost gravity and emphasis" remarked in open Court "I am the Christ". And so the case ended!

In the second case a man had indicted a certain doctor for imprisoning him unlawfully in a "mad-house". He underwent a long and severe cross-examination by the defendant's counsel without exposing his complaint. Another doctor in Court then suggested that the witness be asked "What had become of the princess whom he had corresponded with in cherry-juice" and immediately the man's insanity became evident. He answered "that there was nothing at all in that, because having been (as everybody knew) imprisoned in a high tower, and being debarred the use of ink", he had been obliged to write in cherry-juice and throw his letters into the river below where the princess collected them in a boat!

Thereupon (the tower, princess, etc. of course not existing) the Court ordered the defendant doctor to be acquitted.

CHAPTER V

THE McNAUGHTON RULES

We have already referred to the progress made in the criminal law with the advance of medical science. While at first it refused to admit any form of insanity falling short of raving lunacy or complete imbecility as being a sufficient defence, it later came to recognize that less extreme forms of mental disease existed which might exclude the element of "mens rea", and the law makers accordingly set themselves the task of laying down some rules which would guide the Courts in deciding in what cases a defence of insanity could succeed.

Various efforts were made with this object in view. Doctrines were laid down only to be later overruled. (1) The question finally came

(1) The two leading cases from the modern point of view prior to McNaughton's were probably *R. v. Hadfield* in 1800 (27, St. Tr. 1281) and *R. v. Bellingham* (Old Bailey, May 15, 1812). Hadfield who was tried for shooting at King George III at Drury Lane Theatre was successfully defended (on the ground of insanity) by Mr. (afterwards Lord) Erskine, whose brilliant advocacy is a matter of legal history (See J. L. High's "Speeches of Lord Erskine", vol. IV, p. 165). The judgment ruled that "if a man is in a deranged state of mind at the time, he is not criminally answerable for his acts; but the material part of the case is whether at the very time when the act was committed the man's mind was sane". (See Appendix I, *infra*).

It will be appreciated that this ruling, if followed, would have been unsatisfactory. It laid down no formula on which the Courts could work, but simply left the question as one of fact to be decided by the Jury on the circumstances of each particular case.

to a head and was at least temporarily settled as a result of the celebrated English trial of Daniel McNaughton in 1843. (1) McNaughton, apparently under an insane delusion that he was being hounded by his enemies, made up his mind to kill Sir Robert Peel, but in mistake for the Prime Minister he killed his secretary, a Mr. Drummond. He was tried for murder but was eventually acquitted on the ground of insanity, probably more owing to the able advocacy of Mr. Cockburn who defended him (and who later became Lord Chief Justice) than to the strict and unswayed application of the law as it then existed. The verdict provoked considerable dissatisfaction among the general public and finally became the subject of a debate in the House of Lords. (2) As a result of the debate the Lords submitted certain questions to fifteen Judges with a view to having them lay down some definite set of laws by which criminal insanity cases could be governed. The answers, given by Chief Justice Tindal on

In *Bellingham's* case the judgment based the test of irresponsibility upon the presence or absence of the faculty of distinguishing right from wrong at the time of committing the crime. (See Summary of McNaughton Rules, 2 b. p. 24). Other early cases worthy of note were *Earl Ferrers'* (1760) 19 H. St. Tr. 886; *R. v. Parker* (1812) 1 Coll. Lun. 477; *R. v. Offord* (1831) 5 C. and P. 168; *R. v. Oxford* (1840) 9 C. and P. 525. Oxford like MacLean (See Page 71) was tried for attempting Queen Victoria's life.

As to early application of "Right and Wrong" test see Appendix IV.

(1) *R. v. McNaughton* 10 Cl. and F. 200.

The name McNaughton is spelt in various ways by different authorities e.g. MacNaughten, MacNaughton, M'Naughten.

(2) See Hansard vol. 67, pp. 288, 714.

behalf of 13 of his colleagues (1), and known as the "McNaughton Rules", set forth the law regarding insanity from a modern standpoint. The questions and answers to which we need now refer were as follows : —

QUESTIONS

1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons ; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit ?
2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with an insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence ?
3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed ?

(1) Mr. Justice Maule disagreed with the other 14 Judges and gave a separate set of answers to the questions. (See Appendix III. *infra*.)

4. If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused ?

ANSWERS

1. Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that (notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit) he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law ; by which expression we understand your Lordships to mean the law of the land.
- 2 & 3. As these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of

the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong ; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction ; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable. The usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient

degree of reason to know that he was doing an act that was wrong ; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

4. The answer must of course depend on the nature of the delusion ; but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

For the purposes of quick reference the Rules may be summarized as follows : —

1. Every one is presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

- 2-(a) To establish a defence on the ground of insanity it must be clearly proved that at the

time of committing the act the accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing or — if he did know that — not to know that what he was doing was wrong ;

2-(b) “ If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable. ”

This overrules the principle laid down in Bellingham's case (1), that the test to be applied is the ability to distinguish between right and wrong in the abstract. By the McNaughton ruling the test is the ability of the accused to distinguish between right and wrong, with respect to the particular act with which he is charged.

3. A person labouring under a specific delusion but in other respects sane shall not be acquitted on the ground of insanity unless the delusion causes him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission. (2)

With regard to paragraph one, it will be seen that the burden of proving insanity is upon the accused. (3) This rule is contrary to the

(1) R. v. Bellingham 1812. see p. 18 supra.

(2) See Section 19, Criminal Code of Canada.

(3) See infra. p. 76.

general practice in many of the States of America where (as explained later) it is usually for the prosecution to prove the prisoner is sane if he sets up the defence of insanity.

Some explanation is necessary as to the wording of the rules summarized in paragraph two. It has been decided that the words "*nature*" and "*quality*" refer only to the *physical nature of the act* and are not meant to distinguish between its physical and moral aspects. (1). As to whether the accused "*knew that he was doing wrong, or was conscious that the act was one he ought not to do*", it has been decided that the test to be applied is "*whether according to the ordinary standard adopted by reasonable men the act was right or wrong*". (1) And if the accused actually knew that the act was wrong legally, he must (at least in the case of a serious crime) be taken to have known that it was wrong by this "*ordinary moral standard*". In Pank's case (2) the accused was under the double delusion, first, that his sister-in-law wished to commit adultery, and, secondly, that it was therefore his duty to kill her. The Judge directed the jury as follows: "He knew the nature and quality of his act; for he knew that he was shooting and that his shooting would kill her. Did he know that it was 'wrong'? If

(1) R.v.G. Codere 12, C.A.R. 21, (1916).

(2) R. v. Pank C.C.C. May 21 (1919) Kenny O. of C.L. (1929) p. 54.

he knew that his act would be wrong in ordinary circumstances, it is no defence that he thought the special circumstances present in this particular case would render it justifiable in him to do that act". The prisoner was convicted of murder and sentenced.

The Rule set forth in paragraph 3 above is sufficiently explained by the remarks mentioned in the Judges' answer to Question 4. The delusion in question is sometimes called "insane mistake of fact". It should be noted, however, that the act and the delusion must be directly connected. So in Georgia, (U.S.A.) where much the same rule applies, it was held that "if a person has an insane delusion upon any one subject, but commits a crime in some other matter not connected with that particular delusion, he is equally guilty as if he had no insane delusion and was perfectly sane". (1)

It must also be borne in mind that a delusion is distinguishable from both an Illusion and an Hallucination. An illusion has been defined as a "misinterpretation of a sensation". Hallucination is also a "disorder of sensation" — such as hearing a voice when there is none, or seeing an object when no such object is within vision. Delusion on the other hand is not a sensory disorder but occurs entirely within the intellectual

(1) U.S. v. Ridgeway, 31 Fed. Rep. 144.

sphere. "It is an erroneous belief, but of such a kind as is due to a disordered mind. The latter clause of this definition is essential, for an insane delusion is something different from an ordinary mistake of judgment or opinion". (1)

Delusions are either systematized or unsystematized. In the first type the delusion is "fixed and coherent"; in the second it is composed of "elements more or less fleeting and changeable and which do not cohere so as to constitute a definite opinion in the patient's mind". (1)

There is some difficulty in grasping the meaning of the Rules until cases in which they have been applied are examined. It is hoped that with the reading of the various practical examples in the following pages their extent and working will be appreciated.

(1) See Wharton and Stillé's Medical Jurisprudence, Vol. I. It appears that *Hallucinations* are sometimes experienced by perfectly normal persons. An example cited by several authorities is that of Socrates who was often guided by an imaginary voice.

CHAPTER VI

ADOPTION AND CRITICISM OF THE McNAUGHTON RULES

Admittedly the laying down of the McNaughton Rules is to date the greatest landmark in the history of criminal insanity law. To set out the law on such a complicated subject in short and concise form and in such a way as to be applicable to all cases where the defence of insanity is raised is, however, a difficult task. It is not surprising, therefore, that the Formula has been attacked on various grounds and in some cases not strictly followed. The Rules came into force in England as soon as they were laid down. They were later followed (in slightly modified form) in Canada and in both countries they are still, generally speaking, regarded as law. (1) They were also adopted (in some cases in modified form) by some of the States of America whose present laws will be dealt with later.

(1) By the enactment of the Criminal Code of 1892, 55-56 Vict. (Can) C. 29, S. 14 the Canadian law was set forth in much the same way as the McNaughton formula and the Canadian Courts have also applied the McNaughton rules in leading cases e.g. *R. v. Riel* (No. 2) 1 Terr. L.R. 63. where leave to appeal was refused by the Privy Council, and *R. v. Jessamine* (infra.)

The Canadian law is embodied in Section 19 of the Code as follows:

1. No person shall be convicted of an offence by reason of an act done or omitted by him when laboring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.

It is not now proposed to discuss at any great length the criticisms to which the Rules have been subjected. Whatever value these may have will be more apparent if we deal with them as we go along in conjunction with various cases which have arisen. The principal criticisms, for the present purposes, may be summarized as follows: First, from the legal point of view, it has been argued that the laying down of the Rules was originally extra-judicial (1) i.e., they were simply the replies of judges to certain questions put to them not during but after McNaughton's case. They were not based on any one case and the judges were obliged to lay down the law without hearing evidence or argument of counsel. This, in effect, was the reason given by Mr. Justice Maule for his difference of opinion with the other fourteen judges to whom the questions were referred. He contended that the answers should not have been given except in the form of a judgment and upon facts actually proved

2. A person laboring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

3. Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

(1) For this reason Sir James Stephen contended that if any case was appealed which was in any way different from the hypothetical case submitted to the 15 Judges, the Appeal Court would not be bound by the Rules.

in a case instead of upon a series of hypothetical questions as put by the House of Lords.

From a medical point of view it has been argued that the science of medicine has advanced considerably since 1843 and that the Rules are out of keeping with modern views on the subject of insanity. Springing from this argument is probably the most important criticism of all, namely, that in treating criminal responsibility as a matter of *Intelligence* and *not of the Will and Emotions* the Rules are inadequate because they fail to recognize the defence of irresistible impulse. (1). This condition is also known as insane and uncontrollable impulse. It is a species of mental disease under the influence of which a person may apparently commit a crime as a result of some sudden irresistible impulse although he knows what he is doing and knows that it is wrong. Although there has been considerable difference of opinion as to whether the irresistible impulse defence should be or is recognized by English law in spite of the M'Naughton Rules (2), we may say now that the Courts of Appeal have more than once rejected it and the better opinion is that no such defence is known. The same ruling

(1) Sir James Stephen was a strong advocate of the admissibility of this defence. See *Hist. of Cr. Law II.* 167.

(2) Sir Clifford Allbutt said that had the M'Naughton Formula been strictly followed it would have been the means of hanging more than half the women in Broadmoor Lunatic Asylum confined for the murder of their children. "*System of Medicine*" *VIII.* 456.

applies generally in Canada, while in the United States the law differs in the various States. However, we shall deal with these matters more fully in due course.

Various other criticisms have been directed against the Rules from time to time but the fact remains that they are still considered law. The late Professor Kenny of Cambridge University said (1) that "*the practical administration of the Rules has been such as to afford a wider immunity than their language would at first seem to recognize. For many forms of insanity which do not in themselves constitute the particular defects of reason which the judges recognize as conferring exemption from responsibility are now habitually treated as being sufficient evidence to show that one or other of those exemptive defects were also present*". By way of illustrating this statement the Author goes on to say that "*a man who after killing his child goes forthwith to the Police Station to surrender himself, and gives a lucid account of what he has done, would certainly seem to know the nature and quality of the act committed and to know that in doing it he did wrong. Yet if he had previously shown some symptoms of madness and has killed his child with no discoverable motive*" — (though motive is not essential to a crime), (2) "*and with no attempt at concealment, a judge would*

(1) Kenny, *Outlines of Criminal Law* (1929, ed.) p. 55.

(2) See *infra*. p. 83.

probably encourage a jury to regard these facts as evidence of his labouring under such insanity as would justify them in pronouncing him irresponsible. " (1)

As to Dr. Kenny's remark that the Rules have been administered in such a way as to afford a wider immunity than their language would suggest, there is no doubt that the Courts have at times been liberal or over liberal in construing them. Nevertheless there are several recent decisions of the Courts of Appeal declaring that the McNaughton Rules have not relaxed and should be upheld. (2)

(1) See however *R. v. Eurlon* *infra* p. 67 and cases referred to hereunder in note 2.

(2) See rulings in cases mentioned on pp. 40, 41, 68, 69, *infra*.

CHAPTER VII

APPLICATION OF THE McNAUGHTON RULES

Reference has already been made to the many forms and degrees that mental disease may assume. The McNaughton Rules have laid down the conditions which, as a result of such disease, must be present in a criminal's mind at the time of the act before he can be acquitted on the ground of insanity. It follows, therefore, that even if a score of brain specialists come to Court and swear a murderer is insane he can nevertheless be found guilty and sentenced if his insanity falls short of the legal requirements. The following cases may be mentioned as illustrating the general application of the Rules. It will be noted that in the majority of these cases doctors who have examined the prisoner have been called as witnesses with the object of proving him insane. While the law courts always respect medical opinion it must be borne in mind that insanity is by no means always a ground of exemption.

In 1888 one *Hitchens* (1) aged 21, was indicted for murdering his sister by blowing out her brains at close range with a double-barrel gun.

(1) R. v. *Hitchens* ; *Lancet*, March 3, 1888. 2 *Hamilton & Godkin's Leg. Med.* 247.

In support of his plea of insanity (1) it was proved that he had suffered from repeated attacks of epilepsy and that his mother had twice been insane, the second occasion being just prior to his birth. The Judge in his directions to the jury pointed out that the acts and conversations of the prisoner immediately before the crime showed that his judgment was rational and that he must have been capable of knowing the *nature and quality of his act and the fact that it was wrong*. For that reason he instructed the jury that even if they came to the conclusion that Hitchens was insane at the time of the crime they must nevertheless return a verdict of guilty. (*before the Hitchens case*)

In 1875 in the case of *Bloomfield* (2), Mr. Justice Brett said "The man may be mad, I assume that he is so in the medical sense of the term, but the question here is whether he is so mad as to be absolved from the consequences of what he has done. He is not so absolved, though he is mad, if he be not so mad as *not to know what he was doing or to know that he was doing wrong*".

(1) Such expressions as "plea of insanity" and "defence of insanity" have been used in various parts of the book for the sake of convenience and in order to avoid repetition of long terms. It should be understood, however, that "there is no such *special* plea as insanity." The insanity defence is raised after entering a "general plea in Bar" of "not guilty."

It should be noted that when a defence of insanity is set up the Prosecution has a right to call evidence in rebuttal. Owing to the complex nature of insanity doctors frequently disagree on whether or not a prisoner can be said to be insane (e.g. Codere's case mentioned later).

(2) *R. v. Bloomfield*, Reported in *Lancet*, July 21st, 1875.

In *Leigh's* (1) case the prisoner was tried for murder and in support of his defence on the ground of insanity it was proved that he was weak-minded, dissipated, eccentric in his habits, and that he indulged in liquor to such an extent that he was frequently a victim of delirium tremens. However, at the time of the murder he was not suffering from this complaint (if he had been the case might have gone differently). Moreover, the evidence seemed to show that he knew very well what he was doing. The Judge pointed out that the law did not excuse a person simply because "some degree of insanity existed" but required more than that. In the present case he said the prisoner was, according to the evidence, in such a state of mind as to *know both the distinction between right and wrong and the nature and quality of his act*. He was, therefore, responsible.

In 1881 *Charles Guiteau* (2) a lawyer, was tried in the United States for the murder of President Garfield by shooting him in the back at a railway station. In this case the Judge applied the McNaughton Rules. He first said (instructing the jury) "you must bear in mind that a man does not become irresponsible by the mere fact of being partially insane", and later, "if you find from the whole evidence that at the

(1) *R. v. Leigh*, 4 F. & F. 916.

(2) *U.S. vs. Guiteau*, 10 Fed. Rep. 161.

time of the commission of the homicide, the prisoner in consequence of disease of the mind was *incapable of understanding what he was doing or of understanding that it was wrong* — as for example, if he was under an insane delusion that the Almighty had commanded him to do the act and in consequence of this delusion he was incapable of seeing that it was a wrong thing to do — then he was not in a responsible condition of mind . . . and ought to be now acquitted". The jury, however, came to the conclusion that the prisoner knew what he was doing and knew it was wrong. Accordingly, they returned a verdict of guilty and Guiteau was executed.

In 1916 *Lieut. Georges Codere* (1) belonging to a Canadian regiment at that time stationed at Bramshot, England, was tried for the murder of Sergeant Ozanne of the same regiment. Ozanne apparently received \$1500 from home, which he handed over to Codere when the latter undertook to change it into English money for him. The next day Codere went to London in the company of another officer to whom he confided that he intended "doing away with a man". He asked the officer if he would help. To humour him, the officer said "sure, of course". Later on, having changed the money into English currency, he met another Sergeant of his regiment and told him "he was going to make a man

(1) *R. v. Codere*, 12 C.A.R. 21.

disappear" and offered £50 for the Sergeant's assistance. He wished him at a given signal to knock the man on the head with an officer's "cravache" (weighted trench stick). Knowing the man to be peculiar, the Sergeant remarked jokingly "would it not be better to use poison and not shed blood?" He suggested "serum ante-tuberculin", being really of the opinion that it was harmless. After some trouble, Codere procured something from a chemist (though apparently not what the Sergeant suggested). Two days later, in the afternoon, he drove his victim to a house about two miles away which was used by the Colonel and Major of the regiment and where Codere also had a room. He was seen to pour out some whisky and put "some white stuff" into the glass. He then went into the smoking room where the murder was committed. (1) Shortly afterwards he told two orderlies, Desjardins and Keller, that he had killed a man. Keller, known to be a stupid fellow, helped to clean up the blood, wrapped the body in a blanket and hid it in the stable. Sometime later the Colonel and Major returned to the house and all three officers dined together. Codere appeared perfectly calm at the meal and nothing was then suspected of him. Meanwhile, Desjardins had left the house complaining of sickness. Keller remained on and was noticed

(1) Without the aid of poison, however.

to be in an excited state which at the time was put down to drinking. He said nothing of what had happened till the next morning, when steps were taken to arrest both him and Codere. Two days later Codere wrote the following remarkable letter and asked that it should be delivered to Keller. "The thing has been discovered. Someone saw you strike him. As you have been seen to strike him it is no use to put the thing on me, because I shall not be able to help you if you put me in a hole. While I was upstairs scuffling commenced ; having struck you, you struck him for revenge. The only thing to do is to make a confession on paper and say that Lieut. Codere had nothing to do with it . . . Do not forget to say that all you said before was false and that it was to defend yourself".

During the trial this letter was strongly relied upon by the prosecution as showing that Codere knew what he had done and that it was wrong. On the other hand it was pointed out that the letter was so abnormal that it pointed to insanity. In support of the insanity defence it was brought out that the prisoner's aunt and several of his cousins had been insane. He had been dismissed from an agricultural college in Canada because he was not considered "compos mentis" and from early youth had been obviously abnormal. The ferocity with which the murder was committed followed by complete calmness of manner

was also suggested as an indication of insanity ; Ozanne's body having been found with the throat cut nearly to the spine, and with no less than forty-five cuts on the face. The expert medical evidence was somewhat conflicting. While the doctor testifying for the defence classed the prisoner as distinctly "insane" and subject to delusions, the doctor called on behalf of the prosecution maintained that the evidence and medical examination showed that Codere was merely "abnormal". He was not insane to that extent that he did not know the difference between right and wrong.

The Trial Court rejected the plea of insanity and convicted him of murder for which he was accordingly sentenced to death. He then appealed to the English Court of Criminal Appeal, which upheld the conviction of the Lower Court. In rendering judgment the Lord Chief Justice discussed the McNaughton Rules at some length and explained the meaning to be given to several expressions which until then had been the subjects of considerable difference of legal opinion. (1). After dealing with the facts of the case in question, he said that the prisoner was undoubtedly possessed of a mind of very inferior quality. He was popularly known as "fou Codere" and from his own statements, and after considering his family history, he could not be regarded as an

(1) See *supra* p. 25.

ordinary individual. On the other hand, evidence had been given "that he *knew quite enough to know the nature and quality of the act*, namely, that he was killing a man in order to retain money which it was his duty to hand over to the deceased and which he was not in a position to hand over Then he takes Ozanne to the house and kills him, tries to conceal the fact that he is killed, and actually gets two men to help him to conceal the body". It seemed evident, therefore, that the prisoner knew not only the nature and quality of his act but that he also knew it was wrong.

RONALD TRUE'S CASE

In 1922 took place the "cause célèbre" of Ronald True (1), during which the criminal law of insanity was discussed from almost every angle. The case eventually went to the Court of Appeal where it was authoritatively laid down that the M'Naughton Rules should be followed and that a Judge's duty is to explain them to the jury and direct its members to follow them. Lord Hewart, the Chief Justice, in rendering judgment, said "it is conceivable that the M'Naughton Rules may on some future occasion be further con-

(1) *R. v. True*, 16 C.A.R. 168.

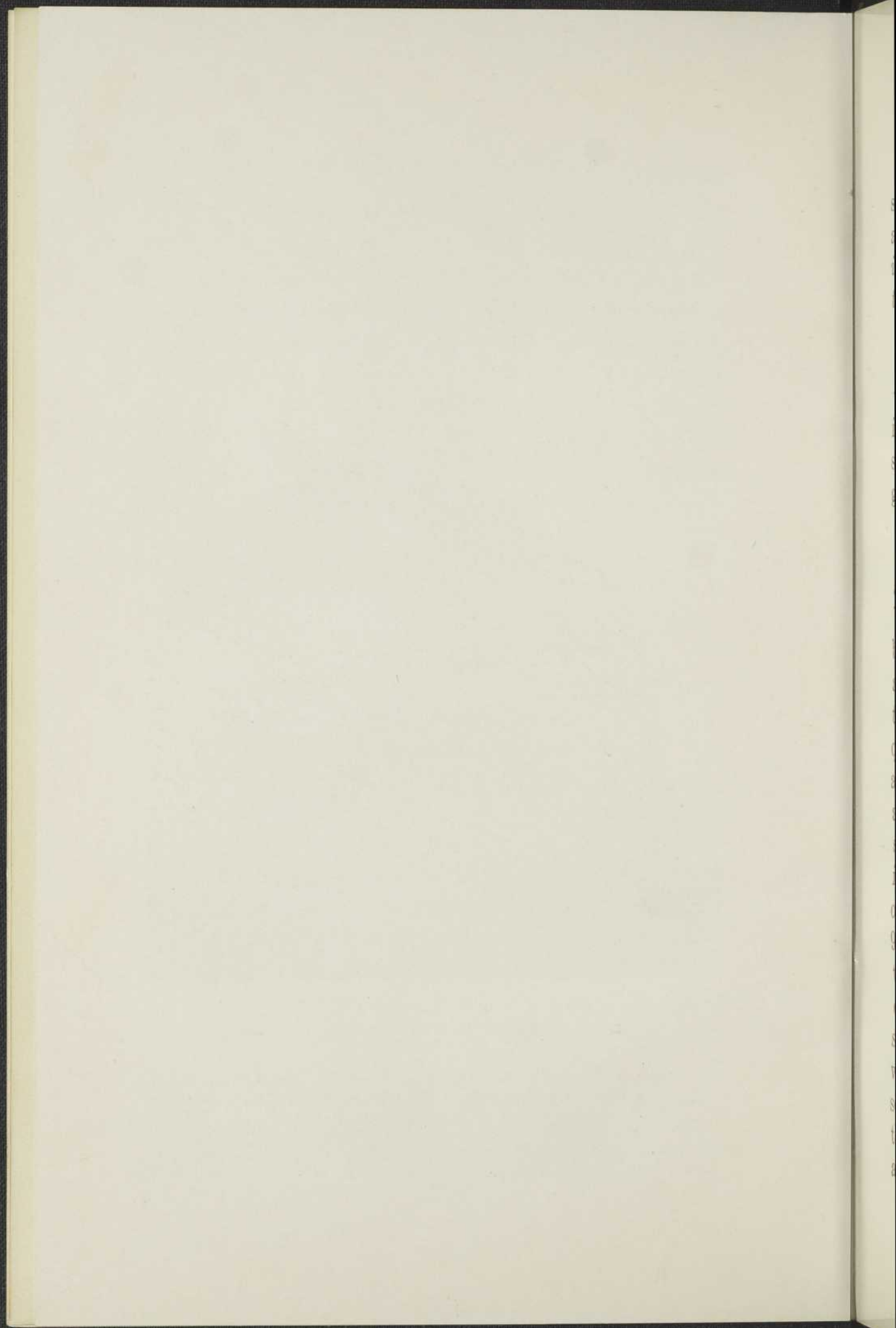
A noteworthy feature of this case is that although the defence produced abundant medical evidence to the effect that the prisoner was insane the Prosecution did not call a single medical witness in rebuttal.



Photograph by Russell & Sons, Southsea, England.

RONALD TRUE

sentenced to death for the murder of Gertrude Yates, alias Olive Young, in her flat in London, England on March 6th, 1922 (See page 40). As a result of an enquiry carried out by order of the Home Secretary True was reprieved and committed to Broadmoor Asylum. This action on the part of the Executive caused considerable public dissatisfaction. (See Appendix II).



sidered but no such consideration is necessary in the present case. *It is enough to say that in the view of this Court there is no foundation for the suggestion that the Rules derived from McNaughton's case have in any sense relaxed*". The case is one of extreme interest and was given wide publicity at the time, and in view of its important bearing on the subject under discussion it is worthy of fuller description than that given to other cases.

Ronald True, aged 31, "well connected" and an officer of the Royal Air Force during the War, was tried for the murder of a woman going by the adopted name of Olive Young. She was a prostitute and seemingly one of the more fortunate ones as it appeared that she had saved quite a little money, possessed valuable jewelry and lived comfortably in a London flat. To look after her apartment she employed a domestic servant "whose practice was to come in the morning and leave in the afternoon". On the morning of the murder the maid arrived, as usual, at about 9.15 letting herself in with a key. On going by the sitting-room she noticed a man's scarf and overcoat on the table, and looking around she saw that a glass pane of the closed bedroom door was cracked. Going into the kitchen she found some warm tea in a tea pot and it was evident that between the time that the milk was delivered at 7.30 and the maid's arrival at 9.15 someone

in the flat had got up and made tea. A few minutes after this last discovery, True came out of the bedroom and said to the maid "do not wake your mistress, she is in deep sleep. We were late last night. I will send the car around for her at twelve o'clock." He then gave her a tip, left the flat and got into a taxicab. The maid then knocked at the bedroom door, and, receiving no reply, walked in. In turning down the bed clothes she noticed that two pillows had been laid lengthwise so as to make it appear as if someone were in the bed. "At the foot of the bed was a rolling pin, and beside the chair a broken cup and saucer; but, apart from that, there was nothing to indicate that a struggle had taken place". The dressing table drawers were open and some jewelry was missing from a cupboard. Entering the bathroom she found the "dead and naked body of her mistress lying between the bath and the wall". She thereupon telephoned the police who arrived and found blood on the bedroom walls and ceiling, from the marks of which it appeared that the first stage of the killing had taken place in the bedroom and that the body had afterwards been dragged into the adjoining bathroom. The Police Surgeon estimated that the woman had been dead about two hours. He found five wounds on the head, inflicted by five separate blows with an instrument such as a rolling pin. He also found part of a towel, which had been stuffed into

her mouth, and the girdle of her dressing gown which had been tied tightly around her neck apparently to keep the towel in place. He came to the conclusion that death was due to strangulation and not to the blows.

After leaving the flat it was proved that the prisoner took a taxicab to an outfitters' establishment where he bought a new suit and hat. He explained that the blood stains on his old suit were due to an airplane accident he had had that morning. And when one of the shop assistants noticed a jewel case protruding from his pocket (which was in fact the dead woman's property) he pulled it out and explained he had just brought it from France. He next went to a pawnbroker's where he borrowed some money on part of the jewelry. That same evening he was arrested while at a theatre, and when some of the woman's jewelry was found in his pockets he said "I can explain how I got possession of it, I do not want to say anything to-night, it is no use putting up a defence until the proper time." Late the same evening he made a vague statement to the police which purported to throw suspicion on some unnamed party.

In suggesting a motive for the crime, the prosecution showed that the woman, for one of her type, was well off and possessed comparatively valuable jewelry. The prisoner, on the other hand, was at the time in bad financial straits.

Three days before the murder he had left a hotel without paying his bill. The next day he pawned a cigar case, and later cashed a bad cheque. It was also proved that, although he spent the whole night with the deceased about three weeks before the murder, he visited her on several subsequent occasions apparently with a view to seeing her alone. Each time, however, finding someone else there he left in a few minutes. The prosecution suggested that he had made up his mind to murder her and was awaiting a suitable opportunity, and claimed that in view of the whole evidence there could be no possible doubt but that the prisoner was the murderer. The defence (conducted by Sir Henry Curtis Bennett) pleaded that even if the Court were satisfied the prisoner was in fact the murderer he should nevertheless be excused on the ground that he was insane at the time of the act.

It is as well at this juncture to call attention to the difficulties that lay in the way of such a plea. Under which of the *McNaughton Rules*, even liberally construed, could the defence rely? Whether or not the prisoner's short visits meant that he was awaiting an opportunity to kill the woman, it is clear that he was in desperate need of money which alone would provide a motive for the crime. It would also appear that he not only knew what he was doing when he committed the murder but that he was also sufficiently aware

of the wrongfulness of his act to endeavour to conceal it.

The evidence showed that ~~the~~ first stages of the killing took place in the bedroom; it was there that the rolling pin played its part. Then the woman was strangled to death either before or after the body was dragged into the bathroom. This (according to medical evidence) took place about 7.45 A.M., shortly after both parties had partaken of some tea. Then the murderer proceeds skilfully to arrange the bed in order to deceive anyone who might happen to enter the room. A little more than an hour later he walks out of the bedroom and casually informs the maid that her mistress is asleep and should not be awakened. Then he proceeds to buy a new suit and hat, giving, without hesitation, reasons for having blood stains on his clothes and the jewelry case in his pocket. Later, on being arrested, he makes the very sane statement (a great deal saner than many normal people make under somewhat similar circumstances) that he does not intend to make any defence until the proper time but that he will explain everything later. Subsequently, he throws the suspicion on someone else.

In his opening statement, Sir Henry Curtis Bennett said that in support of his contention that the prisoner was insane he would prove that from his earliest youth Ronald True had been

abnormal. To start with, he was born when his mother was a mere girl of sixteen, which might possibly account in some way for his abnormalities. While serving in the Flying Corps during the Great War he had two serious accidents, and since then he had become a confirmed morphia fiend (1). Evidence would be brought, said Counsel, to show that the prisoner was irresponsible and could not have known the difference between right and wrong at the time the murder was committed. This evidence would be given by two prison doctors and two independent brain specialists.

The trial which was held in the Central Criminal Court of the Old Bailey before Mr. Justice McCardie, lasted five days. In support of the defence the following, amongst many other facts, were brought out.

True's aunt said that he had been exceptionally abnormal since a young child ; for instance, at the age of four he used to bury his pet rabbits with their heads out of earth and take pleasure in visiting them every day until they finally died. He also grossly maltreated his pony.

A doctor who treated True in 1916 said that in his opinion he (True) was then a confirmed

(1) There can be little doubt that the devastating effects of modern warfare on the nervous system must have accounted to a large extent for many of the crimes committed by ex-service men shortly after the termination of the Great War.

morphia maniac. He had also suffered from syphilis, of which insanity is one of the common after effects.

The Head Matron of a mental home said that in 1920 True was admitted on a specialist's advice. He was then a nervous and physical wreck and a confirmed morphia addict. His daily dose had been 30 grains and when this was decreased and eventually stopped he suffered fits sometimes of depression and sometimes of violence. He was without doubt mentally unbalanced.

A proprietress of a nursing home for drug cases testified that True was admitted to her establishment in 1921, that he was a very bad morphia case with suicidal tendencies and required the constant attention of two male attendants.

The prison doctor said that he had made a point of seeing a lot of True when he was in jail. After a few interviews with him he came to the definite conclusion that he was insane and a homicidal maniac who was a danger to the public and should certainly be kept confined. Asked as to the behaviour of the prisoner, the senior Doctor said that he was remarkably calm and that it was quite possible he remembered nothing of the murder at all. He seemed to be rather proud of his position and the fact that he had been given wide publicity. The doctor also gave his opinion that the prisoner's sense of the differ-

ence between right and wrong had never properly developed (1) and that at the present time, although he might realize the nature and quality of some act he did, he would probably be incapable of knowing whether that act was right or wrong morally. Asked as to the likelihood of the prisoner having had a spell of epilepsy when he killed the woman, the doctor said that was possible. He also said that he found traces of insane delusions. The following are the doctor's words : " He referred to me about being impersonated and that appeared to be very persistent. I could discover no cause for it and I came to the conclusion it was a general insane delusion. Delusions are one of the hallmarks of insanity." Other evidence was also given to the effect that True had on several occasions complained of being impersonated.

In cross-examination the Head Doctor was asked by Crown Counsel : " What do you mean by morally right in a case of this kind — murder ? How could any man, who knew that he was committing the crime of murder, and knew that was a crime against the law of the Country, have any

(1) In some cases doctors have given their opinion that the accused was only possessed of the mentality of a child and under such circumstances it has been urged (e.g. by Sir Matthew Hale) that an insanity defence should succeed. In *State vs. Richards* 39. Conn. 591 it was held that if the accused had no greater capacity than a child of fourteen he should be acquitted ; but this ruling has not been generally followed.

doubt that the crime of murder was morally wrong?" By way of illustrating his reply to this question the Doctor described a former case in which he had given evidence where a man was tried for attempted murder. He said: "A man was tried at the Oxford Assizes who was found in a road attacking a boy with a hatchet and had cut his throat. He came from Reading to Oxford that morning, and at the first shop he came to got a hatchet. When he was arrested attacking the boy he said 'let me go, I must commit a murder; I want to be hung'. In that case I said I thought the man knew the nature and quality of his act, and knew that he was doing wrong in the sense of being punishable but I did not think that he knew whether it was right or wrong from the moral point of view".

One of the prison hospital officers said that while True was in jail a man named Jacoby, who had been convicted of murder, was admitted into one of the wards. On one occasion True happened to pass by the ward and seeing Jacoby, and apparently knowing of his crime, said to him: "Another one to join the murder club we are only accepting members who kill them outright".

A well known mental specialist said that in his opinion True was certifiably insane and not fit to be at large, that he had homicidal tendencies, delusions and "a definite disease of the mind in

a moral sense". Questioned as to why, if the prisoner was insane he should have taken the trouble to cover up his acts, e.g., in preparing the bed clothes, the Doctor said that attempts to conceal are often consistent with the actions of a lunatic and that even if the murder had been committed during an epileptic seizure (which was not impossible) attempts to conceal afterwards would still be consistent with such a condition. (1) He might not know what he was doing at the time he killed the woman but he might find out almost immediately afterwards and then proceed to conceal his crime in the best way possible.

The defence also argued that the extremely calm and casual behaviour of the accused immediately after the murder pointed to his being insane. The prosecution, however, referred to the well known case of Doctor Crippen, who was apparently sane when he poisoned his wife and cut her up into small pieces yet attended his consulting room and appeared as calm as usual the morning after the murder.

It should be noted that the defence was obliged to rely solely on its contention that True was insane. There was no attempt to prove an alibi, i.e., no evidence to show that he was not in the woman's flat at the time of the murder, nor was any explanation offered as to how he came to

(1) This opinion seems to be shared by the majority of leading alienists.

have the jewelry which was found in his pockets when arrested. There was virtually an unchallenged chain of evidence which showed him to be the murderer. The whole question to be decided, therefore, was whether he was sufficiently insane at the time of the murder to be excused in law.

In his address to the jury, Mr. Justice McCardie cited the Rules of the McNaughton case and referred to the various criticisms to which from time to time they had been subjected and which had been discussed at some length during the trial. While describing the Rules as setting forth the Criminal Law of England on the subject of insanity, he said : " I must say the case has given me much anxiety because of the conflict of opinion which has existed in the past and exists at the present time as to the law, and I shall put this point to you (i.e. to the jury) that *even if the prisoner knew the physical nature of the act and that it was morally wrong and punishable by law, yet was he, through mental disease, deprived of the power of controlling his actions at the same time ?* If yes, then in my view of the law the verdict should be 'guilty but insane'. I have expressed my view, but I want to point out to you, if you will allow me, that this particular head of exemption, if I may call it such, is one which should be applied by the jury with great care ; it would never do to diminish unduly

the doctrine of responsibility for criminal acts. It would be unwise to allow any man to think he was saved from the need of controlling his actions because he was able to say to the jury 'from mental disease I could not control myself'".

It will be seen that in putting this question to the jury the learned Judge went outside the M'Naughton Rules. (1). In effect he asked: "Did this man commit murder because of some irresistible insane impulse?" In other words, he supported the criticism that the M'Naughton Rules should be extended to cover those very complex cases where individuals may be temporarily deprived of their senses to such an extent as to be unable to control their actions although they know them to be wrong. We shall have occasion to consider this subject shortly, but we can repeat now that as far as the English law is concerned the better opinion is that irresistible or insane impulse is no defence. In any event, as already pointed out, the Court of Appeal in True's case declared in rather emphatic language that the M'Naughton Rules had not relaxed and should be upheld (2).

(1) In Holt's case (15, C.A.R. 10) *infra* p. 68 Mr. Justice Greer also went outside the M'Naughton Rules in leaving the question of "uncontrollable impulse" with the jury.

(2) No opinion, however, was expressed on the Insane Impulse question.

In his charge to the jury Mr. Justice McCardie said that one of three verdicts was possible : " Not Guilty ", " Guilty of Wilful Murder " and " Guilty but Insane ". Near the end of his address he said : " I want you please to remember whilst on the one man you may equally desire that no man insane shall be found guilty of wilful murder, yet, on the other hand, I want you to realize that if a man be not absolutely insane within the meaning of the English law it is vital that the jury should vindicate the law with iron firmness ". The jury took little more than an hour to reject the plea of insanity and return a verdict of wilful murder. True was accordingly sentenced to death and on appeal, as already stated, the conviction was upheld. A petition was then presented to the Home Secretary praying for a reprieve, and, after due investigation, it was granted. As a result True was committed to Broadmoor Criminal Lunatic Asylum.

It should be added that the Home Secretary's action in granting a reprieve was not in any way legally inconsistent with the verdict of the Trial Court or the judgment of the Court of Appeal. The law provides (1) that where it appears to the Home Secretary that there is doubt as to the sanity of a prisoner under sentence of death he may order an investigation to determine whether or not the prisoner is insane. There is also good

(1) Sec. 2 (4) Criminal Lunatics Act, 1884 (England).

authority for saying that if a man who commits a capital offence when sane (and is accordingly sentenced to death) afterwards becomes insane he should not be executed. (1) There cannot be much doubt from the evidence already referred to that True was insane. The final judgment showed that there is still less doubt that he was not sufficiently insane to be irresponsible for his actions when he killed the woman. There was, therefore, nothing irregular in the Home Secretary's action. He recognized the prisoner's legal responsibility at the time of the murder, but, as a result of his investigation made after the Appeal Court had confirmed the conviction, he came to the conclusion that there was abundant evidence of insanity which would justify a reprieve and an order for asylum committal.

Some idea of the way in which the Courts have applied the McNaughton Formula in order to determine the presence or absence of that degree of insanity necessary for exemption from responsibility will have been gathered from the above mentioned cases. Although the Rules were laid down as long ago as 1843 they have continued to be and are still regarded as law in England, and (with certain minor exceptions) in Canada. They were also adopted and in modified form are still in force in several of the States

(1) See *R. v. Leys*, 17 C.C.C. 198 and *infra* p. 75 and p. 126.

of America. While the Trial (or Lower) Courts have at times been inclined to give them an over-liberal construction, the Appeal Courts have laid down repeatedly that they should be upheld and not be loosely construed. We shall have occasion to mention several such decisions in discussing the subject of insane and uncontrollable impulse. Before going further, however, something should be said of Drunkenness in its relation to Insanity.

CHAPTER VIII

DRUNKENNESS

Drunkenness (1) must be distinguished in law from delirium tremens, for while the latter is really a form of "settled insanity" (2) existing in some cases after alcoholic consumption has ceased, "drunken insanity" is short-lived and is the direct and immediate result of a violent bout of drinking. (3) Drunkenness by itself is no excuse for crime. (4) The principle is that if a person gets drunk he does so of his own accord, or, at least, as a result of his own folly in overdrinking; having done that, he cannot expect to be pardoned for crimes he commits in that condition. (5) "The law will not allow one wrong act to be an excuse for another". In some cases, however, drunkenness is taken into

(1) It was described by Coke and Hale as "acquired madness". Until 1872 it was actually a criminal offence in England "to become drunk".

(2) Delirium Tremens is a recognized form of insanity covered by the McNaughton Formula.

(3) See *Evers vs. State*, 31 Tex. R. 318.

(4) The same rule pertains in the U.S.A. See *U.S. vs. King* (1888) 34, Fed. Rep. 302 (N.Y.) and *Meagher's case*, 37 Fed. Rep. 875 (Tex), where it was held that "intoxication is no excuse for crime but should be considered as affecting the defendant's mental condition with reference to his capability of a specific intent".

In *U.S. vs. Claypool* (1882) 14 Fed. Rep. 127, it was held that "Drunkenness is no excuse for crime and, in the instances in which it is resorted to to blunt moral responsibility, it heightens the culpability of the offender".

(5) Hale P.C. p. 32:

consideration in mitigating the punishment which would ordinarily be meted out if the criminal had committed the same crime when sober, e.g., where a youth, unaccustomed to liquor and generally of good habits, is persuaded to drink by an older companion, and, being intoxicated, breaks into a shop and steals cigarettes, the judge will deal lightly with him. In such cases there is at least a partial lack of "mens rea" or guilty intent on the part of the accused, and that is taken into consideration by the Court when imposing sentence. Thus there are cases where murderers escape the extreme penalty of the law and are only convicted of manslaughter on account of their crimes being committed under the powerful influence of liquor. (1) However, the law in this respect is rigidly applied. The fact of a man more readily giving way to a violent passion simply because he is slightly drunk is no excuse. He must be so drunk as to take away his criminal intent. (2) But where a person is so drunk at the time of committing a crime as to be temporarily insane, it is a different matter. The question is then no longer one of drunkenness but of insanity.

(1) *R. v. Studdard*, 25 C.C.C. 81.

(2) See *R. v. Beard*, L.R. (1920) A.C. 479. See also *R. V. Spellman* (1921) 37 C.C.C. 390. Refer also to *R. V. Wilson*, 21. C.C.C. 448 (Canadian) and *R. V. Davis* 14 Cox. C.C. 563.

The leading case on this subject is that of *Beard* (1), which took place in 1920 and was finally decided in the House of Lords. Beard, who was drunk at the time, raped a young girl of thirteen. To prevent her screaming and struggling he put his hand over her mouth and pressed his thumb against her neck, with the result that he suffocated and killed her. He was charged with and convicted of murder in the Trial Court. The defence was that he was so drunk that he did not know what he was doing, and the Judge instructed the jury that for such a defence to succeed they must be satisfied that by reason of drunkenness the prisoner did not know what he was doing or did not know that what he was doing was wrong. The jury came to the conclusion that he knew both these things, and found him guilty. The case was then brought to the Court of Criminal Appeal which reduced the verdict from murder to manslaughter. Finally, the House of Lords, by a unanimous judgment of eight Law Lords, restored the original verdict of murder and laid down authoritatively the law as to the defence of drunkenness and of insanity when caused by drunkenness. Lord Birkenhead, then Lord Chancellor, pointed out that generally speaking a person cannot be convicted of a crime unless there is "mens rea".

(1) *R. v. Beard* L. R. (1920) A. C. 479.

There was no doubt that insanity was, under certain circumstances, a defence and the fact that that condition was brought about by drunkenness made no difference. (1) In Beard's case, however, there was no insanity, nor did it appear that there was sufficient drunkenness to have deprived him of "mens rea". The original verdict of wilful murder rendered by the Trial Court was, therefore, correct.

The Lord Chancellor then proceeded to criticize the direction which had been given to the jury by the trial judge. He said that there was an essential difference between a defence founded on insanity and one founded on mere intoxication, and that judges should be careful to distinguish between the tests in each of the two cases. "Where the defence is one of drunkenness and not insanity the question of whether the defendant 'knew that he was doing wrong' is irrelevant", and the direction given in the present case was an "innovation not supported by authority".

(1) It would appear that the fact of an insane person voluntarily aggravating his mental condition by the use of alcohol does not lessen his chances of successfully pleading insanity. (*Choice vs. State*, 31. Ga. 424.) But when an insane person commits a crime while actually intoxicated reliance should be placed on the original degree of insanity and not upon the subsequent drunkenness. (*State vs. Kraemer*, 49. La. Ann. 766.)

CHAPTER IX

INSANE IMPULSE

We now come to that very complex species of insanity commonly known as insane or uncontrollable impulse, which is sometimes called "moral", "emotional", or "impulsive" insanity. It is known among medical writers as "lesion of the will". By this is meant that a person's mind may be so deranged temporarily that he is unable to resist committing a crime by reason of some irresistible impulse which deprives him of all control over his actions. The impulse is essentially irresistible and uncontrollable and not merely unresisted or uncontrolled. Accordingly, crimes of passion such as sexual offences and acts committed in fits of violent temper are not regarded as being due to insane impulse. The striking feature of this form of insanity is that a person may irresistibly commit a crime although he knows what he is doing and knows that it is wrong. It is obvious, therefore, that the defence of insane impulse is excluded from the M'Naughton Formula and for this probably more than for any other reason the Rules have met with adverse criticism.

As examples of crimes committed under the influence of insane impulse may be mentioned the thefts of a kleptomaniac who knows that what he is doing is wrong but appears unable to

resist stealing. The remarkable thing is that he (or she) frequently takes things of which he has not the slightest need and seems to make a specialty of certain articles, e.g., umbrellas or straw hats. (1) So, also, there have been countless cases where mothers have, without apparent reason, murdered their young children although they were undoubtedly devoted to them. It has been shown afterwards that they knew perfectly well what they were doing but were apparently unable to control their actions, e.g., a woman who has felt the increasing impulse to kill her infant has been known to ask that the child be taken away from her for the night, but has succumbed to the recurring impulse a few days later. (2)

The chief obstacle in the way of allowing insane impulse as a defence is the difficulty of proof — the difficulty of determining whether a crime was in fact irresistible or whether it was merely unresisted. In the Canadian case of *Jessamine* (3) which was heard before the Ontario Court of Appeal in 1912 the defence of insane impulse was rejected and the Canadian criminal

(1) See Kenny, *Outlines of Criminal law* (1929 ed.) p. 57.

(2) There is no doubt however that infanticide when due to genuine puerperal insanity has in practice frequently been held excusable so that in certain cases this form of impulse (because it is not only an impulse) may be an exception to the general rule.

(3) *R. v. Jessamine*, (1912) 1, D.L.R. 285. See also *R. v. Creighton*, 14, C.C.C. 349.

law of insanity was declared generally speaking to be similar to that of England. In this case the prisoner had watched for his victim on the street and when he spotted him fired several shots killing him instantly. The medical evidence showed that he was incurably insane yet was capable of knowing what he was doing and of appreciating the difference between right and wrong. The defence was, therefore, narrowed down to insane impulse, i.e., that the prisoner had lost his power of inhibition and could not resist the impulse he had to kill the deceased. The Trial Judge said that it was not the law that a person, even though insane, may kill another without being punished for it. He pointed out that there had been hundreds of insane persons who have killed others and who have been executed, both in England and in Canada. "Life would not be safe under such circumstances. There is one in every three hundred persons in most countries who is insane in one way or another, and it would never do if the law were such that one man out of every three hundred — that is to say in Toronto something over 1000 people — could go out and slay at will without being brought to task and punished by the strong arm of the law. A man is not to be acquitted on the ground of insanity unless his mind is so affected by that insanity as that he is not capable of appreciating the nature and quality of his act and of knowing that such act

was wrong, it is not the law here as it is said to be in some countries that if an insane person who is capable of appreciating the nature and quality of the act and of knowing that it is forbidden by law yet has what is called an impulse to do the act, which impulse he cannot resist, he is to be acquitted on the ground of insanity ”.

At various times the English Courts have leaned towards the allowance of insane impulse as a defence although in the long run it has been rejected. In 1872 in *Jordan's* (1) case the Judge said that when it can be reasonably assumed that the accused was so affected by an insane impulse to do an act that he was unable to resist, then he should be acquitted on the ground of insanity.

In 1883 in *Gill's* (2) case, Mr. Justice Kay in his address to the jury said that “ if a man's mind was in such a diseased condition that he was subject to uncontrollable impulse, they would be justified in finding him irresponsible for his actions ”. In effect, he instructed the jury that if they were satisfied that the prisoner's mind was so overwhelmed by some insane impulse as to rob his will of all resistance, then they should acquit him on the ground of insanity.

(1) Martin, B. in *R. v. Jordan* (1872).

(2) *R. v. Gill*, 2 Hamilton & Godkin's Leg. Med. 248, 249.

In *Hay's* (1) case 1911 the medical evidence showed that the prisoner was eccentric, morbid and inclined to homicidal tendencies but that when he fired the revolver at his victim he knew what he was doing and knew that it was wrong yet was probably prevented by mental disease from controlling his actions. The Judge said if the jury believed this evidence they would be justified in acquitting him on the ground of insanity. (The late Professor Kenny, however, claimed that the common opinion that this case is authority for saying that insane impulse is a defence, even if a man knows his act to be wrong and knows its nature and quality, is incorrect. He has pointed out that the official court record shows that Hay knew the nature of the act but he *did not know the quality of it.*)

Strong support was given to the opinion that insane impulse should be recognized as a defence by one of the recommendations of Lord Atkin's Committee (2) which in 1922 was called upon to "consider what changes, if any, were desi-

(1) *R. v. Hay*, 22 Cox C.C. 286, and see Mr. Justice McCardie's statement in his charge to the jury in *True's* case. (Supra. p. 51)

Note also that Mr. Justice Greer in *Holt's* case (15 C.A.R. 10) left the question of uncontrollable impulse with the Jury.

(2) The Committee convened in July 1922 and its report was published on November 1st, 1923. Lord Justice Atkin presided as Chairman. The other learned and distinguished gentlemen who took part were Sir Leslie Scott, Sir Richard Muir, Sir Edward Marshall-Hall, Sir Ernest Pollock, Sir Herbert Stephen, Sir E. Troup, Sir Ernest Blackwell and Sir Archibald Bodkin.

nable in the then existing criminal law of insanity". The Committee was appointed by Lord Birkenhead, who was then Lord Chancellor, and medical experts and boards were called upon to advance their opinions. There was considerable ground to be covered but at present we are concerned only with the subject of insane impulse. In this connection the Report of the British Medical Association recommended that a person should be held to be irresponsible if prevented by mental disease "from controlling his own conduct unless the absence of control is a direct and immediate consequence of his own default". The Committee, in its Report, agreed with the suggestion and said that it was satisfied that there were cases of mental disease where the impulse to commit a crime is uncontrollable; referring to such cases, the Report reads "*In fact the accused knows the nature of the act and that it is wrong, and the McNaughton Formula is not logically sufficient. It may be that the true view is that under such circumstances the act, owing to mental disease, is not a voluntary act. We think that it would be right that such cases should be brought expressly within the law by decision or statute*". The Report then goes on to say that the Committee appreciates the difficulty of distinguishing some of such cases from those where no mental disease exists, such as sexual offences where the act is not uncontrollable but merely uncontrolled. The final conclusion arrived at was as follows :

"It should be recognized that a person charged criminally with an offence is irresponsible for his act when the act is committed under an impulse which the prisoner was, by mental disease, in substance, deprived of any power to resist. It may require legislation to bring this rule into effect". In spite of this powerful recommendation, however, and the various court rulings to the same effect the English law has not appreciably changed and has refused to allow the McNaughton principles to be extended to cover the insane impulse defence, nor has the legislature passed any law providing for its admission. (1). The following authorities may be mentioned to support this contention : —

In 1859 *Haynes* (2), a Canadian soldier, was charged with the murder of a girl while at camp in Aldershot. There appeared to have been no motive and the only defence possible was that of insane impulse. The Judge rejected this and said that the only question to be determined was whether the prisoner knew the nature and quality of his act and that it was wrong. The

(1) "Impulsive insanity is the last refuge of a hopeless defence". Darling, J. in *R.v. F.H. Thomas*, 7, C.A.R. 36 (1911).

In 1878 an attempt was made to codify the Criminal Law of England (a task which incidentally has never been accomplished) and the draft (prepared by Sir James Fitzjames Stephen) included a provision for the admissibility of the irresistible impulse defence. The Commissioners to whom the draft code was referred struck out this provision.

(2) 1. *Foster and Finlason*, 666 (England)

jury decided that he did, and he was sentenced to death.

In 1863 *Burton* (1), a lad of eighteen, was charged with murdering a young boy with whom he had been playing in a park. He struggled with the boy for some time and eventually killed him by cutting his throat. The murder committed, he went forthwith to a police station and made a full admission. He said "I knew the boy and knew his mother but I had no particular ill feeling against the boy ; only I had made up my mind to murder somebody". The defence was one of insanity. Evidence was called to show that the prisoner was eccentric and that his mother had been insane. The prison doctor said that the boy was obviously suffering from what he would call "moral insanity". In discussing uncontrollable impulse the Judge said that to allow it as a defence would be "a most dangerous doctrine and fatal to the interests of society and to security of life". He also pointed out that the doctrine was quite inconsistent with the *McNaughton Rules*. "A state of mind in which a man, perfectly aware that it was wrong to do so, kills another under an uncontrollable impulse is no defence for a crime." (2). The prisoner was sentenced to death and executed.

(1) 3. Foster and Finlason, 772 (England)

(2) See also Canadian case of *Jessamine*, (Supra p. 61)

In *Barton's* (1) case 1848, the Judge remarked : " The excuse of an irresistible impulse co-existing with the full possession of the reasoning powers can find no countenance in the law of England ".

In *Pate's* (2) case 1850 it was held that " the law does not acknowledge the doctrine of an uncontrollable impulse if the person was aware that it was a wrong act he was about to commit ".

In *Holt's* (3) case 1920 it was laid down by the Court of Appeal that uncontrollable impulse is not a defence unless it amounts to absolute insanity within the meaning of the law. In rendering judgment the Lord Chief Justice said " The tests in *McNaughton's* case must be observed and it is not enough for a medical expert to come to the Court and say generally that in his opinion a criminal is insane. There must be some evidence within the meaning of the Rules in *McNaughton's* case ".

In 1925 the English Court of Appeal once more rejected the defence of uncontrollable impulse. A man named *Kopsch* (4) was indicted

(1) R.v. Barton (1848) 3 Cox, C.C. 275.

(2) R.v. Pate ; judgment of Baron Alderson.

(3) R.v. Holt, 15 C.A.R. 10. It is worthy of note that in the Trial Court Mr. Justice Greer left the question of uncontrollable impulse " to the jury " (contrary to *McNaughton* Rules) in much the same way as Mr. Justice McCardie in *True's* case.

(4) R.v. Kopsch. 19 C.A.R. 50.



LIEUT. F. R. HOLT

who (notwithstanding the fact that the trial Judge left the question of irresistible impulse to the Jury) was found guilty of the murder of Kitty Breaks near Blackpool, England on December 23rd, 1919. The Home Secretary after enquiring into the prisoner's mental condition refused to advise a reprieve and Holt was executed. He remained apparently indifferent to the last. (See pages 68 and 81).



and convicted of the murder of his aunt by marriage, with whom he had been on affectionate and intimate terms for some time. It appeared that at her own request he strangled her with a necktie. The defence was that at the time of the murder he was entirely controlled by his subconscious mind and was therefore acting under an uncontrollable impulse for which he was not responsible. The Lord Chief Justice, in rendering judgment, cited the McNaughton Rules and declared emphatically that the English law knew no such defence as irresistible impulse.

The last case that need be mentioned in the same connection is that of *Edward Flavelle* (1) which was tried in 1926. The prisoner was charged with the murder of his step-brother, a lad of fifteen. The defence pleaded uncontrollable impulse and claimed that the law as expressed by the McNaughton Rules was not in keeping with modern medical opinion and should be changed. The Trial Court rejected this plea and rendered a verdict of wilful murder. The prisoner then applied for leave to appeal submitting once more that the law should recognize the defence of insane impulse. In refusing to grant this application the Court of Appeal declared in no uncertain language that the McNaughton Rules were still the law, and to allow

(1) R.v. Flavelle, 19 C.A.R. 141.

See also R.v. Coelho (1914) 10 C.A.R. 212.

the defence of uncontrollable impulse would be acting contrary to a great number of important decisions already laid down on that very same point.

We should add that the recommendation of Lord Atkin's Committee that a modified recognition should be given to the insane impulse defence was referred in 1924 to twelve High Court Judges for their opinion. Ten of the twelve Judges advised against admitting any such defence.

CHAPTER X

PROCEDURE

Without discussing in any great detail the legal procedure followed before, during and after insanity trials, it now becomes necessary to refer to several rules and principles which are of considerable importance in Practice.

First, it may appear strange that when a prisoner is acquitted on the ground of insanity the verdict, in England, should be "guilty but insane" instead of "not guilty because insane". The very reason for his being acquitted is because he had no guilty intent or "mens rea". Why, then, call him guilty? Originally, the English law in this respect, was similar in effect to that now generally in force in Canada and the United States, and the form of verdict was "not guilty on the ground of insanity". In 1882 however, Queen Victoria was shot at by a lunatic, who was tried and found "not guilty on the ground of insanity" (1). The recognition that it was improper that anyone attempting the life of royalty should be declared "not guilty" appears to have led to the passing of the Trial of Lunatics Act (2) the next year. Ever since then the verdict has been "guilty but insane", in

(1) R.v.Maclean, 1883. In 1840 another lunatic had attempted the Queen's life (*R. V. Oxford*, 9. C. and P. 525.)

(2) 46 and 47 Vict. C. 38.

spite of the recommendation of Lord Atkin's Committee that the original form of verdict should be restored. (1).

In all the cases so far mentioned there has been some question as to whether or not the accused was insane at the time he committed the particular offence, and in each case the prisoner was sufficiently sane to be tried. If, however, either before or during the trial it appears to the Court that there is good reason for doubting his sanity and his ability for that reason to conduct his defence (or rather to advise his counsel of the facts necessary to conduct his case) then a special investigation by jury may be ordered to inquire into the prisoner's mental condition. (2) If he is found sane the trial proceeds, if insane then the trial proper does not take place (or if it had already commenced is discontinued) and the prisoner is kept in custody till "His Majesty's pleasure" (or, in Canada, till the decision of the

(1) See *infra* p. 109.

(2) If it is part of the defence that the prisoner is insane at the time of the trial it should be alleged that he is unfit to plead. *R. v. Perry*, 14 C.A.R. 48. "Every step in the proceedings against a criminal is arrested by his or her becoming lunatic." (Lord Hatherley in *Mordaunt vs. Moncrieffe*, L.R. 2. H.L. Sc. p. 393).

"Where it appears that the accused was insane at the time of the trial, but counsel failed to draw the matter to the attention of the court Counsel's omission will not deprive the accused of his statutory right under S. 967 of the Code, and a new trial will be ordered to enable the direction of an issue in accordance with that section." *R. v. Williams* (1928) 50 C.C.C. 230.

It should be noted that the issue that the prisoner is unfit to plead may be raised either by the defence or the prosecution.

Lieutenant Governor of the Province where the case arises) is made known." (1) If at some later date the prisoner recovers, then the trial may proceed. (2).

In those cases where the prisoner, after proper trial, is found to be guilty of the act but insane the Court may order him to be kept in custody till His Majesty's pleasure (or, in Canada, the decision of the Lieutenant Governor) is made known" (3) The King, or, in Canada, the Lieutenant Governor (4) (acting of course through the proper channels) may then order him to be confined in any place or manner he sees fit. This, in most cases, means a criminal lunatic asylum where the confinement is usually life long. In England, the majority of lunatics is sent to Broadmoor Asylum and statistics show that (with the exception of offences committed by women as a result of puerperal insanity coming on after childbirth) considerably less than one per cent of the prisoners admitted to that institution ever obtain release. (5)

Sometimes a prisoner who has been acquitted

(1) 39 and 40 Geo. III. C. 94, S. 2 (England) and Section 967 (V. and VI) Criminal Code of Canada, R.S.C. 146, S. 967.

(2) See *Delorme vs. Sisters of Charity*, 40 C.C.C. 218 and *R. v. Delorme* K.B. (Crown side) June 1923, Montreal.

(3) 46 and 47 Vict. C. 38, S. 2 (England), and Criminal Code of Canada, Section 966 (II).

(4) Criminal Code of Canada. Section 969 (R.S.C. 146. S. 969).

(5) Kenny, *Outlines of Criminal Law* (1929 ed.) p. 59.

on the ground of insanity at the time he committed the offence is found to be sane (at least temporarily) at the time of his trial. It has been held, however, that this does not prevent a warrant being issued for his committal to an asylum ; his apparent sanity might be of only short duration and in view of his past history it would be inviting trouble to let him once more go on his way. (1).

In those cases where the Trial Court has rendered a verdict of guilty the Court of Criminal Appeal has the power, if it considers there is sufficient cause, to substitute a verdict of " guilty but insane " or in Canada a verdict to the effect that the accused is not guilty on the ground of insanity. (2) A considerable number of cases where prisoners have been found guilty and condemned, notwithstanding their plea of insanity, are therefore brought to appeal. (3) Probably

(1) Re : Alexandre Duclos (1907) 12 C.C.C. 278, (Canadian).

(2) Section 5, subsec. 4, Criminal Appeal Act, 1907 (England) and Art. 1016 (IV) Criminal Code of Canada. 13-14 Geo. V. C. 41, S. 9.

(3) It should be noted, however, that no appeal lies on behalf of an accused person *found to have been insane when the offence was committed* ; nor does an appeal lie at the instance of the Crown from such a finding. *Felstead's case* (1914) A.C. 534, 10 C.A.R. 129.

When a defence of insanity has been properly left to the jury with the proper directions the Appeal Court will not, as a rule, interfere with the verdict. *R. v. Law*, 9 C.A.R., 246.

" A new trial will not be granted on the grounds of insanity where the plea was not raised at the trial and there is not enough shown to indicate fresh evidence which would warrant sending the case back ".

the very fact of so many cases being appealed (often on scanty grounds) has led the Appeal Courts to adopt a very strict policy in connection with the power conferred upon them. Thus in *Flavelle's* case, already mentioned (1), it was declared "that only in very exceptional circumstances does this Court feel inclined to that course".

We said before that if a prisoner becomes insane after being convicted and sentenced to death he cannot be executed—at least until his recovery; the reason presumably being that he might possibly have some plea which if he were sane he could advance in order to postpone the execution. In this connection there is a Statutory relief accorded to a convicted prisoner, which has already been mentioned in connection with Ronald True's case, namely the power of the Home Secretary (2) to grant a reprieve in certain cases and order the prisoner to be confined to an asylum, notwithstanding the fact that the

R. v. Sloane (1930) 53 C.C.C., 342 (Canadian). See also *R. v. Tellett* (1921) 15 C.A.R., 159, Remarks of Darling J.

Where the plea of insanity is not raised at the trial the Court will not, as a rule, allow it to be raised on appeal but will leave the question of sanity to be dealt with by the Home Secretary in accordance with the facilities given to him by law. *R. v. Lumb*, 7 C.A.R., 263.

(1) *Supra.* p. 69.

(2) See True's case, *supra* p. 53 and *R. v. Lumb*, 7, C.A.R. 263 (1912), and *R. v. Loake*, 7 C.A.R. 71, (1911) and *R. v. Jesshope*, 5 C.A.R. 1, (1910), and see Appendix II.

courts have found him legally responsible at the time of his offence. In Canada this power is exercised by the Minister of Justice (1). There must first, however, be good grounds for doubting the prisoner's sanity. A medical investigation is then carried out and if the prisoner is found sufficiently insane the special power is exercised.

As to the procedure during the trial itself, a few points should be mentioned by way of illustrating the application of the principles already discussed. First, there is a general rule of criminal law that the accused is not guilty until he is proved otherwise. The burden or onus of proving this guilt is, therefore, on the Crown or Prosecution. In cases, however, where the defence is insanity, i.e., where the accused prays for acquittal because he was insane the burden of proving that insanity is upon him. (2). It is

(1) In virtue of the Royal Prerogative of mercy.

(2) *McNaughton's case* (Supra).

R. vs. Stokes, 3 Car & K. 185.

R. vs. Layton, 4 Cox, C.C. 149.

R.v. Megill (1929) 2 D.L.R. 279.

See also *R.v. Turton*, 6 Cox, C.C. 385, and *R.v. Jefferson* (1908) 72, J.P. 467, 469.

It will be remembered that the *McNaughton* Rules in this connection stipulate "that the jury ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes *until the contrary be proved to their satisfaction*". It has been held, however, that the plea of insanity need only be established by a preponderance of the evidence and that it need not be made out beyond any reasonable doubt, and that it is a misdirection to say that such a defence must be made out beyond a reasonable doubt. *R. vs Myshra*, 8 C.C.C. 474 : *R. vs Anderson*

for him to prove that he was so insane at the time of the act that he should be excused. If he does not succeed in convincing the court on that score and it is proved that he committed the crime charged (the issue of insanity being seldom if ever raised when there is any *real question* of whether or not the crime was committed) he is found guilty and sentenced. He may then, if he has sufficient reasons, bring his case to the Court of Appeal. The usual reason brought forward is that the Trial Judge misdirected the jury, i.e., that in instructing the jury as to the law of insanity he failed to state the law correctly, or else omitted something which, if explained, would have influenced the jury in the prisoner's favour. Once before the Appeal Court the burden of proving insanity is again upon the accused. The jury of the Trial Court have found him guilty and it is for him to put forward some good reason why the sentence already rendered should not be carried out. The fact of the burden of proving insanity resting upon the accused seems logical enough although (as explained later) this rule is different in many of the States of America. In any event, any possible unfairness in this law is largely avoided by the practice in force both in England and Canada that whenever the question of insanity is raised all the evidence in the posses-

(1914) 22 C.C.C. 455 ; 5 W.W.R. 1052 : See in particular *Clark vs the King* (1921) 35 C.C.C. 261 and note different ruling in *Davis vs U.S.* 160 U.S. Rep. 469.

sion of the Crown to do with the prisoner's mental condition is placed at the disposal of the defence.
(1)

The next point to consider in connection with the procedure during the trial itself is the question of what kind of evidence is permissible. In most cases of course this evidence is given at least partly by doctors, e.g., the family doctor, the prison doctor, or an independent mental specialist. However, medical evidence is not essential. The fact that a prisoner was sufficiently insane within the meaning of the law may often be proved by the evidence of relatives, acquaintances, and other non-medical parties, and by the very behaviour of the accused himself (2). Moreover, in some cases it would appear that such evidence is preferable to medical evidence, e.g., in *Edward Lloyd's* case where the defence was based on insanity and no medical evidence was called, Mr. Justice Avory said that "ordinary witnesses are often better than doctors in cases of this kind". (3) Incidentally, Lloyd was acquitted.

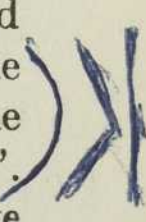
When the Lords put their questions to the Judges — the answers to which are the *McNaughton Rules* — they included a question on

(1) *R.v. Keirstead* (1918) 42 D.L.R. 193, 30 C.C.C. 175., and see also *R.v. Abramovitch* (1912) 7 C.A.R. 145 at page 147.

(2) *R.v. Dart*, 14 Cox C.C. 143.

(3) *R.v. Lloyd* (1927) 20 C.A.R. 139.

procedure, to which we have not yet had occasion to refer ; it was this " Can a medical man, conversant with the disease of insanity who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the committing of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time ? " In reply, the Judges declared that under such circumstances a medical man "cannot in strictness be asked his opinion in the terms above stated ; because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. " (They added that when the facts are admitted and the whole question is one of science only, then the questions may be put to the jury in a general form although the asking of such questions cannot be insisted upon as a matter of right). In other words, a doctor cannot put himself in the place of the jury and say " That man was so insane at the time he committed the crime that he did not know the nature or quality of his act or know it was wrong". Because this is the very question the jury have



to decide and if they come to that conclusion the prisoner will be acquitted. (1).

The last thing that need be mentioned in connection with Court procedure is the nature of the Court itself. It must be remembered that most of the cases where insanity is pleaded as a defence take place (in the Trial Court) before a Judge and jury. As is the general rule in all jury trials, the Judge decides the questions of law and the jury the questions of fact. The jury consists usually of twelve laymen without the slightest legal training, and, in many cases, its members have never before been in a court house; the Judge's duty is to explain the law to them on the questions involved and to tell them what alternative verdicts they may render. The rest remains with the jury. They are the judges of the facts and ultimately render the verdict. If, in the Judge's opinion, there is sufficient evidence of insanity then he places the matter in the jury's hands. Once he has done this, and explained the law, the question of whether the prisoner was or was not insane is one of fact which is for the jury and not for the Judge to decide. (2) In the Criminal Appeal Courts, however, there is no jury because the questions

(1) See *R.v. Dubois*, 17 Q.L.R. 203, and *R.v. Frances* (1849) 4 Cox, C.C. 57, and *R. v. Burton* 3 F. and F. 772 (Wightman, J.)

As to medical proof see also *Wright's Case* (1821) Russ. and Ry. 456; *R. v. Searle* (1831) 1 Mood and R. 75; *R. v. Coelho*, 10 C.A.R. 210; *R. v. Marsland*, 7 C.A.R. 77; *R. v. Smith*, 8 C.A.R. 72.

(2) *R.v. McCoskey* (1927) 47 C.C.C. 122 (Canadian).

there to be decided are almost invariably purely legal. The facts as found by the Trial Court jury are taken as proved once and for all and any ground for appeal, therefore, must as a rule be a legal one, e.g., misdirection of the jury. (1)

In addressing the jury the Judge sums up the evidence which has been heard on behalf of both sides at the trial and explains in as clear a manner as possible the meaning and effect of the *McNaughton Rules* "adding thereto such observations as the circumstances of each particular case may require". (2). He usually concludes by instructing the jury that one of three verdicts is possible : "Not Guilty" if they think the prisoner is innocent ; "Guilty" if they think he committed the offence with which he is charged and was legally responsible for his actions at the time ; or, "Guilty but Insane" or not guilty

(1) When the defence of insanity has been raised in the Trial Court it is only in exceptional circumstances that the Appeal Court will hear further evidence on that subject.

R.v. Perry, 14 C.A.R. 48. (See also *R.v. Marsland*, 7, C.A.R. 77).

An example of the presence of such exceptional circumstances is to be found in *Holt's case* (15 C.A.R. 10). *Holt* was charged with and found guilty of murder by the Trial Court notwithstanding his plea of insanity. At the time of the trial the doctors who examined him suspected he had suffered from syphilis (a common cause of General Paralysis of the Insane), but this the prisoner strenuously denied. A certain doctor happened to read an account of the trial in the newspapers and remembered that he had once treated *Holt* for advanced syphilis. He accordingly telegraphed the prisoner, but by that time the trial was over. The Higher Court granted leave to call this doctor as a witness on the appeal.

(2) See *McNaughton Rules* (Answer No. 3) *Supra* p. 23.

on the ground of insanity if they come to the conclusion that he committed the offence but that at the time of committing it he was so insane as to be irresponsible according to law.

It may appear strange that in all the cases so far mentioned the offence charged has been one of murder. (1) The fact is that in nearly every case where insanity is pleaded (except in courts of inferior jurisdiction) the prisoner is on trial for a capital offence, though it is also less frequently pleaded in cases of manslaughter, arson and other crimes punishable with long terms of imprisonment. The reason for this is fairly obvious. The prisoner would be unwise *voluntarily* to bring up the question of insanity and risk life-long confinement in a lunatic asylum if the maximum punishment he could receive for his crime were, for instance, five years in the penitentiary. It is a different matter if he is faced with the possibility of execution or imprisonment for life.

(1) And in each case the crime has been committed by force or with the use of a gun or other weapon. Where a murder has been committed by the use of poison a defence of insanity can seldom succeed as the facts in the majority of such cases indicate an abundant presence of *mens rea*.

CHAPTER XI

MOTIVE

Motive is not (contrary to popular opinion) essential to crime, e.g., a person can be convicted and hanged for a murder even though no motive whatsoever for his act is apparent. Motive becomes "important indirectly only as throwing light, in cases of circumstantial evidence, upon the criminal intent". (1) It is therefore quite distinct from intention or "mens rea" which, as already said, is an essential element of crime. "Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result". (2)

But although motive is not essential to crime its absence is frequently invoked by the defence as one of the grounds for contending the accused was insane. Especially is this so in cases of irresistible impulse where a crime is frequently committed on the spur of the moment, e.g., the act of a mother murdering her infant.

When we say "no motive" we are, of course, speaking from the standpoint of sane and reasonable people. What sane motive could a well-to-do devoted mother have in murdering her perfectly normal child? From our point of view,

(1) Glueck, "Mental Disorder and the Criminal Law" p. 105.

(2) *People v. Molineaux*, 168 N.Y. 264, 297 (1901), (Werner J.)

none. But medical men who have specialized in mental diseases tell us that insane persons can and often do have a motive for their crimes e.g., "a morbid and restless thirst for blood". (1) Maybe it is a perverted one (which would only be natural in view of their condition) but it is a motive just the same. On the other hand, "lunatics" are often capable of what we may call "sane motive" e.g., they have been known to murder their keepers in revenge for ill treatment. (2)

A remarkable case is described in Taylor's Principles and Practice of Medical Jurisprudence, which shows how a definite (yet on its face hidden) motive may exist in a lunatic's mind. It is a case of a young man affected with insanity upon whom an "inquisition" was held in 1843. (3) "He was a person of childish manners and among the symptoms of imbecility there showed itself a strong propensity for watching windmills. He particularly wished to be tied to one of the arms of the mill when they were going around; he would go any distance to see a windmill and would sit watching one for days together. His

(1) See R. vs. Haynes, 1 Foster and Finlason 666, Bramwell, B. "Motives exist unknown and innumerable."

Although the fact of a crime being apparently motiveless is not by itself sufficient to establish insanity, it may nevertheless be of importance as helping to prove the prisoner insane when there is other evidence of insanity. R. v. Vyse 3 F. and F. 247.

(2) R. v. Farmer, York Spring Ass. 1837.

(3) "Taylor's Principles and Practice of Medical Jurisprudence" (8th ed.) Vol. I. p. 844.

friends removed him to a place where there were no mills, in the hope that this strange propensity would wear away. He (then) collected a number of lucifer matches and set fire to the house (to which he had been moved) in order that he might escape during the confusion to some imaginary land of windmills ; and on another occasion he enticed a child into a wood and, in attempting to murder it, cut and mangled its limbs with a knife in a horrible manner". As the author says : " How would any sane person have connected his propensities for windmills with the attempts at arson and murder ? " Yet, as far as the young lunatic was concerned he had a very definite motive of his own kind. He wanted to get away from the house and return to the windmills and he thought that by burning the house and murdering the child he would achieve his object.

CHAPTER XII

INSANITY IN SUICIDES

We are all familiar with the common verdict of a coroner's jury "suicide while temporarily of unsound mind" We also know that in many cases the person upon whose death such a verdict is rendered was a perfectly sane individual.

It must be borne in mind that suicide or even attempted suicide is a crime. In the early part of the nineteenth century the fact of a person committing suicide in England resulted in a forfeiture of all his property to the Crown, and revolting treatment of his body after death. It is not surprising, therefore, that coroners' juries availed themselves on the slightest possible pretext of the verdict of insanity. For, if they declared the deceased to have been so insane that he did not know what he was doing then the suicide was not criminal and the usual penalties were not exacted. Although comparatively late in the nineteenth century the law was changed and forfeiture of goods abolished and a decent burial provided, juries still continued to make use of the insanity verdict. If there was any evidence to show that the deceased had been worrying, then they held this as cause of insanity — on the other hand, if there were no apparent reason for a man to have killed himself, they held that the fact of suicide without reason pointed to insanity ; and this practice still continues, e.g.,

Professor Kenny has said that "in every thousand cases of suicide (in England) upon which coroner's inquests are held, there are usually less than forty in which a verdict of 'felo de se' (technical name for suicide) is returned". In the other 960 or more cases the jury finds that the deceased was temporarily insane.

Probably the principal reason for juries returning a verdict of insanity in such cases is out of pity for the deceased's relations. On the other hand, it has been pointed out that, on the whole, it might be better for the relations' sake if a straight verdict of suicide were rendered. The mention of the word "insanity" may throw upon the man's family an undeserved stigma and cause considerable damage. (1).

Of course there are many cases where suicide is committed under the influence of genuine insanity. Originally it was thought that there was a special type of mental disease, the chief symptom of which was a desire on the part of the patient to do away with himself. This was called "suicidal mania". However, it is now generally recognized that the desire to commit suicide may occur in any person who is mentally unsound. It is said (2) that a person is often irresistibly compelled to destroy himself because of the overwhelming influence of some secret

(1) Kenny, "Outlines of Criminal Law" (1929 ed.) p. 113.

(2) Taylor's Principles and Practice of Medical Jurisprudence (8th ed.) Vol. I. p. 714.

delusion which for months has been "pressing like an incubus on his imagination", and that people may suffer under the influence of terrifying hallucinations and "monomaniacal ideas" without their existence being as much as suspected by their closest friends. As an example the following letter from a patient is quoted in Taylor's Medical Jurisprudence. (1) : — "For six months I have never had the idea of suicide, night or day, out of my mind. Wherever I go an unseen demon pursues me, impelling me to self-destruction. My wife, friends and children observe my listlessness and perceive my despondency but they know nothing of the worm that is gnawing within".

Apparently people thus afflicted are often sane enough to retain sufficient will power to put temptation out of their way, e.g., X, suffering from an attack of so-called "suicidal mania", while residing with B in Paris handed him his razors one night and asked him to keep them out of his sight as otherwise he feared he would destroy himself. He recovered from this attack but the suicidal impulse recurred later on and he succumbed to it by taking prussic acid. (1)

A person subject to suicidal tendencies generally has attacks at intervals. An attack may come on suddenly in the form of an irresistible impulse to kill oneself, (e.g., the patient in a

(1) Taylor's Principles and Practice of Medical Jurisprudence, Vol. I. (8th ed.) p. 714.

normal condition goes to clean his gun and on seeing it takes it up and shoots himself), or it may work itself up gradually until it overpowers its victim. A remarkable thing about these attacks is that they may apparently be halted or averted by some sudden or severe shock, e.g. While on his way to a bridge with the intention of throwing himself into the river, a man was attacked by robbers. He was obliged to put up a desperate fight in order to escape from them. He was then quite unable to account for being where he was and calmly walked home "having abandoned the intention of destroying himself". (1.)

Suicide is often attributed to extreme melancholia — a thoroughly depressed condition accompanied by a feeling of utter worthlessness and often guilt. Patients confined in sanitariums and asylums have been known to express their desire to commit suicide as a form of self-punishment, and have subsequently carried out their intentions (2). This melancholia sometimes results from severe nervous shock, operations, illness, etc., and persons subject to it have therefore to be watched. Victims of delirium tremens are also apt to do away with themselves, that disease being, as already said, a recognized form of insanity.

(1) Taylor's Principles and Practice of Medical Jurisprudence, Vol. I. (8th ed.) p. 715.

(2) The shocking forms of self-mutilation as sometimes practised by melancholics are described in Wharton and Stillé's Med. Jr. Vol. 1, P. 628 and see also P. 633.

CHAPTER XIII

EPILEPSY

Apart from the violent fits usually associated with epilepsy the disease manifests itself in various forms such as depression, ill humour, confusion, delirium, automatism and stupor. In such conditions the patient is sometimes inclined to commit crimes such as theft, arson, damage to property, indecent exposure and sexual offences.

The violent form of the disease is in the nature of a "convulsive attack" and sometimes leads to homicide and violent sexual offences and assaults. (1) Three stages of this form of epilepsy have been recognized by medical specialists. In the first (the pre-paroxymal stage) the patient is inclined to be restless, sleepless, unreasonably suspicious, and may suffer under delusions of persecution or grandeur. In the second (the prodromal stage) occur the various warnings of the approaching attack, e.g., visions, increased excitement, irritability, etc. This is immediately followed by the third stage, i.e., the convulsive attack itself, which is characterized by a "fall with unconsciousness and spasm". The unconsciousness may continue for some time until the patient awakens or falls into ordinary sleep, or

(1) "No maniacs show such blind incalculating violence and frequent fury as the epileptics." W. & S. Med. Jr. Vol. 1, P. 736: See also Osler Practice of Medicine, p. 1109.

it may be interrupted by periods of consciousness. It is during these periods that the condition known as "post-epileptic automatism" is likely to occur, where the patient's movements and acts are automatic, so that he may commit a crime without knowing what he is doing and without having the slightest recollection of it when he recovers. At the time, he may appear outwardly normal but in reality he is acting in much the same way as a sleep-walker or person in a trance. (1)

The mind of a person suffering from repeated attacks of epilepsy gradually becomes deteriorated; he loses his memory and sense of judgment, suffers from "strains of unclear consciousness", becomes erratic, irritable, and generally unbalanced mentally. Epilepsy is accordingly a recognized form of mental disease which, under certain conditions, is covered by the McNaughton Rules. It is not always enough, however, to prove that a person is and has been subject to epileptic fits; it must be shown that he was suffering from epilepsy at the time he committed the crime, and that his mind was so affected as to bring him within the meaning of the Rules. Thus in *Perry's* (2) case (1919) the Lord Chief Justice said: "The

(1) See Osler Practice of Medicine at p. 1109.

(2) *R. v Perry*, 14 C.A.R., 48.

It should be noted that there are many different kinds of epilepsy varying greatly in symptoms and degree. The victims are peculiarly susceptible to the influence of alcohol but the craving for intoxicants may be symptomatic of the disease.

crux of the whole question is whether this man was suffering from epilepsy at the time he committed the crime. Otherwise it would be a most dangerous doctrine if a man could say ' I once had an epileptic fit, and everything that happens hereafter must be put down to that ' ''.

In those jurisdictions, however, where irresistible impulse is recognized as a defence (e.g. various of the States of America) the task of successfully pleading that a criminal is not responsible by reason of epileptic insanity is made much easier. Crimes are frequently committed by epileptics while in a comparatively normal condition and when they are capable of knowing the difference between right and wrong. Probably, however many such crimes are due to impulse which by reason of the patient's weakened will power may be irresistible and may, therefore, be excused, where the defence of irresistible impulse is allowed.

CHAPTER XIV

SLEEP-WALKING

Sleep-walking, or somnambulism, is frequently though not always associated with some form of mental disease (1). There have been only a few cases where it has been raised in defence of criminal charges, but it is nevertheless interesting from the point of view of the legal tests of irresponsibility because it is one of those conditions in which a person may do certain things in a, so to speak, subconscious state without having any real intentions in his own mind. He becomes, in fact, a dual personality, a kind of Jekyll and Hyde (2) ; the Hyde in him may commit murder of which the Jekyll is innocent because the Jekyll had no guilty intent, or, perhaps, no intent at all. So a person may commit a crime while in the state of somnambulism without knowing what he is doing and without knowing it is wrong, and it would appear that crimes committed in that condition are therefore covered by the *McNaughton Rules*.

(1) "Like chorea, hysteria and epilepsy, it is the expression of a general morbid predisposition, an indication of a nervous diathesis." (*Enc. Brit.*)

(2) Dreams are "strictly speaking evidences of a temporarily disordered action of the brain ; and this is proved by the fact that the delusional state of the Insane is not a little like the disorder of dreaming". Thus it has been said that "madness is the dream of him who is awake." (*Wharton and Stillé's Medical Jurisprudence*, Vol. I., p. 476.)

An interesting question arises in connection with crimes committed in the semi-conscious state which exists when a person is suddenly roused from sleep. Medical writers point out that the mind at that time is often subject to hallucinations and delusions. In one case a man awoke at midnight and saw before him what he thought to be a phantom. Twice he called out : " Who is that ?" but receiving no reply and seeing the " phantom " advance near, he seized a weapon and attacked it. The " phantom " turned out to be his wife and the violence of his attack resulted in her death ! He was charged with murder but was acquitted on the ground that at the time he was not conscious of his actions. (1)

A striking case of murder committed actually during sleep was that of Simon Fraser (tried in Edinburgh in 1878 and cited in Wharton & Stillé's *Med. Jur.* Vol. I, p. 903). The prisoner was generally recognized to be a confirmed somnambulist. He had been known to arise from his bed and, still asleep, dress himself and walk to a neighbouring farm to fetch milk. He was also capable of going out and cutting wood, without apparently interfering with his sleep, and on several occasions he had assaulted various members of the household (to all of whom he was devoted) while in a similar state of unconscious-

(1) Cited in Taylor's *Principles and Practice of Medical Jurisprudence* (8th ed.) p. 855.

ness. On the night of the murder he retired as usual with his wife and child (all three sleeping in the same room). Shortly after falling to sleep he began to suffer from delusions and imagined that a wild beast had entered the room intending to kill his child. Thereupon he sprang out of bed and began to struggle with what he imagined to be the monster. His wife awoke to find him dashing the child's head against the wall and before she could intervene it was dead. Shortly afterwards he regained consciousness, realized what he had done and, bitterly distressed, sent for a doctor. On his trial for murder he was acquitted on the ground that although he was "guilty in his sleep" he was "not guilty in his senses".

In *Tolson's* case Mr. Justice Stephen after pointing out that the "full definition of every crime contains expressly or by implication a proposition as to a state of mind", and that "if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed", took as an example the case of a sleepwalker. He said: "Can anyone doubt that a man who committed what would otherwise be a crime in a state of somnambulism would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing." ((1889) 23. Q.B.D. 168 at page 187.)

CHAPTER XV

SEXUAL OFFENCES

Doctors agree generally that, owing to the connection between the brain and genital organs, insanity may sometimes result in excessive or abnormal sexual desire which frequently leads to indecent assaults. A defence of insanity, however, very seldom succeeds in such cases, even in those jurisdictions where the irresistible impulse doctrine is recognized. The truth is that even though the impulse to commit these offences may be due to a disordered mental condition and even though they may be hard to resist, they are, in the majority of cases, in fact resistible. Most crimes of this nature are committed because the impulse is simply unresisted by reason of weakened will power and not because it is irresistible.

The dangers of allowing criminals who have committed rape and other sexual offences to have the defence of insanity "up their sleeve" are obvious. It is unnecessary to refer to the countless cases which follow the general rule of dismissing the insanity defence in connection with offences of this nature. On the other hand, a case of some interest may be mentioned where a prisoner charged with rape was acquitted on the ground that he was under an insane delusion that what he was doing was right, and for that

reason was covered by the McNaughton Rules. The prisoner was examined in Court the day after the crime. He calmly explained that he thought he was under the influence of the Magistrates and that if he did not ravish the woman in question he would lose his life. There was apparently a struggle before the rape was committed. Evidence was given to the effect that he had suffered from epilepsy which had greatly affected his brain and that he was subject to frequently recurring delusions. A few days previous to the crime he had several violent fits and it was urged on the part of the defence that at the time of the act he was suffering from a delusion and did not know that he was doing wrong. The jury accepted this argument and acquitted him on the ground of insanity. (1)

(1) Edin. Month. Jour. Feb. 1863, p. 772.

CHAPTER XVI

AMERICAN PRACTICE

Reference has more than once been made to the fact that some of the American laws in connection with the exemptive effect of insanity on crime differ from those of England and Canada, and, while it is not intended to go into any detailed discussion of American law, that statement requires some explanation.

It must be remembered that England has one set of laws which apply to the whole country. In the same way, Canada has a general criminal code which is uniform and in force in all its Provinces. The United States, on the other hand, has no code which prevails throughout the Union. Each State has its own laws which, within certain limits, it is free to change or amend as it sees fit. The result of this is that in order to discuss any given subject of American law at all fully, it is necessary to consider the law in force in each State in much the same way as considering a subject from an international viewpoint. For the present purposes, however, it is only necessary to refer briefly to various of the State laws and some of the opinions of American Judges and writers. We have already dealt with some of the criticisms to which the McNaughton Rules have been subjected in the country where they originated and it is, therefore, enlightening

to consider to what extent they have been adopted in a foreign English-speaking nation, the criminal laws of which are, generally speaking, not dissimilar from those of England and Canada. It must be borne in mind, however, that we are concerned only with the question of what degree of insanity is necessary to excuse a crime and the rules to be followed in determining whether that necessary degree existed in the criminal's mind at the time of the offence. This branch of American law (quite aside from the fact of there being different laws in different States) is admittedly in a state of confusion. A few of the States have specific statutory provisions covering the tests of irresponsibility for crime, while in the others the subject is dealt with by case law which in many of the States is scanty and indefinite. American lawyers complain that owing to the imperfect and incomplete legislation on this subject and the fact that the law is scattered through numerous improperly indexed books, it is by no means difficult, in examining the Jurisprudence, to overlook some pertinent provision. (1)

One writer at least maintains that the M'Naughton Rules are indirectly responsible for the confusion which exists. He points out that

(1) See Glueck "Mental Disorder and the Criminal Law" p. 500.

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the Rules were, in the first place, adopted by many of the States but that their phraseology left too much to conjecture and judicial construction, with the result that the American judges have "seized upon various and sundry scraps" instead of interpreting the Rules as a whole. (1)

H. Oppenheimer divided the United States of America into three groups, according to the principles upon which the criminal liability of lunatics was governed in the various States. (2) *Group 1* was composed of those States which adopted (in some cases in modified form) and applied the M'Naughton Rules as law, among which we may now mention New York (3), California, Idaho, Maine, New Jersey, North Carolina, Oklahoma, Oregon, Nebraska, Nevada, Florida, Texas, Tennessee. *Group 2* consisted of the States which recognized the right and wrong test of the M'Naughton Rules, but also recognized the defence of irresistible impulse. In this group may probably now be included Arkansas, Colorado, Connecticut, Delaware, Indiana, Kentucky, Iowa, Louisiana, Massachusetts, Montana, Pennsylvania, Vermont, Virginia, Wyo-

(1) See Glueck, "Mental Disorder and the Criminal Law" p. 186.

(2) Oppenheimer's "Criminal Responsibility of Lunatics" (1909).

(3) See for instance the leading case of *Flanagan vs. People*, 52 N.Y. 467, 470. 11 A.M.R. 731.

ming and New Mexico. *Group 3* in Oppenheimer's division "clustered around New Hampshire" where two decisions were laid down to the effect that "it is a question of fact whether *any* universal test exists" (1) and that question is in all cases one for the jury to decide. Much the same law appears to be in force in various other States such as Illinois, Kansas, Michigan and Alabama. For instance, in *Parson's* (2) case, Alabama, the Judge said: "the question seems to be whether an old rule of legal responsibility shall be adhered to, based on theories of physicians promulgated hundreds of years ago, which refuses to recognize any evidence of insanity except the single test of mental capacity to distinguish right and wrong — or whether the Courts will recognize as a possible fact, if capable of proof by clear and satisfactory testimony, the doctrine, now alleged by those of the medical profession who have made insanity a special subject of investigation, that the old test is wrong and *that there is no single test* by which the existence of the disease, to that degree which exempts from punishment, can in every case be infallibly detected".

As being not altogether included in Oppenheimer's Group 1, nor yet in Group 2, may be mentioned the Mississippi law which recognizes

(1) *State vs. Jones*, 50 N.H. 369, and *State vs. Pike*, 49, N.H. 399.

(2) *Parsons vs. State*, 81 Ala. 577 (1886).

irresistible impulse when it is of "so high a degree that for the time it overwhelms reason, judgment and conscience or where it is caused by delusion". (1) It would appear, however, that such extreme conditions existing in a person's mind would automatically deprive him of his sense of right and wrong and in that case he would be covered by the M'Naughton Rules irrespective of any question of impulse. It seems clear from *Cunningham's* (1) case that by the Mississippi law irresistible impulse by itself (i.e. when it is not produced by delusion and does not obscure the prisoner's sense of right and wrong) is no defence. In that case the Judge said (speaking of insane impulse) : " this kind of insanity, if insanity it can be called, though sometimes recognized by respectable Courts and still oftener, perhaps, by juries seeking an excuse to evade the stern dictates of the law, is properly rejected by the authorities generally. The possibility of the existence of such a mental condition is too doubtful, the theory is too problematical ... to afford a safe basis of legal adjudication ".

It will be seen that this declaration though made by an American judge as early as 1879 expresses the present day law on the subject in question in force in England and Canada and

(1) *Cunningham vs. State*, 56 Miss. 269 (1879).

several of the United States of America. On the other hand, the Vermont case of *Doherty* (1) (1901) may be cited as an example of the doctrine supported by a large number of the States that irresistible impulse is a valid defence. In this case the Court ruled that "if a man's mental and moral faculties are so disordered and deranged that he cannot distinguish between right and wrong or is not conscious at the time of the nature of the act he is committing, or if conscious of it and able to distinguish between right and wrong, yet if his mind or will is, involuntarily, so completely destroyed that he cannot control his actions, he is in a legal sense insane and not subject to punishment for criminal acts committed when in such a state".

Other States which recognize irresistible impulse as a defence realize the danger of allowing it and demand a high degree of proof before they will acquit a prisoner on that ground. In *Mosler's* (2) case, for instance, (Pennsylvania) the Judge in referring to insane impulse said: "There may be an unseen ligament pressing on the mind drawing it to consequences which it sees, but cannot avoid, and placing it under coercion which, while the results are clearly perceived, is incapable of resistance. *The doctrine which acknowledges this mania is dangerous in its relations,*

(1) *Doherty vs. State*, 73 Vt. 380 (1901).

(2) *Commonwealth vs. Mosler*, 4 Pa. 264 (1846).

and can be recognized only in the clearest cases. It ought to be shown to have been habitual or at least to have evinced itself in more than a single instance To establish it as a justification in any particular case it is necessary to show by clear proofs its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency developed in previous cases."

The United States Supreme Court has also admitted the defence of irresistible impulse. In *Davis'* (1) case, for example, it ruled that even if a person is capable of distinguishing between right and wrong he is nevertheless legally irresponsible if his will is so completely destroyed that his actions are beyond his control.

(1) *Davis vs. U.S.* 160 U.S. Rep: 469 (1895).

CHAPTER XVII

AMERICAN CRITICISM OF THE McNAUGHTON RULES

American writers who uphold the defence of irresistible impulse, and those who go still further and maintain that there is no test at all, criticize the McNaughton Rules principally on the following grounds: First, they point out that the opinion of the judges was indefinite because after setting forth the questions that should be submitted to a jury they added that the questions should be "accompanied with such observations and explanations as the circumstances of each particular case may require". This, it is claimed, "left the door open for modification" and showed that the Judges had but "halting faith in the efficacy, clearness and all-inclusiveness of their own tests". (1)

The second ground of criticism is that the Rules are based on antiquated medical opinion in that they treat delusions and symptoms as being in themselves mental diseases whereas they are really only the outward signs of fundamentally deep-seated disorders. It is claimed that the mind cannot be considered as split up into compartments (at least in so far as insanity is concerned) and that if a person suffers from a delu-

(1) Glueck, *Mental Disorder and the Criminal Law*, p. 427.

sion in one sense a general disease of the brain is thereby indicated. The delusion is merely an outward symptom and should not be considered alone.

It is also argued that a person may be insane yet know the difference between right and wrong and know what he is doing, and that in that condition he may be irresistibly compelled to commit a crime against his own will. The opinion that anyone knowing the nature and quality and wrongfulness of his act must necessarily be sane is claimed to be medically incorrect according to modern views.

Finally, the Rules have been criticized on the ground that while the questions put to the Judges refer only to delusions the answers are considered in practice to cover all branches of insanity. This, of course, is more a criticism of the consequences of the Rules than of the Rules themselves.

Before leaving the subject of American law, we should mention one or two other differences between it and the English practice to which we have referred. We said that the burden of proving insanity under the English and Canadian law is upon the accused — if he defends himself on the ground that he was insane, it is for him to prove that he was in that condition. In the United States, on the other hand, the law, generally speaking, is to the effect that if

the accused sets up insanity as a defence then the burden of proving he was sane is upon the prosecution. It appears, however, that while this is the general practice there is a growing tendency among various of the States to adopt the English procedure which is really based upon one of the answers forming part of the M'Naughton Rules, i.e., "Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes *until the contrary be proved* to the satisfaction of the jury".

Another difference (1) that should be men-

(1) In the English and Canadian law, mental deficiency falling short of legally recognized insanity is no defence. In *R.v. Alexander* (9 C.A.R. 139) it was argued on behalf of the prisoner that where a man is not insane but is mentally deficient, the jury should consider what amount of provocation would justify them in returning a verdict of manslaughter instead of murder. Darling J. ruled against this argument.

On the same point see *R.v. Lesbini*, 11 C.A.R.7. In the earlier case of *R.v. McQueen* (1912) 8 C.A.R. 89; it was held that feeble-mindedness not amounting to insanity may mitigate the sentence but it does not in law alter the amount of provocation necessary to reduce murder to manslaughter.

In 1913 the *Mental Deficiency Act* was passed in England (3 & 4 Geo. V. C. 28, S. 1) which was intended to apply to moral imbeciles who, though not sufficiently insane to be exempt from criminal responsibility, are "too incapable of self control to be deterred effectively by the prospect of punishment".

The Act provides that, where a person who has belonged to this class *since birth or from an early age*, commits a crime punishable by penal servitude or imprisonment, the Court after committing him may appoint a guardian or order his detention in an institution instead of passing sentence in the ordinary way.

The unsatisfactory limit (so called) of "since birth or from an early age" was later changed (by 17 and 18 Geo. V, c. 33) to from "*before the age of eighteen*".

tioned is the fact that in some of the States a murderer may escape with comparatively light punishment by reason of insanity which is not of sufficient gravity to excuse him altogether. (1) "A person's mental condition may not be such as to make him irresponsible for his acts, and yet it may relieve him from the extreme penalty imposed by law for the committed act". So an accused person who admits having committed a crime may appeal to the mercy of the Court to treat him leniently on account of his feeble mindedness or highly abnormal character. An example of this is the comparatively recent case of Leopold and Loeb, in Chicago, where the eccentric characters and apparently abnormal mental constitutions of two well educated and intelligent youths were taken into account by the Court and resulted in a sentence of imprisonment instead of the death penalties. So, also, in Texas (which does not recognize the irresistible impulse defence) the Court ruled in *Swann's* (2) case, 1922, that "uncontrollable passion or excitement rendering the mind incapable of cool reflection may reduce killing to manslaughter". Sir Clifford Allbutt in his "System of Medicine" (3) upholds this American practice on the ground

(1) See *State vs Anselmo* (1915) 46 Utah 137 (Utah Supreme Court).

(2) *Swann vs. State*, 92, Tex. Crim. Rep. 153 (1922).

See also *Smith vs. People*, 32, Col. 251, 258 (1904).

(3) "System of Medicine" VIII, 291.

that insanity, even though of mild form, necessarily weakens the will-power and accordingly lessens the degree of "mens rea" or guilty intent in the prisoner's mind. For that reason he claims the punishment should be proportionately decreased. (1.)

Lastly, there is the question of the verdict rendered by a Court when it has found the accused sufficiently insane at the time of the crime to be acquitted. It has already been pointed out that since the Trial of Lunatics Act in 1883 (and notwithstanding the recommendation of Lord Atkin's Committee) the verdict in such cases in England has been "Guilty but Insane". In Canada and the United States, on the other hand, the general effect of the verdict is "not guilty on the ground of insanity" and this appears to be more logical. The reason for acquittal is absence of guilt; "Guilty" is, therefore, the last word that should be used. It is somewhat astonishing that the recommendation of Lord Atkin's committee (in so far as this subject of the law of insanity is concerned) has never been acted upon. The recommendation more fully was as follows: "This verdict (meaning "Guilty but Insane") seems to us illogical. The verdict is one of acquittal. An accused person cannot be guilty of a physical act which is not in itself

(1) In *lesser offences* than murder weakened self-control may mitigate the sentence in English and Canadian practice.

an offence. The word 'guilty' in criminal terms should connote only criminality, the committing of a crime ... the verdict should be that the accused did the act (or made the omission) charged but is not guilty on the ground that he was so insane as not to be responsible according to law, at the time."

CHAPTER XVIII

MEDICAL OPINIONS

The fact that insanity is not a valid ground of exemption from criminal responsibility unless it is of such a nature as to satisfy the provisions of the M'Naughton Rules (as judicially interpreted) has led to the invention of the somewhat misleading terms "Medical insanity" and "Legal insanity". The latter expression would seem to infer that the criminal law fails to recognize any degree of mental derangement falling short of the requirements of the M'Naughton Formula, and implies that there is a conflict of views — medical and legal — as to how insanity should be defined. This however is not the case. The M'Naughton Rules (and prior rulings in such cases as *Hadfield* and *Bellingham*) were the result of legal recognition that insanity could not be regarded as a "fixed term having a certain meaning" but that it is a disease of countless gradations the lesser of which do not preclude the element of *mens rea*. For that reason it was necessary to draw a line somewhere on the scale of gradations to separate those classes of mental disease which truly render a person irresponsible for his actions from those which do not. The Law, therefore, far from disregarding insanity "in the medical sense" has been framed as a direct result of its recognition.

The question of any possible conflict between the legal and medical views was referred to in the Report of Lord Atkin's committee as follows. (1) "Much of the criticism directed from the medical side is based upon a missapprehension ... When once it is appreciated that the question is a *legal* question, and that the present law is that **a** person **of** unsound mind *may* be criminally responsible, the criticism based upon a supposed clash between the legal and medical conceptions of insanity disappears".

The question of where the line should be drawn to separate those degrees of insanity which afford exemption from responsibility from those which do not (though a legal one for the Legislature and Courts to decide) provides scope for endless argument. In this connection the majority of medical experts disagree with the English and other laws which refuse to recognize the defence of irresistible impulse. Reference has before been made to the recommendation of the

(1) Published in 1923 and already referred to.

In contending that a person may by some irresistible impulse be compelled to some action, the nature of which he knows and knows to be wrong, medical authorities, after pointing out that insanity more frequently attacks a person's Will and Emotions than his intellectual powers, claim that a Conative form of insanity (affecting the will and emotions) may exist alongside an unimpaired intellect. *Thus a good and sane intellect may be entirely governed by a corrupted and insane will.* For this reason it is urged that the M'Naughton rules, in treating insanity as a matter of intelligence and not of will, are inadequate and should be changed in the light of modern medical opinion.

British Medical Association (made to Lord Atkin's Committee) that such a defence should be allowed in a modified form. This recommendation was preceded in the Association's Report by the following statement which deals with the general aspect of insanity from a modern medical standpoint, and serves as yet another illustration of how an insane person may yet be legally responsible for his acts. "*Unsoundness of mind is no longer regarded as in essence a disorder of the intellectual or cognitive faculties. The modern view is that it is something much more profoundly related to the whole organism — a morbid change in the emotional and instinctive activities with or without intellectual derangement. Long before a patient manifests delusions or other signs of obvious insanity he may suffer from purely subjective symptoms which are recognized to be no less valid and of no less importance in the clinical picture of what constitutes unsoundness of mind than the more palpable and manifest signs of the fully developed disorder which may take the form of delusions, mania, melancholia or dementia*".

The Medico-Psychological Association also filed a report with Lord Atkin's Committee contending that the M'Naughton Rules should be wholly repealed and that "the responsibility of a person should be left as a question of fact to be determined by the jury on the merits of the particular case". This recommendation, which

in effect advocated the adoption of the New Hampshire law (U. S. A.) was happily (at least from the legal point of view) rejected by the Committee.

In criticizing the McNaughton Rules medical writers have pointed out that the "right and wrong test" does not in some cases enable a distinction to be made between the insane Homicide and the sane Criminal. It is said (1) that "many insane persons have committed acts which they knew to be wrong, and of the criminality of which they were at the time fully conscious. They have been known to commit murder in order to receive the punishment of death; and therefore they must have been conscious of the wrongfulness, or rather of the illegality, of the act which they were perpetrating, and must have known they were committing an offence against the laws of man".

A suggestion of some interest, having to do with Court Procedure in insanity trials, was made in 1911 by Doctor William White, an American. (2) He recommended that the jury's function should be confined merely to deciding whether or not the crime charged had been committed. If it had, then the prisoner should be turned over to the

(1) Taylor's Principles and Practice of Medical Jurisprudence (8th ed.) Vol. I, p. 836. See also Bucknill, *Crim. Lun.* 59.

(2) See also Dr. White's "Insanity and the Criminal Law". (N.Y. 1923) and Smoot on "Insanity" (U.S. 1929).

State Authorities who would determine the question of insanity by employing medical experts ; the jury would have nothing to do with deciding whether or not the prisoner was insane. Other medical authorities maintain that the determination of sanity should rest with the jury but that the panel, instead of consisting of laymen, should be made up of trained alienists or brain specialists.

It is unnecessary for the present purposes to discuss further the many and varied criticisms and suggestions in connection with criminal insanity law which have been advanced on the medical side. It is hoped that the opinions, both legal and medical, mentioned alongside of the cases we have cited will be sufficient to illustrate the principal points of view which from time to time have been taken.

As Lord Dunedin said in *Brown's* (1) case, "No one can say what insanity is" ; and the extreme difficulties which arise in dealing with such a subject in connection with Crime will have been gathered, at least in some degree, from the examples and attempted explanations in the foregoing pages. The question as to whether the McNaughton Rules are still justly regarded as law, or whether they should be abrogated, amended or extended will be left to the reader for his consideration and opinion.

(1) *H.M. Advocate vs. Brown* (1907), S.C. 67 at p. 76. 44 S.L.R. 634 at p. 639.

APPENDIX I.

HADFIELD'S CASE

On Page 18 we referred to the celebrated case of Hadfield, who in 1800 was tried for High Treason for attempting the King's life, and to the brilliant advocacy of his counsel, Mr. (afterwards Lord) Erskine, who so successfully defended him on the ground of insanity. Of Mr. Erskine's speech for the defence Lord Campbell said (and doubtless rightly so) that "it is now and ever will be studied by medical men for its philosophic views of mental diseases — by lawyers for its admirable distinctions as to the degree of alienation of mind which will exempt from penal responsibility — by logicians for its severe and connected reasoning — and by all lovers of genuine eloquence for its touching appeals to human feeling". Although a verbatim report of the speech would be out of place here (consisting, as it did, of some twelve thousand words) it is desirable to record some of the points made by so able an advocate in the face of almost insurmountable obstacles. The facts of the case were briefly as follows : —

James Hadfield was a retired invalid soldier. In distinguishing himself in the battlefields he

suffered several wounds, one of which penetrated as far as the brain, leaving it partly exposed. As a result he was frequently subject to fits of insanity and on various occasions had been confined for protection. In particular, he suffered from a delusion that he had constant intercourse with the Almighty, that the world was about to end and that like Christ he was to sacrifice himself for its salvation. Rather than be guilty of suicide he made up his mind to commit some act which would insure his own execution, and thus accomplish his mission. On May 11th, 1800 he went, armed with a loaded pistol, to Drury Lane Theatre taking a seat conveniently near the Royal Box. As soon as the King entered Hadfield stood up on his seat and openly and deliberately taking aim fired at His Majesty's person. Happily his shot went wild and he was immediately apprehended. At this time his conversation and manner appeared normal under the circumstances and those about him perceived nothing to indicate insanity. The prisoner was consequently tried for High Treason in compassing the death of the King. There was no doubt as to his having fired the pistol nor apparently as to his intention in doing so. The only defence possible was therefore insanity.

The extracts that follow have been selected from Mr. Erskine's speech as being of particular interest from the legal point of view. In reading

them it must be remembered that this case was tried only seventy-seven years after that of Arnold (see Page 7) when the criminal law of insanity was not developed as it is today. Moreover the defence in order to succeed was obliged to attack and upset the doctrines which until then had been generally recognized as law. For instance, near the commencement of his address (after pointing out that it is "the reason of man which makes him accountable for his actions and that deprivation of reason acquits him of crime") Mr. Erskine said "The Attorney-General" (who acted as Crown Prosecutor) "standing undoubtedly upon the most revered authorities of the law, has laid it down, that *to protect a man from criminal responsibility there must be a total deprivation of memory and understanding.*" He then proceeded skilfully (and always respectfully) to expose the harshness and inadequacy of the law as expounded by two of the greatest legal authorities in English history. He continued

" *I admit that this is the very expression used, both by Lord Coke and Lord Hale, but the true interpretation of it deserves the utmost attention and consideration of the court.* If a total deprivation of memory was intended by these great lawyers to be taken in the literal sense of the words — if it was meant that, to protect a man from punishment, he must be in such a state of prostrated intellect,

“ as not to know his name, nor his condition, nor his relation toward others—that if a husband, he should not know he was married ; or, if a father, could not remember that he had children ; nor know the road to his house, nor his property in it — *then no such madness ever existed in the world. It is idiocy alone which places a man in this helpless condition* ”

“ *But in all the cases which have filled Westminster Hall with the most complicated considerations — the lunatics and other insane persons who have been the subjects of them, have not only had memory, in my sense of the expression — they have not only had the most perfect knowledge and recollection of all the relations they stood in toward others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable — the disease consisting in the delusive sources of thought — all their deductions within the scope of the malady, being founded upon the immovable assumption of matters as realities, either without any foundation whatsoever, or so distorted and disfigured by fancy, as to be almost nearly the same thing as*

“ their creation. *It is true, indeed, that in*
“ *some, perhaps in many cases, the human*
“ *mind is stormed in its citadel, and laid*
“ *prostrate under the stroke of frenzy ; these*
“ unhappy sufferers, however, are not so
“ much considered by physicians as ma-
“ niacs, but to be in a state of delirium,
“ as from fever. There, indeed, all the
“ ideas are overwhelmed — for reason is not
“ merely disturbed, but driven wholly from
“ her seat. Such unhappy patients are
“ unconscious, therefore, except at short
“ intervals, even of external objects ; or,
“ at least, are wholly incapable of consider-
“ ing their relations. Such persons, and
“ such persons alone (except idiots), are
“ wholly deprived of their understandings,
“ in the Attorney-General’s seeming sense
“ of that expression. *But these cases are*
“ *not only extremely rare, but never can be-*
“ *come the subjects of judicial difficulty.*
“ *There can be but one judgment concerning*
“ *them.* In other cases, reason is not
“ driven from her seat, but distraction sits
“ down upon it along with her, holds her
“ trembling upon it, and frightens her from
“ her propriety. Such patients are victims
“ to delusions of the most alarming de-
“ scription, which so overpower the facult-
“ ies, and usurp so firmly the place of realit-
“ ies, as not to be dislodged and shaken by

“ the organs of perception and sense ; in
“ such cases the images frequently vary,
“ but in the same subject are generally of
“ the same terrific character. Here, too,
“ no judicial difficulties can present them-
“ selves ; for who could balance upon the
“ judgment to be pronounced in cases of
“ such extreme disease ? Another class,
“ branching out into almost infinite sub-
“ divisions, under which, indeed, the for-
“ mer, and every case of insanity may be
“ classed, is, where the delusions are not of
“ that frightful character, but infinitely
“ various, and often extremely circum-
“ scribed ; yet where imagination (within
“ the bounds of the malady), still holds the
“ most uncontrollable dominion over reality
“ and fact ; and these are the cases which
“ frequently mock the wisdom of the wisest
“ in judicial trials ; because such persons
“ often reason with a subtlety which puts
“ in the shade the ordinary conceptions of
“ mankind ; their conclusions are just, and
“ frequently profound ; but the premises
“ from which they reason, when within the
“ range of the malady, are uniformly false ;
“ not false from any defect of knowledge or
“ judgment, but because a delusive image,
“ the inseparable companion of real insan-
“ ity, is thrust upon the subjugated under-

“ standing, incapable of resistance, because
“ unconscious of attack.

“ *Delusion, therefore, where there is no*
“ *frenzy or raving madness, is the true char-*
“ *acter of insanity ;* and where it can not be
“ predicated of a man standing for life or
“ death for a crime, he ought not, in my
“ opinion, to be acquitted ; and if courts
“ of law were to be governed by any other
“ principle, every departure from sober, ra-
“ tional conduct would be an emancipation
“ from criminal justice. I shall place my
“ claim to your verdict upon no such dan-
“ gerous foundation. I must convince you,
“ not only that the unhappy prisoner was a
“ lunatic, within my own definition of
“ lunacy, but that the act in question was
“ the immediate, unqualified offspring of
“ the disease..... ”

“ He alone can be so emancipated,
“ whose disease (call it what you will)
“ consists not merely in seeing with a
“ prejudiced eye, or with odd and absurd
“ particularities, differing in many respects
“ from the contemplations of sober sense,
“ upon the actual existence of things ; but
“ he only, whose whole reasoning and cor-
“ responding conduct, though governed by
“ the ordinary dictates of reason, proceed
“ upon something which has no foundation
“ or existence. ”

In dealing with the evidence Mr. Erskine pointed out that Hadfield had no malicious intention of attempting to kill the King. "There was not an idea in his mind, from the beginning to the end, of the destruction of the King ; on the contrary, he always maintained his loyalty, lamented that he could not go again to fight his battles in the field, and it will be proved that only a few days before the period in question, being present when a song was sung, indecent, as it regarded the person and condition of His Majesty, he left the room with loud expressions of indignation and immediately sung God save the King, with all the enthusiasm of an old soldier, who had bled in the service of his country. "

As to the prisoner's apparent composure when arrested, Erskine said that "insane persons frequently appear in the utmost state of ability and composure, even in the highest paroxysms of insanity, except when frenzy is the characteristic of the disease." It will be realized that this opinion is thoroughly in accordance with the views that exist today. Near the end of his address he said : —

"If you were trying a man, under the
"black act, for shooting at another, and
"there was a doubt upon the question of
"malice, would it not be important, or
"rather decisive, evidence, that the pri-
"soner had no resentment against the pro-

“secutor, but that, on the contrary, he was
“a man whom he had always loved and
“served? Now the prisoner was maimed,
“cut down, and destroyed, in the service
“of the King.”

Lord Chief Justice Kenyon, who had at first appeared favourable to the Prosecution, stopped the trial after a few of the defence witnesses had given their evidence and declared that he was satisfied that the prisoner was *insane at the time he fired the pistol*. Hadfield was accordingly acquitted.

The judgment had important results. In previous cases prisoners acquitted of criminal charges on the ground of insanity were allowed to go free in the absence of any special order of the Court to the contrary. Following Hadfield's acquittal, Lord Kenyon expressed the opinion that it was absolutely necessary for the sake of the community that the prisoner should be confined. Accordingly the Criminal Lunatics Act was passed (39 and 40 Geo. III, C. 94) which provided that where a prisoner charged with treason, murder or felony was acquitted on the ground of insanity the jury “should find specially whether such person was insane at the time, and to declare whether he was acquitted on the ground of such insanity”; if yes, then the Court was to order that he should be kept in safe custody “during His Majesty's pleasure”. Hadfield having been so found was

committed to Bedlam Asylum where he is said to have outlived everyone who took part in his trial.

By far the most important effect of Hadfield's case, however, was the legal recognition that delusion is the true test of irresponsibility due to insanity. When Erskine took up the case he was faced with the "total deprivation of memory and understanding" theory of such eminent authorities as Coke and Hale. It was obvious from the evidence that his client was not in that class. He was therefore obliged to attack the law as it then existed and he did this in a truly remarkable manner. He first cited without hesitation the existing law (so obviously opposed to the interests of his case) and then proceeded to "interpret" it in his own way and in the manner he considered it should be applied. It cannot be doubted that but for his brilliant eloquence and logical reasoning he could never have succeeded. It has been aptly remarked that in appearing to interpret the law he in fact misinterpreted it, howbeit all to the good. The hitherto accepted doctrine of Coke and Hale was overruled; the "total madness" theory was laid to rest and a concept, which until then was unknown to the law, was brought into existence, namely, "delusion in connection with the criminal act".

APPENDIX II

REPRIEVE OF LUNATICS UNDER SENTENCE OF DEATH

Reference has been made in the Foreword and in the text (Page 75) to the power exercisable by the Executive to reprieve a prisoner under sentence of death on the ground of insanity and order his committal to an asylum notwithstanding the fact that the Courts have found him guilty and sufficiently sane to be legally responsible at the time he committed the crime. This means in effect that although the careful investigations and considerations of the law Courts have resulted in a death sentence the orders of the Court will not be carried out if two or three doctors appointed by the Executive say that in their opinion the prisoner is insane. Instead, the prisoner will be sent to an asylum just as if his defence of insanity had been legally upheld at his trial.

The state of the law in this respect has more than once been the cause of severe criticism and public dissatisfaction. It therefore becomes necessary to explain how this curious anomaly happens to exist.

First of all, there is a generally recognized common law principle to the effect that if *after*

being sentenced a criminal becomes insane, the sentence will not be carried out until he recovers. The verdict and sentence, however, are not to be questioned. "There could be a reprieve only if after sentence there was a change of circumstances by supervening lunacy" (Theobald on Lunacy, Page 254) and the degree of lunacy required is uncertain, although it is considerably lower than that required by the Courts for exemption from responsibility. In cases where a prisoner is under sentence of death various reasons for the common law rule have been advanced e.g. that if he were sane he might be able to give some information or explanation which would have the effect of postponing his execution, but the rule is really founded on the humane principle that to hang a lunatic is repugnant to the ideas of justice.

The common law rule had been in force for some time before *McNaughton's Case*, but later the matter became the subject of statutory legislation in England (3 and 4 Vict. C.54, S.1 and 27 and 28 Vict. C. 29, S.2). The earlier statutes were repealed in 1884 by the passing of the Criminal Lunatics Act (already mentioned in connection with *True's case*), by Section 2 (4) of which it was provided that "In the case of a prisoner under sentence of death if it appears to a Secretary of State, either by means of a certificate signed by two members of the Visiting Committee of the prison in which the said prisoner is confined, or

by any other means, that there is reason to believe such prisoner to be insane, the Secretary of State shall appoint two or more legally qualified medical practitioners forthwith to examine such prisoner and inquire as to his sanity, and after such examination and inquiry such practitioners shall make a report in writing to the Secretary of State as to the sanity of the prisoner, and they, or the majority of them, may certify in writing that he is insane. ”

It should be noted that the Secretary of State *is bound to act on the certificate of members of the Visiting Committee, or on his own knowledge*, by appointing two or more medical men, but that his power of removing a prisoner (who has been certified in accordance with the Act) to an asylum is discretionary.

Now suppose X commits a brutal murder and at his trial raises the defence of insanity. After a prolonged hearing and examination of medical experts the jury finds him guilty and he is sentenced to death. The Appeal Court subsequently confirms the verdict of the lower Court, finding the prisoner to have been sane enough to have been legally responsible when the act was committed. The attention of the Executive is then directed to the fact that although the Courts have found the prisoner insufficiently insane for the purposes of exemption there is nevertheless some doubt as to his sanity. Alienists are then appointed who

find the man insane. He is therefore sent to an asylum and escapes the gallows. The public on hearing what the Executive has done are highly dissatisfied. They point out that the murder was a particularly atrocious one, that the Courts have decided the whole question — why should there be interference ?

The above is precisely what happened as a result of True's case where the trial judge himself drew the Home Secretary's attention to the fact that the prisoner was probably insane. The matter was taken up by the press and so great was the general dissatisfaction that a "moral monster" should escape the death sentence that the Home Secretary, Mr. Shortt, was called upon in the House of Commons to explain his actions. In a lengthy speech he reviewed in some detail the authorities in support of the common law rule to which we have referred, and the provisions of the Criminal Lunatics Act in virtue of which he ordered the prisoner's committal to Broadmoor Asylum. The public were thus made aware of the true state of the law and the press withdrew its accusations.

Sir Henry Theobald has recommended that in cases such as True's, where the insanity defence has been rejected by the Courts, the medical certificate on which the Executive will act should state specifically that the mental condition of the prisoner is such that he is *unfit to undergo his sentence*.

It is suggested that the inclusion of such a statement would do much to prevent public dissatisfaction.

It should be added that Lord Justice Atkin's Committee 1923 (referred to several times in the text) recommended that no change should be made in connection with the powers of the Executive, as above set forth. In dealing with this question the report reads in part: "Everyone would revolt from dragging a gibbering maniac to the gallows. We are not prepared to draw a line short of the certificate of insanity given after inquiry by reasonable and experienced medical men."

A very recent example in Canada of the reprieve of an insane person under sentence of death (*R. v. Taupier*) has already been mentioned by the Honourable Chief Justice Greenshields in the Foreword to this book. An inquiry into the prisoner's mental condition, carried out at the instance of the Minister of Justice, resulted in a report that Taupier was insane. The mercy of the Royal Prerogative was accordingly extended to him and instead of being executed he was committed to an asylum.

APPENDIX III

MR. JUSTICE MAULE'S ANSWERS

The questions put to the fifteen judges by the House of Lords as a result of the debate which followed the McNaughton case, together with the answers (the McNaughton Rules) given and concurred in by all but one of the judges referred to, have already been set forth at length in the text (see Pages 20 and 78). We explained that the one dissenting judge, Mr. Justice Maule, expressed his inability to agree with the other judges and gave a separate set of answers. The learned judge contended that the questions were too general in character, not being based on any actual case where the evidence of witnesses and argument of counsel would have helped him to form an opinion. It is interesting to compare the answers which he gave with those given by the other fourteen judges. They were as follows : (See questions on Page 20).

“The first question, as I understand it, is in effect, what is the law respecting the alleged crime, when at the time of the commission of it the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some

supposed public benefit ? If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for their solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done ; and therefore request to be permitted to answer the question only so far as it comprehends the question, whether a person, circumstanced as stated in the question, is, for that reason only, to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding ? And I am of opinion that he is not. There is no law, that I am aware of, that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which involves or is necessarily connected with such an unsoundness, this is not a matter of law but of physiology, and not of

that obvious and familiar kind as to be inferred without proof.

“ Second, the questions necessarily to be submitted to the jury are those questions of fact which are raised on the record. In a criminal trial, the question commonly is, whether the accused be guilty or not guilty ; but in order to assist the jury in coming to a right conclusion on this necessary and ultimate question it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are and the manner of submitting them, is a matter of discretion for the Judge — a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law ; and, if on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question as being, in my opinion, the law on this subject.

“ Third, there are no terms which the Judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the Judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

“ Fourth, the answer which I have given to the first question is applicable to this.

“ Fifth, whether a question can be asked depends, not merely, on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it ; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has merely been present and heard the witnesses ; these circumstances, of his never having seen the person before, and of his merely being present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful ; though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect.

“ Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witnesses had been present and heard the evidence, it is to be considered whether that is enough to sustain the question. In principle it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the

evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence most clearly open to this objection and on the admission of which the event of a most important trial probably turned, was received in the case of *R. v. McNaughton*, tried at the Central Criminal Court in March last, before the Lord Chief Justice, Mr. Justice Williams, and Mr. Justice Coleridge, in which counsel of the highest eminence were engaged on both sides ; and I think the course and practice of receiving such evidence, confirmed by the very high authority of these Judges, who not only received it, but left it, as I understand, to the jury, without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament."

APPENDIX IV

EARL FERRERS' CASE

The case of Earl Ferrers (already mentioned in the Foreword and notes p. 19) is unique in that the accused nobleman was *himself* obliged by law to argue his own insanity defence. Owing to his rank he "enjoyed" the privilege of being tried by a jury of peers in the House of Lords where he found himself in the awkward predicament of having to plead his case with the Attorney General as his formidable opponent. Some time ago it was said by an English author that "in the whole annals of our criminal jurisprudence no trial perhaps has excited more lasting interest, and is more generally known than that of Earl Ferrers". (Burke's "Trials Connected with the Aristocracy" p. 193). A short description of the case is therefore indicated.

Ferrers was tried in 1760 for the murder of a Mr. Johnson who had been appointed Receiver of the Earl's estates when the latter became separated from his wife by special Act of Parliament. Everything seems to have gone smoothly at first but after about a year of Johnson's administration the Earl became convinced that the trustee was defrauding him and furthermore that he had been largely instrumental in procuring the special Act by which he (the Earl) was separated from Lady Ferrers. He first en-

deavoured to induce Johnson to break his trust but meeting with no success he decided to get rid of the man. Accordingly he invited him to come to his house on a certain afternoon, having previously ordered his mistress, a Mrs. Clifford, and most of the servants to absent themselves until the evening. Johnson arrived at the appointed time, little knowing what was in store for him. Less than an hour later he was ordered down on his knees, cursed as a villain and shot. The bullet penetrated his abdomen but failed to kill him instantly and his lordship appears to have "felt a few momentary touches of compassion". A Doctor Kirkland was summoned and the miserable Johnson was put to bed. Ferrers then made a full confession to the doctor, admitting that he had at first intended murder but expressing the hope that the man would recover and asking Kirkland not to mention the matter outside lest he be arrested. This the doctor agreed to and after dressing the wound he and Ferrers repaired downstairs where they consumed a bottle of port. Ferrers then returned to his victim and on seeing him was seized with what must have been a fit of madness. He cursed and swore at the unhappy man who (as it turned out later) was nearing his last breath and, but for the doctor's physical restraint, would have pulled him out of bed. The dying man earnestly requested that he should be re-

moved to his own house but this Ferrers refused to allow saying that he was glad to have him under his roof so that he could "plague the rascal". Some hours later he expired and Ferrers was arrested and charged with wilful murder.

The family, much against his own will, persuaded him to base his defence on insanity. In support of it he called several witnesses, including his two brothers, all of whom he examined with great skill, which fact the Attorney General contended (and the lords undoubtedly agreed with him) was in itself sufficient proof of his sanity. Space does not permit of a reproduction of the evidence here but one or two points may be mentioned.

Elizabeth Williams, keeper of a public house frequented by the Earl, testified that he had handled her roughly on several occasions without cause, that he invariably drank his coffee from the spout of the coffee pot and that he was "always mad".

Prisoner : "Have you ever seen me commit any other acts of outrage besides those you have mentioned?"

Witness E.W. : "A great many more that are worse."

Prisoner : "Name them".

Witness E.W. : "Swearing, cursing and damning us, and wishing us all at hell . . . and talking to himself for hours together in bed."

One of his brothers said that although his lordship was not on the best of terms with his family he appeared to be under the delusion that there was a secret combination against him. He was also at times unable to distinguish between a moral and an immoral act. Medical evidence was also given but failed to create much impression.

At the opening of his case the prisoner addressed the Court in part as follows : — "My lords, the kind of defence I mentioned to your lordships before I really don't know how myself to enter upon ; it is what my family have considered for me, and they have engaged all the witnesses that are to be examined upon this unhappy occasion, who I really have not seen . . . My lords, I believe that what I have already mentioned to your lordships, as the ground of this defence, has been a family complaint ; and I have heard that my own family have, of late, endeavoured to prove me such. The defence I mean is occasional insanity of mind ; and I am convinced, from recollecting within myself, that at the time of this action, I could not know what I was about . . ." Later he said "I have been driven to the miserable necessity of proving my own want of understanding, and am told the

law will not allow me the assistance of counsel in this case, in which, of all others, I should think it most wanted. ”

Counsel for the Crown had little difficulty in convincing the Lords that the prisoner was not insane and that the crime had been committed with deliberation and an obvious knowledge of its wrongfulness. A unanimous verdict of guilty was accordingly returned.

When asked if he had anything to say why sentence of death should not pass Earl Ferrers stood up and replied “ My lords, I must acknowledge myself infinitely obliged for the fair and candid trial your lordships have indulged me with. I am extremely sorry that I have troubled your lordships with a defence that I was always much averse to. ” He was then sentenced and removed to the Tower from whence, on the day of his execution, he proceeded to the scaffold in his own carriage attended by a large and distinguished procession. The prospect of death failed to unnerve him and he remained apparently at his ease to the last.

The case is not without importance from the legal-historical point of view because it shows that the “ right and wrong test ” (although somewhat clumsily applied) was in force as long ago as 1760. For instance counsel for the Crown in arguing that the prisoner committed the mur-

der with obvious deliberation and knowledge of its wrongfulness proposed the question "Could he, did he, at the time distinguish between good and evil?"

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ADDITIONAL NOTES TO PAGE 72

(regarding unfitness to plead)

When the issue is raised by the defence the burden of proof is upon the accused.

If it is alleged that the prisoner is insane at the time of trial the question as to his fitness to be tried should be raised before he is called upon to plead. If this is not done the trial may commence and the question of the prisoner's fitness to plead and his responsibility for the crime charged may both be left to the jury at the same time. *R. v. Southey* 4 F & F. 864.

As to the degree or kind of insanity required, a prisoner even though partly insane may be tried if he understands his condition with reference to the proceedings and has control over his mental powers with ability to remember and testify and instruct his counsel on the material facts of the case. *U. S. v. Chisolm* 149 Fed. 284.

It is probable that a prisoner who appears manifestly insane may sometimes be adjudged unfit to plead although, if the trial had proceeded, his insanity might not have been such as to satisfy the McNaughton tests.

A plea of unfitness to plead unsuccessfully raised may often prejudice the chances of successfully pleading insanity on the main issue.

"Accused persons should not be found on arraignment unfit to plead except on the evidence of at least two doctors, save in very clear cases." Lord Atkin's Committee 1923.

The Jury may take into consideration not only the evidence but also the conduct of the prisoner in their presence. *R. v. Davies*, 6 Cox C.C. 326.

The question of whether or not the prisoner is fit to plead cannot strictly speaking be called part of his defence to the crime charged because it is not concerned with whether or not he is guilty of such crime.

31.10.1955
20.10.1955

INDEX

(For index to Cases see page XV)

- ACQUIRED INSANITY, 11.
ALIENIST, VI, 128.
 see also *Evidence and Medical Evidence*.
ALLBUTT, Sir Clifford, 30 n., 108.
AMERICAN LAWS, 98-110.
APPEAL, 74.
ASYLUM,
 Bedlam, 125.
 Broadmoor Criminal Lunatic, 73.
 criminal lunatic, 73, 124.
ATKIN, Lord Justice, 64 n.
 Committee of, 64, 70, 72, 109, 112, 113, 130, 142 n.
AUTOMATISM,
 post-epileptic, 91.
 in somnambulism, 93, 94.
AVORY, Mr. Justice, 78.

BIRKENHEAD, Lord, 58, 65.
BLACKBURN, Lord Justice, 5 n.
"BORDER LINE" between sanity and insanity, IX, 8.
BRAMWELL, Lord, 16.
BRITISH MEDICAL ASSOCIATION, 65, 113.
BROADMOOR CRIMINAL LUNATIC ASYLUM, see *Asylum*.
BURDEN OF PROOF, 24, 76, 106, 142 n.

"CHILD OF FOURTEEN" test, 48 n.
CIRCULAR INSANITY, 12.
CODE,
 Criminal, of Canada (s. 19) 28 n.
 proposed criminal, of England, 66 n.
COKE, Sir Edward (later Lord), 56 n. 118, 125.
CONATIVE (as distinct from cognitive) form of insanity, 30, 106, 112 n.
 See also *Insane Impulse*.
CONCEALING,
 of crimes by lunatics, 50.
 of mental disorder by lunatics, 17 n.
CONGENITAL INSANITY, 11.
CORONERS' INQUESTS, 86.
CRIME, meaning of, and mental element in, 1.
CRIMINAL APPEAL ACT 1907 (England) 74.
CRIMINAL LUNATICS, custody of, 73.
CRIMINAL LUNATICS ACT,
 of 1800 (England), 73, 124.
 of 1884 (England), 53, 127.
CURTIS BENNETT, Sir Henry, 44, 45.

DARLING, Mr. (later Lord) Justice, 66 n., 107 n.
DELIRIUM TREMENS, 56, 89.

DELUSION,

- connection of, with criminal act, 26, 125.
- considered as merely symptomatic of mental disorder, 106.
- distinguished from illusion and hallucination, 26.
- in sexual offences, 96.
- in somnambulism, 95.
- in suicides, 87.
- systematized and unsystematized, 27.
- And see *McNaughton Rules*.

DELUSIONAL INSANITY, see *Monomania*.

DEMENTIA, 13.

- paralytica, see *General Paralysis of the Insane*.

DIPSOMANIA, 14.

DRUNKENNESS, 56.

DUNEDIN, Lord, 5 n., 115.

EMOTIONAL INSANITY, see *Insane Impulse*.

EPILEPSY, and Epileptic insanity, 90.

ERSKINE, Lord, 17 n., 18 n., 116.

EVIDENCE,

- in appeal, 81 n.
- in rebuttal, 34 n., 40 n.
- at trial, 78.

GENERAL PARALYSIS OF THE INSANE, 13.

GEORGE III, King, 18 n., 116.

GREER, Mr. (now Lord) Justice, 68 n.

HALE, Sir Matthew (later Lord), 56 n., 118, 125.

HALLUCINATION, 26, 27 n.

HEWART, Lord Chief Justice, 40.

HOME SECRETARY, 53, 75, 127.

ILLUSION, 26.

IMPULSIVE INSANITY, see *Insane Impulse*.

INFANCY, 3.

INFANTICIDE, 61.

INSANE IMPULSE,

- American law on, 100.
- in epileptic insanity, 92.
- in suicides, 88.
- meaning of, and exclusion from *McNaughton Formula*, 60.
- medical views on, 112.
- opinion of High Court Judges in 1924 as to, 70.
- recommendation of Lord Atkin's Committee as to, 65.
- rejected as a defence by Appeal Courts, 68, 69.
- sometimes upheld as a defence, 51, 63, 64, 68 n.

INSANITY,

- before and during trial, 72, 142 n.
- distinguished from irresponsibility, 33.
- Lord Atkin's Committee on, 64, 70, 72, 109, 112, 113, 130, 142 n.
- meaning of, 5.
- medical and "legal", 111.
- medical views on, in *True's case*, 47.
- types and degrees of, 11.

- INTOXICANTS,
 voluntary aggravation of mental disorder by use of, 59 n.
- INTOXICATION, see *Drunkenness*.
- IRRESISTIBLE IMPULSE, see *Insane Impulse*.
- IRRESPONSIBILITY, distinguished from insanity, 33, 111.
- JUDGE, province of, distinguished from that of Jury, 80.
- JUDGES,
 opinion of, after McNaughton's case, see *McNaughton Rules*.
 opinion of High Court, in 1924, 70.
- JURY,
 province of, distinguished from that of Judge, 80.
 of Peers, 136.
- KATATONIA, 15.
- KENNY, Doctor C.S., 16, 31, 64, 87.
- KENYON, Lord Chief Justice, 124.
- KLEPTOMANIA, 14, 60.
- "LEGAL INSANITY", 111.
- LESION OF THE WILL, 60.
- LIEUTENANT GOVERNOR, 73.
- LUNACY, see *Insanity*.
- MANIA, 14.
- MAULE, Mr. Justice, 20 n., 29, 131.
- McCARDIE, Mr. Justice, 46, 51, 53.
- McNAUGHTON RULES,
 adoption of, 28, 54, 99.
 application of, 33-55.
 criticism of, 29, 65, 105, 112.
 origin of, IV, 18.
 questions and answers of Judges, 20, 79.
 report of Lord Atkin's Committee as to, 65.
 summary of, 23.
 upheld in appeal, 40, 41, 68, 69.
- MEDICAL EVIDENCE,
 is not essential to establish insanity, 78.
 in True's case, 46.
 See also *Evidence*.
- "MEDICAL INSANITY", 111.
- MEDICAL SCIENCE, influence of, on early law, 7.
- MEDICO-PSYCHOLOGICAL ASSOCIATION, 113.
- MELANCHOLIA, 14, 89.
- MENS REA, 1.
- MENTAL DEFICIENCY, 107 n.
- MENTAL DEFICIENCY ACT (England) 107 n.
- MINISTER OF JUSTICE, 76, 130.
- MISTAKE OF FACT, 4,
 insane, 26.
- MITIGATION OF PUNISHMENT, 57, 108, 109 n.
- MONOMANIA, 12, 88.
- MORAL IMBECILES, 107 n.

- MOTIVE,
 absence of, not by itself sufficient to establish insanity, 84 n.
 distinguished from intent and mens rea, 83.
 not essential to crime, 83.
- NECESSITY, 3.
- NEW HAMPSHIRE LAW, 101.
- NEW YORK LAW, 100.
- OPPENHEIMER'S CLASSIFICATION (1909), 100.
- PARTIAL INSANITY, see *Insanity*.
- PEEL, Sir Robert, 19.
- PENNSYLVANIA LAW, 103.
- PERIODIC INSANITY, see *Circular Insanity*.
- POISON, insanity defence to charge of criminal administration of, 82 n.
- PREROGATIVE, Royal, of Mercy, 76, 130.
- PRESUMPTION OF SANITY, see *Burden of Proof* and *McNaughton Rules*.
- PROCEDURE, 71-82.
- PROOF, see *Burden of Proof, Evidence, Medical Evidence*.
- PUERPERAL INSANITY, 12, 61, 73.
- REPRIEVE, 75, 126.
- RIGHT AND WRONG TEST,
 early application of, 140.
 rulings as to, in cases of Hadfield and Bellingham, 18 n.
 in McNaughton Rules, 21.
 to be applied with respect to particular crime charged, 24.
- ROMAN LAW, 8 n.
- SENILE DEMENTIA, 13.
- SEXUAL OFFENCES, 96.
- SLEEP-WALKING, 93.
- STEPHEN, Sir James Fitzjames, I, V, 29 n., 30 n., 66 n.
- SUICIDAL MANIA, 87.
- SUICIDES, insanity in, 86.
- SUPREME COURT (U.S.A.) 104.
- SYPHILIS, 13, 47.
- TEMPORARY INSANITY, see *Insanity*.
- THEOBALD, Sir Henry, 127, 129.
- TINDAL, Lord Chief Justice, 19.
- "TOTAL DEPRIVATION OF MEMORY AND UNDERSTANDING" theory, 118.
- TOXIC DEMENTIA, 13.
- TRANCE, see *Automatism*.
- TRIAL OF LUNATICS ACT 1883 (England), 71, 73, 109.
- UNITED STATES, Laws of, see *American Laws*.
- VERDICT,
 of Coroners' juries, 86.
 form of, 71.
 Judge's instructions to Jury as to, 53, 81.
 recommendation of Lord Atkin's Committee as to form of, 109.
 upsetting of, by Appeal Court, 74.
- "WILD BEAST" test, 7.

84 n.

of, 82 n.

n Rules.

ory, 118.

6, 109.

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