The David Lloyd Roberts Lecture

ON

CRIMINAL LAW AND INSANITY.

BY

LORD HEWART.

THE fifth David Lloyd Roberts Lecture was delivered on November 16th at the house of the Medical Society of London by the Right Hon. Lord Hewart, Lord Chief Justice of England, who took as his subject "Criminal law and insanity." Mr. Herbert W. Carson, President of the Society, was in the chair, and there was a very large attendance.

Lord Hewart began by remarking that the medical and legal professions seemed to have so much in common, and to be devoted in so unusual a degree to the public welfare, that any real misunderstanding between them upon a matter of public importance would be much to be deplored. Yet from time to time there were indications of a lack of complete harmony in the views with which the two professions respectively regarded, or tended to regard, the attitude of the criminal law towards insanity. The true description of the subject-matter of that difference, or apparent difference, was of no small importance. The subject-matter was not insanity, but the attitude of the criminal law towards insanity. It was natural enough that the two professions should regard insanity from somewhat different points of view. That circumstance, far from being matter for regret, was matter for satisfaction. What was to be regretted was a difference of view upon the actual and the proper attitude of the criminal law towards insanity.

The Defence of Insanity: Conditions it Must Satisfy.

The leading principle of the criminal law of England relating to insanity was still to be found in the answers given to the House of Lords by the judges in the M'Naghten case. Every man was presumed to be sane, and to possess a sufficient degree of reason to make him responsible for his acts, until the contrary was proved to the satisfaction of the jury. In other words, the burden of proof, where insanity was pleaded, was upon the defence. It was not for the prosecution to establish the sanity of the accused; that was presumed. It was for the accused to prove, if he could, that at the material time he was, within the meaning of the criminal law, insane. The word was "prove," not "suggest," nor "indicate," nor "insinuate," nor any such word. Nothing short of proof was sufficient. In order to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the person accused was labouring under such a defect of reason, from disease of the mind, that he did not 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 meaning of these words was sufficiently plain. The crucial time was the time of committing the act, not some other time earlier or later. The sufficient defence of insanity, related to that time, must satisfy three conditions, the first two of which were in every case obligatory, while as to the third there was a choice of alternatives. It must be proved (1) that the accused was suffering from disease of the mind, and (2) that, in consequence of that disease, he was labouring under a defect of reason. It must further be proved that that defect of reason was one of two particular kinds, and it was here that the alternatives arose. The defect of reason, due to disease of the mind, must be clearly proved to be such as either to prevent him from knowing what he was doing or from knowing that he was doing what was wrong. The defence was not required to prove both these conditions, but it must prove one of them.

Different Standpoints of Physician and Criminal Lawyer.

This requirement, that the defect of reason must be clearly proved to be such as to prevent the accused from knowing what he was doing or from knowing that he was

doing what was wrong, served to illustrate the difference between the standpoint of the physician and of the criminal law. For the physician, it might be enough to find that the patient was suffering from disease of the mind and was in consequence labouring under a defect of reason. When these two facts were established it might follow, naturally, that the patient needed medical care and attention. But when the question was whether a person was to be excused from responsibility for what appeared to be a criminal act, the law insisted upon further investigation. Disease of the mind would not, of itself, afford an excuse, nor would consequential defect of reason. It must be further established that the defect of reason was of a particular kind and exhibited particular characteristics—that is, that at the material time it prevented the accused from knowing what he was about, or, alternatively, from knowing that he was doing what was wrong.

Two tests at least were satisfied by this requirement. It seemed to be manifestly in accordance with justice and good sense, as it was in accordance with the principles of the English criminal law, that a man should be excused from criminal responsibility if, through mental disease, he was at the time of his act in such a state of unreason as not to know what he was doing. This was what was meant by "not knowing the nature and quality of his act." It meant, for example, that he thought he was peeling an apple when in fact he was cutting a throat. The like observation might be made when a man was, through a like cause, in such a state of unreason that, although he knew what he was about, he did not know that he was doing what was wrong. He recalled the case of a middle-aged woman who had strangled her mother-in-law, laid the dead body on the hearthrug, and brought in the neighbours to see how well she had done her "duty." In the second place, this requirement had the effect of providing a useful test and criterion which the evidence in the case might well enable a jury to apply. In other words, what the prisoner had said or done, and the surrounding circumstances, very often yielded material which helped the judge and jury to perceive whether it was true to say that at the crucial time he did not know what he was doing, or that what he was doing was wrong.

The law did not presume to define insanity. That was a medical question. What the law considered was the conditions which had to be satisfied in order that a person might be excused from criminal responsibility, and that was a legal question. At present that question was answered in accordance with the principles laid down in the M'Naghten case. It was possible, no doubt, to find in textbooks, especially in footnotes, passages which seemed to entertain or suggest a broader, not to say a looser view, or perhaps to find here and there a similar passage in the report, whether accurate or not, of an individual summing-up. But the law remained, and it must not be forgotten that as matters now stood it was only the defendant who could appeal to the Court of Criminal Appeal; no such opportunity was open to the prosecution. Nor must it be forgotten that, while the physician tended to regard primarily the interests of his patient, the criminal law was concerned with public security. "When I am invited," said Sir Matthew Hale, "to pity the criminal, I reflect also that there is a pity due to my country." This was not to say that criminal responsibility should be imputed where it did not really exist, but it did mean that criminal responsibility should not be overlooked in those to whom it properly belonged.

Criticisms of the Criminal Law.

Lord Hewart went on to say that he did not propose to waste time in the examination of the silly, the ignorant, or the captious criticisms which had from time to time been directed against the principle of the English law. There was a kind of controversy called "eristic," which sought triumph, and a kind called "dialectic," which sought truth. No serious person had any concern with arguments which did not seek to elicit and establish what was true. Charlatanism and chicanery, for which there was a rich and attractive field, might be left alone. It would be idle to dwell upon their suggestions, and worse than idle to advertise their authors. On the other hand, it was necessary

to examine every argument or representation which did aim at the truth. The contest was brought to a point five years ago, when, after a certain notorious trial for murder, a committee was appointed, under a learned chairman, to consider any changes which might be desirable in the existing law where the plea of insanity was raised as a defence. The Council of the British Medical Association tendered evidence. The materials were fully set out in the extremely interesting and valuable report of the Committee, dated November, 1923. The British Medical Association in substance approved the Rules in the M'Naghten case, but added the qualification that no act should be regarded as a crime if at the time when it was done the person who did it was prevented by defective mental power, or by any disease affecting the mind, from controlling his own conduct, unless the absence of the power of control was the direct and immediate consequence of his own default.

The Committee so far agreed with the report of the British Medical Association as to recommend (1) that it should be recognized that a person charged criminally with an offence was not responsible for his act when the act was committed under an impulse which he was by mental disease in substance deprived of any power to resist, and (2) that in other respects the Rules in the M'Naghten case should be maintained. Was this not manifestly a fundamental alteration in what he had just described as the third requirement or condition? If accepted, it would be immaterial that the prisoner knew what he was about or that he was doing what was wrong; he would still be excused from criminal responsibility if he committed the act under an impulse which he was by mental disease in substance deprived of any power to resist.

The Plea of Uncontrollable Impulse.

This suggestion, whatever its merits, was not at all a product of the twentieth century. It was really the ancient and dangerous plea of the uncontrollable impulse, which in practice was so difficult to distinguish from the impulse that was not in fact controlled. The doctrine involved two propositions which were by no means of the same kind, nor indeed upon the same plane. The first was a proposition of fact—namely, that there were unfortunate persons in existence who, though they knew what they were about, and that they were doing wrong, were nevertheless impelled, by diseased and irresistible impulse, to commit an apparently criminal act. The second was a proposition of legislative morality or expediency—namely, that these persons, by reason of their number or otherwise, were of such importance as to require or deserve a fundamental revision of the criminal law. As to the first proposition, a mere lawyer would hesitate much before he ventured to express an opinion. The proposition belonged rather to the field of medical observation and experience. Let it be granted, for the sake of argument, that persons of this unfortunate type existed. The question remained whether, for that reason, it was just and necessary to make a drastic alteration in the criminal law. The door would be thrown widely open if the alteration were made. The objective tests for judge and jury would immediately and finally disappear. The crucial, the overriding, the dominant question would come to be whether the prisoner was acting under an irresistible impulse. Upon what materials, and with what guidance, would the jury be called upon to answer that question? Would there be any such at all except the medical opinion which the prisoner might be fortunate enough to adduce in his favour, contradicted by the medical opinion offered by the prosecution?

And what were the true dimensions of the difficulty for which so far-reaching a solution was suggested? "It was established," said the report of the Committee already referred to, "to our satisfaction that there are cases of mental disorder where the impulse to do a criminal act recurs with increasing force until it is, in fact, uncontrollable." The report here referred incidentally to mothers who were seized with the impulse to destroy children to whom they were normally devoted, but already a special statute which dealt with infanticide offered a

lenient alternative in cases of mental disturbance, falling far short of insanity, where a mother not yet fully recovered from the effects of childbirth destroyed her newly born child. The Committee went on to say: "In practice, in such cases, the accused is found to be guilty but insane." That was a very remarkable statement. It suggested that what was required was already done. If the proposed change in the law were made, the verdict in such cases would be that which was briefly, popularly, and inaccurately described as "guilty, but insane." But this verdict was, it appeared, in practice already returned in such cases. What, then, remained? "We appreciate," the Committee frankly added, "the difficulty of distinguishing some of such cases from cases where there is no mental disease, such as criminal acts of violence or sexual offences where the impulse at the time is actually not merely uncontrolled, but uncontrollable." Yet the far-reaching change in the law was recommended apparently upon the ground that "the M'Naghten formula is not logically sufficient."

The Necessary Stringency of the Law.

Lawyers and statesmen would, he thought, hesitate long before they opened the door to an incalculable flood of mischief for the purely academic purpose of giving logical sufficiency to a formula. But the doctrine or theory of uncontrollable impulse was not in the least novel. It was older than M'Naghten, and might be taken to have been considered and rejected by the judges in that case. In 1859—sixteen years after M'Naghten—the matter was referred to by Baron Bramwell in *R. v. Haynes*:

"If an influence be so powerful as to be termed irresistible so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, of conscience, and of law. But if the influence itself is to be held a legal excuse rendering the crime dispensable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration."

In 1863 Mr. Justice Wightman (*R. v. Burton*) referred to the doctrine as a most dangerous one, fatal to the interests of society and the security of life. As to the suggestion, said Lord Hewart, which was more often implied than expressed, that under the law as it now stood some prisoners were wrongly held to be fully responsible, it might be doubted whether any lawyer knew of any such case. The tendency was the other way—to accept the defence of insanity upon too slender materials. This was regarded as humane to the prisoner, though it paid too little attention to the misery of prolonged confinement in a criminal lunatic asylum. For the security of the public, on the other hand, could there be any real doubt that the comparative stringency of the existing law was necessary? After all, the mere fact that a man thought he was John the Baptist did not entitle him to shoot his mother. If a man of abnormally jealous disposition was suspicious of his wife, and his suspicions became what it was fashionable to call an "obsession," was he with impunity to kill her by poisoning, having done all that he could to conceal the crime? In cases where there was evidence of real mental disease, antecedent to the commission of the alleged crime, and there was no evidence of motive which might influence a sane person, juries had no difficulty in finding either that the prisoner did not appreciate the nature of his act or did not know it was wrong.

"But if the law were relaxed in the way which has been suggested" (said Lord Hewart in conclusion) "it might well be that, in cases where there has been no such evidence of mental disease antecedent to the alleged crime, mental experts would be found to say that the alleged crime itself afforded evidence that it was committed under an irresistible impulse, and that upon that ground the inference might be based that there was mental disease. If so, the result might be to transfer to a section of the medical profession the question whether a great number of ordinary criminals should be held responsible to the law."