Occasional Notes.

The Atkin Report.

We published in our last number the text of the report of the Committee which sat last year under the chairmanship of Lord Justice Atkin to consider what changes, if any, might be desirable in the law relating to the criminal responsibility of persons of unsound mind. It is an adroit but unsatisfactory document. It concedes, albeit grudgingly, that the objections which medical men have for many years urged against the existing law are not altogether frivolous; but its proposal for mending the matter is about the least happy that could have been devised. It will not satisfy the doctors, because it does not answer the substantial point of their case. It has already provoked the hostility of lawyers, first, by purporting to be a concession to medical opinion, and secondly, by reason of the form in which that concession has been made.

It was no doubt unfortunate that in putting their views before the Atkin Committee the medical profession should have spoken with a divided voice. Two memoranda were submitted to the Committee, one by the Medico-Psychological Association, the other by the British Medical Association, and they were in sharp disagreement. But even if the two bodies had presented a united demand on the lines laid down in the Medico-Psychological Association's report, it is extremely doubtful if the result would have been substantially different. The matter in issue was a complaint against existing law. The plaintiffs were doctors, who were required to conduct their case "in person," and to prove it to the satisfaction of a tribunal composed exclusively of lawyers. The contest was a ludicrously unequal one. The inquiry resolved itself into a debate in which the lawyers, having proved their easy dialectic superiority to the doctors, unanimously awarded the victory to themselves! We do not, of course, suggest that Lord Justice Atkin and his colleagues acted otherwise than in good faith. They were scrupulously fair according to their lights, but they could not help being themselves. It is important to bear that fact in mind in estimating the value of their findings.

The gist of the Atkin Report is that the McNaughton formula is good as far as it goes, but "is not logically sufficient." Accordingly it is suggested that it should be amended to read in effect as follows: "Insanity is no answer to a criminal charge unless it can be shown that by reason of mental disease the accused either (*a*) did not know what he was doing, or (*b*) knowing what he was doing, did not know that it was wrong, *or* (*c*) *was in substance deprived of power to resist the impulse to commit the criminal act.*" The amendment (which we

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have italicized), embodies substantially the recommendation of the British Medical Association. The Medico-Psychological Association took up a radically different standpoint. They proposed that the legal criteria of responsibility expressed by the rules in McNaughton's case should be abandoned, and that in every trial in which the prisoner's mental condition is in issue, the judge should direct the jury to answer the following questions:

(*a*) Did the prisoner commit the act alleged?

(*b*) If he did, was he at the time insane?

(*c*) If he was insane, has it nevertheless been proved to the satisfaction of the jury that his crime was unrelated to his mental disorder?

The first of these questions is strictly formal, for where the defence of insanity is put forward the fact that the prisoner committed the act is in the nature of the case not disputed. But the second and third questions are crucial. It may be, as the Atkin Committee have urged, that the phrasing of the third question is open to objection, but that is not material. The point is that the questions recognize the juristic essence of the problem, *viz.*, that insanity is one thing, and irresponsibility is another—an inference that may or may not be made from insanity. Some medical men maintain that once insanity is established, the inference of irresponsibility is for all practical purposes inevitable; others take a more moderate view. But all are agreed that logically the two things are distinct. We may quote from the memorandum of the Medico-Psychological Association: "Whatsoever may be the exact words used to describe the mental state of a person accused of crime, the law is only concerned to know whether it is a consideration that negatives the existence of *mens rea*. The legal principle involved creates a difficulty which is inherent in the problem of the criminal responsibility of the insane, and would have to be faced even if the McNaughton Rules were abrogated. For these Rules are not wrong in holding that irresponsibility is only an inference that may or may not be drawn from insanity; where they err is in attempting to define precisely the conditions under which the inference is legitimate." These are fairly explicit words. Yet we find the Atkin Report criticizing the Memorandum on the ground that it mistakenly assumes that the McNaughton Rules contain a definition of insanity, and that it fails to appreciate that "the present law is that a person of unsound mind may be criminally responsible." The legal position, so far from being ignored, is the basis on which the Memorandum rests.

Insanity and irresponsibility, then, are two different things. But the fact that they are logically distinct does not mean that they are not logically connected. It is no use making a neat dialectic cut, as

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the Atkin Report does, and saying that the one is a question of medical science and the other a question of jurisprudence. That merely shirks the essential difficulty, which is to define the relation of the two things. The alienist who adheres to the Medico-Psychological Memorandum might make some such rejoinder to the lawyer as this: "If responsibility is purely a legal question, you do not need my assistance in answering it. To the plain question, 'Is this man insane?' I can give a plain answer, supported by intelligible reasons. But if you ask me whether he knew what he was doing, or that it was wrong, or whether he was in substance deprived of the power to control his actions, it is seldom that I can give a satisfactory answer. When I do my best you complain that I am vague and conjectural. Quite right, but I cannot help that if you will ask questions that have no scientific relevance."

We come then to this, that when medical men criticize the McNaughton Rules, it is not because they are blind to the distinction between insanity and irresponsibility. They do not, as the Atkin Report suggests, imagine that the judges of 1843 undertook to frame a definition of insanity. Any alienist who entertained such a notion would be a fit subject for the professional attention of his brethren. Doctors quite appreciate the McNaughton Rules for what they are, *viz.*, a statement, agreeable to the general principles of English criminal justice, of the conditions in which it appears *just* that an insane person should be subject to punishment. Their worth in law, it will hardly be denied, depends on their quality as justice, and any objection to them in that quality is a relevant one. Accordingly, the medical profession do not impugn the Rules as unscientific, but as unjust, being deductions from premises that are now known to be false.

We are anxious to make this point perfectly clear, for though it seems simple enough, it is extremely difficult to get the lawyers to see it. There always lurks at the back of the legal mind a notion that the McNaughton Rules are "rules of law." They are nothing of the sort. A rule of law (*e.g.*, the Rule in Shelley's case or the Rule in Clayton's case) is a species of legal fiction. It is an artificial presumption that the law makes for convenience, and will not permit to be contradicted. The McNaughton Rules are quite different. They are in no sense presumptions, nor were they ever intended to be artificial. They were regarded by those who framed them as inevitable deductions from certain propositions as to the human mind and human conduct that were regarded as axiomatic. The substance of these propositions was this: that the intellectual and cognitive faculties of man, though capable of being swayed by emotional considerations, are entirely distinct from emotion, that if his emotions

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or appetites prompt him to an evil act, his intelligence will restrain him, either on moral or religious grounds or by reminding him of the penalties he may incur. This is the traditional account of the manner in which human beings behave, and upon it the McNaughton Rules are based. If it be true, obviously the only mental disorder that can justly excuse a man from punishment is a disorder of the intellectual and cognitive faculties. The reasoning of the judges in 1843 was perfectly correct. But what if it be not true? What if the premises from which the judges reasoned be questionable, if not demonstrably false? Clearly their conclusions must to the same extent be vicious—that is, unjust and consequently worthless as standards of responsibility. This is in fact what has happened. Modern psychology, though it speaks with many voices, is agreed upon two things—first, that the traditional psychology is wrong, and secondly, that the intellect, so far from being a self-sufficient entity, is rooted in the emotions and instincts as a plant is rooted in the soil. The traditional psychology, it may be admitted, works well enough for juristic purposes so far as the sane mind is concerned. The error of the McNaughton Rules consists in the assumption that it therefore affords a criterion for gauging the blameworthiness of the insane. One might as well say that, because the apparent motion of the sun may be taken as true for the purposes of navigation, it must therefore be regarded as true for all astronomical purposes whatsoever. Before we can claim that a psychology is true we must be in a position to say that it is true for minds generally, whether sound or unsound. If we try to judge the unsound mind by means of a few highly empirical generalizations from the sound mind, we are certain to go wrong, for in the nature of the case the conditions from which our generalizations derive their value are absent. We should be ashamed of elaborating in this fashion the simple proposition that true conclusions cannot be derived from false premises, were it not that the Atkin Committee are by no means of that opinion. After admitting that possibly the judges of 1843 took into consideration the current medical view as to the nature of insanity "if there was one," the Report proceeds: "But it is certain they were not professing to define disease of the mind, but only what degree of disease negatived criminality: as much a question of law as the question at what age a child becomes criminally responsible, *though only to be decided after considering the nature of unsoundness of mind from the physiological* (sic) *side.*" Precisely. That, in a nutshell, is all that the medical profession have ever contended for. In view of that admission one would expect the Committee to recommend a radical re-statement of the legal position to accord with the change in the scientific view. Not at all. The McNaughton Rules are still held to embody valid

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conclusions. Why? Because their logic is sound? Poor Daniel McNaughton's logic led him to shoot Mr. Drummond, whereby he raised a problem of great vexation to lawyers and doctors. By reason of mental disease his data were wrong, but his logic was irrefragable.

The Atkin Report, in fact, is a good example of the scholasticism that is the besetting sin of the legal mind. By scholasticism we mean an infinite belief in the virtue of correct reasoning, combined with a profound reluctance to examine first principles. The latter appears characteristically in the manner in which the Report deals with the legal doctrine of *mens rea*. First, the complaint is made that the Medico-Psychological Association "give no clue as to what they regard as the test of criminal responsibility." Note that the reference is to the test of criminal responsibility *in general*, not the test of the criminal responsibility of the insane. Let it be admitted that here the Atkin Committee have some ground for complaint. Had the Medico-Psychological Association included in their memorandum a discussion of the doctrine of *mens rea*, much misunderstanding might have been avoided. As it was they contented themselves with stating, by implication rather than by express words, that mere knowledge of the act ought not to be regarded as a universal and conclusive test of guilt. This suggestion was quite lost upon the Committee. They observe that the Medico-Psychological Association concede that the law is concerned with the mental condition of an accused person only in so far as it can be shown to negative *mens rea*. Why then, they ask, should there be any objection to the legal test of responsibility being directed to the condition of the accused person's intellectual and cognitive faculties?

The answer is that the maxim, "*Actus non facit reum nisi mens sit rea*," must not be treated as a rule of law hammered into rigidity by a long series of decisions, but must always be interpreted with regard to its ethical substance and intention. In primitive law the wrongfulness of an act consisted in its physical nature, which tainted the doer, however innocent his intention. On this basis brute beasts and even inanimate objects were adjudged guilty and "punished." A civilized morality, however, rejects such a notion, and insists that guilt does not reside in the act, but in the state of mind from which the act has proceeded. If the accused, owing to no fault of his, was unaware of the physical nature of the act, he is innocent—"*ignorantia facti excusat*"—but the burden of proving ignorance rests upon him. External compulsion also may exculpate, for, as in the case of ignorance, the mind does not accompany the act. This is the general doctrine of criminal responsibility. Its substantial justice will not be doubted. It is only when we seek to apply it to the lunatic that any

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difficulty arises. We are faced by the questions, Can an unsound mind also be a guilty mind, and if so, in what circumstances? To the former question English law has always given an emphatic affirmative, and must always, in theory at least, continue to do so. As to the latter question, the answers have varied. Some of the older authorities held that the general doctrine of *mens rea* admitted of no exception. A lunatic must be condemned unless it appeared that his disorder amounted to *ignorantia facti*. The possibility of a morbid internal compulsion analogous to the external compulsion that might excuse a sane man was not so much as dreamed of. The judges who framed the McNaughton Rules relaxed the strict doctrine by allowing—an odd notion for lawyers—that *ignorantia juris* would excuse if caused by mental disease. The Atkin Committee now propose to add the case where the accused committed the act under an impulse, which by reason of mental disease he was in substance deprived of the power to resist. The case of the criminal act that is at once insane and deliberate is passed over in silence, though it is the main ground of the medical criticism of the McNaughton Rules.

We have thus three stages in the development of the law of the criminal responsibility of the insane. The first pushed a legal theory to a practical absurdity, which the second sought to cure by introducing a legal absurdity, while the third proposes to fill out the "logical insufficiency" of the others by introducing an element that has no discoverable relation to either. If, as the Atkin Committee suggest, the legal test of *mens rea* is necessarily directed to the condition of the intellectual and cognitive faculties, how can "irresistible impulse" be admitted? It is a rank anomaly. Theoretical objections, of course, would be of no moment if the suggested alteration promised to work well in practice, but there is very little hope of that. It would not cover any case that cannot be dealt with under that existing law, nor is it intended that it should, its purpose being merely to make good a "logical insufficiency" of the McNaughton Rules. But, as between lawyers and medical men, it would open up new possibilities of dissension, and aggravate the mischief that it purports to cure. The mental expert, mindful of his present discomforts in the witness-box, may well pray to be delivered from the miseries of a cross-examination directed to the question whether the accused "was, by mental disease, in substance deprived of any power to resist" the impulse under which the act was committed.

It would save much confusion if it were clearly understood that "responsibility" is not an inherent attribute of mind that is either present or absent, but merely a judgment pronounced upon a set of facts in accordance with prevailing ethical standards. Of a culprit presumably sane we say that he ought to be punished because he

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knew, or ought to have known, that he was doing wrong. No fault can be found with that rule. It is based on the practical knowledge possessed by every normal man of the working of his own mind. But in the case of the insane criminal we have no such knowledge. All we know is that he is a sick man, and that possibly, though not necessarily, his act was the result of his sickness. What, then, is the test whereby, the sickness notwithstanding, we can justly affirm that the act proceeded from a guilty mind? No test founded on the apparent knowledge or understanding possessed by the accused can be of the slightest use; for such a test assumes that the lunatic can regulate his behaviour in the same manner as the sane person, which is precisely what he cannot do; if he could, he would not be a lunatic. In his case a different basis of responsibility must be found if the term "responsibility" is to retain any ethical meaning.

Accordingly the Medico-Psychological Association propounded what they conceived to be a simple rule agreeable to common notions of justice. It may be stated in two propositions: (1) No man ought to be convicted in respect of an act done in consequence of mental disease. (2) If it appears that an accused person was at the time of the alleged crime suffering from mental disease, there is a presumption that his criminal act was induced by his mental disease, but this presumption may be rebutted. In other words, if a jury are satisfied that an accused person was insane when he did the act, they ought not to find him guilty unless good cause to the contrary be shown. The Atkin Committee object that this would nearly always throw an impossible burden of proof upon the prosecution, and that in consequence a certain number of persons who ought to be punished would escape. That may very well be, but it is a principle of our law that its forms are designed to secure the protection of the innocent, no less than the punishment of the guilty. In the opinion of those best qualified to judge, the act of an insane man is presumptively an insane act. If the contrary be shown, good and well; but if not, the accused, in accordance with the general rule of English justice, is entitled to the benefit of the doubt.

Whether the suggested disposition of the burden of proof on the question of responsibility be sound or not, it is essential that the jury should understand quite clearly that the issue they are trying involves three questions: (1) Did the prisoner commit the act alleged? (2) Was he insane at the time? (3) Was his insanity such as to entitle him to an acquittal? It is very rarely that the three questions are kept distinct. The general practice of judges and counsel is to telescope the second and third, and even to rule that medical evidence must be strictly directed to the latter. Medical men have for long complained of this, and the Atkin Committee have been constrained

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to admit that the complaint is not groundless. "It may be," says the Report, "that some judges, anxious not to lose time, bring the witness very early to the decisive questions. We think that a wise discretion would allow all necessary expert evidence as to the general mental condition as a preliminary to evidence directly bearing on the ultimate legal issue raised by the plea." This rather naïvely phrased admission is all very well; but it is not enough that evidence as to the general mental condition should be allowed. The jury should also be directed that they must come to a conclusion on this point before they can answer the final question. As things are, the common form of direction is something like this: "The medical witnesses have told you that the prisoner is insane. He may be, but that is a medical question with which you have nothing to do. The question you have to answer is whether by reason of insanity he did not know, etc." The judge then goes on to criticize the medical evidence according to McNaughton standards. If, as usually happens, the medical evidence does not come up to these standards, the jury, being plain men unaccustomed to legal distinctions, get the impression that the judge is directing them that the medical evidence is frivolous and that the prisoner is *not really insane*. They are bemused by having two questions put to them in the guise of one. Nothing could be more repugnant either to logic or to fair dealing. If, as the Atkin Committee quite rightly say, proof of insanity is a condition precedent to the issue of responsibility, then let the jury be told so; let them squarely face the fact the effect of their verdict may be, "We find that the prisoner is insane, but is nevertheless responsible for his act."

The conclusion of the whole matter is that, if the practice of the law as to criminal responsibility were made strictly to conform to the theory, and if, accordingly, judges put the legal position explicitly before juries to the extent of directing separate answers to questions which the law regards as separate, no amendment or abrogation of the McNaughton Rules would be necessary. For where a jury had strong evidence of insanity, and, after due direction from the judge on that evidence, were satisfied that the prisoner was, in fact, an insane person, they would think, not twice, but many times, before returning an affirmative answer to the question of his responsibility. The reforms for which the Medico-Psychological Association have pleaded in vain would continue to be denied in theory, but they would be operative in practice. In the course of time practice would remould theory, and the McNaughton Rules would be relegated to a footnote in the text-books as one of the curiosities of English legal history.

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