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INSANITY IN THE CRIMINAL LAW IN AUSTRALIA

INTRODUCTORY NOTE

by

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The Committee of 1924 on Insanity and Crime set up by the Lord Chancellor, Viscount Birkenhead, and presided over by Lord Atkin, recommended a modification in the McNaghten rules concerning insanity. In regard to the first part of the reference to them i.e., "to consider and report upon what changes, if any, are desirable in the existing law, practice and procedure relating to criminal trials in which the plea of insanity as a defence is raised," the Committee suggested various changes the chief of which aimed at a broadening of the McNaghten definition so as to include irresistible impulse. "It should be recognised 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."[1] The Committee had no doubt that, if this matter were settled, most of the medical criticisms of the McNaghten rules "would disappear" and recommended that legislation should be brought in to give effect to this new principle.[2]

In support of their recommendation the Committee made use of the comparative method, although not on a large scale. Thus we read in the Report that their suggested innovation ". . . is in accordance with the Criminal Code of Queensland, 1899, section 27 (set out in Appendix 13 hereto), and with the law of South Africa laid down by the late Lord de Villiers in *R.* v. *Hay*, 16 Cape of Good Hope Rep. (Sup. Ct) 290."[3]

On reading this passage it seemed to us that the exceptional importance of the subject called for comparative investigations on a much larger scale, especially into criminal law and practice

[1] Committee on Insanity and Crime. Cmd. 2005, 1924, p. 21.
[2] *Ibid.*, p. 9 and p. 21.
[3] *Ibid*, p.9.

within the British Commonwealth of Nations. We have taken the two instances mentioned by Lord Atkin's Committee as a point of departure for such investigations.[4]

We therefore approached Mr. John V. Barry, K.C., of Melbourne, Co-editor of the Proceedings of the Medico-Legal Society of Victoria, with whom we have been in touch for some time past, asking him to send us a Report on "Insanity in the Criminal Law in Australia." Six systems of criminal law are in force in the Commonwealth of Australia and we requested our learned collaborator to give us a comprehensive survey comparing Australian principles with those which govern this matter in England.

Mr. Barry is particularly well fitted for such a work, combining as he does the experience of a practising barrister with deep theoretical interest in various problems of criminal science. Of this survey which Mr. Barry has contributed for us we need only say that in the field of short comparative studies we regard it as a model of construction and expression. We wish to thank Mr. Barry for his assistance and we look forward to having the benefit of his continuing collaboration.

A few weeks ago a verdict of guilty but insane was given in an Old Bailey murder trial which had already evoked great interest in the legal as well as in the medical circles of this country. In a letter to the 'Times'[5] a learned correspondent said "the recent trial may well become historical." The verdict in question was given in direct opposition to the traditional concept of legal irresponsibility in cases of insanity as laid down by the McNaghten rules. In this case—to quote again the same correspondent—"the jury cut through a hundred years of McNaghten tradition" and brought once more to the forefront the findings and recommendations of the 1924 Committee. It is very probable that fresh attempts to give legislative effect to that Committee's main proposal, will be made when we have returned to normal times.[6]

This recent trial and the probable future legislative suggestions give an additional importance to Mr. Barry's penetrating essay. All those who are interested in that branch of criminal administration will be grateful to him for having given them a wider insight into the system and practice of Australia.

[4] Hamilton and Addison's "Criminal Law and Procedure," New South Wales, 4th edition, 1940, pp. 24-26, shows the extensive field which Australia presents for similar enquiries.

[5] Times Newspaper, 13th April, 1943. See also previous letters in the same newspaper which appeared on 24th and 26th March, 1943.

[6] On the previous unsuccessful attempt made in the House of Lords, soon after the report was published see D. Seaborne Davies, *Irresistible Impulse in English Law*, (1939) 17 Canadian Bar Review, at pp. 164-165.

INSANITY IN THE CRIMINAL LAW IN AUSTRALIA

The Commonwealth of Australia is a federation of six States; it came into existence when the States of New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia became, in the words of the Commonwealth of Australia Constitution Act 1900[1] an "indissoluble federal union" by virtue of that Act. The background of Commonwealth legislation is the general law of the States[2] and, unlike the Dominion of Canada, the Commonwealth does not possess general jurisdiction over the domain of criminal law.[3] Accordingly the criminal law of the six States is to be found either in statutes enacted by their legislatures and the common law of England, as in New South Wales, Victoria, and South Australia, or in statutes prescribing a Code of criminal law and other statutes creating criminal offences, as in Queensland, Western Australia, and Tasmania. In New South Wales, Victoria and South Australia the position of the criminal law is very similar to that existing in England. In the other three States, however, the Criminal Codes provide that no person shall be liable to be tried or punished in the particular State as for an indictable offence except under the express provisions of the Code, or under some other statute law or under the express provisions of some statute of the United Kingdom which is expressly applied to the State.[4]

So far as concerns criminal responsibility where the defence of insanity is raised, therefore, the law applicable in Queensland, Tasmania, and Western Australia is to be found in the Criminal Codes of those States, whilst the other three States apply the rules embodied in the judges' answers in *M'Naghten's Case*.[5] The first Code in point of time was the Queensland Code. It was enacted in 1899 and was the work of Sir Samuel Griffiths at the time Chief Justice of Queensland and upon the creation of the Commonwealth of Australia the first Chief Justice of the High Court of Australia.[6] After providing, "Every person is

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[1] 63 & 64 Vic. c. 12.

[2] *R.* v. *Kidman* (1915), 20 Commonwealth L.R. 425.

[3] *R.* v. *Hush, Ex. p. Davanny* (1932), 48 Commonwealth L.R. 487, per Evatt J. at p. 518.

[4] Criminal Code Act, 1899, (Q'land), sec. 5; Criminal Code Act, 1924, (Tas), sec. 6; Criminal Code Act, 1913, (W.A.), sec. 4.

[5] *M'Naghten's Case*, 10 Cl. & F. 200.

[6] A. D. GRAHAM, LIFE OF SIR SAMUEL GRIFFITH, Law Book Co., Brisbane, (1939) p. 89. Sir Samuel Griffith, in his Introduction to the Code, wrote with respect to criminal responsibility, "The most important and difficult branch of the law is dealt with in Chapter 5. No part of the drafting of the Code has occasioned me more anxiety, but I may add that I regard no part of the work with more satisfaction."

presumed to be of sound mind, and to have been of sound mind at any time which comes into question, until the contrary is proved,"[7] that Code declares, "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission."

"A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist."[8] The Western Australian Code is in the same terms.[9] The Tasmanian Code declares the presumption of sanity in the same terms,[10] but seeks greater precision in its provisions relating to insanity, which state:—

"(1) A person is not criminally responsible for an act done or an omission made by him—

1. When afflicted with mental disease to such an extent as to render him incapable of—
   (a) Understanding the physical character of such act or omission; or
   (b) Knowing that such act or omission was one which he ought not to do or make; or

11. When such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.

(2) The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of any power to resist.

(3) A person whose mind at the time of his doing an act or making an omission is affected by a delusion on

[7] Criminal Code (Q'land), sec. 26.
[8] Criminal Code (Q'land), sec. 27.
[9] Criminal Code (W.A.), 1902, sec. 27, now found with amendments up to 1913 as an appendix to the Criminal Code Act Compilation Act, 1913.
[10] Criminal Code (Tas.), 1924, sec. 15.

some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.

(4) For the purpose of this section the term "mental disease" includes natural imbecility."[11]

All three Codes dispense with the phrase "the nature and quality of the act," which was used by the judges in *M'Naghten's Case*, and of which Cockburn L.C.J. said, "What is meant by 'the nature and quality of the act' I really do not know."[12] Whether or not "nature and quality" are mere synonyms, as has been suggested, it has been decided they refer to the physical character of the act and not to its moral aspect,[13] and the Tasmanian Code accepts that view. Again, all three Codes refrain from using the word "wrong", found in the judges' answers, and thus avoid the ambiguity which arises from the possibility of interpreting it as meaning; (i) morally wrong; (ii) illegal.[14] The Tasmanian Code, when recognising "irresistible impulse" as a defence, does so in almost the identical words used by Lord Atkin's Committee in its first recommendation;[15] and sub-section 2 of section 16 of that Code is a statutory adoption of the Committee's observation, "No doubt general lack of control would be relevant to the question whether the lack of control in the particular case was due to mental disorder or to a mere vicious propensity."

The only instances which have been reported of judicial decisions upon these provisions come from Western Australia. In *R.* v. *Moore*[16] the question arose of the criminal responsibility of an accused person, charged with wilful murder, who was shown to be weak-minded and to lose the capacity to control his actions under the stress of excitement. Although childish, ordinarily he would understand what he was doing, but he could not prevent himself from losing control, and would have been described accurately as a high grade imbecile. The Full Court of the Supreme Court of Western Australia, after pointing out that the

[11] Criminal Code (Tas.) sec. 16.
[12] Letter to A.-G. on Draft Code of 1879.
[13] *R.* v. *Codere* (1916), 12 Cr. App. R. 21.
[14] See STEPHEN, DIGEST OF CRIMINAL LAW, 1st ed. p. 15; 7th ed. p. 32; Cockburn L.C.J.'s letter (*supra*).
[15] Cmd. 2005, Ronald True (Notable British Trials) p. 294.
[16] (1908), 10 W.A.L.R. 64.

Code really embodies the view of the law expressed by Sir J.F. Stephen in his Digest of the Criminal Law, observed that the Code "accepts the medical theory of uncontrollable impulse and treats people who are insane to the extent that they have not the capacity to control their actions, whether from mental disease or natural mental infirmity, as being persons who are irresponsible. It does not, however, go to the extent we are asked to go on this application, and enable a person who is not of the highest grade of intelligence, and is suffering from excitement, to commit murder, or any other crime, with impunity. What the section was intended to do was to relieve from responsibility a person who is prevented, from disease or mental infirmity, from controlling his actions." It would appear that this decision has placed too narrow a construction upon the Code, and that it limits unduly the words "state of . . . . . natural mental infirmity as to deprive him . . . . . of capacity to control his actions." Mr. A. A. Wolff, K.C. (now Mr. Justice Wolff of the Supreme Court of Western Australia) has expressed the view it is erroneous.[17]

In *Wray* v. *The King*[18] the accused was convicted of wilful murder, the jury adding to their verdict a recommendation to mercy on account of his youth and weak mind. Two Government medical officers testified at the trial that the accused was suffering from dementia praecox and was insane at the time of the killing. The Full Court of Western Australia held the verdict was unreasonable. In the Court's opinion, the evidence showed the prisoner was in such a state of mental disease that he was deprived of capacity to control his actions at the time of doing the act charged, within the meaning of the relevant section of the Code, and the conviction was quashed and a verdict of acquittal on the ground of insanity entered. This course was taken under section 693 (4) of the Code, which provides, "When it appears to the Court that a convicted appellant ought to have been acquitted on account of unsoundness of mind, they may squash the conviction and direct a judgment and verdict of acquittal on account of unsoundness of mind to be entered and shall thereupon order the appellant to be kept in strict custody until His Majesty's pleasure is known, and in any such case the Governor in the name of His Majesty may give such order for the safe custody of the appellant during the pleasure of the Governor, in such place of confinement and in such manner as the Governor

[17] A. A. Wolff, *Crime and Insanity*, 10 Aust. Law Jo. (Supp.) p. 76 at p. 80.

[18] (1930), 33 W. A.L.R. 67.

may think fit." In all States, the verdict of not guilty on the ground of insanity is followed by detention during His Majesty's pleasure.

As has been said, in New South Wales, Victoria and South Australia the M'Naghten rules apply, and attempts to obtain recognition of Sir J. F. Stephen's view[19] that the right-and-wrong formula as laid down in that case is broad enough to include the irresistible impulse doctrine have not been successful. The question was argued in the Victorian case of *Sodeman* v. *The King*[20] and the Justices of the High Court of Australia discussed it fully in their judgments.

On the 2nd December, 1935, at Leongatha, a small country town in Victoria, the dead body of a girl aged about six years was found lying in the scrub alongside a byroad. Her hands were tied behind her back with a strip of material torn from her frock and her clothes were pulled up, leaving the lower part of the body exposed. Her bloomers were stuffed into her mouth, and the belt of her frock was tied across the mouth and behind the back of her neck. The cause of her death was suffocation. There was no reliable sign of sexual interference.

Under interrogation by police officers, Arnold Karl Sodeman confessed to the killing of the child. He also confessed that he had killed three other young girls whose deaths had occurred within the previous five years, and whose bodies had been disposed of in similar fashion. Dr. Anita Muhl asserts that after his conviction it was ascertained that it was impossible for him to have committed one of the crimes to which he confessed.[21] The confessions disclosed a strikingly similar course of conduct by the prisoner in each instance. Shortly, it appeared that he seized each victim around the throat until unconsciousness supervened. He then thrust a portion ofthe victim's clothing into the mouth and turning the body over, tied it up in the manner described. In three cases the feet were tied. In each case death was due either to suffocation or strangulation.

The first girl killed was aged about 12 years and spermatozoa were found in the vagina. The prisoner said he had no recollection of having had intercourse with her, and there were no other facts to assist to determine that point.

At the trial of the prisoner, evidence of these matters was given. It also appeared that before the killing the prisoner had

[19] HIST. CRIM. LAW, Vol. 2, pp. 167-8.
[20] (1936), 55 Commonwealth L.R. 192.
[21] DR. ANITA MUHL, THE A.B.C. OF CRIMINOLOGY. (Melbourne University Press, 1941) p. 125.

taken intoxicants, but the evidence did not show that he was drunk.

The defence raised was that the prisoner was insane at the time of the commission of the killing charged (and, indeed, at the time of each killing). It appeared that his grandfather had died in a mental asylum, and that his father had died of general paralysis of the insane while similarly confined, There was some inconclusive evidence that his mother, after suffering from diabetes, had developed marked amnesia.

The prisoner's medical history showed that after having taken drink in 1933 he had had a fall from a horse and was picked up in an unconscious condition. Two of the killings, however, had occurred before the incident of the fall.

The prisoner did not give evidence, but three medical witnesses were called by the defence. Two of these witnesses were Government medical officers, attached to the prison where the prisoner had been confined awaiting trial, and the third was a mental specialist of considerable experience. Each of these witnesses deposed that, in his opinion, at the time of the commission of each killing the prisoner did not know the nature and quality of his act, and did not know it was wrong. The Crown called no medical evidence. The prisoner was convicted of murder, and sentenced to death.

The Court of Criminal Appeal of Victoria dismissed an appeal against the conviction, and application was made to the High Court of Australia for special leave to appeal. Unfortunately, only four of the Justices of that Court were available to hear the application, and as they were equally divided, leave to appeal was refused.[22] On a petition to the Privy Council for special leave it was held that the case was not one in which leave should be granted.[23] Sodeman was hanged, and the autopsy disclosed the brain was congested and showed an early lepto-meningitis, with excess cerebro-spinal fluid.

Two questions arose for the Court's consideration; the first, whether the trial judge erred in failing to direct the jury that a disease of the mind which deprives the accused of all capacity

[22] *Sodeman* v. *The King* (1936), 55 Commonwealth L.R. 192. The Court consisted of Latham C. J., Starke, Dixon and Evatt JJ. Sir John Latham later became Australian Minister in Japan, and on his return to Australia has resumed the Chief Justiceship. Sir Owen Dixon is now Australian Minister to U.S.A. Evatt J. resigned to enter the Commonwealth Parliament and is now Commonwealth Attorney-General and Minister for External Affairs.

[23] *Sodeman* v. *The King*, [1936] 2 All E.R. 1138, 55 Commonwealth, L.R. 230.

to control his actions in relation to the matters charged as a crime is a ground of irresponsibility; and the second, that the trial judge failed to explain adequately to the jury the nature of the burden resting on the accused to establish a defence of insanity.

Latham C. J., who, with Starke J., was of opinion that the application for leave to appeal should be refused, considered that an irresistible impulse might be a manifestation of mental disease which might have "the effect of destroying or preventing the knowledge of the nature and quality of the act done or knowledge that the act is wrong. In such a case insanity is established by reason of the latter feature of the case and not by reason of an uncontrollable impulse *per se*." He thought, however, that the High Court should adopt the position taken up by the English Court of Criminal Appeal in *Flavell's case*,[24] that it had no power to alter and it would not alter the rules in *M'Naghten's case* so as to introduce a new and independent category of insanity under the head of uncontrollable impulse.

Dixon J. and Evatt J. were of opinion that the trial judge's charge to the jury, which was substantially in the terms of *M'Naghten's case*, was inadequate. Dixon J. expressed his reluctance to refuse to follow the English Court of Criminal Appeal, but he observed: "It is one thing, however, to say that, if he is able to understand the nature of his act and to know that the act is wrong, an incapacity through disease of the mind to control his actions affords no excuse and leaves the prisoner criminally responsible. It is another thing to suppose that inability through disease of the mind to control conduct is in opposition to an incapacity to understand the quality of an act and its moral character. Indeed, while negativing the rule contended for, it is important to bear steadily in mind that if through disorder of the faculties a prisoner is incapable of controlling his relevant acts, this may afford the strongest reason for supposing that he is incapable of forming a judgment that they are wrong, and in some cases even of understanding their nature, It is also necessary to remember that many people find the expression 'understand the nature and quality of the act' anything but illuminating . . . . . Applied to such a case as the present, it appears to me to mean the capacity to comprehend the significance of the act of killing and of the acts by means of which it was done. The alternative test of irresponsibility in the formula already quoted from *M'Naghten's case* is stated with a false

[24] (1926), 19 Cr. App. R. 141.

appearance of simplicity. When a derangement of the mind manifests itself only intermittently and in acts of passion, frenzy or the like, the questions whether the party accused labours under such a disease of the mind that he did not know that what he was doing was wrong may well provoke in response two further questions—namely, what is meant by 'know' and, at what stage in the course of his progress towards the commission of the acts charged must capacity to know cease? In general it may be correctly said that, if the disease or mental derangement so governs the faculties that it is impossible for the party accused to reason with some moderate degree of calmness in relation to the moral quality of what he is doing, he is prevented from knowing that what he does is wrong."

In a robust judgment, Evatt J. did not share Dixon J.'s reluctance to refuse to follow the English Court. The significance of the recommendation of Lord Atkin's Committee was, in his opinion, that cases of "irresistible impulse" could be brought within the law by decision as well as by declaratory statute. "The question whether Stephen's view went further than *M'Naghten's Case* permitted is answered in the affirmative by the Court of Criminal Appeal in England," he said. "But the question is still an open one in this Court. The Court of Appeal in England does not feel itself bound by the decisions of the English Court of Criminal Appeal, the Judges of which are taken from the Divisional Court (*Hardie & Lane Ltd.* v. *Chilton*).[25] And this Court does not consider itself necessarily bound, even by decisions of the Court of Appeal (*Smith* v. *Australian Wollen Mills Ltd.*)[26] There is no decision of the House of Lords or the Privy Council on the present point. It would be unsatisfactory if the common law of England, of which the rule in *M'Naghten's Case* is a part, must be regarded as forever unable to adjust its rules to modern medical knowledge and science, and this merely as a result of the decision of a Divisional Court in England, the rulings of which are not considered necessarily authoritative by the House of Lords."

He considered that apart altogether from the question whether, consistently with *M'Naghten's Case*, irresistible impulse could be regarded as a complete defence, "it is quite obvious that proof of the existence of disease causing such impulse may at least afford evidence in proof of the existence of such a defect of reasoning as may cause the absence of knowledge necessary for establishing the defence of insanity under the

[25] [1928] 2 K.B. 306.
[26] (1933), 50 C.L.R. 504.

rule in *M'Naghten's Case*. For this reason it was wrong for the trial Judge to suggest and emphasize an antithesis between diseases of the mind leading to irresistible impulse and the conditions described in *M'Naghten's Case*, for the latter might not only accompany, but even be inferred from, a disease of the mind producing 'an irresistible impulse.' It is quite out of accord with modern research in psychology to assert an absolute gap between cognition and conation."

When the matter came before the Privy Council, Viscount Hailsham L.C. considered that if their Lordships were to take a different view of the law from that which prevailed in *Flavell's Case*[27] and *Kopsch's Case*[27] their decision would not alter the English authorities and there would be different standards of law prevailing in England and the Dominions. In these circumstances, they held that an argument that the case presented a good opportunity for establishing the law beyond doubt could not be sustained and therefore did not afford a ground for granting special leave.

The result is that in three States there is little likelihood of the courts interpreting the M'Naghten rules so as to include irresistible impulse as a ground of irresponsibility, but that evidence of facts which would support a defence of irresistible impulse is admissible as being manifestations of a mental disease which may fall within the exemptions of the M'Naghten rules.

On the second question, namely, the weight of the onus of proof of insanity, the Justices of the High Court were unanimous, but they were equally divided on whether the trial judge had adequately explained to the jury the nature of the onus. The judges in *M'Naghten's Case* had said that "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 it that he did not know he was doing what was wrong." An acquaintance with legal history disposes one to think that had the judges been asked in 1843 where the burden lay of establishing circumstances of necessity or accident when a homicide was proved, they would have answered in similar words, that it must be clearly proved that at the time of commiting the act the accused acted in self defence or caused the death by accident. *Woolmington's Case*[28] has established with greater eloquence than

[27] (1926), 19 Cr. App. R. 141; (1925), 19 Cr. App. R. 50.
[28] [1935] A.C. 462. *Cf. Mancini* v. *D. P. P.*, [1942] A.C. 1, at p. 11, per Simon L.C.

historical accuracy that Sir Michael Foster[29] and all subsequent text writers were wrong and that where the defence is accident unless the Crown establishes beyond reasonable doubt on the whole of the evidence that the prisoner killed the deceased with malicious intention, the Crown has not made out the case and the prisoner is entitled to an acquittal. In that case, however, it was said that "the onus is definitely and exceptionally placed upon the accused to establish" the defence of insanity. The High Court of Australia accepted the view that the onus rested on the accused to satisfy the jury of his insanity, but that it was discharged by satisfying them on the balance of probabilities, and the Privy Council observed, "It is certainly plain that the burden on the accused in cases in which he has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or a defendant in civil proceedings."[30]

But the feeling recognised by Dixon J. when he said "it has become incredible that the ordinary presumption of innocence should not cast upon the Crown, from first to last, the burden of proving beyond reasonable doubt the guilty intent of the accused",[31] has resulted in at least one attempt to remove the incongruity whose presence mars the symmetry of the legal theory of the burden of proof. In 1938 Lowe J., of the Supreme Court of Victoria, in the unreported case of *The King* v. *Johnson*, where the defence of insanity was raised, directed the jury, "You will probably have no doubt . . . . that the accused did kill both these men . . . . . The point upon which the debate turns in this case is wilfulness, and I am emphasing at the very outset that the onus is on the Crown to satisfy you beyond reasonable doubt that the killing was wilful . . . . it is for the prisoner to satisfy you he was insane at the time he did this deed, if you think he did it, but if you are left in reasonable doubt at the end of the case as to whether by reason of insanity he did wilfully kill these two men, then he is entitled to be acquitted. If you have no reasonable doubt, that, I suggest to you, is a verdict of guilty. If you are left in reasonable doubt by reason of the defence of insanity which has been raised, I suggest to you that the verdict is not guilty on the ground of insanity."

[29] DISCOURSE OF HOMICIDE, FOSTER'S CROWN LAW (3rd ed.), p. 255.

[30] [1936] 2 All E.R. 1138 at p. 1140. Sir Isaac Isaacs, a former Chief Justice of the High Court and first Australian-born Governor-General of the Commonwealth, was a member of the Board. The contrary view, that the burden is on the prisoner to establish the issue of insanity beyond reasonable doubt is well presented in an article, unfortunately anonymous, "The Quantum of Proof of Insanity in Criminal Proceedings," 5 Jo. Crim. Law. 254.

[31] *The Development of the Law of Homicide*, 9 Aust. Law Jo. (Supp.) at p. 67.

The seat of Government of the Commonwealth is at Canberra in the Federal Capital Territory, and up to the end of 1933 the High Court had in relation to the Territory for the Seat of Government original jurisdiction in criminal matters.[32] The law applicable in the Territory to the defence of insanity is governed by the M'Naghten rules. In 1933 Dixon J. presided at the trial of one Porter for the murder (by poisoning) of his infant child aged 11 months. The defence was that the accused was insane at the time of committing the act, and the jury returned a verdict of "Not guilty on the ground of insanity at the time of the commission of the act charged." Dixon J.'s charge to the jury is reported in the Commonwealth Law Reports.[33] Evatt J., in *Sodeman's Case*, described it as "clear, accurate and elaborate", and it should serve as a model for judges who have to perform the task, extraordinarily difficult, if not impossible, in the present state of the law, of directing juries intelligently upon the defence of insanity.

In the States which have Criminal Codes, the difficulties which arise from the necessity of expounding the antiquated formula of *M'Naghten's Case* do not complicate criminal trials in which the defence of insanity is raised, and the provisions relating to insanity in those Codes result in the law attaining the minimum standard which Lord Atkin's Committee thought desirable. There is, in Australia, however, as there seems to be in other countries which derive their concepts from the English criminal law, a marked reluctance to face the problems to which a realistic approach to the question of criminal responsibility give rise. Dean Roscoe Pound's reproach, that "despite all that psychiatry and psychology have achieved, the lawyer can draw only a plain straight line between an artificial legal conception of insanity and a no less artificial legal conception of normal responsibility,"[34] is unhappily all too general in its application.

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[32] Judiciary Act 1903-32, section 30B, since repealed by the Seat of Government Supreme Court Act, 1933, section 4.

[33] *The King* v. *Porter*, 55 Commonwealth L.R. 182.

[34] Quoted by MENINGER, THE HUMAN MIND (Knopf, New York, 1900) p. 435.