Art. IV.—CODIFICATION OF THE COMMON LAW AS TO INSANITY.

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I am sure that the acute minds of many of our most distinguished lawyers have not failed to perceive the incongruities and deficiencies of the present law, and yet there are many who seem adverse to any attempt to make the law of insanity more conformable than it is with medical science. Lord Justice Bramwell told the Select Committee on the Homicide Bill: "I think that, although the present law lays down such a definition of madness *that nobody is hardly ever really mad enough to be within it*,* yet it is a logical and a good definition." He further stated that, in his opinion, the law was right, because it might deter many insane persons from crime by the threat of punishment. Lord Justice Blackburn, in his testimony before the Select Committee on the Homicide Bill, said: "On the question of what amounts to insanity that would prevent a person being punishable or not, I have read every definition which I ever 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 that it is not in human power to do it. You must take it that *in every individual case you must look at the circumstances* and do the best you can to say whether it was the disease of the mind which was the cause of the crime, or the party's criminal will." He also said: "*But we cannot fail to see that there are cases where the person is clearly not responsible, and yet knew right from wrong.*" He then goes on to give the case of a woman he tried who had killed one child and was going to kill another, but who fortunately dropped the second child and went to a neighbour, telling her what she had done. This woman clearly knew the difference between right and wrong, and knew the character of her act, and, on the definition in the *M'Naughten* case in 1843, was guilty. Lord Justice Blackburn, however, as the woman was a raving maniac, so charged the jury on the ground of exceptional cases that the jury found her "not guilty, on the ground of insanity," and rightly. The Lord Chief Justice of England, in his criticism of Sir Fitzjames Stephen's plan of

* Italics are mine.

codifying the law of insanity, said: "As the law as expounded by the Judges in the House of Lords now stands, it is only when mental disease produces incapacity to distinguish between right and wrong that immunity from the penal consequences of crime is admitted. The present Bill introduces a new element—the absence of the power of self-control. I concur most heartily in the proposed alteration of the law, *having been always strongly of opinion that, as the pathology of insanity abundantly establishes, there are forms of mental disease in which, though the patient is quite aware he is about to do wrong, the will becomes overpowered by the force of irresistible impulse; the power of self-control, when destroyed or suspended by mental disease, becomes, I think, an essential element of responsibility.*" The Lord Chief Justice of England, in his weighty and truly scientific opinion, the intrinsic weight of which is immense, deserves the admiration of both the legal and medical profession all over the world. Lord Moncrieff, the Lord Justice Clerk of Scotland, has said from the bench that "*in point of fact there are very few lunatics who do not know right from wrong*," an opinion which I have myself insisted on before the New York Medico-Legal Society in two different papers read there. If we have the *absence of self-control produced by disease of the body affecting the mind*, in any given case of homicide on trial, it seems to me that every fair-minded lawyer in America will concur in acknowledging that we have here a philosophic or scientific principle on which to found the plea of "not guilty, on the ground of insanity," and one which includes the cases of all insane criminals. It does not seem to me that in the question of what constitutes insanity the members of the two great professions of law and medicine should, or at all need to, entertain essentially different and irreconcilable views, or that on the question of the irresponsibility of criminals who are supposed to be insane there should be such a diversity of opinion as exists to-day. The physician naturally studies the whole history of his patient and his ancestry, and searches for the causes of any bodily and mental changes that he finds, and thus arrives at the true pathology of the disease; while the lawyer and jurist is mainly interested in the *existence* of mental disease, its *degree* and its *influence on conduct*. We know far more about insanity than they did in the last generation, and it is obviously unfair that laws pertaining to insanity, when the knowledge of that disease was comparatively in its infancy, should not be amended to keep pace with our increased knowledge of the pathology of mental disease In that form of homicidal monomania where the patient is possessed of a sudden, blind, motiveless, unreasoning impulse

to kill, I do not think that there is any desire, motive or reasoning intention to commit such a deed, the true pathology of this form of insanity consisting, it seems to me, in a *vis a tergo* received from the diseased action of the brain. We have here a *diseased state of mind with absence of self-control.* We have in suicidal monomania also a *vis a tergo* received from the diseased action of the brain, in which, while perhaps our patient exhibits no other mental derangement, with no delusion or other intellectual disorder, the blind, motiveless, unreasoning impulse to suicide which, alike with the homicidal impulse, is the joint result of undoubted insanity. In both these cases the impulse is long enduring, and gives rise to actions of patient deliberation, and of cunning contrivance. The lawyer and physician are willing alike to recognise disease in the suicidal act; why, then, the apparent unwillingness to recognise disease in the homicidal act? We must not look at these questions socially and ethically, but by the aid of the light of modern pathology, as the Lord Chief Justice of England has done already. There are many persons born with a predisposition to madness, and symptoms indicating that disease display themselves at frequent intervals through the whole course of life, but for many years may never reach such a pitch as to induce those in contact with such persons to treat them as insane. When an overt act *is* committed by such persons, can anyone question the value of a careful study of the past life and acts of the accused? His life has exhibited the natural history of insanity, and with our present accurate and trustworthy method of investigation, a careful and experienced physician in nervous diseases can clearly point out to the lawyer and jurist the unmistakable evidences of mental disease which the latter, necessarily, alone and unaided, could not discover. The lawyer and physician should naturally aid each other in such investigations, impartially and by the light of science. I have elsewhere pointed out that epileptics are to be classed in the most homicidal group of all, also that puerperal women and women at the climacteric period are subject at times to dangerous delusions, and also that kleptomania is a peculiarity of a certain number of cases of general paralysis. These facts are classical, and should be so accepted by the judiciary and by the legal profession generally. In a paper on "Mental Responsibility and the Diagnosis of Insanity in Criminal Cases," read before the New York Medico-Legal Society and subsequently published in the English *Journal of Psychological Medicine and Mental Pathology*, I suggested a series of eight questions which, it seemed to me, if adopted by jurists in criminal cases, would form a most efficient and just test in any given case. Perhaps the legal profession may prefer

the simpler proposition which, as the result of Sir Fitzjames Stephen's attempt to codify the common law of England on insanity, may be briefly summed up as follows, viz., *homicide is not criminal if the person by whom it is committed is, at the time when he commits it, prevented by any disease affecting his mind from controlling his own conduct.* This is very simple and very comprehensive, and therefore the legal profession may very properly prefer it to my own. The eight questions which I proposed in my paper are as follows, viz.:

1. Have the prisoner's volitions, impulses or acts, been determined or influenced *at all* by insanity, and are his mental functions—thought, feeling, and action—so deranged, either together or separately, as to incapacitate him for the relations of life?

2. Does the prisoner come of a stock whose nervous constitution has been vitiated by some defect or ailment calculated to impair its efficiency or damage its operations?

3. Has the prisoner been noticed to display mental infirmities or peculiarities which were due either to hereditary transmission or present mental derangement?

4. *Has the prisoner the ability to control mental action, or has he not sufficient mental power to control the sudden impulses of his disordered mind, and does he act under the blind influence of evil impulses which he can neither regulate nor control?*

5. Has the act been influenced *at all* by hereditary taint which has become intensified so that the morbid element has become quickened into overpowering activity, and so that the moral senses have been overborne by the superior force derived from disease?

6. Was the act effected by, or the product of, insane delusion?

7. Was the act performed without adequate incentive or motive?

8. Does the prisoner manifest excitement or depression, moody, difficult temper, extraordinary proneness to jealousy and suspicion, a habitual extravagance of thought and feeling, an inability to appreciate nice moral distinctions, and finally does he give way to gusts of passion and reckless indulgence of appetite?

Some or all of the characteristics in number eight are found generally in connection with transmitted mental infirmity.

In closing this perhaps too lengthy paper, I desire to speak briefly upon the subject of testamentary capacity. In my opinion the mental unsoundness of a man, if unconnected with the testamentary disposition, ought not to destroy testamentary

capacity. If the will of a person is not affected by, or is not the product of, an insane delusion, it should be regarded as valid. Delusions *per se* should not, I think, void a will. A person may be a monomaniac and yet have sufficient mental capacity to make a valid will. In such a case the mental faculties are often unimpaired and undisturbed. The most important point to be looked into is *whether the testator has ignored natural affection and the claims of near relationship* in the making of the will in question. The testator's mental faculties must be so far normal that he shall understand the nature of the act and also the consequences of it, and *he must also have a clear idea as to the amount of property which he is disposing of.* There must be a clear, sound moral sense, and the human instincts and affections must be intact. There must be no insane suspicion or aversion, and no loss or impairment of reason and judgment. A person should not be considered capable of making a valid will if the act in question has been the product of, or has been actuated or influenced at all by—first, hereditary taint which has influenced his volitions, impulses, or acts; or, second, by mental disease or insanity which has weakened, perverted, or destroyed the mental functions.