PART II.—REVIEWS.

A History of the Criminal Law of England. By Sir James Fitzjames Stephen, K.C.S.I., D.C.L. 3 Vols. Macmillan and Co., 1883.

Lawyers and mental physicians usually meet under conditions so unfavourable to the fair discussion of the questions which are of gravest interest and importance to both, that it is very satisfactory to find one of the most distinguished members of the Bench carefully examining these questions in the work at the head of this review, and approaching them in a spirit of the utmost fairness and candour—qualities too often conspicuous by their absence in the heated atmosphere of the Law Court. Sir James Stephen, while noticing with regret, and we must say not without some reason, the "often harsh and rude attacks" made upon the lawyers, admits that medical men "are sometimes (often?) treated in courts of justice, and even by judges, in a manner which, I think, they are entitled to resent. Sarcasm and ridicule are out of place on the Bench in almost all conceivable cases, but particularly when they are directed against a gentleman and a man of science who, under circumstances which in themselves are often found trying to the coolest nerves, is attempting to state unfamiliar and in many cases unwelcome doctrines, to which he attaches high importance" (Vol. ii., p. 125).

Fully prepared as we are to grant that medical as well as legal men may be one-sided and prejudiced, we heartily reciprocate the sentiment, as admirable as the terms in which it is expressed are felicitous, when the author says:—

"I think that in dealing with matters so obscure and difficult, the two great professions of law and of medicine ought rather to feel for each other's difficulties than to speak harshly of each other's shortcomings" (p. 128).

At the outset of the chapter devoted to the subject under discussion (Vol. ii., chapter xix), and which is entitled "Relation of Madness to Crime," the observation made by the author in complaining that medical writers for the most part use the word "responsible" incorrectly, brings out strongly the different standpoints from which lawyers and ourselves view the matter; the different atmospheres, in fact,

which the two professions necessarily breathe. The lawyer, we are reminded, has in view legal responsibility, while the doctor is apt to confound it with his notions of moral responsibility, and to expect the judges to do the same. The doctor, no doubt, is in fault when he does the latter, or if he does not make it clear in what sense he is employing the term. When, however, he is called upon to examine the mental condition of a criminal with a view to ascertain his responsibility, he is not bound to adopt the test which appears to be at the time the legal one; he may well endeavour to discover whether the man before him is really a responsible being in what he believes to be the true sense of the term, although he should be prepared to give the evidence sought by the lawyers who are bound by the tests of responsibility determined by the judges in McNaughten's case in 1843. While, therefore, we agree with the author that a mental expert ought to remember that with judge and jury, "responsible" means "legally responsible," and that he should, in giving evidence, understand in what sense the Court employs the term, and is legally justified in so employing it, we hold that as a man of science, the physician is not to blame for applying his own tests of responsibility in examining the prisoner, and stating his opinion to the Court, just as we should expect an engineer, employed to ascertain the safety of a bridge, to employ his own tests of safety, and to speak of the structure being safe or otherwise in accordance therewith, and not in accordance with the test which the law had laid down, although the latter must be, or rather we should say, ought to be, followed, if the law were always consistent with itself. No clearer proof can be given of the importance of medical men attaching their own sense to the term responsible, so long as they make it clear in what sense they do use it—even though Sir James Stephen may say that "to allow a physician to give evidence to show that a man who is legally responsible is not morally responsible is admitting evidence which can have no other effect than to persuade juries to break the law" (p. 128)—no clearer proof, we say, can be given that such a course is justifiable than the fact that medical men by doing so have induced the judges themselves, in some instances, to see the weakness of the legal test and the cruel injustice which it would inflict upon the prisoner if adopted, so strongly, that they have deliberately avoided doing that which our author lays down as a fundamental principle

they ought to do, when he writes, "one leading principle which should never be lost sight of, as it runs through the whole subject, is that judges when directing juries have to do exclusively with the question—Is this person responsible, in the sense of being liable, by the law of England as it is, to be punished for the act which he has done?" Thus, to give a recent example of what has now and again occurred. At the trial of Joseph Gill at the Leeds Assizes in April last, for attempting to murder Mrs. Fox-Strangways, the learned judge, Mr. Justice Kay, said, in directing the jury—"The most important question was, were they dealing with a sane man? Judges had said over and over again that a man could not be considered insane merely because he did a criminal act, and the importance of that view could not be over-estimated. Nevertheless, he did not agree with the learned counsel who put it that 'it was necessary to prove that a man did not know the difference between right and wrong in order to show that he was insane.' 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. . . . What the jury had to ask themselves was—Was the prisoner's mind subject to an uncontrollable impulse over which his Will had no power? If so they must acquit him on the ground of insanity." This is not "the law of England as it is."

Sir James has been disappointed in finding so slight a description of insanity, as a whole, in the text books, independently of its various forms; and this criticism is just, where the broad features of insanity are not given, or a more or less complete definition of the disease is not attempted, but when that which is generally common to all cases of insanity—loss of mental control, or whatever the characteristic fixed upon may be—has been stated, we cannot proceed far without confounding specific forms in our description, for there is no form of insanity which we can take as an example of the whole, just as there is not any one inmate in an asylum whom we could single out to show a stranger as a representative lunatic. But this is no more exceptional or surprising than the impossibility of describing a healthy human character. A few words would have to suffice, for to attempt the "accurate picture" our author covets, would end in presenting an inaccurate picture of the very next person met with. Even Shakespeare's magnificent description of the attributes common to man—and who can improve

upon them?—would fail to convey quite an accurate picture of any of the members of the Salvation Army shouting in Exeter Hall. In truth, to return from this digression, the phases of insanity are so numerous and so opposite that the characteristics common to all are comparatively few. Few as they are, however, they are given by Dr. Bucknill under the head of the "Diagnosis of Insanity" in the "Manual of Psychological Medicine."* After describing the varieties of mental disorder, as derived from the text-books, and attempting a short summary of "the disease of madness," Sir James proceeds to the consideration of the law as to insanity, and it will be convenient to present his digest of it.

"No act is a crime if the person who does it is at the time when it is done, prevented [either by defective mental power or] by any disease affecting his mind—

"(*a*) From knowing the nature and quality of his act, or

"(*b*) From knowing that the act is wrong [or

"(*c*) From controlling his own conduct, unless the absence of the power of control has been produced by his own default].

"But an act may be a crime although the mind of the person who does it is affected by disease, if such disease does not, in fact, produce upon his mind one or other of the effects above-mentioned in reference to that act" † (p. 149).

Sir James Stephen observes in reference to the answers given by the judges to the questions addressed them by the House of Lords in 1843, after McNaughten's acquittal, that although he has followed them, their authority is questionable, and he candidly admits that "when they are carefully considered they leave untouched the most difficult questions connected with the subject, and lay down propositions liable to be misunderstood." He, however, maintains that they might, and thinks ought to be construed "in a way which would dispose satisfactorily of all cases whatever." It is to this daring task Sir James applies his vigorous intellect, and the question of most interest to us, is, whether he has succeeded.

All the points on which the law appears still doubtful, notwithstanding these answers of the judges, may, in the author's opinion, be reduced to one question—"Is madness

* Page 402, Edit. 1879. It is to be regretted that in his references to this work the author has not consulted the last edition.

† "The parts included in brackets are doubtful."

to be regarded solely as a case of innocent ignorance or mistake, or is it also to be regarded as a disease which may affect the emotions and the will in such a manner that the sufferer ought not to be punished for the acts which it causes him to do?"

Sir James doubts in the first place whether the answers were meant to be exhaustive, and he shows that if they were, they imply that the effect of insanity upon the emotions and will is to be disregarded altogether—a proposition so monstrous in its consequences that he shrinks from admitting it to be part of the English law. We cannot help thinking that in 1843 the judges did not shrink from such a conclusion, and really meant what they said. In 1883 an enlightened judge sees things differently, and if he induces others to interpret these words in accordance with his own view, the mischief they have done for want of so able an interpreter will not be repeated.

If Hadfield's notion that he had received a command from the Almighty to offer himself up as a sacrifice for the salvation of the world, had been a true one instead of being a delusion, would his act have been morally wrong? for according to the judges, a person must be considered in the same situation as to his responsibility as if the facts with respect to which the delusions exist were real, *e.g.*, 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. (Ans. iv.) Sir James Stephen replies that a sane belief of this kind entertained by Hadfield would be no excuse at all for crime, and he pertinently remarks that if a special Divine order were given to a man to commit murder, he (Sir James) should certainly hang him for it, unless he got a special Divine order not to hang him. Hence, although Hadfield ought to have been convicted according to the natural sense of the rule enunciated by the judges, it is so obvious to lawyer as well as doctor that he was rightly acquitted that Sir James Stephen considers that the existence of delusions must have some legal effect other than those which the answers of the judges contemplate. All we can say is, it is a pity that so vastly important a document as the one in question should not have stated clearly what was and what was not contemplated in its scope and bearings; and that if we adopt the sensible exegesis of our author, we are driven to understand some of

the judges' phraseology in something very like a non-natural sense. We cannot but agree with Sir James that "every judgment delivered since the year 1843 has been founded upon an authority which deserves to be described as in many ways doubtful" (p. 153), and that the propositions laid down are "liable to be misunderstood," although it was of vital importance that they should be lucidity itself. Mental physicians may at any rate console themselves with the reflection that this setting forth of the law of criminal responsibility, which has been their *bête noire* for the last forty years, and against which they have been constantly waging war, has not been vilified by them without good cause, and only becomes intelligible and reasonable when construed by Sir James Stephen.

The learned author sees clearly enough, in reference to the question, what effect an insane delusion can exert on a man's conduct, except in relation to the matter to which it relates, that it may indicate disease affecting the mind otherwise than by merely causing a specific mistake, and that it may evidence a mental condition which prevented the person from knowing that his act was wrong. Thus it is recognised that a delusion, which as such, is wholly unimportant, may be highly so, from the indication it affords of serious disturbance of the whole mind, and it is seen that "it is practically almost impossible to say what part of the conduct of a person affected with a fixed insane delusion is unaffected by it" (p. 162). Again, on the second point—that a delusion may afford evidence that a person, in the language of the judges, was "labouring under such a defect of reason from disease of the mind that he did not know that what he was doing was wrong," Sir James Stephen observes that the word "wrong" is ambiguous, as well as the word "know," for it may signify either "illegal" or "morally wrong" (p. 167). Anyone, says the author, would fall within the above description "who was deprived by disease affecting the mind, of the power of passing a rational judgment on the *moral character* of the act which he meant to do" (p. 163). Hadfield knew his act was illegal, and in this sense knew it was wrong, but he believed it to be morally right.

Sir James Stephen maintains, that even accepting the answers of the judges, the law allows that *a man who by reason of mental disease is prevented from controlling his own conduct, is not responsible for what he does* (p. 167). Further,

he holds that "the existence of any delusion, impulse, or other state which is commonly produced by madness, is a fact relevant to the question whether or not he can control his conduct." He grants, however, with his accustomed fairness, that the judges' answers "are capable of being construed so as to support the opposite conclusion"—but he holds that it is a narrow interpretation, which forces us to regard insanity as "merely a possible cause of innocent mistakes as to matter of fact and matters of common knowledge." With his own wide interpretation, "*the law*," he says, "*includes all that I, at all events, would wish it to include*" * (p. 168).

The sensation experienced when, after dreaming we are in a state of hopeless confusion or lost in some inextricable labyrinth, we suddenly wake and find to our intense relief and surprise that we have escaped every difficulty, is not more pleasurable than that which we experience when painfully bewildered after looking in vain in the answers of the judges for a clue to the solution of the problem of criminal responsibility, we are shown that it was there all the time, and only wanted pointing out by the magic wand of Sir James Stephen. We know now, on his high authority, that the essential principle for which medical men have so long been contending is the very one which, unseen by the dim optics of our profession, is contained in the answers referred to. Remarkable indeed are the words of the author:—

"The proposition, then, which I have to maintain and explain is that, if it is not, it ought to be the law of England that no act is a crime if the person who does it is at the time when it is done, prevented, either by defective mental power, or by any disease affecting his mind, from controlling his own conduct, unless the absence of the power to control has been produced by his own default. . . . . .

"No doubt there are cases in which madness interferes with the power of self-control, and so leaves the sufferer at the mercy of any temptation to which he may be exposed; and if this can be shown to be the case, I think the sufferer ought to be excused" (p. 168-70).

Sir James Stephen then asks—"Can it be said that a person so situated knows that his act is wrong?" And he replies, "I think not, for how does anyone know that any

* In every instance the italics are our own.

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act is wrong, except by comparing it with general rules of conduct which forbid it, and if he is unable to appreciate such rules, or to apply them to the particular case, how is he to know that what he proposes to do is wrong? Should the law upon this subject be codified, a question would no doubt arise whether the article relating to madness should refer in express terms to the possible destruction by madness of the power of self-control or not" (p. 171).

We may refer here to Mr. Russell Gurney's Bill of 1874, which appeared to medical men to mark a vast stride in advance of previous legislation, in the way in which it recognised, among other things, the loss of self-control from disease, as one of the proofs of irresponsibility. Now, this Bill was drawn by Sir James Stephen, who at that time so clearly saw the importance of this point that he introduced it into this Bill for the amendment of the law relating to Homicide. Though it did not pass into law, it led to the appointment of a Select Committee, when Sir James Stephen gave valuable evidence, and maintained that it was eminently desirable that we should have definitions, and that these definitions should state plainly what the law is.

The opinion expressed in writing to this Committee by the Lord Chief Justice (Cockburn) is well-known, but is so remarkable that it can hardly be too frequently placed on record. He 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." The Lord Chief Justice did not see, as Sir James Stephen now sees, that the latter is involved in the former. Then he added, in those emphatic, and it should seem unmistakable, terms—"I concur most cordially 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 (ir)responsibility."

In the Criminal Code Commission of 1878-9 the subject of loss of self-control was discussed, but the Draft Code as

settled made no reference to it. Sir James Stephen says that his Bill of 1878, upon which this Draft Code was founded, did refer to it. Sir James does not think this is important, so long as the words "know" and "wrong" are construed—we will not say in a non-natural sense, but—as he would construe them. He takes much subtle pains to show that the man who does not know that an act he commits is wrong is incapable of self-control. In short, he would, after all, be "fully satisfied with the insertion in a Code of 'knowledge that an act is wrong' as the best test of responsibility"—adding once more the essential condition "the words being largely construed on the principles stated here" (p. 171).

We cannot but regret that after the enlightened view which the author really takes of the question, he should seem to be in danger of falling again into the errors from which we fondly hoped he had emancipated himself, for when he says, as he proceeds to say, that if "power" is "seriously impaired" "knowledge" is "disabled," and adds, "It is as true that a man who cannot control himself does not know the nature of his acts, as that a man who does not know the nature of his acts is incapable of self-control" (p. 171), we think that he sails dangerously near the rock on which the judges in their answers were shipwrecked. In short, the legal and metaphysical principle thus formulated, however ingenious, is at variance with the facts daily witnessed in asylum life, and, as we have had occasion to point out, the late distinguished Lord Chief Justice failed to perceive its validity.

We now approach the question of punishment, in some instances, of the insane, and Sir James Stephen discusses it with his usual ability. He does not think it expedient that a person unable to control his conduct should be the subject of legal punishment—perhaps he might have put it a little more strongly! He then opposes the notion that the mere fact that an insane impulse is not resisted is to be taken as proof that it is irresistible, and adduces the case of the woman who felt impelled to kill the child she was nursing with a knife, but had sufficient control to throw away the knife and rush out of the room. Unfortunately Griesinger terms this "an *irresistible* desire to murder the child," and Sir James Stephen is obviously justified in pointing out the illogicism involved in the remark. It is not, on the other hand, clear that the case which he

adduces helps us much, for had the woman killed the child there would have been no proof that she could have helped it. Here is just the difficulty. If a person pressed by a violent impulse is able to resist it, and does resist it, he is not accused of crime, and the question of responsibility does not arise. It is only when he yields that the question presents itself; and then if it is shown to have been an insane impulse, it seems to us that its irresistibility for legal purposes must be assumed, although it is possible he might have exercised more self-control. No one disputes that among the inmates of a lunatic asylum there are different degrees of uncontrollability. This must necessarily be the case in the various stages and gradations through which they pass from better to worse and from worse to better. But the broad fact of mental disorder has to be taken at every period as the proof of such an amount of practical irresistibility as forbids the idea of punishment—except that which is necessarily involved in the deprivation of liberty. We cannot draw a hard line between those who are insane in an asylum and those who are insane out of it. And with the former, how delicate is the line, even when it seems definite enough to the patient himself, which separates the moment when he is and the moment when he is not master of himself! We know a patient at the present time in an admirably conducted asylum, who is allowed, and advisedly allowed, to have deadly weapons in his room, although a dangerous lunatic, because when conscious of the on-coming desire to injure others, or himself, he desires these instruments to be removed, or he locks them up himself. Yet who would deem it just to punish him if he committed a violent act in the interval between his paroxysms of homicidal excitement? The fact of mental disease would constitute a legitimate presumption that he had lost his power of control.

Sir James Stephen proposes that a jury should be allowed to return three verdicts—(1) Guilty; (2) Guilty, but the power of his self-control was diminished by insanity; (3) Not Guilty on the ground of insanity.

At first sight, the second proposition seems fair enough. It, no doubt, is the simple statement of a fact, and if the sentence to which the verdict led were only imprisonment, there would in some cases be no serious ground for complaint of a miscarriage of justice. Still, insanity is insanity, and where, as here, it is admitted that the power of self-control

is weakened thereby, we cannot bring ourselves to consent to any other course than protecting society by confining the individual in a criminal asylum. See to what a conclusion the view advocated by the author conducts him. He supposes the case of a man in a private asylum "suffering to some extent from insanity," but the disease is going off. He is also "wicked," and when his brother visits him he deliberately poisons him in order to inherit his estate. He recovers and does inherit it. Why, asks Sir James, should he not be hanged, "though he happened to be mad when he did it?" and he thinks such a course would be warrantable. We doubt whether any medical superintendent of an asylum would think so. The other illustration given by the author is as little convincing. "If," he says, "a lunatic was proved to have committed a rape, and to have accomplished his purpose by an attempt to strangle, would there be any cruelty in sentencing him to a severe flogging? Would the execution of such a sentence have no effect on other lunatics in the same asylum?" (p. 176). We think there ought to be but one answer to this question on the part of medical men. Nor would public sentiment sanction, we are persuaded, any such proceeding.

There is another very interesting question discussed by Sir James Stephen, on which, we think, his conclusion would conduct him too far if logically carried out—although a final judgment, declared by Omniscience, might be fairly supposed to follow it. He holds that the rule—that a person should not be punished when deprived by disease of the power of self-control—should be qualified by the words "unless the absence of the power of control has been caused by his own default" (p. 177). It is certain that such an exception would allow of numbers who are now in asylums being treated as responsible persons, and punished accordingly, and we think this would be very cruel. Are we really justified in punishing the epileptic maniac for killing his attendant, because the attack under which he labours can be distinctly traced to an immoral life? If a man suffers from general paralysis of the insane and in his mad delusions commits a theft, is he to be punished because his insanity is due to dissipation? On such a principle it would be only necessary to take the causation-table of an asylum, and determine which patients should be regarded as criminally responsible for their actions by the character of the cause assigned for their disorder. The result would be curious, not to say startling.

We must not quit this interesting and able disquisition without observing that the author in referring to moral insanity, allows that if the statements made by standard authorities on the subject are correct, they may be taken "to prove that disease in some cases has the specific effect of destroying for a time, or diminishing in a greater or less degree, those habitual feelings which are called, I think unfortunately, the 'moral sense,'" but he comments on the fact, only too true, that many sane people possess but little that resembles it. This, however, is rather a clever hit at the general depravity of mankind than meant as a serious objection to the admission of those peculiar cases which it is intended to comprise under the term moral insanity, and for which legal irresponsibility is claimed. Here, as elsewhere, Sir James Stephen is as fair as he is able. His fairness will, we hope, lead him to allow that there is, after all, some reason why "many people, and, in particular, many medical men, cannot be got to see the distinction between an impulse which you cannot help feeling and an impulse which you cannot resist" (p. 171). No doubt there is a distinction in degree, but if, as we suppose, Sir James means by "an impulse which you cannot help feeling" an insane impulse, there is no difference in kind. The two alike fall under the cognisance of medical men as diseases which he has to treat; and if under the influence of an insane impulse the subject of it commits a criminal act, his medical attendant would naturally be disposed to conclude that the impulse which he could not help feeling had mastered his previous efforts to resist it. The conclusion is not necessarily logical, but would generally be true; while the opposite conclusion, would not necessarily be logical, and would generally be false.

The medical feeling is precisely in unison, it is important to observe, with what Sir James Stephen acknowledges to be the sentiment by which juries are guided. "They are reluctant to convict if they look upon the act itself as upon the whole a mad one, and to acquit if they think it was an ordinary crime." In other words, they, like the physician, find it hard to avoid making madness and loss of control practically synonymous as regards the infliction of punishment. And when the science of doctors and the instinct of juries lead to a common result, it is not difficult to see what will be the fate of the lawyers in those cases in which there is a difference of opinion.

In concluding this review, we would repeat that we regard

it as of good omen that a distinguished lawyer should have discussed one of the most important questions of the day, affecting alike the lawyer, the physician, the criminal, and society, with so much breadth of thought and so much good feeling. With him the two constituent elements of legal responsibility remain to be equally, knowledge and power; with us the latter is infinitely the most important, as the one which is more or less wanting in all cases of insanity, and which directly affects the efficiency of the penal code in preventing crime—the true test, according to Casper, of responsibility.*

We heartily commend this work to our readers, and sincerely thank the learned author for the spirit in which he has approached, and the manner in which he had treated the medico-legal questions discussed in his pages, for *nil molitur inepte*, although we do not always assent to his conclusions.

Injuries of the Spine and Spinal Cord without apparent Mechanical Lesion, and Nervous Shock in their Surgical and Medico-Legal Aspects. By HERBERT W. PAGE, M.A., &c. J. & A. Churchill, 1883.

The scope of this work, sent to us for review, may seem scarcely to fall within our province, but the medical psychologist will find cases recorded which are by no means without interest in their psychological bearings.

The serious mental symptoms, falling, in general, short of actual insanity, which may arise from injury to the spinal cord, are of great interest and importance, more especially in relation to railway accidents. It must be evident, however, that in such cases, it would be impossible to separate the injurious shock to which the cord is subjected from that which the brain suffers at the same time. Neither would it be possible to determine, when mental symptoms supervene, how much is due to the molecular disturbance, and how much is the result of terror on the occurrence of an accident. That there may be no "apparent mechanical lesion" is very certain.

After an accident has taken place, another phase of abnormal mental influence comes into play, and a very extensive

* Casper's words are—"Zurechnungsfähigheit in Strafrechtlichem Sinne (Imputabilität) ist die psychologische Möglichkeit der Wirksamkeit des Strafgesetzes." See his "Practisches Handbuch des gerichtlichen Medicin, Erster Band," p. 413, 1876.