# COMMENT

## "DANIEL M'NAUGHTEN AND THE DEATH PENALTY"

By J. J. GOW*

READING Dr Morris' article, "Daniel M'Naughten and the Death Penalty,"[1] has given me much pleasure and profit. I am disappointed, however, that his references to Scots Law[2] are restricted to diminished responsibility, for there is much more in Scots Law relevant to Dr Morris' principal thesis.

The "M'Naughten Rules" are not of course in the strict sense part of the law of Scotland. In criminal matters the Scottish Courts are supreme, there is no appeal to the House of Lords, and, therefore, Scottish criminal law as distinct from civil law (e.g., quasi-delict *anglicé* tort) retains its distinctive character. Hence the law of insanity has developed along lines which diverge from that followed in England. The basic difference is, I think, this, that according to English law there is either complete unsoundness of mind or none at all, whereas the Scottish view is that the manifestations of insanity are infinite and cannot be segregated in water-tight compartments. Thus as far back as 1874 in *Miller's* case[3], the Lord Justice Clerk (Moncreiff) could say this, in charging the jury:—

" . . . . it is entirely imperfect and inaccurate to say that if a man has a conception intellectually of moral or legal obligation, he is of sound mind. Better knowledge of the phenomena of lunacy has corrected some loose and inaccurate language which lawyers used to apply in such cases. A man may be entirely insane, and yet may know well enough that an act which he does is forbidden by law. Probably a large proportion of those in our asylums are in that position. It is not a question of knowledge but of soundness of mind. If the man has not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his unsound mind to do an act simply because it is forbidden, or not to do it because it is enjoined. If a man has a sane appreciation of right and wrong he is certainly responsible; but he may form and understand the idea of right and wrong and yet be hopelessly insane. You may discard these attempts at definition altogether. They only mislead."

The difference between Scots and English law may be summarised thus:—

* B.L., Ph.D. (Aberdeen), Lecturer in Law, the University of Tasmania.

[1] (1954) 6 *Res Judicatae* 304.

[2] *Ibid.* at pp. 321 and 330.

[3] 3 Cooper 16.

(a) Scots law recognises the defence of irresistible impulse, and has from as far, if not further, back than 1853. (cf. Lord Cockburn's charge to the jury in *Scott's* case);[4]

(b) In the same case Lord Cockburn laid it down that there is insanity where the moral perceptions are obliterated. A recent example is *Sharp's* case.[5] There a father was charged with the murder of two of his children. Evidence was led which showed that at the date of the alleged crime the accused was in ordinary matters intelligent and sane, but was obsessed with the idea that the only way out of financial difficulties into which he had fallen was to kill two of his children and so relieve his wife of the burden of their support. The trial judge accepted the evidence of insanity, but had this to say about the report by one of them:—

"... . Dr Sheen seems to have imagined that the legal view of insanity was rather different; and, accordingly, in his report he put it that, according to the ordinary legal standard, the accused was fit to plead, because he understood the nature and quality of his deed. I think that when Dr Sheen put that in his report he was seeking to express the view of a lawyer, and did not express it quite correctly . . . a man may be quite in a position to appreciate the nature and quality of his deed as an illegal act, which by the law of the country will be punished in a certain way, and may nevertheless be insane, his insanity consisting in a failure to recognise that the act is morally wrong."

(c) There is good authority for the views that the M'Naughten interpretation of a decision is far too narrow. If a man is so insane as to believe he is Napoleon Buonaparte and thereby kills his neighbour who bears the surname Wellington, then the test of his responsibility is not whether the fact of his belief was true, but whether he is of unsound mind. There is no such thing as a partial delusion. Hence in *Miller's* case[6] the Lord Justice-Clerk directed the jury— ". . . if you are satisfied that at the time when this act was committed, the prisoner laboured under insane delusions, you will of course find him of unsound mind. I do not say that you must be able to connect the particular delusion with the act charged."

(d) Diminished responsibility; but I need not repeat what Dr Morris has said.

The important feature is that stressed by Lord Justice-Clerk

[4] 1 Irvine 132. [5] [1927] Justiciary Case 66. [6] *Supra.*, n. 3.

Moncreiff in *Miller's* case,[7] viz., is there unsoundness of mind? The classifications of Scots law are only aids to finding an answer. Thus, in *Sharp's* case[8] the defence of insanity could have been allocated to any of the categories of "irresistible impulse", "delusion", "obliteration of moral perceptions". These are differences of emphasis not of kind.[9]

[7] *Supra.*, n. 3. [8] *Supra.*, n. 5.

[9] *Postscript:*— In view of the expression of opinion given by the Faculty of Advocates and referred to in the Report of the Royal Commission on Capital Punishment (s. 261, p. 92), I may have stated too dogmatically the law as to irresistible impulse. I would not, however, accept that opinion as conclusive. On the other hand the Royal Commission made no recommendation that the existing law in Scotland should be amended (s. 334, p. 117).