open to attack on the ground of invalidity[18]. Wanstall J. however, held that S. 38 (4) was not conclusive and that an ordinance could be held to be in excess of power if (a) it could be seen to be not a real exercise of the power conferred; or (b) if it were inconsistent with or repugnant to some provision of the enabling Act.[19] At the present time it seems that in view of the dicta on this matter in *Lynch's case* the opinion of Wanstall J. rather than that of the majority would be more likely to be followed by the High Court if it were called upon to decide the validity of an ordinance which was found "to be altogether outside the province of the Council as a subordinate legislative authority".

R. D. LUMB*

CRIMINAL LAW

Diminished Responsibility

The Criminal Code and Other Acts Amendment Act of 1961 has introduced into the criminal law of Queensland the doctrine of diminished responsibility. The Amendment Act inserted S. 304A into the *Queensland Criminal Code*. Subsection (i) of this Section provides:

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only.

S. 304A therefore substantially adopts S. 2 of the *English Homicide Act* 1957 which in its turn introduced into English law the Scottish doctrine of diminished responsibility.

The wording of the English provision has been slightly altered to suit the context of the Queensland Criminal Code. Thus S. 304A refers to both wilful murder and murder; it speaks of acts and

18. *Ibid.*, at pp. 248, 252.
19. *Ibid.*, at p. 262. It is interesting to note certain comments of Wanstall J. on the question whether the Full Court of Queensland is bound by its own decisions. He is of the opinion that exceptions analogous to those relating to the binding effect of previous Court of Appeal decisions on the Court of Appeal which were laid down in *Young v. Bristol Aeroplane Company* should be applied to Full Court decisions. Therefore the Full Court may choose between two conflicting decisions of its own and should refuse to follow a decision of its own which is inconsistent with a decision of the High Court.

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omissions; and it specifically designates the time at which the state of abnormality of mind is relevant. These alterations probably have little significance. However in S. 304A the draftsman has avoided the use of the words "mental responsibility" to be found in the English provision. In S. 304A these two words have been replaced by the formula "capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission". By making this alteration the draftsman has avoided some of the difficulties of interpretation which have beset the English provision.

The doctrine of diminished responsibility has been known to Scottish law for some ninety years at least.[1] It was not introduced to correct the anomalies arising under the McNaghten Rules for these rules had never been part of the law of Scotland.[2] Nor was the doctrine restricted by Scottish law to murder alone; it also applied to such offences as fire raising, theft and assault.[3] The *English Homicide Act* 1957, which introduced the doctrine into English law, followed the Report of the Royal Commission on Capital Punishment.[4] This Royal Commission did not recommend the introduction of the doctrine into English law unless it could be applied to responsibility for all crimes.[5] However the English Act limited the doctrine to murder; and this course has been followed in Queensland. Thus S. 304A applies only to killings which would otherwise constitute wilful murder or murder.

In interpreting S. 2 of the Homicide Act, the English Courts have frequently discussed the decisions of the Courts of Scotland upon the doctrine of diminished responsibility. However this process may not continue for the statutory provision does not extend to Scotland itself. As the Scottish doctrine is not restricted to homicide and as it does not depend upon statutory interpretation, it may well be that future Scottish cases will be of little use to English (or Queensland) Courts. In the past the Scottish case most frequently referred to has been *H.M. Advocate v. Braithwaite.*[6] Stanley Braithwaite was charged with the murder of his wife by stabbing. Counsel for the accused argued that Braithwaite was not fully responsible for his actions and that the crime which he had committed was accordingly not murder but culpable homicide. In his charge to the jury, Lord Justice-Clerk Cooper said[7] ". . . it will

1. See the article by Professor T. B. Smith of the University of Aberdeen at [1957] Crim. L.R. 354.
2. *Loc. cit.* p. 355.
3. *Loc. cit.*, p. 357.
4. Cmd. 8932.
5. [1957] Crim. L.R. 283.
6. 1945 S.C. (J.) 55.
7. at p. 57.

not suffice in law for the purpose of this defence of diminished responsibility merely to show that an accused person has a very short temper, or is unusually excitable and lacking in self control. The world would be a very convenient place for criminals and a very dangerous place for other people, if that were the law. It must be much more than that. You must find warrant in the evidence for something of the nature . . . of something amounting or appraoching to partial insanity and based on weakness or aberration".

H.M. Advocate v. Braithwaite[8] was discussed by the English Court of Criminal Appeal in *Reg. v. Spriggs.*[9] Spriggs had been convicted of capital murder and sentenced to death. At the trial diminished responsibility was set up as one of the defences. In his summing up the trial judge read S. 2 of the *Homicide Act* to the jury and told them that it was for them to decide whether or not the accused was suffering from such an abnormality of mind as substantially to impair his mental responsibility. The judge then proceeded to review the evidence on that issue. Spriggs appealed claiming, *inter alia,* that the judge had failed to give to the jury any direction upon the meaning of the expressions "abnormality of mind" or "mental responsibility" in the statutory provision. In giving judgment for the Court of Criminal Appeal, Lord Goddard C. J. said, "When Parliament has defined a particular state of things, as they have defined here what is to amount to diminished responsibility, it is not for the judges to re-define or attempt to define the definition. The definition has been laid down by Parliament and it is a question then for the jury".[10] Lord Goddard then referred to *H.M. Advocate v. Braithwaite*[8] and said, "It will be seen there that the Lord Justice-Clerk is not going into nice distinctions between mind or emotion or intellect and emotion, and one has to remember, after all, that juries are not drawn from university professors or university dons . . . The fact is that this section is borrowed from the Scottish law, and the Scottish law, as the Lord Justice-Clerk points out, recognizes that a man may be not quite mad but a border-line case, and that is the sort of thing which amounts to diminished responsibility."[11]

Both these passages have given rise to difficulty. In the first place it must be admitted that the Court of Appeal showed an extraordinary reluctance to construe a section in an Act of Parliament. This judicial reluctance was taken a step further in *Reg. v. Walden*[12] where the defence of diminished responsibility was again raised. The trial judge caused a copy of the section to be handed to the jury and he then put before them, by way of illustration, matters

8. 1945 S.C. (J.) 55.
9. [1958] 1 Q.B. 270.
10. at p. 274.
11. at p. 276.
12. [1959] 1. W.L.R. 1008.

which they might consider in deciding whether the case came within the section. However he then said:

> *"What you have to consider is whether you think I am right in the interpretation I have put upon these words. If you do not, put the interpretation you think is right, because it is for you".*[13]

The accused was convicted of capital murder and sentenced to death.

On appeal, it was contended that by virtue of the decision in *Reg. v. Spriggs* the judge was not entitled to do more than call the attention of the jury to the exact words of the section. This argument was rejected by the Court of Criminal Appeal in the following passage:

"*Reg v. Spriggs* does not establish either of the two propositions raised by Mr. Scott and, though it is a sufficient direction if the judge draws the attention of the jury to the exact terms of the section, it is not, in our view, a misdirection if he points out to the jury the sort of things which they could look for in order to decide whether upon the facts the case comes within the section."[14] However in *Reg v. Terry*[15] the Court of Criminal Appeal did not follow its previous decision that it was a sufficient direction if the trial judge drew the attention of the jury to the exact terms of the section. In *Reg v. Terry* the trial judge merely referred without explanation to the words of section 2 of the *Homicide Act.* The Court of Criminal Appeal held that it would no longer be proper merely to put the section before the jury; but that a proper explanation of the terms of the section ought to be put before the jury.

Thus it appears to have been definitely determined that the trial judge must explain the terms of the section to the jury. However the question naturally arises in what way should he explain the meaning of the section. In *Reg. v. Walden*,[16] the trial judge, apparently relying on passages in *H.M. Advocate b. Braithwaite*[17] and *Reg v. Spriggs*,[18] explained the section as follows:

"There are some cases . . . where a man has nearly got to that condition [*i.e.* insanity] but not quite, where he is wandering on the borderline between being insane and sane; where you can say to yourself, 'Well, really, it may be he is not insane, but he is on the border-line, poor fellow. He is not really fully responsible for what he has done.' Now, you may think . . . , and it is entirely a matter

13. [1959] 1. W.L.R. 1008 at p. 1009. The italics are mine.
14. *Ibid.*, at p. 1011.
15. [1961] 2. W.L.R. 961; 45 Cr. App. R. 180.
16. [1959] 1. W.L.R. 1008 at p. 1009.
17. 1945 S.C. (J.) 55.
18. [1958] 1. Q.B. 270.

for you, that that is what is meant by those words in the Act of Parliament, 'such abnormality as substantially impairs his mental responsibility, ".

At the outset it must de doubted whether the interpretation of an Act of Parliament is entirely a matter for the jury. However the passage could not be criticized if it was intended merely to guide the jury by an illustration. This latter view was taken of the passage by the Court of Criminal Appeal on appeal:

"In our view, in this passage from the summing-up the judge was only giving an illustration of the sort of thing which the jury might consider in deciding whether upon the facts the case came within the section."[19]

It can be seen from the above discussion that the crucial part of the English section has been the phrase "such abnormality as substantially impairs his mental responsibility." The line between illustrating this phrase on the one hand and redefining it on the other is likely to be a fine one. In *Reg v. Byrne*[20] the Court of Criminal Appeal held that the trial judge had passed from the realm of illustration to that of redefinition. Byrne had been charged with the murder of a young woman. The evidence showed that the accused was a sexual psychopath suffering from violent perverted sexual desires which he found difficult or impossible to control. The trial judge directed the jury in terms which suggested that if the accused had killed the young woman under an abnormal sexual impulse which he found difficult or impossible to resist, he could not set up the defence of diminished responsibility if in all other respects he was normal. On appeal it was contended that this direction involved a misconstruction of the section and had withdrawn from the jury an issue of fact which it was their province to decide. No doubt the direction may have been influenced by the well accepted principle that uncontrollable impulse is not a defence within the McNaghten rules. The Court of Criminal Appeal allowed the appeal substituting a verdict of manslaughter for that of murder. However the life sentence imposed upon the prisoner was not disturbed. In his judgment Lord Parker C. J. said that the term "abnormality of mind" "means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but *also the ability to exercise will power to control physical acts in accordance with that rational*

19. [1959] 1. W.L.R. 1008 at p. 1012.
20. [1960] 2. Q.B. 396.

judgment."[21] In Queensland such a conclusion is more obvious for S. 304A makes direct reference to the capacity of the accused to control his actions.

Even after the section has been adequately explained to the jury, it is still confronted with imponderable questions of fact and degree. In taking into account the cause of abnormality of mind the jury is entitled to rely on the evidence of expert witnesses. In the words of Lord Parker.

"The aetiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury) does . . . seem to be a matter to be determined on expert evidence."[22] However in determining whether the accused did in fact suffer from "abnormality of mind", the jury is entitled to take into account evidence other than the expert medical evidence. "They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it."[23] However if the expert medical evidence is unchallenged, the jury is not at liberty to ignore it.[24]

The most baffling question for the jury to determine, however, is whether the abnormality of mind (if there has been abnormality of mind) has been such as "substantially to impair" one of the three capacities of the accused referred to in S. 304A. In attempting to explain this phrase to juries, trial judges have encountered their greatest difficulty. The phrase obviously involves an important question of degree; and many cases will turn upon what the jury considers to be the meaning of the word "substantially". This difficulty has been inherited from Scots law. In his charge to the jury in *H.M. Advocate v. Savage*,[25] Lord Justice-Clerk Alness gave the following instructions upon this matter:

"It is very difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; *that there must be a state of mind which is bordering on, though not amounting to, insanity*; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility—in other words, the prisoner in question must be only partially accountable for his actions".[26] This passage was quoted to the jury in *H.M. Advocate v. Braithwaite*[27] and from there the principle underlying the words italicised has found its way into English law. The

21. *Ibid.*, at p. 403. The italics are mine.
22. [1960] 2 Q.B. at p. 403.
23. *Ibid.*
24. *Reg. v. Matheson* [1958] 1 W.L.R. 474.
25. 1923. S.C. (J.) 49 at p. 51.
26. at p. 51. The italics are mine.
27. 1945. S.C. (J.) 55 at p. 57.

passage was quoted without disapproval by Lord Goddard C. J. in *Reg. v. Spriggs*.[28] In *Reg v. Walden*[29] the trial judge directed the jury in similar terms and on appeal the Court of Criminal Appeal held that there had not been a misdirection. In *Reg. v. Byrne*,[30] Lord Parker C. J. considered that the Scottish cases indicated "that such abnormality as 'substantially impairs his mental responsibility' involves a mental state which in popular language (not that of McNaghten Rules) a jury would regard as amounting to partial insanity or *being on the border-line of insanity*."

This line of authority has been explained by the Privy Council in *Rose v. The Queen*.[31] This was an appeal from the decision of the Supreme Court of the Bahama Islands upon legislation identical in terms with the English act. At the trial the learned judge had directed the jury upon the defence of diminished responsibility in terms of the borderline between sanity and insanity; but he had then proceeded to explain the term "insanity" by reference to McNaghten's rules. At the time, the learned trial judge did not have available to him the judgment of Lord Parker C. J. an extract of which has been quoted above. Before the Privy Council, the Crown contended that the trial judge had correctly invited the jury to assess the degree of abnormality of mind in terms of the borderline between legal insanity and legal sanity as laid down in the McNaghten Rules. However the Privy Council rejected this contention holding that there had been a serious and vital misdirection. To use the words of the Privy Council,

"There may be cases in which the abnormality of mind relied upon cannot readily be related to any of the generally recognised types of 'insanity'. If, however, insanity is to be taken into consideration, as undoubtedly will be usually the case, the word must be used in its broadest popular sense. It cannot too often be emphasised that there is no formula that can be safely used in every case—the direction to the jury must always be related to the particular evidence that has been given and there may be cases where the words "borderline" and "insanity" may not be helpful."[32]

Two small matters may be mentioned before concluding this note. S. 304A (2) provides that on a charge of wilful murder or murder, it shall be for the defence to prove that the person charged is by virtue of the section liable to be convicted of manslaughter only. Upon the equivalent English subsection, the English Court of Criminal Appeal has held that the burden of proof placed upon the defence is discharged if the evidence justifies the conclusion that

28. [1958] 1 Q.B. 270 at p. 275.
29. [1959] 1 W.L.R. 1008.
30. [1960] 2 Q.B. 396 at 404. The italics are mine.
31. [1961] A.C. 496.
32. at p. 507.

the balance of probabilities is in favour of the defence.[33] This decision has been affirmed in *Reg v. Byrne*.[34] Secondly, the English Court of Criminal Appeal has laid down a rule of practice in cases where a defence of diminished responsibility is raised. It has been resolved that a plea of Guilty to manslaughter on this ground should not be accepted. The issue must be left to the jury. Furthermore if a jury returns a verdict of manslaughter on an indictment of murder the judge may, and generally should, ask the jury whether their verdict is based on diminished responsibility or some other ground or on both.[35]

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LAND LAW

Limitation Act—Title Extinguished but not Estate

If the majority decision in *St. Marylebone Property Co. Ltd. v. Fairweather*[1] is correct, that case has created, or discovered, a hitherto unsuspected limbo where the ghosts of the estates of statute-barred owners maintain an ineffectual existence, belonging still to their dispossessed owners, but unenforceable against all but their creators. The Limitation Act provides that at the expiration of the period prescribed for a person to bring an action to recover land the title of that person to the land shall be extinguished. But the majority held that this does not mean that the estate which he held is extinguished. In this case a lessee was barred by adverse possession, but the majority held that the estate continued, so that the lessor did not become entitled to recover possession against the adverse possessor until the estate came to an end. Here it was brought to an end by a surrender made by the lessee whose title had been extinguished. If the Statute does not extinguish a leasehold estate, it would seem to follow that equally it does not extinguish a fee simple or any other estate, but merely extinguishes the title of the statute-barred owner. And if, as one member of the Court specifically held, a statute-barred lessee continues to hold the lease against his lessor, so also it would seem, a statute-barred fee simple owner and his successors continue to hold it in perpetuity against his grantor (query also the grantor's predecessors and successors in title) but not against the rest of the world. These are strange propositions, and the case therefore must be an

33. *Reg. v. Dunbar* [1958] 1 Q.B. 1.
34. [1960] 2 Q.B. 396.
35. *Reg. v. Matheson*. [1958] 1. W.L.R. 474 at p. 479.
1. [1961] 3 W.L.R. 1083; [1961] 3 All E.R. 560.

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