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A LECTURE

ON THE

RELATION OF MADNESS TO CRIME.

Delivered at the London Institution, February 28, 1884.

PRESENTED
by the
AUTHOR.

BY

J. C. BUCKNILL, M.D., F.R.S.,

Late Lord Chancellor's Visitor in Lunacy.



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RELATION OF MADNESS TO CRIME.

Delivered at the London Institution, February 28th, 1884.

By J. C. BUCKNILL, M.D., F.R.S.,
Late Lord Chancellor's Visitor in Lunacy.

PERHAPS no medico-legal question has been more discussed, and with fewer results, for the last forty years, than the one I have to introduce to you this evening. I have myself taken part in the discussion for nearly all that time, and yet it seems to me fresh and inexhaustible as ever. To say nothing of the mass of volumes, great and small, which have been written on it in this and other countries by men of my own profession, it has engaged and baffled the utmost acumen of the greatest lawyers. It was discussed at length in the House of Lords in 1843. It was argued with the utmost ability by the greatest criminal judges before the Select Committee on the Homicide Bill in 1874; and, again, by the Royal Commission of eminent judges on the Criminal Code Bill in 1879, who declared it to be a "very difficult subject"—so difficult, indeed, that they saw no way out of the difficulty by any definition of insanity which would be both safe and practicable. It has been discussed in two important papers by the late Chief Justice Cockburn, published by order of the House of Commons; and, lastly, it has been fully and ably discussed in the second volume of Sir James Stephen's recent edition of his *History of the Criminal Law of England*.

Sir James Stephen, now one of the justices of Queen's Bench, has made the criminal law his own subject. No other person can speak with anything like his minute literary knowledge of it, and his practical knowledge also has been most wide and varied. The author of the Indian Criminal Code, and of the Homicide Amendment Bill, and one of the Royal Commissioners on the Criminal Code Bill, his special knowledge is unequalled, and all that he has to say on the subject commands the highest respect.

I do not propose this evening to enter at large into the medical aspect of this question—to discuss the nature of the diseases which cloud the reason, or to make any attempt to unravel those trains of deranged emotion and thought which they occasion. What I do propose to show you is that the state of the law of insanity as regards crime, when life is at stake, is as imperfect as the state of the law of homicide and murder generally, of which it forms part, so that, in the words of the Select Committee, “a new definition is urgently needed to rescue the law from its present discreditable state;” for, as they say in their report, “if there is any case in which the law should speak plainly, without sophism or evasion, it is when life is at stake; and it is on this very occasion that the law is most evasive and most sophistical.”

What is insanity? Medically, it is disease of the brain affecting the mind. Formerly, medical men recognised only the grosser forms of madness. Dr. Willis, lecturing to the College of Physicians in 1822, recognised only two conditions or varieties of madness, namely, the high and the low state—mania and melancholia.

Now medical men recognise a great variety of forms and degrees of insanity, and physicians do rightly endeavour to recognise the earliest and slightest forms and degrees of insanity, because these forms and degrees are the most curable, and to cure insanity is the physician's especial duty. The physician must, therefore, observe the causes of insanity in order to remove them. But the duty of the lawyer leads him to neglect the causes of insanity, and to regard almost entirely its consequences, in order to ascertain the influence of insanity upon the conduct. Conduct is the outward expression of the mental state; but insanity is frequently of such kind and degree, that it does not influence the conduct so as to make the insane man break the law; and thus it becomes the lawyer's task to discriminate between insanity which makes a man break the law from that which does not. It is admitted that man is not responsible for breaking the law, if his action in so doing be helpless. It is admitted that by responsibility is here meant punishability, and that the punishability of an offender is strictly a legal question to be determined by lawyers, physicians as such having nothing to do with it. But physicians who are conversant with the insane, and who know their characteristics, who can distinguish the forms and degrees of the malady, their causes and consequences, can instruct lawyers so as to enable them to distinguish the different kinds of insane persons, and the different kinds of their conduct, to distinguish that conduct which is the result of insanity from that which is not the result of insanity—that which they can help, and for which they are therefore punishable, from that which they cannot help, and for which they are therefore not punishable.

The physician must distinguish, as the lawyer and the public do, between slight medical forms of insanity and grave legal forms of insanity. The definition of medical insanity as disease affecting a man's mind, he must, therefore, supplement with a medico-legal definition. Definitions of insanity are most difficult and arduous. “They are either too narrow, and become meaningless, or too wide, and the whole human race are involved in the drag-net.” [See leader in

the *Times*, July 22nd, 1854]. Lord Blackburn said: "I have read every definition of insanity 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."

Since this was said before the Select Committee on the Homicide Law Amendment Bill in 1874, Mr. Justice Stephen has attempted a definition as follows. "Sanity exists when the brain and the nervous system are in such a condition that the mental functions of feeling and knowing, emotion, and willing, can be performed in their regular and usual manner. Insanity means a state in which one or more of the above-named mental functions is performed in an abnormal manner, or not performed at all, by reason of some disease of the brain or nervous system" (page 130). But this is a medical definition, covering the slightest deviation from mental health arising from hysteria or alcohol, from bile or gout. It includes states of feeling as sensation, which may not affect the mind. It includes abeyance of mental functions, which is not insanity; for, when the mental functions are not performed at all, there is no insanity.

It is clear from the context that this definition of insanity would include more than Mr. Justice Stephen could allow to be irresponsible; and no good is gained by thus analysing the mind, and detailing the results of the analysis, more or less complete, as functions which may be separately affected. I shall myself venture to make one more medico-legal definition of insanity. *Insanity is incapacitating weakness or derangement of mind caused by disease.* It seems to me to be practically useful and scientifically accurate to make a distinction between weakness and derangement of mind. It seems to me also that all insanity which is not weakness will fairly come under the head of derangement in its widest sense; for morbid states of the emotions derange the play of mind. But the all important term in the definition is, of course, the attribute which points to the want of power to do something. In criminal inquiries, it means incapability of abstaining from the criminal act. It means that condition of irresponsibility pointed to by Lord Bramwell in Dove's trial—Could he help it? It means that which has been much insisted upon by medical writers and great legal authorities, the loss of self-control. Lord Chief Justice Cockburn and Justice Stephen have both expressed the strongest opinion that this state of mind caused by insanity ought to remove responsibility.

Other judges, however, have raised strong objections to the term loss of self-control, and not, I think, without reason. As a matter of fact capable of proof, there is more or less of self-control in the condition of the insane, and more or less loss of self-control in the conduct of sane criminals. But the term incapacitating is less dubious. If a man have such mental disease that he is incapable of obeying the law, that man clearly ought not to be punished by the law. Justice Stephen says, "To threaten such a man with punishment is like threatening to punish a man for not lifting a weight which he cannot move" (p. 172).

In the relations of law to insanity, the question of capacity or inca-

capacity seems always to be involved. In inquisitions, the question is whether a man is capable of taking care of himself and his affairs; in probate cases, the question is whether a man was capable of making a reasonable will; and in criminal trials, whether a man was capable of avoiding the compulsion of disease to crime.

Incapacity therefore is, and must be, the real test of irresponsibility, for otherwise the law would be both foolish and cruel. This principle of law being granted, the working law must go further, and declare what shall be held to constitute incapacity. It does so in other respects; for instance, it declares that a child of such tender years that it has no discretion is not punishable, and that a man under absolute compulsion of any kind is not punishable.

With regard to insanity, the judges have laid down rules, by which they attempt to distinguish an insane offender who is capable of avoiding his offence from an insane offender who is incapable of avoiding his offence on account of mental disease. These rules, which constitute the law of insanity in relation to crime, have varied from time to time. They reflect, more or less, the knowledge of the age in which they are made. From the nature of the case, they cannot precede the knowledge which men have of nature; and the knowledge which men have of the nature of disease has been very slowly acquired, and is still far from perfect. The drugs and the instruments they used but a few years ago are now curiosities, only to be met with in museums; and new discoveries which invalidate old beliefs are still frequently made. Alteration of the law follows slowly in the wake of increasing knowledge; but still it does follow and change as knowledge advances; and I have no doubt that, when the knowledge of insanity possessed by physicians can be shown to be complete, the law of insanity will, after more or less delay, due to professional conservatism, be brought into reasonable agreement with it.

Lord Coleridge, not long ago, said in court that "to adhere too persistently to the old law is to forget that law grows; and that, though the principles of law remain, yet it is one of the advantages of the common law that these principles are applied to the changing circumstances of the time."

No circumstance of the time is so changing or so important as the knowledge which man possesses of the operations of nature; and in no special field of knowledge has this circumstance been more changing or more important of late years than in the pathological explanations of insanity. Unfortunately, theory has oftentimes outrun, obscured, and discredited knowledge; and it is therefore not surprising that the powerful and responsible officials who administer and alter the common law should refuse to make changes, of the reason and necessity of which they have not been convinced.

But we must no longer delay to inquire what the law is. I may fairly claim to omit any reference to its earlier phases, and to come at once to that important statement of the law as it was made by fourteen out of the fifteen English judges in reply to questions put to them by the House of Lords after McNaghten's acquittal on the charge of the murder of Mr. Drummond in 1843. I have the text here, but it would take too long to read *in extenso*. The first and the fourth ques-

tions and answers refer to delusion. McNaghten, you may remember, shot Mr. Drummond under the influence of a delusion. The judges declare, with regard to delusion, that it is law that the accused is in the same situation as to responsibility as if the facts with respect to which the delusions exist were real. For instance, he might kill a man whom he madly thought to be going to kill him; but if he killed a man whom he madly thought to have inflicted any injury upon him, it would be murder. The second and third questions and answers deal with the terms in which the prisoner's state of mind at the time when the act was committed ought to be put to the jury; and in these the law of responsibility is tersely declared thus.

"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."

This is regarded by the great majority of the judges as the law, and the whole law, on the subject-matter; and I think that the contention of Lord Chief Justice Cockburn and of Mr. Justice Stephen, that it is only such part of the law as sufficed to answer the questions of the House of Lords, leaving other important portions of the law unexpressed, cannot be maintained, for the following reasons.

1. It does not appear that the fourteen judges who concurred in answering the questions of the Lords felt any disinclination to expound the law fully in what has been called an extra-judicial judgment. One judge alone, Mr. Justice Maule, did appear to entertain an objection, and, in consequence thereof, he made separate replies, saying as little as he could.

2. The questions were formulated by members of the House of Lords, who were themselves great lawyers, for the evident purpose of eliciting an explicit declaration of the law.

3. One of the great judges who took an active part in framing the declaration of the law, has left it on record that he meant it to be a full exposition of the law. This was Lord Wensleydale, replying to Mr. Waddington's question before the Royal Commission on Capital Punishment. "You do not think that the sort of insanity which exempts a person from capital punishment in case of murder could be more accurately defined to the jury than it is in the resolutions of the judges in McNaghten's case?" To this, Lord Wensleydale replied: "I do not think it can. I entirely concurred in that judgment, and took a share in the preparation of it, with my late excellent friend, Chief Justice Tindal, who took very great pains, I know, to lay down the law most correctly. I have always acted upon it, and I think it quite right. Whether it could be improved in any respect, I am not prepared to say until the objection shall be made and discussed."

4. Mr. Justice Stephen, who more than anyone contends that the law was, on this occasion, insufficiently expressed, and who maintains that its strict enforcement would lead to "monstrous consequences,"

fully admits that it is practically the law of the land. "It has been the general practice ever since," he says (p. 153), "for judges charging juries in cases in which the question of insanity arises, to use the words of the answers given by the judges on that occasion. It is a practice which I have followed myself on several occasions; nor, until some more binding authority is provided, can a judge be expected to do otherwise, especially as the practice has now obtained since 1843."

5. And, finally, it is the latest exposition of the law in this country, and in this city, for in two trials at the Central Criminal Court, in its sittings last autumn, this law was declared to the jury in its most unconditional simplicity.

On the trial of William Gouldstone, before Mr. Justice Day, for the murder of his five children, the jury were charged that "if the prisoner, at the time he killed the children, knew the nature and quality of the act he was committing, and knew that he was doing wrong, then he was guilty of wilful murder. The nature and quality of the act meant that the man knew what it was that he was doing, that is to say, that he knew he was killing a fellow-creature. He repeated that, if a man killed a fellow-creature, knowing at the time he was doing wrong, then he was guilty of wilful murder."

At the next sittings of the Central Criminal Court, on the trial of James Cole for murder, Mr. Justice Denman told the jury that "to prove the prisoner was not responsible, it must be shown that he was suffering from such a state of mental disease as not to know the nature and quality of the act he was committing, or that it was wrong." In passing sentence of death upon James Cole, Mr. Justice Denman further said: "An attempt has been made to make out that you were irresponsible; that attempt has failed, and I must express my opinion that, according to the law of England, it has rightly failed. Although it was, I think, established in evidence that you had been suffering from delusions, I cannot entertain a doubt that on the occasion on which you violently caused the death of your child, you knew you were doing wrong, and knew that you acted contrary to the law of this country, and that you did it under the influence of passion, which had got possession of your mind from want of sufficient control, the result being that the poor child came by a sudden and savage death."

The language of this sentence is remarkable as showing with what exact fidelity the judges of the present day adopt and administer the law of their predecessors as it was declared to the House of Lords; namely, that notwithstanding the existence of delusions (the delusions were that he was being poisoned, and that men were hid under the floor and in a cupboard to injure him), the prisoner is punishable if he knew that he was acting contrary to the law of the land. Mr. Justice Denman's language is further remarkable from his employment of the term control. He inferred, not the innocence, but the guilt of a man suffering from delusions, from his not having exercised sufficient control over his passion.

Such being the law, so established that the judges cannot be expected to do otherwise than to use the very words of it in charging juries, let us now devote a little time to the inquiry of what the judges

themselves think of it ; and first let us hear what some of the judges say who approve of the law. The first I shall cite is Lord Blackburn, Chairman of the Criminal Code Bill Commission in 1879, which Commission was satisfied with expressing the existing law with but slight verbal alteration, namely, the change of "not knowing the nature and quality of the act" into "incapable of appreciating the nature and quality of the act." In his evidence before the Select Committee on the Homicide Law Amendment Bill, 1874, Q. 276, Lord Blackburn gave some details of a trial in which "he felt it quite impossible to say that the prisoner ought to be punished, although, on this definition, you would be obliged to say she was guilty." Therefore, he says : "I told the jury that there were exceptional cases, and on that the jury found her not guilty on the ground of insanity, and I think rightly."

But what does this exceptional case of Lord Blackburn's mean if it does not mean that, if you put the law in force, you will hang innocent people ?

I, also, in the course of a large experience, can call to mind another exceptional case which is the converse of Lord Blackburn's. I can remember one case, and one only, of a lunatic on trial for murder, who really did not know the nature and quality of the act which she had committed. It was that of a maniacal woman who had drowned her two children in the Exeter Canal. She was so mad when placed in the dock, that Mr. Justice Coleridge, father to Lord Coleridge, saw that she was unfit to plead. He sent for his brother judge from the Nisi Prius Court, and well I remember seeing the two judges standing in their robes of different colour, and talking low to each other as they looked at the prisoner, and formed their own judgment of her mental state, and Mr. Justice Coleridge ordering her removal to the county asylum. Before the next assize she had completely recovered, and I again received an order to produce her in court, and Mr. Justice Coleridge (for he again was the judge), without taking any evidence, directed the jury to find a verdict of Not Guilty, on the ground of insanity ; and, upon that verdict having been given, he ordered her to be given into the care of her friends. I fancy this procedure was not quite regular, but it was most sensible and humane, for she was innocent and she was sane.

The case supplementing Lord Blackburn's, which did not come within the law, goes to prove that, when a prisoner is so mad as actually to come within the definition of the law, the formalities of the trial may be superfluous.

Again, before the same select committee, Lord (then Baron) Bramwell said : "I think that, although the present law lays down such a definition of madness, that nobody is hardly ever mad enough to be within it, yet it is a logical and good definition." I know not how it can be logical to make a law of exemption which exempts nobody, or how a definition can be good which includes nothing. But Lord Bramwell's judgment of what, using the words of the law, we may fairly call the nature and quality of the law, will be fully endorsed by every one who really knows lunatics and the motives of their conduct. "Nobody is hardly ever mad enough to be within it." It would be

impossible to invent a more sweeping condemnation of the law than is expressed in that pregnant sentence.

And now let us hear what those judges say who do not approve of this law. The late Lord Chief Justice Cockburn, in his memorandum, July 8th, 1874, on the Homicide Law Amendment Bill, says: "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 that 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 in the question of responsibility." In his memorandum of June 12th, 1879, the Chief Justice criticises the law of the Code Bill, which repeats that of the fourteen judges. He says that the language of the essential sentence—namely, that the accused did not know the nature or quality of the act, or that it was wrong, is loose and uncertain; and that it is "language not the less loose and uncertain because it is used by learned judges." Wrong, he thinks, must be understood to mean legally wrong; but what is meant by the nature and quality of the act, he says that he really does not know. To this and to much more criticism he subjected the law, so as to leave no shadow of doubt that he thought that law insufficient and bad.

Now hear what Mr. Justice Stephens says, not when he is contending for his Amendment Bill, but since he has become a justice of the Queen's Bench. How much he may feel himself at liberty to declare the existing law to be a downright bad law, I do not know; but I observe that, as one of the Royal Commissioners on the Criminal Code Bill, he says that a judge "is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are to be found in previous judicial decisions, or in books of recognised authority, and that, in consequence, the elasticity of the law is much smaller than it is often supposed to be" (Report, p. 7). I suppose, therefore, that, as a judge, the expression of his opinions is under some restraint.

In his great work on the *History of the Criminal Law*, vol. ii, Mr. Justice Stephen declares his opinion that the "law of England on this subject is insufficiently expressed" (p. 128). Respecting delusion, which, he says, may interfere more or less with every function of the mind, which falsifies all the emotions, alters in an unaccountable way the natural weight of motives of conduct, weakens the will, and enfeebles every part of the mind, he declares that "upon these questions the answer of the judges throws no light at all, because it assumes the man to be insane in respect of his delusion only, and to be otherwise sane; in a word, the prisoner is treated as a sane person under a mistake of fact for which he is not to blame" (p. 157).

With regard to the emotions and the will, he says: "If the answers were meant to be exhaustive, they certainly imply that the effect of insanity, if any, upon the emotions and the will is not to be taken into account in deciding whether an act done by an insane man did or did not amount to an offence; but they do not explicitly assert this, and

the proposition that the effect of disease upon the emotions and the will can never, under any circumstances, affect the criminality of the acts of persons so afflicted, is so surprising, and would, if strictly enforced, have such monstrous consequences, that something more than an implied assertion of it seems necessary before it is admitted to be part of the law of England" (p. 159).

Again, he says that, "carefully considered, they [that is, the judges' answers] leave untouched the most difficult questions connected with the subject, and lay down propositions liable to be misunderstood, though they might, and I think ought, to be construed in a way which would dispose satisfactorily of all cases whatever." The propositions, as construed by Mr. Justice Stephen, certainly offer a remarkable example of legal dialectic. Thus construed, wrong may mean either illegally or morally wrong, and knowledge may mean a calm judgment of the circumstances and consequences of the act. If it be really possible to construe the propositions of the judges as Justice Stephen thinks they might and ought to be construed, I can well believe that "to read judicial decisions correctly is," as he says, "an art in itself, to be acquired only by long professional practice, aided by rules well known to lawyers, but unknown to medical men." But I am happy to say the art of construing does not satisfy the sound common sense of Mr. Justice Stephen, who concludes his efforts in that direction by a distinct proposition of his own as to what ought to be the law of England, which is as different as well can be from that which is the law.

I have come, then, to the end of this part of my task, and I claim to have proved, not from the theories and imperfect knowledge of medical men, but out of the mouths of the great judges of the land, that the law of the land is, to use one of their mildest terms, "insufficiently expressed;" and, to use a stronger term, that, if strictly enforced, it would lead to "monstrous consequences." It would, indeed, lead to frequent acts of the most cruel injustice. With much pleasure, I now pass with Mr. Justice Stephen to the consideration of what the law ought to be. He says:

"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 of control has been produced by his own default."

I entirely agree with the idea contained in this proposition, but I think it would be difficult to put a good and true idea into language more open to dispute. What is meant by defective mental power which is not conditioned by disease? Is it mere folly which is meant, or is it idiocy, which, as Chief Justice Cockburn pointed out, is omitted from the present law? "No provision is made for original malorganisation; in other words, for idiocy" (Memorandum, 1874). What is meant by "the absence of the power of self-control, produced by the prisoner's own default?" If states of intoxication be meant, they ought to be specified. But, if states of real insanity, caused by evil habits of life of any kind, are meant—as by the context I am led

to suppose—then the proposition is, in this respect, impossible to act upon.

Moreover, the phrase “prevented from controlling his own conduct,” is liable to objection, and has, indeed, been objected to by many judges, and has not been a little worried by Mr. Justice Stephen himself. How can it be said with accuracy that a man controls his conduct when he refrains from a crime, and does not control his conduct when he commits one? Mr. Justice Denman, as we have seen, condemned James Cole on the ground that he did not control his passion. Surely, the most undoubted lunatic, who purposes and plans and executes the most insane homicide, does control his conduct, though in an insane fashion, as the sane man who is tempted to crime and refrains from it controls his conduct sanely, from higher or lower motives of duty or selfishness. For my part, after having long used the term “loss of self-control” in this relation, I give it up as altogether too loose, ambiguous, and inaccurate for so grave and precise a purpose as the definition of responsibility. There are many more definite terms to choose from: incapable, unable, compelled to, cannot help, helpless, cannot avoid; and of these, the first seems as good as any, and it is used in the Criminal Code Bill: “incapable of appreciating.” I would suggest therefore the following simplification of Sir James Stephen’s proposed law of England as it ought to be. *No act is a crime if the person who does it is at the time incapable of not doing it by reason of idiocy, or of disease affecting his mind.* I know not whether Lord Blackburn would think that this definition would be leaving the question “too much at large,” as he said; but surely it would be better than any definition which would leave exceptional cases to be provided for. I think it ought not to be objectionable to Lord Bramwell, who, when trying a lunatic who was also an abominable villain, put the law into a nutshell when he said that the real question was, “Could he help it?”

It contains no medical theories or views, but is wide enough to contain all medical knowledge, and is yet definite enough to meet the practical requirements of the lawyers; and it is, I believe, entirely in accordance with Mr. Justice Stephen’s own line of thought as to the principle of the needful amendment of the law, although it is expressed more simply and tersely than his own proposition of what the law ought to be.

Having come to this conclusion, I must still crave your indulgence for a short time, while I make some remarks upon procedure, *i.e.*, upon the manner in which the law, as it stands, is administered, and add some suggestions perhaps as to its possible amendment. In this country, the questions of the commission of a crime and its excuse on the plea of insanity are, as you know, the joint subjects of one judicial investigation at the trial of the prisoner. But this is not the case in other countries; notably it is not the practice in France, where the code of procedure enacts that when the magistrate during the examination perceives, or is informed by attested certificates, that the person accused of crime does not enjoy the full measure of his intelligence, he is to suspend his examination, and to make an order by virtue of which one, two, or three experts are requested to examine the accused. These ex-

perts having been sworn, examine into the particulars of the crime, and the prisoner's history, and they examine the prisoner himself as often as need be, either in prison or elsewhere; and they can even have him removed to a lunatic asylum for the purpose of prolonged observation. If they report that the prisoner is insane, the magistrate generally accepts their verdict as final, and issues an order of *non lieu*, or no jurisdiction. It is upon the report of these experts, or on the report of another set of experts whom the court has the power of appointing if not satisfied with the first, that it depends whether the trial for the crime itself does or does not take place. But at the real trial, the question of irresponsibility cannot be raised. Practically the same system prevails in Austria and some other continental countries. In a remarkable paper on insanity as a defence for crime, read by Mr. George B. Corkhill, United States Attorney for the District of Columbia (every one will remember Guiteau's abuse of Corkhill), read last year before the Medico Legal Society of New York, this most experienced prosecutor says :

"My candid opinion, resulting from a very large experience in the trial of these cases, is that, when a prisoner proposes to defend his crime on the ground of insanity, a jury specially selected for their fitness should be chosen to try the special plea; and, if the prisoner be found insane, then he should be confined in an insane prison for a time commensurate with the character of the crime; and, if the verdict of the jury be in favour of his *sanity*, then the plea should not be allowed upon the trial of the cause."

At the last annual meeting of the English Medico-Psychological Association, which is composed mainly of the superintendents and other medical officers of lunatic asylums, a resolution, proposed by the President, Dr. Orange, was adopted, recommending a medical examination of persons supposed to be insane before the trial. This examination, it was proposed, should be made in each county by the surgeon of the county gaol, the superintendent of the county asylum, and one other local medical man; and their joint report should be given to the counsel for the prosecution. I see many objections to this proposal. Among others, I feel sure that the examiners indicated would not always be competent to the efficient discharge of their difficult task. Our procedure, as you are aware, does not provide for any official examination into the prisoner's mental state before the trial, although an unofficial one does frequently take place in his behalf; but a prisoner is put upon his trial with no official provision for his defence beyond the nomination of a counsel by the judge, if one have not been provided by the prisoner or his friends. If he should have no friends and no means, I am not aware of any manner by which he will be provided with the services of a solicitor, or in what manner evidence can be sought for, or witnesses summoned for his defence. It is true that, in criminal trials, the witnesses for the prosecution are expected to tell the truth without reservation or prejudice; and consequently, in these days, there is no great danger of a man being found guilty of a murder which he has not committed, however poor, friendless, and undefended he may be. But the absence of pecuniary resources or personal interest in the defence of an insane prisoner is very likely to occasion,

and, there is no doubt, frequently has occasioned, a wrong verdict, with the chance of being remedied in an irregular fashion by the Royal prerogative of mercy, or the other chance of being hanged in ignorance and mistake.

Lord Sydney Godolphin Osborne, the well known "S. G. O." of the *Times* columns, expressed a strong opinion on this matter to the Royal Commissioners on Capital Punishment, an opinion founded upon his large experience as a prison-chaplain. He said: "I am satisfied that we have hanged many insane people; and that we have let off, on the ground of insanity, very many who were never anything but sane."

The late Dr. Swaine Taylor, also, who had great experience of medico-legal trials of all kinds, entertained and expressed a very strong opinion on the great uncertainty which attaches to the trial of insane criminals, arising from the different degrees of publicity and interest which the offence or the trial has excited. Indeed, we may see that it must be so, if we reflect that the lunatics who commit murders are usually those who are afflicted with some kind of madness the signs of which have not been easily observed, so that they have been left at large instead of being confined in asylums. I have known some instances in which madness has for the first time been discovered at the trial. We need, therefore, be little surprised that a number of persons are condemned to death for murder who have to be reprieved by the Home Secretary on the ground of insanity, or that the cause of these reprieves is, to a great extent, accidental. Take, for instance, the two men already mentioned, who were tried and sentenced for murder at the Central Criminal Court last autumn, William Gouldstone and James Coles. Respecting the first case, Dr. Savage of Bethlem wrote a letter to the *Times*; and, respecting the second case, Dr. Jackson of Thornton Heath also wrote to the same journal, demanding further inquiry. Each of these gentlemen had personal knowledge of the condemned man, of whose insanity and irresponsibility he was convinced. The medical press and some organs of the general press of this metropolis backing up these opinions, the Home Secretary was moved to order a medical investigation, with the result that both of these men were reprieved on the ground of insanity, and removed from the condemned cell to the care and protection of Broadmoor Asylum.

There can be little doubt that, if these men had been tried in some remote county, and had not attracted the attention of eminent medical men with knowledge of the subject, and spirit to assert their opinions, both of them would have been executed; for the terms in which they were sentenced render it impossible to believe that the judges could have interfered. Indeed, I understand that it is quite an unusual thing for a judge to interfere.

The late Baron Martin is said to have communicated with the Secretary of State about Victor Townley, whom he had condemned, and which was thought quite unusual. Another judge to whom I myself wrote, suggesting inquiry into the mental state of a prisoner whom he had sentenced, replied to me that it was contrary to custom and etiquette for the judge to approach the Secretary of State in that regard.

I suppose that, if a judge had a strong opinion that a prisoner he had condemned was really not responsible, it would be his bounden duty to convey his opinion to the executive. I cannot readily believe that it can be otherwise, but I do not know, as a fact, that it is so. If the judge had not a strong opinion, I suppose he would let the responsibility for the verdict and its consequences rest upon the heads of the jury. With regard to the Home Secretary, he may be moved by individuals or by the press. I have moved him myself on several occasions in both ways; but I understand that he requires to be moved to consider whether it is right for him to order an inquiry. There is, I believe, no one whose duty it is to call the attention of the Home Secretary to any man lying under sentence of death, respecting the grounds for supposing him to be irresponsible from insanity. If there be such a person it should be known, in order to remove in some degree the unpleasant conviction that these proceedings are in the highest degree fortuitous, depending mainly upon the accident of public interest, or rather of the interest of private individuals capable of forming a rough judgment as to the need and justice of an inquiry.

Surely it ought to be the duty of some responsible official to look into the circumstances of every trial in which sentence of death has been passed, and to state whether there be any *prima facie* ground for the supposition that the condemned man was not responsible on the ground of insanity.

Up to the present reign, the list of persons sentenced to death at each sitting of the Old Bailey was presented to the king in council as the recorder's report, and it was then and there carefully gone through by the king and his council, and who was and who was not to be executed, was considered and decided (Stephen, p. 88).

The whole burden of this momentous decision is now placed upon the shoulders of the Home Secretary. When this powerful minister has been moved to think it right to order an inquiry into the responsibility of a condemned man on the ground of insanity, he entrusts the inquiry to the medical superintendent of the Criminal Lunatic Asylum at Broadmoor, conjoined with whom is one of the medical officers of the prison department.

It would be pleasing to know that the report, that these gentlemen are not paid for their services, is untrue. Those who dispense the Queen's justice are not without their reward, and those who determine the incidence of the Queen's mercy ought not to go without the wages of anxious and difficult work.

I do not know that the order of the Home Secretary is imperative and binding, though I think that it ought to be; for surely it is best to make action in which life or death is in the balance as little voluntary as possible. The order, at least, is obeyed, and the condemned man's mind examined for the first time, it may be, with thoroughness and skill. An ignorant or perfunctory examination of a criminal supposed to be insane is worse than useless; but a systematic examination conducted by skilful and experienced examiners will almost certainly make known the real condition of a man's mind, especially if he be insane. I am not so sure, however, about a sane man who cunningly pretends to be mad.

It must be remembered, however, that this examination takes place some time, often several months, after the murder has been committed, and when the man's state of mind may have more or less changed. The examiners therefore must take into consideration all the circumstances of the crime as signs or symptoms of the mental state which prompted it. They may inquire, moreover, into the conduct of the prosecution and of the defence. Sometimes they may find that the prosecution was unfair so far as the presentment of the mental facts was concerned ; sometimes that the defence was weak, ignorant, and casual, some inexperienced barrister having been appointed to conduct it on the spur of the moment, with no evidence on which to rely. And I do not know that they are even debarred from considering the terms in which the judge declared the law in his summing up. And these terms may vary greatly, even to the length of a rope.

The examiners embody their opinion, with the grounds for it, in a report to the Home Secretary, who, so far as I know, invariably acts upon it. If a reprieve be granted, and the condemned man be sent to Broadmoor, or to Pentonville, it cannot accurately be said that the Sovereign has exercised the prerogative of mercy ; for the Home Secretary and his examiners in these proceedings constitute an informal court of appeal, or an appeal which is not a court, and the decision of this appeal is a reversal of the sentence of the court below on the ground of its injustice. But, court or no court, these proceedings ought not to be kept secret. It is to my mind monstrous that the reports of these medical examiners, upon which the Home Secretary stays the action of the criminal law, should not be made public.

Moreover, although the greatest confidence may rightly be placed in the examiners, still I maintain that, acting as they do in these inquiries as witnesses, they ought to give their evidence under the same sanctions and conditions as are imposed upon witnesses generally, and which are imposed upon the medical experts who are employed to examine criminals who are suspected to be insane, in France and other continental countries. They ought to make their examinations and report under oath, and be subjected to cross-examination thereupon.

Surely it is in the highest degree inconsistent that medical opinion, which is placed under such stringent limitations and restrictions in criminal courts, should be so implicitly accepted, without any test of its validity, in the proceedings which reverse the decisions of those courts.

Moreover, as the judge in this informal court, namely, the Home Secretary, is not always a lawyer, and still less frequently a criminal lawyer, it would seem to be adding the climax to the informality and insufficiency of the proceedings that he should act upon the evidence of the medical examiners without the aid of a judge to advise or determine the relevance or bearing of that evidence in regard of the law. The most simple and efficient change in all these respects would probably be to transfer the whole of these proceedings to a limited court of appeal.

But, if it be desired to keep up the fiction of the exercise of the royal prerogative of mercy in these cases, through the action of Her Majesty's Minister, then, at least, let Her Majesty's Minister provide

himself with the aid of professional knowledge upon the determination of a question which her Majesty's servants, the judges of the land, are agreed in considering one of the most difficult in the range of their duty.

It is scarcely needful to say that my comments do not apply to the action of any individual Home Secretary past or present. It is the system which I criticise. The judges, I am surprised to find, prefer the system which makes them, as Lord Bramwell says, automaton as to the extreme sentence of the law, and leaves the determination of its execution to the executive. On this account, they object to the restoration of their once discretionary power of recording sentence of death, which means the option of inflicting secondary punishment. But for the judges to take vast pains and trouble in their endeavours to settle a reasonable law of insanity *quoad* responsibility, and to labour with patient industry and care to put that law into execution, and then, without remonstrance or disapproval, to see the result of it all snatched from their hands by a secret and unjudicial proceeding, is an inconsistency which would scarcely be credible if it did not certainly exist.

I trust that I have convinced you that, if the law on this matter is bad, the procedure is worse. It only continues to exist because its most important action is taken in secrecy. Once let the report of the examiners be published, and the formalities and sanctions of judicial investigation will necessarily be imposed. The only instance I can call to mind in which the report of such an examination was not kept secret, was that upon George Victor Townley, in whose examination I assisted and the report of which I wrote. The Home Secretary published this report in the newspapers, with the effect of at once allaying a distressing controversy. Whether the examination into the mental facts take place before or after the trial, there can, I think, be no real doubt that it ought not to be secret, or loose and diffuse as to its scope, or the evidence elicited deprived of the usual sanction of fidelity, or released from the test of professional examination as to its real purport and accuracy, or carried on under no superintending authority.

I do not expect that my comments will be objected to by the experienced and competent examiner who is now employed, for he has himself proposed to the association, over which he is president, the change to an examination before the trial by other examiners. To this change one great objection, in my opinion, is that it would exclude his own services.

I have no objection to an unofficial examination before the trial on behalf of the prisoner, with the concurrence and consent of his solicitor; and a man put on trial for his life ought to have a solicitor, however poor he may be. A solicitor is really more important in such defences as we are considering, than a counsel, for he can collect and prepare evidence. The greatest objection to an examination forerunning the trial is that it would be almost impossible to prevent it from eliciting confession of the deed, which would often be embarrassing and contrary to the spirit of our law (although, in France, as you may know, confession is encouraged or provoked). A solicitor for the defence would decide whether this danger existed or not, and would

have a mental examination instituted or not, as he thought best for his client. An official examination, forerunning the trial, which had the misfortune to elicit a confession fatal to the prisoner would, I think, be condemned by English opinion. I do not know what legal right the prosecution or the executive has to order the examination of a prisoner committed for trial.

The examination of a man who has already been condemned to death for murder, and the formation and expression of an opinion as to whether he is insane in such a manner or degree that he ought to be reprieved, or not so, and therefore ought to be executed, imposes such a burthen of responsibility, that it ought not to be laid upon any man without those easements in the discharge of duty which lighten the responsibility of all who take part in judicial investigations.

From every consideration, therefore, of judicial method and consistency, the present mode of dealing with condemned men suspected of insanity, ought to be abolished, and a systematic investigation by sworn examiners, who should give public evidence subject to cross-examination, under the control of a judge, should be substituted.