This statement that shame depends on the opinion of others is by no means contradicted by the possibility of the individual feeling shame while alone, for there is always the reference to a standard other than his own. But the shy or diffident person notoriously feels sure of himself in solitude. In imaginary rehearsals of scenes through which he has passed—actually to his own confusion—he always carries himself with easy self-possession, and *l'esprit d'escalier* is famed for its brilliancy. He can make plans for his confident behaviour, but the presence of others disconcerts him totally. Shame, it may be repeated, is experienced quite irrelevantly to the presence of other people.

Where all were afraid, or immodest, or brutal, or obscene, or dishonest, or disgraced, none would feel shame. From what has been expressed in the foregoing paragraphs it will be seen that shame is invariably set up by an *incongruity* between the shamed person and his associates. If the particular circumstances involved no loss of position—moral or material—it is doubtful whether shame would ever be felt. And as this dependence on the opinion of others is the important factor, it does not seem too far-fetched to define shame as "the social expression of self-interest."

Unfitness to Plead in Criminal Trials. By M. HAMBLIN SMITH, M.A., M.D., Medical Officer, H.M. Prison, Portland.

THE subject of this paper is the criteria of an accused person's fitness to plead to an indictment charging him with some criminal offence. It is a consideration of the questions which are involved in the special verdict of "insane on arraignment." We shall see, however, that in this connection the word "insane" is used in an extended sense.

There are four stages in the process of any criminal case, tried on indictment, at which the question of the accused person's mental condition may have to be reviewed: (1) Before the trial. (2) Before he pleads to the indictment at the trial. (3) During the progress of the trial. (4) After the trial. The questions raised at the second of these stages are those

which mainly concern us here; although, for statistical purposes, we must consider the cases found insane before trial. We shall see that these questions are essentially practical, and that they differ materially from the fascinating metaphysical question of a person's "responsibility according to law."

Probably the very controversial character of the points involved in the verdict of "guilty but insane" accounts, to some extent, for the comparatively small attention which has been given to the verdict of "insane on arraignment." But the latter verdict is worthy of attention, and is by no means infrequent.

The author trusts that he may be pardoned for giving a short historical introduction. He thinks that this is not merely of antiquarian interest, but that it really serves to throw light on the question of pleading at trials.

In former times persons accused of felony were not considered to be tried properly unless they consented to their trial by "pleading and putting themselves on the country." The indictment having been read, the prisoner was asked (as he is at the present day), "How say you; guilty or non-guilty?" If he replied, "Non-guilty," he was then asked, "How will you be tried?" He had to reply, "By God and my country." If he refused to answer these questions he was said to "stand mute"; and a jury was sworn (as a jury may be sworn to-day) to try whether he was "mute of malice" or "mute by the visitation of God." If found "mute of malice," and accused of treason or misdemeanour, he was taken to have pleaded guilty, and was dealt with accordingly. But if accused of felony the trial could not proceed in the absence of a plea, and the prisoner was condemned to be pressed (*peine forte et dure*) until he pleaded or died. The usual object of a refusal to plead was to preserve the accused man's property for his family by avoiding the forfeiture to the Crown which followed on a conviction. As there could be no trial, there was no conviction, and hence no forfeiture of goods. In 1659 a Major Strangways was pressed to death for refusal to plead. The last case of pressing was in 1726, when a man accused of murder was pressed for two hours, and then pleaded not guilty; he was tried, convicted, and hanged. The law remained as stated above until 1772, when standing mute in cases of felony was made equivalent to a conviction. In 1827 it was

enacted that in such cases a plea of not guilty should be entered, and the trial be proceeded with in the usual way (1). A part of old Newgate Prison was known as the "press-yard," and the name survived until the destruction of the building.

The question of "mute of malice" need not detain us long. At the present day such an event is not likely to occur, save in the case of a prisoner who is attempting to feign insanity. A curious case may be mentioned, that of a man named Harris who was tried for murder in 1897. After the murder he had attempted to cut his own throat, and had inflicted such injuries on his vocal cords that he was unable to speak. His trial was postponed to the next sessions, when presumably his vocal condition had improved, for he was then tried and sentenced to death. It might, perhaps, be debated whether this man was mute "of malice."

Coming to muteness "by the visitation of God," this may occur in deaf-mutes, or in cases of insanity or mental defect. As the question of the cause of the muteness is only one of the questions which may be raised on arraignment, it will be convenient to return to muteness later.

Having found that the prisoner is "mute by the visitation of God," the jury may next be sworn to try whether the prisoner is "fit to plead." And, further, the jury may again be sworn to try whether he is "sane or not." It seems that, strictly speaking, the jury should be separately sworn to try each of these three issues, in the order as stated above. This rule, however, is not always followed, and the judge may put all or any of these three issues to the jury.

The prisoner may not be mute, and yet may be unfit to plead by reason of mental disease or defect. It is a general rule of English law that a man must be present at his trial. This is certainly the case in trials for felony, and, except under very exceptional circumstances, in trials for misdemeanour also. The prisoner has a right to be present in body, though he may forfeit this right by his own misconduct: judges have ordered the removal of a prisoner who was wilfully and persistently noisy. And he has also a right to be "present in mind." In other words, he must be sane at the time of his trial; or, at any rate, he must be able to understand the proceedings. This right appears to be part of the English common law. Hale says: "If a man in his sound memory commits a capital offence, and

before arraignment becomes mad, he ought not to be arraigned, because he cannot advisedly plead to the indictment" (2). And Blackstone says: "If a man before arraignment for a capital offence becomes mad, he ought not to be arraigned, because he is not able to plead to the indictment with that advice and caution that he ought" (3).

It will, of course, be remembered that in the days of Hale and Blackstone capital offences were far more numerous than they are now. The Statute 33 Hen. VIII, c. 20, made treason a special exception to this general rule, and provided that if, after committing an act of treason, the prisoner became insane, he was still to be tried, and if found guilty was to be dealt with. But this remarkable statute was repealed by 1 and 2 Phil. and Mary, c. 10. It appears from old authorities that the question of the prisoner's sanity at the time of trial might be inquired into by the jury impanelled to try the indictment (4). But the law was finally settled by "The Criminal Lunatics Act," 1800. This statute was passed after the trial of Hadfield (a man who had fired a pistol at George III), and it provided—"that if any person indicted for any offence shall be insane, and shall on arraignment be found so to be, by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment, it shall be lawful for the Court to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure shall be known." And this remains the law to-day.

So we have to consider what is the degree, and what the kind of mental disease or defect which justifies this verdict of "insane on arraignment." Pleading to the indictment is not merely a matter of saying "guilty" or "not guilty." Much more is involved than this. The essential point is the state of the prisoner's mind at the time of arraignment. And, according to Russell, the test is "whether the prisoner is of sufficient intellect to comprehend the course of the proceedings on the trial so as to make a proper defence" (5).

The word "proper" is clearly the difficulty. Baron Alderson in the case of R. *v.* Pritchard directed "that the jury must be satisfied that the prisoner was of sufficient intellect to comprehend the course of the proceedings on the trial so as to make a proper defence, to challenge a juror to whom he might object, and to understand the details of the evidence." The author

has heard it laid down in court that the prisoner must be able (if defended by counsel) to give proper instructions for his defence, or (if undefended) to cross-examine the witnesses for the prosecution. Presumably *all* the criteria mentioned by Baron Alderson must be satisfied in order to establish the prisoner's fitness to plead.

If these rules were applied strictly and literally a very large number of prisoners would have to be declared unfit to plead. For instance, take the right to object to (technically, to "challenge") a juror. How many prisoners are even aware of their right in this respect? True it is that the Clerk of the Court repeats a formula which informs the prisoner of his right. But one may be permitted to wonder how many prisoners find this information intelligible. And, again, it is a question as to how many prisoners are capable of making what may reasonably be called a "proper defence," or of cross-examining witnesses, or (if defended) of giving proper instructions for their defence. But it is clear that mere ignorance, or lack of education, or ordinary stupidity, will not be enough to justify a verdict of unfitness to plead. And cases of this kind, if undefended, are safe in the hands of the presiding judge, from whom they receive all possible and proper assistance.

What then is necessary in order that a prisoner may properly be allowed to plead? He must clearly understand that he is on his trial. He must understand for what offence he is being tried. And he must be able to appreciate the difference between a plea of "guilty" and of "not guilty" (see R. *v.* Wheeler, 1852). If there is any uncertainty on these points he is unfit to plead. Next, he must have a reasonably clear idea of the proceedings against him at the trial, and of their meaning and effect. It must not, of course, be expected, or claimed, that an ignorant man of the labouring class should have the same ability to make a defence which would be possessed by a highly educated man. But it may perhaps be insisted upon that he should not be markedly below (either by reason of mental defect or disease) the average mental capacity of a man of his age, education, station in life, etc. No demur will be taken to the position that any condition of acute insanity—mania, melancholia, dementia præcox with stupor, acute confusional insanity, etc.—would justify a verdict of "insane on arraignment." The real difficulty arises in cases of undeveloped insanity, *e.g.*, early

general paralysis or commencing senile dementia, and also in such states as paranoia and some cases of epilepsy.

What, then, are the points which we must consider? Memory is an important matter. If the prisoner's memory for recent events is markedly affected, so that he is unable to remember the events at the time of the alleged crime, then surely it is impossible for him to make a proper defence to the charge. Indeed, in some cases of senile dementia the word "trial" would be a misnomer. Difficulty, in this direction, may arise in early cases of general paralysis; and an awkward problem is presented in cases where an offence has been committed during an epileptic "equivalent," or in a post-epileptic condition. As a general rule, such a patient will have no recollection of events which occurred when he was in this state. And so it might be urged that he was, to a large extent, incapacitated from defending himself against the charge. The author is of opinion that the prisoner should plead, evidence of the epilepsy being placed before the court at the proper time. Such a patient might well be apparently normal in the intervals between his epileptic attacks. But in a case of *epileptic insanity* the situation is altogether different, for here the memory, perception, attention, and judgment may be so affected that the prisoner may be unfit to plead (R. *v.* Henley, 1912). Memory is not, of course, the only point to be considered. If his perception, attention, reasoning power, and the other elements which make up intelligence, are markedly impaired, then it may be that the prisoner should be regarded as unfit to plead, having regard to the conditions of fitness to plead which have already been laid down. And, besides intelligence, the emotional reaction and the will power must be taken into account.

The existence of delusions would not be, in itself, a sufficient ground on which to base inability to plead. Delusions are, of course, excellent facts on which to base a demonstration of insanity, and it is impossible to say what part of a man's conduct is unaffected by an insane delusion. Yet in cases of paranoia, where delusions (*e.g.*, of persecution) may be the prominent feature, the patient may be capable of defending himself with much acumen. It cannot be too clearly pointed out that a man may be insane, and may be found "guilty but insane" at his trial, and yet may have been rightly considered fit to plead.

A person may have been insane at the time of the crime, and may be recovering at the time of trial. Such an event is very likely in cases of puerperal insanity with destruction of the child. The prisoner should plead, and a verdict of "guilty but insane" will probably be returned. The mental questions on arraignment are solely concerned with the state of mind at the time of arraignment.

A prisoner may be aware of the nature of the crime with which he is charged, may have given himself up for it, and may know quite well that he is being tried, but yet may be unable by reason of his mental state to "take a rational part in his trial, to understand the evidence against him, and to do his best to defend himself against the charge" (Baron Pollock, in R. *v.* Mills, 1884).

So far we have considered what may be called cases of "certifiable insanity." Surely the principles laid down might include many cases of "mental deficiency." An "idiot" or an "imbecile" would naturally be found "insane on arraignment." And it seems that the rule might apply in many cases of "feeble-mindedness." The "Mental Deficiency Act," 1913, defines such cases as persons "who by reason of mental defect, existing from birth or from an early age, require care, supervision, and control, for their own protection or that of others." Apply the criteria of fitness to plead to such persons. And apart from what might be called "statutory feeble-mindedness," in which a congenital or early origin must be proved, there are many cases of "senile" and of "alcoholic" feeble-mindedness. In these, as in the congenital cases, the intelligence, the emotional reaction, and the will-power are often most markedly affected. Such persons may often be quite unfit to plead. And the author would suggest that the criteria of fitness to plead might often be applied in such cases, and the power of detention under the "Criminal Lunatics Act," 1800, might often be used. The congenital or early origin of the case need not be proved; the question of fitness to plead is all that need be considered. If it is objected that it is too great an extension of terms to call such cases "criminal lunatics," the answer is that it is not so great an extension as we shall see later is made in some cases of deaf-mutes.

So we have seen that no general rule can be laid down as to the degree or character of mental disease or defect which

renders a person unfit to plead, any more than an absolute rule can be made as to the degree of mental derangement which renders a person "irresponsible for his criminal actions." Each case must be considered on its merits. All the circumstances must be weighed with care. And the possibility of feigning or exaggerating symptoms must not be ignored. All this will require close and continuous observation of the prisoner, and often careful inquiry into his history and into the circumstances of the crime. The process may be of a very intricate character, and may involve repeated and prolonged interviews with the prisoner. The author knows that he is touching on difficult and highly controversial matter. But he ventures to think that in many cases inquiry will be futile unless there is discussion of the circumstances of the crime with the prisoner. And, further, he considers that any information, bearing on the guilt of the prisoner, which is obtained in this way, must be regarded as confidential. The author believes, and it is confirmed by his personal experience, that this privilege, though perhaps technically unknown to the law, is practically allowed by courts at the present day. In epileptic, and in other cases, where the question of loss of memory may be of paramount importance, free discussion of the circumstances of the crime must be an essential feature of the examination. All this has its bearing on the question of full inquiry into the mental state of every person before his trial. The author holds strong views on this subject, but it is not a matter which can be entered into here.

Many cases may be doubtful. And it must be remembered that, as Dr. Nicolson says, it is desirable that a prisoner, although insane, should be allowed to plead if he is at all capable of doing so (6). It is, for many reasons, well that whenever possible a verdict should be obtained on the merits of the case. It may happen that the prisoner is proved innocent. If he is insane, there are still ways of dealing with him.

Now let us return to deaf-mutes. There may be the possibility of communicating with such a case either by writing or by means of the sign language. And the prisoner is then in the same position as a foreigner, ignorant of English, who has to be communicated with through an interpreter. His sanity or insanity would still have to be considered. But a deaf-mute who is illiterate and is ignorant of the sign language cannot be

communicated with at all. Such a person is clearly unfit to plead, and is properly so found. And in the case of R. *v.* Emery, 1909, it was held that such a finding is equivalent to a verdict of "insane on arraignment." Exactly similar cases were R. *v.* Leese, 1914, and R. *v.* King, 1908. So, as suggested at the beginning of this paper, the word "insane" has a somewhat extended meaning. With deaf-mutes the only thing to be done is to endeavour to prove whether there is any means of communicating with them. This may involve a difficult decision. And this difficulty may be much increased when the deafness, although great, is not absolute, and the inability to speak is not complete (R. *v.* Birch, 1914).

The possible combinations of circumstances, and the verdicts, may be put in a tabular form :

(I) Prisoner may be "mute by the visitation of God."
  (i) Sane and can be communicated with—Fit to plead.
  (ii) Presumably sane, but cannot be communicated with—Unfit to plead.
  (iii) Insane (or mentally defective), but can be communicated with—Unfit to plead.

(II) Prisoner not mute, but insane (or mentally defective) :
  (i) Able to make a proper defence—Fit to plead.
  (ii) Unable to make a proper defence—Unfit to plead.

How do such cases usually occur in practice? The author, of course, writes from the position of a prison medical officer, upon whom the duty of reporting to the court in all doubtful mental cases is laid. The jury may form their opinion of the prisoner's sanity or insanity from his manner and appearance (7). But practically there must be some suggestion, however informal, of unfitness to plead ; and this may come from the prosecution, from the defence, or from some other source. And in most cases the first suggestion comes from the prisoner's side, in cases which are defended by counsel (an insane man himself is not likely to put forward a plea of insanity). This explains the fact that pleas of insanity are most common in capital and other serious cases. Counsel are unwilling to risk an indefinite detention for a client, in consequence of an offence which would normally be punished by a short period of imprisonment. The modern tendency towards shorter sentences will increase this reluctance.

Simple uncontroverted cases will give rise to no difficulty.

But the case may be contested by the prosecution (as in R. *v.* Taylor, 1888), or by the prisoner (as in R. *v.* Mauerberger, 1887). Counsel may wish for a verdict on the facts. In this event the medical witness will be cross-examined. There is some difference of opinion as to the manner in which the medical evidence should be given. Facts must, of course, be the basis of any opinion which is given. Some judges allow, and even ask, the medical witness (after he has described the observed facts) to express his opinion as to the prisoner's ability to understand the proceedings, to make a defence, etc. Other judges appear to have ruled that these latter questions are for the jury alone, and that the medical witness must confine himself strictly to a description of facts. This latter view, if pushed to the limit, seems unreasonable. But perhaps the best plan is to describe the case fully and give a reasoned opinion in the written report before trial, and in court to answer such questions as may be asked.

A defended prisoner may persist in pleading in spite of his counsel's admission that he is unfit to plead. This occurred in the case of R. *v.* Douglas, 1885. He was finally allowed to plead, and was found guilty but insane.

A peculiar condition of affairs occurs when an insane man, having been declared fit to plead, persists in pleading guilty. Further inquiry into his mental state by the court appears to be barred, and he must be sentenced and then dealt with as an insane prisoner. Such a case occurred in R. *v.* Swatman, 1876, and also in a case in the author's own experience in 1913.

There is no appeal against the finding of a jury that a prisoner is fit to plead. Of course it is possible to appeal that a sentence may be quashed on the grounds of insanity (7).

All persons, deaf-mutes and others, who are ordered to be detained as insane on arraignment are treated and classed as "criminal lunatics." This seems a peculiar title, for two reasons. Firstly, such persons have never been convicted of the crime charged against them. Under the "Criminal Lunatics Act," 1884, if a person detained as "insane on arraignment" becomes sane, the Secretary of State *may* order him to be remitted to prison to be dealt with according to law. And, presumably, a deaf-mute, detained because it was impossible to communicate with him, might also be remitted to prison for trial, if, by means of education, communication became possible. And secondly, it

is doubtful whether even persons found "guilty but insane" at their trial can properly be termed *criminal* lunatics. For the judgment of the House of Lords in R. *v.* Felstead (1914)was that a verdict of "guilty but insane" does not amount to a conviction.

Taking a number of years before the war, the average yearly number of verdicts of insane on arraignment was 24 male and 6 female cases. This amounted to 3 per 1,000 males and 9 per 1,000 females of cases convicted on indictment. (Strictly the figures should be reckoned on the numbers tried on indictment, but the author simply wanted to illustrate the relative frequency of the verdict in men and women.) To these numbers should be added such cases as are certified insane while waiting trial (38 males and 30 females), who were presumably so insane that any attempt at a trial would have been impossible. And there must also be added an uncertain number who were certified insane on remand and at the police court, some of whom would have been indicted had their cases being allowed to proceed. During the same period a yearly average of 28 men and 12 women were found "guilty but insane." From the opening of Broadmoor Criminal Lunatic Asylum to the end of the year 1912 there were received into that institution 721 cases certified while awaiting trial or found insane on arraignment, of which 482 (67 *per cent.*) were charged with murder or attempted murder, and 1,282 cases acquitted on the grounds of insanity, found guilty but insane, or reprieved on the grounds of insanity, of which 1,115 (87 *per cent.*) were for murder or attempted murder. (These numbers support the suggestion, made earlier in this paper, that the plea of insanity is far more frequent in murder trials than in any other class of crime.) And on December 31st, 1912, there were in Broadmoor 195 men and 74 women certified while waiting trial or found insane on arraignment; and 346 men and 145 women acquitted on grounds of insanity, found guilty but insane, or reprieved on grounds of insanity. The marked preponderance of women will be noted, having regard to the fact that the number of men tried on indictment to the number of women so tried is about 11·5 to 1. The great excess of these cases among women is probably accounted for by the large number of infanticide cases, in which there is a great reluctance to convict (a conviction necessarily implying a sentence which everyone knows will not be carried out).

CONCLUSIONS.

(I) The term "insane on arraignment" is used in a somewhat extended sense. And it would be well if some alteration in the legal phraseology were made (*e.g.*, to substitute the words "unfit to plead").

(II) No absolute standard of insanity or mental defect can be laid down as unfitting a man to plead. Each case must be considered on its merits.

(III) That while recognizing that the presumption in all cases should be that the prisoner is fit to plead, there is some reason to think that in many cases it would have been well had the question of the prisoner's mental state been considered at an earlier stage.

The author is only too well aware of the defects of this paper. He has two excuses for publishing it—the comparatively small attention which seems to have been given to this verdict, and the fact that he was asked to write it by an eminent alienist with whom he was associated in a case several years ago. He has tried to make the legal side of the paper as accurate as possible.

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