The Plea of Insanity in Cases of Murder. The Case of Tierney. By D. Yellowlees, M.D. Edin., F.F.P.S.G., Physician Superintendent Glasgow Royal Asylum.

The following case occurred at the Glasgow Circuit Court, in September, 1875, and seems well worthy of record in the "Journal of Mental Science." It is especially important, as showing that the Crown, disregarding the formal definitions of the Judges, has practically recognised that insanity, like other diseases, varies greatly in degree, that it may modify without destroying legal responsibility, and that it may mitigate without annulling the penalty due to crime.

That the insane retain more or less knowledge of right and wrong, more or less sense of responsibility, and more or less power of self-control, are truths which have always been recognised by physicians; and they are the foundation of all asylum Government, as well as the basis of all moral treatment. The following case is merely the application of these principles in the administration of justice, and to an individual whose mental deficiency was not so great as to have obtained for him the benefit of asylum care.

While to alienists this case is thus but the natural and legitimate application of principles for which they have long contended in vain, it marks a wonderful and most welcome advance in our legal administration. It gives grounds for hoping that insane criminals may at length be dealt with on some reasonable and uniform principle, and that an end may be put to the utter uncertainty and the constantly-recurring errors which have made these cases a scandal on our administration of justice.

The facts of the case were simple, and were not disputed. The prisoner Tierney and his victim, Campbell, had been employed for years in the same coal-pit, and for months had worked together in the same "heading." No other collier worked in that heading, and these two filled alternately the hutch, or tram, in which the coal is sent to the surface. As coal-cutting is paid according to quantity, each man tries to send up as many hutches as possible; and as the full hutch must be removed before the empty one can enter the heading, each man in turn may have to wait for the other. Disagreements are thus apt to arise, and it was proved that these two men had repeatedly quarrelled about their hutches, the oversman of the pit stating that his interference had

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been necessary to arrange their disputes, and that he had generally found Tierney in the wrong. On the forenoon of April 21st, 1875, the two men had been working together as usual, but Tierney suddenly left the pit, and some fellow-workmen, who were employed about twelve yards off and had heard no quarrel, were attracted to the heading by groans. They found Campbell in a dying state, with two large stones lying upon his body, and with many fractures of the skull, evidently caused by blows from a collier's pick. Tierney was arrested the same evening at some distance from his home.

While in prison awaiting trial, allegations were made as to Tierney's insanity, which led the Procurator Fiscal to desire a special medical examination and report as to his mental condition. This duty was entrusted to Dr. Robertson, of the City Parochial Asylum, Glasgow, and myself. We twice examined the prisoner in July last, and spent about an hour with him on each occasion, a week elapsing between our interviews. We also examined the warder who had charge of Tierney and a fellow prisoner who was associated with him, as to his behaviour in prison; while the prisoner's wife and the Roman Catholic priest informed us as to his previous history and general character.

This evidence was all brought to us at our request by the Procurator Fiscal, and it was impossible to get such facilities for fully investigating the whole case, as well for as against the prisoner, without feeling how important for the accused, as well as for the public, is the existence of a Public Prosecutor. Had Tierney's deed been committed in England no such aid would have been given him; and as his poverty precluded so full a defence, he would in all likelihood have been executed. No one can tell how many partially insane criminals have thus suffered wrongfully the extreme penalty of the law.

The result of our most anxious investigation was a Report, of which the following sentences formed part:—"His manner was peculiar, reserved, and suspicious, and his replies to questions were slow and evasive. He was fully aware that he is charged with murder, but denied all knowledge of the crime, and appeared quite easy and indifferent as to his serious position. His present mental peculiarities are quite consistent with the occurrence of a previous prolonged attack of insanity, with occasional subsequent relapses, and are even suggestive of it; but we were unable to dis-

cover any such mental aberration or defect as would justify us in certifying that the prisoner was insane at the time of our examinations." In transmitting this report, we directed special attention to the statement made by the prisoner's wife, which of course required confirmation, but which went to show (1) that Tierney's father and cousin had been insane; (2) that Tierney had been insane for a considerable time about sixteen years ago; (3) that he had had several subsequent relapses; and (4) that at no time had his mental condition been perfectly restored to what it was previous to the first illness. I may say here that the first of these allegations was not substantiated eventually, and seems to have been incorrect; the second was true, the third, though not proved at the trial, was apparently true, and the fourth was also probably true.

We again examined Tierney just before his trial, which took place at the Glasgow Autumn Circuit Court, before Lord Ardmillan, and found his condition unchanged.

The following details were elicited at the trial, and are important. The murder took place shortly after eleven a.m. on 21st April, 1875. About eleven o'clock a hutch filled by Tierney was taken away, and a witness, who saw Campbell take in the empty hutch, and heard the noise caused by filling it, was told by him that it was his fifth, and that Tierney and he had already filled four each. Another witness, who had heard the two men quarrelling about their hutch only a day or two previously, was the first to enter the heading after the murder. He saw a hutch full of coal and Campbell lying near it beneath two stones. When he asked the prisoner "What had done that," Tierney, who was putting on his coat, said, "It was me." Tierney had come to this witness a few minutes previously for a light to his lamp, and when asked, "What was wrong, that he required a light," he answered, "Nothing."

On his way from the heading to the bottom of the shaft, Tierney was asked by two witnesses, "Where he was going," or "why he was going so soon?" To one he answered that he was going home, and that he had filled *five* hutches, and to the other that some supports were required in his working, and that he was dropping off until they were put up. He had to wait for about ten minutes at the bottom of the shaft, till the engine resumed work, and he there had a conversation with the oversman of the pit, who ascended with him. He told him as his reason for leaving work at that unusual

hour that he was going from home; and he also asked for a change of place in the pit, as he did not like his present working. The oversman promised him a change, and saw nothing unusual about him. As he hurriedly left the top of the shaft, he told the pitheadman, "quite coolly and collectedly," that he had filled *five* hutches. Neither did this man see anything unusual in his manner. "He had known Tierney for six years, and never noticed anything peculiar about him."

Tierney did not go home, but went to the house of a neighbour, and asked for his wife. Finding that she was out at work, he said to the woman of the house, "Where shall I hide?" The woman was afraid of Tierney, "for he looked excited, and he had a name of not being right in his mind," and asked what was wrong. She understood him to answer that he had "put the pick in Campbell." She said, "Dear me, was he meddling with you?" and he replied, "Of course." He then asked for water that he might wash, which was given him: the woman got his clothes from his own house, his son brought him some money, and he went off. He was apprehended the same evening at Rutherglen, on his way to Glasgow. There was nothing strange about his manner then; and when charged with the murder, he only asked, "Who saw me do it?"

It was proved that the stones which were found on Campbell's body could not have fallen upon him from the roof, but must have been carried some yards. It was also proved that four hutches of coal had come to the pit-head from each of the men that morning, and that a fifth hutch, *bearing Tierney's mark*, came up next day.

Tierney had been regularly at work during that month, up to the 21st, on which day the murder was committed, with the exception of one day.

The medical witnesses, who had been allowed to remain in court, in order that they might hear the other evidence, were next called. It seems to me an error in the procedure, that the medical testimony should be taken before all the facts, for the defence as well as for the prosecution, have been proved in court. The present course hampers the witness, who cannot quote in his evidence, nor entirely found his opinion upon, facts which have been certified only by near relatives or interested friends; and it no less hampers the prisoner's counsel, who can elicit replies pertinent to the case in hand, only by putting questions on hypothetical cases. It would be much

better for both sides that all the other evidence should be given first, the medical witnesses being present, and the facts being thus fully elicited, that the medical opinions founded on them should then be called for. The medical witnesses would thus be placed in their true position, and be better able to discharge their proper function—that of giving the correct medical interpretation of all the facts, irrespective of either side.

In the present case, fortunately, this erroneous mode of procedure was of no moment, as we were already perfectly familiar with all the facts of the case; but we did what we could to rectify it by frankly telling the prisoner's counsel, previous to the trial, and without any formal pre-cognition, our full opinion of the case, and how far we were able to go in the prisoner's favour. To our surprise, little or no use was made of this information; and it was at our own suggestion that, after the facts in the prisoner's favour had been proved in court, we were again examined, and were enabled to give him the full benefit of our opinion.

Our first evidence was thus confined, in great measure, to what we had ourselves seen, or to such opinions as we knew to have a secure foundation in fact. It was as follows—this and all the quotations being taken from the "Glasgow Herald" of September 17, 1875:—

Dr. Walter Walker Lennox, Hamilton Prison, said that towards the end of April he conversed with the prisoner for the purpose of ascertaining his mental condition, and found that he was perfectly sane. His reasoning faculties appeared to be good, and the only thing peculiar about him was his thorough indifference to his position. He was of ordinary intelligence.

Cross-examined by Mr. Lang—He had no doubt that Tierney was brought to him 16 years ago for examination, but he had no recollection of that fact.

Re-examined by Mr Muirhead—He had heard the evidence given, and had heard nothing to cause him to alter his opinion as to the sanity of the prisoner.

By the Court—When he last saw the prisoner there was no change in the condition of his mind from what it was at first.

Dr. D. Yellowlees, Gartnavel Asylum, had examined the prisoner in Hamilton Prison on two occasions, and conversed with him for nearly an hour on each occasion. He seemed a suspicious kind of man, casting furtive glances towards those with him, but there was no indication that his mind was not sound. Witness saw prisoner on the 14th inst., and he was convinced that he was a dour, sulky, repellent

sort of man, but that he was quite sound in mind. He had heard nothing that day to alter his opinion as to the sanity of the prisoner.

Cross-examined by Mr. Lang—Assuming that the prisoner was insane 16 years ago, that would not necessarily alter the opinion he had expressed. It depended entirely whether the man had recovered perfectly and completely from the original illness or not.

By the Court—When he examined the man he was aware that it was reported that he had been previously insane, and it was impossible to divest the mind of that fact. In these circumstances, what he saw was not inconsistent with, but was rather suggestive of former insanity, from which the man might not have completely recovered; but at the same time he saw no indications of existing insanity. If a man shows no signs of existing insanity, he held his recovery to have been complete. If a man continued at his work steadily, drawing his wages, counting his hutches, telling correctly the work he did up to a short time of a particular act, that would indicate sanity up to the particular time. If immediately afterwards he correctly stated the number of hutches he had filled, conversed quietly, and asked to be taken to the top of the pit, that would afford a presumption that he was then sane. There was a possibility of a man labouring under a mental deficiency doing all the duties of life without his neighbours observing insanity. If he heard in a case like the one before the court, that since the original attack there had been recurrent attacks of insanity that would lead him to regard the mental condition of the man as more unstable and uncertain than it would have been had there been no intermediate attacks.

Dr. Robertson, City Parochial Asylum, in conjunction with Dr. Yellowlees, examined the prisoner on the 20th and 26th of July, and his opinion was that on these occasions he was of sound mind, but of peculiar temperament, being suspicious and indifferent. Previous to the second occasion he learned that the prisoner had been insane 16 years before; but the fact did not change his opinion. It was quite possible for a man who had been insane to recover, and be able to go about his usual avocations with perfect sanity. There was such a thing as homicidal insanity, and persons suffering from it were easily excited, did things rashly, and had sometimes a disposition to homicide, coming on in paroxysms, the mind in the interval being calm and apparently rational. He would be inclined to think it very improbable that such paroxysms would recur in the case of a person who, though he had been insane, had for 16 years in the interval followed his usual avocation in a perfectly sane manner. He had heard the evidence as to the circumstances of Campbell's death, and in his opinion it did not go to show that the prisoner had done what was testified to in such a paroxysm.

Sheriff Spens then testified that the prisoner emitted his deposition while in his sound and sober senses, though his

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manner was peculiar. In the deposition the prisoner admitted that he had worked with Campbell; but when asked whether he had struck him with a pick, he remained silent.

The exculpatory evidence was next led. It was proved that Tierney had been insane for a lengthened period about sixteen years ago, after the death of a child, and that he was about that time removed to Ireland as a lunatic, by the Hamilton Parochial Board. Tierney's brother-in-law testified that his insanity had been of a dangerous character, that "he was in the habit of taking a razor to bed with him;" that on one occasion he burned "all the clothes he could lay his hands on," and that he (witness) had returned to Glasgow with them, when they left Ireland, in order to protect his sister. The same witness stated that for the last fourteen years he "had noticed nothing in prisoner's conduct, except that he was a dull, stupid, unsociable man," whereas before this illness he had been cheerful and sociable.

There was no distinct proof of any illness since the first, although I think proof might have been found of at least one distinct recurrence of insanity, about three years previous to the murder, when two of his children died. I am unable to see why, in a case like this, the wife's testimony should not be admissible as to the past history of her husband. Let her statements be carefully tested, and let there be such reservation or deduction in receiving them as the other evidence seems to demand; but it appears strange deliberately to reject the witness who must be the best informed as to the past history and habits of the accused.

The only testimony brought by the defence as to the recent mental condition of Tierney, which was of any importance, was that given by the Roman Catholic Priest. It was as follows:—

Rev. John Shaw, R. C. clergyman, Rutherglen, had known prisoner for seven or eight years. He always thought he was not altogether right in his mind or accountable for his acts. He would sometimes come to speak to witness, and when his mission was over he would stand without speaking like a person distracted. Witness was one day out in Cambuslang and called on prisoner. He came out, and came along with witness for some distance. He ordered him to go home. He said nothing, but continued to accompany him all the way to Rutherglen. When he reached witness' house, he went away home again without saying a word.

By Lord Ardmillan—My opinion was that he was of weak intellect. To receive the privileges of religion a man requires to be sane, and I

refused him those privileges on that account. I thought he was not able to perform a humane act. He was unable to form a correct judgment. I have not seen him since his apprehension. I saw him some time previously. The neighbours were blaming his wife for leaving him; but I told them not to blame her, as her husband was insane, and she was in danger of her life.

By the Advocate-Depute—When he answered me in course of conversation, his answers would be rational enough, but generally speaking he would not answer me at all. He was a silent, morose, taciturn man. He was never violent. Q. What led you to believe that he would possibly use violence towards his wife?—A. From my intercourse with him, I thought he was not a man of sound mind.

It amounts, like this gentleman's testimony to Dr. Robertson and myself, to a strong and evidently sincere conviction of Tierney's insanity, based upon his peculiarity of manner, and his having, on one occasion, persisted in silently accompanying the witness to his house, and evidenced by the fact that he, as his clergyman, had refused him the privileges of religion. Unfortunately, none of Tierney's fellow-workmen in the pit, where he had worked four or five years, were brought forward who could express a similar opinion; while several of them declared that they had never seen anything peculiar about him. It is difficult to see how the reverend gentleman could have extended the privileges of religion to a man, whatever his mental condition, who was so notoriously cruel to his wife that she had repeatedly been compelled to leave him, and that, on at least one occasion, the priest had himself sanctioned this course.

I certainly think that the best exculpatory evidence was that given by Dr. Robertson and myself, when, at our own suggestion, we were recalled. The admirable questions put by Lord Ardmillan elicited a definite, and, I believe, a true picture of the prisoner's mental condition.

Dr. Yellowlees, recalled and examined by Mr. Lang, deposed—I have heard most of the evidence, and the effect of it on my mind is that it enables me to express the opinion I had formerly founded on the history I had ascertained for myself; formerly, I was speaking entirely as to what I had seen with my own eyes. That opinion was that the peculiarity which this man has, is not his natural temper or temperament, but is distinctly the result of his former attack of insanity, which left in the man's mind a certain amount of weakness, possibly confirmed by subsequent casual attacks of insanity. Q. You would be disposed to say that the recovery has not been complete?—A. At all events, it has left this amount of peculiarity.

The Advocate-Depute—Does anything you have heard lead you to alter the conclusion at which you previously arrived, that he was a sane man?—A. When I examined Tierney I saw nothing that would enable me to certify that he was insane. From what I have heard of his history, I believe that this amount of mental peculiarity may have lessened his power of self-control and self-regulation. I do not think that mental peculiarity was such as would make him the mere helpless instrument of his own impulses.

Lord Ardmillan—Supposing there was no actual access of mania, the mental deficiency of the man might have removed his power of self-control, so that an amount of irritation which would not have enraged another man might have enraged him very greatly?—A. Quite so. Q. Another view of the case is that what you have heard of his history makes a recurrence of an actual access of mania fairly presumable?—A. I think had there been a real access of mania upon the occasion referred to there would have been just before it some indication of the act other than the mere act itself. In the former attacks the mania had not been of that impulsive momentary character. Q. Bearing in mind that it has been proved that, in the case of the former attack, he was for a considerable time in a state of insanity, what is your inference from the fact that since this act on 21st April there is no proof of insanity, and that he is now sane, confessedly?—A. I can scarcely answer that question ignoring the fact that I believe there have been inter-current attacks of insanity of a brief kind. Q. You think that possible?—A. I believe from the history of the man that there have been since the attack sixteen years ago certain casual exacerbations of his condition. I think there have been periods when his mental condition was worse. I don't say that this act was committed at such a period. Q. If you admit that there have been certain recurrent exacerbations of his mental condition, a possible access of mania at the date of the act is rendered more possible?—A. It is rendered more possible. Q. Subsequent sanity at this moment is not inconsistent with that supposition?—It is not. Q. If he knew and stated before the act what work he had been doing, what he did then, and after the act made an accurate statement of what he did, would that alter your opinion as to the possible access of mania?—A. It does not necessarily disprove it; but it makes it unlikely. It is an unfavourable fact, because had there been an access of mania there would have been some indications of it, as on the former occasion. Q. If he really were in a position of liability to access of mania, a trifling irritation might bring it on?—A. It might call it forth. As a matter of fact, in his previous history the death of his children was the occasion for the most part.

The Advocate-Depute—Assuming that the act was committed by the prisoner, and that the motive for the act is perfectly apparent, and that the act he did was one by which the end of the motive could be obtained, would that, in the witness' mind, suggest the idea of

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recurrence of a paroxysm of homicidal mania?—A. These facts are suggestive of sanity. They do not disprove insanity. I wish to put it both ways.

Lord Ardmillan—If the motive were merely to get credit for another hutch of coal, would that be an adequate motive?—A. It would show that the man's power of control over his conduct was defective.

Dr. Robertson, recalled, said—The evidence I have heard corroborates the opinion that there is in this man a certain mental deficiency consistent with sanity. I think this mental deficiency is referable to the previous attacks of insanity. Q. And that the recovery has not been complete?—A. The restoration has not been complete—not so much with regard to his intellect—as the moral powers or his mind.

The Advocate-Depute—You mean that, in consequence of that previous attack of insanity, his power of regulating his actions has been somewhat weakened, although his mind can still judge of the nature of his actions?—A. That is exactly what I mean.

The Advocate-Depute, Professor Muirhead of Edinburgh, then addressed the jury for the prosecution. He pointed out that the chief question for their consideration was the prisoner's mental condition. If sane, his act was murder; if insane, of course they would acquit him on that ground. But he argued that there was no ground for thinking him insane at the time the act was committed, either from the recurrence of his malady, or from an accession of homicidal mania. He said however "there was an intermediate view that might be taken. They might, upon the evidence, feel themselves persuaded that, through the operation of disease at an earlier period, there had been, as regarded this man, a diminished power of regulating his actions. What would be murder in a man whose mental faculties had never been affected by disease, might, in the case of a man who had been so affected, and whose mental faculties were for the time obscured by disease, be looked on more leniently. If the jury, looking on all the evidence, felt that they could conscientiously pronounce a more lenient verdict, he asked them to find that the panel was guilty of culpable homicide."

The Counsel for the prisoner argued that insanity had been fully proved, that the deed was the result of a purposeless homicidal impulse, and that the prisoner must be acquitted on the ground of insanity.

In summing up, Lord Ardmillan went carefully over all the evidence, especially as regarded the prisoner's mental condition; and instructed the jury as to what was required to establish the plea of insanity. He said: "Liability to

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sudden irritation, susceptibility to provocation, sullenness, ill-temper, silence, gloom—none of these would do. All these might exist without that deprivation of reason, that shattering of the powers of the mind, which constituted insanity. But, if there was a recurrence of the disease, depriving the man of the power of controlling his actions, impelling him irresistibly to commit certain actions, that excluded responsibility." He did not favour the suggestion of the prosecution, "that the man's control over his own mind might have been so weak as to deprive the act of that wilfulness which would make it murder;" but indicated to the jury that they should find him either sane or insane, and give their verdict accordingly.

After an absence of three quarters of an hour the following verdict, evincing, in my judgment, a very honest and accurate appreciation of the evidence, was returned:—"The jury unanimously find the panel guilty of murder as libelled, but strongly recommend him to mercy on account of the excitement which might result from previous insanity."

The prisoner was then sentenced to death in the usual way, listening to his doom with apparently stolid composure. This was his demeanour throughout the trial, except during the evidence as to the facts of the murder, and as to Campbell's injuries, when the restless movements of his hands revealed some anxiety.

From the first, Dr. Robertson and I had thought Tierney worthy of punishment, though not of death, and, at the conclusion of the trial, we offered to join in a recommendation to the Home Secretary on his behalf. We did so, a few days later, setting forth our opinion that, while his mental condition did not entitle him to acquittal on the ground of insanity, yet it was such as should mitigate his punishment, and save him from the extreme penalty of the law. The result of this, and other representations on the prisoner's behalf, was that a special medical inquiry was ordered by the Home Secretary. The condemned convict was examined by Dr. Briscoe, the Medical Inspector-General of Prisons, in conjunction with the medical officers of the Glasgow prison; and the ultimate result was the commutation of his sentence to penal servitude for life, after he had lain under sentence of death for a fortnight.

Remarks.—The result was just and satisfactory, although so tardily and wrongly reached.

There was no ground for alleging that there had been a return of the insanity under which Tierney formerly laboured. The form of his illness, on each previous occasion, was melancholia, which made him restless, sleepless, taciturn, and suspicious. There was no such history on this occasion, either before or after the deed; nor does that form of insanity come and go thus instantaneously.

Neither was there any reason to attribute the murder to a blind, restless impulse of homicidal mania. There was nothing in the history to sustain such a theory. The men were known to have frequently quarrelled about their hutches, they had been heard quarrelling about them only a day or two before the murder; and immediately after it Tierney claims Campbell's hutch as his. His reply, "It was me" to the witness who first entered the heading, and asked, "what had done that," was not the fearless answer of a man who had just accomplished what an insane impulse had told him must be done. It was rather the defiant desperation of a criminal who had hoped to escape unobserved, but was detected almost in the act through the moaning of his victim. The rest of his behaviour, the placing of stones on Campbell's body in order to conceal, for a time, the real cause of his injuries; the hurried escape from the pit; the plausible and varying excuses he gives for leaving work so soon; the request for a change of working; the persistent lie about the hutch; the avoidance of his own house; the anxiety to hide; the rapidity with which he changed his clothes and made off—all this, while not necessarily precluding insanity, certainly seems the conduct of a conscious criminal, and not of an insane person.

His suspicious and half-repellent tone during our interviews with him; the guarded way in which he fenced off direct questions by general answers, and the promptitude with which he modified a reply, if, in spite of his caution, it seemed capable of a construction adverse to him, all gave the same impression.

The murder was neither caused by a recurrence of melancholia, nor by the fierce impulse of homicidal mania. It was simply the result of evil passions uncontrolled; and the only excuse for the murderer was that his power of controlling them might have been weakened by previous disease.

On this ground the jury recommended him to mercy; and on this ground, for there was no other, was the capital sentence commuted.

Had the jury regarded Tierney as insane, they would have acquitted him on the ground of insanity. Had he been deemed insane by the Home Secretary, he would have ordered his detention during Her Majesty's pleasure. Both the jury and the Crown obviously regarded his mind as in some degree impaired, and therefore they did not measure him by the same standard of accountability, nor deem him worthy of the same punishment, as an ordinary criminal. It is most satisfactory to find the great truth of partial insanity thus definitely and practically recognised. Half the difficulties and errors in this department of jurisprudence have arisen from wilfully ignoring it.

Tierney's case contrasts instructively with that of the lunatic shipwright, Blamfield, who murdered a fellow-workman at the Chatham Dockyard, only a few days before. Although the circumstances of the murders were remarkably similar, they apparently reveal quite different mental conditions. Blamfield's act seems to have been the result of a sudden accession of insanity, by which the man's whole nature was for a time changed and dominated, and of which he was apparently but the blind instrument. Tierney's deed was the outcome of the evil passions common to all men, sane or insane, which his weakened mind did not adequately control.

In Blamfield's case, the legal directions given to the jury, were based on the often-quoted definitions of insanity by the judges; but so contrary did these definitions seem to what justice required in the case, that the jury deliberately disobeyed the instructions, and acquitted the man on the ground of insanity. Few now regard these definitions as truly representing our knowledge, and in his instructions to the jury in Tierney's case, Lord Ardmillan distinctly recognises the power of controlling our acts to be as essential an element of sanity and responsibility as the knowledge of their nature and consequences.

The recognition, by the jury and by the Crown, of the existence of partial insanity, is a yet greater advance.

The law is slow to admit the fallacy and the danger of the rigid mathematical line, by which it would divide mankind into two classes only—the sane and the insane, the responsible and irresponsible. But, between these two classes, there is an intermediate multitude unrecognised by the law, who belong to neither class, while having affinities with both, and who show in most variable mixture traits both of sanity and

insanity. These intermediates may do much, or perhaps all that legally sane men can do in the daily work of life, and their weakness may be so concealed by the routine of habit, or may be apparent on occasions so few and brief, that their neighbours scarcely observe it. It may be periodic, irregular, or constant in character; may have reference to special subjects or individuals; or may be evinced merely by oddity, irritability, or obtuseness. Its degree and its expression may vary greatly, not only in different individuals, but in the same individual at different times; occasionally no weakness can be detected by the most careful observation, at other times it is apparent to all. Yet the habitual daily lives of such people may not differ materially from those around them, and only the members of their own households, or those in daily contact with them, may recognise that they are not like other men.

It is these unfortunate intermediates who occasion so much confusion and uncertainty in our criminal courts, when the plea of insanity is urged. An intermediate at the criminal bar must be regarded as either sane or insane. Hence the testimony as to his mental condition is often conflicting, for it will depend on the aspect of his character which each witness has seen; and the sentence he receives must of necessity be unjust, for if he be deemed sane it will be too severe, and if he be deemed insane it will be too lenient.

This confusion and error must continue until the law recognises that there is a condition of partial insanity, which may disturb, without destroying, a man's appreciation of his acts and their consequences, and may lessen, without annulling, his power of self-control. This partial insanity must be held to imply a modified responsibility; and the evil deeds of such a man must entail a modified punishment.

The recognition of this doctrine in Tierney's case is most satisfactory. It has been recognised by Scottish criminal courts in at least two previous instances. The case of McFadyen in 1860, and of Milne in 1863—in both of which the capital sentence was commuted to penal servitude for life, on the ground of the prisoner's mental condition. [See Irvine's Justiciary Reports, vol. iii, p. 650; and vol. iv, p. 301. See, also, a valuable summary of such cases by Sheriff Spens in the "Journal of Jurisprudence," for November, 1875.]

It was not surprising that lawyers should have held so tenaciously to their imaginary division and erroneous definitions. Some physicians have done much to justify them.

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They have been so acute that, with prophetic eye, they could detect insanity in its obscurest beginnings, and could evoke from the slenderest data the direst picture of irresponsible disease; or they have been so charitable that they were ready to rush to the rescue of a criminal when insanity was but whispered, and to throw over him, with due flourish of trumpets, the shield of their detective wisdom. Such conduct is most mischievous; it lessens the due weight of medical evidence, it obstructs justice by bringing the plea of insanity into contempt, and it too often gives pretext for the false and ignorant sneer that insanity can generally be proved, if there be money enough to prepare the defence.

But lawyers have a better reason for their tenacity than exceptional folly like this. To lower the general sense of responsibility for wrong-doing, would be a public calamity so grave, that it cannot be too carefully guarded against; and this evil could not fail to result if the plea of insanity were too lightly accepted. On the other hand, what can tend more to lessen the public respect for justice, and the public confidence in its administration, than to see a man solemnly condemned as a criminal, and afterwards practically acquitted as a lunatic, by being sent to an asylum during Her Majesty's pleasure?

The acquittal of every criminal in whom any degree of mental defect could be discovered would be both unjust and dangerous, nor is the common excuse that confinement in an asylum is the same as perpetual imprisonment, at all sound. It is untrue as regards the individual, it is unsafe as regards other intermediates who might, by his conviction, have been deterred from similar crimes; and it is a violation of the public sense of justice, when a criminal escapes merited punishment.

The suggestions made in the interest of the prisoner by the Advocate-Depute, that Tierney's power of controlling his actions had been so weakened by the previous diseases, that the jury might possibly find him guilty of culpable homicide, rather than of wilful murder, deserves attention, as one mode of solving the difficulty occasioned by intermediate criminals.

Perhaps it evades the difficulty, rather than solves it, unless, indeed, the principle were adopted that in every case the jury should consider the character and motives of the murderer, as well as the circumstances of the deed, and should specify, as in some other countries, the degree of his guilt. Whether this would not be in itself more equitable, and in every way

more satisfactory, than the utterly uncertain and irregular way in which the Royal clemency is now dispensed, is not a question for this paper.

I have suggested, as a simple way of meeting the difficulty, that when the jury cannot acquit a prisoner on the ground of insanity, and yet are satisfied that there is some mental defect, they should be able to find him "Guilty, but *entitled* to mercy on account of his mental condition." This finding should save the prisoner from the extreme penalty due to his crime, whatever the crime may be, and should leave it entirely to the judge to determine what mitigation of punishment the mental condition demands.

It has been said that, if the power of barring the capital sentence were in the hands of the jury, they would be too apt always to exercise it, and that the power of mitigating the sentence should be left solely with the judge, when the jury have unanimously recommended the prisoner to mercy on account of his mental condition. Possibly this would be better; but either course would put an end, in great measure, to the present uncertainty and error. It is a great and increasing evil, that the solemn sentences of public criminal courts should be continually reviewed and altered by the Secretary of State, for reasons which the public never know.

It may of course be objected that no man can accurately gauge the accountability or self-control of his fellow man, and that to adopt this suggestion would give only an approximation to justice. This is perfectly true, but it is the nearest approximation we can make. It recognises at once what is needful for society, and what is just to the individual, by awarding punishment to his crime and extending mercy to his weakness. Nor could any material wrong be occasioned, if the Judge failed to estimate with perfect accuracy the relative proportions of wickedness and weakness in the prisoner's mind. A sentence unduly severe could probably never be carried out, as the further development of insanity in prison would quickly procure the prisoner's removal to an asylum for the insane. On the other hand, even after the most lenient sentence, the liberation of the prisoner should be subject to satisfactory guarantees as to his future care. Practically then this approximation would secure substantial justice alike to society and to the individual; and what is all human justice but an approximation, but a rough endeavour after the perfect justice which Omniscience alone can render?

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