THE LUNACY LAW OF THE WORLD

By

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ERRATA.

Page 1, Introduction.

It is encouraging to observe that in many of the States and Territories of the United States, distinguished by the vilest lunacy laws, court decisions denounce said laws and pronounce same unconstitutional: and yet same remain.

Footnote to follow phrase, "with many honorable exceptions," 7th line, page 1, Introduction.

Page 179, Point 4.

Point 4. "The said proceedings in 189— were void for lack of due process of law for the following reason, to-wit: Said trial was had *in absentia.* The court failed to direct the appearance, before said commission and said sheriff's jury, of plaintiff; and the court also failed to direct that, failing this, said commisison and jury should visit plaintiff in his cell in the ——— Hospital, at ———."

Wherever the following phrase occurs, to-wit: "And the court also failed to direct that, failing this, said commission and jury should visit plaintiff in his cell in the ——— Hospital, at ———:" the following words are understood to occur, to-wit: *"or committees made up therefrom"*: immeditely following the words "said commission and jury," wherever found under said point. Said corrected phrase will therefore read: "And the court also failed to direct that, failing this, said commission and jury, or committees made up therefrom should visit plaintiff in his cell in the ——— Hospital, at ———."

Page 198.

The word *"progress"* should read *"process"* in the following, towit: "Daniel Webster's definition of due process of law in the Dartmouth College Case. 'The general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.'"

ERRATA.

Index—p. V, "Conkley" should be "Conkey."
" p. V, "citing Acts, chap. 25," should be omitted.
" p. VII, "McMurray" should be "McCurray."
" p. VI, "Stewart Isaac Admunson" should be "Stewart Isaac Edmunson."

Introduction—p. XIII, "Rafalto" should be "Rapallo."
p. XIX, add New Jersey to list of States.
p. XXI, "Kemiler" should be "Kemmler."
p. XXI, "breeches" should be "breaches."
p. XXIII, "investiganote" should be "investigation."
p. XXVIII, * should be omitted.
p. XXVIII, "citizens" should be "citizeness."

Book proper—p. 94, "zeal the lay" should be "zeal they lay."
p. 180, "plentitude" should be "plenitude."
p. 267, transpose (3) and (2).
p. 282, add New Jersey to list of States.
p. 344, "Conley Hatch" should be "Colney Hatch."

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CASES CITED.

What the Law Reviews Have to Say About "THE LUNACY LAW OF THE WORLD," by J. A. Chaloner.

NORTHEASTERN REPORTER.

ST. PAUL, MINN., *July, 1907.*

"The Palmetto Press, Roanoke Rapids, N. C., has printed a book on 'The Lunacy Law of the World,' by J. A. Chaloner, of the same place. It is an examination of the laws of each of the States and Territories, and of the Six Great Powers of Europe, on this subject, and is in terms a very severe arraignment of most of them. It would appear that the iniquitous system against which Charles Reade waged war has by no means disappeared. People may still be incarcerated in insane asylums without notice, and without an opportunity to be heard, either in person or by attorney; and once in an asylum, a patient has little protection against the keepers. They may be wise and kind, but the instances of cruelty which occasionally reach the public indicate that this is not a safe assumption. *Mr. Chaloner holds a brief for the accused, and puts his case very strongly, but, in view of the cases he cites, it would be impossible to state the matter too strongly.* He says:

'A survey of the field of Lunacy Legislation the world over presents today an appalling spectacle. It affords, to put it mildly, the strongest card in favor of anarchy—of no law—ever laid upon the table of world-politics; and throws into lamentable relief the fact that in about forty per cent. of the States and Territories of the United States neither the Bench—with many honorable exceptions—the Bar nor the Legislature, can be entrusted with safeguarding that fundamental principle of liberty, the absolute rights of the individual.'

The book should awaken public interest in an important matter."

THE OHIO LAW BULLETIN.

NORWALK, OHIO, *July 29, 1907.*

"Chaloner, Lunacy Law of the World.

A criticism of the practice of adjudging persons incompetent and depriving them of their liberties without due process of law, fortified by decisions of the courts, is the theme upon which the author has developed this interesting and instructive work. The lunacy law of all the States of the Union and six of the Great Powers of Europe are reviewed, and surprising as it may seem, nearly half of the States and Great Britain fail to require notice of the inquisition to be given the alleged lunatic or incompetent; twenty-four of the States and Germany and Great Britain fail to afford him opportunity to appear and be heard. *The author makes it conclusively appear that there is needed revision of these laws.* Edited by J. A. Chaloner, counsellor at law. Published by the Palmetto Press, Roanoke Rapids, N. C."

THE OKLAHOMA LAW JOURNAL.

GUTHRIE, OKLAHOMA, *September, 1907.*

"The Lunacy Law of the World.
By J. A. Chaloner.
Published by the Palmetto Press,
Roanoke Rapids, N. C.

This is a volume of nearly four hundred pages, well printed, but bound in paper covers—a point always detrimental to the sale as well as the dignity of a law book. However, *when the contents are carefully read and reflected upon, it is found one of the best and most needed books that has appeared for many years.*

The subject of Lunacy Law in spite of all the legislation we have had in other departments, has received little attention. In fact, it is little better than when Charles Reade wrote his book entitled 'Hard Cash.' The fact that many mentally deranged persons are incapable of comprehending the nature of the steps taken to place them in custody, the custom has become prevalent that no process is needed to place them on trial as to their sanity. It is to be remembered that in every State of the Union, and in fact, in every country of the world, fraud has been perpetrated on men and women of means by greedy relatives and the unfortunate ones placed

(OVER)

in asylums for no other purpose than to secure control of their property. And further it should be remembered that one once adjudged insane if he cannot secure a hearing of his right to restoration through the influence of true friends he is forever barred of the right to be heard. He has lost the standing of a citizen. *There is much in Mr. Chaloner's book that should be well studied by every lawyer and legislator as to what should be done to secure the constitutional rights of every one alleged to be of unsound mind.* The book carefully goes over the law of lunacy in the forty-five States and territories as well as that of the leading nations of Europe."

LANCASTER LAW REVIEW.

LANCASTER, PA., *September 30, 1907.*

"The Lunacy Law of the World."
By J. A. Chaloner, Counsellor at law,
Palmetto Press, Roanoke Rapids, N. C.

The work is a review of the lunacy laws of the States and Territories of this country together with those of Great Britain, France, Italy, Germany, Austria and Russia, with a view of showing their defects mainly in regard to affording proper protection to the alleged lunatic.

To those of us who have been accustomed to look with complacency on our lunacy laws, remembering how lunatics were thrown into dungeons and chained and tortured but a short time ago, this book brings home some startling truths. It shows clearly the dangers of that class of legislation in force in England and many of our States (as our own Act of April 20, 1869, P. L., 78) which permits an alleged lunatic to be incarcerated upon the certificate of 'two or more reputable physicians.'

The author contends that in lunacy proceedings notice to the alleged lunatic ought to be absolutely essential and that the trial should be by jury in the presence of the alleged lunatic; that any other practice is a violation of his constitutional rights and dangerous, in that it might be used by designing relatives for fraudulent purposes.

The importance of a jury trial in such cases has been recognized by Judge Brewster in Com. ex rel. vs. *Kirkbride, 2 Brewster, 492. The writ of habeas corpus is not a sufficient safeguard.*

In setting forth the importance of allowing the alleged lunatic an opportunity to appear, the author says:

'The test of sanity is a mental test wholly within the power of the accused to accomplish and without any witnesses, professional or lay, to back him up. Suppose two paid experts in insanity, in the pay of the other side, swear that the defendant cannot tell what his past history has been—that said defendant's mind is a total blank upon the subject. Would that professional and paid and interested oath stand against the defendant's refutation thereof by taking the stand and promptly and lucidly giving his past history, provided he were afforded his legal privilege of taking the stand in place of being kept away from court and having to allow his liberty and property to be perjured away from him in his enforced absence?' (Page 217).

Collusion would be very difficult to prove. It has been held that no presumption arises from the fact that the parties certifying to the alleged lunacy were in fact mistaken. Williams *vs.* Le Bar, 141 Pa., 149.

The subject is an important and interesting one, and the book shows extensive and careful research. It is forcefully written and carries conviction."

LAW NOTES.

NORTHPORT, NEW YORK, *September, 1907.*

"The Lunacy Law of the World.
By J. A. Chaloner, Palmetto Press,
Roanoke Rapids, North Carolina. 1906. Pages 348.

The writer is assuredly earnest, . . . setting forth the unquestionable abuses to which the state of the lunacy laws has given rise.

The exhaustiveness of his research into the question compels admiration, an author who can work through lunacy law from the time of the Emperor Conrad down to the present."

INTRODUCTION.

A survey of the field of Lunacy Legislation, the world over presents to-day an appalling spectacle.

It affords, to put it mildly, the strongest card in favor of anarchy—of no law—ever laid upon the table of world-politics: and throws into lamentable relief the fact that, in about forty per cent. of the States and Territories of the United States, neither the Bench—with many honorable exceptions—the Bar, nor the Legislature can be entrusted with safeguarding that fundamental principle of liberty, the Absolute Rights of the Individual.

We are well aware that the above is rather a strong statement, but, strong though said statement be, said statement is amply borne out by the facts.

For example: In a Note (23 L. R. A., 737), upon "Necessity of notice of lunacy proceeding to alleged lunatic:" the following appears. To wit: "It appears, strangely enough, that the statutes in some States providing for inquisition to determine the fact of lunacy are entirely silent as to the necessity for any notice of the proceeding to the person whose status is to be adjudicated. The courts have, in some cases, required such notice even when the statute did not provide for it, but in other cases have dispensed with any notice to the person in question, and in one or two instances, seem to have regarded it unnecessary to give notice to any one respecting him.

Thus in South Carolina an early case declared that no notice was necessary to the party who was found of unsound mind. *Medlock* v. *Cogburn*, 1 Rich. Eq., 477."

And in no less a State than that of New York the statute says that the judge may dispense with personal service and

does not require the judge to direct substituted service, but leaves it optional with him. "Cumming and Gilbert, Law of Insanity, State of New York, 1900." "Judge may dispense with personal service or direct substituted service to be made. He shall state in certificate to be attached to the petition his reason for dispensing with the personal service, and if substituted service is directed the person to be served therewith."

And in "Note.—23 L. R. A., 737, *et seq.*" "That Court, (the highest court in New York), has not yet decided whether or not there is a constitutional requirement of notice in every instance."

"Due Process of Law as applied to Insane Persons; 43 American State Reports, 531 (Note)." "It is a fundamental principle of both state and national constitutional law that no man shall be deprived of life, 'liberty or property' without 'due process of law;' and under the express provision of the fourteenth amendment to the Constitution of the United States, no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The right of personal liberty is thus jealously guarded by constitutional law, and we are unaware of any distinction between the civil rights of a sane person, and those of an insane subject of the government. Nor shall there be any. Persons though insane, are still human beings, and laws which provide for their commitment to hospitals for proper care and treatment mark, it is said, the vast difference between civilized free people and a savage nation. Such laws are common, but it must be observed in connection with them that all power over the person is liable to abuse. The deprivation of the liberty of a citizen upon the charge of insanity, is a matter of very grave importance, because it may easily happen that for fraudulent purposes, perhaps with a view to deprive a person owning property of his control over it, a perfectly sane man may be sent to an asylum by his relatives, upon certificate of physicians merely, and be illegally confined there for years. The civil rights of insane persons do not seem to have been

often adjudicated by the courts, and a close search for authorities reveals the fact that, since the ratification of the fourteenth amendment, in July 1868, its doctrines as applied to such persons have seldom been defined. Enough is gleaned from the authorities, however, to show that insane persons have rights, that the mere existence of the fact of insanity does not take away or abridge the rights of a citizen, and that a person charged with insanity cannot be deprived of his civil rights without the formalities prescribed by law; *Commonwealth* v. *Kirkbridge,* 2 Brewst., 400, 419."

Again in *Van Deusen* v. *Newcomer,* 40 Mich. "The defendant's theory was that the restraint of insane persons in asylums is lawful, and being lawful, the placing of them, whether for their own benefit, or for the protection of others, is in itself, 'due process of law,' even in the absence of any judicial investigation into the question of sanity. While this theory was approved by two of the Justices, it was disapproved by Justices Cooley and Campbell. The former in his opinion pointed out difficulties in proceeding without judicial inquiry, showing that the law should not tolerate the forcible taking and detention of one in an insane asylum upon the mere assertion that he is mentally unsound; that secret investigations into cases of this character should be frowned down, that safety lies in the publicity of the proceedings; and that, while it is no doubt true a public trial of the fact of insanity would be more or less exciting and disturbing to a mind already in a diseased or abnormal condition, it is by no means certain that the consequences would be more serious than those likely to follow from the sudden arrest or the removal for confinement in the asylum of a person who believes himself to be perfectly sane. 'An insane person,' said the astute justice, 'does not necessarily lose his sense of justice, or his right to the protection of the law; and when he is seized without warning, and without the hearing of those whom he might believe would testify in his behalf, and delivered helpless into the hands of strangers, to

be dealt with as they may decide within the limits of a large discretion, it is impossible that he should not feel keenly the seeming injustice and lawlessness of the proceeding.' "

State v. *Billings,* (55 Minnesota, 467., 43 Am. St. Rep., 525, January, 1894).

Collins J. said: "Mr. Webster's exposition of the words 'law of the land,' and 'due process of law,' viz: 'The general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial,' was quoted: and then the court went on to say that in judicial proceedings, 'due process of law' requires notice, hearing and judgment. These words, said the court, do not mean anything which the legislature may see fit to declare to be 'due process of law,' for there are certain fundamental rights which our system of jurisprudence has always recognized, which not even the legislature can disregard, in proceedings by which a person is deprived of life, liberty, or property, and one of these is 'notice before judgment in all judicial proceedings.'

But it may be stated generally that due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the constitution, and the usages of the common law, would be a protecttion to him or to his property: *People* v. *Board of Supervisors,* 70 N. Y., 228. Due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential, 'due process of law' without these conditions cannot be conceived: *Stuart* v. *Palmer,* 74 N. Y., 183; 30 Am. Rep., 289.

It follows that any method of procedure which a legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose the deprivation of a person of his life, liberty, or property, is in no sense the process of law designated and imperatively required by the constitution. And

while the State should take charge of such unfortunates as are dangerous to themselves and to others, not only for the safety of the public, but for their own amelioration, due regard must be had to the forms of law and to personal rights. To the person charged with being insane, to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a trial before the judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and submit evidence. The question here is not whether the tribunal may proceed in due form of law, and with some regard to the rights of the person before it, but, rather, is the right to have it so proceed absolutely secured? Any statute, having for its object the deprivation of the liberty of a person cannot be upheld unless this right is secured, for the object may be attained in defiance of the constitution, and without due process of law.

That it has opened the door to wrong and injustice to the making of very serious and unwarranted charges against others by wholly irresponsible and evil-mineded persons—is evident, although the method of instituting the proceedings does not effect the validity of the act."

And again in *Ferguson* v. *Crawford,* 70 N. Y., 253. Chief Judge Rafalto said: "He is sought to be held bound by a judgment when he was never personally summoned or had notice of the proceeding, which result has been frequently declared to be contrary to the first principles of justice."

And again: re W. H. Lambert (Cal.), L. R. A., 55 (1902), p. 856.

Harrison J., said: "What constitutes due process of law may not be readily formulated in a definition of universal application, but it includes in all cases the right of the person to such notice of the claim as is appropriate to the proceedings

and adapted to the nature of the case, and the right to be heard before an order of judgment in the proceedings can be made by which he will be deprived of his life, liberty, or property. The constitutional guarantee that he shall not be deprived of his liberty without due process of law is violated whenever such judgment is had without giving him an opportunity to be heard in defense of the charge, and upon such hearing to offer evidence in support of his defense. If his right to a hearing depends upon the will or caprice of others, or upon the discretion or will of the judge who is to make a decision upon the issue, he is not protected in his constitutional rights. *Underwood* v. *People,* 32 Mich. 1, 20, Am. Rep., 633. To say that, if he is in fact insane, therefore any notice to him would be vain, is to beg the very question whose determination underlies the right of the State to deprive him of his liberty. The fact of his insanity is to be determined before his right to his liberty can be violated. If that question is determined against him without any notice or opportunity to be heard or to introduce evidence in his behalf, and under such determination he is confined in the hospital, his constitutional guaranty is violated."

And again: Matter of Georgiana, G. R. Wendel. Marean J., said: "She had no notice of the application, either personal or by substituted service on some person in her behalf, and there was no hearing at which she was either present or represented by any other person. She had been finally adjudged insane and committed to perpetual restraint, without notice or hearing. She is deprived of her liberty, therefore, without due process of law. *People ex rel. Ordway* v. *St. Saviour's Sanitarium,* 34 App., Div. 363. The Insanity Law so far as it permits this, is in violation of the constitution."

And again: *The People ex rel. Elizabeth Ordway* v. *St. Saviour Asylum,* 34 App. Div., the court said: "No matter what may be the ostensible or real purpose in restraining a person of his liberty, whether it is to punish for an offence

against the law or to protect the person from himself or the community from apprehended acts, such restraint cannot be made permanent or of long continuance unless by due process of law.

We refer to that process by or under which a person is detained for a definite period of time—and not to that summary process which issues to take in custody a supposed or alleged dangerous or incompetent person, and under which he may be detained until an investigation in the ordinary course of law may be had,—but where a person is confined by what is upon its face final process and by which he is consigned to incarceration or restraint of his person by adjudication for a long period, that is to say, by a judgment claimed to be binding upon him, there is not due process of law unless he has had notice and a hearing, or at least such a hearing as implies notice."

Again on page 371, the court said:

"A hearing or an opportunity to be heard is absolutely essential; we cannot conceive of due process of law without this. It surely cannot be said that the procedure authorized by the act under which this relator was committed and which created the wrong is due process of law simply because the Legislature chose to authorize that procedure."

One notes, on studying the extracts from Chapter 545 of the New York laws of 1896 the tortuousness thereof. For instance, take section 62. This said section contradicts itself. It says: "Notice of such application, (for commitment to an Insane Asylum), shall be served personally, at least one day before making such application upon the person alleged to be insane."

That is no more than fair. Somebody takes it into his or her head or pretends to take a notion into his or her head, for certain reasons, that you are crazy. It seems fair that you

should be allowed to confront your accuser—a common murderer has that privilege, and be heard in defence to his, or her allegations, before being summarily arrested like a malefactor, and put behind bars without a trial for an indefinite period, perchance for life. Well, the above wholesome specimen of boasted Anglo-Saxon justice, law, freedom, etc., is at once wiped out and rendered utterly nugatory by what follows. After the above bold bluff at justice—after saying, "notice of such application, (for commitment to an Insane Asylum), shall be served personally, at least one day before making such application, upon the person alleged to be insane"—the law dodges justice and sneaks out at the following carefully prepared loophole: "the judge to whom the (said) application is to be made may dispense with such personal service." The judge has it all his own way. Get at the right judge and it's plain sailing.

In other words a citizen of the State of New York can be condemned, and imprisoned for years, perchance for life, without a hearing. All that is required to deprive a citizen of the "Empire State" of his liberty—is, one or two false witnesses, two dishonest doctors, and a judge who can swallow New York lunacy procedure without a qualm. No defense is allowed to the accused.

And again: *Evans, Committee* v. *Johnson,* W. Va. (1894), 23 L. R. A., 737. Brannon P., said: "It lies at the foundation of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property, and even his freedom of person, and commits his property, his person, his liberty to another, stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made, short of conviction of infamous crime. Will it be said in answer to this, that he is insane, and that notice to an insane man will do him no good? The response is that his insanity is the very question to be tried, and he is the only party interested in the

issue. Often if given notice, he will be prompt to attend, and in his person be the unanswerable witness of his sanity; often if not given notice, those interested in using or robbing him of his property will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice. There is abundant authority for this position. Even though the statute be silent as to notice, as ours to appointment of committees by county courts is, though that as to circuit court appointment requires notice, yet the common law steps in and requires it. See *Chase* v. *Hathaway*, 14 Mass., 222, 224; *Hathaway* v. *Clark*, 5 Pick., 490; *Hutchins* v. *Johnson*, 12 Conn., 376, 30 Am., Dec. 622; *McCurry* v. *Hooper*, 12 Ala., 823, 46 Am., Dec. 280; *Monroe County Supvrs.* v. *Budlong*, 51 Barb., 493; *Eslava* v. *Lepetre*, 21 Ala. 504, 56 Am., Dec., 266; *Dutcher* v. *Hill*, 29 Mo., 271, 77 Am., Dec. 572; Buswell, Insanity, 55; *Stafford* v. *Stafford*, 1 Mart., (N. S.), 551. In Georgia, Judge Bleckly, delivering the opinion, said: 'You shall condemn no man unheard. The requirement is as old, at least, as Magna Charta. It is the most precious of all gifts of freedom, that no man be desseissed of his property, or deprived of his liberty, or in any way injured, *nisi per legale judicium parium suorum, vel per legem terrae.* It is a principle of natural justice which courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard.'

Chief Justice Marshall held void a judgment of even a court martial imposing fines on militia men, because without notice. *Meade* v. *Deputy Marshall of Virginia*, Dist., 1 Brock, 324 Fed., case No. 9, 372."

And again: In re William M. Bryant, 3 Mackey, 489, counsel said: "Due process of law, as defined by the courts and by the law-writers, does not mean, the certificate of two physicians and the request of a sister. It means laws which hear before they condemn, and render judgment only after trial. It cannot be a police regulation, independent of the

judiciary and entirely under the control of the Legislature. This would enable the Legislature to deprive the citizen of his liberty, without the intervention of the judiciary or any other department of the government. 4 Wheat, 519."

The court of Maryland. (Chancellor Bland), said: 'Generally and technically speaking, those only are considered lunatics, who have been so found and returned; without an inquest and return thereon, no one can be judicially treated as a lunatic, and be debarred of his liberty, or have the management of his propety taken from him. The power to divest a citizen of his personal freedom and of his property, is one of the most extraordinary and delicate nature; and should, therefore, never be exercised without observing every precaution required by law.' Rebecca Owings' Case, I Bland Ch., Rep. 290. Mr. Justice James said: "This deprivation of the liberty of a citizen upon the ground of lunacy is a matter of very grave importance, because it may easily happen that for fraudulent purposes, perhaps with a view to deprive a person owning property of his control over it, a perfectly sane man might be sent to an asylum by his relatives, upon a certificate of two physicians, and be illegally confined there for years."

The following States and Territories fail to provide that notice, either express or implied, shall be given the alleged lunatic or alleged incompetent:

Alabama
Delaware
Iowa
Kentucky
Maryland
Massachusetts
Missouri
Nebraska
New Hampshire
New York
North Dekota
Oklahoma
Pennsylvania
South Carolina
South Dakota
Tennessee
Utah
Vermont
Wisconsin

Of the six Great Powers of Europe, namely: Great Britain, France, Italy, Germany, Austria-Hungary and Russia, all provide that notice, either express or implied, shall be given the alleged lunatic, with the solitary exception of Great Britain.

The following States and Territories fail to provide that the alleged lunatic or the alleged incompetent shall have opportunity to appear and be heard—must either be brought before the court or visited by the court:

Alabama	New York
Arizona	North Dakota
Connecticut	Pennsylvania
Delaware	South Carolina
Iowa	South Dakota
Kentucky	Oklahoma
Maine	Tennessee
Maryland	Utah
Massachusetts	Vermont
Missouri	Wisconsin
Nebraska	Wyoming
New Hampshire	District of Columbia

The Great Powers in which the alleged lunatic may have no opportunity to appear and be heard—need neither be brought before the court nor visited by the court:

Germany.
Great Britain.

The following States and Territory fail to provide that notice, either express or implied, shall be given the alleged lunatic or alleged incompetent; and also fail to provide that the alleged lunatic or the alleged incompetent, shall have op-

portunity to appear and be heard—must either be brought before the court or visited by the court:

Alabama
Delaware
Iowa
Kentucky
Maryland
Massachusetts
Missouri.
Nebraska
New Hampshire
New York
North Dakota
Oklahoma
Pennsylvania
South Carolina
South Dakota
Tennessee
Utah
Vermont
Wisconsin

The Great Powers in which the alleged lunatic has neither notice, either express or implied, nor opportunity to appear and be heard—need neither be brought before the court nor visited by the court:

Great Britain.

We submit that the above is a showing calculated to open the eyes of the average Judge, the average Lawyer, the average Legislator and the average Citizen.

We submit that the above is a disgrace to the Powers, States and Territories affording the said atrocious spectacle of an utter disregard for the very first elementary principles of common law, common justice, and common sense, to say nothing regarding the palpable fact that said atrocious spectacle is in direct contravention of Magna Charta and the Constitution of the United States.

Presumably no lawyer will deny that the light by which the Constitution of the United States, as well as the Constitutions of the States and Territories of the United States, are to be interpreted is the principles of the common law. See Mr.

Chief Justice Fuller, in re *Kemmler*, 136 U. S., 436. Mr. Chief Justice Fuller, who delivered the opinion of the court in that case, discussing the question whether the act was in conflict with the fourteenth amendment to the Constitution of the United States, said: "As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so in the Fourteenth Amendment, the same words refer to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Could grosser breeches of "the principles of the common law" to say nothing of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," be imagined than the denial to the accused of notice and opportunity to appear and be heard?

In view of Mr. Chief Justice Fuller's aforesaid praise of "the principles of the common law," of which the chief jewel is trial by jury, it sounds somewhat strange to read in Messrs. Cumming and Gilbert's Law of Insanity, State of New York, 1900, "*Deprecate treatment of insane person as criminal in* proceedings by jury," etc., page 441.

Let us hear what Sir William Blackstone has to say upon the subject of trial by jury.

"Its (the trial by jury) establishment, however, and use in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In Magna Charta it is more than once insisted on as the principal bulwark of our liberties; but

especially by chapter 29, that no freeman shall be hurt in either his person or property; 'nisi per legale judicium parium suorum vel per legem terrae.' A privilege which is couched in almost the same words with that of the Emperor Conrad, two hundred years before: 'Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum.' And it was ever esteemed in all countries a privilege of the highest and most beneficial nature." Blackstone (Chase's edition—New York, 1882) pages 786, 787.

"The trial by jury, or the country, per patriam, is also that trial by the peers of every Englishman, which as the grand bulwark of his liberties, is secured to him by the great charter: 'Nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo modo destruatur, nisi per legale judicium parium suorum, vel per legem terrae.'" Page 1023. Chase's Blackstone.

Since trial by jury is as much "the principal bulwark of our liberties," as it was in Blackstone's day, it sounds rather strange to speak, as do Messrs. Cumming and Gilbert, ibid, of substituting for it "medical inquiry by expert practitioners."

Seeing that in order to establish the following contentions: (1) That in lunacy proceedings notice is essential. (2) That in lunacy proceedings trial by jury is essential before an indefinite commitment may be had. (3) That in lunacy proceedings opportunity to appear and be heard is essential. (4) That in lunacy proceedings trial *non in absentia* is essential. (5) That in lunacy proceedings a written instrument by a person accused of insanity may successfully offset *prima facie* evidence of insanity; seeing that the above said contentions rest for support upon the common law, Magna Charta and the Bill of Rights; and seeing that the former is the instrument from which is derived the provision in the United States Constitution that "no person shall be deprived of life, liberty, or

property, without due process of law" (cf. note by editor of Chase's Blackstone); and seeing that the latter has had a number of its provisions copied literally into the United States Constitution, as well as into those of many of the States (cf. note by editor of Chase's Blackstone page 337,) it was essential for us to make a most thorough and profound investigation of not only said charter and said bill, but of all and sundry charters and bills touching said points, from that of the Emperor Conrad, two hundred years anterior to Magna Charta, to the Constitution of the United States; not forgetting all and sundry statutes *in re* lunacy procedure in England from that of De Praerogativa Regis, 17 Edward II, 1324, to the Lunacy Acts of 1890 and 1891; and since the absolute rights of the individual seem to have been either utterly forgotten, or utterly ignored, by the said, about forty per cent. of the States and Territories of the United States, to say nothing of Great Britain, in these latter days, it became incumbent upon us to look up the same as laid down by Sir William Blackstone, and, in order to accomplish said end, it was necessary to collate everything said by said Blackstone, upon said topic in the latter's commentaries; thereafter it became incumbent upon us to offer some attempt at an explanation of the amazing state of affairs *in re* lunacy procedure in Great Britain to-day, as well as in the said about forty per cent. of the States and Territories of the United States.

To our mind the only reason for the existence of illegal lunacy laws in nineteen States and Territories out of the forty-eight States and Territories of the United States, or about forty per cent. thereof, at this point in the twentieth century *of so-called civilization, progress, and political and personal* liberty is the astounding fact that, in lunacy procedure, up to date, no Federal court has had an opportunity to pass upon said basic five points; and so by block the unlearned and illegal opinions sometimes rendered by State courts, particularly in what, for lack of a better name, we have described as the "black belt of lunacy legislation."

The cause of the lawlessness of the lunacy laws in nearly forty per cent. of the States and Territories of the United States is not far to seek. The State of New York, being rich and populous, sets a fashion, so to speak, in lunacy law, which said fashion is promptly and obsequiously followed, in due course, by the said States and Territories of the said "black belt of lunacy legislation." The cause of the rottenness of the said fashion in lunacy laws so set by New York is easily traced. It lies in the fact that New York being a great seaport State, and in close touch commercially and socially with London, the fashions in London find their way to New York. The cause of the rottenness of the said fashion in lunacy laws so set by Great Britain is as easily traced. Said rottenness is caused by the fact that Great Britain, astounding as the proposition sounds at this late date and after the centuries of boastings upon the part of Britons to the contrary, said rottenness is caused by the fact that Great Britain is not a constitutional country. By which, of course, we mean that the British unwritten Constitution, so-called, has absolutely no authority over Parliament—may be a mere chopping-block for the legislature—for Parliament. When Parliament cares to drive a coach and four through the boasted British Constitution, Parliament may so do. Whenever a bare majority of Parliament cares to ride rough shod over said boasted Constitution, said bare parliamentary majority may do so. See Blackstone (Chase's Edition) page 58, "the legislature, being in truth the sovereign power * * * it acknowledges no superior upon earth." Also see note by the editor, page 15, ibid, to-wit: "There is a fundamental difference between the power and authority of the legislative branch of the Government in England and in the United States. The English Parliament is not limited, as regards the scope and extent and subject-matter of legislation, by a written constitution defining and restricting its powers, and its enactments therefore constitute the supreme law of the land, are absolutely binding upon the courts, which

have no option but to appropriately enforce them. It is for this reason that Parliament is sometimes said to be 'omnipotent.' What is spoken of as the 'English Constitution' embraces the body or system of laws, rules, principles and established usages, upon which is based the organization of the government, the relation of its various departments or branches to each other, and the nature of their functions, and in accordance with which the administration of the Government is regularly conducted. But this Constitution, based as it is upon previous acts of Parliament, upon custom and tradition, is subject to change and modification by other acts of Parliament, though it is undoubtedly true, that it has, by force of precedent, and by the natural effect of ordinary usage upon the habits and ideas of the people, great controlling and restrictive power upon the course of legislation. But in the United States, legislation is uniformly controlled by written constitutions adopted by the people in their sovereign capacity. The United States' Constitution limits and defines the powers of Congress and is also binding upon the legislatures of the several States, so that their enactments cannot violate its provisions. The legislation of the States is also further controlled by the special constitution, which each has adopted. To the courts is committed the power and duty of determining whether particular enactments are in conformity with constitutional provisions; and if it is adjudged that they are not, such laws are pronounced null and void. This is not, however, done by the courts, of their own motion and directly upon a consideration of the terms of the statute with reference to the Constitution, but only in the course of decision of actually litigated causes in which the constitutionality of the statute is essentially involved. But all statutes not obnoxious to the provisions of the Constitution of the State or of the United States are as supreme and absolute, within their appropriate sphere, as the acts of the English Parliament."

In a word, England has no Constitution worthy said name as has the United States.

Hence, the constitutional provision in Magna Charta, and in its prototype, that of the Emperor Conrad, providing trial by jury before a person's liberty could be lost upon any plea. See Blackstone, page 787.

"In Magna Charta it (trial by jury) is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29, that no freeman shall be hurt in either his person or property; 'nisi per legale judicium parium suorum vel per legem terrae:' a privilege which is couched in almost the same words with that of the Emperor Conrad, two hundred years before: 'nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum': and it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature": which provision in its ancient purity and simplicity, before lunacy quacks and lunacy shysters had doctered said provision, which provision provided all four said points, to-wit: notice, opportunity to appear and be heard, trial by jury, and that said trial should *be non in absentia*, not in the absence of the party whose liberty was in jeopardy; hence and in spite of *confirmatio cartarum*, of which Blackstone says, page 66, ibid, "the statute called confirmatio cartarum (Edward the First) whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void," hence, and in spite of both Magna Charta and *confirmatio cartarum*, said provision, covering our said fundamental, our aforesaid basic, points in lunacy procedure, has been swept out of existence by the unconstitutional lunacy laws of Great Britain, initiated by said lunacy quacks and lunacy shysters in the early part of the last century, as will be fully set forth.

Lastly, in said connection, a second cause prevails, to-wit: the British legislature is superior to the British courts, whereas with us the courts are superior to the legislature, in that said

courts can pronounce null and void an act of legislature upon the ground, for example, of unconstitutionality.

Great Britain stands to-day in lunacy procedure at the very bottom of the list of the six great European powers, to-wit: Great Britain, France, Italy, Germany, Austria-Hungary, and Russia. The above is an astounding statement touching the Mother of the Common Law, as well as the "Mother of Parliaments." Nevertheless, such is the cold bare fact. As we have shown, at least notice is given the unfortunate threatened with loss of liberty upon a charge of insanity, in France, Italy, Germany, Austria-Hungary, and Russia, whereas no notice is given said unfortunate in Great Britain. Great Britain trailing behind Russia in the race for legality, constitutionality, common justice, and humanity is a sight sufficient to make Blackstone, Coke and Lyttleton—to say nothing of King John and his haughty barons—turn in their respective graves. It is a proud satisfaction to feel that a majority of the States and Territories of this Union are not behind Russia in said particulars; but it is a source of humiliation to us as a lawyer to note that about forty per cent. of said States and Territories, in said particulars, lag behind Russia. It is a still prouder satisfaction to feel that a majority of the States and Territories of the United States provide not only notice, but opportunity to appear and be heard, to the said unfortunate, thereby setting a shining example to Germany, which affords notice but not necessarily opportunity to appear and be heard, not to mention Great Britain, which affords neither notice nor opportunity to appear and be heard, and said about forty per cent. of said States and Territories, which do the reprehensible like. Finally, in said connection, it is surely profoundly satisfactory to note that the pristine purity of the liberty provided by said clause in Magna Charta is preserved in the statute books of the following five States, which actually provide, not only notice, and opportunity to appear and be heard, but trial by jury and trial *non in absentia* for said

unfortunate; said notable States, to-wit: Colorado, Michigan, Mississippi, Texas, and Washington.*

It strikes us as high time that Blackstone, and the absolute rights of the individual, were thrust between usurping legislatures, unscrupulous lawyers, lawless courts, and the defenceless citizen, or citizens.

The opinions adversely cited in the body of this work, have no more authority to stand upon than the judgments of Judge Lynch, which said opinions have even less weight back of them than those of Judge Lynch, for the judgments of Judge Lynch generally have the weight of local public approbation back of them.

In conclusion. For convenience of treatment we shall consider said propositions as though appertaining to an actually litigated case, in which plaintiff was subjected to all the illegalities said propositions attack.

J. A. C.

Roanoke Rapids, North Carolina, April 9, 1906.

THE

LUNACY LAW OF THE WORLD.

BEING THAT OF EACH OF THE FORTY-EIGHT STATES AND TERRITORIES OF THE UNITED STATES, WITH AN EXAMINATION THEREOF AND LEADING CASES THEREON: TOGETHER WITH THAT OF THE SIX GREAT POWERS OF EUROPE—GREAT BRITAIN: FRANCE: ITALY: GERMANY: AUSTRIA-HUNGARY: AND RUSSIA.

BY

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COUNSELLOR-AT-LAW.

PALMETTO PRESS:
ROANOKE RAPIDS, NORTH CAROLINA.
1906.

The Lunacy Law of the World.

POINT 1. The said Commitment Proceedings were void *in toto* for they were without due process of law and therefore unconstitutional for the following reason.

There was lack of notice.

The said Commitment Papers show that plaintiff——— was committed to———Insane Asylum at———, New York, by an order entered March —, 189—, by Judge——— of the Supreme Court of that State, upon the Petition of ——— and ———, brothers of plaintiff, and ———, a cousin of plaintiff, and upon the certificate of Dr. ——— and Dr. ———, Statutory Medical-Examiners-in-Lunacy; and that personal service of process upon plaintiff was dispensed with by said Judge on the alleged ground that plaintiff was dangerous. The said proceedings under which plaintiff was so committed were had without any notice to plaintiff whatsoever, such notice having been specifically dispensed with by order of said Judge. Said Commitment was not temporary, but indeterminate and permanent as to time and was stated to be after "a hearing duly had." Said order was that plaintiff be "adjudged insane and that he be committed to——— Insane Asylum at ———, New York, an institution for the custody and treatment of the insane."

Plaintiff had no notice of said application either personal, or by substituted service on some person in plaintiff's behalf; and there was no hearing at which plaintiff was either present, could be present, or was represented by any other person. Plaintiff was finally adjuged insane and committed to perpetual imprisonment, without notice of hearing, and therefore without due process of law.

SAID COMMITMENT BEING, ON ITS FACE, A PERMANENT ORDER AND WITHOUT NOTICE, IS, FOR WANT OF DUE PROCESS OF LAW, VOID.

It is a true principle of law and justice that a person cannot be deprived of his liberty, or his property, without notice to him and opportunity to be heard in his own behalf. This proposition has been repeatedly expressed in the highest courts in many of the States of the United States. In many of them it has been specifically applied to cases of insanity upon *de lunatico inquirendo* proceedings. The above proposition is sustained by the following excerpts and abstracts from cases ranging from 1817 to 1902 in date.

In Hathaway *vs.* Clark, 5 Pick. (Mass.) 490 (decided in 1827), the question of the necessity of notice arose indirectly, but was directly decided. A writ of error was brought to reverse a judgment, on the ground that the original defendant, at the time of the service of the writ upon him and of rendition of the judgment, was under guardianship as a person *non compos mentis,* and that no notice of the suit was ever given the guardian (corresponding to the Committee, in New York State). Issue was raised as to the existence of the guardianship; and to prove it, the records of the Probate Courts were produced, showing the appointment of a guardian, but containing no adjudication that defendant was *non compos* and no affirmative evidence that he ever had notice of the inquisition, or of the proceedings upon the return. *Held,* per Morton J., the party

alleging the existence of the guardianship had failed to prove it, because: (1) By statute, notice to the person to be affected by the inquisition, and of the adjudication, is essential to the validity of the proceedings in the Probate Courts.

(2) In the absence of such notice, the decree is absolutely void (citing Chase *v.* Hathaway, 14 Mass. 222).

(3) Notice was not shown by the record, and would not be presumed.

Hutchins *v.* Johnson, 12 Conn. 376 (1837)
was an action brought by the conservator (the term then used to designate the committee) of a lunatic. One of the facts to be proved by plaintiff was his appointment as conservator. On appeal from a judgment in his favor, it was *held* (per Williams, Ch. J.) that because the record of his appointment failed to show that notice of the application was ever given to the alleged lunatic, the judgment should be reversed, notice being essential to the validity of so important a proceeding both by "the fundamental principles of justice" (citing Chase *v.* Hathaway, 14 Mass. 224) and by the statute of Connecticut. "A requirement so salutary should be enforced; and, until such notice is given, the court has no more right to make the appointment, no more jurisdiction in the case, than any other tribunal. * * *

"The case presented to us is that of a court, to whom an authority is delegated upon certain terms and conditions, having proceeded to act under that authority without having seen that those pre-requisite conditions were complied with: in which cases we have held such proceeding void."

(Action was in simple *Assumpsit.*)

In Board of Supervisors *vs.* Budlong, 51 Barb. 493 (1868) defendant was sued for the expense of maintaining his wife at the County insane asylum. The question was presented, (both by objection and exception to the introduction in evidence of a certificate of the County Judge, and by offer to prove an ex-

ception to the exclusion of evidence, that the facts stated in said certificate as to the insanity of the wife were untrue,) whether the defendant, who was not a party to the proceeding to adjudge his wife a lunatic, was concluded thereby and by the certificate of the result thereof. *Held* per E. D. Smith J., the husband was not so bound; and the admission in evidence of the certificate, and the exclusion of evidence of the sanity of the wife, were error, requiring reversal. "The Statute, which authorized the certificate, does not declare what shall be the force or effect of such certificate as evidence, or whom it shall bind; and it must, therefore, stand upon the same basis with all other judgments or adjudications. It must bind those who were parties and privies to the proceeding, and had an opportunity to litigate the questions involved in such investigation and adjudication. No one else can be bound by this certificate. It is a fundamental rule of law and of common justice that no one shall be concluded by a legal judgment, decision or adjudication had or made in any suit or proceeding to or in which he was not a party or privy, and of which he had no notice, or in respect to which he had no opportunity to defend himself, or to litigate the question involved, or upon which his liability depended. The jurisdiction of all courts and officers exercising judicial functions is open to investigation, question and inquiry, whenever their proceedings are set up or sought to be enforced; and when there is no jurisdiction, such proceedings are absolutely void. If this certificate, then, was *prima facie* evidence of the facts it recites and affirms, or finds, it could not be conclusive on the defendant and he was clearly entitled to disprove the facts alleged or stated therein, upon which the jurisdiction of the judge depended."

Eslava *vs.* Lepetre, 21 Ala. 504 (1852) was a suit to foreclose mortgages, one of which was executed by the mortgagor

and his wife's guardian in lunacy. She was not made a party, though her guardians were. It appeared that they had been appointed on petition of the husband, alleging his wife's insanity, etc., but there was no issuance of a writ *de lunatico inquirendo* and no finding of a jury therein. *Held* per Ligon, J., appointment void, and objection that wife was not a party to the foreclosure suit well taken. "Without the issuance of this writ, and the finding of a jury, the County Court Judge had no power to declare her a lunatic or to appoint a guardian for her. These proceedings are indispensable to give the County Court jurisdiction to make the appointment; and as they were not had and as that Court is one of limited jurisdiction, the proceedings upon the appointment of guardians are *coram non judice* and void. Such being the case they may be impeached in any Court in a collateral proceeding in which a party seeks a benefit under them. * * * Neither does the record show that she had any notice whatever of the proceedings. They were *ex parte*, and are consequently null and void."

Molton *vs.* Henderson, 62 Ala. 426 (1878) was an action brought by the guardian of a lunatic, the son of one Thos. Molton, to declare lands in defendant's possession subject to the trusts created by the will of the lunatic's father. The guardian had been appointed without notice to the lunatic and had brought proceedings to have the land in question sold, as beneficial to the lunatic. The sale took place, and defendant later purchased from grantees of the purchaser. Plaintiff now claims the sale to be void, alleging the jurisdictional defect in the appointment of the guardian, invalidating the proceedings for the sale.

Held, the want of notice rendered the inquisition of lunacy void. But the defendant having had possession adversely for the statutory time, *held*, entitled to retain it.

Mulligan *v.* Smith, 59 Cal. 206. Holds in reference to notice in street opening proceedings. In absence of notice, not precluded from attacking sufficiency of petition.

Hey Sing Ieck *v.* Anderson, 57 Cal. 251. *Held in re* seizure of Fishing nets: Confiscations without a judicial hearing and judgment, after due notice, are void, as not due process of law.

McGee *v.* Hayes, 127 Cal. 336. I under Code Civ. Proc. 1763, providing that, on the filing of a petition for the appointment of a guardian for an incompetent person, notice must be given to such person of time and place of hearing of at least 5 days and "such person if able to attend must be produced," the personal appearance of such person on the hearing and his request that the petition be granted do not cure fatal defects in the notice of the hearing served on him.

Board of Education *vs.* Bakerwell 122 Ill. 348 *Re* taking of property for normal school. "As said in Westervelt *vs.* Gregg, 2 Kern 209. "Due process of law undoubtedly means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such an act as the legislature may, in an uncontrolled exercise of its power, think fit to pass is in no sense the process of law designated by the Constitution."

Susan Conkey, by Whipple Cook, her Guardian, *versus* Henry Kingman, 24 Pick. 115.

Assumpsit on a promissory note as follows:

"Pelham, October 27th, 1827. For value received of Whipple Cook, guardian of Susan Conkey a distracted person, of Pelham, I promise to pay him the sum of $7.67 annually, that is to say, at the expiration of each year from the above date, for and during the natural life of said Susan Conkey. Witness my hand. Henry Kingman."

The Plaintiff sued by Cook as her guardian, and the defendant pleaded in abatement, that at the time of suing out the writ the plaintiff was not under the guardianship of Cook; and issue was joined upon this plea.

At the trial in the Common Pleas, before Williams, J., the plaintiff produced the following evidence, (to the competency of all of which the defendant objected,) viz., a letter of guardianship, dated September 4th, 1827, from the judge of probate, appointing Cook the guardian of the plaintiff as a person *non compos mentis*, and a bond duly executed and approved for the faithful performance by Cook, of his duties as guardian. The plaintiff further proved, that afterwards Cook, claiming a right to act in behalf of the plaintiff by virtue of the letter of guardianship, demanded of one Fitts, in behalf of the plaintiff, that he should set off her dower in a parcel of land of which she was dowable, and which her husband had conveyed to the defendant, and the defendant had conveyed with warranty to Fitts; that upon this a negotiation was had, which resulted in an agreement by the defendant to pay Cook so much money annually as was equivalent to the value of the dower, to be determined by arbitrators; and that in consideration thereof Cook agreed not to procure the dower to be set off; that arbitrators, mutually chosen, then awarded that the defendant should pay the sum of $7.67 annually; that Cook, as guardian, executed a writing purporting to be a lease of the dower during the life of the plaintiff, and the defendant thereupon gave the note above recited; and that on the 3rd of November, 1828, the defendant paid one instalment of the note.

To meet this evidence, the defendant proved, (the plaintiff objecting to the introduction of the evidence), that the application by the selectmen of Pelham for a commission contained the name of Sarah Conkey, and not Susan Conkey; that the order of inquisition contained the same name; and that the name of Susan Conkey first occurs in the return of the com-

mission. The defendant also proved, that previous to the appointment of Cook as guardian no notice was issued by the judge of probate to the plaintiff to appear and show cause why a guardian should not be appointed, nor any adjudication made that she was *non compos mentis*, or that a guardian be appointed.

The judge ruled that Cook was not guardian of the plaintiff for the purpose of prosecuting this action, and by consent of parties ordered a nonsuit. To this ruling and also to the admission of the evidence offered by defendant the plaintiff excepted. * * *

Morton, J., pronounced the judgment of the court:

The letter of guardianship and the bond for the faithful performance of the trust, approved by the judge of probate, were undoubtedly *prima facie* evidence of the appointment of the guardian. But they were not conclusive. The defendant might show, that though in form they were correct, yet in substance they were defective and void. * * *

It further appears, that no notice was given to the plaintiff, of the inquisition of the selectmen or of the proceedings before the judge of probate, and that there was no adjudication that she was *non compos mentis* or that a guardian be appointed. She was thus deprived of the management of her property and, to some extent, of her liberty, without an opportunity to object or be heard, and without any formal judgment. These are undoubtedly fatal defects, and render the whole proceeding unauthorized and void. It was so adjudged in Chase *v.* Hathaway *et al.* 14 Mass. R. 222; Wait *v.* Maxwell, 5 Pick. 217; and Hathaway *v.* Clark, in *id.* 490. And in the last case, it was holden, that the healing influence of time, after a lapse of thirty years, could not cure the infirmity.

The appointment of the guardian being a nullity, it cannot authorize him to do any act which would bind his ward. Even an executive officer, to whom the guardian was likened in the

argument, cannot justify under a void precept. And although the letter of guardianship produced by the plaintiff was sufficient *prima facie*, yet we can discover no principle by which the defendant should be precluded from showing its invalidity. * * *

Judgment of Court of Common Pleas affirmed.

Doyle Petitioner.
(16 Rhode Island, 537.)
June, 1899.
Per Curiam: * * *

It is not enough to answer that the persons are insane, since whether they are insane is the very question which ought to be determined before they are so completely confined as not any longer to have power to institute proceedings for their own relief, or to be heard and adduce evidence in their own behalf.

Great West Mining Company *v.* Woodmas of Alston Mining Company. 13 Am. St. Rep. 204. (December 1888.) (12 Colorado 46.)

Gerry, J., said: *Void judgment, Effect of.*—Absence of legal service or authorized appearance is jurisdictional, and without jurisdiction no judgment can be entered under which any rights can be lost or acquired.

Jurisdiction cannot be acquired by the mere levy of an attachment, sufficient to authorize the court to determine the question of indebtedness, and to condemn the attached property to pay the same. Though an attachment is levied, jurisdiction is not acquired until service of summons.

Due Process of Law. * * * No person can be prejudiced, or his rights of person or property affected, without notice, actual or constructive. Any proceeding which violates this principle is not due process of law, and is not according to the law of the land. * * *

Judicial Sale. * * * *Relief will be granted from a sale based upon a judgment* entered without service of process upon or appearance on behalf of the defendant, without inquiring as to the merits of the original claim. Although a just cause of action exists against the defendant, he must be allowed an opportunity to pay the debt, or redeem the property from sale, before his title thereto can be divested by judicial proceedings.

McCurry *v.* Hooper, 12 Alabama, 823 January Term, 1848.

This was an action of detinue, brought by the plaintiff, to recover of defendant, certain slaves. On the trial, the plaintiff read in evidence a bill of sale, executed to him for the slaves, by George L. Patrick, bearing the date of January, 1845. At the date of the instrument, the slaves were in possession of Patrick, and belonged to him. The consideration, expressed in the bill of sale, is $1,200.

The defence was, that at the date of the execution of the instrument Patrick was *non compos mentis;* and to show this, the defendant offered in evidence the transcript of a record from the orphans' court of St. Clair, from which it appears, that on the first day of January, application was made to the judge of the orphans' court, by the friends of George L. Patrick, for an inquisition of lunacy, to ascertain if said Patrick was not a lunatic, and incapable of managing his affairs; but it does not appear who those friends were. The judge of the orphans' court ordered a writ *de lunatico inquirendo,* to be issued to the sheriff of the county, commanding him to summon twelve citizens of the county, to make inquisition, if said Patrick be a lunatic, and incapable of managing his affairs. The sheriff summoned the jury, and on the 4th day of January, 1845, after being sworn, they found that Patrick was incapable of transacting his business, and was liable to be imposed on by any designing person, and certified this verdict, under their hands and seals. The sheriff returned the writ, with this verdict of the jury, to the orphans' court.

Dargan, J.: * * * The first question we propose to examine, is, was the record of the Orphans' Court of St. Clair, purporting to be an inquisition of lunacy, to ascertain if George L. Patrick was sane, or *non compus mentis*, evidence for any purpose?

These proceedings purport to be had on the application of the friends of Patrick. The writ was issued, and the jury certified that he was unable to transact business; that he was liable to be imposed upon by designing persons; and that he was *non compos mentis*. This verdict was returned with the writ, and thereupon, a guardian was appointed, the defendant in error, to take charge of his property and person. It does not appear that George L. Patrick had any notice whatever, of the time, and place, of making this inquisition; or that the jury saw him, or made any application, or effort to see him. It does not appear that he had any notice of the application to the court for the writ, or that he had any notice of the action of the court, on the return of the writ; but the proceedings were *ex parte* merely; and by the judgment of the orphans' court, the defendant in error is invested with the control of the property and person of Patrick.

I think it is a fundamental principle of justice, essential to the rights of every man, that he shall have notice of any judicial proceeding that is about to be had for the purpose of divesting him of his property, or the control of it, that he may appear and show to them, who sit in judgment on his rights, that he has not lost them by the commission of a crime; nor should those rights be taken from him by reason of any misfortune. That he has the right to appear before the jury, and the court, and to show that he is not insane, that he, and his property should not be put in charge of another is a self-evident truth, and is denied by no legal authority. (See 12 Ves. 444; *Ex parte* Crammer, Stock on Lunacy, 100.) This

being his right, to appear, and defend himself, the question is, what effect is the law to give to a proceeding that had denied this right?

In the case of Wait *v.* Maxwell, 5 Pickering, 219, this precise question came up, and the court held, that the proceeding of the court of probate, and the grant of letters of guardianship, were null and void, because the *non compos* had no notice of them. And in 14 Mass. R. 222, it was determined, that it was the right of an individual, against whom proceedings in the court of probate were taken, to appear and controvert the fact of insanity, and that an inquisition taken without notice, was void.

These authorities seem to be, in unison with the first principles of justice, and are not opposed by any authorities that have fallen under our observation. We therefore come to the conclusion, that the proceedings of the county court, in the nature of an inquisition, and determining said Patrick to be *non compos mentis,* are void; that they are not evidence for any purpose in the trial of the issues in this case, and should have been rejected, and not allowed to go to the jury. * * *

Let the judgment be reversed and the cause remanded.

DUE PROCESS OF LAW.

George Burdick *v.* The People of the State of Illinois, 149 Ill. 600.

(Filed at Mt. Vernon April 2, 1894.)

Magruder, J., said. * * * The phrase "due process of law" is the equivalent of the words "law of the land" as used in Magna Charta, and means, "in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights." (Board of Education *v.* Bakewell, 122 Ill. 339; Rhinehart *v.* Schuyler, 2 Gilm. 473; Davidson *v.* New Orleans, 96 U. S. 97; Cooley on Cons.

Lim. 5 ed. marg. page 356, top page 435.) An act of the legislature is not necessarily the "law of the land." A State cannot make anything "due process of law" which, by its own legislation, it declares to be such.

Murray's Lessee *v.* Hoboken Land & Improvement Co. 18 How. (U. S. 1855) 272.

The Court, per Curtis, J., "The Article (in United States Constitution *re* "due process of law") is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will.

Bardwell *v.* Collins, 20 Am. St. Rep. 554, Minn. (July, 1890).

Mr. Justice Field, in delivering the opinion of the court in the recent case of Dent *v.* West Virginia, 129 U. S. 114, 123, discussing this question, said: "As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law,' a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown, and place him under the protection of the law. They are deemed to be equivalent to 'the law of the land.' In this country, the requirement is intended to have a similar effect against legislative power; that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property."

"Due process of law" not confined to judicial proceedings. * * * Due process of law does not always mean judicial

process. It is not confined to judicial proceedings, but extends to every case which may deprive the citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature: Eames *v.* Savage, 77 Me. 212; 52 Am. Rep. 751; Weimer *v.* Bunbury, 30 Mich., 201; Stuart *v.* Palmer, 74 N. Y. 183.

Mr. Justice Miller, in delivering the opinion of the court in Davidson *v.* New Orleans, 96 U. S. 104, said: "Whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * * It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." * * *

But the enforcement by a state of a tax levied under a void law is the deprivation of the owner of his property without due process of law; Dundee Mortgage, etc., Co. *v.* School District No. 1, 19 Fed. Rep. 259. And a law that imposes an assessment for local improvements, without notice to, and a hearing on, or an opportunity to be heard, on the part of the owner of the property to be assessed, deprives him of his property without due process of law; Stuart *v.* Palmer, 74 N. Y. 183. A proceeding for the assessment of property for taxes—that is, the ascertainment of its value upon evidence taken—is judicial in its nature. And to make a law authorizing such a proceed-

ing valid, it must provide some kind of notice and an opportunity to be heard respecting it, before the proceeding becomes final, otherwise it will lack the essential ingredient of due process of law: County of Santa Clara *v.* Southern Pacific R. R. Co., 18 Fed. Rep., 385. * * *

A statute which provides that the rates of charges for passengers and freights recommended and published by a state railroad commission shall be final and conclusive evidence as to what are equal and reasonable, and that there can be no judicial inquiry as to the reasonableness of such rates, deprives a railway company of its property without due process of law: Chicago etc. R'y Co. *v.* Minnesota, 134 U. S. 418. Mr. Justice Blatchford, in delivering the opinion of the majority of the court in this case, referring to the statute, said: "It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy." * * *

A law which authorizes the summary seizure and sale of property in use by a person from whom a license is due, without any notice to the owner, without any trial, and without any opportunity to be heard, is void, because it attempts to authorize the taking of property without due process of law: Chauvin *v.* Valiton, 8 Mont. 451.

An act which undertakes to charge the owner of a dog with the amount of damage done by his dog, as fixed by the selectmen of the town, without an opportunity to the owner to be heard, is unconstitutional, because it attempts to take his property without due process of law: East Kingston *v.* Towle, 48 N. H. 57; 2 Am. Rep. 174. * * *

A statute providing that no convict shall be discharged from a state prison until he has remained the full term for which he was senteneed, excluding the time he may have been in solitary

confinement for any violation of the rules and regulations of the prison, deprives him of his liberty without due process of law, and is therefore void: Gross *v.* Rice, 71 Me. 241. * * *

A person imprisoned for refusing to appear or testify before a county attorney under the Kansas act prohibiting the manufacture and sale of intoxicating liquors is distrained of his liberty without due process of law: *In re* Ziebold, 23 Fed. Rep. 791. * * *

A perusal of the foregoing cases will assist in determining the question, What is due process of law?"

Bardwell *v.* Collins (*supra*).

In re Kemmler, 136 U. S. 436, Mr. Chief Justice Fuller, who delivered the opinion of the court in that case, discussing the question whether the act was in conflict with the fourteenth amendment to the constitution of the United States, said: "As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the constitution of the United States, exercised within the limits therein prescribed, *and interpreted according to the principles of the common law,* so in the Fourteenth Amendment, the same words refer to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Moody *v.* Bibb *et al.* 50 Alabama, 245.

Peters, C. J., said: "This great light in this important jurisdiction may sometimes enable us to do right, which is the law of laws, and what the sovereign authority always must intend. * * *

"I. The appointment of Moody as guardian of Rufus R.

Sims, by the Orphans' Court of Tuscaloosa County, in June, 1849, whether for special or general purposes, was clearly void. The court acted without jurisdiction. Sims was not brought before the court in any manner and had no notice whatever of the proceedings to declare him a lunatic. This was necessary, before he could be put under the restraint of a guardianship and deprived of the control of his own person and of his property. This appointment was made before the adoption and promulgation of the Code of Alabama. The proceeding was, therefore, under the law as existed before the Code was proclaimed. A like case to this came under the judicial notice of this court in 1852, at the June term of that year. This was the case of Eslava *v.* Lepetre, 21 Ala. 505. In this latter case, the report shows that a guardian had been appointed for Mrs. Eslava as a person of unsound mind, on the petition of her husband, by the Orphans' Court of Mobile County, without proceedings to have her declared a lunatic. The appointment of the guardian was made before the 7th day of January, 1849, as on that day her guardian was served with subpœna to bring her into court. 21 Ala. 511. In her case, the court said: "This appointment was made upon no other assurance of the fact of Mrs. Eslava's lunacy than a petition of her husband without notice to her, and without the issue of a writ *de lunatico inquirendo,* and the verdict of a jury thereon. Without the issue of this writ, and the finding of the jury, the county court judge had no power to declare her a lunatic, or to appoint a guardian for her. * * *

"But the right to life, liberty, and property, is sacred, and it cannot be invaded by the legislative power. Decl. of Independence; Cooley's Const. Limit. p. 351 *et seq.;* Sedgwick on Stat. & Const. Law, p. 177 *et seq.*"

The State *ex rel.* Larkin *vs.* Ryan, Court Commissioner, 70 Wisc. 676.

January 17—February 28, 1888.

Cassoday, J., said: "So sacred are certain rights of the citizen that they are especially guarded by our national constitution; which, among other things, declared that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' Sec. 1, Art. XIV., Amend. Const. U. S. In Mugler *v.* Kansas, 123 U. S. 663, it is said by the court: 'Undoubtedly the state when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government."

Joseph Chauvin, Respondent, *v.* Henry G. Valiton, Appellant, Constitutional Law, 5th Division, Revised Statutes.

The court held: Nothing can be the law of the land in the sense of the Constitution, however general it may be, and however it may affect the rights of all persons alike, which deprives the citizen of his life, his liberty, or his property, without due process of law; and that, as we have already seen, contemplates that a hearing must be allowed to him at some stage of the proceedings against him, and a hearing would be but a hollow mockery if he could not be allowed to defend and be protected in his rights by the judgment of the court, or the administrative or executive officer with whom he has to do.

Sidney H. Stewart, Jr., Appellant, *v.* George W. Palmer, as Collector, etc., *et al.,* Respondents, 74 New York, 183. (May, 1878.)

Earl, J., held: "I am of the opinion that the Constitution sanctions no law imposing such an assessment, without a notice to and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. * * *

The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice. * * *

The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these "without due process of law" has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the Legislature cannot do nor authorize to be done. "Due process of law" is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive. (Weimer *v.* Bruenbury, 30 Mich., 201.)

This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred

rights. * * * It may however be argued generally that due process of law required an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this. * * *

In Philadelphia *v.* Miller (49 Penn. 440), Agnew, J., speaking of taxation, says: "Notice or at least the means of knowledge is an essential element of every just proceeding which affects the rights of persons or property." * * *

It is a plain principle of justice applicable to all judicial proceedings, that no person should be condemned, or shall suffer judgment against him without an opportunity to be heard; and he says that an act "assessing persons without notice transcends the power of the Legislature, and is itself void."

Portland *v.* Bangor (65 Me. 120).

Walton, J., said: If white men and women may be thus summarily disposed of at the North, of course black ones may be disposed of in the same way at the South; and thus the very evil which it was particularly the object of the fourteenth amendment to eradicate will still exist.

The objection to such a proceeding does not lie in the fact that the persons named may be restrained of their liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against them are true. Not in committing them to the work-house, but in doing it without first giving them an opportunity to be heard. * * *

Philo Parsons and another *v.* George B. Russell and another, 11 Michigan, 113.

It was said: "Story defines 'due process,' etc., as 'being brought in to answer,' etc. This also means much the same as 'agreeably to the principles and usages of law' found in many

statutes, *e. g.* U. S. Jud. Act. § 14; and these principles and usages form the substratum of all State and Federal laws; Marshall Ch. J. Burr's Trial. * * *

Martin, Chief Justice, said:

Whatever may be the difficulty of defining this phrase of the Constitution when sought to be applied to other proceedings, when used in relation to those of a judicial character, it is evidently, and has been so universally held, intended to secure to the citizen the right to a trial according to the forms of law of the questions of his liability and responsibility, before his person or his property shall be condemned. Judicial action is in such cases imperatively required, and "implies and includes *actor, reus, judex*—regular allegations, opportunity to answer, and trial according to some settled course of judicial proceedings." While we adopt the common law, or, to speak more accurately, so long as we recognize and submit to it, we recognize and adopt the fundamental principle that no man shall be party and judge in his own case; that if tried, it shall be by his peers, and if deprived of liberty or property, it shall be by impartial judicial authority, after a trial and judgment under general laws. * * *

In the Common Pleas of Philadelphia.

Commonwealth *ex relatione* Isaac Edmundson Stewart *v.* Thomas S. Kirkbride, M. D. 2 Brewster, 419.

Brewster, J., said: I hold to the doctrine that no man can be deprived of his liberty without the judgment of his peers, and that it matters not to the law whether the alleged cause of detention is insanity or crime. * * *

The record shows no order made by the court for service of a notice of the proceedings, either upon the alleged lunatic or any other person; nor does it show that notice of any kind was given to any person. Lord Chancellor Erskine (*ex parte* Cranmer, 12 Ves. Jr. 455) said: "The party must certainly be

present at the execution of the commission; it is his privilege." The same rule has been adopted in the United States. (See Russell's Case, 1 Barb. Ch. Rep. 38; and Hinchman's Case, Brightly's Rep. 181.) * * *

It is abhorrent alike to our sense of justice and to all judicial precedent that his character, liberty, and estate should be swept away from him without a hearing or opportunity of defence. To hold otherwise would be contrary to every principle of reason and justice.

They call for notice, and tested by their requirement this decree crumbles to ashes.

In Dowell against Jacks, 53 North Carolina Reports, page 387, the following is the *verbatim* finding of the court.

Manly, Judge: We regard as of no importance, connected with the merits of the petitioner's case, that attorneys were employed by a friend to attend; in her behalf, to the inquisition of lunacy at July Term 1859. She had no notice—was not legally represented, and what is of still greater importance, was not present, to be seen and examined by the jury.

Benjamin Chase, Appellant, &c., *versus* Barzillai Hathaway, 14 Mass. 221 (1817) July Term.

Parker, J., said: But we are of opinion that, notwithstanding the silence of the statute, no decree of the Probate Court so materially affecting the rights of property and the person, can be valid unless the party to be affected has had an opportunity to be heard in defense of his rights.

It is a fundamental principle of justice, essential to every free government, that every citizen shall be maintained in the enjoyment of his liberty and property, unless he has forfeited them by the standing laws of the community, and has had opportunity to answer such charges as, according to those laws, will justify a forfeiture or suspension of them. And whenever a Legislature has provided that, on account of crime or mis-

fortune, the public safety or convenience demands a suspension of these essential rights of the individual, and has provided a judicial process by which the fact shall be ascertained, it is to be understood as required that the tribunal, to which is committed the duty of inquiring and determining, shall give opportunity to the subject to be heard in support of his innocence or his capacity.

It has been intimated that notice to an insane person would be of no avail, because he would be incapable of deriving advantage from it. But the question upon which the whole process turns is, whether *he is* insane; for the presumption of law is that every man is of sound mind until the contrary is proved; and it being possible that interested relatives might falsely suggest insanity with a view to deprive the party of the power of disposing of his estate, it is essential that every possibility should be guarded against by personal notice to him when practicable, that he may expose himself to the view of the judge and prove, by his own conduct and actions the falsity of the charge. * * *

Indeed, it would seem strange that the whole estate of a citizen might be taken from him and committed to others, and his personal liberty be restrained, upon an *ex parte* proceeding, without any notice of the pendency of a complaint, upon a suggestion of lunacy or other defect of understanding; while the depriving of the minutest portion of that property or the slightest detention of his person would be illegal upon a charge of crime, or a breach of a civil contract, unless all the formalities of a trial were secured to him by the forms of process, and the regular execution of it."

Re W. H. Lambert (Cal.) L. R. A. 55 (1902) p. 856.

Harrison, J., said: An examination of the foregoing provisions of the statute shows that there is no provision for giving to the alleged insane person any notice of the proceedings

against him, and that under its provisions the first intimation that he may have thereof may be when the sheriff takes him into his custody under the order of commitment. The person making the application for the commitment is not required to give him any notice thereof, nor is there any requirement that he shall be informed of the object for which the physicians are examining him. * * *

This certificate may be made by any two physicians who have received and filed the certificate of a superior judge showing that they possess the requisite qualification. There is no limit to the number of physicians who may become such medical examiners, nor does the act authorize a superior judge to refuse his certificate to any physician who may show himself qualified therefor. No certificate is to be made unless two examiners shall find the person to be insane, but the person seeking the order of commitment is not concluded by the determination of the first examiners to whom he may apply, but is at liberty to continue his application for a certificate until he shall find two examiners who will certify to the insanity of the person. The examination is not made by them under any direction of the judge, nor do they receive any letter of authority or power to compel testimony. The statute does not require that their certificate shall be given under oath, nor does it require that the witnesses before the examiners shall give their testimony under oath, or provide for any oath to be administered to such witnesses. They are only required to make "such examination" of the person as will enable them to form an opinion "as to his sanity or insanity," and their examination may in fact be so conducted that he will have no knowledge that they are examining him for that purpose, or even making any examination of him. * * * The statute does not require the judge, when he passes upon their sufficiency, to give any notice thereof to the alleged insane person, or even to require him to be brought into his presence. * * *

The provision in section 4 for a trial upon the question of his insanity is effective only after the order of commitment has been made, under which the person may have been immediately placed in the hospital, and cannot be made a substitute for his right to have an opportunity to be heard, and to defend himself against the charge before being deprived of his liberty. For the purpose of showing the inefficiency of this provision in protecting a person against an invasion of his constitutional right to a notice and a hearing before he can be deprived of his liberty, it is only necessary to read, in connection therewith, the provision that, before such trial can be had, he must provide for the payment of the costs thereof, and also the provision of section 8 in article I. of the act, that, after he has been committed to the hospital, he may be restrained of all correspondence with the outer world, except with the superior judge and the district attorney of the county from which he was committed. The statute thus clearly provides that the proceedings before the judge in a case like the present may be entirely *ex parte*, and that he may be satisfied that the alleged insane person is insane by merely examining the certificate and petition. He may issue the order of commitment upon the opinion of the two examiners, without any examination by himself of the person sought to be committed, or of the examiners who have made the certificate, and without any knowledge of the facts or testimony upon which they have made their certificate. In thus acting upon these documents, he takes as the sole basis of his action the opinion of the examiners, ascertained as before shown, that the individual is insane. The opinions of practitioners of medicine, however, upon the question of insanity, are not always uniform or infallible, especially if such opinion is formed *ex parte*, or without an opportunity for a full investigation of the charge. The mere certificate of an opinion thus obtained ought not to be a sufficient warrant for an order for the con-

finement of a person in an insane asylum. There should at least be the semblance of a judicial investigation, of which a public record can be preserved, before a person can be deprived of his liberty. * * *

It does not appear, either from the order of commitment or by the accompanying documents, that any notice was given to the petitioner of an intention to make an application for the order, or that he was ever notified or had any knowledge that the medical examiners would make any examination or investigation in reference to his sanity, or that the judge of the superior court ever directed any notice to be given him of the application, or of an intention to determine the question of his sanity; nor does it appear that he was present at the time the matter was under consideration by the judge, or was at any time seen or examined by the judge. The act in question was evidently suggested by the insanity law of New York passed in 1896 (1 N. Y. Laws 1896, chap. 545), and the provisions of that act have been closely copied. * * *

In People *ex rel.* Sullivan *vs.* Wendell, 33 Misc. 496, 68 N. Y. Supp. 948, the relator had been committed to an insane asylum under the provisions of this section, but had had no notice of the application, either personally or by substituted service on any one in her behalf, and there was no hearing at which she was either personally present or represented by any person. The court held that, to the extent that the insanity law authorized such proceeding, it was in violation of the Constitution, in that it deprived her of her liberty without due process of law, and ordered her release. An order for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle in English jurisprudence that, before any judgment can be pronounced against a person, there must have been a trial of the issue upon which the judgment is given. Under the laws of this State, a guardian of the person

or the estate of an insane person cannot be appointed without giving him notice of the application therefor (Code Civ. Proc. § 1763); nor can a judgment for so small a sum as $5 be rendered against him unless he has been served with a summons in the action. (Code Civ. Proc. § 411.) Much more is there reason for giving him notice of an application to deprive him of his personal liberty. The provision in the statute for a notice to a relative or friend of the alleged insane person cannot be made the equivalent of a notice to the person himself. * * *

What constitutes due process of law may not be readily formulated in a definition of universal application, but it includes in all cases the right of the person to such notice of the claim as is appropriate to the proceedings and adapted to the nature of the case, and the right to be heard before an order of judgment in the proceedings can be made by which he will be deprived of his life, liberty, or property. The constitutional guarantee that he shall not be deprived of his liberty without due process of law, is violated whenever such judgment is had without giving him an opportunity to be heard in defense of the charge, and upon such hearing to offer evidence in support of his defense. If his right to a hearing depends upon the will or caprice of others, or upon the discretion or will of the judge who is to make a decision upon the issue, he is not protected in his constitutional rights. Underwood *vs.* People, 32 Mich. 1, 20 Am. Rep. 633. To say that, if he is in fact insane, therefore any notice to him would be vain, is to beg the very question whose determination underlies the right of the state to deprive him of his liberty. The fact of his insanity is to be determined before his right to his liberty can be violated. If that question is determined against him without any notice, or *opportunity to be heard,* or *to introduce evidence in his behalf,* and under such determination he is confined in the hospital, his constitutional guaranty is violated.

The case before us does not involve the right of the state to provide for the summary arrest of a person against whom a charge of insanity is made, and his temporary detention until the truth of the charge can be investigated. Such arrest would itself be a notice to him of the charge, under which he would be afforded an opportunity for a hearing thereon. Nor is there involved the right of the state to permanently restrain an insane person of his liberty, whether such person be harmless or dangerous, but the question is whether he is entitled to a judicial investigation of the charge that he is insane, and the right to be heard thereon before its determination. The question to be determined is not whether the action of the judge in investigating the insanity of the petitioner was conducted under the forms of law, and with proper regard for his rights, but whether the judge had the right to enter upon the investigation, or take any action whatever in reference to his sanity. * * *

"It is not enough that he * * * may by chance have notice, or that he may, as a matter of favor, have a hearing. The law must require notice to him * * * and give him * * * the right to a hearing, and an opportunity to be heard. * * * The constitutional validity of law is to be tested not by what has been done under it, but by what may by its authority be done." Stuart *v.* Palmer, 74 N. Y. 188, 30 Am. Rep. 291. "It is not what has been done, or ordinarily would be done under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The Constitution guards against the chances of infringement." Bennett *v.* Davis, 90 Me. 105, 37 Atl. 865. The following authorities may be referred to in support of the foregoing views: Underwood *v.* People, 32 Mich. 1, 20 Am. Rep. 633; *Re* Doyle, 16 R. I. 537, 5 L. R. A. 359, 18 Atl. 159; State *v.* Billings, 55 Minn., 467; 57 N. W. 206, 794; Portland *v.* Bangor, 65 Me. 120, 20 Am. Rep. 681; Bennett *v.*

Davis, 90 Me. 102, 37 Atl. 864; People *Ex Rel.* Ordway *vs.* Saviour Sanitarium, 34 App. Div. 363, 56 N. Y. Supp. 431. In the case last cited the question was quite fully considered by the General Term of the Supreme Court of New York. The relator had been committed to an asylum for inebriates for a term of one year under provision of a statute of that state authorizing such commitment to be made by any judge of a court of record upon a certificate in writing, signed by two physicians, containing statements bringing the person within the description mentioned in the statute. It was held that as the order had been made without any notice to the relator, and without her presence, she was deprived of her liberty without due process of law, and that the commitment was void; the court very tersely and aptly phrasing the principle underlying its decision as follows: "No matter what may be the ostensible or real purpose in restraining a person of his liberty,—whether it is to punish for an offense against the law or to protect the person from himself, or the community from apprehended acts,—such restraint cannot be made permanent or of long continuance unless by due process of law."

Under the foregoing considerations, it must be held that the insanity law of 1897 to the extent that it authorizes the confinement of a person in an insane asylum without giving him notice and an opportunity to be heard upon the charge against him, is unconstitutional, and that the proceedings by virtue of which the petitioner is held by the respondent are invalid.

It is ordered that the petitioner be released from the asylum.

We concur: Beatty, Ch. J., Temple, J., Henshaw, J., Garoutte, J., dissenting.

Matter of Georgiana G. R. Wendel.

The people *ex rel.* Maurice J. Sullivan, Relator, *v.* John G. Wendel and Mary E. A. Wendel, Respondents, 33 Misc. 496. (Supreme Court, Kings Special Term, December, 1900.)

Marean, J., said: "She had no notice of the application, either personal or by substituted service on some person in her behalf, and there was no hearing at which she was either present or represented by any other person. She had been finally adjudged insane and committed to perpetual restraint, without notice or hearing. She is deprived of her liberty, therefore, without due process of law. People *ex rel.* Ordway *v.* St. Saviour's Sanitarium, 34 App. Div. 363. The Insanity Law, so far as it permits this, is in violation of the constitution.

"When one has been duly adjudged insane, when his *status* as an insane person has been duly established, personal notice, or notice of proceedings affecting his interest, may be dispensed with, if it appears that such service would be prejudicial to his mental condition. But, for the protection of those who are sane, it ought not to be tolerated that any person should be adjudged insane, and finally committed, without either notice or actual hearing.

"It is doubtful, also, if the commitment of the alleged incompetent to the custody of her sister, even if it were valid, warranted her transfer to the hospital by the commission. The statute only permits transfers from one hospital to another.

"She is discharged."

West Virginia Supreme Court of Appeals.

Heil J. Evans, Committee of Evan Morgan, *v.* Omer B. Johnson *et al.*, Thornton Pickenpaugh, Impleaded, etc., Appt. W. Va., April, 1894, 23 L. R. A. 737.

Brannon, P., said: The brief of appellant's counsel, in its opening, presents what in its nature is the first question for us to decide, by insisting that the plaintiff has no right to recover in this suit or any suit. The first reason given by counsel for this contention is that the appointment of Heil J.

Evans to be committee of Evan Morgan as an insane person is void for want of notice to said Evan Morgan. In Lance *v.* McCoy, 34 W. Va. 416, the opinion is expressed that such an appointment by a county court without notice, as required by Code Chap. 58, § 34 is void. A re-examination of this question in this case has confirmed me in the view then expressed. The question is of importance, both because of its frequent occurrence and of its effect upon persons alleged to be insane. So far as my observation has gone, the practice has been, in clerk's offices of the county courts and in county courts, to make such appointments without such notice. It lies at the foundation of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property, and even his freedom of person, and commits his property, his person, his liberty to another, stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made, short of conviction of infamous crime. Will it be said, in answer to this, that he is insane, and that notice to an insane man will do him no good? The response is that his insanity is the very question to be tried, and he the only party interested in the issue. Often if given notice, he will be prompt to attend, and in his person be the unanswerable witness of his sanity; often, if not given notice, those interested in using or robbing him of his property will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice. There is abundant authority for this position. Even though the statute be silent as to notice, as ours to appointment of committees by county courts is, though that as to circuit court appointment requires notice, yet the common law steps in and requires it. See Chase *v.* Hathaway, 14 Mass. 222, 224; Hathaway *v.* Clark, 5 Pick. 490; Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622; McCurry *v.* Hooper, 12 Ala.

823, 46 Am. Dec. 280; Monroe County Suprs. *v.* Budlong, 51 Barb. 493; Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Dutcher *v.* Hill, 29 Mo. 271, 77 Am. Dec. 572; Buswell, Insanity, § 55; Stafford *v.* Stafford, 1 Mart. (N. S.) 551.

In Molton *v.* Henderson, 62 Ala. 426, held that 'inquisition of lunacy without personal notice to the alleged *non compos* is void, and so is the appointment by the probate court of a guardian for said lunatic, and the proceedings by such guardian for a sale of lands belonging to said lunatic.' A statute authorizing an inebriate to be committed to a hospital on *ex parte* proceeding was held void by the New York supreme court. *Re* Janes, 30 How. Pr. 446. In Georgia the statute required notice to three relatives of the person before appointment of a guardian over him as an insane person. Judge Bleckly, delivering the opinion, thought there ought to be also notice to the person. He said: 'It is, to say the least, doubtful whether the property of an adult citizen can be taken out of his custody and committed to guardianship without previous warning served either upon him, or some person duly constituted by law or some legal tribunal to be notified in his stead. If it was unreasonable, in the opinion of a Roman governor, to send a prisoner, and not signify withal the crime alleged against him, the law judges it to be equally so to pass upon the dearest civil rights of the citizen, without first giving him notice of his adversary's complaint. The truth is that at the door of every temple of the laws in this broad land stands justice, with her preliminary requirement upon all administration:—

You shall condemn no man unheard. The requirement is as old, at least, as Magna Charta. It is the most precious of all gifts of freedom, that no man be disseised of his property, or deprived of his liberty, or in any way injured, *nisi per legale judicium parium suorum, vel per legem terrae.* It is a

principle of natural justice which courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard.' He said that in that case there was 'action, trial and judgment in two days, and no previous notice.' In our practice it often occurs in ten minutes. This practice, I say, as was said by the Louisiana court in Stafford *v.* Stafford, *supra,* might put 'the wisest man in the community under the control of a curator, and hold him up to the world as an adjudged insane.' Both constitution and statute confer this power on the county courts as a jurisdiction. Before appointing, the court must determine whether or not the fact which alone gives it power to act exists; that is, whether the party is in any of the phases or conditions of mind to be considered insane under the statute. It must inquire into the fact, and, in deciding, exercise judgment, and of this legal investigation, all important to him, he ought to have notice. He wants to deny the very basis of the proposed order,—his insanity. It is an important transaction to him. Shall he have no notice of it? Am I told that the statute does not in terms require notice? I answer as shown in Lance *v.* McCoy, 34 W. Va. 416, as a circuit court cannot appoint without, so, by proper construction of the code, neither can a county court. I answer, further, that a statute will not be construed to authorize proceedings affecting a man's person or property without notice. It does not dispense with notice. Bishop, Written Law, § § 25, 141; Chase *v.* Hathaway, 14 Mass. 222, 224; Arthur *v.* State, 22 Ala. 61; Endlich, Interpretation of Statute, § 262; Boonville *v.* Ormrod, 26 Mo. 193; Wickham *v.* Page, 49 Mo. 526. *Chief Justice Marshall held void a judgment of even a court-martial imposing fines on militia men, because without notice.* Meade *v.* Deputy Marshall of Virginia Dist. 1. Brock 324 Fed. Cas. No. 9, 372. This statute is one of summary proceeding.

If the case were one of mere error or irregularity, it might

be said that the order was good against collateral attack, and must be reversed by a direct proceeding; but the question is one of jurisdiction,—a want of authority to make the order, for want of jurisdiction over the person to be affected. How can his property be affected or title given the committee to enable him to sue for it, if the order is void as to the person? If he is not affected by it, how is his property? If the committee would restrain the person of the *non compos,* could he not release himself by treating the order as void? I cannot see how an order of a clerk fixing the personal *status* of a person, without notice, can rob him of his property and vest title in another person. A tribunal may have jurisdiction of cases *ejusdem generis* with the matter involved in a proceeding before it, and it may have jurisdiction of the particular matter involved in that particular case; but if it have no jurisdiction of the person, by service of process or appearance, if the proceeding is not *in rem* it cannot go on. Though the Taylor county court has jurisdiction to appoint committees for insane persons, and though it had lawful jurisdiction to act on the matter of the appointment of a committee in the particular instance of Evan Morgan, yet it could not act without notice to him, unless we say notice was not required by law, which I have above sought to show is not the case. A sentence of the court without hearing the party, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to any respect in any other tribunal. Jurisdiction is indispensable to the validity of all judicial proceedings. Jurisdiction of the person as well as the subject-matter are prerequisities and must exist before a court can render a valid judgment or decree, and, if either of these is wanting, all the proceedings are void. So said the court literally in Haymond *v.* Camden, 22 W. Va. 180, syl. § § 5, 9. So it has often held, as shown by Judge Green in the opinion in McCoy *v.* McCoy, 29 W. Va. 807. No court has more sturdily

held the rule of necessity of process or appearance than this court, whether as to proceedings of superior or inferior courts. Must there be process before a superior court can render merely money judgment, and yet no notice before a clerk can stamp a man with insanity, and take from him his property and freedom of person? * * *

When we say there must be jurisdiction, we mean both that the matter must be within the jurisdiction of the court and the person to be affected, by service of notice upon him. Cooley, Const. lim. 403. I maintain that such action as the appointment of a committee for one as insane without notice, being so grave in its effects upon his personal *status* his right to vote, liberty, and property, is not due process of law. It violates the defining by Mr. Webster in the Dartmouth College Case, generally received as a proper one of due process of law, that "it hears before it condemns."

The decree is reversed and the bill is dismissed, without prejudice to any other suit by Evan Morgan or any lawful committee. No prejudice against the collection of the debt shall result from this decision.

Hinchman *v.* Richie. (April 9, 1849.)
1 Brightly's Reports, 144.
Note, p. 180.

No one, however, has a right to confine an insane person for an indefinite period, until he shall be restored to reason, but upon compliance with the formalities of the law. Colby *v.* Jackson, 12 N. H. 526. * * *

Krause, President, said: The 6th section requires the court to direct notice, either to the party in respect to whom the commission shall issue or to some near relations or friends who are not concerned in the application, and the object being to procure a defence when that may reasonably be made, it is obvious that such as counsel a finding against the defendant,

or desire it are excluded from that list of persons, as ineligible to stand in his stead. For some purpose or other this direction was not asked of the court; and notice was not given by the commissioner. * * *

Nor was he himself summoned beforehand or brought in at the time to be present at the examination of the witnesses, on whose testimony he was pronounced incapable of exercising the rights and duties of husband, father and citizen. He was in fact not present for any purpose of defence, but for exhibition merely—a conclusion that is forced on the mind by the whole course of conduct; for the witnesses had been heard when he was called into the room; his desire to have friends and counsel to aid him, was disregarded, and the business affecting all his high interests was concluded after he had been removed. In *ex parte* Cranmer, 12 Ves. Jr. 455, Chancellor Erskine says: "the party must certainly be present at the execution of the commission; it is his privilege;" and such must be the construction of our statute, except where, from the necessity of the case, it is impracticable to give literal force and operation to the principal, as in the state of facts instanced in the third division of the second section, by which a commission may be executed against an inhabitant of the state, who is absent from it, in the county containing his real estate. But that is justified upon the ground of its being a purely beneficial measure, to save the property from impending mischief; and to prevent oppression, the court exacts ample proof that such is the object, and directs extraordinary efforts to be made, by publication or otherwise, to reach the party with notice.

Mary Smith *vs.* Stephen Burlingame, 4 Mason (R. I.) 121, November Term, 1825.

Story J. said: My opinion is that the objection is fatal. The Courts of probate have no right to put a person under guard-

ianship, as unfit to manage her affairs, without notice to the party, and an adjudication on the facts; and until such adjudication, no letters of guardianship can legally be issued. The case of Chase *v.* Hathaway (14 Mass. R. 222) is directly in point, and with that case I entirely concur.

Wait *vs.* Maxwell, 16 American Decisions, 391. (5 Pickering, 217.)

Parker, C. J. said: The decree of the court of probate, granting letters of guardianship, is void, because it does not appear that any notice was given to the subject of it before the inquisition taken; nor is there any judgment or decree ascertaining that she was *non compos mentis.*

In McMurray *v.* Hooper, (Ala.) 46 Am. Dec. 280, the Court said:

"I think it is a fundamental principle of justice essential to the right of every man, that he should have notice of any judicial proceedings which is about to be had for the purpose of divesting him of his property or the control of it, that he may appear and show to them who sit in judgment on his rights that he has not lost them by the commission of a crime, and that they should not be taken away from him by reason of a supposed misfortune. That he has a *right* to appear before the jury and the court, to show that he is not insane and that he and his property should not be put in charge of another, is self evident truth and *is denied by no legal authority.*"

So, in Hutchins *v.* Johnson, (Conn.) 30 Am. Dec. 624, the Court said:

"Notice of such proceedings (*de lunatico inquirendo*) so important to the subject, is required by the *fundamental principles of justice.*"

And in the case of Mays, 10 Pa. County Ct. Reports 293, this language was used:

"But, in whatever way we regard it, the necessity for notice faces us, and, if it has not been given, the proceedings cannot for an instant be maintained."

The text writers also enunciate the same principle of insanity cases. Thus, in Buswell on Insanity, section 55, it is said:

"In the United States it is generally held that the party alleged to be insane has the *right* to have notice, *and to be present* at the proceedings instituted for determining the issue of sanity."

And in Cuming and Gilbert on the "Poor, Insanity, &c. Laws of New York," at page 173, it is said:

"Under a constitutional government no person can be deprived of life, liberty or property, without due process of law, and, therefore, no person can be lawfully declared insane and his personal liberty permanently restrained without formal proceedings and an opportunity afforded him to appear personally and with witnesses to refute the allegations of the person seeking to deprive him of his liberty."

But the very question was recently considered by the Appellate Court of the State of New York, in a case so similar to the one presented by plaintiff that it must be considered as conclusive. It was the case of The People *ex rel.* Elizabeth Ordway *v.* St. Saviour Asylum, reported in 34 App. Div.

Elizabeth Ordway was induced by her family and her friends to take some steps to be confined and treated for inebrity. It was arranged that she should permit herself to be committed to St. Saviour Asylum for one year for the purpose of treatment. Proceedings were had under the statute and she was committed by the court to St. Saviour Asylum for the period

of one year unless sooner discharged by the Trustees at that institution. *There was no notice of the proceedings served on Miss Ordway.* She, however, was fully cognizant of the proceedings and they were had with her consent and permission and in persuance of the commitment order she gave herself up and entered the Asylum.

After she had been there for some time, she decided that she desired her freedom again. The Trustees refused to discharge her and she sued out a writ of *habeas corpus.* The Trustees replied by a return showing the record of the proceedings under which she was placed in their custody. Counsel for Miss Ordway demurred to the return, arguing that the proceedings were void as being in contravention to the constitutional provisions requiring due process of law: The court sustained the demurrer, held the proceedings void and restored Miss Ordway to freedom. The Court, at page 370, said:

"No matter what may be the ostensible or real purpose in retaining a person of his liberty, whether it is to punish for an offense against the law or to protect the person from himself or the community from apprehended acts, such restraint cannot be made permanent or of long continuance unless by due process of law. * * * We refer to that process by or under which a person is detained for a definite period of time * * * and not to that summary process which issues to take in custody a supposed or alleged dangerous or incompetent person, and under which he may be detained *until an investigation in the ordinary course of the law may be had,* * * * but where a person is confined by what is upon its face *final process* and by which he is consigned to incarceration restraint of his person by adjudication for a long period, that is to say, by a judgment claimed to be binding upon him, there is not due process of law unless he has had notice and a hearing, or at least such a hearing as implies notice."

Again on page 371, the court said:

"A hearing or an opportunity to be heard is absolutely essential; we cannot conceive of due process of law without this."

And on page 372:

"The statute now under consideration goes far beyond the condition of danger. It subjects the person to restraint *not during periods of danger*, but for a year if the judge so orders, and for treatment and reformation. * * * What reason exists why a person alleged to be incompetent or dangerous should not have an opportunity before judgment finally against him confining him for a long period of time, which he cannot shorten, to contest the charge, as much as a person accused of crime? The rights of one are as sacred and inviolable as of the other. * * * Shall *ex parte* proof that would only avail to *hold an alleged criminal for trial* be regarded as conclusive proof against a supposed unfortunate?"

Continuing on page 373, the Court says:

"Acts of the Legislature which go beyond the allowance of *temporary confinement* and restraint *until trial or hearing* may be had, and the accused person have his day in court in some way customary or adequate to enable him to present his case, are invalid exercise of legislative power. * * * It surely cannot be said that the procedure authorized by the act under which this relator was committed and which created the wrong is due process of law simply because the Legislature chose to authorize that procedure."

And the Court concludes its able opinion as follows:

"We are of the opinion that the commitment under which this relator is held is not due process of law, and that proceedings under the act, so far as they result in restraint for a year *or less period* of time depending upon the discretion of those who detain the relator, are invalid, for the reason that *no notice was given by which she might in the proceedings itself*

by immediate intervention or subsequent opportunity to intervene, be heard in resistance of the accusation made against her."

Applying the language of this decision to the case under consideration, we find that it fits every circumstance that is essential.

1st. The proceedings were on their face final.

2nd. It was not temporary in character, ordering a commitment for safety until a hearing—it recites that the order was made *after a hearing.*

3rd. There was no notice to plaintiff of the proceedings—it was specifically dispensed with—and plaintiff had no opportunity "in the proceeding itself" to be heard in defense of his rights."

The conclusion is, therefore, inevitable that upon the authority of the decisions cited above, and particularly of the decision in the Ordway case, the proceedings in plaintiff's case were absolutely void for want of notice which is required by due process of law, provided for in the Constitution of the United States. And the mere fact that the Legislature, in the act under which the proceedings were had, provided for such proceeding without notice does not alter the legal effect of such proceedings when had *without notice.*

POINT 2. The said proceedings were void for the reason that a jury-trial is necessary before an indefinite commitment may be had.

"The civil rights of insane persons do not seem to have been often adjudicated by the Courts, and a close search for authorities reveals the fact that, since the ratification of the Fourteenth Amendment, in July, 1868, its doctrines as applied to such persons have seldom been defined. Enough is gleaned from the authorities, however, to show that insane persons have rights, that the mere existence of the fact of in-

sanity does not take away or abridge the rights of a citizen, and that a person charged with insanity cannot be deprived of his civil rights without the formalities prescribed by law: Commonwealth *v.* Kirkbride, 2 Brewster, 400, 419." (Note in 43 Am. St. Rep. 531.)

The above coincides with our search of said authorities. We have been able to find but two instances of parties charged with insanity demanding a trial by jury before being deprived of rights under an innocent charge of insanity which under a charge of murder or robbery would be protected by the greatest safe-guard to personal liberty experience has yet been able to discover, to wit, a trial before a jury of his peers. In neither of said cases was the said suit carried—so far as we have been able to find—beyond the trial Court thus leaving said question of a trial before a jury unsettled. A still further search among the authorities disclosed the fact that there is a most astonishing divergence of opinion among Courts of the various States of the Union on the subject of the civil rights of alleged or *bona fide* lunatics. Said divergence appears to us to be utterly unwarranted. Said divergence appears to us to be astounding. Said divergence appears to us to be an alarming sign of forgetfulness, upon the part of said diverging Courts, of the fundamental principles of law upon which all our legislation both State and National as well as our very Civilization, and Civil rights both personal and property depend. Said astounding fact set us upon a search of the Causes which led to said divergence of opinion as to the civil rights of alleged and *bona fide* lunatics upon the part of said Courts. Said search took us to England, whence comes our system of Jurisprudence, in order to ascertain whether or not said forgetfulness upon said part of Judges, as well as of legislatures, of said fundamental principles of law upon which all our legislation, both State and National as well as our very civilization, and civil rights both personal and property depend, in

order to ascertain whether or not said forgetfulness was observable in English Judicial decisions regarding lunatics, alleged or *bona fide*, as well as regarding the Lunacy Legislation, and Laws, and Practice in England. Said forgetfulness was even more apparent in both cases than in said States in the United States and said decisions of said Judges therein. Regarding said Judicial decisions we were unable to discover so much as a solitary one which would lead one to suppose that said fundamental principles of law had not been forgotten by the English Bench. Regarding said Lunacy Legislation, and Laws, and Practice matters were even worse. Regarding said Lunacy Legislation, and Laws and Practice a state of facts was developed which required weeks of most thorough search upon our part to discover the reason for, after unearthing said facts. Said state of facts is a disgrace to the country which produced a Blackstone. Said state of facts is a disgrace to Modern English Jurisprudence. Such being the case we had recourse to Blackstone in order to discover whether or not we had judged said Judicial decisions, regarding lunatics *bona fide* or alleged, together with said Lunacy Legislation, and Laws, and Practice too harshly. We found that we had not. We found that Blackstone spoke in the strongest terms *against disregarding said fundamental* principles of law upon which all our legislation both State and National as well as our very civilization, and civil rights both personal and property depend. In order that a correct view may be obtained of said English Lunacy Legislation and Laws, and Practice we append our researches therein, off-set by our researches in Blackstone's Commentaries in which the origin of said fundamental principles of law is set forth and described particularly as regards the absolute rights of individuals regarding person and property; and lastly Blackstone's definition of the origin of and advantages of trial by jury wherever a question arises regarding the deprivation of an individual of any of

said absolute rights. Said remarks are lengthy but nothing less extended could have given a comprehensive and conclusive view of the vitality to-day of the said fundamental principles of law which are virtually attacked in England and in many of the States of the Union to-day by said Judicial decisions regarding lunatics *bona fide* or alleged as well as by said Legislatures, as shown by the wholly illegal law touching lunacy procedure in many of the said States of the Union to-day. Said researches in Blackstone's Commentaries are begun by an examination of the feudal abuses upon the part of the Kings and Lords which led up to the Magna Charta; as well as of said Charter and subsequent Charters and Statutes up to and including the Petition of Right, all and sundry of which were broken through so often as possible by said Kings and Nobles; and a parallel is instituted between said breakings-through, and the modern breaking through of Magna Charta and subsequent Acts, by said present Lunacy Legislation, and Laws, and practice in England today.

Lastly we investigated the Constitution of the United States with a view to discovering whether or not said instrument threw its ægis around the personal and property rights of persons charged with insanity. To our mind said instrument does throw its ægis around the personal and property rights of persons charged with insanity. It appears to us that said instrument protects as completely said rights as said instrument protects the rights of person and property of persons charged with crime. It may seem at first glance that we have repeated ourselves in said investigation but a closer inspection of said investigation will prove that there is not one line of repetition, by which we mean needless repetition. As we have shown said ground of investigation is—so far as we can discover—virgin soil in law. Such being the case—by which we mean that in investigating said question no authorities no opinions could be found bearing upon said question—such being the case we

had nothing but argument to go upon in order to reach a conclusion. Logic is of course the soul of argument, and logic is amenable to laws laid down when logic was proved to be an exact science. We therefore, for fear that we should go astray, stuck closely to the said laws in folowing out our argument, and any repetition therein is chargeable to said laws and not to us.

POINT 2. *To Resume.*—The said proceedings were void for the reason that a jury-trial is necessary before an indefinite commitment may be had.

TRIAL-BY-JURY-RIGHTS OF ALLEGED LUNATICS.

Although there are several New York decisions holding that procedure in lunacy cases, being derived from the Court of Chancery, is within the power of the Supreme Court of that State to modify at its pleasure, without constitutional or common law restrictions as to notice, trial by jury, etc., these cases proceed upon a mistaken notion of the English law at the time of the adoption of the New York State and Federal Constitutions.

The accompanying authorities show the following to be the case. The jurisdiction of the Chancellor over persons of unsound mind in England was not in its origin a chancery or equitable jurisdiction such as the jurisdiction over married women, but was originally in the king as *pater patriae,* one of whose prerogatives it was to guard lunatics, idiots, &c., and take care of their lands.

STATUTE

De Praerogativa Regis 17 Edw. II. st. I., A. D. 1324.

Caps IX and X.

Cap IX.

(Concerning idiots.)

"The King shall have the custody of the lands of natural

fools" (idiots) "taking the profits of them without waste or destruction, and shall find them their necessaries, of whose fee soever the lands be holden. And after the death of such idiots he shall render them to the right heirs; so that by such idiots no alienation shall be made, nor shall their heirs be disinherited."

Cap X.

(Concerning lunatics.)

"Also, the King shall provide when any (that beforetime hath had his wit and memory) happen to fail of his wit, as there are many having lucid intervals, that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently from the issues of the same; and the residue beyond their reasonable sustentation shall be kept to their use, to be delivered unto them when they recover their right mind; so that such lands and tenements shall in no wise within the time aforesaid be aliened; nor shall the King take anything to his own use. And if the party die in such estate, then the residue shall be distributed for his soul by the advice of the ordinary."

This prerogative was exercised by the King through his Chancellor, not *qua* Chancellor, but merely as a ministerial officer or agent. The right and duty to act for the King could have been delegated to any other Crown officer.

The royal prerogative in regard to lunatics might be delegated to other great officers of State, 4 Bro. C. C. 233. An instance is recorded of the warrant having been given to the Lord High Treasurer, 2 Dick. 553.

The true source of the Chancellor's power in cases of lunacy, idiocy, &c., is always recognized by the English courts, is mentioned by Blackstone, and was applied in Sherwood *v.* Sanderson, 19 Ves. Jr., 280.

Lord Eldon Chancellor (1815) at P. 285, said, "This application (for costs made by the petitioners in an unsuccessful proceeding to declare Kitty Sherwood lunatic) considered first as made in the lunacy alone is made to the Lord Chancellor *not as Chancellor* but as the person having under the special warrant of the crown the right to exercise the duty of the crown to take care of those who cannot take care of themselves. The application has therefore no concern with anything passing in the Court of Chancery, *but is made to the person holding the Great Seal*, to whom the Crown has usually thought proper to vest this jurisdiction, *as it would be made to any other person having that authority.*"

The Lord Chancellor "or Lord Keeper (whose authority by statute 5, Eliz. Ch. 18, is declared to be exactly the same) is with us at this day created by the mere delivery of the King's Great Seal into his custody * * * is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. *And all this over and above* the vast and extensive jurisdiction which he exercises in his *judicial capacity* in the court of chancery; wherein, as in the exchequer, there are two distinct tribunals; the one ordinary, being a court of common law; the other extraordinary, being a court of equity. * * * In this ordinary, or legal, court is also kept the *officina justitiae* out of which all original writs that pass under the great seal, all commissions of * * * bankruptcy, idiocy, lunacy, and the like do issue."

Bl. Comm. Bk. III. Chap. III., pp. 641, 642.

In a note to *Ex parte* Ogle 15 Ves. Jr. 112, the reporter refers to the Lord Chancellor sitting in lunacy as "the great officer who administers this branch of the Crown's prerogative."

From time immemorial it was held in England that the King, and *a fortiori* his Chancellor, *had no power* to seize the lands or person of a lunatic or idiot *without previous adjudication* of the fact of idiocy or lunacy *through the verdict of a jury founded on personal examination.*

"The Crown as *parens patriae* has by virtue of its prerogative the care and custody of the person and estate of those of non-sane memory and who from want of understanding are incapable of taking care of themselves. *This royal prerogative seems to have existed anterior to the statute of 17. Ed. II., called Prer., Regis.*, which is declaratory only: the date of its origin is not easy at this remote period to ascertain with certainty. *It is however a right which is never exercised but upon a previous office (or Inquisition) found.*"

Elmer, Pr. in Lun., p. 1 and author. cit.

In Lord Ely's Case, 1 Ridgw. Parl. Ca. 515 (1764), the court charging the jury empaneled in a commission *de lunatico* said:

"In order to come at this proof (required to rebut *the legal presumption of sanity*) the practice in former times was on a petition to the Lord Chancellor suggesting idiocy or lunacy in a particular person of competent age and verified by affidavit of facts to issue a writ to the Sheriff or Escheator of the county where his resdience was, to try by a jury and *personal examination* of the party whether that suggestion was true or not. The practice of later years has been to try these matters under such a special commission as this upon which you have been sworn." (pp. 520-1).

In 1751, the Chancellor said:

"The old way was by writs directed either to the Escheator or the Sheriff; the modern way, and for a long time, is by commissions in the nature of these writs; and so it is called a writ *de lunatico inquirendo.*"

Ex parte Southcot, 2 Ves. Sen. 401.

At the common law and down to the act of 1833 (3 & 4 William IV., C. 36) the English lunacy practice was as follows:

"The question whether a person was idiot or lunatic was determined either by writ or by commission. The former procedure which was the more ancient, consisted in the issue of a writ to the Sheriff or Escheator of the county where the alleged idiot or lunatic resided to *try by a jury and personal examination* of the party whether he was idiot or lunatic or not. The writ was issued by the Lord Chancellor on a petition suggesting idiocy or lunacy, and verified by affidavits of facts, and was returnable into the Court of Chancery, and any person found idiot or lunatic in this way had a *right of appeal* to the Court of Chancery or the *King in Council.*

"In the course of time the second mode of inquiry above referred to superseded the first. Commissions were issued by letters patent under the Great Seal from the common law side of the Court of Chancery, directed to five persons as commissioners, who, or any three or more of them, were to inquire, upon the oaths of good and lawful men of the county, whether the party named in the commission was idiot or lunatic or not, and as to the extent or value of his property. The commissioners held their inquiry generally in or near the place of abode of the supposed idiot or lunatic; the inquisition, which was required to be made by indenture, and sealed with the seals of twelve jurymen, was returned into Chancery, with the commission, within a month after it was taken; and thereafter, if the verdict was one of idiocy or lunacy, the Lord Chancellor referred to one of the ordinary Masters in Chancery the matter of the lunacy, and in particular the duty of ascertaining and reporting upon the property and next-of-kin or heir-at-law of the person so found by inquisition—questions which although included in the commission were not, in later

practice at any rate, investigated by the Commissioner or their jury."

Renton. "The Law of and Practice in Lunacy," pp. 329-330. (London, 1896.)

Matter of Runey Dey, alleged to be a lunatic, 9 N. J. Eq. Rep. 181 (1852). Chancellor Benj. Williamson said:

"No person can be deprived of the right to manage his own affairs or of his personal liberty without the intervention of a jury, and in cases of lunacy the verdict of the jury is to be founded, as in all other cases, upon satisfactory and unexceptionable evidence submitted to their consideration."

The verdict of the jury in such cases, unlike a verdict on feigned issues framed by a Chancellor in an equity suit, was held conclusive on the Chancellor, and did not merely serve to inform his conscience. If the jury decided in favor of sanity, the Chancellor had no power to act further, and the verdict related back and annulled his prevous proceedings. If the jury found the alleged incompetent insane, it was a matter of absolute right on the latter's part to traverse the return and have the issue tried the second time.

A traverse to the return to an inquisition finding a person lunatic is a *right* by law, even though the Chancellor is satisfied:

Ex parte Wragg & *Ex parte* Ferne, 5 Ves. Jr. 150.

"The traverse is *de jure*. It is *no favor*. The parties apply by petition, stating that they are dissatisfied with the finding; and that stops the commission."

Per Loughborough, Ch.

Ex parte Ferne, 5 Ves. 832.

In re Farrell, 6, Dick, Ch., (N. J.) 353. (51 N. Y. Eq., 353.) 2 & 3 Edw, VI. c. 3 & 6.

(1815) Sherwood *vs.* Sanderson, 19 Vesey Jr., 280.

"It is remembered that originally the King as *parens patriae*, had custody of idiots and lunatics and their property * * * and that it was his habit to commit such persons and property to the care of committees.

"Later, to avoid solicitations and the shadow of undue partiality in the bestowal of such offices, he became accustomed by warrant under his royal sign manual to delegate his power in such matters to the Chancellor who was the keeper of the Great Seal under which grant, by letters patent, to the committee was made.

"It became the practice of the Chancellor first to inquire into the idiocy or lunacy, and to that end to issue a commission under the Great Seal directed to persons as commissioners, who were to inquire through a jury as to the matter given them in charge by the commission; and *after* a return to the commission, finding idiocy or unsoundness of mind, as the case might be, and trial of a traverse of the inquisition, if the subject of the inquisition should possess sufficient intelligence to wish to traverse, to proceed to grant the custody of the person and the property of the idiot or lunatic to a committee."

(Per Chancellor McGill 1893)

In re Farrell, *supra*, at p. 358.

If the second jury found him sane, the proceedings theretofore taken were annulled, and the Chancellor had no power to award costs out of the alleged incompetent's estate, having no jurisdiction whatever over it.

Sherwood *vs.* Sanderson, *Supra.*

In the matter of Clapp, 20 How. Pr. 385, *held*, if the inquisition finds the alleged lunatic sane, the Court has never acquired jurisdiction to charge the expenses on his estate. "*But after a jury has passed upon the question* and found the al-

leged lunatic of unsound mind, the Court upon confirming the inquisition acquires complete jurisdiction over the lunatic and his property." (p. 389).

(Per E. D. Smith, J., 1861.)

The only instance in which the Chancellor could take charge of persons alleged to be incompetent before the question of their competency had been determined by the verdict of a jury, was where such care was necessary to preserve the person of the incompetent or the public peace, *and in this case it was an extraordinary exercise of what we here call the police power, and limited to its precise and narrow end of preserving the person of the incompetent or the safety of the public. The interference must be temporary, pending the execution of a commission.*

Temporary Commitment Pending Inquest.

"While the rule is fully recognized that the Chancellor cannot permanently assume the custody of a supposed lunatic's person or estate without the verdict of a jury, yet it has been held that he may *temporarily* interfere and take care of persons as to whom a commission has been allowed, until the jury have passed upon the case."

Barb. Ch. Pr. Bk. V, Chap. 6 (Vol. 2 p. 240.)

Commitment only for Safe Custody while Awaiting Trial by Jury.

"When a delinquent is arrested * * * he ought regularly to be carried before a justice of the peace, * * * The justice before whom such prisoner is brought is bound immediately to examine the circumstances of the crime alleged; and to this end by statute 2 & 3 Ph. & M.; ch. 10, he is to take in writing the examination of such prisoner, and the information of those

who bring him: which Mr. Lambard observes, was the first warrant given for the examination of a felon in the English law. For at the common law *nemo tenebatur prodere seipsum:* and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men. If upon this inquiry it manifestly appears, that either no such crime was committed; or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the charge against him. *This commitment, therefore, being only for safe custody,* wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes." Page 1001 Black. Comm.; Chase.

In the case of Bryce *v.* Graham, which came before the House of Lords, sitting as a court to hear appeals from the courts of Scotland, the Chancellor said, with reference to the English practice:

"The court itself can do nothing except to interpose some temporary care when that temporary care is found to be necessary, and to send the matter to a jury." The Chancellor said that it was unquestionably the law in England that the court had no power to take upon itself the care of any individual, either as to his person or as to his property, on the ground of insanity, without the verdict of a jury.

In Bryce *vs.* Graham (*supra*), 2 Will's 7 Shaw's App. Ca. 481, at pp. 514-515 *et seq.*, the Chancellor in the House of Lords, sitting as a Court of appeals to hear appeals from the courts of Scotland, discussing the power of the court to appoint a curator of an alleged incompetent before a jury had passed upon his sanity said:

"*The Court can do nothing except to interpose some temporary care, when that temporary care is found to be neces-*

sary, and to send the matter to a jury" (p. 517) * * * after much reflection, the Chancellor could not bring himself to think "that the Crown has in Scotland *what it unquestionably has not in England,* namely, the power of taking upon itself the care of any individuals either as to their persons or their property, on the ground that they are of unsound mind, without the verdict of a jury."

This was also the ancient law of Scotland.

So Elmer, Pr. in Lun. and author. cit. (*supra.*)

"The Crown as *parens patriae* has by virtue of its prerogative the care and custody of the person and estate of those of non-sane memory and who from want of understanding are incapable of taking care of themselves. This Royal Prerogative seems to have existed anterior to the Statute of 17 Ed. II. called *Praer. Regis,* which is declaratory only; the date of its origin is not easy at this remote period to ascertain with certainty. It is, however, a right which is never exercised but upon a *previous office (or inquisition) found.*"

So Lord Erskine in the Cranmer Case.

"*I have no authority to act upon his liberty and his property except upon a verdict.*"

In Cranmer, *Ex parte,* 12 Vesey Jr. 445 (1806), *supra.*

A commission was issued to inquire whether H. C. is a lunatic. The jury found that he was so debilitated in mind as to be unable to manage his affairs. On motion to confirm: *held,* return should be set aside and a new inquiry ordered for the failure of the jury to find a "lunatic" or not in the words of the commission. The Chancellor (Erskine) observing:

"I have no authority to act upon his liberty and his property, except upon a verdict, expressed in legal words."

Hence the jury must find on the issue of the alleged incompetent's sanity, unambiguously; *else the court is improperly*

substituted for the jury. Accordingly, the Chancellor quashed the inquisition and ordered a new one.

On the second application for a fresh commission (instead of a fresh execution of the former one, be it remembred) the Chancellor said (apparently in response to the query of counsel):

"*The party certainly must be present at the execution of the commission. It is his privilege.*"

(p. 455.)

That the foregoing is a correct statement of the origin of the powers of the Chancellor in lunacy cases is admitted in Hughes *v.* Jones, 116 N. Y. 67.

"The origin and history of lunacy proceedings throw some light upon the subject. It was provided by an early statute in England that 'the King shall have the custody of the lands of natural fools (idiots) taking the profits of them without waste or destruction, and shall find them in necessaries, of whose fee soever the lands be holden; and after their death he shall restore them to their rightful heirs, so that no alienation shall be made by such idiots, nor their heirs be in any-wise disinherited.'

(17. Ed. II. chap. 9.)

The same statute provided for lunatics or such as might have lucid intervals, by making the King a trustee of their lands and tenements, without any beneficial interest, as in the case of idiots, who were the source of considerable revenue to the crown. (*Id.* chap. 10; Beverley's case, 4 Coke 127*a*; 1 Blackstone's Comm. chap. 8 No. 18, p. 304.)

This statute continued in force from 1324 until 1863.

(Ordronaux Judicial Aspects of Insanity, 4.)

The method of procedure thereunder is described by an early writer as follows: 'And, therefore, when the King is *informed* that one who hath lands or tenements is an idiot, and is a

natural from his birth, the King may award his writ to the Escheator or Sheriff of the county where such idiot is to inquire thereof.' (Fitzherbert de Nat. Brev. 232.) The object of the writ was to ascertain by judicial investigation whether the person proceeded against was an idiot or not, so that the King could act under the statute, *for his right to control idiots or lunatics and their estates did not commence until office found.* (Shelford on Lunatics, etc., 14.) Subsequently authority was given to the Lord Chancellor to issue the writ or commission to inquire as to the fact of idiocy or lunacy, and the method of procedure was by petition *suggesting* the lunacy. (*Id.; In re* Brown, 1 Abb. Pr. 108, 109.) It was the ordinary writ upon a supposed forfeiture to the crown, and the proceeding was in behalf of the King as the political father of his people. (*Id.;* Fitzherbert de Nat. Brev. 581.)

As the means devised to give the King his right by solemn matter of record, it was necessary before the Sovereign could divest title. (3 Bl. Com. 259; Phillips *v.* Moore, 100 U. S. 208, 212; Anderson's Dict. tit. Office Found.)

It was used to establish the fact upon which the King's rights depended, as in the case of an alien who could hold land until his alienage was authoritatively established by a public officer upon an inquest held at the instance of the government. Whether the basis of the action was lunacy or alienage, or otherwise, the proceeding was in behalf of the public, represented by the King. (*Id.*)

The inquisition was an inquiry made by a jury before a Sheriff, Coroner, Escheator or other government officer, or by commissioners specially appointed, concerning any matter that entitled the sovereign to the possession of lands or tenements, goods or chattels, by reason of an escheat, forfeiture, idiocy and the like. (Chit. Prerog. 246, 250; Staunt. 55, Rappalje & Lawrence Law Dict., tit. Inquest of Office.)

Thus the law came to us from England, and after the

Revolution the care and custody of persons of unsound mind, and the possession and control of their estates which had belonged to the King as a part of his prerogative, became vested in the people, who, by an early act, confided it to the Chancellor, and afterwards to the Courts. (Laws of 1788, chap. 12. 2 Greenl. 25; Laws of 1801, chap. 30; Laws of 1847, chap. 280; I. R. S. 147; 2 *id.* 52.)

But, while the same power was confided, the practice or method of exercising that power was not regulated by the legislature, so that, almost of necessity, the English course of procedure was followed. (Matter of Brown, *supra.*)

For nearly a century there was no statute authorizing any court or officer to issue a commission of inquiry, except as the right to judicially ascertain who were lunatics, etc., was implied from the acts committing their care and custody at first to the Chancellor and later to the Supreme Court. The right to judicially learn whether a person was a lunatic or not was inferred from the right to his care and custody, provided he was such. Thus it appears that these proceedings have always been instituted in behalf of the public, at first, in behalf of the King, as the guardian of his subjects, and then in behalf of the people of the State who succeeded to the rights of the king in this regard.

In both countries the theory of the proceeding was the same, resting upon the interest of the public, as is apparent from an examination of the various statutes, and decisions upon the subject already cited. That interest is promoted by taking care of the persons and property of those who are unable to care for themselves, and, by preserving their estates from waste and loss, preventing them and their families from becoming burdens upon the public. *The inquisition is an essential step preliminary to assuming control.* It is a judicial determination that the person proceeded against is one of the class of persons whose care and custody has been delegated to the courts by the public."

If the foregoing is correct, it follows that the phrase "due process of law" as used in the New York State and Federal Constitutions, implies the right of trial by jury before the liberty of an individual could be interfered with by the court of Chancery in the exercise of its lunacy powers, except where the police power, in cases of furious madness, requires a temporary restraint *pending an adjudication of insanity by "due process of law."* In other words the right to trial by jury *"in all cases in which it has heretofore been used"* includes the right in lunacy cases, which right the New York State Constitution provides (Art. I, Sect. 2) shall *"remain inviolate forever."* Compare Art. I, Sect. 1, of the Constitution as follows:

"No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof unless by the law of the land or the judgment of his peers."

MODERN ENGLISH LUNACY LEGISLATION.

As has been shown, the law in England relative to procedure in lunacy prior to the nineteenth century was as follows:

"The question whether a person was idiot or lunatic was determined by a jury and personal examination." (Renton *supra.*)

The above wholly legal and strictly constitutional method of procedure insuring as it did first: the presence in the alleged lunatic's home county of a jury to try him, and second: his presence before said jury when said trial took place; was gradually attacked and insidiously undermined by various acts in the nineteenth century; until it was practically totally destroyed and rendered null and void by the Lunacy Acts of 1890 and 1891, (53 Vict. c. 5 and 54 and 55 Vict. c. 65), which we shall presently notice.

The first sign of the cloven hoof appears in the act (3 and 4 William IV. c. 36), in 1833 "to diminish the inconvenience and expense of commissions in the nature of writs *de lunatico inquirendo,*" Renton, page 330.

While said act was in itself unimportant it dared to attack the safeguards which the law had always thrown around the liberty of the individual, on the trivial plea of "inconvenience" and the sordid one of "expense." Several more acts in the same direction were passed until in 1853 we see the first deadly blow aimed at the trial-by-jury-rights of alleged lunatics. In said act, that of 16 and 17 Viet. c. 70, we read (Renton, page 332), "If the alleged lunatic demanded a jury, the demand was granted as a matter of right. If, on the other hand, he did not demand a jury, and no notice of opposition was given, the Lord Chancellor or the Lords Justices directed an inquiry before a Master without a jury." How would it sound in law to read, "That if the alleged burglar demanded a jury the demand was granted as a matter of right. If, on the other hand, he did not demand a jury, and no notice of opposition was given, the Lord Chancellor or the Lords Justices directed an inquiry before a Master without a jury?" And yet the risk that the alleged burglar runs is no greater than the alleged lunatic runs; both, upon condemnation, receive sentences for a term of years, and frequently, in the alleged lunatic's case, for life, together with practical confiscation of his property. What a cry would be put up from the bar, bench, and public, were such an act as the above to be passed, concerning the trial of alleged criminals.

Various acts tampering with the rights of alleged lunatics were passed; until in the Lunacy Acts of 1890 and 1891 (53 Viet. c. 5 and 54, and 55 Viet. c. 65), the last vestige of trial-by-jury-rights of alleged lunatics was swept away. However, deadly as the said acts are to liberty and trial-by-jury-rights, they begin by boldly enough affirming said trial-by-jury-rights,

but, alas, end by—less boldly, but none the less effectively—denying same, to wit, (Renton, p. 275,) "Where the alleged lunatic is within the jurisdiction, he shall have notice of the application (to have him declared a lunatic), and shall be entitled to demand an inquiry before a jury." Now note the stultification (Renton, p. 279), "Where the alleged lunatic demands a jury, the Judge in Lunacy shall in his order for inquisition direct the return of a jury, unless he is satisfied, by personal examination of the alleged lunatic, that he is not mentally competent to form and express a wish for an inquisition before a jury."

Again (Renton, p. 277), "The Judge in Lunacy may refuse to comply with the demand (for a jury), if he is satisfied that the alleged lunatic is not mentally competent to form and express a wish in that behalf, and it appears to him on the evidence that an inquisition before a jury is unnecessary and inexpedient."

How strangely such words sound after "the rule is fully recognized that the Chancellor cannot permanently assume the custody of a supposed lunatic's person or estate without the verdict of a jury." Barb. Ch. Pr. V, Chap. 6 (Vol. 2, p. 240 *supra*), and "The court itself can do nothing except to interpose some temporary care, when that temporary care is found to be necessary, and to send the matter to a jury." Bryce *vs.* Graham (*supra*).

Lastly Lord Erskine in the Cranmer case (*supra*), "I have no authority to act upon his liberty and his property except upon a verdict." Else, as we said, the Court is improperly substituted for the jury.

However with a truly English desire to save appearances the said Lunacy Acts of 1890 and 1891, do insist upon the presence of a jury, when there is no probability of the alleged lunatic's ability to avail himself of that seemly privilege, to wit (Renton, p. 299), "Where the alleged lunatic is not within

the jurisdiction * * * the inquisition shall be before a jury."

But in order to pile Pelion upon Ossa and make assurance doubly sure, the same enlightened clause contains the following words, represented by asterisks in the above quotation, therefrom, to wit: "it shall not be necessary to give him notice of the application for inquisition."

In a word, where the alleged lunatic is out of the country and can not readily get before the jury, let him *have* a jury; *but, lest* he should get before the jury, *do not allow him the privilege of notice of his approaching trial.*

But as we delve deeper into the said tortuous Lunacy Acts of 1890 and 1891, we shall discover that not only has the Court been improperly substituted for the Jury, but that two medical men have been improperly substituted for the Jury, and one medical man improperly substituted for the Court.

The legal profession, and all other professions and occupations, have been shown to be sadly at a discount: and the unbiased "oaths of (12) good and lawful men of the county," (where the accused lunatic resides), (Renton, p. 329, *supra*), have been made to give place to the bare statements unsupported by affidavit of two medical men from anywhere, in the pay of the party, or parties, interested in locking up the accused alleged lunatic perchance for life: while the open atmosphere of a courtroom has been metamorphosed into the frequently questionable precinct of a doctor's office.

The English Lunacy Act of 1890 (53 Vict. c. 5) and the amendment act of 1891 (54 and 55 Vict. c. 65) together called the Lunacy Acts of 1890 and 1891, provide that subject to exception in urgency cases—those in which the welfare of the alleged lunatic or the public safety requires prompt attention (Renton, p. 114)—and criminal cases: "A person not being a pauper or a lunatic so found by inquisition, shall not be received and detained as a lunatic in an institution for lunatics, or as a single patient, unless under a reception order made

by the judicial authority hereinafter mentioned." (Renton, p. 86.) Such an order must be based on a signed petition preferably of a relative, if not, with an explanation why not, accompanied by a signed statement of particulars and two medical certificates; and the petitioner must undertake to visit the lunatic, personally or by deputy, every six months. (Renton, pp. 87-89-90.) These papers must be presented to a Justice of the Peace specially appointed therefor, or a Judge of County Courts, or a Magistrate. (Renton, p. 107.) The Judge may make an order for the commitment of the alleged lunatic forthwith, or, if not satisfied, may appoint a time for further consideration; and meanwhile make inquiries, or visit the lunatic. If the Judge sees fit to appoint a time for further consideration, the alleged lunatic (in the Judge's discretion) and a person appointed by the lunatic, and the medical men signing the certificates, may be present. (Renton, pp. 90-91-94.) "This discretion" (to exclude the alleged lunatic from the said hearing) "should, it is thought, only be exercised, however, on medical grounds." (Renton, p. 95.) The Judge may then dismiss the proceedings, adjourn them for any period, not exceeding fourteen days, for further evidence, or make an order of commitment. (Renton, p. 95.) Unless he has viewed the alleged lunatic the latter has the right to be taken before, or visited by, another Judge, except the medical officer of the institution certifies within 24 hours that the exercise of such right would be prejudicial to the alleged lunatic. (Renton, p. 102.) At the outset, and before attempting to interpret the above Statutes, it is necessary to observe that the word "notice" has a, so to speak, mystic meaning in English Lunacy procedure, quite foreign to its usual legal one of notice for the purpose of preparing for trial and appearance. The meaning of "notice" in English Lunacy procedure is strictly confined to the restricted, and, as we shall prove, futile, purpose of enabling the alleged lunatic to demand a jury.

"Where the alleged lunatic is within the jurisdiction, he shall have notice of the application" (to have him declared a lunatic) (Renton, p. 275).

But Renton observes in explanation of the term "notice" as follows: "The object of the notice is to enable the alleged lunatic to demand a jury." (Renton, p. 275.) Furthermore, we shall find that the usually plain, non-mysterious words "personal examination of the alleged lunatic" (by the Judge) have a, so to speak, ghostly meaning in English Lunacy procedure; a meaning which admits of the Judge's projecting his personality by means of a third party, for we read: (Renton, p. 279) "Personal Examination." "In practice the Judge in Lunacy frequently directs a previous examination and report by one of the medical Chancery visitors or by a medical man appointed by himself." Thus, upon being interpreted, "notice" and "personal examination" (by the Judge) vanish into thin air, and leave the alleged lunatic *stripped* of "notice," and "personal examination" (by the Judge)—to say nothing of trial by jury.

With the light shed by the aforesaid mystical meaning of "notice," and the aforesaid ghostly meaning of "personal examination" (by the Judge), we shall see clear in the otherwise sombre regions of the said Lunacy Acts of 1890 and 1891. "Where the alleged lunatic is within the jurisdiction, he shall have notice of the application (to have him declared a lunatic) and shall be entitled to demand an inquiry before a jury" (Renton, p. 275 *supra*): being interpreted means that he shall *not* have notice, which shall prevent his being arrested, and haled to a cell on a possibly false charge of lunacy without an opportunity of preparing his case, or being present when it is heard; but that after his arrest and imprisonment without notice or opportunity to be heard in his own behalf, he shall have notice by the voice of his jailer—the medical superintendent of the madhouse in which he is imprisoned—to the

effect that he may have his case brought before a jury *only if* the Judge is satisfied "by personal examination of the alleged lunatic" (Renton p. 279 *supra*) *which*, be it remembered, *never takes place, only if* the Judge is satisfied that the alleged lunatic is mentally competent to form and express. A wish for an inquisition before a jury: (Renton, p. 279 *supra*) and also *only if* it appears to the Judge, on the evidence, that an inquisition before a jury is necessary and expedient. (Renton, p. 277 *supra.*) How would it sound in law to read "The Judge may refuse to comply with the demand of the alleged murderer to be tried before a jury, if it appears to him, on the evidence, that trial before a jury is unnecessary and inexpedient?" As we observed, not only has the Court been improperly substituted for the jury, but two medical men have been improperly substituted for the jury; and one medical man improperly substituted for the Court. The two medical men aforesaid are the two signers of "the two medical certificates" aforesaid; while the one medical man is the medical officer of the institution in which the alleged lunatic is imprisoned. In other words, his jailer becomes his judge. For the said jailer's mere *ipse dixit*, unsupported by affidavit can shear the alleged lunatic's right to be taken before, or visited by, another judge if the judge who has imprisoned him has not "*personally* examined him"—by *deputy*. (Renton, pp. 101-102 *supra.*) "When a lunatic has been received as a private patient under an order of a judicial authority, without a statement in the order that the patient has been personally seen by such judicial authority, the patient shall have the right to be taken before or visited by a judicial authority other than the judicial authority who made the order, unless the medical officer of the institution, or, in the case of a single patient, his medical attendant, within 24 hours after reception, in a certificate signed and sent to the Commissioners, states that the exercise of such right would be prejudicial to

the patient." Was ever a grosser temptation thrown in the way of the proprietor of a madhouse, to prevent inconvenient judicial prying into the question, as to whether or not the parties from whom said proprietor made his living by holding as pay prisoners, possibly for life, and at snug annual mulcts, as to whether or not, said possible victims were insane or sane? There can be no possible doubt as to the aforesaid "two medical certificates" for they are the only parties the alleged lunatic has an absolutely unemasculated right to see. For on the mere presentation of the papers in the case the Judge may, without having seen the alleged lunatic, make an order for the commitment of the alleged lunatic forthwith. (Renton, p. 91, *supra*.) And if the Judge should deign to appoint a further hearing it is discretionary with him whether or not he permits the alleged lunatic to be present. (Renton, p. 94, *supra*.) With fine irony Renton goes on to say (pp. 94-95), "The petitioner has an absolute right to be present," (at the said hearing.) "The alleged lunatic may be excluded by the judicial authority at his discretion." As we observed the "oaths of (12) good and lawful men of the county," (where the alleged lunatic resided,) (Renton, p. 329, *supra*), have been made to give place to the bare statements, unsupported by affidavit, of two medical men, when the question is raised of imprisoning a party perchance for life, together with the practical sequestration of all his goods and chattels, upon a possibly false charge of lunacy. Not only shall we prove this to be the case, but also we shall prove that the bare statement of the petitioner or petitioners, who be it remembered may be neither kith nor kin to the alleged lunatic—"The petition shall be presented, if possible, by the husband or wife or by a relative of the alleged lunatic. If not so presented it shall contain a statement of the reasons why the petition is not so presented, and of the connection of the petitioner with the alleged lunatic, and the circumstances under which he presents the

petition" (Renton, p. 87)—but also we shall prove that the bare statement of the petitioner or petitioners, unsupported by any hint of affidavit, avails to deprive a party of liberty and property, possibly for life, on a possibly trumped up charge of insanity.

For that purpose we append forms of said petition and said medical certificate. (Renton, pp. 723-724-726.)

(Renton, p. 723.)

THE SECOND SCHEDULE.

FORM 1.

Section 339, *ante*. Sections 4, 5, *ante*.

Petition for an order for Reception of a Private Patient.

In the matter of A. B. a person alleged to be of unsound mind.

To a justice of the peace for

(or

To His Honor the judge of the county court of

or

To stipendiary magistrate for)

(1) Full postal address and rank, profession, or occupation.

The petition of C. D. of (1) in the county of

(2) At least twenty-one.

1. I am (2) years of age.

(3) Or an idiot or person of unsound mind.

(4) Insert a full description of the name and locality of the asylum, hospital, or licensed house or the full name, address and description of the person who is to take charge of the patient as a single patient.

2. I desire to obtain an order for the reception of A. B. as a lunatic (3) in the asylum (*or* hospital *or* house *as the case may be*) of situate at (4).

(5) Some day

3. I last saw the said A. B. at on the (5) day of

4. I am the (6) of the said A. B. (*or if the petitioner is not connected with or related to the patient state as follows*:)

I am not related to or connected with the said A. B. The

reasons why this petition is not presented by a relation or connection are as follows:

(*State them.*)

The circumstances under which this petition is presented by me are as follows:

(*State them.*)

within 14 days before the date of the presentation of the petition.
(6) Here state the connection or relationship with the patient.

5. I am not related to or connected with either of the persons signing the certificates which accompany this petition as (*where the petitioner is a man*) husband, father, father-in-law, son, son-in-law, brother, brother-in-law, partner, or assistant (*or where the petitioner is a woman*), wife, mother, mother-in-law, daughter, daughter-in-law, sister, sister-in-law, partner, or assistant.

6. I undertake to visit the said A. B. personally or by some one specially appointed by me at least once in every six months while under care and treatment under the order to be made on this petition.

7. A statement of particulars relating to the said A. B. accompanies this petition.

If it is the fact add:

8. The said A. B. has been received in the asylum (*or* hospital *or* house, *as the case may be*) under an urgency order dated the

The petitioner therefore prays that an order may be made in accordance with the foregoing statement.

(Signed)

full Christian and surname.

Dated

Date of presentation of the petition.

Substituted by Act of 1891, S. 23.

(Renton, p. 724.)

FORM 2.

Statement of Particulars.

Secs. 4, 5, 11, *ante.*

Statement of particulars referred to in the annexed petition (or in the above or annexed order).

The following is a statement of particulars relating to the said A. B. (1):

(1) If any particulars are not known, the fact is to be so stated. (Where the patient is in the petition order described as an idiot, omit the particulars marked*.)

Name of patient, with Christian name at length.

Sex and age.

* Married, single, or widowed.

* Rank, profession, or previous occupation (if any).

* Religious persuasion.

Residence at or immediately previous to the date hereof.

* Whether first attack.

Age on first attack.

When and where previously under care and treatment as a lunatic, idiot, or person of unsound mind.

* Duration of existing attack.

Supposed cause.

Whether subject to epilepsy.

Whether suicidal. Whether dangerous to others, and in what way.

Whether any near relative has been afflicted with insanity.

Names, Christian names, and full postal addresses of one or more relatives of the patient.

Name of the person to whom notice of death to be sent, and full postal address if not already given.

Name and full postal address of the usual medical attendant of the patient.

Signed

When the petitioner or person singing an urgency order is not the person who signs the statement, add the following par-

ticulars concerning the person who signs the statement.

Name with Christian name at length.

Rank, profession, or occupation (if any).

How related to or otherwise connected with the patient.

(Renton, p. 724.)

FORM 3.

Order for reception of a private Patient to be made by a Justice appointed under the Lunacy Act 1890, *Judge of County Courts, or stipendiary Magistrate.* Section 6, *ante.*

I, the undersigned E. F., being a justice for specially appointed under the Lunacy Act 1890 (*or* the judge of the county court of *or* the stipendiary magistrate for) upon the petition of C. D. of (1) in the matter of A. B. a lunatic, (2) accompanied by the medical certificates of G. H. and I. J. hereto annexed, and upon the undertaking of the said C. D. to visit the said A. B. personally or by some one specially appointed by the said C. D. once at least in every six months while under care and treatment under this order, hereby authorize you to receive the said A. B. as a patient into your asylum (3). And I declare that I have (*or* have not) personally seen the said A. B. before making this order.

(1) Address and description.
(2) Or an idiot or person of unsound mind.
(3) Or hospital or house or as a single patient.
(4) To be addressed to the medical superintendent of the asylum or hospital, or to the resident licensee of the house in which the patient is to be placed.

Dated

(Signed)

E. F.

A justice for appointed under the above-mentioned Act (*or* the judge of the county court of , *or* a stipendiary magistrate.)

To (4).

(Renton, p. 726.)

FORM 8.

Certificate of Medical Practitioner.

In the matter of A. B. of (1) in the county (2) of (3) an alleged lunatic.

I, the undersigned C. D., do hereby certify as follows:—

1. I am a person registered under the Medical Act 1858, and I am in the actual practice of the medical profession.

2. On the day of 18 , at (4) in the county (5) of (separately from any other practitioner) (6), I personally examined the said A. B. and came to the conclusion that he is a (lunatic, an idiot, or a person of unsound mind) and a proper person to be taken charge of and detained under care and treatment.

3. I formed this conclusion on the following grounds, viz.:—

(*a*) Facts indicating insanity observed by myself at the time of examination (7) viz.:—

(*b*) Facts communicated by others, viz.:—(8)

(*If an urgency certificate is required it must be added here.* See Form 9.)

4. The said A. B. appeared to me to be (*or* not to be) in a fit condition of bodily health to be removed to an asylum, hospital, or licensed house (9).

5. I give this certificate having first read the section of the Act of Parliament printed below.

(Signed)

C. D., of (10)

Dated

Secs. 4, 11, 16 23, 24, *ante*.
(1) Insert residence of patient.
(2) City or borough, as the case may be.
(3) Insert profession or occupation, if any.
(4) Insert the place of examination, giving the name of the street, with number or name of house, or should there be no number the Christian and surname of occupier.
(5) City or borough as the case may be.
(6) Omit this where only one certificate is required.
(7) If the same or other facts were observed previous to the time of the examination, the certifier is at liberty to subjoin them in a separate paragraph.
(8) The names and Christian names (if known) of informants to be given, with their addresses and descriptions.
(9) Strike out this clause in case of a private patient whose removal is not proposed.
(10) Insert full postal address.

Extract from Section 317 of the Lunacy Act 1890, ante.

"Any person who makes a wilful misstatement of any material fact in any medical or other certificate or in any statement or report of bodily or mental condition under this Act, shall be guilty of a misdemeanor."

As will be observed there is no sign of an affidavit here. Did any one ever hear of depriving a party of liberty and property, without the solemnity of an affidavit to support a charge so lamentable in its consequences? Wilful misstatements in a court of law, where, prior to the nineteenth century, the charges of lunacy and idiocy were tried, wilful misstatements in a court of law are serious things, being perjury and felony; and therefore a court of law affords a strong counterpoise to the temptation to misstate; but under the said Lunacy Acts of 1890 and 1891, said healthful counterpoise is swept away, and, strangely enough, by an Act of Parliament itself: for we read in "Form 8 *supra*" *Extract from section 317 of the Lunacy Act 1890, ante.* "Any person who makes a wiflul misstatement of any material fact in any medical or other certificate or in any statement or report of bodily or mental condition under this Act, shall be guilty of a misdemeanor." It is therefore not a felony but only a misdemeanor for a medical man, for pay or otherwise, to declare a sane man insane.

Could any greater temptation for falsely declaring a sane man insane, than said Act of Parliament holds out to unscrupulous medical practitioners, be imagined? Could any greater temptation be imagined for falsely declaring a sane man insane, in order to gratify a personal spite, or obtaining possession of his property, than said Act of Parliament holds out to unscrupulous relatives?

Strange as the assertion sounds we can answer that question in the affirmative. (Renton, p. 279.) "On the other hand, where a case for protection is not made out, and it appears that a petition" (to have a party declared and locked up as a

lunatic), "has been presented from improper motives, the petition will be dismissed, and may (and "MAY") be dismissed with costs." Pitiful costs!

As we delve still deeper into the said tortuous Lunacy Acts of 1890 and 1891, we shall discover that all that has been held out by said Acts in the shape of trial-by-jury-rights of alleged lunatics; all that has been held out by said Acts in the shape of a hearing before a judicial authority; all that has been held out in said Acts in the shape of a visit even by proxy at the hands of a judicial authority; and all that has been held out by said Acts in the shape of anything but a summary arrest without a shadow of hope of trial, hearing, visit or anything but incarceration, is a sham and pretence.

All that is necessary to put out of the way a rich or obnoxious relative, or even acquaintance, under the said Lunacy Acts of 1890 and 1891. is first—The petitioners must set in motion the "Urgency Orders," as follows, (Renton, pp. 114-115), "In cases of urgency where it is expedient, either for the welfare of a person, (not a pauper), alleged to be a lunatic or for the public safety, that the alleged lunatic should be forthwith placed under care and treatment, he may be received and detained in an Institution for Lunatics, or as a single patient upon an urgency order, made (if possible), by the husband or wife or by a relative of the alleged lunatic, accompanied by one medical certificate."

Thus one unscrupulous medical man is alone needed to support the possibly false charge of lunacy, possibly trumped up by an unscrupulous designing or hostile relative, or acquaintance. We now append the form of the said urgency order made out, but not sworn to, by said possibly designing or hostile relative or acquaintance, together with the (Medical) "Statement", also unsupported by affidavit, signed by said unscrupulous medical man (Renton, pp. 725-727).

(Renton, p. 725.)

FORM 4.

Form of Urgency Order for the Reception of a Private Patient.

Section 11, *ante*.

I, the undersigned, being a person twenty-one years of age, hereby authorize you to receive as a patient into your house (1) A. B. as a lunatic (2) whom I last saw at
on the (3) day
of 18 .

I am not related to or connected with the person signing the certificate which accompanies this order in any of the ways mentioned in the margin (4). Subjoined (or annexed) hereto (5) is a statement of particulars relating to the said A. B.

(Signed)

[

Name and Christian name at length.
Rank, profession, or occupation (if any).
Full postal address.
How related to or connected with the patient.

(If not the husband or wife or a relative of the patient, the person signing to state as briefly as possible: (1) Why the order is not signed by the husband or wife or a relative of the patient. (2) His or her connection with the patient, and the circumstances under which he or she signs.)

Dated this day of
18 .

To superintendent of
the asylum (hospital *or*
resident licensee of the house).

(1) Or hospital or asylum or as a Single patient.
(2) Or an idiot or a person of unsound mind
(3) Some day within two days before the date of the order.
(4) Husband, wife, father farther in-law mother, mother-in law, son, son-in-law, daughter, daughter-in-law, brother, brother-in law, sister, sister-in law, partner, or assistant.
(5) See form 2. Describing the asylum, hospital, or house by situation and name.

(Renton, p. 727.)

FORM 9.

(Medical) *Statement accompanying Urgency Order.*

I certify that it is expedient for the welfare of the said A. B. (*or* for the public safety, *as the case may be*) that the said A. B. should be forthwith placed under care and treatment.

My reasons for this conclusion are as follows: (*State them.*)

Second.

The revolving of the wheels of the above legal machine guarantees to land the alleged lunatic, will he nill he, behind the bars without loss of time or unnecessary, and possibly unpleasant, publicity for the parties interested.

The alleged lunatic, is arrested and haled to a cell by force, and kept there by force without the slightest show of notice of a hearing, a day in court, or any of the other usual concomitants of the process of depriving a man of his liberty. No judicial authority is invoked because under said act none is needed. Lay and medical authority solely are invoked. The next step in the game is to note that an urgency order shall remain in force only seven days (Renton, p. 118). "An urgency order shall remain in force for seven days from its date; or if a petition for a reception order is pending, then until the petition is finally disposed of."

Third.

The next move in the game is to "dispose of" the petition. This is done as follows. So soon as the alleged lunatic is safely housed behind the bars, the said possibly designing or hostile relative or acquaintance, assumes the role of a "petitioner." This is done by filling out and signing—the formality of swearing is obligingly dispensed with by said Lunacy

Acts of 1890 and 1891—this is done by filling out and signing "Form 1" (*supra*). Therein, among other things, said petitioner says (*supra*) "2. I desire to obtain an order for the reception of A. B. as a lunatic in the Asylum (or hospital or house as the case may be) of situated at ." Followed later by the pregnant phrase: "8. The said A. B. has been received in the Asylum (or hospital or house, as the case may be) under an urgency order dated the . The petitioner therefore prays that an order may be made in accordance with the foregoing statement.

"(signed)

"Full Christian and surname.

"Dated.

"Date of presentation of petition.

Fourth.

The next move is to decide as to whom the above petition should be presented. Care should be observed at this juncture. The choice lies between a Justice of the Peace, Judge of the County Courts, or a Magistrate. Care should be observed at this juncture because it might be inconvenient for the said possibly designing or hostile relative or acquaintance, as well as for the said unscrupulous medical man, were said choice to fall upon a Justice of the Peace, Judge of the County Courts or Magistrate who was not so guileless as to believe all he hears, and who might demand to lay eyes on the alleged lunatic, or at least to project his personality, as aforesaid, and afford him the privilege of a "*personal* examination" by *deputy*, before signing the commitment order imprisoning the alleged lunatic possibly for life. The thing to do is to select a Justice of the Peace, Judge of the County Court, or a

Magistrate who has a ready ear, and a large charity for "petitioners."

Such a justice of the peace, Judge of the County Courts, or Magistrate may be readily discovered, without risk of treading on any one's toes by one of two methods—First—By examining the files of commitment orders and seeing which Justice of the Peace, Judge of the County Courts, or Magistrate has, in a given locality, the largest number of signed orders of commitment to his credit.

Second—By inquiry among the medical men, who make a living by certifying as to the lunacy of parties brought before them; and by inquiry among the lawyers who make a business of setting the wheels of Lunacy procedure in motion; as to which Justice of the Peace, Judge of the County Courts, or Magistrate has the readiest ear in his locality.

This done the rest is easy. For as has been shown the selected Justice of the Peace, Judge of the County Courts, or Magistrate may dispense with a sight of the alleged lunatic, and may also dispense with the formality of a "personal examination" by deputy, and, as the files of commitment orders will show, said selected Judicial authority does invariably dispense with the aforesaid formalities, or he would not have been selected. The alleged lunatic being thus secretly and discreetly stowed out of harm's way, there remains but one last rite in his obsequies, to wit,—"After the alleged lunatic has been finally committed by Judicial authority without a statement in the order that the patient has been seen personally by such Judicial authority, the patient shall have the right to be taken before or be visited by a Judicial authority, other than the Judicial authority who made the order, unless the medical officer of the institution, or, in the case of a single patient, his medical attendant, within twenty-four hours after reception, in a certificate signed and sent to the commissioners,

states "that the exercise of such right would be prejudicial to the patient." (Renton, pp. 101 and 102 *supra*.)

Upon the strength of the foregoing a series of, so to speak, "*pour parlers*" is set in motion, purely for form's sake, between the prisoner and his jailer. Although purely a formal matter it is necessary that the form be carried out to the letter, otherwise a mild punishment is in store for the jailer.

The said "*pour parlers*," consist in the interchanging of polite notes between the prisoner and his jailer, based upon the former's alleged—but really wholly chimerical "right to be taken before or visited by a Judicial authority, other than the Judicial authority who made the order," (*supra*), when the latter has refused to see or "personally examine" by deputy, the said prisoner.

As Renton naively remarks, p. 102, "This right" (aforesaid) "as will be shown below" (*and as we have shown above*), "is a qualified one." But "qualified" or not the form must be carried out to the letter. Renton goes on to say, p. 102, "The notice to a lunatic of his right to demand an interview must be given within twenty-four hours after reception, also if no certificate is granted. This might lead to awkward consequences if the manager of an institution were not informed in time that no certificate was to be given, as any omission, wilful or otherwise, to comply with the section is a misdemeanor. Wilful misstatement of any material fact in such a certificate is a misdemeanor."

The said manager therefore indites and delivers "*pour parler*" number one, known as "Form 6" (Renton, p. 725).

"*Notice of Right to Personal Interview.*"

"Take notice that you have the right, if you desire it, to be taken before or visited by a Justice, Judge of County Courts, or Magistrate. If you desire to exercise such right,

you must give me notice thereof by signing the enclosed form on or before the day of dated.

(Signed) C. D.

Superintendent of the Asylum or Hospital or
Resident Licensee of (or as the case may be)."
Section 8 *Ante.*

To which the said alleged lunatic replies by signing *"pour parler"* number two, known as "Form 7" (Renton, p. 726).

"I desire to be taken before or visited by a Justice, Judge, or Magistrate having jurisdiction in the district within which I am detained.

(Signed)"

The said manager therefore winds the matter up by signing *"pour parler"* number three, known as "Form 5." (Renton, p. 725).

"Certificate as to Personal Interview after Reception.

I certify that it would be prejudicial to A. B. to be taken before or visited by a Justice, a Judge of County Courts, or Magistrate.

(Signed) C. D.

Medical Superintendent of the Asylum or Hospital
or Resident Medical Practitioner or Attendant of the
or Medical Attendant of the said A. B."
Section 8 *Ante.*

Surely it is not a wide surmise to assume that frequently said allegation should read "I certify that it would be prejudicial to *me,* if A. B. be taken before or visited by a Justice, a Judge of County Courts, or Magistrate."

(Signed) C. D. etc.

Surely we do not pass the bounds of moderation in observing that a more scandalous, barefaced, farce, in the guise of law-making, it has seldom been our pleasure to peruse.

So much for the Lunacy Acts of 1890 and 1891.

Now let us examine the "Idiots Act of 1886." (Renton, p. 777).

(Renton, p. 777.)

IDIOTS ACT 1886.

(49 & 50 Vict. c. 25.)

An Act for giving facilities for the care, education, and training of idiots and imbeciles.

(25th June, 1886.)

WHEREAS it is expedient to make provision for the admission into hospitals, institutions, and licensed houses of idiots and imbeciles and for their care, education, and training therein: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lord's Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Idiots Act 1886.

2. This Act shall not extend to Scotland or Ireland.

Sec. 1 Short title.

3. This Act shall commence from and immediately after the thirty-first day of December one thousand eight hundred and eighty-six.

Extent of Act.

From and immediately after, i. e. on first January 1887.

Sec. 3 Commencement.

Hospitals, institutions and licensed houses for idiots and imbeciles

4. An idiot or imbecile from birth or from an early age may, if under age, be placed by his parents or guardians or by any person undertaking and performing towards him the duty of a parent or guardian, and may lawfully be received into, and until of full age detained in, any hospital, institution, or licensed house, registered under this Act for the care, education, and training of idiots or imbeciles upon the certificate in writing of a duly qualified medical practitioner in the Form 1 in the Schedule that the person to whom such certificate relates is an idiot or imbecile, capable of receiving benefits from such hospital, institution or licensed house, accompanied by a statement in the Form 2 in the Schedule signed by the parent or guardian of the idiot or imbecile, or the person undertaking or performing towards him the duty of a parent or guardian.—Certificate—See form of, Schedule, Form 1, Post.

Retention and admissions of idiots and imbeciles after full age.

5. Any idiot or imbecile who has while under age been received under this Act into any hospital, institution, or licensed house, registered under this Act, may, with the consent in writing of the Commissioners in Lunacy, be retained therein after he is of full age, and an idiot or imbecile from birth or from an early age may be received into any hospital, institution, or licensed house, registered under this Act after he is of full age upon the certificate in writing of a duly qualified medical practitioner in the Form One in the Schedule, accompanied by a statement in the Form Two in the Schedule signed by the parent or guardian of the idiot or imbecile, or the person undertaking or performing towards him the duty of a parent or guardian.

A perusal of the above will prove that while an alleged lunatic practically has *no* show of notice, opportunity to appear and be heard before a Judicial authority minus a jury, or any kind of

a day in Court; strange as it may sound, an alleged idiot has even less.

First—There is a noticeable simplicity about procedure under the said Idiots Act of 1886. There is a total absence of the labyrinthine legal mazes of statutory obscurity and guile, so prominent in the Lunacy Acts of 1890 and 1891. There is no sign of false pretences relative to bogus trial-by-jury-rights of alleged idiots or imbeciles. There is no sign of a possibility of an alleged idiot or imbecile's having, as in the case of the alleged lunatic, a *quasi*, hypothetical, purely chimerical, right to be taken before a second Judicial authority, provided the committing judicial authority declines to allow the alleged lunatic to be present at the hearing when he is finally committed; and also provided the said committing Judicial authority declines to "personally examine" the alleged lunatic—by deputy.

Such signs of manipulation at the hands of medical men interested in increasing the number of alleged lunatics in the country: and at the hands of lawyers whose business it is to see that the wheels of the machinery for turning out alleged lunatics do not grow rusty from lack of use: and that sufficient dust is thrown into the public eye to hide the above said machinations from view: such signs are noticeably absent from the simple knock-down-and-drag-out methods employed in imprisoning, perhaps for life, a person on a possibly false charge of idiocy or imbecility. An examination of "The Schedule" will show that all legal or judicial authority is conspicuously absent. All that is required to incarcerate a person upon the possibly false charge of idiocy or imbecility is the action of his parents, or guardians, or "any person undertaking and performing towards him the duty of a parent or guardian," supported by a medical man, upon whose bare allegation, unsupported by affidavit, the alleged idiot or imbecile may be imprisoned for life. There is only one exception to said rule, and

that is where the alleged idiot or imbecile has been incarcerated while under age.

In this case the consent in writing of the Commissioners in Lunacy—(There are ten Commisssioners in Lunacy, four unpaid, and six paid, of whom three are legal and three are medical Commissioners." Renton, 469)—is necessary for retaining the alleged idiot or imbecile in durance after he is of full age (Renton, p. 778). The said formality of the consent of the said Commissioners in Lunacy is dispensed with where the incarceration of an adult alleged idiot or imbecile is concerned. Here the simple process aforesaid of bare allegations unsupported by affidavit, upon the part of the alleged idiot or imbecile's parents or guardian, "or person undertaking or performing towards him the duty of a parent or guardian" suffices, supported, as aforesaid, by a medical man, upon whose bare allegation, unsupported by affidavit, the alleged idiot or imbecile may be imprisoned for life.

Lastly. An examination of the "Schedule" (Renton, pp. 784-785, *Post*) will show upon what frail and slender affirmation the liberty of an alleged idiot or imbecile may be destroyed. The said medical man modestly asserts that "I am of opinion *that the said C. D. is an idiot.*" The parent or guardian, or their substitute, haltingly avers "to the best of my knowledge the above particulars are correctly stated" (Renton, p. 785, *Post.*) "To the best of his knowledge" a parent knows "the name of patient," his or her son or daughter! "To the best of his knowledge" a parent knows "the sex and age" of his or her son or daughter! The Superintendent or principal officer of the "hospital, institution, *or licensed house*" (Renton, p. 780) in which the alleged idiot or imbecile is imprisoned, deprecatingly suggests that the said alleged idiot or imbecile "is alleged to be capable of deriving benefit from the treatment he or she will receive herein" (Renton, p. 785, *Post.*) A far cry this from the aforesaid purely legal and strictly constitutional method of pro-

cedure obtaining prior to the nineteenth century: wherein, as aforesaid, an alleged idiot or imbecile had as fair a show for his liberty and property as an alleged lunatic or an alleged thief or murderer. For as aforesaid, the alleged idiot or imbecile, under the old way, was granted a jury trial, and personal examination by said jury as to whether he or she were idiot or imbecile. (Renton, p. 329, *supra.*)

An examination of the Lunacy Administration down to 1890 (Renton, pp. 70-75) will show that from the beginning of the eighteenth century to the end of the nineteenth, the public have been protractedly struggling against the proprietors of private madhouses, and medical men professionally interested in making it easy and secret to incarcerate a person upon a charge of lunacy, and lawyers professionally interested in having it easy and secret to incarcerate a person upon the said charge. During the eighteenth century the struggle between the public and the aforesaid parties practically confined itself to the protection from brutality and torment of persons legally and constitutionally declared insane by the intervention of a jury and personal examination thereby. The public won heavily in their said attack upon the method of treatment of insane persons by their keepers in private madhouses. Internal reforms of a decided character were achieved in the regulation of madhouses. But, on the other hand, the said parties, worsted in their struggle with the public in said struggle regarding the inside of madhouses, concentrated their efforts upon the outside thereof: that is to say. Seeing that the public had become aware of their criminal practices upon lunatics in confinement, they artfully submitted to the reforms which they were compelled by outraged public opinion to undergo, regarding humane instead of brutal treatment of patients; but revenged themselves by artfully attacking the law, which was as old as Magna Charta and older, which prevented an alleged lunatic's confinement behind the bars without first having been examined and tried by a jury of

his peers in open court. It having been made more difficult for them to maltreat a lunatic in confinement, they concentrated their efforts on making it easier to confine a person upon a charge of lunacy. With this end in view, they insidiously attacked, and finally with overwhelming success undermined, the old safeguard of trial by jury, and inspection by jury, of persons charged with lunacy or incompetency, or idiocy, and in its place put the said iniquitous Lunacy Acts of 1890 and 1891, and the said Idiot's Act with their entirely unconstitutional procedure.

(Renton, p. 784.)

THE SCHEDULE.

Form 1.

Form of Medical Certificate.

I, the undersigned A. B., a person registered under the Medical Act 1858, and in the actual practice of the medical profession, certify that I have carefully examined C. D., an infant (*or* of full age) now residing at , and that I am of opinion that the said C. D. is an idiot (*or* has been imbecile from birth, *or* for years past, *or* from an early age), and is capable of receiving benefit from (the institution [describing it]), registered under the Idiots Act 1886.

(Signed)

(full postal address.)

Form 2.

Form of statement to accompany Medical Certificate.

(If any particulars in this statement be not known the fact to be so stated.)

Name of patient, with Christian name at length.

Sex and age.

When and where previously under care and treatment.

In any asylum or institution.

Whether subject to epilepsy.

Whether dangerous to others.

I certify that to the best of my knowledge the above particulars are correctly stated.

(Signed)

Name and full postal address.

(To be signed by the parent or guardian of the idiot or imbecile, or the person undertaking and performing towards him the duty of a parent or guardian.)

(Renton, p. 785.)

FORM 3.

Form of Certificate of Reception.

I hereby certify that aged was admitted into on the day of 18 , on the request of of and of and that he (*or* she) is alleged to be capable of deriving benefit from the treatment he (*or* she) will receive herein.

A. B.

Superintendent or Principal Officer.

Dated this day of 18 .

To the Commissioners in Lunacy.

(Renton, p. 70.)

"LUNACY ADMINISTRATION DOWN TO 1890."

"The following have been the chief points, in so far as the administrative side of the question is concerned, in the de-

velopment of the legislation whose results the Lunacy Acts 1890 and 1891 embody.

From the beginning till after the middle of the eighteenth century there was an increasing demand on the part of the more enlightened and humane section of the community for an inquiry into the state of private madhouses in England. Of this demand Defoe was perhaps the most influential and eloquent exponent. It is impossible here to enter into a detailed examination of the abuses against which the efforts of asylum reformers were directed. It must suffice to state that in England, as in every other country in Europe at the time, such a system of asylum administration as existed was disfigured by the most pernicious defects.

The inmates of asylums were not classified according to the nature of their insanity, or treated medically with a view to their cure. There was no attempt to provide them with even the minimum of accommodation necessary to health. The wards were as uncleanly as they were incommodious. Asylum regimen was an alternation between, or rather a combination of "stripes, fetters, and darkness." Government inspection was unknown, and it was easy for family interest or private ill-will to secure the committal to an asylum, and the permanent incarceration there, of persons who were perfectly sane. In 1763 the first step in the path of reformation was taken. A committee of the House of Commons, comprising the elder Pitt, Wilkes, North, Grenville and Townsend, was in that year appointed to inquire into the condition of the private madhouses in the Kingdom. The committee reported in favor of the intervention of the Legislature, and ten years later, after the facts which they had recorded had had time to sink into the public mind, the first Bill for the regulation of private madhouses was introduced into and passed the House of Commons. It was thrown out by the House of Lords. In the following year, however, an Act for the regulation of madhouses (14 Geo. III. c.

49) did pass into law, which prohibited under a penalty of £500, any one from harboring more than one lunatic, without the license of the College of Physicians, who were required to elect annually five of their Fellows to act as Commissioners for this purpose; and further provided that reports of abuses should be furnished to the College of Physicians, and suspended in the Censor's Room for inspection by any one who applied to see them. * * * For more than thirty years after the enactment of this measure nothing further was accomplished in Parliament for the reform of asylum administration. But the mysterious illness of Chatham, the insanity of George III., the distinguished success attending the establishment of the York Retreat under William Tuke, and the labors of Pinel at the Bicetre in Paris, kept public interest in this question alive. * * * After this temporary diversion of public attention to the case of pauper lunatics, the struggle for asylum reform once more centred round private madhouses. The success of Mr. Tuke's Retreat excited the jealousy of the superintendent of the York Asylum; a discussion ensued; then came revelations as to the manner in which York Asylum was conducted: a select Committee of the House of Commons was appointed in 1814 to investigate their truth; the accuracy of the charges brought against the asylum was abundantly demonstrated; and in 1816 Mr. Rose who had been a leading member of the Committee of 1814, introduced into the House of Commons a Bill providing for the inspection of private madhouses twice a year by a body of eight Commissioners appointed by the Home Secretary, and assisted by two of the local magistrates in each district. This Bill passed the Commons, but was rejected in the Lords. * * * In 1827 Mr. R. Gordon succeeded in securing the appointment of a Committee to inquire into the condition of pauper lunatics in Middlesex. The investigations of this Committee disclosed a state of matters which made the immediate intervention of the Legislature imperative. It appeared that the old evils against

which asylum reformers had been contending since 1763—the want of proper accommodation for the insane, the absence of sufficient precautions against the confinement of persons who ought to have been at liberty, the secondary position assigned to curative treatment, the undue employment of mechanical restraint, and such like—were still active if somewhat diminished in force and range. * * *

The chief work done by the Metropolitan Commissioners was to prepare and present to Parliament in 1844 the famous Report on the Condition of the Asylums of England and Wales, which has been well called "the Domesday Book" of all that concerns institutions for the insane at that time, and which directly led, on the motion of the Earl of Shaftesbury (then Lord Ashley), to the enactment of the Lunacy Acts of 1845 (8 & 9 Vict. c. 100, and 8 & 9 Vict. c. 126). The former of these statutes established a permanent Lunacy Commission consisting of ten members, four unpaid, and six—of whom one-half were physicians and one-half barristers—paid at salaries of £1500 a year each. * * *

In 1858 there was a revival of public suspicion in regard to the conduct of asylums, and in February, 1859, a Select Committee of the House of Commons was appointed to inquire into the working of the various Acts of Parliament for the care and treatment of lunatics and their property. The outcome of the labours of this Committee was the enactment of a Lunacy Law Amendment Act in 1862 (25 & 26 Vict. c. 111,) which contained a number of important safeguards against the improper admission of patients into institutions for the insane. A person signing an order for admission must have seen the patient within one month. (Sec. 23.)

Certain persons were prohibited from signing any certificate or order for the reception of any private patient into a licensed or other house, viz., those receiving a percentage on, or otherwise interested in the payments to be made by such patients,

as well as any medical attendant. (Sec. 24.) If defective medical certificates were not amended within fourteen days, the Commissioners were authorized to order the patient's discharge. (Sec. 27.) On the admission of a patient, the documents relating to his case were to be transmitted to the Commissioners within one clear day instead of after two, and before the expiration of seven. (Sec. 28.)

Provision was also made for more frequent visitation of patients by Commissioners (sec. 29), for the release of patients on trial (sec. 38), and for the transmission of their correspondence unopened. (Sec. 40.) The next event requiring notice here is the appointment of the Dillwyn Committee in 1877.

The Dillwyn Committee, appointed on 12th February, 1877, "to inquire into the operation of the Lunacy Law so far as regards the security afforded by it against violations of personal liberty," like the Committee of 1859, was in large measure an outcome of the conviction of certain sections of the public that the admission of patients into asylums was too easy, and that their discharge from them was too difficult; and much of the interesting evidence which it collected is confined to cases of alleged hardship and injustice.

(Among the conclusions of the said Committee in the report which it presented to the House of Parliament was the following:)

"The anomalous state of the law, which undoubtedly permits forcible arrest and deportation by private individuals, and the fearful consequences of fraud or error have induced the Committee to inquire whether any additional safe-guards may be devised." * * *

Mr. Dillwyn introduced a Bill in 1880 framed with a view to carrying into effect the recommendations of the Committee of 1877. It was sharply criticised by the Commissioners in Lunacy, chiefly on the grounds that the interposition of magisterial authority—for which it provided, before a patient could

be sent to an asylum—would hinder early treatment and cause clandestine removals. But these objections did not prevent the Earl of Selborne from introducing a Bill embodying substantially the same provision and recommendations in 1883. This Bill was passed in the House of Lords by Lord Herschell in 1886, and again by Lord Halsbury in 1887 and 1888, and it became law as the Lunacy Acts Amendment Act 1889."

The first thing that strikes one on reading the above, is the slowness with which an idea sinks into the public mind in England. After a committee containing such names as the elder Pitt, Wilkes, North, Grenville and Townsend, appointed by the House of Commons to inquire into the condition of the private madhouses in the Kingdom, had reported in favor of the intervention of the Legislature, it required ten years for the facts which said committee had recorded to sink into the public mind. Renton says specifically "and ten years later, after the facts which they had recorded had had time to sink into the public mind." The next thing that strikes us, is the fact that the outcome of the labors of the said committee, the first bill for the regulation of madhouses, was thrown out by the House of Lords. The same fate overtook Mr. Rose's Bill framed to remedy, by semi-annual inspection, the abuses in York asylum, which a select committee of the House of Commons, appointed for the purpose, had examined and found to be substantially affirmed.

The next thing that strikes one upon reading the above, is the suspicion with which the public have always looked upon the management of madhouses. Renton says "In 1858, there was a revival of public suspicion in regard to the conduct of asylums." And again "The Dillwyn Committee, appointed February 12, 1877, to inquire into the operation of the Lunacy Law so far as regards the security afforded by it against violations of personal liberty, like the committee of 1859, was in large measure an outcome of the conviction of certain sections

of the public that admission of patients to asylums was too easy, and their discharge from them was too difficult."

The last thing one notices on reading the above is the sinister statement by Renton, passed over by him without comment of any sort, that Mr. Dillwyn's bill in 1880, framed to carry into effect the recommendations of the Committee of 1877, "was sharply criticised by the Commissioners in Lunacy, chiefly on the grounds that the interposition of magisterial authority—for which it provided—before a patient could be sent to an asylum—would hinder early treatment and cause clandestine removals." How, one might ask, could such a sane and legal provision "hinder early treatment?" The alleged lunatic could be treated at home for the few hours required to put in motion an urgency order, and land the alleged lunatic behind the bars in short order. And what, pray, is the meaning of the mysterious words "and cause clandestine removals?" Cause clandestine removals from where? Cause clandestine removals of parties illegally and falsely permitted to be committed as Lunatics by the said Commissioners in Lunacy—from private mad-houses, by the order of the said Commissioners in Lunacy, in order to prevent the discovery of the fraud by the passage of said bill, permitting the interposition of magisterial authority before a person could be deprived of his liberty? The said mendacious and absurdly puerile and ignorant strictures, upon the part of the said Commissioners in Lunacy, did not have any more weight than they deserved with honest and intelligent men: and the Earl of Selborne introduced a Bill embodying substantially the same provisions and recommendations in 1883. This Bill was passed in the house of Lords by Lord Herschell in 1886, and again by Lord Halsbury in 1887, and 1888, and it became law in the "Lunacy Acts Amendment Act in 1889." Such suspicious action upon the part of the said Commissioners in Lunacy, is sufficient to make the name of Commissioners in Lunacy as a stench in the nostrils of all hon-

est and intelligent men forever after. Such suspicious action upon the part of the said Commissioners in Lunacy, rouses the thought in the minds of all honest and intelligent men, who care enough about the subject to give it a moment's thought, "What can be the motive which so strongly urges the said Commissioners in Lunacy that in their misplaced zeal the lay themselves open to the suspicion of being financially interested—in the shape of commissions—along with the owners of private madhouses—in keeping up the bars about those umbrageous institutions with a view to barring out indiscreet 'interposition of magisterial authority' when it comes to railroading a rich, sane, alleged lunatic to a cell, for a consideration, for life?" Perhaps a person might say in answer "But Commissioners in Lunacy are above that sort of thing, they are men chosen for their fitness for the post, and are too highly respectable and too eminently proper to be found taking a hand in any such nefarious game of cheating a sane man out of his liberty for a consideration." But it should be remembered that after all even Commissioners in Lunacy are but mortal, and that the Law expects mortals uniformly to fall by the wayside, whenever temptation meets with opportunity. Where could be found a more baleful conjunction of temptation and opportunity, than in the almost unlimited satrap-like power of Commissioners in Lunacy: with no earthly eye to view them, no earthly ear to hear their plans and actions, when exposed to the temptation of fabulous bribes from the owners of private mad-houses; who are in position to pay fabulous bribes when one set of millionaires combine against another millionaire and run him behind the bars, and force the imprisoned millionaire to pay his own mulct, to the said mad-house proprietor through a Committee of his person and estate?

The said Commissioners—six out of the ten—are poor men; that is to say they work for their living and receive a salary in return. They receive fifteen hundred pounds per annum,

(Renton p. 470.) In other words, $7500, are sufficient consideration to command the yearly life work of a Commissioner in Lunacy.

How much of a consideration for the work of signing his name would be $17000 or $27000—over three years' salary—in the shape of an honorarium, upon the part of a set of millionaires—or even one millionaire—who wanted to keep, for business reasons, a rival millionaire out of the way—how much of a consideration would $27000 appear along-side of $7500? Would it not loom large?

It should perhaps be observed that, at the proper place, we shall prove our assertion that Commissioners in Lunacy are but mortal, and that money is to them a considerable consideration.

In dismissing this odoriferous topic it should be observed, that Renton's silence is perhaps chargeable to the brief he apparently holds for private mad-house proprietors for he never loses an opportunity to frown down, any effort upon the part of the public, or their representatives in Parliament, to interpose magisterial authority between the greed of private mad-house proprietors and the personal liberty of the citizen. To take an instance: (Renton, p. 331.)

(Renton, p. 331.)

Procedure under Acts of 1842 and 1845.

"The procedure on inquisitions under the Acts of 1842 and 1845 was substantially as follows. The petition for a commission, duly supported by medical and other affidavits, was lodged with the Secretary of Lunatics for the Lord Chancellor's inspection. If satisfactory and unopposed, the petition was endorsed and the commission issued. If a *caveat* was entered, liberty was given to attend and oppose it, and the inquiry was held in the most convenient place. A jury of twenty-four persons was summoned by the sheriff on the instructions of the Master in Lunacy to try the case. The jury and the Master being assembled, and the former sworn, the Master in Lunacy ex-

plained to the jury what they had to try. After witnesses and counsel were heard, and the alleged lunatic had been examined, the Master summed up, and the verdict—which was required to be of twelve jurors at least—was given. Then the inquisition was filled up and signed by the twelve jurymen, and the Master annexed a duplicate copy to the commission, and endorsed on the commission the words: "The execution of this commission appears by the inquisition hereunto annexed.' The chief defect of this legislation was its requisition of a jury in all cases."

Note Renton's sapient comment upon said Acts of 1842 and 1845, in comparison with which the Lunacy Acts of 1890 and 1891 are as a Satyr to Hyperion. Renton says: "The chief defect of this legislation was its requisition of a jury in all cases." He prudently refrains from hazarding a reason for this preposterous assertion, and like too many lawyers gambles on the hope of a smooth pen's carrying his bluff unchallenged. Apply the said sapient remark of Renton to criminal legislation and see where Renton stands. He stands on his head.

If we now turn to the question of the ancient and honorable right of traverse of an inquisition in lunacy, a right as old as the time of Edward the Sixth, we shall see that said ancient and honorable right to traverse an inquest in lunacy has had a career marked by variegated vicissitudes, such as rarely—in a law-abiding country—fall to the lot of a Statute.

Second. An examination of said vicissitudes will show an astounding daring, or rather an astounding ignorance of law, upon the part of several of Great Britain's highest judicial authorities.

Third. An examination of said vicissitudes will show an astounding torpor upon the part of the members of the English Bar, in allowing their client's rights to be so trodden down by the aforesaid astounding daring, or rather astounding ignorance

of law, upon the part of several of Great Britain's highest judicial authorities.

Fourth. An examination of said vicissitudes will show the amusing spectacle of a Lord Chancellor attempting to knock the said ancient and honorable right to traverse an inquest in lunacy, on the head, while craftily dodging the burden of boldly killing it openly.

Fifth. An examination of said vicissitudes will show that Parliament would not permit the slaughter of said Statue meditated by said Lord Chancellor, but permitted said Statute to maintain a precarious hold on life, dependent solely upon the pleasure of the court.

Lastly. An examination of said vicissitudes will show the scandalous disregard in England today of the absolute rights of individuals, as laid down by so high an authority as Sir William Blackstone in his Commentaries, when the mere question of expense or scandal is connected with the trial of an individual whose liberty is at stake, as well as whose property is at stake, upon a charge of lunacy.

(Renton, p. 306.)

"Traverse of an Inquisition."

101. (1) "Any person desiring to traverse an inquisition, not being a verdict upon an issue tried in the High Court, may, within three months next after the day of the return of the inquisition, apply for that purpose to the Judge in Lunacy. This subsection re-enacts the first clause of sec. 148 of the Lunacy Regulation Act 1853 (16 & 17 Vict. c. 70), as amended by sec. 7 of the Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86.) The effect of these sections, and the reason for the amendment of the former by the latter, are considered below. Applications for traverse to be made within a limited time.

Any Person.—(1) Any person found lunatic by inquisition— Traverse by lunatic.

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otherwise than upon an issue tried in the High Court—has a right to traverse if the judge is satisfied that the application is really that of the party in whose behalf it is made, and that he is mentally competent to form and express the wish to do so. This point was long considered doubtful, and as the Judges who took a view contrary to that just stated were of the highest distinction, it may be convenient to trace the history of the controversy on the subject at this point.

History of controversy as to right to traverse. Common law.

At common law, when the king became seised of any estate of freehold or inheritance by inquest of office, the party aggrieved could have no traverse of the inquest, but had to proceed by petition of right, or in some cases, including chattels real, and higher interests, by *monstrans de droit*—a procedure which in either case put him in the position of a plaintiff who had to make out his title affirmatively.

Statute *de Prærogativa Regis.*

This rule, of course, governed the case of inquisitions in lunacy, since by the statute *de Prærogativa Regis* (17 Edw. II., cc. 9 & 10, *post* Appx.) embodying the principle of the common law, the Crown was entitled to the custody of the lands of a lunatic. In cases, however, where the lands were not in the king's hands a traverse was allowed, the effect of which was that the king was only entitled to a *scire facias* in the nature of that action to which a subject would have been entitled under similar circumstances, and in such cases the party being in the nature of a defendant might appear and traverse the office without showing any title in himself. The remedy by petition, or *monstrans de droit,* having been found inconvenient, the statute 34 Edw. III., c. 14, provided that in certain cases the party aggrieved might traverse the inquest, after office found; and by the statute 36 Edw. III., c. 13, a general right was given to traverse inquests of office taken before escheators. This right was extended to commissions in lunacy by the statute 2 & 3 Edw. VI., c. 8, sec. 6, which enacted that if any person should be untruly found lunatic or idiot, every person aggrieved by

34 Edw. III., c. 14.

Sec. 101. (1) 36 Edw. III. c. 13. 2 & 3 Edw. VI. c. 8.

such finding should have a right to traverse at his pleasure, and should have the like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices found. *Prima facie* and apart from authority, this statute would appear to confer a right of traverse on the conditions which it indicates, viz., that there should be an untrue finding, and that the application should be made by a party aggrieved by it, in the clearest and strongest terms. But a contrary construction of the statute gradually came to be adopted from a variety of causes. In the first place, although there is a case on record—*re Gervase Heely*[1]—where a traverse was filed in the Petty Bag Office without the assent of the lunatic or the leave of the Court, and Lord Hardwicke left the traverse to be tried without interfering with it, liberty to traverse was generally applied for. The reasons why this course was taken are clearly pointed out by Lord St. Leonards *in re* Cumming.

Construed against right of traverse.

(1) 1748. Cited and examined by Lords St Leonards L. C. *in re* Cumming 1852.

(a) Liberty generally applied for.

The traverse could not take place until the party had been found lunatic on a commission issued by the Great Seal, and therefore no one would, generally speaking, attempt to traverse except with the leave of the Great Seal, because otherwise he would have no security for the reimbursement of his costs of thus defending the interest of the lunatic. A person going behind the back of the Court and exercising his legal right (if he had it) could hardly come and ask for costs, as he would do in respect of proceedings taken under the authority of the Great Seal. But in spite of these considerations, the fact that liberty to traverse was usually applied for probably contributed to the growth of the idea that no right to traverse existed. Another circumstance which told in the same direction was the fact that the Lord Chancellor, when applied to for liberty to traverse, undoubtedly exercised a certain jurisdiction over the application. It was his duty to see that it was really the application of the party in whose name it was made, and that the party was able to exercise volition in regard to

Why?

(b) Jurisdiction of Lord Chancelor over application.

it. With a few exceptions, it will be found that in every case in which liberty to traverse has been withheld, the refusal has rested on the exercise, not of any discretion by the Lord Chancellor, but of his jurisdiction in regard to one or other of the points above mentioned, viz., that the applicant had no interest,

Sec.101. (1)

or that the lunatic was incompetent to form and express a wish for a traverse. It cannot be denied, however, that there are many *dicta* to the effect that the grant of a traverse is discretionary. Lord Hardwicke expressed an opinion to this effect in *ex parte Roberts;* Lord King appears to have taken the same view in a case which is reported under different names; and Lord Thurlow followed suit *in re* Fust.

(c) "Untruly founded" lunatic.

The last circumstance which helped to produce the impression that liberty to traverse was at the discretion of the Court was the fact that the statute 2 & 3 Edw. VI. c. 8, spoke of those "untruly founden" lunatic,—language which seemed to point to some form of preliminary inquiry and gave only "the like remedy and advantage as in other cases of traverse upon untrue inquisitions." This remedy in the case of traverse in reference to lands was said to be confined by the statutes 8 Hen. VI. c. 16, and 36 Edw. III. c. 13, to such parties as could "show good evidence proving their traverse to be true," and it was contended that a party found lunatic, and desirous of traversing had the same kind of obligation resting upon him—to show reasonable grounds for the allegation that the finding was wrong. The point taken under the statutes referred to was based upon a misconception which was lucidly

Re Cumming.

explained by Lord St. Leonards, L. C., *in re Cumming.* "The proposition," said his lordship, "(is) that under those statutes there could be no issuing of a traverse in the cases of escheats generally until the title of the party had been established and proved, and that so * * * the words * * * giving the party the like remedy and advantage as in other cases of traverse upon untrue inquisitions, require a title to be shown before the

application can be granted. This argument, however, proceeds upon a mistake, because the right given to a party in regard to lands and upon ordinary escheats was not only the right to traverse, but was also the right to have the lands demised to him for a certain time during the existence of the trial: the party asserting his right to traverse as against the Crown had that right, and, on showing his title to the satisfaction of the Chancellor, had also a right to have the very lands which he claimed demised to him, so as to secure to the Crown a rent if he turned out to be wrong, and to secure to himself the possession of the lands if he turned out to be right."

Right to traverse *de jure*.

The proposition that a traverse is *de jure*, subject to the condition stated above (*ante* p. 306) was laid down by Lord Rosslyn in *ex parte*. Wragg, *ex parte* Fern, by Lord Eldon in *ex parte* Ward, and Sherwood *v.* Sanderson; by Lord Cottenham *In re* Bridge; and finally by Lord St. Leonards *In re* Cumming (*sup.* p. 308, note 1), which is the *locus classicus* in regard to this point."

(Renton, p. 292.)

Inquiries before a jury may be made by means of an issue in the High Court.

(1) "Wherever the Judge in Lunacy orders an inquisition before a jury, he may by his order direct an issue to be tried in the High Court, and the question in such issue shall be, whether the alleged lunatic is of unsound mind and incapable of managing himself or his affairs; and the provisions of this Act with respect to commissions of lunacy, and orders for inquisition to be tried by a jury, and the trial thereof, and the constitution of the jury, shall apply to any issue to be directed as aforesaid, and the trial thereof, and subject thereto and to the provisions of this Act such issue and the trial thereof shall be regulated by the Rules of the Supreme Court for the time being in force relating to the trial of issues of fact by a jury, and the verdict upon any such issue finding the alleged lunatic to be of unsound mind and incapable of managing himself or his

affairs shall have the same effect as an inquisition under this Act."

"This subsection re-enacts subs. (4) of the Lunacy Regulation Act 1862. (25 &26 Viet. c. 86.) That Act was passed after, and largely in consequence of, the *Windham case*. Between the passing of the Lunacy Regulation Act 1853 (16 & 17 Viet. c. 70) and that case there had been issued 560 commissions in lunacy, but of these 19 only had been tried by jury, and none of these had occupied any length of time. The inquiry in the case of Mr. W. F. Windham, however, which was held before Master Warren and a jury in the Court of Exchequer, occupied the better part of 34 days; it was roughly computed at the time to have cost £60,000; 48 witnesses were examined by the petitioners, and 91 for the alleged lunatic; the evidence ranged over the whole life of the alleged lunatic; much of the medical testimony adduced was of a highly speculative character; and the details of the ordinary evidence were extremely painful and disgusting.* Public feeling was very strongly aroused by this *cause celebre*, and the Master was severely, though it was afterwards admitted unjustly, criticised for having allowed the inquiry to be protracted for so long a period of time. Even after it was acknowledged that the strictures on Master Warren had been unjust, fresh legislation on the subject of inquisitions was perceived to be necessary. For the *Windham case* showed how unsettled the law was on many points. Thus doubts were raised as to whether an inquisition was a crown prerogative proceeding merely, or a litigation between parties, as to whether the Master had any right to conduct the examination of the alleged lunatic in private, and as to the number and position of jurymen. And in addition to these technical points there

Origin of section.

Windham case.

Doubts raised by *Windham case*.

* How would it sound objecting to jury trial of a murderer on the ground that "the details of the ordinary evidence were extremely painful and disgusting"? Fancy objecting to "the principal bulwark of our liberties"—as it is styled by Blackstone *i e.* trial by jury—for the defence of a burglar on the score of its being "scandalous in point of costliness"!

were grave general questions. Although the *Windham case* was far more scandalous in point of costliness than any of its predecessors, other flagrant instances of undue expense in such inquiries were not wanting. The unlimited range which the inquiry might assume, and the abuses of the right to traverse were open to serious objection, and it was very generally felt that provision should be made for inquisition with a jury being held, if necessary, before a stronger tribunal than that of the Master. It was in consequence of the facts just stated that the Lord Chancellor of the day (Lord Westbury) brought forward the Bill which ultimately became law as the Lunacy Regulation Act 1862. (25 & 26 Vict. c. 86.) We shall refer to the history and provisions of this Act, so far as is necessary, in the notes. Lunacy Regulation Act 1862.

"*Judge in Lunacy.*—See sec. 108, *post.*

"*Orders.*—See notes to sec. 90, subs. (1), *ante.*

"*An inquisition before a jury.*—As to when an inquisition before a jury is ordered, see notes to sec. 93, *sup.*

"*He may by his order.*—Lord Westbury proposed originally the compulsory reference to the superior Courts of *all* inquisitions which were to be held before a jury. This provision was afterwards, however, abandoned, and the reference was made permissive only, on the lines of a corresponding clause in a Bill introduced into the House of Commons by Lord, then Sir Hugh, Cairns in 1859." Reference to Superior Courts.

(Renton, p. 315.)

"A traverse of a verdict upon an issue tried in the High Court shall not be allowed, but the Judge in Lunacy may, if he thinks fit, upon application within three months next after the trial of any such issue, order a new trial of the issue, or a new inquisition as to the insanity of the alleged lunatic, subject to such directions and upon such conditions as to the Judge may seem proper."

"This section re-enacts sec. 7 of the Lunacy Regulation Act 1862. (25 & 26 Vict. c. 86.) Lord Westbury, who was the author of that statute, probably anticipated that the trial in the superior Courts which it substituted for an inquisition before a Master would largely supersede the latter procedure (*v. ante* p. 292), and that consequently the prohibition of traverses in the case of issues tried in this way would be tantamount to the abolition of traverses altogether. In point of fact, however, only one inquisition has yet been tried as an issue before a High Court Judge—*re* Scott—and in that case no application for a new trial was made."

An examination of the above will prove our aforesaid first contention: to the effect that the construction of the Statute concerning the right to traverse an inquest of lunacy, 2 and 3 Edw. VI. c. 8, sec. 6, will show some strange things from a legal point of view. Said construction will show:

First.—That all the rules applicable to the construction of Statutes as laid down by Blackstone—applicable to it—have been totally disregarded.

Lastly.—That no rule has been followed in the construction by the courts of said Statute, but in the place of rule there sprang up an absolute haphazard, unlearned process of interpretation founded upon chance; timidity upon the part of lawyers in enforcing their client's rights; and ignorance upon said lawyer's part, as well as on the part of the courts which heard them, as to what said client's rights were in the premises. In this connection, it may not be amiss to refer to Blackstone upon the subject of the interpretation of Statutes. Blackstone says, page 52 (Chase's Blackstone, edition of 1882) "1. There are three points to be considered in the construction of all remedial Statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the Act; what the mischief was, for which the common law did not provide; and what remedy the Parliament hath provided to cure this mis-

chief. And it is the business of the Judges so to construe the Act as to suppress the mischief and advance the remedy." Applying Blackstone to the said situation we see

First.—"The old law." (Renton, p. 306.) "At common law, when the king became seised of any estate of freehold or inheritance by inquest of office, the party aggrieved could have no traverse of the inquest, but had to proceed by petition of right, or in some cases, including chattels real, and higher interests, by *monstrans de droit*—a procedure which in either case put him in the position of a plaintiff who had to make out his title affirmatively. This rule, of course, governed the case of inquisitions in lunacy, since by the Statute *de Praerogativa Regis* (17 Edw. II. cc. 9-10) embodying the principle of the common law, the Crown was entitled to the custody of the lands of a lunatic."

Second.—"The mischief." "The party aggrieved could have no traverse of the inquest, but had to proceed by petition of right, or in some cases including chattels real, and higher interests, by *monstrans de droit*—a procedure which in either case put him in the position of a plaintiff who had to make out his title affirmatively." (*Supra* Renton.) Lastly, the remedy by petition, or *monstrans de droit*, was found to be inconvenient.

Third—"The remedy." "The statute 34 Edw. III., c. 14 (*supra*), provided that in certain cases the party aggrieved might traverse the inquest, after office found; and by the statute 36 Edw. III. c. 13, a general right was given to traverse inquests of office taken before escheators. This right was extended to Commissioners in Lunacy by the statute 2 and 3 Edw. VI. c. 8, sec. 6, which enacted that if any person should be untruly found lunatic or idiot, every person aggrieved by such finding should have a right to traverse at his pleasure, and should have the like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices found."

Fourth.—"And it is the business of the Judges so to construe

the Act as to suppress the mischief and advance the remedy."

Nothing could be plainer than what "the business of the Judges" was in this matter. Renton observes *"Prima facie,* and apart from authority, this statute would appear to confer a right of traverse on the conditions which it indicates, viz., that there should be an untrue finding, and that the application should be made by a party aggrieved by it, in the clearest and strongest terms."

Now let us see how the Judges proceeded to attend to their "business so to construe the Act as to suppress the mischief and advance the remedy." With the solitary honorable exception of Lord Hardwicke, in the solitary recorded case *re* Gervaise Heely in 1748; throughout more than a hundred years, down to 1852, and the enlightened advent of Lord St. Leonards, and his enlightened opinion *re* Cumming 1852, there is not one solitary Judge who did his duty as laid down by Blackstone, and construed the Act so as to suppress the mischief and advance the remedy.

The above astounding state of affairs grew out of a desire upon the part of the parties traversing, or rather desiring to traverse, to stand well with the Court in order to be awarded costs.

The said parties therefore supinely requested permission to traverse—in order not to irritate the Court by acting independently of it, under the said statute, and traversing in their own right, as was done in the case of Gervaise Heely (*supra*). The Courts, in said cases, instead of regarding the said statute usurped an authority which, by implication, was emphatically withheld from them, to wit.—The Courts instead of granting the request to traverse "to every person aggrieved by such finding," presumed to exercise jurisdiction over the said application and presumed to withhold the said request at pleasure. In so doing the Courts ran foul of the two following rules for the constructing of statutes laid down by Blackstone, to wit.—

Blackstone says (p. 55) "4. Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule"; ("3. Penal statutes must be construed strictly." Blackstone, p. 54.) "most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally."

And Blackstone (p. 56) "6. A saving, totally repugnant to the body of the Act, is void." It should not require much liberality upon the part of Courts to construe a statute that enacts that "if any person, should be untruly found lunatic or idiot, every person aggrieved by such finding should have a right to traverse at his pleasure," into meaning that "if any person *should be untruly found lunatic or idiot*, every person aggrieved by such finding should have a right to traverse at his pleasure."

Furthermore. It should be remembered that the ancient case of Gervaise Heely so far back as 1748, had established the precedent that a traverse could be filed in the Petty Bag Office without the assent of the lunatic or the leave of the Court. In disregarding the said precedent the Courts broke another rule laid down by Blackstone, to wit (Blackstone, p. 35), "It is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new Judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent Judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not dele-

gated to pronounce a new law, but to maintain and expound the old one."

Furthermore. If any possible doubt could by any possibility have crept into the mind of the court as to just what was meant by the words: "If any person should be untruly found lunatic or idiot, every person aggrieved by such finding should have a right to traverse at his pleasure." Blackstone could have enlightened him where he says: "Statutes against frauds are to be liberally and beneficially expounded." And again: "When the Statute acts upon the offence by setting aside the fraudulent transaction, here it is to be construed liberally." (Blackstone p. 55.) That is to say that if any person should be untruly found lunatic or idiot, every person aggrieved by such finding should have a right to traverse at his pleasure for the purpose of setting aside the fraudulent transaction.

Furthermore. The saving which the courts usurped to themselves in the construing of the said Statute, namely, as to the discretionary right of the court to refuse a request to traverse upon the usurped discretionary right of the court, to usurp the powers of the jury and improperly substitute itself therefor, and sit in judgment upon the question as to whether the person aggrieved was aggrieved, as well as upon the question as to whether the person untruly found lunatic or idiot was untruly found lunatic or idiot, such a saving which the courts usurped to themselves in the construing of the said Statute was void on its face according to Blackstone who says: "A saving totally repugnant to the body of the Act, is void." (*Supra.*) There can be no possible doubt as to the said saving being totally repugnant to the body of the Act, for the said Act goes on to say "and should have the like remedy and advantage as in other cases upon traverse upon untrue inquisitions or offices found." (Renton, *supra.*) In "other cases" a general right was given to traverse inquests of office taken before escheators. To have attempted to usurp the said saving and thereby improperly sub-

stitute itself for the jury in the said "other cases" the court would have run foul of Blackstone again. (Page 787.) "In Magna Charta it (the trial by jury) is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29, that no freeman shall be hurt in either his person or property; *'nisi per legale judicium parium suorum vel per legem terræ.'* "

Such a degeneration in law and liberty as the above brief sketch of the English Lunacy Laws of the 19th century exhibits, when placed beside those which obtained before that alleged enlightened era, such a degeneration in liberty and law requires some explanation. The latter is not far to seek. It is answered by the familiar adage, "History repeats itself."

To support the contention we append a list of English Statutes from William the Conqueror, to Cromwell, given in the Appendix, which parallel for illegality and tyranny the degenerate Statutes aforesaid of Victoria and is as grossly repugnant as are the latter, to the provisions to Magna Charta.

Discussion of Ancient English Charters and Statutes.*

(Showing how what was a mere benevolence on the part of the vassals towards the lord, came in time to be demanded by the latter as a right and the tyranny resulting therefrom. Chase's Blackstone edition of 1882, p. 257.)

In the nineteenth century Parliament assumed the tyrannical role above exercised by the Kings and feudal Lords, and what had been for ages demanded as a right by all free Englishmen, and what had been secured to all free Englishmenn for ages by the Common law and later by Magna Charta, as the condition precedent before a man could be deprived of liberty or property—namely—trial by a jury of his peers; (Blackstone says

*In appendix.

p. 1023, "The trial by jury, or the country *per patriam,* is also that trial by the peers of every Englishman, which as the grand bulwark of his liberties, is secured to him by the great Charter: '*nullus liber homo capiatur, vel imprisonatur, aut exulet, aut aliquo modo destruatur, nisi per legale judicium parium suorum vel per legem terræ.*' ").

This irrefrangible, solemn condition precedent before a man could be deprived of life, liberty, or property, was universally regarded as so irrefrangible, so solemn, so precedent a condition before an Englishman could be deprived of life, liberty or property, that the law did not allow said Englishman any choice in the matter but said that the said solemn formality of a trial by his peers must precede an adjudication upon the life, liberty or property of a free Englishman whether the said Englishman desired to dispense, for any reason, with the aforesaid solemn formality of a trial by his peers or not. For example, Parliament, by the Act 16 and 17 Vict. c. 70 (Renton, *supra*), first dared to insinuate the thin edge of a knife which was destined later to totally cut the throat of said irrefrangible solemn condition precedent before a free Englishman could be deprived of life, liberty or property—to wit, a trial by a jury of his peers. The said thin edge of the said knife consisting in making it optional with an alleged lunatic whether or not he should have a trial by jury before risking his liberty and property on an adjudiction of insanity. Furthermore, Parliament, grown bolder, dared further to insinuate the edge of said knife by declaring in the Lunacy Acts of 1890 and 1891 (53 Vict. c. 5, and 54 and 55 Vict. c. 65 (Renton, *supra*) that trial by jury before a man could be deprived of liberty or property, which before was a right, had, by this same law, become a mere benevolence upon the part of the court; dependent in turn upon the say so of the medical man in charge of the madhouse, having the said alleged lunatic in durance, and consequently that said benevolence might be withheld at the discretion of the court; thereby

completely cutting the throat of the said irrefrangible, solemn condition precedent before an Englishman could be deprived of liberty or property, to wit, a trial by a jury of his peers.

["Instance of Kings sinking distasteful clauses in charters or breaking through them, Chase's Blackstone, p. 258."]

The instances recorded under said title, of kings and nobles, or kings alone, as the case might be, playing hide and seek through loop-holes in Magna Charta and other charters with the object of dodging the provisions in said charters which protected the rights of free Englishmen regarding "Aids," etc., are perfectly paralleled by Parliament in the nineteenth century; as instanced by its subterfuges and tricks to deprive Englishmen of the benefits of the guarantees in Magna Charta aforesaid, of trial by jury before a man could be deprived of liberty or property. "Sinking distasteful clauses in charters" is amply exemplified by the Acts 16 and 17 Vict. c. 70, (*supra,*) and the Lunacy Acts of 1890 and 1891, (*supra.*) The first *partially* sinking the distasteful clause, trial by jury, before an alleged lunatic can be deprived of liberty or property, by making said trial-by-jury-right optional with the alleged lunatic. The second *totally* sinking the said distasteful clause, trial-by-jury-right, by making it optional with the court. Said "breaking through" is amply exemplified by the crafty action of Parliament, Renton, p. 292, (*supra,*) "Wherever the Judge in Lunacy orders an inquisition before a jury he may by his order direct an issue to be tried in the High Court,"—which, while not daring openly to do away with the *de jure* right to traverse an inquisition in lunacy, slyly endeavors secretly to do away with it by enacting—(Renton, p. 315, *supra*), "A traverse of a verdict upon an issue in the High Court shall not be allowed."

(Instance of the King and Parliament conspiring to pluck female wards, C.'s B., p. 260.)

Again, Parliament conspired by its Lunacy Act, 16 and 17 Vict. c. 70 and the Lunacy Acts of 1890 and 1891, (*supra,*) to

pluck male and female wards in lunacy, by unconstitutionally depriving them of their property, after having unconstitutionally deprived them of their liberty, and turning the conduct of said property, over to a committee of the Estate, who is paid a commission for his work of handling the profits thereof. The deprivation of a person of liberty or property, without the intervention of a jury, being contrary to Magna Charta, and therefore unconstitutional.

(Showing that Magna Charta itself was a mere feudal compromise on the broader charter of Henry I, which was again a mere feudal compromise on the equitable and popular laws of Edward The Confessor, founded on Alfred The Great's Dome Book, Chase's Blackstone, pp. 260-261-248). The Lunacy Acts of 1890-1891 (*supra,*) were an emasculation of the Act 16 and 17 Vict. c. 70, (*supra*). Which was again an emasculation of the Ancient Lunacy procedure—prevailing up to said Act's passage—founded on the provisions of Magna Charta guaranteeing trial by jury to all free Englishmen, when the question of depriving them of liberty or property was at issue.

(Instance of a feudal custom running counter to Magna Charta, Chase's Blackstone, p. 261).

All the Lunacy legislation from the Act 16 and 17, Vict. c. 70, and after, run counter to Magna Charta in that they fail to provide as a condition precedent, trial by a jury of his peers of every Englishman whose liberty or property is at issue.

(Instance of the Crown taking advantage of said custom, in itself contrary to Magna Charta, to rob its subjects through "False inquisitions," Chase's Blackstone, pp. 261-262).

False inquisitions again crop up in the nineteenth century only too frequently, whenever a false inquisition in lunacy takes place.

To again quote from Blackstone, pp. 261-262, "In order to ascertain the profits that arose to the Crown by these first fruits

of tenure, and to grant the heir his livery, the itinerant justices, or justices *in eyre*, had it formerly in charge to make inquisition concerning them by a jury of the County, commonly called an *inquisitio post mortem;* which was instituted to inquire (at the death of any man of fortune), the value of his estate, the tenure by which it was holden, and who and of what age his heir was; thereby to ascertain the relief and value of the primer seizin, or the wardship and livery accruing to the King thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance, it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII, that by colour of false inquisitions they compelled many persons to sue out livery from the Crown, who by no means were tenants thereunto. And afterwards a court of wards and liveries was erected, for conducting the same inquiries in a more solemn and legal manner."

The perusal of the above will strike the observer, who happens to be in a position to know, as a remarkable, so to speak, prophesy upon the part of Blackstone, anent modern lunacy procedure, not only in England but in New York. The indictment Blackstone here makes against *inquisitio post mortem*, for fraud, robbery, and general injustice and illegality, perfectly fits all and sundry *inquisitio de lunatico inquirendo* in the state of New York, and, presumably their name is legion, where, as in plaintiff's case in the proceedings under said head in New York, in 1899, the plaintiff, while within the jurisdiction of the Court, and while within the custody of the agents of the other side, is tried as aforesaid in *absentia*, and condemned without the jury's ever laying eyes on him; although the experts in the employ of the other side, swore that he was too ill to be brought to court, when—upon re-examination—that question arose; and although plaintiff was not represented at the said hearing by counsel or otherwise; and where therefore, as

in plaintiff's case, the defendant is condemned without an opportunity to appear and be heard, the lack of such opportunity, we shall show in due course, is a jurisdictional defect.

A further perusal, of the above citation from Blackstone, will strike the observer with the striking similarity of the details in the said *inquisitio post mortem,* and those in the said *inquisitio de lunatico inquirendo.* For example; Said *inquisitio post mortem,* was instituted "at the death of any man of fortune," *said inquisitio de lunatico inquirendo,* is instituted at the *civil* death of any man of fortune. A verdict of insanity rendering its recipient *civiliter mortuus,* or civilly, dead.

Said *inquisitio post mortem* was instituted "to inquire the value of the defunct's estate." Said *inquisitio de lunatico inquirendo* is instituted to inquire the value of the (civilly) defunct's estate.

Said *inquisitio post mortem* was instituted "to inquire who and of what age the defunct's heir was." Said *inquisitio de lunatico inquirendo,* is instituted to inquire who, and of what age the (civilly) defunct's heir is, if he has one, and who are the (civilly) defunct's next of kin.

A still further perusal of Blackstone's strictures upon the said *inquisitio post mortem,* will prove how strikingly said strictures apply to said *inquisitio de lunatico inquirendo.*

For example,—Blackstone says, "A manner of proceeding that came in process of time, to be greatly abused, and at length an intolerable grievance, it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII, that by colour of false inquisitions, they compelled many persons to sue out livery from the Crown, who by no means were tenants thereunto."

Concerning said *inquisitio de lunatico inquirendo,* in New York state it may truthfully be said, that they are "A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievence, that by colour

of false inquisitions, they compelled many persons to sue out" delivery from false imprisonment, and a false charge of lunacy or incompetency, by means of a *habeas corpus;* or delivery of their property from the hands of a falsely alleged committee of the person and estate, illegally appointed.

Blackstone concludes his said strictures upon said *inquisitio post mortem thus.* "And afterwards, a court of wards and liveries was erected, for conducting the same inquiries in a more solemn and legal manner."

Is it too much to hope that, in time, the ruling of the Supreme Court of the United States,—that notice and opportunity to appear personally and be heard are jurisdictional, and that their absence renders any proceeding null and void,—is it too much to hope that all and sundry of the Supreme Courts of New York together with the Court of Appeals of that state, will accept said Federal ruling; when, of a certainty, the happy result foretold—so to speak—in Blackstone's—so to speak—prophecy will surely and inevitably come to pass concerning *inquisitio de lunatico inquirendo;* and one may say of them in the future as he said of *inquisitio post mortem* in the past, rulings were recognized "for conducting the same inquiries in a more solemn and legal manner?"

(Instance of Kings and land-lords disregarding charter, Chase's Blackstone, pp. 262-263).

Parliament disregards Magna Charta wherever in its Lunacy Act 16 and 17 Viet. c. 70 and the Lunacy Acts of 1890 and 1891 (*supra*) it permits the deprivation of a person's liberty or property without the intervention of a jury.

(Instance of the King and Parliament taking a handle to work oppression from an ambiguity of phrase in Henry III's Charter, out of which Henry III. himself made a good thing, Chase's Blackstone, pp. 263-264).

For "King and Parliament" read Lord Chancellors (with this saving exception that there is no hint of their having done so for

sinister reasons) in the case of the erroneous rulings of Lord Chancellors for a long period up to the advent of Lord St. Leonards (L. C.) in re Cumming (page ... *supra*) on the *de jure* right of traverse. Furthermore, for "King and Parliament" read—and this time without the saving exception that there is no hint of their having done so for sinister reasons—for "King and Parliament" read owners of private mad-houses, medical men who make it a profession to declare all men insane who are brought before them, and lawyers who make it part of their profession to have declared insane all men whom their clients desire to be considered and incarcerated as such. The above gentry, not content with "taking a handle" to work oppression from an ambiguity of phrase wherever found, have the effrontery to actually create "ambiguity of phrase" in order to increase the number of their unfortunate victims of both sexes, as well as to hide the tracks of their nefarious acts by befogging the public. All of which is most clearly shown in the chicanery of the laws discussed *supra*.

(Showing how Kings abused their prerogative until national clamor forced Magna Charta; whereupon the succeeding king, Henry III, made a new Charter, sinking in his Charter the salutary clause in Magna Charta. Chase's Blackstone, pp. 266-267.)

This is not the only instance in English history where an abuse has raised a national clamour and upon the heels of the suppression, or supposed suppression, of which abuse, it has either re-appeared, or another abuse equally flagrant has sneaked into being under cover of the suppression or supposed suppression of the first abuse; *vide* the national clamour aroused by the brutalities to patients, at the hands of mad-house keepers, *Renton*, pp. 70-75 (*supra*) where the brutalities were rendered more difficult of accomplishment by the various Acts therein mentioned, but under cover of which the owners of mad-houses, lawyers and medical men, making money out of having parties de-

clared insane, conspired to kill the provision of trial by jury, before said parties could be deprived of their liberty on the charge of lunacy, and did successfully kill jury trial by the Act 16 and 17 Vict. c. 70 (*supra*).

(Showing that the feudal abuses in England after Magna Charta and in spite thereof, were such that they required the sword of a Cromwell to destroy. C.'s B. pp. 267-268-269.)

A perusal of the above will impress the reader with the striking similarity in the abuses under modern lunacy legislation not only in England but, as a comparison of that state's Lunacy Laws with those of England will prove, in New York, and the abuses Blackstone laments as cropping up under the old feudal constitution of England before Cromwell got at it and cut it into shape. Blackstone says: "For the present I have only to observe, that by the degenerating of Knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real), of the feudal constitution were destroyed." One might say that for the present, I have only to observe that by the degenerating of English and New York legal procedure in lunacy, from constitutional procedure, in which the alleged lunatic had notice and an opportunity to be heard, before a jury of his peers, into a purely unconstitutional and *ex parte* procedure, initiated by a summary and secret process of arrest—by a purely unconstitutional process of arrest, without either notice or opportunity to appear personally and be heard in defense of his rights, and followed by condemnation by a Judge who never sees the alleged lunatic, and again later, if proceedings *de lunatico inquirendo* are instituted, by condemnation to probably life imprisonment, and total loss of property and civil rights; by a jury in a proceeding IN ABSENTIA.

Blackstone next says, "Instead of forming a national militia composed of barons, knights and gentlemen, bound by their interest, their honour, and their oaths, to defend their King and Country, the whole of this system of tenure now tended

to nothing else, but a wretched means of raising money to pay an army of occasional mercenaries."

One might, without hyperbole, say that instead of forming a legal and scientific militia, composed of lawyers bound by their oaths,—"I do hereby solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of attorney, and counsellor at law, according to the best of my ability"—and physicians bound by the *esprit de corps* of their profession, and by the demand of Science to heal, instead of condemning to a living death, worse than death, parties submitted to their professional offices, the whole of this system of English and New York lunacy practice both at the hands of Legal practitioners and of Medical practitioners, in lunacy, now tends to nothing else but a wretched means of raising money, by being paid by parties wishing to incarcerate for life, a sane man or woman, on a false charge of lunacy or incompetency, from spite or a desire to obtain possession of his or her property, or both, the whole of this system of English and New York lunacy practice, both at the hands of Legal practitioners, and at the hands of Medical practitioners, in lunacy, now tends to nothing else but a wretched means of raising money, by being paid by said parties, to achieve said parties' nefarious ends, by being paid as "an army of occasional mercenaries."

Blackstone next says, "In the mean time the families of all our nobility and gentry, groaned under the intolerable burthens which (in consequence of the fiction adopted after the Conquest), were introduced and laid upon them by the subtlety and *finesse* of the Norman lawyers."

One might say that in the mean time in England, the families of all the nobility and gentry, as well as all the families of the plain people, and that in the meantime the families of all millionaries, as well as the families of all the people residing

in or having the misfortune to visit New York State, were in danger of spending the residue of their natural lives in groaning in a mad-house, in misery and poverty, under the intolerable burden of false imprisonment, upon a false charge of lunacy, trumped up by hostile or avaricious relatives or both, which (in consequence of the legal fictions in lunacy procedure adopted in New York, after the Conquest of the New York legislature by the gold of mad-house proprietors), were introduced and laid upon them by the subtlety and *finesse* of the New York lawyers.

Blackstone next says: "For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in Parliament, they might be called upon by the King or lord paramount for aids, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of relief, and primer seizin; and if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith very feelingly complains, 'When he came to his own, after he was out of wardship, his woods decayed, house fallen down, stock wasted and gone, lands let forth and ploughed to be barren,' to reduce him still farther, he was yet to pay half a year's profits as a fine for suing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this, the untimely and expensive honor of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a license of alienation. A slavery so complicated and so extensive as this, called aloud for

a remedy in a nation that boasted of its freedom." Plaintiff might, as well as Sir Thomas Smith, very feelingly complain that when he came to his own home, after he had been fortunate enough to escape out of wardship to the ——— Hospital, he found his woods decayed, house not yet fallen down but beginning to, stock wasted and gone, lands let forth and ploughed to be barren, and to reduce him still further, he was yet to pay the fees of an army of lawyers and physicians, whom he was forced from his calamitous circumstances to employ, to aid in reinstating him in his civil rights at his trial on a false charge of insanity.

We may well conclude with Blackstone that "A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom."

Modern lunacy legislation, not only in England but in many of the States of the United States, totally ignores the absolute rights of individuals, as well as the absolute right to trial by jury, before being deprived of liberty, or property.

It is therefore apropos to draw attention to what Blackstone says on those two important topics.

Discussion of the Digest of Blackstone on the Absolute Rights of Individuals.

"Though sometimes a little impaired by the ferocity of the times" is a criticism of Blackstone on the lawlessness of the alleged legal proceedings against alleged lunatics in the 19th and 20th centuries in England, New York State, and far too many other States of the United States—as we shall in due time prove. Let us now recapitulate some of the more prominent points promulgated by Blackstone pertaining to the absolute rights of individuals.

First.—Blackstone says: "It is an established rule to abide

by formed precedents. * * * Yet this rule admits of exception, where the former determination is most evidently contrary to reason, much more if it be clearly contrary to the Divine law. * * * And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law, that they tell us that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law." What could be more contrary to reason, to say nothing of the Divine law, than to deprive a person of liberty and property, perchance of life, on a possibly trumped up charge of insanity, trumped up by hostile or avaricious relatives, or both, who wish to put said party out of the way, in order that they may be rid of his company and possessed of his property? That such a supposition is not farfetched the slightest newspaper-reading, the slightest following of the affairs of the times as reflected in the press and courts of justice will prove. The safeguards which the law for centuries has thrown around the absolute rights of individuals are the result of thousands of years' experience of human nature and the weaknesses and vices thereof. As we have said elsewhere the law expects a man to do what he is tempted to do when he has an opportunity to do it with impunity. By temptation we mean a desire to do so strong that the desire to do right—in other words not to do—is swept away. The law thus being aware of human frailty endeavors to protect said frailty from itself and throw safeguards around temptation where other persons rights are concerned, which will make it impossible, or practically so, for a sane man of sense to do wrong no matter what the temptation, where other people's rights are concerned.

Such has been and such is, the attitude of the law in all civilized countries under the sun where crime is concerned. Such has been, but sad to say, no longer is, save in a certain

number of States, of the United States whose proud privilege it is to see to it that, by their Statutes, the Scales of Justice are as evenly balanced where lunacy legislation is the question, as they are in all civilized countries where criminal legislation is the question. In all other states and countries the law for the nonce appears to be asleep. The law has apparently been in a sound sleep for nearly a hundred years, or, to be exact, for fifty odd years, in England alone—to say nothing of the rest of the world—from 1853, when the Act 16 and 17 Vict. c. 70, first administered a narcotic to English justice, to date. Where crime is concerned nothing could be fairer or more equitable, than the safeguards the law of all civilized countries throws around the absolute rights of the accused criminal. By what process of reasoning does it come to pass, that it is safer in this day and generation for a man to be accused of murder, arson, theft, or what not, so be that it is strictly and unqualifiedly criminal and vile in its nature, how comes it to pass nowadays, that crime is safer than insanity? How is that result obtained? How is it got at? On the charge of the vilest crime the alleged criminal is notified of the charge, summarily or otherwise, he is then allowed free and untrammeled access to counsel, and, if too poor to employ counsel, the law presents him with one. Thereupon he has his day in court, protected by all the laws of evidence and procedure in the regular course of justice, being confronted with the accusation against him and the witness or witnesses thereto, and being allowed to rebut their testimony and by his counsel cross examine them. What on the other hand is the case with the unfortunate, law abiding citizen, accused of insanity, or incompetency?

With the honorable exception of the said States of the United States, which give an alleged lunatic or incompetent, as fair a chance for his liberty and property as an alleged criminal, with the said exception, no Country of the first class

today, gives the said alleged lunatic or incompetent, any show at all for his liberty or property.

The alleged lunatic or incompetent in said Countries, is summarily arrested without the slightest warning. In nine cases out of ten, he does not even know that he has been "examined" as to his sanity, by alleged experts therein; as the universal rule among alleged experts in insanity, among so-called "experts" in lunacy, is to grossly deceive the party they allegedly "examine," and to lie to him, and cheat him in every way possible of the truth of their occupation and errand.

Sometimes they come in the guise of an oculist.

Sometimes they come in the guise of gentlemen of leisure, who have no business on earth but to amuse themselves, and whose present pressing business is to amuse the alleged lunatic.

Sometimes they come as business men, with a business proposition to advance and after a few convivial drinks, and a few such bogus business visits, clap their unsuspecting victim into a mad-house cell.

The above are a few of the tricks of the medical trade as practiced by so-called experts in lunacy. Where the person to be incarcerated, perchance for life, on a false charge of lunacy, is of the opposite sex the proceedings are conducted rather differently. Here the usual way is to impose on the lady by introducing the alleged expert in insanity as a "specialist" in any branch of medicine but insanity. However, this is not the only method, and the social habits of the victim are dragooned into service and, if of a social turn, and given to entertaining, the alleged expert in insanity is introduced to the said female victim as a distinguished social light from some distant city, and an invitition to dinner is obtained for the said social light by the party interested in incarcerating the said female victim, from the said female victim, or she is invited to meet said social light at the house of a mutual friend, at table. Two meetings at dinner, or in a drawing room, or at a ball, are,

under the law in New York State, for instance, quite sufficient to allow the said distinguished social light to certify to the hopeless lunacy or incompetency of the said female victim. The above procedure is practicable where the lady's family physician happens—as is only too frequently the case—to hold on the sly a certificate as an expert in lunacy granted only too readily by the State Board of Lunacy, or State Commission in Lunacy, or whatever the title may be, granted by it only too readily as the result of a "pull."

The "pull" may be either political, professional, or social. If a list of alleged experts in lunacy in any city on earth were published, it would show the majority of its experts in lunacy, more qualified as "experts" on the horse, as veterinary surgeons, than neurologists. The above may sound like a wide assertion. Let it be put to the proof. To resume. If the female victim's family physician doesn't happen to be on the strict quiet, and for revenue only, an expert in lunacy, the method of working the game is to double the number of "social lights" aforesaid, from a distant city, and the game is won. After the alleged lunatic or incompetent of either sex has been thus "examined" and thereupon summarily arrested and haled to a mad-house cell, perchance for life, he or she may linger there in durance unspeakable for years. He most assuredly will linger there in durance vile provided only his estate affords sufficient income, or capital, if it is desired to draw on capital, by the party or parties having control of the alleged lunatic's purse-strings, provided only he is rich enough to be forced to pay an annual mulct to the proprietor or proprietors of the mad-house holding him a prisoner.

There are three ways in New York in which the alleged lunatic may obtain his freedom. *First*,—by a procedure *de lunatico inquirendo* before a sheriff's jury. In that event the alleged lunatic must be more fortunate than plaintiff was, or he will not be able to get before that august body.

If there is the least likelihood of the alleged lunatic's desiring to go before said body, he will encounter such craft as plaintiff encountered at his trial in 1899, before a sheriff's jury.

Second.—By being fortunate enough to communicate with the outside world in spite of the Cerberus-like vigilance of madhouse doctors, employees, and keepers. Under the rules of New York madhouses, every letter that goes out from them must be inspected by the authorities of said madhouses. What chance has an alleged lunatic to communicate with counsel?

Third.—If as fortunate as plaintiff he may escape.

Such being the working of modern lunacy legislation all over the civilized world, with the aforesaid honorable exception of a mere handful of the 48 States and Territories of this Union, as will be shown hereafter, does not modern lunacy legislation run counter to Blackstone's definition of law, does not modern lunacy law run counter to reason, and does not Blackstone say that what runs counter to reason is not law?

Blackstone says further: "When a custom is actually proved to exist the next inquiry is into the legality of it, for, if it is not a good custom, it ought to be no longer used; '*Malus usus abolendus est*' is an established maxim of the law." Seeing that with the said honorable exception of the said handful of States of the United States, seeing that with the said exception, it is now the world-wide custom in lunacy procedure to proceed as above outlined, and as above proved, in a path which is "not law," and as above proved to proceed as above outlined is not good, and as Blackstone says: "If it is not a good custom it ought to be no longer used, '*malus usus abolendus est*' is an established maxim of the law:" seeing all this should not the modern world say in regard to its custom in Lunacy Procedure *malus usus abolendus est?* Blackstone further says, "But customs must be reasonable—If they are not reasonable evidence of them will be rejected."

Seeing that the world-wide custom in Lunacy Procedure as

above outlined and as above proved is proved to be not reasonable, should not the modern world say with Blackstone evidence of it will be rejected? Blackstone says lastly in this connection, "customs ought to be certain." Seeing that the said world-wide custom in Lunacy Procedure of committing an alleged lunatic or an alleged incompetent person, without the intervention of a jury, for an uncertain period—perchance for life—is therefore an uncertain custom, does it not fall short of Blackstone's definition, "customs ought to be certain"?

Blackstone further says: "By the absolute rights of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature. * * * Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of States and societies, so that to maintain and regulate these is clearly a subsequent consideration. And therefore the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple. And then such rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated. These will take up a greater space in any code of laws and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind."

Since "it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals" most surely, according to Blackstone, at least, should the said world-wide custom in Lunacy Procedure, which maintains and regulates nothing but a nest of private madhouses

honeycombing the civilized world, and rather badly as we shall show, in due course, rather badly regulates them at that; most surely, according to Blackstone, at least, should the said world-wide custom in lunacy Procedure be abolished.

Blackstone says further: "The absolute rights of every Englishman, (which taken in a political and extensive sense, are usually called their 'liberties,") (are asserted) "First by the Great Charter of liberties which was obtained sword in hand from King John." (Note by editor of Chase's Blackstone. "The provision (of Magna Charta) which is of chief importance on constitutional grounds, is that which guaranteed the protection of life, liberty, and property, against arbitrary interference and spoliation, and secured the observance of due legal methods of procedure in proceedings against the citizen. It is declared that 'no freeman shall be taken, or imprisoned, desseized, or outlawed, or exiled, or in any manner injured, nor will we proceed against him, nor send against him, unless by the lawful judgment of his peers, or by the law of the land,' from this is derived the provision in the U. S. Constitution that 'no person shall be deprived of life, liberty, or property, without due process of law:' similar provisions have been embodied in the constitution of the various States.") "Which charter contained very few new grants but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the Statute called *confirmatio cartarum*, whereby the great charter is directed to be allowed as the common law." If, as is said above, the chief provision, on constitutional grounds in Magna Charta, is that which protected liberty and property against arbitary interference and spoliation, and secured the observance of due legal methods of procedure in proceedings against the citizen, surely the said world-wide custom in Lunacy Procedure which lays wide open to "arbitrary interference and spoliation" both liberty and property as proved above, and repudiates *in toto* and *ab initio*, due legal

methods of procedure in proceedings against the citizen charged with lunacy or incompetency, surely the said world-wide custom in Lunacy Procedure should be abolished.

Blackstone further says: "Next by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two) from the first Edward to Henry the Fourth. Then after a long interval, by the *Petition of Right* which was a Parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign." (Note by editor of Chase's Blackstone. "The *Petition of Right* was, in the main, a redeclaration and reassertion of rights and privileges already established and guaranteed, and contained also provisions for the redress of grievances which had grown up since the adoption of Magna Charta and the various confirmatory acts. * * * The Petition provides among other things, 'that * * * freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the King's special command, without any charge.'") * * * "To these succeeded the *Bill of Rights*, or declaration delivered by the lords and commons to the Prince and Princess of Orange, 13th February, 1688; and afterwards enacted in Parliament when they became King and Queen; * * * and the act of Parliament itself recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be true, ancient and indutiable rights of the people of this kingdom." (Note by editor of Chase's Blackstone. "The Bill of Rights is of much importance in the study of American constitutional history and jurisprudence since a number of its provisions were copied literally into the U. S. Constitution and have also been embodied in many of the State Constitutions.") "Lastly these liberties were again asserted at the commencement of the present century, in the *Act of Settlement,* whereby the Crown was limited to his present Majesty's illustrious house: and some new provisions were added at the same fortunate era, for better securing

our religion, laws, and liberty; which the Statute declares to be "the birthright of the people * * * according to the ancient doctrine of the common law." Seeing that the Common law has to fortify and support it, the Petition of Right, the Bill of Rights, and the Act of Settlement, to say nothing of Magna Charta, the first providing, among other things, "that freemen be imprisoned or detained only by the law of the land or by due process of law"; the second recognizing "all and singular, the rights and liberties asserted and claimed in the said declaration to be true, ancient, and indutiable rights of the people": the third again asserting these liberties and declaring them to be "the birthright of the people * * * according to the ancient doctrine of the Commonlaw": seeing that the Common law has all this to support it, surely the said world-wide custom in Lunacy Procedure so repugnant to "the ancient doctrine of the Common law" in those countries, at least, in which the Common law prevails—or is alleged to prevail—in those countries at least the said repugnant custom should be abolished.

Blackstone says further: "1. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation."

If "the Right of Personal Security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation": and if the Right of Personal Liberty is so hedged about by the Petition of Right—to say nothing of anything else—"that no freeman shall be imprisoned or detained without cause shown to which he may make answer according to law": and if the Right of Property "consists in the free use and enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by due process of law": then have plaintiff's Rights of Personal Security, or Personal Liberty, and of Private Property been grossly and outrageously outraged. As Blackstone says: "Of great importance to the public is the preservation of this personal liberty. * * * Some

have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the Commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."

Lastly in this connection Blackstone says: "In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank and property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist primarily in the free enjoyment of personal security, of personal liberty, and of private property."

Concerning the right to trial by jury, Blackstone has this to say: "Its establishment, however, and use in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In Magna Charta it is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29, that 'no freeman shall be hurt in either his person or property, *nisi per legale judicium parium suorum vel per legem terrae.*' A privilege which is couched in almost the same words with that of the Emperor Conrad, two hundred years before: '*Nemo bene-*

ficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum.' And it was ever esteemed in all countries a privilege of the highest and most beneficial nature. * * * The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which as the grand bulwark of his liberties is secured to him by the Great Charter: *'nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo modo destruatur, nisi per legale judicium parium suorum, vel per legem terræ.'* "

What "was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it," to wit, trial by jury, the craft and chicanery of lawyers working in the interest of mad-house proprietors have done.

Rhinehardt *vs.* Schuyler, 7 Illinois, 473. (Dec. T. 1845.)

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P. 518.

I come now to consider the remaining branch of the subject, wherein it is insisted that the eighth section of the eighth article of the Constitution has been violated, because the former owner of the land in controversy, was deprived of his "freehold" by a summary proceeding and sale by the auditor, without the judgment of his peers, and against the law of the land. The clause in the section referred to, is in the language of the corresponding clause in the twenty-ninth chapter of Magna Charta, and reads as follows: "No freeman shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Upon this clause it is gravely contended, that the laws in question are unconstitutional, because the plaintiff in error has been disseized of his "freehold", without a trial by jury, and without judgment

and execution, which they contend is the meaning of the words "judgment of his peers," and "law of the land." In order to give a proper exposition to these words, it will be necessary to examine, and ascertain when, and under what circumstances Magna Charta was obtained, and what meaning has been adopted by the judges and ancient law writers in England, from whence it derives its origin.

In the time of King John, and his son Henry the Third, the rigors of the feudal tenures were so warmly maintained and enforced by the crown, that they occasioned many insurrections of the barons, who were the principal feudatories, which at last had this effect: that first, King John himself, and afterwards his son Henry, consented to the famous Magna Charta, which has ever since been regarded as the foundation of the liberty of Englishmen. The following is in the original language of the twenty-ninth chapter of that famous instrument: "Nullus liber homo capiatur, vel imprisonetur, aut dissesisiatur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur. Nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ; nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam;" that is, "no freeman shall be arrested or imprisoned, or disseized of his own free tenement or his liberties or his own free customs, or outlawed, or exiled, or in any manner ruined or destroyed; nor will we trample upon him, nor will we condemn him, unless by the lawful judgment of his peers, or the law of the land; to none will we sell; to none will we deny, or delay right and justice," Mr. Sullivan, in the second volume of his lectures, page 243, says: "The words *liber homo,* in the ancient acts of parliament, is in general rightly construed 'freeholder,' and so it means here in the second branch which prohibits disseizins; for none but a freeholder is capable of being disseized, no others being said to have a seizin in the land." Lord Coke, in commenting upon the words, *nullus*

liber homo capiatur, vel imprisonetur, says that the act extends not only to prevent private persons, particularly the great men, from arresting and imprisoning the subjects; but extends also, to those from whom, on account of their extraordinary power, the greatest damage might be apprehended, that is the king's ministerial officers, his council and himself in person. "No man," he says, "should be taken"; that is, restrained of his liberty, by petition or suggestion to the king or his council, unless it be by presentment or indictment of good and lawful men, where such deeds be done. For in that case, it is *per legale judicium parium;* though an indictment found, or a presentment made by a grand jury, in one sense, cannot properly be called *judicium*, as it is not conclusive, but the fact must afterwards be tried by a petit jury of twelve good and lawful men.

The effect of the Magna Charta, which was in the nature of a constitution or bill of rights, was to impose a limitation upon the improper exercise of the king's prerogative; and the objects intended to be secured by this important concession on the part of the crown, have been classed under six general heads:

1. To secure the personal liberty of the subject;
2. To preserve his landed property from forfeiture;
3. To defend him against unjust outlawry;
4. To prevent unjust banishment;
5. To secure him against all manner of destruction; and
6. To restrict and regulate criminal prosecutions at suit of the king, by securing to the subject a proper administration of justice through the means of courts and juries, conformable to the principles and usages of the common law, independent of the will and caprice of the sovereign power.

Mr. Sullivan, in the second volume of his lectures, 276, in commenting upon the words, *nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, aut per legem terræ*, observes that "from the words here being in

the first person, they refer to the suit of the king; and relate not only by the latter words, to a legal trial, as to matter and form, but also to a trial in a proper and legal court. The words *nec super eum ibimus* belong to the king's bench, where the suits of the king, the *Placita coronae*, are properly handled, and where the king is always supposed to be present. The words *super eum mittemus*, refer to other courts sitting for the same purposes, as justices of jail delivery, for instance, under the king's commission, etc.

Chief Justice Ruffin says, in the elaborate opinion delivered by him in Hoke *v.* Henderson, 4 Dev. N. C. R. 15: 'The law of the land in bills of right does not merely mean an act of the legislature, for that construction would abrogate all restriction on legislative authority. The clause means that statutes which would deprive a citizen of the right of person or of property, without a regular trial according to the course and usage of the common law, would not be the law of the land in the sense of the Constitution. Judgment of his peers, means trial by a jury of twelve good and lawful men according to the course and usage of the common law. Even in private suits the trial by jury is preserved by the Constitution of the United States, where the value in controversy exceeds the sum of Twenty Dollars.'"

Cf. the words *per legem terræ* "by the law of the land" as used in Magna Charta in reference to this subject are understood to mean "due process of law" that is, by indictment or presentment of good and lawful men; and this, says Sir Edward Coke, is the true sense and exposition of these words. 2 Coke's Inst. 50; 2 Kent's Com. 13, and note *b*.

DISCUSSION ON U. S. CONSTITUTION.

If the foregoing is correct, it follows that "the principal bulwark of our liberty" (Blackstone, *supra*) trial by jury is assured to every citizen of the United States by Magna Charta

which being part of the common law, by *confirmatio cartarum* 25 Ed. I., at the time of the adoption of the United States Constitution became *ipso facto* a part of the law of the United States. Which Magna Charta says: "that no freeman shall be hurt in either his person or property *'nisi per legale judicium parium suorum vel per legem terræ.'*" "The judgment of his peers" and "the law of the land" are in the aforesaid case, where person or property are at stake, synonymous terms; for "the law of the land" was that person and property were under the protection of "the principal bulwark of our liberties" namely trial-by-jury. The phrase *"vel per legem terræ"* has therefore not only *a cumulative force* and stands for "et per legem terræ" *but is convertible therewith,* as is conclusively proved by the language in the prototype of Magna Charta namely the Charta of the Emperor Conrad two hundred years before, to-wit: "Nemo beneficium suum perdat, nisi secundum antecessorum nostrorum *et per* judicium parium suorum." The words *per legem terræ* "by the law of the land" as used in Magna Charta in reference to this subject are understood to mean "due process of law" that is, by indictment or presentment of good and lawful men; and this says Sir Edward Coke, is the true sense and exposition of these words, 2 Coke's Inst. 50; 2 Kent's Com. 13, and note *b*. It follows therefore that trial by jury is a constitutional privilege of any person whatever in the United States, who, for any reason whatsoever is in danger of being "hurt in either his person or property" (*cf.* Magna Charta *supra*). That the common law is part of the law of the United States is proved by the Seventh Amendment to the Constitution of the United States. The said Seventh amendment to wit: "1. In suits at common law, where the value at controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; *and no fact* tried by a jury shall be otherwise re-examined in any court of the United States, *than according to the rules at the common law.*"*

*Cf. Mr. Chief Justice Fuller *in re* Kemmler, and Mr. Chief Justice Ruffin in Hoke *v.* Henderson, *supra.*

Regarding the right to trial by jury where life, liberty, or property are concerned the Constitution of the United States says in Article III., Section 3, "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may, by law, have directed." And also in the Sixth Amendment "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defense." The object in view of the framers of the Constitution was, evidently, the protection of the life, liberty, and property of *any person* from forfeiture, loss, or seizure without the intervention of the basic safeguard of life, liberty, and property, trial by jury. No man of sense could be so absurd as to presume to say that the aforesaid basic safeguard of civilization, trial by jury, was intended to be narrowed down and exclusively limited in its beneficent scope to that comparatively small portion of the body politic known as criminals and malefactors, or alleged criminals and alleged malefactors. No sane man could presume to assert such a preposterous proposition. A law-abiding citizen surely has as much right to the said basic safeguard of civilization, trial by jury, where *his* life, liberty, or property is at issue as an alleged murderer, rapist or burglar. That the liberty and property of a law abiding citizen are in jeopardy, on a charge of lunacy or incompetency, needs no argument. He loses control of both upon conviction thereof. That said party's *life* is also endangered by a charge of lunacy

or incompetency will be apparent presently. The necessary imprisonment in a barred cell, with the necessary restriction of freedom and exercise, which follow a conviction on the charge of lunacy or incompetency, evidently endanger the health, and therefore the life, and surely the length of life, of the unfortunate so convicted. Suppose the only form of outdoor exercise, taken before his incarceration on a charge of lunacy, has been horse-back exercise. Such exercise is at once shut down, upon imprisonment, necessarily, for fear of escape; and it requires no medical man to infer the deleterious effect consequent upon the said person's health, from the total loss of a favorite and only form of outdoor exercise. Lastly, in this regard, the danger of death from a fractured skull, or from fractured ribs penetrating the vital organs, at the hands, feet, or knees of keepers of mad-houses is far from chimerical. The daily papers, every now and then, print cases of suspicious deaths in mad-houses, public and private, from fractured skulls, or broken ribs, or both. That said mysterious deaths are never avenged by the law is not strange; since the party most interested in so doing is under ground.

If the foregoing propositions are correct it follows from the said Article III. Section 2 and the said Sixth Amendment to the United States Constitution that "*trial * * * by jury*" and the enjoyment of "*the right to a speedy and public trial*, by an *impartial jury*" shall not be construed as limited in their scope to alleged criminals and felons, but that the virtuous section of the community has an equal right to the safeguards of life, liberty, and property which "trial * * * by jury" and "the right to a speedy and public trial, by an impartial jury" imply. It follows that *any person* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy on any charge that entails loss of liberty or loss of property—

of liberty or property, has an equal right, with alleged criminals and felons, to the safeguards to life, liberty, and property which "trial * * * by jury" and "the right to a speedy and public trial, by an impartial jury" imply. Otherwise the Fourteenth Amendment to the United States Constitution would be contravened. It says: "SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws." "Trial * * * by jury" and the enjoyment of "the right to a speedy and public trial, by an impartial jury" are the "privileges" of alleged criminals, in jeopardy—in consequence of their alleged crimes—of life, liberty, or property, according to the aforesaid Article III, Section 2, and the aforesaid Sixth Amendment to the United States Constitution. If the said "privileges" of alleged criminals are denied to honest alleged lunatics, and honest alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty or property; or to *any person* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty or property; such a proceeding does *ipso facto* "abridge the privileges" of alleged criminals in the case of said honest alleged lunatics, and said honest alleged incompetents, as well as in the case of said *any person*, in contravention of the aforesaid Fourteenth Amendment which says "No State shall make or enforce any law which shall *abridge the privileges* —of citizens of the United States." It is therefore unconstitutional to "abridge the privileges" of alleged criminals in the

case of said honest alleged lunatics, and said honest alleged incompetents, as well as in the case of said *any person*. It is therefore unconstitutional to guarantee "Trial * * * by jury," and the enjoyment of "the right to a speedy and public trial, by an impartial jury," wherever the liberty or property of an alleged felon is at issue, and withhold them wherever the liberty or property of a law-abiding citizen, on a charge of lunacy or incompetency, is at issue; or whenever the liberty or property of said *any person*, on said any charge is at issue.

If the above propositions are correct it follows: (1) that "Trial * * * by jury" and the enjoyment of "the right to a speedy and public trial, by an impartial jury" form part of the "privileges" of alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property, as well as of said *any person* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property: (2) that so forming part they cannot be abridged.

Furthermore. To "abridge the privileges" of alleged criminals in the case of said honest alleged lunatics, and said honest alleged incompetents, and said *any person*, is *ispo facto* to create class distinction in legal procedure in favour of alleged criminals, and opposed to said honest alleged lunatics, and said honest alleged incompetents, as well as opposed to *any person* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy— on any charge that entails loss of liberty or loss of property—of liberty or property. Such an absurd anomaly *ipso facto* upsets an equal protection of the laws, and throws more protection of the laws around the rights of an alleged criminal than those of an honest alleged lunatic, or an honest alleged incompetent, or those of said *any person*. Such an absurd anomaly is in direct contravention of the Four-

teenth Amendment to the United States Constitution aforesaid, which says "Nor shall any State—deny to *any person* within its jurisdiction *the equal protection of the laws.*" It is therefore unconstitutional to create class distinction, in legal procedure, in favour of alleged criminals and opposed to said honest alleged lunatics and said honest alleged incompetents, and said *"any person."* It is therefore unconstitutional to guarantee "the right to a speedy and public trial, by an impartial jury—and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence" wherever the liberty or property of an alleged felon is at issue, and withhold it wherever the liberty or property of a law-abiding citizen, on a charge of lunacy or incompetency, is at issue, or wherever the liberty or property of said *"any person,"* on said any charge, is at issue.

Furthermore. If the above propositions are correct we have shown: (1) that trial by jury forms part of the privileges of alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as of *"any person"* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property: (2) that so forming part it cannot be abridged. It follows therefore that trial by jury in the case of said alleged lunatics, and said alleged incompetents, as well as in the case of said *"any person"* is due process of law. It follows therefore that due process of law in said respect, touching said alleged lunatics and said alleged incompetents, as well as touching said *"any person"* is identical, in said

respect, with due process of law touching alleged criminals and alleged malefactors.

Furthermore. If the above propositions are correct it follows that another Amendment to the United States Constitution provides the aforesaid basic safeguard of civilization, trial by jury, for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as for said "*any person*" in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property: namely the Fifth Amendment. If the above propositions are correct we have shown: (1) that trial by jury forms part of the privileges of said alleged lunatics and said alleged incompetents, as well as of said "*any person*": (2) that so forming part it cannot be abridged: (3) that trial by jury in the case of said alleged lunatics and said alleged incompetents, as well as in the case of said "*any person*" is due process of law (4) that due process of law in said respect, touching said alleged lunatics and said alleged incompetents, as well as touching said "*any person*" is identical, in said respect, with due process of law touching alleged criminals and alleged malefactors. *Ergo* where a clause in the United States Constitution guarantees due process of law which *in itself includes* "trial * * * by jury" *and "the right to a speedy and public trial, by an impartial jury"* for alleged criminals and alleged malefactors in jeopardy—in consequence of their alleged crimes—of liberty, or property; as well as for *"any person"* in jeopardy of *"liberty, or property,"* said clause *ipso facto* includes the guarantee of due process of law *which in itself includes "trial * * * by jury"* and *"the right to a speedy and public trial, by an impartial jury"* for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of "liberty, or property"; as well as for *"any person"* without distinction of race, colour, honesty, or lack

of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy—on any charge that entails loss of liberty or loss of property—of "liberty or property." The Fifth Amendment to the United States Constitution guarantees due process of law *which in itself includes "trial * * * by jury"* and *"the right to a speedy and public trial, by an impartial jury"* for alleged criminals and alleged malefactors in jeopardy—in consequence of their alleged crimes—of "liberty, or property"; *ergo* the said Fifth Amendment guarantees due process of law *which in itself includes "trial * * * by jury"* and *"the right to a speedy and public trial, by an impartial jury"* for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of "liberty, or property"; as well as for *"any person"* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy—on any charge that entails loss of liberty or loss of property— of "liberty or property." The said Fifth Amendment as follows: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,—*nor be deprived of life, liberty, or property, without due process of law.*"

If the above propositions are correct we have shown: (1) that trial by jury forms part of the privileges of alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as of said *"any person,"* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property: (2)that so forming part it cannot be abridged: (3)that trial by jury in the case of said alleged lunatics and said alleged incompetents, as well as in the case of said *"any person,"* is due process of law: (4) that

due process of law in said respect, touching said alleged lunatics and said alleged incompetents, as well as touching said *"any person"* is identical, in said respect, with due process of law touching alleged criminals and alleged malefactors: (5) that the said Fifth Amendment to the United States Constitution guarantees *due process of law which in itself includes "trial * * * by jury"* and *"the right to a speedy and public trial, by an impartial jury"* for alleged criminals and alleged malefactors. It follows therefore that the said Fifth Amendment to the United States Constitution guarantees *due process of law which in itself includes "trial * * * by jury"* and *"the right to a speedy and public trial, by an impartial jury"* for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as for said *"any person"* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property:

Furthermore. If the above propositions are correct it follows that another Amendment to the United Sates Constitution provides the aforesaid basic safeguard, trial by jury, for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as for said *"any person"* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property: namely the Fourteenth Amendment.

If the above propositions are correct we have shown: (1) that trial by jury forms part of the privileges of said alleged lunatics and said alleged incompetents, as well as of said *"any person"*; (2) that so forming part it cannot be abridged: (3) that trial by jury in the case of said alleged lunatics and said alleged incompetents, as well as in the case of said *"any person"* is due process of law: (4) that due process of law in said respect touching said alleged lunatics and said alleged incompetents, is identical, in said respect, with due process of law touching said

"any person." *Ergo* where a clause in the United States Constitution *guarantees for any person in jeopardy*—on any charge that entails loss of liberty, or loss of property—of liberty, or property, *due process of law*, said clause *ipso facto guarantees* for said *any person* in jeopardy—on said any charge—*trial by jury*. The Fourteenth Amendment to the United States Constitution so guarantees; *ergo* the said Fourteenth Amendment guarantees trial by jury for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property, as well as for *"any person"* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property. The said Fourteenth Amendment as follows "Nor shall any State deprive *any person* of * * * liberty, or property, without due process of law."

If the above propositions are correct we have shown: (1) that trial by jury forms part of the privileges of said alleged lunatics and said alleged incompetents, as well as of said *"any person"*: (2) that so forming part it cannot be abridged: (3) that trial by jury in the case of said alleged lunatics and said alleged incompetents, as well as in the case of said *"any person"* is due process of law: (4) that due process of law respecting trial by jury touching said alleged lunatics and said alleged incompetents, is identical, in said respect, with due process of law touching said *"any person"*: (5) that the said Fourteenth Amendment to the United States Constitution guarantees trial by jury for *"any person"* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property. It follows therefore that the said Fourteenth Amendment to the United States Constitution guarantees trial by jury for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or

property; as well as for any person without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy —on any charge that entails loss of liberty or loss of property —of liberty, or property. *It follows therefore that in the Fourteenth Amendment aforesaid the term "due process of law" is synonymous with trial by jury.*

In conclusion. The Seventh Amendment to the United States Constitution reads as follows "1. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules at the common law." The "value in controversy" in plaintiff's case was emphatically more than twenty dollars. To say nothing of his large estate, the control and enjoyment of which was taken out of his hands upon his arrest and imprisonment March, 189—, to say nothing of said estate he was actually annually muleted by the——— Hospital, his jailers, of the substantial sum of one hundred dollars per week—not counting extras—or over five thousand dollars per annum.

The said over $5,000 per annum were "in controversy" when proceedings to commit plaintiff as a lunatic were brought in March, 189— for, as it turned out, the mere fact of his being committed as a lunatic to the custody of the ——— Hospital entailed *ipso facto* the loss to him of over $5,000 aforesaid. *Ergo* the said sum was "in controversy" from the start. *Ergo* wherever any person, financially stronger than a pauper, is imprisoned at his own cost in a madhouse against his will "the value in controversy"—to wit said party's keep at said madhouse—to say nothing of his loss of enjoyment of property or salary—*does in the nature of things "exceed twenty dollars."* and the same

holds good for a party with or without property, but with a previous salary, or earning capacity, of more than twenty dollars per annum, imprisoned against his will, free of charge, in a pauper madhouse, since said party perforce loses the fruits of said earning capacity by said imprisonment. *Ergo* in either of said cases "the right of trial by jury shall be preserved."

If the foregoing is correct, it follows that "the principal bulwark of our liberties" (Blackstone [*supra*]) trial by jury is assured to every citizen of the United States by Magna Charta which being part of the common law, by *confirmatio cartarum* 25 Ed. I, at the time of the adoption of the United States Constitution became *ipso facto* a part of the law of the United States. Which Magna Charta says: "that no freeman shall be hurt in either his person or property *'nisi per legale judicium parium suorum vel per legem terrae.'*" The judgment of his peers and "the law of the land" are in the aforesaid case, where person or property are at stake, synonymous terms; for "the law of the land" was that person and property were under the protection of the "principal bulwark of our liberties" namely trial-by-jury. The phrase "vel per legem terræ" has therefore not only a cumulative force and stands for "*et per* legem terræ" but is interchangeable therewith as is conclusively proved by the language in the prototype of Magna Charta namely the Charta of the Emperor Conrad two hundred years before, to wit, "Nemo beneficium suum perdat, nisi secundum antecessorum nostrorum *et per* judicium parium suorum." It follows therefore that trial by jury is a constitutional privilege of any person whatever in the United States, who for any reason whatsoever is in danger of being "hurt in either his person or property" (cf. Magna Charta [*supra*]). That the common law is part of the law of the United States is proved by the Seventh Amendment to the Constitution of the United States. The said Seventh Amendment to-wit, "1. In suits at common law where the value at controversy shall exceed twenty dollars, the right of trial by jury shall be pre-

served; *and no fact* tried by a jury shall be otherwise re-examined in any court of the United States, *than according to the rules at the common law.*"

If the foregoing is correct, it follows that the phrase "due process of law" as used in the New York State and Federal Constitutions, implies the right of trial by jury before the liberty of an individual could be interfered with by the Court of Chancery in the exercise of its lunacy powers, except where the police power, in cases of furious madness, requires a temporary restraint *pending an adjudication of insanity by due process of law.* In other words the right to trial by jury *"in all cases in which it has heretofore been used"* includes the right in lunacy cases, which right the New York State Constitution provides (Art. I, Sect. 2) *shall remain inviolate forever.*" Compare Art. I, Sect. 1, of the Constitution as follows:

"No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof unless by the law of the land or the judgment of his peers" (*supra*).

If the above propositions are correct we have shown: (1) that trial by jury forms part of the privileges of alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as of said *"any person,"* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property: (2) that so forming part it cannot be abridged: (3) that trial by jury in the case of said alleged lunatics and said alleged incompetents, as well as in the case of said *"any person,"* is due process of law: (4) that due process of law in said respect, touching said alleged lunatics and said alleged incompetents, as well as touching said *"any person"* is identical, in said respect, with due process of law touching alleged criminals and alleged malefactors: (5) that the said Fifth Amendment to the United States Constitution guarantees *due process*

*of law which in itself includes "trial * * * by jury"* and *"the right to a speedy and public trial by an impartial jury"* for alleged criminals and alleged malefactors. It follows therefore that the said Fifth Amendment to the United States Constitution guarantees *due process of law which in itself includes "trial * * * by jury"* and *"the right to a speedy and public trial, by an impartial jury"* for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as for said *"any person"* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property. Furthermore. If the above propositions are correct it follows that another Amendment to the United States Constitution provides the aforesaid basic safeguard, trial by jury, for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as for said *"any person"* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty or property; namely the Fourteenth Amendment.

If the above propositions are correct we have shown: (1) that trial by jury forms part of the privileges of said alleged lunatics and said alleged incompetents, as well as of said *"any person"*: (2) that so forming part it cannot be abridged: (3) that trial by jury in the case of said alleged lunatics and said alleged incompetents, as well as in the case of said *"any person"* is due process of law: (4) that due process of law respecting trial by jury touching said alleged lunatics and said alleged incompetents, is identical, in said respect, with due process of law touching said *"any person"*: (5) that said Fourteenth Amendment to the United States Constitution guarantees trial by jury for *"any person"* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property. It follows therefore that the said Fourteenth Amendment to the United States Constitution guarantees trial by jury for alleged lunatics and alleged

incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as for any person without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property. *It follows therefore that in the Fourteenth Amendment aforesaid the term "due process of law" is synonymous with trial by jury.* Cf. Sir Edward Coke and Chief Justice Ruffin, page 134. (*Supra.*)

If the above propositions are correct it follows: 1. Magna Charta being a part of the common law which common law is again a part of the law of the United States, and said Magna Charta saying "that no freeman shall be hurt in either his person or property" "*nisi per legale judicium parium suorum vel per legem terra*" and said phrase "*vel per legem terra*" having been shown to have not only a cumulative force to stand for "*et per legem terra*" but is convertible therewith as is conclusively proved by the language in the prototype of Magna Charta namely the Charta of the Emperor Conrad two hundred years before; "Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum *et* per judicium parium suorum;" it follows therefore that said phrases "nisi per legale judicium *parium suorum*" and "*vel per legem terrae*" and "*nisi secundum consuetudinem antecessorum nostrorum*" and "*et per judicium parium suorum*" were not only cumulative but interchangeable, and in said context one said phrase cannot be followed without following the other said phrase. Hence it follows that wherever said pair of phrases appears in the later Constitutions the aforesaid construction, being the original construction, as shown above, of said phrases, the aforesaid construction of necessity follows said phrases, and whenever, as in the Constitution of the State of New York we find "No member of the State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof unless by the law of the land or the

judgment of his peers," said pair of phrases is governed by said construction, and said pair of phrases demands not only "the law of the land" but "the judgment of his peers" *one following the other forever inseparable.*

It follows therefore that trial by jury is a common law privilege of any person whatever in the United States, who, for any reason whatever, is in danger of being "hurt in either his person or property."

2. That the phrase "due process of law" as used in the New York State and Federal Constitutions, implies the right to trial by jury before the liberty of an individual could be interfered with by the Court of Chancery in the exercise of its lunacy powers, except where the police power, in cases of furious madness, requires a temporary restraint *pending an adjudication of insanity by "due process of law."*

3. That the right to trial by jury *"in all cases in which it has heretofore been used"* includes the right in lunacy cases, which right the New York State Constitution provides (Art. I, Sect. 2) shall *"remain inviolate forever."*

As we have shown above the practice in lunacy procedure in England during the Eighteenth Century was the personal appearance of the alleged lunatic before a jury. Since said practice necessarily obtained—or should have—at said time in New York, at said time a Colony of Great Britain, and since New York Colony became New York State at said time—namely during said Eighteenth Century—therefore at said time trial by jury was used in New York in said cases and therefore the words in said State's Constitution—touching trial by jury—*"in all cases in which it has heretofore been used"* shall *"remain inviolate forever"* includes *ipso facto* in lunacy cases the right to trial by jury.

4. That the Fifth Amendment to the United States Constitution guarantees *due process of law which in itself includes "trial*

* * * *by jury*" and "*the right to a speedy and public trial, by an impartial jury*" for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as for *any person* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty, or property.

5. That the Fourteenth Amendment to the United States Constitution guarantees trial by jury for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty or property; as well as of said *any person.*

6. That since the Seventh Amendment to the United States Constitution says "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved;" wherever any person, financially stronger than a pauper, is imprisoned at his own cost in a mad-house against his will "the value in controversy"—to wit said party's keep at said mad-house—to say nothing of his loss of enjoyment of property or salary—*does in the nature of things "exceed twenty dollars,*" and the same holds good for a party, with or without property, but with a previous salary of more than twenty dollars per annum, imprisoned against his will, free of charge, in a pauper mad-house: since said party perforce loses the fruits of said earning capacity by said imprisonment. *Ergo.* In either of said cases "the right of trial by jury shall be preserved."

Eslava *vs.* Lepetre 21 Ala. 504 (1852) (*supra*) was a suit to foreclose mortgages, one of which was executed by the mortgagor and his wife's guardian in lunacy. She was not made a party, though her guardians were. It appeared that they had been appointed on petition of the husband, alleging his wife's insanity,

etc., but there was no issuance of a writ *de lunatico inquirendo* and no finding of a jury therein. *Held* per Ligon, J., appointment void, and objection that wife was not a party to the foreclosure suit well taken. "Without the issuance of this writ, *and the finding of a jury*, the County Court Judge had no power to declare her a lunatic or to appoint a guardian for her. These proceedings are indispensable to give the County Court jurisdiction to make the appointment; and as they were not had * * * the proceedings upon the appointment of guardians are *coram non judice* and void. Such being the case they may be impeached in any Court, in a collateral proceeding in which a party seeks a benefit under them. * * * Neither does the record show that she had any notice whatever of the proceedings. They were *ex parte*, and are consequently null and void."

In the Common pleas of Philadelphia. (*Supra.*)

Commonwealth *Ex Relatione* Isaac Edmundson Stewart *v.* Thomas S. Kirkbride, M. D. 2 Brewster, 419. Brewster J. said:

* * * "I hold to the doctrine that no man can be deprived of his liberty without the judgment of his peers, and that it matters not to the law whether the alleged cause of detention is insanity or crime."

People *ex rel* Ordway, *vs.* St. Saviour Sanitarium, 54 App. Div. 363, 56 N. Y. Supp. 431. (*supra.*)

The Court—the General Term—*held:*

"No matter what may be the ostensible or real purpose in restraining a person of his liberty,—whether it is to punish for an offense against the law or to protect the person from himself, or the community from apprehended acts,—such restraint can not be made permanent or of long continuance unless by due process of law."

In Brown *v.* Board of Levee Commissioners, Simrall, J. said:

"The term under consideration (due process of law) refers to certain fundamental rights which that system of jurisprudence of which ours is a derivative has always recognized. If *any of these* are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by 'due process of law.'" Am. and Eng. Ency. of Law, p. 296, N. 2.

Bethea against McLennon North Carolina Reports (1840) (*supra*). The Court said "It is true that the Lunatic is entitled to be present before the *jury*."

Chase *versus* Hathaway (1817) (*supra*). Parker J. said "It is a fundamental principle of justice, essential to every free government, that every citizen shall be maintained in the enjoyment of his liberty and property, unless he has forfeited them by the standing laws of the community. * * * Indeed, it would seem strange that the whole estate of a citizen might be taken from him and committed to others, and his personal liberty be restrained * * * upon a suggestion of lunacy or other defect of understanding; while the depriving of the minutest portion of that property or the slightest detention of his person would be illegal upon a charge of crime * * * unless *all* the formalities of a trial were secured to him."

Dowell against Jacks North Carolina Reports (1859) (*supra*) The Court said, "She * * * was not legally represented, and what is of still greater importance, was not present, to be seen and examined by the *jury*."

Stewart *v.* Palmer (1878) (*supra*). The Court said "The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

Evans Committee *v.* Johnson (1894) (*supra*). Brannon P. delivered the opinion of the court and cited Judge Bleckley of Georgia who said "The requirement is as old, at least, as Magna Charta. It is the most precious of all gifts of freedom, that no man be disseized of his property, or deprived of his liberty, or in any way injured, *nisi per legale judicium parum suorum, vel per legem terræ.*"

The State *ex rel.* Larkin *vs.* Ryan (1888) (*supra*). Constitutional law: Due Process of law: Confinement of inebriates: *Habeas Corpus.*

1. Ch. 194, Laws of 1887 (providing that any person charged with being an inebriate, habitual or common drunkard, shall be arrested and brought before a judge of a court of record for trial, and if convicted shall be sentenced to imprisonment or confinement in any inebriate or insane asylum in this state for a period not exceeding two years nor less than three months, provided some relative or friend shall execute a bond conditioned that he will pay for the support of such inebriate, habitual or common drunkard during his imprisonment and confinement), is in violation of Sec. 1, Art. XIV., Amend. Const. of U. S., which provides that no state shall deprive any person of liberty without due process of law, nor deny to any person the equal protection of the laws.

2. A person convicted and confined under that act may be discharged on a writ of *habeas corpus* issued by a court commissioner.

Cassoday, J. "From what has been said it appears that the relator stands before the court innocent of any offense known to the law, and yet committed 'to imprisonment or confinement' for the period of two years, upon a commitment issued by a

judge at chambers, and without any authorized process from any court of law. If the legislature may thus authorize imprisonment for two years, without the commission of any offence made punishable by law, then it may do so for ten or twenty years."

Doyle Petitioner (1899) (*supra*). *Per Curiam*: * * * "It is not enough to answer that the persons are insane, since whether they are insane is the very question which ought to be determined before they are so completely confined as not any longer to have power to institute proceedings for their own relief, or to be heard and adduce evidence in their own behalf."

McCurry *v.* Hooper (1848) (*supra*). Dargan, J. said "That he has the right to appear before the *jury*, and the court, and to show that he is not insane, that he, and his property should not be put in charge of another is a self-evident truth, and is denied by no legal authority. (See 12 Ves. 444; *Ex parte* Crammer, Stock on Lunacy, 100). * * * These authorities seem to be, in unison with the first principles of justice, and are not opposed by any authorities that have fallen under our observation."

In re William M. Bryant (1885) Washington D. C. (*supra*). Counsel said: "Due process of law, as defined by the courts and by the law writers, does not mean, the certificate of two physicians and the request of a sister. It means laws which hear before they condemn, and render judgment only after trial. It cannot be a police regulation, independent of the judiciary and entirely under the control of the legislature. This would enable the legislature to deprive the citizen of his liberty, without the intervention of the judiciary or any other department of the government. 4 Wheat. 519." * * * Mr. Justice James delivered the opinion of the court. "There must be a regular ad-

judication of the question by due process of law, without which even the chancellor cannot act; *and due process of law in establishing the insanity of a person has long been declared to be by inquiry through a jury.*"

State *v.* Billings (1894) (*supra*). Collins, J., said "Where it is plain that legislation upon any subject is in conflict with constitutional provisions, the duty of the court is obvious, and must be performed, whether the interests of a large number of a certain class of people are involved, *or the rights of a single citizen.*"

Point 3. The Proceedings in New York City, in 189. ., before a Commission and a Sheriff's jury to declare plaintiff an incompetent person *in absentia*, plaintiff never being before the jury or represented in Court in any way, were void *in toto* for they were without due process of law and therefore unconstitutional for the following reasons. (*a*) There was lack of proper notice, for plaintiff being at the time in duress of imprisonment, illegally confined under a void proceedings, and without access to counsel, the so-called notice was no notice at all. The Supreme Court of New York had in effect civilly murdered plaintiff. It had in effect illegally rendered him civilly dead—an insane person is *civiliter mortuus*—it had so to speak placed him in his coffin, and in the act of nailing down the lid and consigning him to the tomb—the proceedings to appoint a committee of his person and estate—served notice on his corpse to be present at said ceremony. He having been rendered physically incapable of observing said summons by the said illegal act of said Supreme Court which said act had by confining him for years in a madhouse cell rendered him for the time bed-ridden as the experts in the pay of the other side virtually admit. Said proceedings in 189— being in point of fact conducted in plaintiff's absence through plaintiff's said enforced physical inability to be present

thereat were therefore also, in like manner as said proceedings in 189— truly and typically *ex parte* and therefore utterly void. (*b*) There was lack of opportunity to appear and be heard. For plaintiff, upon the sworn testimony of the medical men in the pay of the Petitioners, was incapacitated from coming to Court, plaintiff being in bed with an affection of the spine at the time of said trial, and having been so for more than three weeks previous thereto.

SAID SUBSEQUENT PROCEEDINGS TO APPOINT A COMMITTEE.

Plaintiff was confined in the ——— Hospital at ———, New York, from ———, 189—, until ——— 189—, before any steps were taken to have plaintiff declared incompetent and to have a Committee of plaintiff's person and estate appointed. And it must be noted that this detention was an illegal one, absolutely void, that plaintiff was UNDER DURESS OF IMPRISONMENT.

In 189—, over two years after plaintiff had been committed, a petition was filed by two of plaintiff's brothers, aforesaid, to have plaintiff declared an insane and incompetent person by a Sheriff's jury, and a committee appointed for plaintiff's person and estate.

It appears by the record of said subsequent proceedings that an order was entered.

Notice was served.

The Court entered an order for the appointment of a commission *de lunatico inquirendo*.

The appointment of the three Commissioners was issued, and they were instructed "to make inquisition into the facts hereinbefore recited." The commissioners were also directed to,

"cause previous notice of the time and place of execution of this motion to be given to the said [plaintiff] and to Doctor ———, the person having the charge and care of him * * * and that whenever you shall so demand, the said Doctor ———

shall produce before you and a jury the said [plaintiff] to be inspected and examined by you and the said jury, but that in your discretion you may dispense with the attendance of the said [plaintiff] before you and the jury unless the jurors some or one of them shall require the attendance of the said [plaintiff] before the jury."

In the pursuance of this order the three commissioners qualified and issued the following notice:

"Please take notice that a commission heretofore issued out of under and by order of the Supreme Court dated the — day of —, 189—, to inquire whether [plaintiff] is an incompetent person and by reason of which infirmity he is incapable of managing his person and property and to us directed as commissioners, will be executed at the County Court House in the Borough of Manhattan and City of New York on the — day of —, 189—, at four o'clock in the afternoon of that day."

By the affidavit of ——— it will appear that this notice was likewise served on plaintiff at said ——— Hospital, ———, and upon said Dr. ——— at the same place.

The commissioners then proceeded on the — day of ——— 189— to inquire into the plaintiff's mental condition. Plaintiff was not present at the proceedings and the attorneys for the petitioners stated that they would not produce him unless ordered so to do by the commissioners.

The commissioners did not at any stage of the investigation order plaintiff to be produced, nor was there any person present in plaintiff's behalf authorized in any way to represent plaintiff. Doctor ——— aforesaid, who testified, stated distinctly that plaintiff did not wish him (———) to represent him in the proceedings. He stated that said plaintiff was physically incapacitated from being present before the jury. And upon further examination said Dr. ——— stated that plaintiff would be temporarily injured mentally and physically by his production before the jury.

Upon this statement and similar statements by the other

physicians who testified, the jury brought in its verdict that (plaintiff) was incompetent to manage his person or his affairs. Plaintiff was never before the commissioners or the jury.

Opportunity to be Heard.

The whole purpose of notice as required by the statutes, and by the decisions under the due process clause of the Constitution is to give opportunity to the defendant or respondent to appear and defend his rights. The plain language of the text writers and decisions of courts is that the defendant in any proceeding is entitled to NOTICE AND AN OPPORTUNITY TO BE HEARD.

The above proposition is sustained by the following excerpts as well as by the following excerpt from a full note on "Due Process of Law as applied to Insane Persons." 43 American State Reports, 531. Followed by numerous other excerpts from leading cases.

In Brown *v.* Board of Levee Commissioners, 50 Miss. 468, (*supra*) Simrall, J. said "The term under consideration (due process of law) refers to certain fundamental rights which that system of jurisprudence of which ours is a derivative has always recognized. If *any of these* are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'"

Am. and Eng. Ency. of Law, p. 296, n. 2.

"* * * the most satisfactory definition (due process of law) is that it secures to every one the right to have notice of any proceeding by which his rights of life, liberty or property may be affected, and to be afforded an opportunity to defend, protect and enforce such rights in an orderly proceeding adapted to the nature of the case."

Am. and Eng. Ency. of Law, p. 296, and ca. ci.

John L. Bethea, Adm'r of Susannah Robinson, dec'd Against Alexander McLennon. 23 North Carolina Reports 1840, page 523, 526-7. (Iredells Law Vol. 1.) (*supra*).

The court held: It is true, that the lunatic is entitled to be present before the jury; and if they deny his right, such denial would be sufficient cause for setting aside the inquisition.

Stafford *v.* Stafford 6 Martin's Rep. 643, (*supra*).

Porter J. said: But if, on the contrary, the petition of interdiction is solicited, from malice, or through error, against one of sound mind, it is not perceived by us why the proceedings should be carried on, without his knowledge. So far from it, that we think it indispensable he should have the opportunity afforded him to hear and confront those, who by their evidence are about to deprive him of all control over his actions, and take from him the enjoyment of his property. The defendant had a right to demand in the appellate court, legal proof of her insanity, and that legal proof was not furnished by testimony taken out of her presence. The principles on which this case has been supported might place the wisest man in the community under the control of a curator, and hold him up to the world as an adjudged insane.

In Re William M. Bryant. 3 Mackey 489. (*Supra.*)

Counsel said: Due process of law, as defined by the courts and by the law-writers, does not mean, the certificate of two physicians and the request of a sister. It means laws which hear before they condemn, and render judgment only after trial. It cannot be a police regulation, independent of the judiciary and entirely under the control of the Legislature. This would enable the Legislature to deprive the citizen of his liberty, without the

intervention of the judiciary or any other department of the government. 4 Wheat, 519. * * *

The Court of Maryland (Chancellor Bland) said: "Generally and technically speaking, those only are considered lunatics, who have been so found and returned; without an inquest and return thereon, no one can be judicially treated as a lunatic, and be debarred of his liberty, or have the management of his property taken from him. *The power to divest a citizen of his personal freedom and of his property, is one of the most extraordinary and delicate nature;* and should therefore, never be exercised without observing every precaution required by the law." Rebecca Owings' Case, 1 Bland Ch. Rep. 290. * * *

Mr. Justice James said: " * * * One of the terms for admission is that two physicians shall certify to the insanity of the party. But that does not do away with the necessity of a proper judicial ascertainment of the fact of insanity. The provision for the physician's certificate only contemplates the fact that a person may have been found insane by a jury on inquiry, and yet may have become sane again, and, therefore, the certificate is to show that the insanity has not ceased. As a matter of interpretation, the statute is merely permissive. It gave no power to seclude a person *in invita* who has not been judicially found to be insane. * * *

"There must be a regular adjudication of the question by due process of law, without which even the Chancellor cannot act; and due process of law in establishing the insanity of a person has long been declared to be by inquiry through a jury. * * *

"This deprivation of the liberty of a citizen upon the ground of lunacy is a matter of very grave importance, because it may easily happen that for fraudulent purposes, perhaps with a view to deprive a person owning property of his control over it, a perfectly sane man might be sent to an asylum by his relatives, upon a certificate of two physicians, and be illegally confined there for years."

Due Process of Law as Applied to Insane Persons. 43 American State Reports 531. [Note.]

"It is a fundamental principle of both state and national constitutional law that no man shall be deprived of 'life, liberty, or property' without 'due process of law;' and under the express provision of the fourteenth amendment to the Constitution of the United States, no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The right of personal liberty is thus jealously guarded by constitutional law, and we are unaware of any distinction between the civil rights of a sane person, and those of an insane subject of the government. Nor shall there be any. Persons though insane, are still human beings, and laws which provide for their commitment to hospitals for proper care and treatment mark, it is said, the vast difference between civilized free people and a savage nation. Such laws are common, but it must be observed in connection with them that all power over the person is liable to abuse. The deprivation of the liberty of a citizen upon the charge of insanity is a matter of very grave importance, because it may easily happen that for fraudulent purposes, perhaps with a view to deprive a person owning property of his control over it, a perfectly sane man may be sent to an asylum by his relatives, upon a certificate of physicians merely, and be illegally confined there for years. The civil rights of insane persons do not seem to have been often adjudicated by the courts, and a close search for authorities reveals the fact that, since the ratification of the fourteenth amendment, in July 1868, its doctrines as applied to such persons have seldom been defined. Enough is gleaned from the authorities, however, to show that insane persons have rights, that the mere existence of the fact of insanity does not take away or abridge the rights of a citizen, and that a person charged with insanity cannot be deprived of his civil rights without the formalities prescribed by law; Commonwealth *v.* Kirkbride 2

Brewst. 400, 419; and it has been held that statutes providing for the examination, commitment, and custody of insane persons are mandatory, and must be strictly pursued: Meurers Appeal, 119 Pa. St. 115: State *v.* Baird 47 Mo. 301; Territory *v.* Sheriff of Gallatin County, 6 Mont. 297. If 'due process of law' means the regular and orderly course of judicial proceedings in the administration of justice it would also seem clear that a determination of insanity is not conclusive, without the person charged with being insane has had notice and opportunity to be heard either in person of by counsel, an opportunity to produce witnesses, and to confront those seeking his retirement to an asylum or hospital, and in general to make whatever defense may be justified by the circumstances of the case. * * *

In the class of cases under consideration 'due process of law' undoubtedly means, 'in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights:' Burdick *v.* People, 149 Ill. 600 41 Am. St. Rep. 329. It means, at least some legal procedure, in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself: Doyle Petitioner, 16 R. I. 537; 27 Am. St. Rep. 759. For example, a state statute which authorizes the placing of insane persons in certain hospitals or asylums within the state by their parents, guardians, relatives or friends, or if paupers, by the overseers of the poor, upon certificates of their insanity, made by two practicing physicians of good standing, and which provides that when placed in hospitals or asylums they may be lawfully received and detained therein, until discharged in one of the modes provided in the statute, where such statute does not provide a procedure by which the person confined can, as of right, defend himself, is void, being in conflict with the due process clause of the national constitution: Doyle, Petitioner, 16 R. I. 537; 27 Am. St. Rep. 759.

The arrest of a person upon the charge of insanity for the

purpose of confining or committing him in an insane asylum is, strictly speaking, not an arrest in either a civil or criminal proceeding, but is one *sui generis*, and ought not, in this day of regard for personal liberty, to be allowed, otherwise than upon information on oath and an order made directing the alleged lunatic to be brought before the court for examination. * * *

All reasoning in favour of confinement without legal investigation assumes the person to be insane. The question of insanity is the very one to be adjudicated. The question as to whether, in doubtful cases, an inquisition to determine the insanity of a person is a prerequisite to his confinement in an asylum came up in the case of Van Deusen *v.* Newcomer, 40 Mich. 90. (*supra.*)

The court was equally divided, two of the justices holding that it was necessary, and two of them that it was not. In this case Mrs. Newcomer, the defendant in error, being at the passenger house of the Michigan Central Railroad at Albion, was, on October 1st, 1894, forcibly taken and put aboard the cars of that railroad and removed to the Michigan Asylum for the Insane at Kalamazoo, where she was restrained of her liberty until August 4th following. The persons chiefly instrumental in procuring this confinement were her son-in-law and his mother, with whom she had difficulty, but her daughter gave assent. A person having no more legal authority than that which might be claimed for any citizen accompanied her on the cars and to the asylum. The reason assigned for removing Mrs. Newcomer to the asylum was her insanity. There had been no judicial finding of the fact, and it was not made to appear that there were any such manifestations of mental delusion as indicated danger to others. The plaintiff in error was at that time in charge of the asylum, and he received and detained Mrs. Newcomer in the full belief that she was insane. It was not shown that the medical and other

assistants in the asylum believed her to be insane while she remained there. On being discharged from the asylum Mrs. Newcomer brought suit for false imprisonment, and recovered six thousand dollars damages. Mrs. Newcomer claimed never to have been insane at all, and the contest in the court below was mainly over the question of fact. The defendant's theory was that the restraint of insane persons in asylums is lawful, and being lawful, the placing of them, whether for their own benefit, or for the protection of others, is in itself, 'due process of law,' even in the absence of any judicial investigation into the question of sanity. While this theory was approved by two of the Justices, it was *disapproved by Justices Cooley and Campbell. The former in his opinion pointed out difficulties in proceeding without judicial inquiry, showing that the law should not tolerate the forcible taking and detention of one in an insane asylum upon the mere assertion that he is mentally unsound; that secret investigations into cases of this character should be frowned down, that safety lies in the publicity of the proceedings; and that, while it is no doubt true a public trial of the fact of insanity would be more or less exciting and disturbing to a mind already in a diseased or abnormal condition, it is by no means certain that the consequences would be more serious than those likely to follow from the sudden arrest or the removal for confinement in the asylum of a person who believes himself to be perfectly sane. 'An insane person,' said the astute justice, 'does not necessarily lose his sense of justice, or his right to the protection of the law; and when he is seized without warning, and without the hearing of those whom he might believe would testify in his behalf, and delivered helpless into the hands of strangers, to be dealt with as they may decide within the limits of a large discretion, it is impossible that he should not feel keenly the seeming injustice and lawlessness of the proceeding.'* 'Nothing but actual insanity,' said Campbell, C. J., 'will authorize the se-

clusion of one who makes known his objections, and claims against reception. If no objection is made by a sane person to his own seclusion he cannot complain of it afterward. The authorities are uniform that there must be consent or actual insanity': Van Deusen *v.* Newcomer, 40 Mich. 90, 142; Anderson *v.* Burrows, 4 Car. & P. 210; Rex *v.* Turlington, 2 Burr. 1115; Hall *v.* Semple, 3 Fost. & F. 337; Fletcher *v.* Fletcher, 1 El. & E. 420; Look *v.* Dean, 108 Mass. 116; 11 Am. Rep. 323; Colby *v.* Jackson, 12 N. H. 526.

Insanity has a multitude of forms, and while a dangerous maniac may be restrained temporarily, even by a private citizen without warrant, until he can be safely released or arrested upon legal process, or committed to an asylum under legal authority, this is not the case in the milder forms of insanity, and even a desire to promote the welfare of the unfortunate individual does not justify an arrest, for nothing is more harmless than some of the milder forms of insanity. *The right of personal liberty is deemed too sacred to be left to the determination of an irresponsible individual, however conscientious. The law gives insane persons the safeguards of legal proceedings, and the care of responsible guardians*: Kelcher *v.* Putnam, 60 N. H. 30; 48 Am. Rep. 304.

It has been held that a commission to examine a person alleged to be an imbecile, etc., issued without the requisite notice, and neither preceded nor followed before judgment by the appointment of a guardian *ad litem*, is not aided by the presence of the imbecile and his representative by counsel, even when the counsel gives his consent to the judgment appointing the guardian, it appearing that the commission issued one day was executed the next, and that the judgment appointing the guardian followed immediately. 'The object of notice,' it is said, 'is that

there may be due warning to make objection for legal cause to the commission or any of the commissioners as well as to prepare for adducing evidence on the main question': Morton *v.* Sims, 64 Ga. 298.

We have always understood that no judgment of a court is supported by due process of law if rendered without jurisdiction of the subject matter and notice to the party; but some of the courts have not been over strict in applying the doctrine of notice to cases of insanity. *The very object of requiring notice* to be given to a party charged with insanity, or of requiring him to be produced in open court when possible, would seem to be designed to prevent fraud in the procuring of verdicts of insanity without affording the defendant an opportunity of being heard. * * *

Attempts by interested persons to get control of the person and property of another by the aid of lunacy proceedings, or proceedings on the ground of habitual drunkenness are not infrequent, and no precaution should be omitted which may apprise the party of the proposed action, and enable him to appear and defend. The authorities and text writers assume that the party proceeded against should have notice of the time and place of executing the commission. * * *

Jury Trial. One cannot be secluded *in invita* as an insane person until after a regular adjudication of the question by due process of law he has been found to be insane: and 'due process of law' in establishing the insanity of a person requires the fact of insanity *to be found by a jury of inquiry*: *In re Bryant,* 3 Mackey, 489: *Commonwealth* v. *Kirkbride,* 2 *Brewst.* 419: *Territory* v. *Sheriff of Gallatin County,* 6 *Mont.* 297: *State* v. *Baird,* 47 *Mo.* 302: *In re Lindsley,* 46 N. J. Eq. 358: *Fiscus* v. *Turner,* 125 Ind. 46, *In re Dickie,* 7 Abb. N. C. 417: *Gridley* v. *College,* etc. 137 N. Y. 327. *DeHart* v *Condit,* 51 N. J. Eq., 611: 40 Am. St. Rep. 545. It is true that most of the cases

cited seem to have been based on provisions of the statute allowing a trial of the issue of insanity before a jury when, upon an inquisition, the alleged lunatic demands a jury, except in cases where the lunatic clearly appears mentally incompetent to frame such a demand: *but it appears that he had the right, at common law, to a trial of such issue by a jury.* For a statement of the common-law doctrine, see *DeHart* v. *Condit*, 51 N. J. Eq. 611: 40 Am. St. Rep. 545. And in *Commonwealth* v. *Kirkbride*, 2 Brewst. 419, a case not founded upon a statute, the *doctrine is clearly announced that no man can be deprived of his liberty without the judgment of his peers, whether the detention is for insanity or crime.* * * *

Statutes requiring a party charged with insanity to be produced in open court, when possible, are designed to prevent fraud in the procuring of verdicts of insanity without affording the defendant an opportunity of being heard: Fiscus *v.* Turner 125 Ind. 46 *ibid.*

Remedies * * * One illegally committed as an insane person may move to set aside the inquisition for insufficiency of the evidence or other material matters: *In re Perrine*, 41 N. J., 409; or he may be discharged on *habeas corpus*: *Territory* v. *Sheriff of Gallatin County*, 6 Mont., 297; *Doyle Petitioner*, 16 R. I. 537; 27 Am. St. Rep. 759. Or an action for damages will lie for a malicious prosecution on a charge of insanity which results in committing to an asylum one who is not insane. The order of commitment in such a case is not conclusive evidence against the plaintiff of his insanity at any time, or of probable cause for the prosecution: *Kellogg* v. *Cochran*, 87 Cal. 192. In an action by such a person, for false imprisonment the broadest latitude should be allowed in showing the jury what the patient said and did, and how he appeared when in the asylum, as facts bearing

on the question of his sanity: *Van Deusen* v. *Newcomer,* 40 Mich., 90. The defendant in a lunacy proceeding may personally appeal from a judgment declaring him to be a person of unsound mind: *Cuneo* v. *Bessoni,* 63 Ind. 524.

Confinement upon Charge of Insanity After Acquittal of Crime on Ground of Insanity * * * A statute providing for the confinement in the insane hospital of the state prison of persons acquitted of murder or other felony on the ground of insanity, until discharged by the governor on receiving the certificate of the trial judge and the medical superintendent of the state insane asylum, upon an examination made by them, after being duly summoned for that purpose by the prison directors, that the prisoner is no longer insane, has been condemned, not only upon the ground, that it fails to furnish adequate means for the enforcement of the remedy provided, against the restraint being continued beyond the necessity which alone can justify it, but also upon the ground that it plainly violates the constitutional safeguard against restraints of personal liberty without 'due process of law,' the proceedings contemplated by it being not only inquisitorial and *ex parte*, but incapable of being set in motion except at the will of the prison directors, who would, therefore, practically control the liberty of the person: Underwood *v.* People 32 Mich., 1; 20 Am. Rep. 633."

State *v.* Billings. (55 Minnesota, 467. 43 Am. St. Rep. 525. January 1894).

Collins, J. said: "Mr. Webster's exposition of the words 'law of the land,' and 'due process of law' viz:—'The general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial' "—was quoted; and then the court went on to say that, in judicial proceedings, 'due process of law' requires notice, hearing and judgment.

"These words," said the court, "do not mean anything which the legislature may see fit to declare to be 'due process of law,' for there are certain fundamental rights which our system of jurisprudence has always recognized, which not even the legislature can disregard, in proceedings by which a person is deprived of life, liberty, or property, and one of these is 'notice before judgment in all judicial proceedings.' * * *

But it may be stated generally that due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the constitution, and the usages of the common law, would be a protection to him or to his property: People *v.* Board of Supervisors, 70 N. Y. 228. Due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential, 'Due process of law' without these conditions cannot be conceived: Stuart *v.* Palmer, 74 N. Y. 183; 30 Am. Rep. 289.

It follows that any method of procedure which a legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose the deprivation of a person of his life, liberty, or property, is in no sense the process of law designated and imperatively required by the constitution. And while the state should take charge of such unfortunates as are dangerous *to themselves and to others*, not only for the safety of the public, but for their own amelioration, due regard must be had to the forms of law and to personal rights. To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a trial before the judg-

ment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and submit evidence. *The question here is not whether the tribunal may proceed in due form of law, and with some regard to the rights of the person before it, but, rather, is the right to have it so proceed absolutely secured?* Any statute having for its object the deprivation of the liberty of a person cannot be upheld unless this right is secured, for the object may be attained in defiance of the constitution, and without due process of law. * * *

That it has opened the door to wrong and injustice to the making of very serious and unwarranted charges against others by wholly irresponsible and evil-minded persons—is evident, although the method of instituting the proceedings does not affect the validity of the act. * * *

The commission issues to the examiners, and they are authorized and directed to "examine" the alleged lunatic.* * * *It (the examination) may be formal or informal, as they choose, and the person under examination may not have the slightest idea that he is the subject of inquiry or investigation. The examination may be at any place where the subject can be found, or at a place convenient for the examiners. It may be public or private, and, judging from the questions found in the form to be answered by the examiners, it may consist simply in observing the alleged lunatic, and in making inquiries of him or his acquaintances, or, for that matter, accepting common street gossip.* To illustrate: In the certificate signed by the physicians who made this examination is the answer to a most important question, viz: 'Has the patient shown any disposition to injure others?' The answer is: 'Yes. It is reported that she threatens to shoot, carries firearms, and did shoot at one person passing, not knowing whom.'

When this examination, of which the subject need not be informed, and in which he takes no part, is completed the examin-

ers are required to make a verified written report and recommendation, and on this the officer may commit without any other or further act, except that he must see the subject, either in or out of court informing him fully of the proceedings, and must also notify the county attorney of what is going on. *Not until after the examination, report, and recommendation, upon which the officer may commit, if he so chooses, need there be any notice whatsoever to the person charged with being a proper subject for the insane asylum, nor need the county attorney be advised of the proceeding. If personal rights are of any consequence, and if they need protection at any time, such notice should precede the examination, not follow it. But, aside from this serious defect in the law, it will be seen that there is no provision which assures to the accused a trial at any time, either before or after notice, under the forms of law; no provision which guarantees to him a judicial investigation and a determination as to his sanity. The officer before whom the inquiry is pending is nowhere required to conduct his examination with the least regard to the rights of the person charged with being insane—his right to exercise his faculties without unwarranted restraint, and to follow any lawful avocation, for the support of life.*

Nor is the officer obliged to hear a particle of testimony although he is at liberty so to do. The accused or the county attorney might appear before him with an army of volunteer witnesses; but if their testimony was received or heard, or if there was the slightest approach to a trial, it would be through the grace of the officer, not as a matter of right to the person whose personal liberty is jeopardized by the proceeding. We are not speaking of what every honourable and humane officer would do when a case was before him, but of what the statute will permit an officer to do.

Further examination of this enactment need not be made, for enough has been said to establish its invalidity and to indicate what outrages might be perpetrated under it. The objection to

such a proceeding as that authorized by this statute does not lie in the fact that the person named may be restrained of his liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against him are true; not in committing him to the hospital, but in doing it without first giving him an opportunity to be heard.

We are compelled to the conclusion that the enactment of the sections referred to is unconstitutional, because they allow and sanction a denial of the protection of the law, and the deprivation of personal liberty without due process of law. * * *

As we have shown, the statute is so constructed that the opportunity to be heard in defense is not guaranteed to the person charged. It is not framed so as to compel a hearing before condemnation or a trial, under the general forms of law, before judgment is pronounced. Where it is plain that legislation upon any subject is in conflict with constitutional provisions, the duty of the court is obvious, and must be performed, whether the interests of a large number or of a certain class of people are involved, or *the rights of a single citizen.*"

As was said in the case quoted above, People *ex rel.* Elizabeth Ordway *v.* St. Saviour Asylum, 34 App. Div. at page 371: "*A hearing or an opportunity to be heard,* is absolutely essential, we cannot conceive of due process of law without this."

And quoting again from Cumming and Gilbert on The Poor, Insanity &c., Laws of New York, page 173: "No person can lawfully be declared insane and his personal liberty permanently restrained without formal proceedings, *and an opportunity afforded him to appear personally.* * * *"

And again from Buswell on Insanity, section 55: "* * * The party alleged to be insane has the right to have notice AND TO BE PRESENT at the proceedings for determining the issue of sanity * * *."

So in Hinchman *v.* Ritchie, Brightley (Pa.) 182, the Court said: "In all other cases * * * he is followed and the commission executed where he is found, that this PRIVILEGE OF BEING PRESENT may be secured to him, and secured not merely for exhibition of him to the commissioner and inquest * * * but also to give him full OPPORTUNITY of defeating proceedings improper, for want of foundation or legal conduct, in any of its stages."

And in the case of James, 30 How. Pr. (N. Y.) 453, it was said: "I think no person should be adjudged to be insane, or be confined as a lunatic except perhaps temporarily, without AN OPPORTUNITY OF BEING HEARD on the question of his alleged insanity before a tribunal competent to decide it."

And in another New York case, *In re* Tracey, 1 page 580, It was said: "It is the privilege of a party against whom a commission of lunacy is issued to have notice AND TO BE PRESENT at its execution."

Approved in *In re* Whitemack, 3 N. J. Eq. 252.

In Holman *v.* Holman, 80 Me. 139, the Court used this language: "It is a well settled rule of the common law that when an adjudication is to be made which will seriously affect the rights of a person, he should be notified AND HAVE OPPORTUNITY TO BE HEARD."

In the case of Vanauken, 10 N. J. Eq. 186, the following occurs: "The alleged lunatic has a right TO BE PRESENT AT THE EXECUTION OF THE COMMISSION, to make his defense by himself or counsel and to examine witnesses."

And in the very early case of *Ex parte* Crammer, 12 Ves. Jr., at page 455, the Chancellor said: "The party certainly must

BE PRESENT AT THE EXECUTION OF THE COMMISSION. IT IS HIS PRIVILEGE."

And in the Supreme Court of the United States the same question has been discussed and passed upon. In Windsor *v.* McVeigh, 93 U. S. 278, the Court said: "The law is and always has been, that wherever notice or citation is required, the party cited has the right TO APPEAR AND BE HEARD."

But it is useless to multiply authorities. The proposition is well settled that a party against whom any charge or claim is made likely to affect his liberty or his property, must have an *opportunity* to be heard in his own behalf.

What opportunity did plaintiff have to appear in person and defend his liberty, and his entire estate?

This being so, and it being true that plaintiff, through physical inability as aforesaid, had no opportunity to appear and defend plaintiff's rights, what effect can be given to the notice that was served upon the plaintiff. We find that a case somewhat similar to it has been passed upon by no less an authority than the Supreme Court of the United States. In Windsor *v.* McVeigh, 93 U. S. the facts were these:

McVeigh was a Virginian and owned property in Alexandria County in that State. During the Civil War, he was a supporter of the Confederate Government and a soldier in its army. An Act of Congress was passed providing for the confiscation of the property of such persons, and under that Act, proceedings were instituted in Alexandria County to enforce the confiscation of McVeigh's property.

Notice of the proceedings were given by publication as was required by the statute and in response to that notice, McVeigh appeared by attorney and filed his answer in the suit.

The United States' attorney moved the court to dismiss the answer because McVeigh was a rebel. The Court did dismiss

the answer and denied McVeigh the opportunity to defend his property rights and entered an order confiscating his property. The cause was taken to the Supreme Court of the United States and the proceedings were held void. The Court said, pages 277-8: "Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made. It is a summons to him to appear and to speak, if he has anything to say, why judgment sought should not be rendered. A DENIAL TO A PARTY OF THE BENEFIT OF A NOTICE WOULD BE IN EFFECT TO DENY THAT HE IS ENTITLED TO NOTICE AT ALL, and the sham and deceptive proceedings had better be omitted altogether."

And again at page 278: "The law is and always has been that whenever notice or citation is required, the party cited has the RIGHT TO APPEAR AND BE HEARD; and when the latter is denied (NOTE THE DISTINCTION BETWEEN *Notice* AND *Opportunity*) the former is INEFFECTUAL FOR ANY PURPOSE. The denial to a party in such a case of the right to appear is in legal effect the RECALL OF THE CITATION TO HIM."

The case of McVeigh *v.* United States, 11 Quall, 259, and the case of Underwood *v.* McVeigh, 23 Gratt. (Va.) 409, are to the same effect, and grew out of the same general state of facts.

In Underwood *v.* McVeigh, at page 418, the court said: "No sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* AND WITHOUT OPPORTUNITY OF DEFENCE * * * a tribunal which decides without hearing the defendant or giving him an OPPORTUNITY TO BE HEARD cannot claim for its decrees the weight of of judicial sentences."

Notice the similarity of the two cases in general characteris-

tics: In both cases notice was given to the defendant: in one by actual service in person, and in the other by publication. In both cases the party was prevented from appearing by order of the Court. In the McVeigh case, the order was entered after he attempted to appear. In the plaintiff's case, the order was entered before notice to plaintiff. In both cases it was the order of the court which nullified the notice that was given. McVeigh could not appear because the court *would* not let him. Plaintiff could not appear because the court *did* not let him. Plaintiff could not appear because the court had placed him in such a position—said physical disability brought on by the confinement ordered by Judge ——— in said Judge's said order of ———, 189—, that it was impossible for plaintiff to appear except by order of a competent tribunal directing said commission and said jury to visit plaintiff, in his cell—in the event of plaintiff's being physically incapacitated from making the journey to Court—*and said order was never entered.* The law does not countenance the doing of a vain thing. If it required notice to be given plaintiff in the said proceedings to appoint his said committee it required it for the purpose of giving him an opportunity of being present to represent himself in said proceedings. And if said opportunity to appear, which said notice was intended to give, was not in fact given but was prevented by plaintiff's said situation—said physical disability—which was itself due to the said order of said Judge ——— in ——— 189— (and under a void proceeding be it remembered) then said notice is in effect withdrawn and said proceedings are wholly *ex parte* Windsor *v.* McVeigh (*supra*), Underwood *v.* McVeigh, (*supra.*) The said Commissioners had the power to require the production of plaintiff, before them and said jury. Said power was especially conferred upon them by the order of their said appointment. And said power was for the purpose not

only of examining plaintiff but also for the purpose of giving him the chance to defend himself. Hinchman *v.* Ritchie, Brightley 182. "In all other cases * * * he is followed and the Commission executed where he is found, that this PRIVILEGE OF BEING PRESENT may be secured to him, and secured not merely for exhibition of him to the Commissioner and inquest * * * but also to give him FULL OPPORTUNITY of defeating proceedings improper, for want of foundation or legal conduct, in any of its stages." And the said commission should have so ordered plaintiff's presence, had it not been for the said sworn testimony of Doctors ——— and ——— aforesaid, in effect, that plaintiff would be physically injured by said production before said commission and said jury in New York twenty miles away from plaintiff's cell, where plaintiff lay in bed with an affection of the spine which said affection had confined plaintiff to his bed for three weeks previous at least. Upon ascertaining which said commission and said jury should, as public spirited citizens, mindful of their oaths, have at once visited plaintiff. And the Court should have ordered plaintiff's presence before said commission and said jury as was done in *ex parte* Cranmer cited above—"it is his privilege"—provided only that plaintiff was physically able to attend a court so far removed from his place of residence at said time. Failing which said Court should have ordered that said commission and said jury, should visit plaintiff and examine him and afford hm the opportunity *to appear and be heard* which said void proceedings under Judge ——— in ——— 189— had—by rendering plaintiff ill—deprived him of. If this had been done plaintiff would have been present before the tribunal that was trying him.

As we have shown, a trial had when the defendant is not in a physical or mental condition to appear, and therefore does not appear, is a trial had where the defendant had no opportunity "to appear and be heard." As the United States Supreme Court

said in Windsor *v.* McVeigh, 93 U. S. page 278 *supra* "The law is and always has been that whenever notice or citation is required, the party cited has the *right to appear and be heard:* and when the latter is denied (*note the distinction between notice and opportunity*) the former *is ineffectual for any purpose.* The denial to a party in such a case of the right to appear is in legal effect *the recall of the citation to him.*" Upon plaintiff's own assertion aforesaid, *supported as aforesaid by said Medical experts of the other side* plaintiff was physically unable to be present at said proceedings in 189—. *Ergo* plaintiff had—at said proceedings—no opportunity "to appear and be heard."

POINT 4. The said Proceedings in 189— were void for lack of due process of law for the following reason, to-wit. Said trial was had *in absentia.* The Court failed to direct the appearance, before said Commission and said Sheriff's jury, of plaintiff; and the Court also failed to direct that, failing this, said Commission and jury should visit plaintiff in his cell in the ——— Hospital, at ———. Thereby the constitutional rights "to be confronted with the witnesses against him," "to have compulsory process for obtaining witnesses in his favor," and "to have the assistance of counsel for his defence," were contravened, in that none of the said rights were respected.

In the proceedings in 189— before said commission and the said Sheriff's jury a palpable breach of constitutional privilege was perpetrated (1) by the Court's failure to order plaintiff's production before said commission and said jury in Court; (2) failing this the Court's failure to order that said Commission and said jury visited plaintiff in plaintiff's cell in the ——Hospital at ——— for the purpose of examining plaintiff. For it is confidently submitted that all proceedings before Juries or Sheriff's Juries, or before a judge, referee or commission are illegal when a defendant, who is in confinement, within the state, is de-

clared insane or incompetent or both, without having either been brought before the aforesaid authorities in person—or if for any reason this is not done—when the aforesaid authorities have not taken the trouble to investigate the cause of the defendant's absence, by visiting him, or inquiring into it personally. In approaching this subject we approach a subject surrounded by the growth of years of illegality, unconstitutionality, and fraud. In approaching said subject we approach one of the darkest chapters in Modern Court Practice, and Modern Procedure. In approaching said subject we approach one of the most astounding, one of the most amazing, one of the most iniquitous subjects in all the history of Court practice and procedure. In approaching said subject, finally, we approach, palpably and beyond peradventure, cavil, or contention the rankest blot on Court practice and procedure at present dimming the lustre of the law.

The present position of lunacy proceedings and incompetency proceedings throughout many of the States of the United States though fortunately not in a majority of the said States may, with justice, be said to be the last *bona fide* relic of barbarism—of the Dark Ages—in law today. Said proceedings smack more of the secrecy and guile of the Inquisition under Torquemada than the open atmosphere of a Court of Law. Said proceedings allow the *ipse dixit* in one branch of one of the branches of the medical profession to deprive a law-abiding citizen of liberty, property, and happiness for life. Said proceedings allow a tyranny upon the part of the said small sect which is second—if second—only to that of the Doges of Venice, in the plentitude of their tyranny. Said proceedings allow a tyranny upon the part of the said small sect which is second—if second—only to that of Louis XIV and his *Lettres de Cachet*. Said proceedings allow a tyranny upon the part of the said small sect which is second—if second—only to that of the tyrannical Judges of the Star Chamber. Said proceedings finally, allow an alleged lunatic or an alleged incompe-

tent perchance, illegally held upon a false and perjured charge of lunacy for years, who has been arrested and imprisoned upon a false and perjured charge of insanity without notice, without a hearing, without an opportunity to be heard, and who has been so imprisoned for so long a time that his physical health has begun to succumb, and who is physically incapacitated from coming to court, said proceedings allow the mere *ex parte* allegations of hired witnesses in the pay of the other side to brand said falsely alleged lunatic, with the life-stigma of hopeless and increasingly hopeless insanity, as well as hopeless and increasingly hopeless incompetency, without allowing said falsely alleged lunatic or falsely alleged incompetent a day in Court. In such a proceedings the interest of all the witnesses appearing against the said falsely alleged lunatic or falsely alleged incompetent is against the said falsely alleged lunatic or said falsely alleged incompetent. In such a proceedings the said interest is in the case of alleged expert witnesses—of alleged experts in lunacy—duly bought and paid for in advance by the other side.

In such a proceedings no witnesses, by any possible concatenation of circumstances or chain of events, can possibly but be hostile either by feeling or by interest as aforesaid to the said falsely alleged lunatic or said falsely alleged incompetent; for the machinery of the law is entirely in the hands of the other side. The other side are in a position to pick their Judge, are in a position to pick their Court, are in a position to pick their place of trial—and possibly—pick a place of trial far removed from the cell of the falsely alleged lunatic or falsely alleged incompetent—finally the other side are in a position to pick their witnesses, lay-witnesses as well as alleged expert witnesses. The falsely alleged lunatic or falsely alleged incompetent being incapacitated, from physical disability, to walk, is thereby incapacitated from presenting himself for trial in Court, perhaps far removed from said falsely alleged

lunatic's or said falsely alleged incompetent's cell, providing, and such a proviso is an exceedingly wide proviso, providing always that the other side permit the said falsely alleged lunatic or the said falsely alleged incompetent to present himself at Court. Such a proceedings permit the other side to prevent the said falsely alleged lunatic or said falsely alleged incompetent from budging out of said falsely alleged lunatic's or said falsely alleged incompetent's cell providing said falsely alleged lunatic or said falsely alleged incompetent is physically able to budge.

Such a proceedings permit the other side to forcibly restrain the said falsely alleged lunatic or falsely alleged incompetent by means of a straight-jacket or a "strong-room" or both from budging from said falsely alleged lunatic's or said falsely alleged incompetent's cell providing said falsely alleged lunatic or falsely alleged incompetent is able so to do. Such a proceedings permit the other side to forcibly restrain the said falsely alleged lunatic or falsely alleged incompetent by means of a hypodermic injection of morphine forcibly administered by the paid agents of the other side, the said alleged experts aided by the keepers of the mad-house in which the said falsely alleged lunatic or said falsely alleged incompetent happens to be in durance, providing the said falsely alleged lunatic or falsely alleged incompetent is able to budge. Such a proceedings finally permit the other side to forcibly restrain the said falsely alleged lunatic or said falsely alleged incompetent by rendering said falsely alleged lunatic or falsely alleged incompetent, if able to budge, unable to do so by having said falsely alleged lunatic or falsely alleged incompetent set upon by its agents, the said keepers of the said madhouse in which the said falsely alleged lunatic or said falsely alleged incompetent lies in durance, and so used up by said agents that the said falsely alleged lunatic or said falsely allegd incompetent is surely unable so to do. The gross injustice, conspiracy, perjury, and crime which may be cloaked by such pro-

ceedings, which allow a mere *ex parte* statement out of the mouths of bought and paid for witnesses to condemn a man to life-imprisonment in the interest of parties whose financial interests—to say nothing of their spiteful interest—to say nothing, finally, of their interest of legal self-preservation should the facts ever leak out—are concerned in concealing the truth—the evils so following in the train of said failure of common justice are too obvious to require pointing out.

As we said above. In the proceedings in 189— before said Commission and said Sheriff's jury, a palpable breach of constitutional privilege was perpetrated, (1) by the Court's failure to order plaintiff's production before said bodies in court; (2) failing this the Court's failure to order that said Commission as well as said jury visit plaintiff in his cell for the purpose of examining him. Upon the maxim "Analogy holds good in law" how would it look to read in a Court report that the alleged burglar was pronounced by a brace of doctors as physically incapacitated from appearing in court at his trial, and that in consequence the trial went on in said alleged burglar's absence and the jury duly finding said alleged burglar guilty of the crime alleged, duly convicted said burglar whereupon the Court duly sentenced said burglar in said burglar's absence to ten years' penal servitude? By what right has an alleged burglar more right to a hearing before the Court and jury that tries him and condemns him, than an honest alleged lunatic, or an honest alleged incompetent, before the Court and jury that *tries him* and *condemns him?* By what right has an alleged burglar more right to the enjoyment of a speedy and public trial by an impartial jury, than an honest alleged lunatic or an honest alleged incompetent? By what right has an alleged burglar more right to be informed of the nature and cause of the accusation than an honest alleged lunatic or an honest alleged incompetent? By what right has an alleged burglar more right to be confronted with the witnesses against him than an honest alleged lunatic, or an honest alleged

incompetent? By what right has an alleged burglar more right to have compulsory process for obtaining witnesses in his favor than an honest alleged lunatic, or an honest alleged incompetent? By what right, lastly, has an alleged burglar more right to have the assistance of counsel for his defence, than an honest alleged lunatic or an honest alleged incompetent? We maintain that not only is it by no right, but that all proceedings before juries, or Sheriff's juries, or before a judge, referee, or commission, are flagrantly illegal and profoundly unconstitutional when an alleged lunatic, or an alleged incompetent is declared insane, or incompetent, or both—either without having been brought before the aforesaid judge, or referee, or commission, or jury, or Sheriff's jury, or—if for any reason this is not done—a committee made up of members of the aforesaid jury or the said Commission and Sheriff's jury have not taken the trouble to investigate the cause of the absence, from his trial, of the said alleged lunatic or the said alleged incompetent by visiting him and inquiring into it personally.

Otherwise the door to perjury and even *murder*—as indicated *post* by the instances thereof hereafter cited in said Preface—is opened wide: otherwise said proceedings take on a farcical character analogous to proceedings at which the astral body of an alleged lunatic is sat upon by a Commission and a Jury of—*phantoms*.

Otherwise the Fourteenth Amendment to the United States Constitution would be contravened. It says, Section 1, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor de-

ny to any person within its jurisdiction, the equal protection of the laws." The right * * * *"to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence"* are the "privileges" of alleged criminals, in jeopardy—in consequence of their alleged crimes—of life, liberty, or property, according to the aforesaid Sixth Amendment to the United States Constitution. If the said "privileges" of alleged criminals are denied to honest alleged lunatics and honest alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty or property; or to *any person* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence, in jeopardy—on any charge that entails loss of liberty, or loss of property—of liberty or property, such a proceeding does *ipso facto "abridge* the privileges" of alleged criminals in the case of said honest alleged lunatics, and said honest alleged incompetents, as well as in the case of said *any person,* in contravention, of the aforesaid Fourteenth Amendment which says "No State shall make or enforce any law which shall *abridge the privileges* * * * of citizens of the United States."

It is therefore unconstitutional to "abridge the privileges" of alleged criminals in the case of said honest alleged lunatics and said honest alleged incompetents as well as in the case of said *any person.* It is therefore unconstitutional to guarantee "The right * * * *to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defence,"* wherever the liberty or proprety of an alleged felon is at issue, and withhold them wherever the liberty or property of a law-abiding citizen, on a charge of lunacy or incompetency, is at issue, or wherever the liberty or property of said *any person,*

on said any charge is at issue. If the above propositions are correct it follows: (1) that "the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defence"—forms part of the "privileges" of alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property; as well as of said *any person* in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty or property: (2) that so forming part it cannot be abridged. Furthermore. To "abridge the privileges" of alleged criminals in the case of said honest afleged lunatics, and said honest alleged incompetents, and said *any person*, is *ipso facto* to create class distinction in legal procedure in favour of alleged criminals and opposed to said honest alleged lunatics, and said honest alleged incompetents, as well as opposed to *any person* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity, or lack of sanity, competence, or lack of competence in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty or property. Such an absurd anomaly *ipso facto* upsets an equal protection of the laws, and throws more protection of the laws around the rights of an alleged criminal than those of an honest alleged lunatic, or an honest alleged incompetent, or those of said *any person*. Such an absurd anomaly is in direct contravention of the Fourteenth Amendment to the United States Constitution aforesaid, which says "Nor shall any State * * * deny to *any person* within its jurisdiction, *the equal protection of the laws.*" It is therefore unconstitutional to create class distinction, in legal procedure, in favor of alleged criminals and opposed to said honest alleged lunatics, and said honest alleged incompetents, and said *"any person."* It is therefore unconstitutional to guarantee "The right * * * to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence," wherever the liberty or property of an alleged felon is at issue, and withhold it wherever the liberty or property of a law-abiding citizen, on a charge of lunacy or incompetency, is at issue, or wherever the liberty or property of said "*any person*," on said any charge, is at issue. Furthermore. If the above propositions are correct we have shown: (1) that "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defense,"—forms part of the privileges of alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty or property, as well as of said "*any person*," in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty or property: (2) that so forming part it cannot be abridged. It follows therefore that "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of Counsel for his defence," in the case of said alleged lunatics and said alleged incompetents, as well as in the case of said "*any person*" in due process of law. It follows therefore that due process of law in said respect, touching said alleged lunatics and said alleged incompetents, as well as touching said "*any person*" is identical, in said respect, with due process of law touching alleged criminals and alleged malefactors. Furthermore. If the above propositions are correct it follows that another Amendment to the United States Constitution provides the aforesaid "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of Counsel for his defence," for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty or property; as well as for said "*any*

person" in jeopardy—on any charge that entails loss of liberty or loss of property—of liberty or property; namely, the Fifth Amendment. If the above propositions are correct we have shown: (1) that "The right * * * to be confronted with the witnesses against *him*; to have *compulsory process for* obtaining witnesses in his favour; and to have the assistance of Counsel for his defence," forms part of the privileges of alleged lunatics and alleged incompetents, as well as of said *"any person;"* (2) that so forming part it cannot be abridged: (3) that "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of Counsel for his defence" in the case of said alleged lunatics and said alleged incompetents as well as in the case of said *"any person"* is due process of law: (4) that due process of law in said respect, touching said alleged lunatics and said alleged incompetents, as well as touching said *"any person"* is identical, in said respect, with due process of law touching alleged criminals and alleged malefactors. *Ergo,* where a clause in the United States Constitution guarantees due process of law *which in itself includes "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of Counsel for his defence."* for alleged criminals and alleged malefactors in jeopardy—in consequence of their alleged crimes—of liberty, or property; as well as for *"any person"* in jeopardy of *"liberty or property"* said clause *ipso facto* includes the guarantee of due process of law *which in itself includes "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defence."* for alleged lunatics and alleged incompetents in jeopardy —on a charge of lunacy or incompetency—of "liberty or prop-

erty;" as well as for *"any person"* without distinction of race, colour, honesty, or lack of honesty, intelligence, or lack of intelligence, health or lack of health, wealth, or lack of wealth, sanity or lack of sanity, competence, or lack of competence, in jeopardy—on any charge that entails loss of liberty or loss of property—of "liberty or property." The Fifth Amendment to the United States Constitution guarantees due process of law *which in itself includes "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defence,"* for alleged criminals and alleged malefactors in jeopardy—in consequence of their alleged crimes —of "liberty, or property;" *ergo,* the said Fifth Amendment guarantees due process of law *which in itself includes "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defence,"* for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of "liberty, or property;" as well as for said *"any person"* in jeopardy—on any charge that entails loss of liberty, or loss of property—of liberty or property. The said Fifth Amendment as follows: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * * *nor be deprived of life, liberty, or property, without due process of law."* If the above propositions are correct we have shown: (1) that "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defence," forms part of the privileges of alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty, or property, as well as of said *"any person"* in jeopardy—on any charge that entails loss of liberty or

loss of property—of liberty or property: (2) that so forming part it cannot be abridged: (3) that "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defence," in the case of said alleged lunatics and said alleged incompetents as well as in the case of said *"any person"* is due process of law: (4) that due process of law in said respect, touching said alleged lunatics and said alleged incompetents, as well as touching said *"any person"* is identical, in said respect, with due process of law touching alleged criminals and alleged malefactors: (5) that the said Fifth Amendment to the United States Constitution guarantees *due process of law which in itself includes "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defence"* for alleged criminals and alleged malefactors. It follows therefore that the said Fifth Amendment to the United States Constitution guarantees *due process of law which in itself includes "The right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defence,"* for alleged lunatics and alleged incompetents in jeopardy—on a charge of lunacy or incompetency—of liberty or property; as well as for *"any person"* without distinction of race, color, honesty, or lack of honesty, intelligence, or lack of intelligence, health, or lack of health, wealth, or lack of wealth, sanity or lack of sanity, competence, or lack of competence, in jeopardy —on any charge that entails loss of liberty or loss of property—of liberty or property.

The aforesaid propositions that persons confined in Lunatic Asylums both public and private are liable to be killed by maltreatment at the hands of the keepers thereof, is sustained by

the following seven instances cited by Charles Reade in his Preface to, and defence of, the charges made by him against Private Insane Asylums in his celebrated novel, "Hard Cash," which wrought a veritable revolution in England in the methods of treatment, at the hands of keepers, of persons confined in Insane Asylums in that country. To wit, Santa Nistri, who died in an Insane Asylum with his breast-bone and eight ribs fractured—"a lunatic patient died suddenly, with his breast-bone and eight ribs broken, which figures please compare with Santa Nistri's"—William Wilson, who died with twelve ribs broken in an Insane Asylum—Barnes, who died with an arm and four ribs broken—Owen Swift, who died with his breast-bone and eleven ribs broken, and with his liver ruptured in an Insane Asylum—Matthew Geoghegan, whom "Jones, a keeper, threw down, and kicked * * * several times; then got a stick and beat him; then got a fire-shovel and beat him; then jumped on his body; then walked up and down his body; of which various injuries the man died," in an Insane Asylum. "The keeper who killed a stunted imbecile by internal injuries in the Lancaster Asylum."

How modern this language sounds when compared with that of the following two New York daily papers.

The New York *World* May 5th, 1904.

BROKEN RIBS DUE TO ILL-PAID NURSES.

District-Attorney Arraigns the State for Death of Insane Patient.

President Mabon of the State Commission in Lunacy, began an inquiry at the Manhattan State Hospital yesterday into the

death of Abraham Wendorff of general paresis at that institution last Sunday. An autopsy revealed eight broken ribs.

Detective Arthur Carey also began an investigation, under the orders from Assistant District-Attorney Francis P. Garvan.

Dr. Louis E. Petit and Dr. J. R. Knapp, the two physicians who attended Wendorff, were positive that there had been no knowledge of an injury during their care of the patient. Edward M. Stevens and John T. Ryan, attendants, said Wendorff had often been very violent and at one time had been tied to his bed by sheets to keep him from injuring himself.

In tracing the history of the case it was found that when, on April 10, Wendorff was received at Bellevue Hospital he was suffering from contusions all over his body, but no fractured ribs were discovered.

District-Attorney Jerome arraigned the New York State authorities in speaking of the case.

"It is all due to the fact," he said, "that attendants at the Manhattan Hospital are underpaid and have little knowledge of the condition of the insane they are attending. Let a drunken trolley motorman get discharged, and he bobs up as an attendant of the insane on Ward's Island. Most of the attendants are alcoholic, more or less, in their tendencies. You can't get a good man to go to Ward's Island for $30 or $40 a month.

"When we try to get at the bottom of such abuses we find our main witnesses are people perhaps themselves paretics or paranoiacs who would not be believed by any jury. Of course the attendants tell the best stories to aid themselves."

Patients in public hospitals ought to have the privilege of leaving with ribs at least as good as they take there.

Editorial from New York *American* April 16th, 1904.

INHUMANITY IN NEW YORK INSTITUTIONS.

There is again before the courts one of those dreadful cases

in which a mentally afflicted patient in a New York public institution is said to have been beaten to death by the very attendants whose duty it was to care for him.

The evidence tells of an old man who reached the Manhattan State Hospital on Ward's Island in good physical condition, and within less than a month was taken from the institution a corpse, with fractured bones and crushed ribs. What makes the case uglier as an attempt to conceal the true cause of death under a certificate which indicated that the patient had succumbed to pneumonia.

These cases are altogether too frequent in New York. The public has not forgotten theBellevue Hospital scandals, the investigation of which revealed revolting cruelties practised on the patients in a particular ward—and there have been others since Bellevue was reformed.

Brutality of the order indicated by these reports must be suppressed if the staffs of every institution in New York have to be changed. A particularly discouraging feature usually is that the pride of the head official of one of these institutions places him in a position of being more anxious to disprove the charge than to reveal the facts and to aid in the punishment of a guilty attendant. In the particular case under investigation it may be that the victim was not mangled by his nurses, as alleged, but it is certain that there has been more than one such outrage recently, the perpetrators of which escaped punishment because some doctor was jealous of the reputation of the institution under his charge. This is all wrong.

New York's hospitals must be kept clear of inhumanity. They are the only refuge in many cases of the greviously afflicted, whose lot at the best is terrible.

It would be hard to conceive of an inquity worse than that of a man who would torment, beat and bruise a helpless sick person placed in his charge.

When such a one is discovered there should be no mercy shown him; he belongs in jail.

During the last years of the last decade of the nineteenth century, a party died on an average of one per year—from injuries very similar to those described above in Insane Asylums in or contiguous to the City of New York. If we remember rightly only one judicial investigation was held. In said case the keepers were allowed to go free on the strength of the following from the Penal Code of the State of New York. "Sect. 223. *Use of force or violence, declared not unlawful, etc.* To use or attempt, or offer to use force or violence upon or towards the person of another is not unlawful in the following cases: * * 6. When committed by any person in preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person." In said case "the people of the Asylum stuck manfully together, and agreed to know nothing about it" in the words of Charles Reade commenting upon said Barnes. As said Reade goes on to say: *'It is a very shocking thing that both brute force and traditional cunning should be employed against persons of weak understanding, and that they should be so often massacred, so seldom avenged."*

When a person is killed in a New York Insane Asylum, the customary practice upon the part of the keepers who did the said killing and the doctors who support said keepers in said killing by their testimony in Court, the customary practice is for said keepers and said doctors to excuse said killing upon the ground that in certain forms of insanity the bones soften as the disease advances. A moment's reflection will raise the question "What

has that to do with the necessity for broken ribs?" Ribs do not even in the case of lunatics, break from being looked at. Ribs to be broken even in the case of lunatics require force. What business has force to be applied to ribs in a struggle with a lunatic? What reason is there for applying force to a lunatic's breast bone or liver in such a struggle? A lunatic's arms and legs are the only things to be touched in such a struggle, provided these are held the rest of said lunatic's body may be allowed to be free. What reason has force to be applied to ribs or breast bone or liver unless with the intent to kill by breaking the former—in the manner described by said Reade—or rupturing the latter as also described by said Reade? As said Reade says "I * * examined a number of * * * ex-attendants, male and female, who had gone into other lines of life, and could now afford to reveal the secrets of those dark places. The ex-keepers were all agreed in this—that the keepers know how to break a patient's bones without bruising the skin; and that the doctors have been duped again and again by them. To put it in my own words, the bent knees, big bluntish bones, and clothed, can be applied with terrible force, yet not leave their mark upon the skin of the victim. The refractory patient is thrown down and the keeper walks up and down him on his knees, and even jumps on his body, knees downwards, until he is completely cowed. Should a bone or two be broken in this process, it does not much matter to the keeper; a lunatic complaining of internal injury is not listened to. He is a being so full of illusions that nobody believes in any unseen injury he prates about."

Ex parte Crammer (1806) (*supra*). Lord Chancellor Erskine said "The party certainly must be present at the execution of the commission (*de lunatico inquirendo*). It is his privilege."

Bethea against McLennon North Carolina Reports (1840) (*supra*). The court said "It is true that the lunatic is entitled

to be present before the jury; and if they deny him this right, such denial would be sufficient cause for setting aside the inquisition."

Stafford *v.* Stafford (*supra*). The court said "We think it indispensable he (the alleged lunatic) should have the opportunity afforded him to hear and confront those who by their evidence are about to deprive him of all control over his actions and take from him the enjoyment of his property. The defendant had a right to demand in the Appellate Court, legal proof of her insanity, and that legal proof was not furnished by testimony taken out of her presence."

Dowell against Jacks North Carolina Reports (1859) (*supra*). The court said. "She had no notice—was not legally represented, and what is of still greater importance, was not present, to be seen and examined by the jury."

Stewart *v.* Kirkbride (1867) (*supra*). The court said, "Lord Chancellor Erskine (*ex parte* Cranmer, 12 Ves. Jr. 455) said: "The party must certainly be present at the execution of the commission; it is his privilege." The same rule has been adopted in the United States. (See Rusell's case 1 Barb. Ch. Rep. 38; and Hinchman's case, Brightley's Rep. 181).

State *v.* Billings (1894) (*supra*). The court said, "But it may be stated generally that due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the constitution, and the usages of the common law, would be a protection to him or to his property: People *v.* Board of Supervisors, 70 N. Y. 228."

Lastly the same contention was sustained by the courts in the following cases (*supra*) to wit:

People *ex rel.* Elizabeth Ordway *v.* St. Saviour Asylum, 34 App. Div. at page 371.

Cumming and Gilbert on the Poor, Insanity, etc., Laws of New York, page 173.

Buswell on Insanity, section 55.

Hinchman *v.* Ritchie, Brightley, (Pa.) 182.

Janes, 30 How. Pr. (N. Y.) 453.

In re Tracey 1 page 580, approved *In re* Whitmack, N. J. Eq. 252.

Holman *v.* Holman 80 Me. 139.

In the case of Vanauken, 10 N. J. Eq. 186.

The point has practically been decided by no less an authority than the Supreme Court of the United States in Windsor *v.* McVeigh, 93 U. S. pp. 277-8 the court said:

"Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made. It is a summons to him to appear and to speak, if he has anything to say, why judgment sought should not be rendered. A DENIAL TO A PARTY OF THE BENEFIT OF A NOTICE WOULD BE IN EFFECT TO DENY THAT HE IS ENTITLED TO NOTICE AT ALL, and the sham and deceptive proceedings had better be omitted altogether."

And again at page 278:

"The law is and always has been that whenever notice or citation is required, the party cited has the RIGHT TO APPEAR AND BE HEARD; and when the latter is denied (NOTE THE DISTINCTION BETWEEN *Notice* AND *Opportunity*) the former is INEFFECTUAL FOR ANY PURPOSE. The denial to a party in such a

case of the right to appear is in legal effect THE RECALL OF THE CITATION TO HIM."

The case of McVeigh *v.* United States, 11 Quall. 259, and the case of Underwood *v.* McVeigh, 23 Gratt. (Va.) 409, are to the same effect, and grew out of the same general state of facts.

In Underwood *v.* McVeigh, at page 418, the court said:

"No sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced EX PARTE AND WITHOUT OPPORTUNITY OF DEFENCE * * * a tribunal which decides without hearing the defendant or giving him an OPPORTUNITY TO BE HEARD cannot claim for its decrees the weight of judicial sentences."

Daniel Webster's definition of due progress of law in the Dartmouth College case. "The general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

POINT 5. Plaintiff's sanity at the time of arrest is proved by plaintiff's letter to ——— dated shortly after plaintiff's arrest and incarceration in the ——— Hospital aforesaid, New York, upon Mr. Justice Harlan's opinion in the Runk case which holds that a written instrument by a person accused of insanity may successfully offset *prima facie* evidence of insanity.

TWO EXCERPTS FROM THE TEXT OF MR. JUSTICE HARLAN'S OPINION IN THE RUNK CASE.

SUPREME COURT OF THE UNITED STATES.

No. 142—October Term, 1897.

A. Howard Ritter, executor of William M Runk, deceased, plaintiff in error,

vs.

The Mutual Life Insurance Company of New York.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

(January 17, 1898.)

Mr. Justice Harlan delivered the opinion of the Court.

* * * "Besides these facts, it appeared that on the day before his death he avowed that his debts must be paid, and that they could only be paid with his life. That avowal was in a letter written to his partner, in which he said that he had deceived the latter, and could only pay his debts with his life. That letter concluded: 'This is a sad ending of a promising life, but I deserve all the punishment I may get, only I feel my debts must be paid. This sacrifice will do it, and only this. I was faithful until two years ago. Forgive me. Don't publish this.' On the same day he wrote to his aunt, to whom he was indebted in a large sum, saying among other things: 'Forgive me for the disgrace I bring upon you, but it is the only way I can pay my indebtedness to you.' In addition he left for the guidance of his executor a memorandum of his business affairs, prepared just before his death, and which tended to show that he was at that time entirely at himself.

In view of these and other facts established by the evidence, the court did not err in disaffirming the first and second of plaintiff's points. We may add to that, under the charge to the jury, it became unnecessary for them to inquire whether the policies were taken out with the intention of defrauding the insurance company or of committing suicide. The court said to the jury:

'What constitutes insanity, in the sense in which we are using the term, has been described to you, and need not be repeated. If this man understood the consequences and effects of what he was doing or contemplating, to himself and to others, if he understood the wrongfulness of it, as a sane man would, then he was sane, so far as we have occasion to consider the

subject; otherwise he was not. Here the insured committed suicide, and, as the evidence shows, did it for the purpose, as expressed in his communication to the executor of his will, as well as in letters written to his aunt and his partner, of enabling the executor to recover on the policies, and use the money to pay his obligations. I therefore charge you that if he was in a sane condition of mind at the time, as I have described, able to understand the moral character and consequences of his act, his suicide is a defense to this suit. *The only question, therefore, for consideration is the question of sanity.* There is nothing else in the case. That he committed suicide and committed it with a view to the collection of this money from the insurance companies and having it applied to the payment of his obligations, is not contraverted, and not contravertible. It is shown by his own declaration, possibly not verbal, but written. The only question, therefore, is whether or not he was in a sane condition of mind, or whether his mind was so impaired that he could not, as I have described, properly comprehend and understand the character and consequences of the acts he was about to commit. In the absence of evidence on the subject he must be presumed to have been sane. The presumption of sanity is not overthrown by the act of committing suicide."

The said Runk had been guilty of what any expert in insanity would denominate the act of a madman, under the plea that suicide is the act of a man suffering from "suicidal-mania." The Court below agreed in said presumptive evidence of insanity, which is furnished by the act of suicide. Said Court said to wit: "Suicide may be used as evidence of insanity." Mr. Justice Harlan affirmed said *dictum* of said lower Court by saying, to wit: "Nothing said by the Court upon the question of insanity was erroneous in law." *Ergo* Mr. Justice Harlan held that the act of suicide is *prima facie* evidence of insanity. But Mr. Justice Harlan also agreed with

said lower Court in holding that said *prima facie* evidence of insanity might be offset. *Mr. Justice Harlan agreed with said lower Court that said* prima facie *evidence of insanity might be offset by what?—by expert testimony to the contrary? by sworn allegations by eye witnesses to the contrary? no: by a far simpler, by a far surer means, to wit: by the acts of said alleged insane person's mind, as shown by a written instrument upon the part of said alleged insane person: by a letter in short.*

Said Runk had written a letter to said Runk's business partner, and to said Runk's aunt touching upon the motive of said suicide, as well as a business memorandum to said partner. As nothing to the contrary is alleged it may be presumed that said letters and said memorandum were rather brief, or at least nothing comparable for length with said letter written by plaintiff to said ———— within less than four months from the time of plaintiff's arrest and imprisonment as a lunatic in said ——— Hospital and years before plaintiff was able to escape from said false imprisonment. Furthermore, It may be persumed that said two letters and memorandum upon the part of said Runk were necessarily—from their said rather brief nature—far less sustained specimens of argument and memory than said letter of plaintiff presented.

Said letter of plaintiff was over thirty pages of typewriting in length. Said letter of plaintiff contained an exhaustive examination of the causes which led up to plaintiff's arrest and incarceration upon a false and perjured charge of lunacy, besides an exhaustive account of plaintiff's business affairs directly connected therewith, besides a legal discussion of plaintiff's *status* and plans for legal redress, which said plans were carried out, almost to the letter, by plaintiff years later, upon plaintiff's escape.

If two, presumably brief, notes and a business memorandum offset the actual undoubted presence of presumptive proof—suicide—of insanity in the case of the unfortunate Runk how

much more should such a letter as that of plaintiff offset not so strong a thing as presumptive proof but so fishy a thing as the bought and paid for affidavits of two professional Swearers-in Lunacy?

Plaintiff maintains that sanity is proved by what a person can do with said person's mind. That *sane thinking is a proof positive—the ultimate and final test of sanity.*

To refer once more to Mr. Justice Harlan's said opinion, quoting the lower Court:—

"Suicide may be used as evidence of insanity, but standing alone it is not sufficient to establish it. * * * If you find him to have been insane, as I have described, your verdict will be for the plaintiff, otherwise it will be for the defendant." It thus appears that the case was placed before the jury upon the single issue as to the alleged insanity of the assured at the time he committed suicide, and with a direction to find for the plaintiff if the assured was insane at that time, and for the company if he was then of sound mind.

Assuming that the jury obeyed the instructions of the court, their verdict must be taken as finding that the assured was not insane at the time he took his life. We must then inquire whether the observations of the trial court on the subject of insanity were liable to objection.

We have seen that the plaintiff asked the court to instruct the jury that if the assured intentionally killed himself when his reasoning faculties were so far impaired by insanity that he was unable to understand the moral character of his act, even if he did understand its physical nature, consequences and effect, such self-destruction would not of itself prevent recovery upon the policies.

This was the only instruction asked by the plaintiff which undertook to define insanity, and as before stated, it was given by the court. But in giving it the court said: 'We must understand what is meant and intended by the term 'moral

character of his act.' It is a point which has been used by the courts, and is correctly inserted in the term; but it is a term which might be misunderstood. We are not to enter the domain of metaphysics in determining what constitutes insanity, so far as the subject is involved in this case. If Mr. Runk understood what he was doing, and the consequences of his act or acts, to himself as well as to others—in other words, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family, and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would—then he is to be regarded by you as sane. Otherwise he is not.' Substantially the same observations were made in that part of the charge, which is above given.

The plaintiff insists that the definition of insanity, as given by the trial court, was much narrower than was required or permitted by the decisions of this court. It is said that the impairment not only of the moral vision, but also of the will, leaving the deceased in a condition of inability to resist the impulse of self-destruction, has been accepted by this court as describing a phase of insanity or mental unsoundness. One of the cases to which the plaintiff referred in support of this view is Davis *v.* United States, 165, U. S. 373, 378, which was a prosecution for murder. It was there held that the accused was not prejudiced by the following instruction given to the jury: 'The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distingishing between right and wrong, or unconscious at the time of the nature of the act he was committing; or where, though conscious of it and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but

are beyond his control.' This was substantially what had been held by this court in previous cases. Life Ins. Co. *v.* Terry, 15 Wall, 580; Bigelow *v.* Berkshire Ins. Co. 93 U. S. 284; Insurance Co. *v.* Rodel, 95 U. S. 232; Manhattan Ins. Co. *v.* Broughton, 109 U. S. 121; Connecticut Ins. Co. *v.* Lathrop, 111 U. S. 612; Accident Ins. Co. *v.* Crandall, 120 U. S. 527. In Terry's case above cited—which was an action upon a life policy declaring the policy void if the assured died by his own hand—it became necessary to instruct the jury on the subject of insanity. The court said: 'We hold the rule on the question before us to be this: If the assured, being in the posession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.'

Recurring to the ruling of the court in the present case, it is not perceived that the plaintiff had any ground to complain that its definition of insanity was too strict or too narrow. His fifth point, in general terms, defined insanity as being a condition in which the reasoning faculties are so far impaired that the person alleged to be insane when committing self-destruction was unable to understand the moral nature of his act, even if he understood its physical nature. This definition was not rejected. On the contrary, it was accepted, the court at the time making some observations deemed necessary to show what, in law, was meant by the words 'moral nature of his act.' By these observations the jury were informed that if the as-

sured understood what he was doing, and the consequences of his act or acts to himself and to others—that is, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family, and others and was able to comprehend the wrongfulness of what he was about to do, as a sane man would—then he was to be regarded as sane; otherwise, not.

It is suggested that the attention of the jury should have been brought specifically or more directly to the fact that unsoundness of mind exists when there is an impulse to take life which weakened mental and moral powers cannot withstand—a condition in which there is no continued existence of a governing will strong enough to resist the tendency to self-destruction. But the words of the charge, although of a general character, substantially embodied these views. The court stated the principal elements of a condition of sanity as contrasted with insanity. What it said was certainly as specific as the instruction asked by the plaintiff. If the plaintiff desired a more extended definition of insanity than was given, his wishes, in that respect, should have been made known. The court having affirmed his view of what was evidence of insanity, and such affirmance having been accompanied by observations that brought out with more distinctness and fullness what was meant by the words 'moral character of his act,' the plaintiff has no ground to complain; for nothing said by the court upon the question of insanity was erroneous in law or inconsistent with that which the plaintiff asked to be embodied in the charge. No error of law having been committed in respect of the issue as to the insanity of the assured, it is to be taken as the result of the verdict that he was of sound mind when he took his life."

Mr. Justice Harlan says: "*In addition* (to the said letter written by said Runk to said Runk's partner, and the said letter written by said Runk to said Runk's aunt) *he left for the*

guidance of his executor a memorandum of his business affairs, prepared just before his death, and which tended to show that he was at that time entirely at himself." Mr. Justice Harlan says further: "The Court stated the principal elements of a condition of sanity as contrasted with insanity. * * * Nothing said by the Court upon the question of insanity was erroneous in law. * * * No error of law having been committed in respect of the issue as to the insanity of the assured, it is to be taken as the result of the verdict that he was of sound mind when he took his life." We now insert what said Court said constituted sanity as opposed to insanity. "What constitutes insanity in the sense in which we are using the term, has been described to you, and need not be repeated. If this man understood the consequences and effects of what he was doing or contemplating, to himself and to others, if he understood the wrongfulness of it, as a sane man would, then he was sane, so far as we have occasion to consider the subject. * * * I therefore charge you that if he was in a sane condition of mind at the time, as I have described, able to understand the moral character and consequences of his act, his suicide is a defense to this suit. The only question, therefore, for consideration is this question of sanity. There is nothing else in the case." A perusal of the above will prove that the Supreme Court of the United States supports our aforesaid contention in this point.

We maintain that sanity is shown by the action of a party's mind not by the action of a party's muscles. We maintain that sanity is shown by a party's words and acts rather than by the "reflexes" of a party's knee joints. We maintain that sanity is shown by a party's ideas rather than by involuntary action of a party's eyelids. We maintain that sanity is shown by the words issuing from a party's lips rather than by the mechanical action of the party's labial muscles. We maintain that sanity is shown by the words uttered by a party's tongue rather

than by the question as to whether the party's tongue was "coated" or not "coated." We maintain that sanity is shown by the action of the party's hands as to what the party can do with said party's hands or write with said party's hands rather than as to whether said party's hands were warm or cold. We maintain that sanity is shown by the question as to whether or not said party's ideas are nomal rather than by the question as to whether or not said party's pupils are normal. We maintain that sanity is shown by the quickness of said party's mind rather than by the quickness of said party's pulse. We maintain that sanity is shown by whether or not said party's logical and reasoning powers are firm or tremulous rather than as to whether or not said party's hands are firm or tremulous. We maintain that sanity is shown rather by the question as to whether or not a party's mind reacts to ratiocination and questions put to a party rather than by the question as to whether or not the pupils react to light. We maintain that sanity is shown rather by the fact as to whether or not a party thinks well than by the fact as to whether or not a party sleeps well. Lastly we maintain that sanity is shown rather by the question as to whether or not a party's reasoning is regular than by the question as to whether or not said party's bowels are regular. What is insanity? Suppose a law should be enacted to the effect that certain acts or thoughts would be sufficient proof of mental derangement, and that upon a trial, the facts appearing, the Court should direct a verdict accordingly, and property or freedom should thus be wrested from the defendant. Would such a proceeding constitute due process of law? And yet such a preposterous, such a mechanical and such a charlatanish test of sanity—as that indicated above—is to-day set by so-called "experts" in insanity, who glean certain physical, mechanical muscular actions which sometimes follow insanity, but in the vast majority of cases exist as mere physical idiosynerasies totally free from the slightest taint thereof, and

—to use a technical phrase—are "auxiliary," but not "positive." The result of said quackery is that the public is being gulled into believing that insanity is hidden in a grand arcanum of mystery, to which said grand arcanum only alleged "experts" in insanity hold the key, which said alleged "experts" will not turn without the payment of a fat fee. The result of said quackery is that people lose sight of the fact that, as has been said by the Court (*supra*), the citizen is the sovereign, by which we mean, that the citizen is the final judge of things medical as well as things practical, of things scientific as well as of things simple, of things literary as well as of things non-literary, of things musical as well as of things non-musical, of things finally, religious and thing non-religious: by which we mean that when any of said above domains of human thought enter a law Court, it is the sovereign, it is the plain citizen, it is the juryman and not the judge and not the counsel, and not the experts *bona fide* or alleged who pronounce judgment upon said things—upon the facts. Whoever heard of a patent suit involving say the composition of a chemical substance, so technical, so complicated that none but expert chemists could discuss intelligently, whoever heard of any man's being grossly illiterate and grossly ignorant enough to claim that said question was beyond the reach of solution in a Court of law, and therefore, beyond the reach of a jury, and yet said grossly ignorant and grossly illiterate remark is made daily by intelligent and educated persons to-day concerning insanity, and what is commoner than to hear a party pusillanimously hide himself when asked his opinion as to a party's mental condition by a "I'm not an expert in insanity." The result of said quackery is that a growing danger—growing abreast of the growth of that portion of the medical profession known as experts in lunacy—that a growing danger menaces society to-day. All that is necessary to jeopardize a man's liberty, property, and happiness and threaten all three with life imprisonment is to hire two un-

principled alleged experts in insanity to swear that said party is crazy. At once said party's family and friends fall away from said party as though said party were a leper. At once said party's said family and said friends hold up their hands in superstitious horror, and in reply to said party's modest claim that said party is all right, and that said party does not either claim the things said dishonest quacks swear said party claims, as well as that said party does not say the things said dishonest quacks swear said party says, at once said party's said family and said friends hold up their hands in ignorant illiterate horror and exclaim "O! But the doctor says you do and that settles it." The dangers which threaten society from said source while they undoubtedly fatten the pockets of said dishonest quacks, and while they undoubtedly fill the Madhouses which honeycomb New York States—there being twenty private Insane Asylums in that one State alone—(cf. the Twelfth Annual Report of the New York State Commission in Lunacy Oct. 1st, 1899, to Sept. 30th, 1900, page 96.

"PRIVATE INSTITUTIONS.

"There are twenty institutions and licensed houses in the State authorized by the Commission to receive and retain the certified insane under the following provisions of the Insanity Law")—the dangers which threaten society from said source are too open and palpable to need pointing out. Let it suffice to say that the home circle is no longer a haven from the storms of the world which the home circle once was, which the home circle was before the discovery of alleged "experts" in insanity. But let the ordinary worries of life upset the harmony thereof but to the slightest degree and in sneaks the said alleged "expert" in insanity to spy and lie and later perjure away the liberty and happiness of a brother or a sister or a husband or a wife It is only a question as to who gets at the said alleged "expert" in insanity first, and buys—what, alas, *habeas corpus* pro-

ceedings too frequently prove to be—said alleged "expert" in insanity's perjurious, nefarious, murderous services in swearing the other into a madhouse cell for life.

In dismissing said topic we shall cite an instance showing that New Yorkers are not the only ones who known how to enlist the services of said band of alleged "experts" in insanity. The following clipping is from the New York *World* of March 16th, 1904:

"MUCH COURTED GIRLS QUESTION FATHER'S SANITY."

"NIAGARA FALLS, March 15."—James ———was locked up last week on the complaint of his two daughters, who asserted that he was deranged. ——— was examined as to his sanity and pronounced of sound mind and discharged from custody.

His two daughters, who are of prepossessing appearance, he says, have many admirers. ——— stated that there was not a night that the parlor of his home was not occupied by one of his daughters with her admirer. Sometimes it was morning when the couples would part.

Upon different occasions ——— remonstrated with his daughters. They paid no attention. Seeing that it was useless to talk further, ——— removed his bed to the parlor, informing his daughters that it was his intention to camp out there. He kept his word, refusing to sleep elsewhere. The girls then caused his arrest on the charge of being insane. ——— declares that as long as his daughters are at home they will keep reasonable hours."

How would the Fathers and Mothers of New York State like to face the proposition of being imprisoned for life by incorrigible daughters or lawless sons upon attempting to correct and guide their offspring? This surely is a new danger hanging over the care and anxieties of matrimony which it might be well for parents to look into.

We shall now conclude the discussion of the question as to what constitutes sanity as distinguished from insanity.

We here insert excerpts from Hutchinson *v* Sandt, 26 American Decisions, page 127 (4 Rawle, 234).

"An inquisition finding that a person is and for five years has been of unsound mind, and incapable of managing his estate, is admissible in evidence as against the grantees of the alleged lunatic, for the purpose of avoiding his deed to them.

"Such inquisition is *prima facie* evidence only, and may be rebutted by the showing that the alleged lunatic was not insane, or that he had lucid intervals, during one of which the deed in question was executed. * * *

"EJECTMENT, both parties claiming title under Andrew Hutchinson, deceased; the plaintiffs as his heirs, and the defendant under a deed executed by him in 1817. The plaintiffs, to avoid the effect of this deed, offered in evidence an inquisition taken in February 1818, under a commission in the nature of a writ DE LUNATICO INQUIRENDO, by which, among other things, it was found 'that the said Andrew Hutchinson, at the time of taking this inquisition, is of unsound mind, memory, and capacity, so that he is not capable of governing himself or managing his estate; and that said Andrew Hutchinson hath been in said state of unsound mind, memory, and capacity for the space of five years last past and upwards.' In April, 1818, this inquisition was confirmed by the court, and committees of his person and estate appointed:

"The defendants then offered evidence tending to prove that Andrew Hutchinson was not a lunatic; that he was subject to fits only, and had many lucid intervals, etc. * * *

"Under the directions of the judge the jury found for the defendants. Plaintiffs moved for a new trial, which being refused, they appealed to this court. * * *

"By the court, Kennedy J.: 'The inquisition had been given in evidence by the plaintiffs to show that Andrew Hutchinson was, at the time the deed of conveyance purported to have been

executed by him to wit, on the fifteenth of November, 1817, and under which the defendant claimed, of unsound mind and incompetent to make such an instrument. It was doubtless admissible for this purpose, although entirely an *ex parte* proceeding as respected the grantees in the deed, but for this reason of its being *ex parte* it is only *prima facie* evidence, at most, of Andrew Hutchinson's insanity, and liable to be rebutted and done away by the testimony of those who were acquainted and conversant with him during that period, and knew him to be of sound mind, or that he had at least lucid intervals, and that the deed was executed by him at one of those times. * * *

"The decision of the circuit court, over-ruling the motion for a new trial, is reversed, the verdict set aside, and a new trial granted."

We next insert excerpts from Titlow *vs.* Titlow, 93 American Decisions, page 691. (54 Pennsylvania State 216.)

By Court, Strong, J.: "The general principle is, that an inquisition of lunacy found is *prima facie* evidence in cases involving the sanity of the lunatic, and no more; such is the doctrine of all our cases. * * *"

Gangweress Estate, *Id.* 417 (53 Am. Dec. 554). In the latter of these cases it was distinctly ruled that an inquisition of lunacy finding the party a lunatic without lucid intervals was *prima facie* evidence only, and not conclusive, and a petitioner for the proceeding was not *estopped* from asserting the truth against it, and showing that the party had lucid intervals: See also Hutchinson *v.* Sandt, 4 Rawle, 234.

Den ex Dem. of Aber *v.* Clark, 18 American Decisions, page 417, (5 Halstead, 217). Ewing C. J., said:

"In Sergeson *v.* Sedley, 2 Atk. 412 Lord Hardwicke over-

ruled the objection and said that 'inquisitions of lunacy are always permitted to be read, but are not conclusive evidence; for you may traverse them, if you please. * * *'"

In *ex parte* Barnsley, 3 Atk. 184, Lord Hardwicke said: "In all these inquisitions they are not at all conclusive, for they may bring actions at law, or a bill to set aside conveyances. * * *"

In Hall *v.* Warren, 9 Ves. 603, The Master of the Rolls said: "that inquisition having been taken in the absence of the plaintiff is not conclusive upon him. But it is *prima facie* evidence of the lunacy. It is, however, competent to third parties to dispute the fact and to mainain that, notwithstanding the inquisition, the object of it was of sound mind at any period of the time which it covers. * * *"

Maddox, in his treatise on chancery practice, states the following doctrine: "An inquisition is only presumptive evidence of insanity, and not conclusive, so that upon an action in respect to any contract or deed, it is for a jury to determine whether at the time of executing it, the party was *non compos*, though by the inquisition he was found to be *non compos* at such a period": 2 Madd. 578.

The executors of William B. Hill, deceased, *v.* Edward Day, *et al.* 34 New Jersey Equity, 150. *Note* 43 Am. St. Rep. 531.

"FROM THESE CITATIONS THE FOLLOWING CONCLUSIONS ARE DEDUCIBLE.

"1. An inquisition of lunacy is not conclusive against any person not a party to it.

"2. When an inquisition is admitted in evidence, the party against whom it is used may introduce proof that the alleged

lunatic was of sound mind at any period of the time covered by the inquisition. The position is, indeed, a corollary from the former, as it would be inconsistent to say the inquisition was was not conclusive and at the same time to refuse to receive any evidence to contradict the fact stated in it. * * *

"In page 301, Phillips speaks of the inquisition of lunacy. He says it is evidence against third persons who were strangers to the proceedings. He does not directly say whether conclusive or *prima facie,* though his meaning cannot readily be misunderstood; but to support his position he cites the case already mentioned, of Sergeson *v.* Seale, in which Lord Hardwicke says 'it may be read, but it is not conclusive.' * * *

"Such is the diversity of judgment respecting the state of the mind, that on this, more than perhaps any other question, error may be anticipated from uncontroverted proofs and *ex parte* examinations."

Van Vleet, V. C. said in Hill *v.* Day, *supra,* "The inquisition simply makes a *prima facie* case. * * * *Where there is no reason to suspect fraud, the test in this class of cases is, Did the person whose act is challenged possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing, or the business he was transacting? He may be old, or enfreebled by disease, or irrational upon some topics, and yet possess sufficient mind to make a valid disposition of his property. In the absence of fraud or imposition, the only question the court is required to decide is, Did the person whose act is challenged clearly understand and comprehend what he was doing when he did it?* * * * These remarks show a good memory, and clear understanding and judgment. He remembered what he had done, the motives which had influenced him, and that his judgment approved his conduct until new influences were brought to bear upon it, and then that his judgment underwent a change, and he wanted the mortgage returned to him. * * * His conduct and speech not only show that

he knew what he was doing, but that he was capable of exercising ordinary caution and discretion. * * *

"Contemporaneous conduct or demeanor, constituting part of the transaction brought under review, is always entitled to very grave consideration in cases of this kind. It generally portrays much more truthfully what a witness understood, thought, or believed, at the moment, than words subsequently spoken, even when they are uttered under the sanction of an oath." * * *

Citing again said note in 43 Am. St. Rep. 531, "If the party charged testifies, his conduct is to be considered by the jury as the conduct of any other witness is considered: Fiscus *v.* Turner, 125 Ind. 46. And he has the right to appear and testify before the jury: 7 Abb. N. C. 417."

In Commonwealth *v.* Haskell, 2 Brewst., 491, we find the following propositions, viz: "That insanity is a mental disease, and must indicate a change in the normal condition; *that a change is not, of course, conclusive evidence of insanity, for it may be unattended by any symptoms of disturbance, and may be marked by propriety and moderation; that mere eccentricity or peculiarity is not evidence of insanity where it is shown to be the normal characteristic of the defendant;* that mere weakness of intellect is not of itself sufficient to establish insanity, for it may co-exist with some degree of power: *that one who alleges the insanity of himself or of another must prove it;* that the presence of insanity is to be detected by comparing the symptoms of the defendant with the standard of health, taking into consideration the habits and peculiarities of the defendant when sane, and looking to the causes producing the change; * * * *that the test in cases of insanity lies in the word power*—has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?—in other cases, has the defendant, in addition to the capacities mentioned, the power to govern his mind, his

body and his estate? that the issue in a proceeding of lunacy is, whether the defendant has been so far deprived of his reason and understanding as to be unable to govern himself or to manage his affairs; * * * *that the finding of the original jury upon the petition is not evidence before the jury who try the traverse;* that the commonwealth having first shown that the defendant in a lunacy proceeding was insane before the filing of the petition, may prove his mental condition up to the time of the trial: that it having shown violence of the defendant toward his wife, may ask the witness "What was the conduct of the wife?" and that *it having read in evidence as proof of delusion a letter from the defendant charging others with serious crime, it is competent for the defendant to prove that one of the charges was not a delusion, but a fact.* * * * Statutes requiring a party charged with insanity to be produced in open court, when possible, are designed to prevent fraud in the procuring of verdicts of insanity without affording the defendant an opportunity of being heard: Fiscus *v.* Turner, 125 Ind. 46."

Mr. Justice Harlan (in the Runk case *supra*) approved the following definitions as to what constitutes sanity as opposed to insanity: "What constitutes insanity, in the sense in which we are using the term, has been described to you, and need not be repeated. *If this man understood the consequences and effects of what he was doing or contemplating, to himself and to others,* if he understood the wrongfulness of it, *as a sane man would, then he was* SANE, so far as we have occasion to consider the subject * * * I therefore charge you that if he was in a sane condition of mind at the time, as I have described, able to understand the moral character and consequences of his act, his suicide is a defence to this suit. The only question, therefore, for consideration is this question of sanity. There is nothing else in the case." A perusal of the above will prove that the Supreme Court of the United States supports our aforesaid contention touching sanity and also touching the test as to

whether a party is sane or insane. As said above, we maintain that sanity is shown by the action of a party's mind not by the action of a party's muscles. We maintain that sanity is shown by the words uttered by a party's tongue rather than by the question as to whether the party's tongue was "coated" or not "coated." We maintain that sanity is shown by the question as to whether or not said party's ideas are normal rather than by the question as to whether or not said party's pupils are normal. What is insanity? Suppose a law should be enacted to the effect that certain acts or thoughts would be sufficient proof of mental derangement, and that upon a trial, the facts appearing, the Court should direct a verdict accordingly, and property or freedom should thus be wrested from the defendant. Would such a proceeding constitute due process of law? And yet such a preposterous, such a mechanical, such a charlatanish test of insanity as above indicated, is today set by socalled experts in insanity, who glean certain physical, mechanical, muscular actions which sometimes follow insanity and—to use a technical phrase—mistaking *auxiliary for positive*—impudently place the cart before the horse.

Lastly, as Renton *ante* says the old way of proving sanity was finding out whether a man could count, could tell who his parents were and knew his own name, etc. With the increase of the complexity of life this simple test falls behind the times now-a-days, but its principle still holds true, namely that the test of sanity is a mental test wholly within the power of the accused to accomplish and without any witnesses professional or lay to back him up. Suppose two paid experts in insanity, in the pay of the other side swear that the defendant cannot tell what his past history has been, that said defendant's mind is a total blank upon that subject. Would that professional and paid and interested oath stand against the defendant's refutation thereof by taking the stand and promptly and lucidly giving his past history, provided he were afforded his legal privilege of taking the stand in place of being kept away from Court

and having to allow his liberty and property to be perjured away from him in his enforced absence?

The said decision in the said Runk case proves conclusively that a written instrument—written by the party committing suicide prior but close to said time of said suicide—proves conclusively that said written instrument does successfully offset the *prima facie* presumption of, and *prima facie* evidence of, insanity which said act of suicide entails—suicide being in itself presumptive proof of insanity its name being *suicidal mania*—in the category of insanity. In a word, that a written instrument written by an alleged lunatic at the time of said alleged lunacy can and does successfully offset medical evidence of said alleged lunacy. In a word, *that the mind—not the body—is the seat of sanity or insanity, and as the mind acts so is the party proved sane or insane thereby.*

THE LUNACY LAWS OF THE WORLD.

Lastly we shall introduce the lunacy laws of the forty-eight States and Territories of the United States together with those of the Six Great Powers of Europe—in order that a complete idea of lunacy procedure at the present day may be obtained. An examination of said forty-eight States and Territories' said laws discloses an astonishing state of affairs. An examination of said forty-eight States and Territories' said laws discloses the fact that in nineteen of the said States and Territories the said laws are fundamentally illegal and grossly unconstitutional. The said delinquent States and Territories are as follows:

Alabama,	Nebraska,	South Carolina,
Delaware,	New Hampshire,	South Dakota,
Iowa,	New York,	Tennessee,
Kentucky,	North Dakota,	Utah,
Maryland,	Oklahoma,	Vermont,
Massachusetts,	Pennsylvania,	Wisconsin.
Missouri,		

The said fundamental illegality and gross unconstitutionality therein being that said nineteen States and Territory fail to provide that notice either express or implied shall be given the alleged lunatic or alleged incompetent of the proceedings to deprive said alleged lunatic or alleged incompetent of liberty and the control over said alleged lunatic's or said alleged incompetent's property. Said delinquent States and Territory may well be named the Black Belt of Lunacy Legislation.

An examination of the said forty-eight States and Territories discloses the fact that our contention that a jury trial is as necessary to deprive a law-abiding citizen of liberty and control over said law-abiding citizen's property on a charge of insanity or incompetency, as said jury trial is necessary to do the same for a law-breaker, is sustained by the fact that in following fourteen States and Territory trial by jury is provided:

Arkansas,	Kansas,	Missouri,
Colorado,	Kentucky,	North Carolina,
Delaware,	Maryland,	Tennessee,
Indiana,	Michigan,	Texas,
Indian Territory,	Mississippi,	Washington,

Lastly an examination of the Six Great Powers of Europe proves that Russia is to-day ahead of the State of New York and the other States and Territory in the said Black Belt, in that Russia provides notice either express or implied for alleged lunatics and alleged incompetents in jeopardy of losing liberty and control over property through lunacy or incompetency proceeding. Two States are worthy of notice. One from the illegality of said State's lunacy laws; the other from the reasoning of the Court. The first relates to the State of South Carolina, which is as far behind the times in lunacy as said South Carolina is far behind the times in divorce.* The

*South Carolina being the only State in the Union, or, so far as we

second relates to the State of Iowa, the reasoning of whose court forms the most notable monument of fallacious sophistry it has been our amusement to view in law. Said State of South Carolina's lunacy laws, to-wit: "In South Carolina an early case declared that no notice was necessary to the party who was found of unsound mind. *Medlock* v. *Cogburn,* 1 Rich. Eq. 477."

Note.—23 L. R. A., &c.

CODE OF LAWS OF SOUTH CAROLINA, 1902.

§2251. Upon application for the commitment of an alleged insane person, the judge of the Probate Court is to investigate by examining witnesses or not, just as he sees fit.

§2252. The judge is to call two physicians to certify to the insanity of the person.

There is no provision for notice in application for a committee.

Said reasoning of the Court to-wit:

Note.—232 L. R. A., 737, *et seq.*

"The Supreme Court of Iowa, in *Chavennes* v. *Priestly,* 80 Iowa, 315, has probably gone further than any other in attaching little importance to notice in such cases, proceeding, doubtless, upon the assumption that notice in many cases of insanity would be but an idle form. That case was an action for damages for calling the plaintiff insane. The defense was that he had been adjudged insane according to the statute, and that the adjudication had never been revoked or the plaintiff discharged from custody. The plaintiff, in reply to the defendant's answer in setting up the adjudication of insanity, alleged that he had no notice of the proceedings before the commissioners, and was

know to-day, body politic in the civilized world, recognizing no crime or act whatsoever as ground for divorce.

not present in person or represented by an attorney; that the act creating the board of commissioners of insanity was void, because it did not provide for notice of such actions; and that the effect was 'to restrain a person of his liberty without due process of law.' The Court held, however, that the constitutional provision that 'no person shall be deprived of life, liberty, or property without due process of law' does not require notice to a person, or his appearance, before he can be lawfully adjudged insane, and accordingly restrained; and that the statute was valid and not unconstitutional, because it contemplates that a person may be adjudged insane, and restrained accordingly, without notice or appearance. The Court assumed that plaintiff's absence was justified by the facts, and said: 'It is not a case in which he is adjudged at fault, or in default, and for which there is a forfeiture of liberty or property, but only a method by which the public discharges its duty to a citizen. The misfortunes of citizens sometimes place them where, for their care and preservation, restraints are necessary, and such restraints are even justified at the hands of private persons. They are not in such cases 'deprived of their liberty' within the meaning of the Constitution.' It seems clear, from the later cases, especially those from New York, that, in lunacy proceedings, a presumption will be indulged that all proper notices were served in the absence of anything in the record to show that they were not served. *Gridley* v. *College*, etc., 137 N. Y., 327.

"In Iowa it is held that the restraint of an insane person by virtue of an adjudication of lunacy is not unconstitutional; and that the constitutional provision guaranteeing to the accused, in cases of life or liberty, a speedy trial before an impartial jury, applies only to accusations for offenses against the criminal law, and not to an inquest of lunacy by a board of commissioners, as provided by statute: *County of Black Hawk* v. *Springer*, 58 Iowa, 417."

When the Court says: "The misfortune of citizens sometimes

place them where, for their care and preservation, restraints are necessary, and such restraints are even justified at the hands of private persons;" the Court appears to lose sight of the fact that all persons are presumed to be sane until proved to the contrary. The restraint is necessary and beneficial for *bona fide* lunatics, but that until a party has been regularly adjudged insane said party is not a *bona fide* lunatic. As was well said by the Court in *Allis* v. *Morton*, 4 Gray, 63 *supra*: "To say one is insane and, therefore, need not be notified is to decide the question before it is tried." The same fallaceous reasoning was employed in *Van Deusen* v. *Newcomer*, 40 Mich., 20, 142 *supra*, by the two justices, dissenting from the position occupied by Justices Cooley and Campbell. The said dissenting justices held that "the restraint of insane persons in asylums is lawful, and being lawful, the placing of them therein, whether for their own benefit, or for the protection of others, is in itself due process of law, even in the absence of any judicial investigation into the question of sanity." Justice Cooley in his opinion, pointed out difficulties in proceeding without judicial inqury, showing that "the law should not tolerate the forcible taking and detention of one in an insane asylum upon the mere assertion that he is mentally unsound; and that secret investigations into cases of this character should be frowned down; that safety lies in the publicity of the proceedings; and while it is no doubt true that a public trial of the fact of insanity would be more or less exciting and disturbng to a mind already in a diseased or abnormal condition, it is by no means certain that the consequences would be more serious than those likely to follow from the sudden arrest and removal for confinement in the asylum of a person who believes himself perfectly sane. An insane person does not necessarily lose his sense of justice, or of his right to the protection of the law; and when he is seized without warning, and without the hearing of those whom he might believe would testify in his behalf, and delivered help-

less into the hands of strangers, to be dealt with as they may decide, within the limits of a large discretion, it is impossible that he should not feel keenly the seeming injustice and lawlessness of the proceeding."

The said remark of said lower Court that: "It is not a case . . . . . for which there is a forfeiture of liberty or property," is beneath notice.

New York State is also noticeable from the point of view of said State's decisions *in re* Lunacy. For example: the recent decision of the New York Court of Appeals in the matter of Blewitt, 131 N. Y. 547, leaves much to be desired. Said august tribunal—by said decision—showing the need, upon the part of said august tribunal, of missionary work touching the doctrine of the constitutional requirement of *notice in every instance.*

Note.—23 L. R. A., 737, *et seq.*

"In the *Southern Tier Masonic Relief Asso.* v. *Laudenbach,* 5 N. Y. Supp. 901, it was said in respect to the lack of notice of the inquest to an alleged lunatic 'whether or not the notice shall be required in proceedings *in rem* depends upon the statute. No question of constitutional power is involved. The Fifth Amendment to the Constitution of the United States has nothing to do with it. That amendment restricts the power of the general government, but has no effect upon the States.'

But the court seems to have overlooked the fact that due process of law is demanded by the Fourteenth Amendment, which does apply to the States, as well as by the Fifth Amendment, and also by the State Constitution."

"Moreover, the position of the Court of Appeals of the State of New York regarding the constitutional requirement of notice in all instances, is in conflict with that of the Supreme Court of the United States on the same subject. Citing once

more from Note 23 L. R. A., 737 *et seq.:* 'It is held by the Court of Appeals in a recent case that 'a very clear case should be made before the Court should proceed in lunacy proceedings in the absence of actual, personal, and written notice to the party,'" *re* Blewitt, 131 N. Y. 547, and in a still later case the same Court, in *Gridley* v. *College of St Francis Xavier,* 137 N. Y. 327, said in respect to a commission *de idiota inquirendo:* "We do not deem it important now to determine whether the proceedings would be absolutely void and a nullity, if no notice whatever had been given to the idiot of any of the proceedings." But it was held that if notice was necessary, jurisdiction was obtained by the notice given of the time of the execution of the writ, as this was the vital part of the proceeding, and that lack of notice of a motion to confirm the finding of the jury, and for the appointment of the committee would not be jurisdictional. The Court also held that in support of a judgment of a Court of Common Pleas, as a Court of General Jurisdiction, it would be presumed that the proper notices were served on the idiot, and even that she was present in court, if necessary, in the absence of anything in the record to the contrary. An *ex parte* proceeding for the condemnation of a person to an inebriate asylum was held unconstitutional *in re* James, 30 How. Pr. 446, for lack of due process of law, especially where no provision is made for an examination on his own motion before any court officer or jury on which he can be heard for himself.

The doctrine of the highest court in New York as declared in the late cases clearly requires notice to the party whose sanity is in question, although no provision is made by statute, unless some extraordinary reason exists for dispensing with it, *but that Court has not yet decided whether or not there is a constitutional requirement of notice in every instance.*" And again, from Note 23 L. R. A., 737, *et seq.:* "It seems clear from the later cases, especially those from New York, that, in lu-

nacy proceedings, a presumption will be *indulged that all proper notices were served in the absence of anything in the record to show that they were not served. Gridley* v. *College St. Francis Xavier*, 137 N. Y. 327." The danger of fraud from such an indulgence is too apparent to need pointing out. As is well said in *Hutchins* v. *Johnson*, 12 Conn. 376, *supra*, as far back as 1837, by Chief Justice Williams, "that because the record of his appointment failed to show that notice of the application was ever given to the alleged lunatic, the judgment should be reversed, *notice being essential to the validity of so important a proceeding, both by the fundamental principles of justice,"* (citing *Chase* v. *Hathaway*, 14 *Mass* 224) *"and by the statutes of Connecticut. A requirement so salutary should be enforced, and, until such notice is given, the Court has no more right to make the appointment, no more jurisdiction in the case than any other tribunal."*

Moreover, the same doctrine was laid down in *Hathaway* v. *Clark*, 5 Pick. (Mass.) 490, as early as 1827. *"Notice is not shown by the record, and would not be presumed."*

INSANITY LAWS OF THE STATES AND TERRITORIES OF THE UNITED STATES.

Note.—Necessity of notice of lunacy proceeding to alleged lunatic. (23 L. R. A., 737, *et seq.*)

"It appears, strangely enough, that the statutes in some States providing for inquisition to determine the facts of lunacy are entirely silent as to the necessity for any notice of the proceeding to the person whose status is to be adjudicated. The courts have, in some cases, required such notice even when the statute did not provide for it, but in other cases have dispensed with any notice to the person in question, and in one or two instances, seemed to have regarded it unnecessary to give notice to any one respecting him.

Thus in South Carolina an early case declared that no notice was necessary to the party who was found of unsound mind. *Medlock* v. *Cogburn,* 1 Rich. Eq. 477.

That notice to a lunatic is not required on an application to the Probate Court to appoint a guardian is said in *Bates' Ohio Digest* to have been decided by the Pickaway District Court in the case of *Davidson* v. *Tipton,* 10 Week, L. Bull. 1021, 23 L. R. A.

In Southern Tier Masonic Relief Asso. v. *Laudenbach,* 5 N. Y. Supp. 901, it was said in respect to the lack of notice of the inquest to an alleged lunatic whether or not the notice shall be required in proceedings *in rem* depends upon the statute. No question of constitutional power is involved. The Fifth Amendment to the Constitution of the United States has nothing to do with it. That amendment restricts the power of the General Government, but has no effect upon the States.

But the Court seems to have overlooked the fact that due process of law is demanded by the Fourteenth Amendment, which does apply to the States, as well as by the Fifth Amendment, and also by the State Constitution. It should be said, however, that the effect of the adjudication on the inquisition seems to have been involved in this case only as evidence of the mental capacity of the alleged lunatic at the time of making an appointment of a beneficiary of a mutual benefit certificate, and that the Court decided as a matter of fact that he was not insane at that time, so that no decision was actually rendered in favor of an inquisition without notice.

ALABAMA.

"In Alabama an *ex parte* inquisition finding a person a lunatic is void. *Eslava* v. *Lepretre,* 21 Ala. 504, 56 Am. 2; Dec. 266; *Molton* v. *Henderson,* 62 Ala. 823, 46 Am. Dec. 280; *Moody* v. *Bibb,* 50 Ala. 245." *Note.*—23 *L. R A., etc.*

McCurry vs. *Hooper,* 12 Ala. 823.

Dargan, Judge.

"I think it a fundamental principal of justice, essential to the right of every man, that he should have notice of any judicial proceeding which is about to be had, for the purpose of divesting him of his property, or the control of it, that he may appear and show to them who sit in judgment on his rights, that he has not lost them by the commission of a crime, and that they should not be taken from him by reason of a supposed misfortune. That he has the right to appear before the jury and the court, to show that he is not insane, and that he and his property should not be put in charge of another, is a self-evident truth, and is denied by no legal authority." Signor, Judge, continuing: "If this were not so, oppression the most unholy might be visited upon the unsuspecting victims of the cupidity and malice of others, under the forms of law, and the writ of inquisition authorized by the statute would become indeed inquisitorial in the most offensive sense of that word."

P. 2551.—On application for committment of alleged insane person.

Judge of Probate Court to investigate case by examining witnesses or not, as he sees fit, and if reasonably convinced that application is a just one to have certain questions ascertained by Supt. of Hospital, together with statement as to whether person can be received.

P. 2553.—Upon reply of Supt. in affirmative, Judge to call a physician and other witnesses, and to investigate the facts with or without a jury. No provision for notice, but Alabama cases cited above, all hold that notice must be given.

P. 2257.—On application for appointment of guardian—directs sheriff to take the person alleged to be of unsound mind, and if consistent with his health or safety, have him present at the place of trial.

ARIZONA.

REVISED STATUTES, 1901.

CIVIL CODE, CHAPTER 14, §776.

When it is represented to the Probate Judge, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the Judge *must* cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, *must* be produced before him on the hearing.

§777. Provides for appointment of guardian if Probate Judge decides party incompetent.

Title 36, §1, gives in detail process of committment, such as examination of two friends of party, and by one or more physicians.

ARKANSAS.

"So in Arkansas that an inquest is void if held without notice to the alleged lunatic, is decided in *Arrington* v. *Arrington*, 32 Ark. 674." *Note.*—23 L. R. A., &c.

STATUTES.

§3814. Probate Court's jurisdiction over insane.

§3815. If any person shall give information in writing to Probate Court that any person in his county is an idiot, lunatic, or of unsound mind, and pray that an inquiry thereof be had, the Court, if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the person so charged to be brought before such court and inquire into the facts by a jury if the facts be doubtful.

§3817. If it be found by jury that party is incompetent, court to appoint a guardian.

STATUTES OF CALIFORNIA, 1903.

§2168. Whenever it appears by affidavit to satisfaction of magistrate that a person is of so disordered mind as to endanger health or property, he must issue to peace officer for service a warrant directing person to be arrested and taken before Judge of Superior Court for hearing and examination on such a charge.

Copy of affidavit and warrant of arrest must be delivered to party. Party must be taken before Judge, who must then inform him that he is charged with being insane, and inform him of his rights to make a defense to such charge, and produce any witnesses in relation thereto.

Judge must order time and place of hearing. Judge must order notice of arrest and of hearing to be served on such relations of party known to be residing in county, as Court deems necessary.

§2169. Provides for examination of witnesses. Provides further that the alleged insane person must be present at the hearing, and if he has no attorney, the Judge may appoint an attorney to represent him.

§2179. In case party committed to insane hospital has or acquires property, Secty. of State Comm. in Lunacy may apply for appointment of guardian, in case no guardian is already appointed.

§2174. If person ordered to be committed is dissatisfied, he may within five days after making of order, demand that question of sanity be tried by jury before Superior Court.

STATUTES OF COLORADO, 1891-1896.

§2962. Proceedings to commit insane person whenever any

reputable person shall file with County Court a complaint duly verified, alleging a person to be insane, &c., the County Court or Judge shall forthwith issue an order in the name of the people directing officer to immediately take such person in custody, and take him forthwith before County Court or Judge thereof, and if party so elect, inquest shall be taken without delay. If, upon such inquest it shall be found in the verdict of the jury that party is insane, he is to be committed.

Court to appoint conservator of insane person's property.

APPENDIX TO STATUTES, 1901.

Where order appointing conservator of a lunatic is made, without notice to lunatic of the application therefor, it should be set aside, though such notice is not expressly prescribed by the statute.

Jones vs. *Larned,* 66 P. 1071.

CONNECTICUT.

"In Connecticut, in *Hutchins v. Johnson,* 12 Conn. 376, 30 Am. Dec. 622, it is said that such notice is required "by the fundamental principles of justice," and also that while notice has not been required by statute until recently, the former practice showed the necessity of the regulation." *Note.*—23 L. R. A., &c.

General Statutes of Connecticut, Revision, 1902.

§2736. Jurisdiction of committment to asylums vested in Probate Court.

§2738. Upon complaint being filed in Probate Court, such court shall assign a time, not later than ten days thereafter, and

a place for hearing such complaint, and *shall* cause reasonable notice thereof to be given to the person alleged to be insane, and to such relatives or relations and friends, as it may deem proper. Such Court may also issue a warrant for the apprehension and bringing before it of the person complained of and *shall* see and examine such person, if in its judgment his condition or conduct renders it necessary and proper so to do, or state in its final order why it was not necessary or advisable so to do.

§2751. Provides for appeal from judgment.

DELAWARE.

Laws of Delaware, Chapter 49.

§1. Court of Chancery to have care of insane so far as to appoint trustees for such persons, and to take charge of them, and manage their estates. Before such appointment chancellor shall issue a writ to inquire by a jury and determine whether person named is insane.

§9. In all cases of application for committment, evidence and certificate of two physicians based upon due inquiry and personal examination shall be required.

1898, Chapter 77. Upon committment of person, said person or relatives may present petition for review, and writ *de lunatico inquirendo* is then to be issued to sheriff, commanding him within five days to summon jury, and have determined whether party to be committed is sane or not.

DISTRICT OF COLUMBIA.

United States Statutes.

Proceedings for admission to the United States Government Hospital for Insane of District of Columbia.

§4850. Petition made to Supreme Court of District.

SUB. 3. That the order of the Court directing the filing of the petition shall require a copy thereof to be served on the alleged lunatic, and another on the Commissioners of the District of Columbia.

§5. That the Court shall require the presence of the alleged lunatic at the hearing, unless for good reason it shall direct otherwise, by an order stating such reason.

FLORIDA.

Revised Statute, 1892.

§843. Whenever suggested by petition or otherwise to any judge of Circuit Court of State that there is any lunatic or insane person within limits of circuit, incapable of managing his affairs or taking care of himself, it shall be the duty of said judge to issue a writ to the sheriff directing him to bring said person before him for the purpose of inquiry into the alleged fact of lunacy or insanity.

§844. *Committment.* If it shall be found upon investigation that such person is a lunatic or insane, the judge shall pass such order or decree as is usual or necessary in such cases.

GEORGIA.

"*Morton* vs. *Simms,* 64 Ga. 298. Presence of party and counsel will not cure lack of notice prescribed by statute." *Note.*—23 L. R. A., &c.

CODE OF GEORGIA, 1895.

§2573. On application for appointment of guardian for alleged insane person, ten days notice must be given to three nearest adult relatives of person; if none, to jury of twelve.

§2582. On application for committment, ordinary (officer) or judge of Superior court to issue a warrant as in criminal cases for arrest of insane person, to be produced in Court on day specified.

IDAHO.

Revised Statutes of Idaho, 1897.

§5784. When it is represented to the Probate Judge upon verified petition of any relation or friend that any person is insane, or from any cause mentally incompetent to manage his property, the Judge *must* cause a notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

§5785. If, after full hearing and examination, it appears to Probate Court that person is incompetent, Court must appoint a guardian.

§769. Whenever it appears by affidavit to satisfaction of magistrate that the person is insane, he must issue and deliver to officer for service, a warrant directing that such person be arrested and taken before any judge of a Court of Record within the county for examination.

§770. Judge must subpœna two or more witnesses acquainted with party, to appear and testify.

§776. If judge, after examination, believes party insane, he must commit him.

§782. If judge finds party insane, he must appoint a guardian, subject to general rules.

ILLINOIS.

In Illinois also reasonable notice to the supposed lunatic

is necessary, although the statute is silent on the question. *Eddy* v. *People,* 15 Ill. 386.

In this case the Court says: "If he be in fact a lunatic, the notice would be entirely useless, and that is the very question to be tried; and until a regular trial is had or inquest made, the presumption is in favor of his sanity." *Note.*—23 L. R. A., &c.

REVISED STATUTES, 1899. CHAPTER 85, §3.

Proceedings for Supposed Insane.

Any reputable citizen can file with clerk of County Court a statement in writing, under oath, that person named is insane, etc.

§4. Upon filing of statement, unless party is brought before Court without writ, or affidavit is filed that physical or mental condition of party renders it improper that such party be produced before Court, County judge shall direct a writ to be issued, that party be brought before the Court at fixed time, "and in no case shall such hearing take place until the person alleged to be insane shall have been notified as the Court shall direct."

Inquests in lunacy shall be by jury or commission of two people.

§10. Court may set aside findings and order another inquest.

§12. Provides for appointment of conservator of property in original petition for committment.

JULY 1ST, 1903.

§8. Inquests in lunacy may be in open court, or in chambers, or at home of alleged insane person. The Judge shall preside, whether inquest be by jury or commission, and the

presence of the patient shall be indispensable, and no proceedings can be had in his absence, unless otherwise provided in this act.

On application for appointment of conservator, service shall be had on person for whom appointment is sought, by summons or otherwise, as is had in chancery.

INDIANA.

In Indiana where the party is in court as required by statute, lack of notice was held immaterial. *Nyce* v. *Hamilton,* 90 Ind. 417.

But the appointment of a guardian for an alleged insane person is void for lack of jurisdiction, if the proceedings were had without notice to him, and without his presence in court. *Jesup* v. *Jesup,* (Ind.) Oct. 11, 1893. This case says that while the Indiana statute makes no direct provision for the issuing and service of summons on the person whose sanity is to be inquired into, it does require that such person shall be produced in court.

Under the Indiana statute requiring the person whose sanity is to be determined to be produced in Court, but not requiring notice on such person, the proceedings may be valid without notice or without the appearance of the party in person, if authorized agents appear in his behalf. *Martin* v. *Motsinger,* 130 Ind. 555.

If the statute authorizing the adjudication that a person is of unsound mind, and the appointment of a committee for such person was to be construed as authorizing proceedings of an ex parte character, it would be to that extent in conflict with the Constitution of the United States and void, as depriving one of liberty or property without due process of law. Ibid.

The doctrine of the case last cited, although not fully es-

tablished by express decisions in the other States, whose decisions have been considered above, seems to be the doctrine of the decisions, in most States, and the only doctrine that is really defensible. It ought to be noticed that in none of the cases which have held notice to the alleged lunatic unnecessary has there been any real discussion of the constitutional question except in the Iowa case of Chavannes v. Priestly, supra." *Note.*—23 L. R. A., &c.

REVISED STATUTES, 1897.

§2766. Upon complaint of Court having jurisdiction that party is of unsound mind, and incapable, etc., the Court shall cause such person to be produced, and cause issue to be made by clerk in denial—issue to be tried as in civil action by Court and jury.

§2767. If party is found insane and has property a guardian is to be appointed.

§2768. If the Court shall be satisfied that such person, alleged to be of unsound mind, cannot without injury to his health be produced in Court, such personal appearance may be dispensed with.

PROVISIONS GOVERNING DANGEROUSLY INSANE PERSONS.

§7322. Complaint having been made that any person is insane and dangerous to the community, the Judge is to issue a warrant for apprehension of such person forthwith, the process to be served as in State warrants.

§7323. A jury to be empanelled.

§7324. The alleged insane party is to have right of challenge.

§7325. After hearing evidence and personal inspection of the alleged insane person (who shall personally be present at trial),

if the jury find him insane, the Justice is to appoint a person to take charge of and confine such person.

§7326. The Justice is to certify proceedings thereupon within ten days to Circuit Court, said issue to be tried there by jury of twelve persons as in regular case. If the same verdict is found, the Court is to confirm above appointment or to make other.

§7328. In proper cases a guardian is to be appointed.

Soules vs. *Robinson*, 60 N. E. 726, 1901. Indiana appeal holds that notice to the person whose sanity is to be inquired into, or his presence in Court is necessary.

Martin vs. *Motsinger*, 130 Ind. 555.

While inquest and judgment may be valid without notice if the party is present, it is otherwise when he is not present, and is not represented by some one authorized to appear for him.

While the statute does not in terms provide for notice, the proceedings are of such character that they cannot be *ex parte* and be valid. If the statute was to be construed as authorizing proceedings of an ex parte character, it would be to that extent in conflict with the Constitution of the United States, and void.

INDIAN TERRITORY.

Statutes, 1899.

§2526. Probate Courts to have jurisdiction.

§2527. If any person shall give information in writing to such Court that any person in county is a lunatic, &c., and pray that an inquiry thereof be had, the Court, if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the person so charged to be brought before such Court, and inquire into such facts by a jury, if the facts be doubtful.

§2529. If it be found by the jury that person so brought be-

fore Court is of unsound mind, or incapable of managing his affairs, Court shall appoint a guardian of the person and estate of such insane person.

§2533. Guardian to give bond to take proper care of such insane person.

§2537. Guardian shall take charge of the person committed to his charge, and provide for his support and maintenance.

IOWA.

"In Iowa an inquiry to determine the insanity of a person, had in his absence and without notice to him, is held valid under Iowa Code, §1400, authorizing the commissioners to dispense with the presence of such person if they think it would be injurious to him, or attended with no advantage, and permitting any citizen of the county, or any relative of the person, to appear and resist the application, and also allowing appearance by counsel, with the further requirement of personal examination by some regular practicing physician, who shall report to the commissioners. *Chavannes* v. *Priestly,* 9 L. R. A. 193, 80 Iowa, 316. The Court denies that such a proceeding is a denial of due process of law.

This case cites that of *Black Hawk Co.* v. *Springer,* 58 Iowa, 417, which said nothing about notice, but held that an inquest by commissioners was not a criminal proceeding, within the constitutional provisions for speedy and public trial, etc., in criminal proceedings. It also decided that there were sufficient safeguards given by the statute in a right to appeal from a finding of the commissioners, or to apply for a new commission, or to contest the question of insanity on a *habeas corpus* proceeding." *Note.*—23 L. R. A., &c.

Note to §2265, Code.

The law contemplates the presence of the person whose insanity is brought to be established in all cases, unless upon

inquiry it is made to appear that such presence would probably be injurious to the person, or attended with no advantage to him.

The fact that the proceeding may be had without the presence of defendant in the case specified, does not render the statute unconstitutional, and it shall be assumed that the absence of the person was justified by the fact. *Chavannes* vs. *Priestly,* 80-316.

§2264-65 of Code.

Application to have party committed made on affidavit.

§65. On filing, commissioners may examine informant and other witnesses, if satisfied, may require that person be brought before them, and that examination be had in his presence. May dispense with presence, if they consider that it would be injurious.

Commissioners to appoint physicians to make personal examination of alleged insane person, and report.

§2267. Any person found to be insane as above, may appeal to the District Court.

KANSAS.

GENERAL STATUTES OF KANSAS, 1899.

Chapter 60. Lunatics and Drunkards. Article 1. Section 3802.

Upon information in writing to the Probate Court that the party is a lunatic, etc., and praying enquiry, the Court, if satisfied of good cause for the exercise of its jurisdiction, shall cause the facts to be enquired into by a jury. §3804. In proceedings under this act the Probate Court may in its discretion cause the person alleged to be of unsound mind to be brought before the Court. §3806. At the time fixed for the trial a

jury of six persons is to be impanelled to try the case. The person alleged to be insane shall have the right to be present, to be assisted by counsel, and to challenge jurors, as in civil cases. If it appear that the person is insane, and a fit person to be sent to the asylum, the Court is to order the committment. The Court is to appoint a guardian in a proper case.

In re Wellmon 3 (Kansas Appeal), 100.

An enquiry and trial in the Probate Court had upon an information charging one with being a person of unsound mind, and incapable of managing her own affairs should be had only after notice to the person alleged to be insane, and after opportunity has been given such a person to be present at the trial in person or by attorney.

KENTUCKY.

"*McAfee* v. *Com.*, 3 B. Mon. 305. In this case, where the statute requires ten days' notice in such a proceeding, the lack of notice was fatal. *Lockey* v. *Lockey*, 8 B. Mon. 107. In this case the alleged lunatic was brought into Court, and an inquisition held in open Court; no notice or writ was held necessary." *Note.*—23 L. R. A., &c.

KENTUCKY STATUTES, 1899., CHAPTER 67.

§2156. Jurisdiction in Circuit Court.

At an inquest to determine the lunacy of a party, if the party is found a lunatic or incompetent, the Judge shall appoint a committee, and order the person committed to an asylum, if proper. "But in no case shall an order be made sending an idiot to an insane asylum unless the jury, by their verdict, shall find that he is so dangerous or uncontrollable that he cannot properly or safely be kept by a committee at home."

§2157. No inquest shall be had unless the person charged

to be of unsound mind or incompetent is in Court, and personally in the presence of the jury. Such personal appearance shall not be dispensed with unless it appears, by the oath or affidavit of two physicians, that they have personally examined the individual charged to be of unsound mind, etc., and that they believe his condition to be such that it would be unsafe to bring him into Court.

Taylor v. *Moore,* 23 Kentucky Law Reports, 1572.

An inquest held without the presence of the person charged to be of unsound mind, and without notice to him, is void.

Stewart v. *Taylor,* 23 Kentucky Law Reports, 577.

While 2157 is silent as to notice, yet a judgment, declaring a person insane when she was not present in Court, and had no notice of the proceeding was void, though her personal presence had been dispensed with by the oath of two physicians as provided by the Statute.

Stewart v. *Taylor,* 23 Kentucky Law Reports, 577.

Admitted statement of facts on appeal. Appeal from commitment of Nancy Stewart by application of brother and application of committee. Nancy Stewart was not present at the trial of the proceeding, and received no notice that application had or would be made for committment. She did not know that the proceeding was pending, and there was no written certificate or affidavit of two physicians that she was unable to be in Court because of physical or mental condition. At the trial two regular physicians appeared to be satisfied, that they had examined her, and believed that she was of unsound mind and incompetent to manage her estate, that she was physically unable to be present in Court at the inquest, that a regular practicing attorney was appointed to defend her.

"As to the question whether the Court had jurisdiction to adjudge her to be of unsound mind and incompetent to take care of her estate, when she was neither present at the trial, nor had notice of the proceeding. The effect of the proceeding was

not only to deprive her of the control and management of her property, but to place her person in the charge of another. The statute is silent on the question of notice. If the person, alleged insane, is present in Court, and is made aware of the proceeding, it seems his presence would waive the necessity of notice, but where he is not present it is our opinion that he is entitled to notice of pendancy of proceeding, in order to be able to defend. Otherwise unscrupulous persons might go into Court and have one who is perfectly sane adjudged of unsound mind, and for a *time* take his property from his control.

The mere fact that one may be believed to be a lunatic will not waive the necessity of notice, because that is the very question to be tried. Although the statute is silent, as to notice, we cannot believe that legislature ever intended that one be declared lunatic, and property put in charge of another, without his being present in Court or having notice so as to be able to defend.

Even if legislature had so intended, a judgment rendered in the proceeding would not be valid unless the defendant in the writ had been notified by process of the Court of its pendancy, or was present at the trial, with an opportunity to defend it. To adjudge him of unsound mind without notice, or his personal appearance at the trial, would be to deprive him of important and valuable rights without being heard."

Judgment declaring proceeding void affirmed.

LOUISIANA.

"In Louisiana notice to the party himself must be given in a proceeding of this kind, and it is not sufficient to appoint a curator *ad hoc*. *Segur* v. *Pellerin*, 16 La. 63; *Gernon* v. *Dubois*, 23 La. Ann. 26.

So an earlier Louisiana case held that an *ex parte* proof in such a case would not sustain it, and that where the party on being informed of the proceeding took an appeal, no proof on his

side was necessary to reverse the decision. *Stafford* v. *Stafford*, 1 Mart. (N. S.), 551."

Note.—23 L. R. A., &c.

REVISED LAWS OF LOUISIANA, 1897.

§1768. Whenever it shall be known to the judge of the District or Parish Court, by petition and oath of any individual, that any lunatic or sane person within his district, ought to be sent to or confined in the insane asylum, it shall be the duty of said judge to issue a warrant, to bring before him in chambers said person, and after proper inquiry into all the facts and circumstances of the case, if, in his opinion, he ought to be sent to, or confined in said insane asylum, he shall make out a warrant of committment.

MAINE.

"In Maine want of notice of an inquisition by selectmen, for the appointment of a guardian, for a person on the ground that he is of unsound mind, is a valid objection to the further prosecution of the proceedings, although the statute makes no provision for notice. *Holman* v. *Holman*, 80 Maine, 139.

In the absence of notice to the alleged lunatic, an appointment of a guardian is void, and will not prevent him from maintaining an action of assumpsit to recover his property from the guardian period. *Coolidge* v. *Allen*, 82 Maine 23." *Note.*—23 L. R. A., &c.

REVISED STATUTES, CHAP. 43, SEC. 13, AS AMENDED 1897.

Insane persons shall be subjected to examination as hereinafter provided. Municipal officers of towns shall constitute board of examiners, and on complaint of relative or justice

of the peace, shall immediately inquire into the condition of any insane person therein; call before them all testimony necessary for a full understanding of case; if they think party insane, they shall forthwith send him to a hospital.

AMENDED 1903.

Word relative made blood relative, husband or wife of said alleged insane person (also in line six after word insane), add shall appoint a time and place for a hearing by them of the allegations of said complaint, and shall cause to be given in hand to the person so alleged to be insane, at least twenty-four hours prior to the time of said hearing, a true copy of said complaint, together with a notice of the time and place of said hearing, and that he has the right and will be given the opportunity, then and there, to be heard in the matter.

CHAPTER 67, §6, AMENDED 1903.

On application for appointment of guardian, for alleged insane person, the judge shall appoint a time and place for hearing, and shall order that notice be given by serving person for whom guardian is asked, with copy of papers at least fourteen days before day of hearing.

MARYLAND.

Laws of Maryland, 1900, Chapter 603.

§1. Upon petition of relatives, etc., for committment of alleged insane person, the Circuit Court for county shall cause a jury of twelve good and lawful men to be empanelled forthwith, and shall charge the jury to inquire whether such person is insane, and if found so, the person is to be committed.

Article 16, §96. Gives Court power and authority to direct affairs of persons *non compos mentis,* and to appoint a commission to supervise, (no provision as to notice).

MASSACHUSETTS.

In Massachusetts it is also held that the silence of the statute as to notice to an alleged lunatic does not make valid an adjudication of lunacy without such notice. *Chase* v. *Hathaway,* 14 Mass., 222. And any judgment or decree that a person is *non compos mentis,* or appointing a guardian for that cause without notice, is absolutely void. *Hathaway* v. *Clark,* 5 Pick. 490; *Chase* v. *Hathaway, supra; Conkey* v. *Kingman,* 24 Pick. 115; *Wait* v. *Maxwell,* 5 Pick. 219, 16 Am. Dec. 391.

On the death of the guardian of an insane person, the ward is entitled to notice of the appointment of a new guardian. *Allis* v. *Morton,* 4 Gray, 63.

In this case the Court says: "To say one is insane and, therefore, need not be notified is to decide the question before it is tried," and adds: "When would the existence of insanity be a good reason for dispensing with the notice? A man may be insane so as to be a fit subject for guardianship, and yet have a sensible opinion and strong feeling upon the question who that guardian shall be." *Note.*—23 L. R. A., &c.

Chap. 145, §6. If friend, relatives, etc., appeal to Probate Court to have guardian appointed for alleged insane person, the Court shall cause not less than fourteen days' notice of time and place of hearing to be given him.

Chap. 87, §34. No person to be committed by Judge to State Insane Hospital, unless notice in writing of application was given to overseer of poor, and unless certificate of insanity by two physicians is filed, and that of judge finding person committed insane.

Said judge shall see and examine alleged insane person, or

state in final order reason why not considered necessary or advisable to do so.

MICHIGAN.

In Michigan, in *North* v. *Joslin*, 59 Mich. 624, it is said in respect to notice of proceedings to declare a person incompetent that "such notice must be personally served, and must be a written one, and this is absolutely essential to give the Court jurisdiction." No notice whatever seems to have been given in this case to the alleged incompetent person, unless it was obtained indirectly through a letter written to the daughter.

The Court adds further: "The notice must be not only a written one, but must be given under the order of the judge of Probate." But where due notice to the supposed lunatic was given before making inquisition, the want of notice of the time of entering the decree is not fatal. *Davidson* v. *Johnnot*, 7 Met. 388, 41 Am. Dec., 418." *Note.*—23 L. R. A., &c.

Laws of Michigan.

§1913. Section 21. Upon the application of the relatives, for committment of an alleged insane person, the judge of the Probate Court shall institute an inquest and take proofs, and shall immediately notify such alleged insane person of such an application, and of the time and place of hearing to be held, and any relative or other person having such alleged insane person in charge, shall likewise be notified. And if alleged insane person demand a jury of twelve freeholders to be empanelled, to determine question of sanity.

§8709. On application for appointment of guardian of insane person, notice must be given to alleged person, fourteen days prior to hearing. *Munger* vs. *Kalamazoo Probate Judge*, 86 Mich. 363.

Supposed insane person must have notice of hearing, as well as next of kin.

STATUTES OF MINNESOTA.

§3465. Whenever the Probate Judge shall receive information of insane person in county needing care and treatment, he shall order two commissioners in lunacy to examine alleged insane person, and certify result. If commissioners agree person is insane, he shall visit the alleged insane person, or require him to be brought into Court, but he shall cause him to be fully informed of the proceedings being taken against him. Provides that County attorney shall appear on behalf of insane person.

§4550. Appointment of guardian.

On application for appointment of the above, the Probate Court is to fix time and place for hearing, and shall cause notice of the same, to be given to person for whom guardianship is requested, at least fourteen days prior to time.

Provided that if such person is an inmate of a State hospital for the insane, then a like notice shall be given to the Supt. of said hospital.

CODE OF MISSISSIPPI.

§2835. Writ *de lunatico inquirendo.*

On application of relative or other party, for committment of person alleged to be insane, the Chancery Court is to direct sheriff, by writ of lunacy, to summon the alleged lunatic or insane person to contest the application, and six freeholders to make inquiry thereof, on oath.

MISSOURI.

"In Missouri, although the statute is silent on the subject

of notice to the lunatic, but directs that the Court may in its discretion cause him to be brought before it, it is said in *Dutcher* v. *Hill*, 29 Mo. 271, 77 Am. Dec. 572, that it should appear from the proceedings why notice was not given him, or his attendance required, if this does not appear to have been done." *Note.*—23 L. R. A., &c.

REVISED STATUTES, 1899.

§3650. Upon information that a party is insane, the Probate Court shall cause the facts to be inquired into by a jury.

§3652. In proceedings under this chapter the alleged insane person must be notified of the proceeding, unless the Probate Court order such person to be brought before the Court or spread upon its records the reason why such notice or attendance was not required.

In the matter of Marquis, 85 Mo. 615, held: "It is sufficient ground for setting aside a judgment adjudging a person insane if it does not appear from the record that the alleged insane person was notified of the proceeding against him, and if not notified, the reason therefor."

Opinion says: "The statement is made in the order 'that he was not in a condition of body or mind to be brought into the Court.'"

While this may be a sufficient statement of the reason why Marquis's attendance was not required it does not show any reason why notice was not given him.

Likewise held in *Bell* v. *Brinkman*, 123 Mo. 278.

MONTANA.

Statute provides that alleged lunatic shall be brought before the judge and jury for personal examination.

State vs. *3rd Jud. District Court*, 17 Montana, 411.

Territory vs. *Gallatin Co.*, 6 Montana, 297.

CODE OF MONTANA, PART III., TITLE 5, ARTICLE III.

§2300. Whenever it appears by affidavit to satisfaction of magistrate, that any person within county gives evidence of disordered mind, etc., he must issue and deliver to some peace officer for service, a warrant directing that such person be arrested, and taken before any district judge within the county for examination.

§2301. Judge must subpœna two or more witnesses, best acquainted with alleged insane person, and at least two physicians, who must hear testimony, and make personal examination of alleged insane person.

§2307. If found insane, judge to commit party.

§2970. Petition for appointment of guardian for insane person. The Court or judge must cause a notice to be given to the supposed insane or incompetent person, of the time and place of hearing, not less than five days before time so appointed, and such person, if able to attend, must be produced on the hearing.

NEBRASKA.

Statutes of Nebraska, 1901.

§3341. Upon application for the committment of an alleged insane person, commissioners are to investigate the case. They may require that the person be brought before them, but if they deem it injurious to the person to attend they may dispense with his presence. The commissioners are to appoint a physician to visit such person, and to make a personal examination and report.

§3225. When parties apply to Court of Probate to have a guardian appointed for the alleged insane person, the Court shall cause a notice "to be given to the alleged insane person of

the time and place of hearing not less than fourteen days before the time so appointed."

NEVADA.

Compiled Laws of Nevada, 1861-1900.

§1473. The District Judge, upon application to have party committed as insane, shall cause such person to be brought before him at a stated time and place, and shall also cause to appear witnesses.

NEW HAMPSHIRE.

Laws of New Hampshire, 1901.

Chapter 179. Upon application for the appointment of a guardian for an alleged incompetent, notice must be given, and no decree will be given unless the party has been cited to appear, and show cause against the same.

Chapter 10. Upon an application for the committment of an alleged insane person, the Judge of the Supreme or Probate Court may appoint two reputable physicians to examine the said person, with or without notice. Upon the report, and other evidence the commitment may be granted.

NEW JERSEY.

In a New Jersey case, notice on an alleged lunatic was held sufficient without being personally served on such person, where it was served on her brother, with whom she lived, and who had taken an active part in resisting several inquisitions concerning her condition, and who refused to allow the person having the notice, but who did not disclose his errand, to see her, and another notice was also served on a lawyer who had appeared for

her in similar proceedings, and subsequently appeared on the inquisition in question without objecting to the sufficiency of the notice. *Re* Lindsley, 46 N. J. Eq. 358.

It is declared *in re* Vanauken, 10 N. J. Eq. 186, that no verdict of lunacy should be allowed to pass against any man without affording him an opportunity of defending himself, except in extreme cases, when such cases would be nugatory, but the question involved in that case was the reasonableness of the time of the notice that had been given.

In re Child, 16 N. J. Eq. 498, where the question as to the proper county for the execution of a commission was involved, it was said that it was not necessary for the party to be before the jury, but the question of notice was not touched upon. *Note.*—23 L. R. A., &c.

Re Whiterock, 3 N. J. Eq. 252, appearance does not cure lack of notice. New inquisition ordered on due notice.

IDIOTS AND LUNATICS.

All cases to be determined by inquest, on a commission of idiocy or lunacy issued out of Chancery Court, and proceeding thereon, shall be as heretofore practiced.

NEW YORK.

"The view expressed by the Court in the case of *Southern Tier, etc.*, v. *Laudenbach*, 5 N. Y. Supp. 901, seems to have been taken by the other courts in the State, in which the statute (Code Civ. Proc. 2325) is silent as to notice to the alleged lunatic, but provides for notice merely to the husband or wife of such person, or to one or more of the relatives, or to an overseer or superintendent of the poor "unless sufficient reasons for dispensing therewith are set forth." Thus under this statute it is held that the neglect to give notice to one or more of the rela-

tives of the alleged lunatic of an inquisition, or to show any sufficient reason for dispensing therewith, is merely an irregularity, and not jurisdictional. *Re* Demelt, 27 Hun. 480.

So it was held *in re* Rogers, 9 Abb., N. C. 141, that lack of written notice to one of the relatives of a lunatic, where he had full knowledge of the proceedings, is a mere irregularity, under N. Y. Code, Civ. Proc., §2325, especially where he participated to some extent in the proceedings, seeming to ignore the necessity of notice to the alleged lunatic himself.

Again *in re* Cook, 6 N. Y. Supp. 720, although the necessity of notice to the party himself is not discussed, it is held that jurisdiction in such a case under the New York statute does not depend on notice to all of the next of kin.

In re Russell, 1 Barb. Ch. 38, 5 L., ed. 290, it was held that where it is evident that an alleged lunatic keeps out of the way to prevent the service of notice of the execution of commission of lunacy, service at the place where he makes it his home, and also at the several places where he would be most likely to receive it, is sufficient, at least where there is evidence that he must have been aware of the existence of this notice.

In re Tracy, 1 Paige, 580, 2L., ed. 760, the chancellor said it was the privilege of a party against whom a commission of lunacy is issued to have notice, and to be present at its execution, yet he added that if there were any peculiar circumstances which render it improper or unsafe to give notice to the party, as in some cases of furious madness, the facts should be stated in the application to the Court, so that a provision might be inserted in the commission dispensing with the necessity of notice. But it did not appear that any such exceptional case was there presented, and notice would seem to be possible even in case of furious madness, although the attendance of the lunatic might not be proper or possible at the hearing.

In re Petit, 2 Paige, 174, 2L., ed., 861, in respect to a commission of lunacy for a non-resident, it was said: "The com-

missioners must also give her due notice of the time and place of executing the commission that she may attend if she think proper to do so."

In re Lowe, 45 N. Y. S. R. 914, on motion to discharge a committee appointed without notice to an alleged lunatic, it is said that no sufficient reason seems to have been given for not having served the notice. Although the provision for notice in N. Y. Code, Civ. Proc. 2325, does not mention notice to the alleged lunatic in person, it is held by the Court of Appeals in a recent case that "a very clear case should be made before the Court should proceed in lunacy proceedings, in the absence of actual personal and written notice to the party, unless such a case is made by petition or affidavits, and providing for notice to relatives or otherwise in lieu of personal notice, an adjudication in the absence of such notice should be set aside." *Re* Blewett, 131 N. Y. 541.

And in a still later case the same Court, in *Gridley* v. *College of St. Francis Xavier,* 137 N. Y. 327, said in respect to a commission *de idiota inquirendo*: "We do not deem it important now to determine whether the proceedings would be absolutely void and a nullity, if no notice whatever had been given to the idiot of any of the proceedings." But it was held that if notice was necessary, jurisdiction was obtained by the notice given of the time and place of the execution of the writ, as this was the vital part of the proceeding, and that lack of notice of a motion to confirm the finding of the jury and for the appointment of the committee would not be jurisdictional. The Court also held that in support of a judgment of a Court of Common Pleas, as a Court of General Jurisdiction, it would be presumed that the proper notices were served on the idiot, and even that she was present in Court, if necessary, in the absence of anything in the record to the contrary. An *ex parte* proceeding for the condemnation of a person to an inebriate asylum was held unconstitutional *in re* James, 30 How. Pr. 446, for lack of due

process of law, especially where no provision is made for an examination on his own motion before any court officers or jury on which he can be heard for himself.

The doctrine of the highest Court in New York as declared in the late cases, clearly requires notice to the party whose sanity is in question, although no provision therefor is made by statute, unless some extraordinary reason exists for dispensing with it, but that Court has not yet decided whether or not there is a constitutional requirement of notice in every instance.

Note.—23 L. R. A., &c.

CUMMING AND GILBERT, LAW OF INSANITY, STATE OF NEW YORK, 1900.

Note on §60.—Order for committment of an insane person.

"Under a constitutional goverment no person can be deprived of life, liberty, or property without 'due process of law,' and, therefore, no person can be lawfully declared insane, and his personal liberty permanently restrained without formal proceedings, and an opportunity afforded him to appear personally, and with witnesses to refute the allegations of the persons seeking to deprive him of his liberty."

Deprecates treatment of insane person as criminal in proceedings by jury, etc., and commends medical inquiry (N. Y. Law), into mental condition of patient by expert practitioners.

§62. Proceedings to determine question of insanity.

Notice of such application shall be sent personally, at least one day before making such application upon the person alleged to be insane. Judge may dispense with personal service or direct substituted service to be made, which he may also dispense with. He shall state in certificate to be attached to the petition his reason for dispensing with the personal service, and if substituted service is directed the person to be served therewith.

NEW MEXICO.

Compiled Laws of New Mexico, 1897.

§3619. Whenever it appears to the satisfaction of the justice of peace that a person is disordered in mind, etc., he must issue and deliver to some peace officer for service a warrant directing that such person be taken into custody and taken before the Judge of the District Court for examination.

The judge may order committment after the examination of physicians and witnesses.

NORTH CAROLINA.

Bethea v. *McLennon*, 23 N. C. §523.

"Lunatics are entitled to be present before a jury, and such denial is sufficient cause for setting aside the inquisition."

The Lunacy Law of North Carolina is embraced in Chapter 41 of the Code of 1905, being sections 1870-1887 inclusive. Section 1870, which provides how one may be declared a lunatic, and section 1873, which prescribes the method of having an alleged lunatic adjudged sane and his property restored to him, constitute the only part of this body of law which has any bearing whatever upon plaintiff's case. Section 1870 is as follows:

"Any person, in behalf of one who is deemed an idiot, inebriate, or lunatic, or incompetent for want of understanding, to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the Superior Court of the county where such supposed idiot, inebriate, or lunatic resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed idiot, inebriate, or lunatic, to the sheriff of the county, commanding him to

summon a jury of twelve men to inquire into the state of such supposed idiot, inebriate, or lunatic. The jury shall make return of their procedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, or lunatic, or incompetent person, by inquisition of a jury, as in cases of orphans."

Section 1873 provides:

"Whenever an insane person shall become of sound mind and memory, or shall become competent to manage his property, he shall be authorized to manage, sell, and control all his property in as full and ample manner as he could do before he became insane; and the petition in behalf of such person may be filed before the clerk of the Superior Court of the county of his residence, setting forth the facts duly verified by the oath of the petitioner. Whereupon, the clerk will issue an order, upon notice to the person alleged to be no longer insane, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the said alleged sane person, formerly a lunatic. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same. And if the jury find that the person whose mental condition is inquired of is sane and of sound mind and memory, or is no longer an inebriate, as the case may be, the said person shall be authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane."

NORTH DAKOTA.

Revised Code of North Dakota, 1899.

§1518. In proceedings for adjudging a party insane, commissioners may require the person to be brought before them, and may issue a warrant therefor.

If it is deemed desirable, they may dispense with the presence of the alleged insane person. In the examination they are to hear testimony for and against such an application; any citizen or relative may appear and contest, and also the alleged insane person.

If they elect not to have the person present, they are to appoint a physician to make a personal examination and report. The physician is to obtain answers to certain interrogatories from the relatives of the person.

§6549. Upon petition for the appointment of a guardian for the alleged insane person, the judge must cause such a person to be cited as in other cases.

OKLAHOMA.

(Same law as in South Dakota.)

OHIO.

"That notice to a lunatic is not required on an application to the Probate Court to appoint a guardian is said in *Bates' Ohio Digest,* to have been decided by the Pickaway District Court in the case of *Davison* v. *Tipton,* 10 Week. L. Bull. 1021, 23 L. R. A."

STATUTES OF OHIO, 1902.*

Jurisdiction in Probate Court.

§703. Upon application for committment of alleged insane person, the Probate Judge shall forwith issue a warrant to

*In Ohio it is said, in *Whaler vs. State,* 34 Ohio St. 398, 32 Am. Rep. 375, although it does not appear to be necessary to the decision, that in this country notice to the supposed lunatic in some form has been generally regarded as indispensable.

some suitable party, commanding to bring person alleged to be insane before him, on a day named, and shall subpœna witnesses and physicians. If deemed unsuitable or improper to bring said person into Probate Court, the Judge shall personally visit said person, and make actual inspection, in which event proceedings may go in absence of such person.

§6302. Appointment of guardian.

Notice of three days to next of kin of alleged insane person residing in district, must be given on application for appointment of guardian.

LAWS OF OREGON, 1892.

§2889. Upon application for appointment of guardian for alleged insane person, judge shall cause notice to be given to the supposed insane person, of time and place of hearing, not less than ten days before time so appointed.

§3557. County Judge, upon application for committment of alleged insane person, shall cause such person to be brought before him at such time and place as he shall direct, and shall cause to appear one or more physicians.

Appeal lies to County Court.

PENNSYLVANIA.

"The question appears still somewhat unsettled in Pennsylvania. *In re* Hambright, 10 Lane, L. Rev. 161, the Court of Common Pleas of Lancaster County, Pa., upheld a lunacy proceeding in which the notice was given only to a near friend of the lunatic, and not to the lunatic herself. The Court does not discuss the necessity of notice in such case to the alleged lunatic in person, but did discuss somewhat at length the power of the Court to waive a rule of Court requiring notice to be given for ten days. It cited a large number of cases from the

records of the Court in which less than ten days had been held sufficient, and in many of which it distinctly appeared that no notice was given to the alleged lunatic. No suggestion seems to have been made that there was a constitutional necessity for personal notice to the party most interested. Service on a friend of the alleged lunatic, who in this case was appointed the committee, was held sufficient to sustain the proceedings, in *Com.* v. *Groh.* 10 Pa. Co. Ct. Rep. 557.

In May's case, 10 Pa. Co. Ct. Rep. 283, proceedings to declare a person insane were held void on the ground that they were *ex parte*, where the record did not show notice, but did show that the commission was executed the same day the petition was presented, and therefore reasonable notice could not have been given.

An inquisition in another State without notice to the alleged lunatic was held invalid in Pennsylvania. *Com.* v. *Kirkbride,* 2 Brewst. (Pa.) 419. *Note.*—23 L. R. A., &c.

Re Henchman, 4 Clark (Pa.) 184. Lack of notice not supplied by bringing party to inquisition merely for exhibition.

Application for Appointment of Guardian.

§10. Court to fix a day for hearing of application, and to direct that ten days' notice in writing is to be given to party alleged to be insane, and also to the other members of his family residing in jurisdiction of court.

On Application for Committment.

§9. It shall be the duty of the court at the time of granting any application as aforesaid, to make such order respecting notice of the execution of commission to the party, or to some near relatives or friends, as the said Court shall deem advisable.

RHODE ISLAND.

Gannon v. *Doyle*, 16 R. I., 726.

Hamilton v. *Court of Probate of North Providence*, 9 R. I., 204.

Where the ward is a person of full age, he is the only person entitled to notice of the proceeding.

GENERAL LAWS OF RHODE ISLAND, 1897.

Chapter 82, §1. Upon complaint that a person is insane so as to be dangerous to the peace and safety of the people, etc., the Judge of the District Court shall issue a warrant directing an officer to apprehend such person and have him before the District Court for examination at a time and place named in the warrant.

If physicians certify that the party is invalid and unable to stand examination in open court, the District Court shall hold the same at such times and places as are most conducive to the health and comfort of the person to be examined.

§6. On petition under oath setting forth that a person is insane, any Justice of the Supreme Court may forthwith appoint not less than three commissioners to inquire into the condition of the said person and report facts.

§7. The said commissioners shall give due notice to the person complained of of their appointment and of the time and place of hearing in order that he may have an opportunity to defend himself.

Chapter 210, §8. Whenever application shall be made for the appointment of a guardian of any inmate of any asylum for the insane, the Probate Court shall order personal notice to be served upon such person in such asylum of the time and place of hearing, unless an officer of the asylum makes oath that service would be injurious to the patient, wherein service is made on the keeper of the asylum.

SOUTH CAROLINA.

"In South Carolina an early case declared that no notice was necessary to the party who was found of unsound mind. *Medlock* v. *Cogburn*, 1 Rich. Eq. 477."

Note.—23 L. R. A., &c.

CODE OF LAWS OF SOUTH CAROLINA, 1902.

§2251. Upon application for the committment of an alleged insane person, the Judge of the Probate Court is to investigate by examining witnesses or not just as he sees fit.

§2252. The Judge is to call two physicians to certify to the insanity of the person.

There is no provision for notice in application for a committee.

SOUTH DAKOTA.

Revised Code of South Dakota, 1903.

§2811. On application for the commitment of an alleged insane person commissioners may require the person to be brought before them for examination.

They may dispense with the presence of such person if it is deemed injurious.

Whether or not they dispense with the presence of the person, they must appoint some physician to make a personal examination and report.

Probate Code, §379. Upon application for the appointment of a guardian, the Judge must cause notice to be given to the alleged insane person of the time and place of hearing, not less than five days before.

TENNESSEE.

"In Tennessee, although the statute did not provide for

notice, the Court said in *ex parte Dozier*, 4 Baxt. 81: "It was never intended by the legislature that so important a proceeding as that of declaring a party a lunatic and taking charge of his person and of his estate should be consummated without personal notice, and for lack of it the proceeding was held void."

Note.—23 L. R. A., &c.

Holds further: Where proceedings are commenced in the County Court to have a person declared lunatic and a guardian appointed, the service of a copy of the petition upon such party is required. Other references: 4 Hum, 273, 13 La., 577, 5 Pick, 36.

§5452. A jury of twelve freeholders is to ascertain by inquisition.

§3451. Jurisdiction over the persons and estates of idiots, etc., is entrusted to the County and Chancery Court.

§5465. When an application is made to the Chancery Court, it provides that notice of time and place be given to the defendant.

TEXAS.

Texas Civil Statutes.

Article 128. If information in writing and under oath be given to any County Judge that any person is lunatic or *non compas mentis*, and that the welfare of himself or others requires that he be placed under restraint, the said County Judge shall forthwith issue a warrant for the apprehension of such person and shall fix a day for the hearing and determination of said matter.

Art. 129. Directs sheriff or constable to take the party into custody and produce him at hearing.

Art. 130. Orders a jury to be summoned and to be present at the hearing.

Art. 131. The case is docketed as a civil case.

Art. 133. Special issues are submitted to a jury.

Art. 134-135. Verdict and judgment thereon.

Art. 2740. If it be found by a jury that the defendant is of unsound mind as charged, the Court shall proceed immediately and without further notice to appoint a guardian of the person and estate of such defendant in like manner as of a minor.

UTAH.

Revised Statute, 1898.

§4000. Guardians for the Insane.

The District Court of each county, when it appears necessary, may appoint guardians for the persons and estates of persons who are insane, or from any cause mentally incompetent to manage their property. Such appointment may be made on the petition of a relative or friend, after such notice of the time and place of hearing as the Court may direct, to the person supposed to be insane or incompetent, and to such other persons as the court may designate.

§2173-6. Upon petition of party for commitment of alleged insane person, if the District Judge shall be of the opinion from inquiries he may make that the presence of the accused would be inexpedient, he may dispense with his presence.

VERMONT.

"In Vermont an inquisition without notice was held void in *Shumway* v. *Shumway*, 2 Vt. 339, but here a statute expressly required notice."

Note.—23 L. R. A., &c.

Revised Statutes.

§3239. No person admitted or detained in insane asylum,

except upon certificate of such person's insanity made by two legally qualified physicians.

§3242. Such certificate shall be given only after a careful examination of supposed insane person, made not more than five days previous to making of certificate.

VIRGINIA.

LAWS OF VIRGINIA, 1902.

§1669. Any County or Corporation Judge, or Justice of the Peace, who suspects any person in the county to be insane, or upon written application of any respectable citizen, shall issue his warrant ordering such person to be brought before him and two physicians, the three to form a commission to inquire into insanity of party.

CODE AND STATUTES OF WASHINGTON.

§2660. The Superior Court or Judge, upon application for commitment of alleged insane person, shall cause such person to be brought before him and shall summon witnesses. Alleged insane person may demand trial by jury.

Re Wetmore, 6 Wash., 271.

Semble—That in proceedings for appointment of guardian, even if party has had notice, but is not present at proceedings, Court does not acquire jurisdiction.

STATUTES OF WISCONSIN.

§3976. Petition for appointment of guardian for insane person. Whenever represented to the County Court by petition of relative or friend of insane person, that said person is insane or mentally incompetent, said Court shall cause a notice to be given to the supposed insane or incompetent person,

of the time and place of hearing the case, not less than twenty days before time appointed, and shall also cause said person, if able to attend, to be produced before him at the hearing.

If party is already confined in State or County Hospital for Insane, service of notice on Superintendent of hospital is held sufficient.

Left to discretion of Superintendent whether proper to remove insane person to hearing.

When person, after due judicial examination, has been adjudged insane and a commitment issued for his confinement, upon petition of relative, friend, or creditor, and upon proof, if Court finds necessity therefor, a special guardian for such insane person shall be forthwith, without notice, appointed with power of special administrator.

WEST WIRGINIA.

In West Virginia, as is shown also in the Maine case, the doctrine that notice of proceedings to adjudge a person incompetent and to appoint a committee is a prerequisite to the exercise of jurisdiction in such case, is declared in *Lance* v. *McCoy*, 34 W. Va. 416, in which the main question was as to the right to an injunction, against the exercise of the powers of the alleged committee, which was denied on the ground that there was an adequate remedy at law.

In the Circuit Court of the United States the declaration that Courts of Probate have no right to put a person under guardianship as unfit to manage her affairs, without notice to the party, and an adjudication on the facts is made in *Smith* v. *Burlingame*, 4 Mason, 121, citing *Chase* v. *Hathaway*, 14 Mass. 222."

Note.—23 L. R. A., &c.

CHAPTER. 68, §9.

Any Justice who shall suspect any person in this county to

be a lunatic, shall issue his warrant, ordering such person to be brought before him, and shall inquire concerning same—summoning physician and any other witnesses.

Evans v. *Johnson*, 23 L. R. A., 737.

"It lies at the foundation of justice in all legal proceedings that the person to be affected, have notice of such proceedings. As such an appointment takes from the person the possession and control of his property, and even his freedom of person, and commits his property, his person, his liberty to another, stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made short of conviction for infamous crime.

"The argument that he is insane and the notice will do no good, is a bad one. Insanity is the question to be tried—if given notice, he will be prompt to attend and in his person be the unanswerable witness of his sanity; afterwards if not given notice, those interested in using or robbing him of his property will effectuate a corrupt plan."

WYOMING.

Revised Statutes, 1899.

§4879. When it is represented to the Court or Judge, upon verified petition of any relative or friend or other person, that any person is insane, or from any cause mentally incompetent to manage his property, such Judge or Court must cause a notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, and such person, if able to attend, must be produced on the hearing.

§4880. Determination of insanity shall be by a jury as in civil cases.

§4881. Jury to determine value of estate. Judge to appoint guardian of person and estate.

SUMMARY OF INSANITY LAWS OF THE STATES AND TERRITORIES OF THE UNITED STATES.

(1) Jurisdiction of Matter of Insanity.
(2) As to notice on application for appointment of guardian or committee for alleged insane person.
(3) As to notice on application for commitment of alleged insane person.
(4) Remarks.

ALABAMA:

(1) Probate Court.
(2) Sheriff directed to apprehend person and have him at trial, if safe.
(3) No provision in statute, but case holds *ex parte* inquisition void.
(4) Laws as to commitment indefinite. Left to discretion of Judge as to proceeds of examination.

ARIZONA:

(1) Probate Court.
(2) Notice of five days must be given.
(3) No provision in statute. Five day's notice.
(4)

ARKANSAS:

(1) Probate Court.
(2)
(3) Person must be brought before the Court.

(4) Case holds inquest held without notice void; facts to be tried by jury if doubtful.

CALIFORNIA:

(1) Superior Court.
(2) Notice must be given.
(3) Person must be brought before Judge for examination and must be informed of charge.
(4) Alleged insane person must be present at hearing.

CONNECTICUT:

(1) Probate Court.
(2)
(3) Reasonable notice must be given person complained of, and to relations.
(4) Court to order apprehension of person and production in Court, and shall see and examine such person, unless deemed injurious, in which case reason must be given.

COLORADO:

(1) County Court.
(2)
(3) Judge to issue order for apprehension of person to be brought before Court.
(4) Party may demand immediate inquest and trial by jury.

DELAWARE:

(1) Chancery Court.
(2)

(3) No notice provided for.
(4) Inquiry made by jury. Review may be had within five days.

DIST. OF COLUMBIA:

Admission to U. S. Gov't Hospital.
(1) Supreme Court of District.
(2) *
(3) Notice must be given to alleged lunatic.
(4) Court shall require presence of alleged lunatic unless for good reason it shall direct otherwise by an order stating reason.

FLORIDA:

(1) Circuit Court.
(2)
(3) Judge to issue writ to have person brought before him.

GEORGIA:

(1) Ordinary or Superior Court.
(2) Ten days' notice to be given to three nearest adult relatives.
(3) Warrant to be issued for arrest of party and production in Court.
(4) Presence of party and counsel will not cure lack of notice prescribed by statute.

IDAHO:

(1) Probate Court.
(2) Notice of five days must be given.

*Where no specific provision is made as to notice on application for appointment of commission or guardian, statutes provide that upon committment in due form Court or Party may appoint proper guardian of person and property.

(3) Warrant must be issued for arrest of party and taking him before judge for examination.
(4) Judge must subpœna two or more witnesses acquainted with party.

ILLINOIS:

(1)
(2) Notice to be given by service of summons or otherwise.
(3) Party must be notified by direction of Court.
(4) Party to be brought before Court. Adm't 1903, presence made indispensable.

INDIANA:

(1)
(2) Party to be produced in Court, unless injurious.
(3) Warrant to be issued for arrest, and warrant to be served. Jury trial.
(4) Must be personal inspection of alleged insane person, who shall personally be present at trial.

INDIAN TERRITORY:

(1) Probate Court.
(2)
(3) Party must be brought before Court.
(4) Jury trial if facts doubtful.

IOWA:

(1)
(2)
(3) No provision.
(4) Leaves process largely to discretion of judge.

KANSAS:

(1) Probate Court.
(2)
(3) Optional with judge to compel presence in Court.
(4) Person shall have the right to be present.
Trial to be by jury. Case holds must have notice.

KENTUCKY:

(1) Circuit Court.
(2)
(3) Person alleged to be insane must be in court and in presence of jury, unless it shall appear by affidavit of a physician that they have examined party and believe it would be unsafe.
(4) Cases hold notice must be given.

LOUISIANA:

(1) Parish Court.
(2)
(3) Party to be brought before the Court.
(4) Cases hold that notice must be given.

MAINE:

(1) Municipal officer.
(2) Notice of fourteen days must be given.
(3) Persons must be served with copy of complaint twenty-four hours before hearing.
(4) Am'd of 1903. Last provision.

MARYLAND:

(1) Circuit Court.
(2)

(3) No provision for notice.
(4) Jury of twelve to be empanelled to enquire.

MASSACHUSETTS:

(1) Probate Court.
(2) Notice of fourteen days must be given.
(3) Notice of application must be given to Overseer of Poor.
(4) Judge to see and examine alleged insane person, or state in final order why not.

MICHIGAN:

(1) Probate Court.
(2) Notice of fourteen days must be given.
(3) Notice of application must be given.
(4) Person may demand a jury to try issue.

MINNESOTA:

(1) Probate Court.
(2) Notice of fourteen days must be given.
(3) Party must be informed of proceedings being taken.
(4) Judge must visit person or cause him to be brought before him; county attorney to appear for him.

MISSISSIPI:

(1)
(2)
(3) Sheriff to summon alleged lunatic to contest application.
(4) Jury of six to make enquiry.

MISSOURI:

(1) Probate Court.
(2)
(3) Notice must be given, unless court orders person brought before it.
(4)

MONTANA:

(1) District Court.
(2) Notice of five days must be given.
(3) Party must be brought before Court for examination.
(4) Two or more witnesses best acquainted with person to be subpœned.

NEVADA:

(1) District Court.
(2)
(3) Party and witnesses to be brought before Judge.
(4)

NEBRASKA:

(1) Commissioners.
(2) Notice must be given of fourteen days.
(3) No notice provided for.
(4) Left to discretion of Commissioners whether to summon party. In examination are to hear testimony for and against application. Physicians to make personal examinations and report if person not present.

NEW JERSEY:

(1)
(2)

(3) Provision simply ordinary course of action in chancery, which would require notice.
(4) Cases hold notice to be necessary.

NEW HAMPSHIRE:

(1) Probate Court.
(2) Notice must be given.
(3) Judge may appoint two reputable physicians to examine said person, with or without notice
(4)

NEW MEXICO:

(1) District Court.
(2)
(3) Person to be taken into custody and brought before Judge for examination.
(4)

NEW YORK:

(1) Supreme Court.
(2) No opportunity to alleged lunatic to appear and be heard need be given.
(3) No notice to alleged lunatic need be given.
(4) Proceedings may be entirely summary and *ex parte*.

NORTH CAROLINA:

(1) Clerk Superior Court.
(2) Clerk to notify alleged lunatic and order sheriff to summon jury to "inquire into the state of" said alleged lunatic.

(3) Notice must be given.
(4) Any person may file petition.

NORTH DAKOTA:

(1) Commissioners.
(2) Person must be cited as in other cases.
(3) No notice provided for.
(4) Left to discretion of Commissioners whether to summon party. In examination are to hear testimony for and against application. Physicians to make personal examination and report if person not present.

OKLAHOMA:

Same as South Dakota.

OHIO:

(1) Probate Court.
(2) Notice of three days to next of kin.
(3) Party to be brought to Court, or judge to personally visit said alleged insane person.
(4)

OREGON:

(1) County Court.
(2) Notice of ten days must be given.
(3) Person must be brought before judge of County Court for examination.
(4)

PENNSYLVANIA:

(1) No notice required by statute.
(2)
(3)
(4)

RHODE ISLAND:

(1) District Court; Probate Court.
(2) If person is in asylum personal notice must be given him.
(3) Party to appear before Court for examination. If unable to, such examination to be held at such place as conducive to health and comfort of person to be examined.
(4) Court may appoint commissioner to determine issue. Due notice of appointment of said commission to be given to party.

SOUTH CAROLINA:

(1) Probate Court.
(2)
(3) No provision as to notice.
(4) Left to discretion of judge as to process.

SOUTH DAKOTA:

(1) Commissioners.
(2) Notice of five days must be given.
(3) No provision as to notice.

(4) May dispense with presence of party; but must appoint physician to make personal examination and report.

TENNESSEE:

(1) County and Chancery Court.
(2)
(3) Notice must be given to defendant when application made to Chancery Court. No provision in County Court.
(4) Inquisition to be made by jury of twelve. Cases hold notice must be given in all instances.

TEXAS:

(1) County Court.
(2)
(3) Party to be produced before Court on day of hearing.
(4) Jury summoned. Issues submitted as in regular case.

UTAH:

(1) District Court.
(2) Such notice as Court directs to be given to person.
(3) No provision for notice.
(4) Judge may dispense with presence of person if he deems it necessary.

VERMONT:

(1)
(2)
(3) Provides for careful examination of supposed insane person by two physicians.

(4) Case holds inquisition without notice void.

VIRGINIA:

(1) County or Corporation Judge or Justice of the Peace.
(2)
(3) Person to be brought before judge for examination.
(4) Judge with two reputable physicians to form commission.

WASHINGTON:

(1) Superior Court.
(2)
(3) Court shall order person to be brought before him with witnesses.
(4) Party may demand trial by jury.

WEST VIRGINIA:

(1)
(2)
(3) Party to be brought before judge for examination.
(4) Case holds notice of proceedings prerequisite.

WYOMING:

(1)
(2)
(3) Judge must cause notice to be given to supposed insane person of time and place of hearing.
(4)

WISCONSIN:

(1)
(2) No notice.
(3) No notice if already confined by summary process.
(4)

EPITOME OF INSANITY LAWS OF THE STATES AND TERRITORIES OF THE UNITED STATES.

Classification of the States and Territories of the United States with regard to *notice, opportunity* to appear and be heard, and *trial by jury* of an alleged lunatic or an alleged incompetent.

States and Territories which provide that *notice*, either express or implied, or summary by arrest, shall be given the alleged lunatic or alleged incompetent.

(Express.)

Arizona,	Maine,	North Carolina,
Dist. of Columbia,	Minnesota,	New Jersey,
Connecticut,	Michigan,	Wyoming.
Illinois,	Mississippi,	

(Implied.)

Arkansas,	Indiana,	Ohio,
California,	Louisiana,	Rhode Island,
Colorado,	Montana,	Texas,
Florida,	Nevada,	Virginia,
Georgia,	New Mexico,	Washington,
Idaho,	Oregon,	West Virginia.
Indian Territory,		

States and Territories in which the alleged lunatic or alleged

incompetent must have opportunity to appear and be heard—must be brought before the Court or the Court must visit him or her:

Arkansas,	Indian Territory,	Ohio,
California,	Louisiana,	Oregon,
Colorado,	Michigan,	Rhode Island,
Florida,	Minnesota,	Texas,
Georgia,	Mississippi,	Virginia,
Idaho,	Montana,	Washington,
Illinois,	Nevada,	West Virginia.
Indiana,	New Mexico,	

In Kansas it is optional with the party whether he be brought to Court or not.

States and Territories which provide that notice either express or implied shall be given the alleged lunatic or alleged incompetent, as well as that the alleged lunatic must be brought before the Court or the Court visit him or her:

Arkansas,	Indian Territory,	Ohio,
California,	Louisiana,	Oregon,
Colorado,	Michigan,	Rhode Island,
Florida,	Minnesota,	Texas,
Georgia,	Mississippi,	Virginia,
Idaho,	Montana,	Washington,
Illinois,	Nevada,	West Virginia.
Indiana,	New Mexico,	

In Montana, in proceedings to appoint a guardian, the alleged insane or incompetent person may *not* be produced.

States and Territories which provide trial by jury:

Arkansas,	Kansas,	Missouri,
Colorado,	Kentucky,	North Carolina,
Delaware,	Maryland,	Tennessee,
Indiana,	Michigan,	Texas,
Indian Territory,	Mississippi,	Washington.

(1) States and Territories in which *notice* either express or implied *must* be given the alleged lunatic or alleged incompetent.

(2) And the alleged lunatic or alleged incompetent *must* be brought before the Court on the day of trial.

(3) And the trial *must* be by jury:

Colorado,	Mississippi,	Washington,
Michigan,	Texas,	

States and Territories which fail to *provide that notice* either express or implied shall be given the alleged lunatic or alleged incompetent:

Alabama,	Nebraska,	South Carolina,
Delaware,	New Hampshire,	South Dakota,
Iowa,	New York,	Tennessee,
Kentucky,	North Dakota,	Utah,
Maryland,	Oklahoma,	Vermont
Massachusetts,	Pennsylvania,	Wisconsin.
Missouri,		

States and Territories in which the alleged lunatic or al-

leged incompetent need neither be brought before the Court nor visited by the Court:

Alabama,	Maryland,	Pennsylvania,
Arizona,	Massachusetts,	South Carolina,
Connecticut,	Missouri,	South Dakota,
Delaware,	Nebraska,	Tennessee,
Dist. of Columbia,	New Hampshire,	Utah,
Iowa,	New York,	Vermont,
Kentucky,	North Dakota,	Wisconsin,
Maine,	Oklahoma,	Wyoming,

States and Territories which fail to provide that notice either express or implied shall be given the alleged lunatic or alleged incompetent; and also in which the alleged lunatic or alleged incompetent need neither be brought before the Court nor visited by the Court:

Alabama,	Nebraska,	South Carolina,
Delaware,	New Hampshire,	South Dakota,
Iowa,	New York,	Tennessee,
Kentucky,	North Dakota,	Utah,
Maryland,	Oklahoma,	Vermont,
Massachusetts,	Pennsylvania,	Wisconsin.
Missouri,		

INSANITY LAWS OF THE FIVE GREAT CONTINENTAL POWERS.

FRANCE.

MAJORITY.

488. A person's majority is fixed at the age of 21 years;

at that age, one is capable of performing all the acts connected with civil life, except those covering the rights of marriage.

Decree.

(Privation of the exercise of civil rights.)

489. An adult who is in an habitual state of imbecility, insanity or madness must be interdicted, even if he sometimes has lucid intervals.

490. Every relative is permitted to instigate the interdiction of his kinsman. The same rule applies to each party to a marriage.

491. In a case of madness, if the prohibition is not sought by either party to a marriage, or, by the parents or relatives, it must be done by the King's counsel, who, in a case of imbecility or insanity can proceed equally against an individual who has not a wife or husband, or who is unmarried, or who has no known relatives.

492. All demands to interdict are brought before the tribunal of first instance.

493. The facts proving imbecility, lunacy, insanity, or madness shall be presented in written articles. Those who seek the prohibition shall present the witnesses and documents.

494. The Court shall order a family council to be formed in the manner prescribed in Section IV, Chapter II, entitled "Minority, Guardianship and Emancipation," to give its opinion on the condition of the person against whom the interdiction is demanded.

495. Those who seek the interdiction cannot participate in the family council; however, husband or wife and the children of the person against whom the interdiction is sought may be admitted, without having a vote.

496. After having received the opinion of the family coun-

cil, the Court interrogates the defendant at the Courthouse; if he cannot appear in Court, he shall be examined at his residence by one of the judges, whose special duty this is, assisted by the clerk of the Court. In every case, the King's counsel shall attend the examination.

497. After the first examination, the Court shall appoint, if necessary, a temporary administrator to take care of the defendant's person and of his property.

498. The decision rendered in a case of interdiction shall only be given in public, the parties being called and heard.

499. Should the interdiction be confirmed, the Court may, if the circumstances demand it, order that the defendant henceforth cannot plead, transact or conduct his affairs, receive money, give discharge of debts, without the assistance and advice of counsel who shall be designated by the same decree.

500. In case of appeal from the judgment in first instance, the royal court can, if it is found necessary, interrogate anew or institute investigation, by a commissioner, of the persons against whom the interdiction is demanded.

501. All decisions carrying interdiction or nomination of a council shall be by the petitioners embossed, served on the party and inscribed within ten days on the bulletins that are displayed in the audience chamber and in the offices of the notaries of the district.

A summary abstract of the decision shall also be transmitted by attorney, who has obtained it from the clerk of the Court of the district in which the defendant was born. This shall be done within the month from the date on which the decree goes into effect. This abstract shall be entered by the clerk within fifteen days, on a special register to which all persons shall have access and leave to take a copy of the same. The clerk, after an additional fifteen days, shall send the lawyer a certificate announcing the completion of said formalities.

In regard to foreign individuals, the decision shall be en-

tered in the same form and stated time on the register kept by the clerk of the Tribunal of the Seine. This register shall mention also the decision relating to persons born in the French colonies; all this independently of the register, which shall be kept by the clerk of their birthplace.

All violations of the above provisions committed by the clerk or lawyer shall be punishable by fine of fifty francs and in addition damages and interest.

502. The interdiction or the nomination of a council shall go into effect on the day judgment is rendered covering all the acts pertaining to the interdiction.

503. The acts anterior to the interdiction shall be annulled if the cause of interdiction was notarially stated during the time in which said acts were done.

ITALY.

TITLE VI.

(Incompetency and Interdiction.)

836. A demand for interdiction or disability is made by recourse to the civil court in whose jurisdiction the person resides, against whom the demand for interdiction is made. In taking this recourse, all the facts upon which the demand are founded must be set forth in separate articles; and it must also name all the witnesses who have been informed thereof. It must also embody all the justifiable documents covering the demand. The Court, united in council, and after consulting the jury, provides for the case.

837. If the tribunal does not reject the demand, it orders a family council or appoints a guardian. The deliberations of the family council are deposited by the representative of the family council, together with the recourse. The president

establishes by statute the day and hour on which the defendant is to be heard (the person against whom the interdiction is demanded). A copy of the recourse and statute is given to the defendant within the time established by the president.

838. The interrogatory takes place in court. If the defendant cannot be present in court, the president charges a clerk to go to the defendant's residence to interrogate him there. A verbal process is made which shall contain:

1. Indication of year, month, day and place.
2. Name, surname and address of the parties.
3. The date of the statute which establishes the day for the interrogatory and also the date of the notification made to the parties.
4. If a judge has been delegated, the date of the statute must be stated.
5. The interrogations made and the given answers. The verbal process is signed by the defendant, by the district attorney, by the president or delegated judge, and by the clerk.

839. Whenever the defendant does not or cannot be present at the interrogatory, or refuses to answer, the Court then looks to interest of the party. The Court can, however, nominate a guardian to take care of the defendant's person and goods.

840. The Court, in accepting the proof of the testimony, can decree that the interrogation of the witnesses can be made without the presence of the defendant. In that case, the examination by the district attorney is necessary, and also the defendant's attorney or his guardian can be present.

841. An appeal from the sentence of the Court can be made by any one having the right to demand the recourse for incompetency. In the case indicated in a paragraph of Art. 839, notice of the appeal is also given to the guardian. The defendant, however, can also appeal without having any guardian.

842. When the family council or guardian acknowledges that the charge of interdiction has ceased, they must declare this by means of a deliberation; also, a copy thereof must be given to the royal attorney or solicitor.

842. For the repeal of the interdiction, the above stated rules shall be observed. An appeal from the sentence which repeals the interdiction can be made by any one having the right of demanding interdiction; and also by the members of the family council.

843. In rendering judgment on the interdiction or repeal of any statement not covered by this title, the rules of the foregoing proceeding shall be observed, unless, for urgent reasons, a summary proceeding is required.

No sentence can be pronounced.

844. Provides for the registration of decrees.

GERMANY.

PROCEEDINGS TO DETERMINE THE QUESTION OF INSANITY

645. The incompetency of an insane or feeble-minded person is established by a decree of the Districts Court.

The decree can be obtained only upon motion.

646. The motion can be made by 1, husband or wife; 2, a relative, and 3, the legal representative, who has charge of the person to be declared incompetent.

A relative cannot make this motion regarding a person who is under parental protection or under guardianship.

The motion against a wife can be made by a relative only.

1. If the conjugal relation has been terminated by decree.

2. When the husband has left the wife, and

3. When the husband is incompetent to make such motion, or his residence is unknown.

In any case the Districts-Attorney of the Supreme Court is authorized to make such motion.

647. The motion can be made by petition in writing or by a declaration before the Court Clerk.

It has to contain the facts and the evidence.

648. The proceedings have to be instituted before the District Court which has jurisdiction over the person to be declared incompetent.

Against a German who is not under the jurisdiction of a Court in his country, the motion can be made before the Districts-Court in which district he had his last residence.

649. The Court can request medical certificates before institution of the proceedings.

650. The Court before whom the proceedings are instituted can transfer the matter to the Districts Court in whose district the person to be declared incompetent is living, should the condition of the respective person require this.

The transfer cannot be made any more after the Court has heard the person to be declared incompetent.

652. The Districts-Attorney can in any case institute these proceedings by making the motion, and can be present at all hearings.

He is to be notified of the institution of the proceedings of the transfer mentioned in paragraphs 650, 651, and of all hearings to take place.

653. The Court has to make *ex officio* an investigation upon the facts and evidence contained in the motion, as to the condition of the insanity and to take all evidence which appears to be important.

Before this however, the person to be declared incompetent is to be given an opportunity to bring his or her evidence; this is also to be allowed to the legal representative who has charge of such person, provided he has not made the motion for the declaration of incompetency.

654. *The person to be declared incompetent is to be heard personally in the presence of one or more experts. For this purpose the appearance of the person to be declared incompetent has to be ordered.*

This hearing can be waived *only* 1, if the same is connected with special difficulties; 2, if the same should be to the disadvantage of the health of the person to be declared incompetent.

655. The declaration of incompetency cannot be ordered before the Court has heard one or more experts as to the condition of the mind of the person to be declared incompetent.

656. With the consent of the proponent, the Court can order that the person to be declared incompetent may be transferred to a sanitarium for a period not exceeding six weeks, if according to medical opinion this should be necessary in order to ascertain the condition of mind, and if such can be done without disadvantage to the health of such person.

Before such order can be made, the parties named in paragraph 646 are to be heard.

Against the decree by which such transfer is ordered, the person to be declared incompetent, the Districts-Attorney and the parties named in paragraph 646 can appeal during the time stated in paragraph 646.

659. The order according to which a decree of declaration of incompetency is to be issued has to be served *ex-officio* to the proponent and to the Districts-Attorney.

660. The decree of declaration of incompetency is to be served *ex-officio* 1, to the Surrogates Court; 2, if the respective person is under parental protection or under guardianship, to the legal representative who has charge of such person; 3, to the respective person in case the same is to be declared incompetent on account of a feeble mind.

661. The incompetency on account of insanity is in force if the party is under parental protection or under guardianship, with the serving of the decree or otherwise with the appointment of a guardian.

The incompetency on account of a feeble mind is in force from the serving of the decree upon such person.

662. A decree by which the declaration of incompetency is refused is also to be served upon the person for whom the motion has been made.

663. Against the decree by which the declaration of incompetency is refused the proponent and the Districts-Attorney can appeal.

In the proceedings before the Court of Appeals the provision in 652 and 653 are to be applied.

Proceedings of Appeal.

Against the decree of declaration of incompetency complaint is to be filed within one month.

This complaint can be made 1, by the person who was declared incompetent; 2, by the legal representative who has charge of such person, and 3, by the parties named in 646.

The time begins in case the person has been declared incompetent on account of insanity 1, for such person from the time he receives knowledge of the decree; 2, for all other parties from the time the incompetency is in force.

In case the incompetency has been declared on account of a feeble mind the time begins 1, for the legal representative of the person under parental protection or under guardianship from the date of serving the decree; 2, for the person declared incompetent and all other persons from the time the decree has been served upon the incompetent person.

AUSTRIA.

The provisions of the Austrian law regarding lunatics and idiots are partly such of the Allgemeine burgerliche gestebuch (code of civil law), partly such of the code of civil procedure,

and of the Imperial decree regarding other matters than litigations, of which the courts have jurisdiction. The *code of civil law* reads as follows:

§269. For persons of age who are incompetent to manage personally their affairs and cannot take care of their rights, the courts must appoint a committee (curator).

§270. This is the case———when a person of age becomes a lunatic or an idiot.

§273. Only a person who is declared by Courts to be a lunatic or idiot can be regarded as such, and this declaration can only be made as soon as the Courts have thoroughly investigated his behavior and have heard the physicians, who also must be appointed by the Courts to participate in the investigation.

The procedure in matters of appointing a committee is regulated by the provisions, Title F, Article 3 of the *Imperial decree of August* 9, 1854, and the sections on this subject read as follows:

§184. When a person is declared as incompetent in consequence of lunacy or idiocy, the courts must give public notice hereof by publishing a decree (which is done by publishing same in an official newspaper, and by affixing a copy of said decree to the official bulletin), and must give special notice to the notary public of the district in which the lunatic resides.

§185. Provides that the proceeding of the Courts in such cases must be verbal, not in writing; it may be started on a written petition of the parties, on their verbal demand or officially. No special provisions are made in this law how to proceed in case of alleged lunacy, but a *special decree* was issued *by the Ministry of the Interior and the Ministry of Justice on May* 14, 1874. The parts regarding this matter read as follows: "A physician or superintendent of an institute for the insane must give notice of any case of lunacy, when the alleged lunatic has been confined to such institution, to the Courts, when the

person is, or might be, of age. In any such case, the Court has to appoint a commision consisting of one judge to be of special ability and of at least two physicians (other than the ordinary physicians of the alleged insane), and a thorough investigation must be made *by this judge* and the physicians. The judge must, therefore, *see* the alleged lunatic personally, and it is his duty either when the insanity is stated to take the necessary steps for his committment, or if the person is found to be rational, immediately to reinstate the alleged lunatic into all his rights of freedom as a citizen."

Consequently, the Court must also be informed:

1st. When a minor who is a lunatic or an idiot reaches the age of majority.

2d. When a lunatic person gets cured and is dismissed from the institute of the insane.

Regarding the competency of the courts, provisions are made in the law called *Jurisdictions Norm of August* 1, 1895, which is a part of the code of civil procedure.

§109, of which reads as follows: The District Court, Bezirksgericht (which is the same as the Municipal Court of this country, consisting of one single judge) has a competency to appoint provisional guardians and committees for people subject to its jurisdiction, *i. e.*, living or residing in the district of such Court; however, in a case of commitment for reason of lunacy or idiocy, the final decision is reserved to the *Landes* or *Kreisgericht*, *i. e.*, (Court of first instance consisting of three judges) in the district of which the District Court is situated.

Appeal of this Court goes to the *Oberlandesgericht* (Court having jurisdiction of second instance for a whole county), which finds the decisions by a senate (division) of five judges, and from this Court appeal is allowed even in a case that its decision confirms the decision of the first Court to the Supreme Court of the Austrian Empire, consisting of senates (divisions) of seven judges each."

The foregoing shows that a commitment of an alleged lunatic is only allowed provided he has a personal interview with the judge, and that such a person, therefore, must and will have in any case an opportunity to acquire knowledge of what happens, provided his mental condition allows him to understand it.

The Austrian law states it as the official duty of the Courts to take care of persons who by any reason whatever cannot attend to their own affairs, and a committed person is always in the care of the Court (obervor-mundschaftliche Gewalt). Nothing special is therefore stated which legally must be taken to give notice to the Court in the case of alleged lunacy, and it is the duty of the judge to take care of an alleged lunatic, whether he get such notice by the family or anybody else, officially or unofficially.

While the publication of the decree is the main formality in constituting the commitment, the serving of the decree on the alleged lunatic is not specially provided for in the Austrian law. This law does not take the act of serving as an important one except in case of a complaint or of a judgment, and, therefore, as a rule it will be sufficient to serve the decree on the committee.

However, the serving of such decree does not result in the regular legal consequences of this act in order to protect the rights of the alleged lunatic. It is an established rule, that even if the committee does not appeal against the commitment, the commitment does *not* go into legal force, inasmuch that the right of the alleged person to appeal against the commitment is not touched in any way.

The practice of the Courts is a very liberal one in such cases, and although section 11 of the Imperial decree of August 9, 1854, provides that in cases where there is no litigation the appeal must be made within a fortnight after the day on which the decree against which the appeal is made was served, an appeal which is brought to the Court by an attorney of the

committed man must *always* be taken into consideration, and if the Court does not change its mind, which is in its discretion to do, it must submit the appeal to the higher Court to get its decision. In order to secure this right, which is a natural one, and must be recognized by every law and by every Court of a civilized nation, the highest Court of Austria has decided in several cases that, notwithstanding the commitment of an alleged lunatic, the power of attorney given by him is valuable and gives this attorney the right to take all necessary legal steps which may lead to repair mistakes which may easily be made by physicians or judges in declaring a person as a lunatic, and thus depriving him of his rights and of the management of his affairs.

REVISED STATUTES OF THE RUSSIAN EMPIRE.

VOL. X., PART I.

CHAPTER II.

Concerning the guardianship of the feeble-minded, the insane, the deaf and dumb, and the dumb.

Section 365. Feeble-minded are deemed those that have no sound judgment from their infancy.

Section 366. Insane are deemed those whose insanity is due to accidental causes, constituting a disease that at times leads to fury, may inflict injury to the public and themselves, and they require, therefore, special supervision.

Section 367. Every family that contains a feeble-minded or insane person is at liberty to inform the local authorities about it.

Note.—Those feeble-minded and insane that committed no

crime, and are placed, for the purpose of being cured, in private sanitariums, may be examined in the regular order only upon the request of their relatives, guardians, trustees or heirs. When such feeble-minded or insane are placed in private sanitariums without their previous formal examination, the proprietors of these institutions are obliged to notify the local medical authorities about it without delay, which authorities immediately report to the Governor about it.

Section 368. Upon the application of the family, the feeble-minded or insane persons are subjected to an examination which is performed in the Provincial capitols by the medical department of the Provincial Board, in the presence of the Governor, Vice-Governor, the President of the Circuit Court, whose place, in case of extraordinary business, is taken by his associates, or one of the judges of the Court, the State's Attorney or his assistant; one of the honorary Justices of the Peace residing in the city, with the invitation thereto of the superintendent of the Board of Direct Taxes, when the persons examined are subject to the jurisdiction of that Board, and, in accordance with the status of the person under examination, the Provincial and one or two District Marshals of Nobility, or the President with one or two judges of the Orphans' Court. When noblemen who have served in the army are being examined military delegates are present. In all cases the examination may be conducted also at the place of residence or sojourn of the individual examined in the Provincial Capitol. The minutes of the Commission concerning the examination of feeble-minded or insane persons are drawn by the Provincial Board in conformity with the rules laid down in the Provincial Act.

Note 1.—In the provinces of Tobolsk, Tomsk, Eniseysk, and Irkutsk the general sessions of the Provincial Board in the matters of examination of feeble-minded and insane are attended by the Presidents of the Circuit Courts, and also the

Superintendent of the Board of Direct Taxes, or military delegates, or Presidents and Judges of Orphans' Courts, as the case may be, as set forth in this (368) section.

Note 2.—in the city of St. Petersburg, in the Board mentioned in this (368) section, one of the Supplementary Justices of the Peace may participate, in lieu of the Honorary Justice of the Peace.

Section 369. Repealed.

Section 370. The examination of Russian subjects, who become insane in a foreign land, is conducted in accordance with the laws of that land in which they sojourn, in the presence of a delegate or one authorized by the local Russian legation or Consulate. The report of the examination thus made with a Russian translation thereof and a certificate, are transmitted by the Ministry of Foreign Affairs to the Ministry of Justice for presentation to the Governing Senate for ultimate disposal. The guardianship of the person and estate of one become insane in a foreign land, in the absence of the next of kin or close friends who would consent to take the same upon themselves upon giving certificate to that effect, it is imposed upon the Russian Consul in whose district the affected person sojourns. When they return to normal health such persons are examined; if they reside in a foreign country in the same manner as they were examined after losing their reason, *i. e.*, in accordance with the laws of that land in which they reside at the time being, and in the presence of one authorized by the local Russian Legation or Consulate; and in case of their having returned to Russia, in the manner prescribed in section 378. The examination of an insane person conducted in the absence of one authorized by, or a deputy of the Russian Legation or Consulate is recognized sufficient and all the consequences thereof legal only when there is a certificate from the Minister of Foreign Affairs to the effect that, in that country where the afflicted person was, there was no Russian Lega-

tion or Consulate at the time of the examination. The expense that may be required in order to enable the person authorized by the Legation or Consulate to be present at the examination of an insane Russian subject in a foreign land, as well as the funds for the taking of the necessary steps to safeguard the person there, for his maintenance and treatment in the asylum or for his dispatch to the fatherland, are supplied without delay from the Goverment Treasury, they being later replaced from the estate of the insane person, if after due inquiry such will be found. The inquiry as regards property within the limits of Russia is conducted by the order of the Minister of the Interior, and property in a foreign country by the Ministry of Foreign Affairs.

Section 371. In the seaports of the Provinces of Kherson and Tauris the examination of insane and feeble-minded of the nobility is conducted by the medical officers in the presence of the Chief of Police and the Marshal of Nobility of the nearest district, and, if the insane or feeble-minded is of the merchant class or other class, to the examination are invited also the President of the Commercial Court, where there is such a Court, and the President and two Judges of the Orphans' Court. At the examination of insane and feeble-minded of all classes generally, in addition to the above named persons, are present: in Odessa, the President or Associate Justice or one of the Judges of the District Court (see Section 368), the State's or his assistant of this Court, and one of the Honorary Justices of the Peace residing in the city. But in the remaining seaports of the Provinces of Kherson and Tauris, where there is no District Court, one of the Honorary Justices of the Peace of the district and the assistant State's Attorney.

Section 372. If the forwarding of the person afflicted with feeble-mindedness or lunacy to the Provincial capitol shall appear impossible without endangering his life, he is examined at his place of residence or sojourn by the inspector or a mem-

ber of the Provincial Medical Board and two physicians appointed by the Board. At this examination are present, if the person examined is a nobleman, the presiding officer shall be the Provincial Marshal of Nobility or the acting Marshal; and if he belong to the merchant or other estate, the presiding officer shall be the District Marshal of Nobility. Their associates shall be one of the Honorary Justices of the Peace of the Local Judiciary District, the Assistant State's Attorney, the Sheriff (Ispravnit), and in addition to these, at the examination of a nobleman, the District Marshal of Nobility, and at the examination of others, the President and two Judges of the Orphans' Court. The traveling expenses of the persons appointed for the examination of an insane person at his place of residence or sojourn are borne by the estate of the person undergoing examination.

Section 373. The inquiry consists of a rigid examination of the answers to the given questions pertaining to usual circumstances and home life. These questions as well as their answers should be recorded in the minutes of the proceeding.

Section 374. After the inquiry into a case of insanity or feeblemindedness, if the Commission finds it to be substantial, it submits the result, without appointing a guardian, for the consideration of the Governing Senate, and, pending a final decision from this body, will take only legitimate measures for the care of the patient and the protection of his estate. The decisions, however, concerning peasants that were examined are made by the Provincial Boards or co-ordinate institutions, without presenting them for the consideration of the Governing Senate.

Section 374[1]. The institutions having jurisdiction of the appointment of guardians, immediately upon the receipt of an order directing the appointment of a guardian to a feebleminded, insane, deaf and dumb, or dumb person, publishes in the Senate Gazette why and over whom the guardianship is

instituted, stating the status, rank, name patronomic, and family or surname of this person.

Section 374[2]. At the termination of the guardianship indicated in Section 374[1], the proper institution publishes the fact in the Senate Gazette, giving the number in which the first record was published.

Section 375. Those declared by the Governing Senate as feeble-minded or insane are placed in the care of their next of kin, or, if these decline to serve, are placed in the asylum for insane.

Section 376. The estate of the declared feeble-minded or insane is placed in trust of their heirs with the prohibition of selling or pawning anything thereof during the life of the owner, with the obligation of saving in tact all the profits remaining after legal expenses.

Section 377. In all other respects, as regards the placing of property with next of kin, the requirement of an account from them, and the designation of their compensation, the same rules should be observed as govern the appointment of guardians to estates of infants.

Section 378. When one declared insane is finally cured, as soon as the proper authorities are informed of the fact, a new inquiry is held in accordance with the provisions of Sections 368 and 371-373, and when, as a result of this examination his sanity is established beyond question, the matter is laid before the Governing Senate for decision, and pending the final disposition the cured person should be given full freedom without, however, removing his property from the guardianship. None but such a certificate setting forth the restoration to health can be taken into consideration.

Section 379. In the appointment of guardians, in consequence of the mental derangement of persons possessing real estate, conjointly in the Russian Empire and Provinces of the Polish Kingdom, the following regulations must be observed: (1) These persons are examined in accordance with the laws

of that country wherein they at that time reside. (2) If the person declared insane is in the Empire, the Governing Senate, after making the proper order about the institution of a guardianship to his person, as well as his property within the boundaries of the Empire, prescribes the taking of similar steps for the protection of his property within the jurisdiction of the Provinces of the Kingdom according to the laws in force there; if, however, the insane person resides in the Provinces of the Kingdom, submit the matter with regard to the institution of a guardianship to the estate in the Empire to the Ministry of Justice to be submitted to the Governing Senate.

Section 380. In case of the complete recovery of such persons (Section 379), the certification thereof is made likewise according to the laws of that region where they sojourn at that time, and in the release of their person and their estate from the guardianship the same rule is observed as is prescribed above for the appointment of this guardianship.

EPITOME OF INSANITY LAWS OF THE SIX GREAT POWERS OF EUROPE.

Classification of the Great Powers of Europe with regard to *notice* and *opportunity* to appear and be heard in the case of an alleged lunatic or an alleged incompetent.

The Great Powers which provide trial by jury for an alleged lunatic or an alleged incompetent:

None.

The Great Powers which provide that notice, either *express or implied*, or summary by arrest, shall be given the alleged lunatic.

(Express.)

ITALY.

(Implied.)

FRANCE, GERMANY, AUSTRIA, RUSSIA.

The Great Powers which provide that notice, either express

or implied, shall be given the alleged lunatic, as well as that the alleged lunatic shall have opportunity to appear and be heard, *must* be brought before the Court or the Court visit him or her.

*France, Italy, Austria and Russia.

The Great Powers in which the alleged lunatic has no opportunity to appear and be heard need neither be brought before the Court nor visited by the Court.

Germany.

The Great Powers in which the alleged lunatic has neither notice, either express or implied, nor opportunity to appear and be heard need neither be brought before the Court nor visited by the Court.

Great Britain.

[For a full discussion of the present lunacy laws of Great Britain see Modern English Lunacy Legislation.]

APPENDIX.

ANCIENT ENGLISH CHARTERS AND STATUTES.

(Showing how what was a mere benevolence on the part of the vassal towards the Lord came in time to be demanded by the latter as a right and the tyranny resulting therefrom. (Chase's Blackstone, New York Edition 1882, page 257.)

*In France a legal officer representing the government must attend the proceedings.

"Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress; but in process of time, they grew to be considered as a matter of right, and not of discretion. These aids were principally three; first, to ransom the lord's person if he were taken prisoner, a necessary consequence of the feudal attachment and fidelity; secondly, to make the lord's eldest son a knight, a matter that was formerly attended with great ceremony, pomp and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms: the intention of it being to breed up the eldest son and heir apparent of the seignory, to deeds of arms and chivalry, for the better defence of the nation; thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughter's portions were in those days extremely slender, few lords being able to save much out of their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms. (*Ibid*, p. 258). And one cannot but observe in this particular the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman Republic, between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client, viz., to marry the patron's daughter; to pay his debts, and to redeem his person from captivity.

But besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more, as aids to pay the lord's debts (probably in imitation of the Romans), and aids to enable him to pay aids or reliefs to his superior lord, from which last indeed the King's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the King, who had no superior."

(Magna Charta.)

(Instance of Kings sinking distasteful clauses in charters or breaking through them, page 258, *ibid.*)

"To prevent this abuse, King John's Magna Charta ordained that no aids be taken by the King without consent of Parliament, nor in any wise by inferior lords, save only the three ancient ones above mentioned."

(Henry III's Charter.)

"But this provision was omitted in Henry III's Charter, and the same oppressions were continued till"

(Statute Edward I. Confirmatio Chartarum.)

"the 25 Edward I., when the statute called confirmatio chartarum was enacted; which in this respect revived King John's Charter, by ordaining that none but the ancient aids should be taken."

(Statute Westminster Edward I.)

"But though the species of aids were thus restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's Charter indeed ordered that all aids taken by inferior lords should be reasonable; and that the aids taken by the King of his tenants *in capite* should be settled by Parliament. But they were never completely ascertained and adjusted till the Statute Westminster I., 3 Edw. I., c. 36, which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter."

(Statute Edward III.)

"And the same was done with regard to the King's tenants *in capite* by statute 25 Edward III., c. II."

(Law of William the Conqueror ascertaining the relief, page 258 and 259, *ibid.*)

"But though reliefs had their origin while feuds were only life estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure; especially when, at the first, they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir. The English ill brooked this consequence of their new adopted policy; and therefore William the Conqueror, by his law, ascertained the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war, should be paid by the earls, barons, and vavasours respectively; and if the latter had no arms, they should pay 100s."

(William Rufus Broke Through This.)

"William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws; thereby in effect obliging every heir to new purchase or *redeem* his land."

(Charter Hen. I. restores William the Conqueror's Law.)

"But his brother, Henry I., by the Charter before mentioned, restored his father's law and ordained that the relief to be paid should be according to the law so established, and not an arbitrary redemption."

(Instance of the King and Parliament conspiring to Pluck Female Wards, p. 260, *Ibid.*)

"But if he (the heir) was under the age of twenty-one, being a male, or fourteen being a female, the lord was entitled to the wardship of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males and sixteen in females. For the law supposed the heir male unable to perform knight service till twenty-one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the Statute of Westmn. I., 3; Edw. I., c. 22, the two additional years being given by the Legislature for no other reason but merely to benefit the lord."

(Showing that Magna Charta itself was a Mere Feudal Compromise on the Broader Charter of Henry I., which was Again a Mere Feudal Compromise on the Equitable and Popular Laws of Edward the Confessor, Founded on Alfred the Great's Dome Book. Pp. 260, 261, 248 *ibid.*)

"This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only, yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might, out of the profits thereof, provide a fit person to supply

the infant's services till he should be of age to perform them himself. And if we consider the feud in its original import, as a stipend, fee, or reward for actual services, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry the First, before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or the next of kin. But this noble immunity did not continue many years." - - - - "However, this King (William the Conqueror) and his son, William Rufus, kept up with a high hand all the rigours of the feudal doctrine; but their successor, Henry I., found it expedient, when he set up his pretensions to the Crown, to promise a restitution of the laws of King Edward the Confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter, whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it. But this Charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till in the reign of King John they became so intolerable that they occasioned his barons, or principal feudatories, to rise up in arms against him; which at length produced the famous great Charter at Runing-mead, which, with some alterations, was confirmed by his son, Henry III. And though its immunities, especially as altered on its last edition by his son (Edward I.), are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the further alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted; but this, properly con-

sidered, will show, not that the acquisitions under John were small, but that those under Charles (the second) were greater."

(Instance of a Feudal Custom Running Counter to Magna Charta. P. 261, *ibid.*)

"When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *custerlemain;* that is, the delivery of their lands out of their guardian's hands. For this they were obilged to pay a fine, namely, half a year's profit of the land; though this seems expressly contrary to Magna Charta."

(Instance of the Crown Taking Advantage of Said Custom in Itself Contrary to Magna Charta to Rob Its Subjects through "False Inquisitions." Pp. 261, 262, *ibid.*)

"In order to ascertain the profits that arose to the Crown by these first fruits of tenure, and to grant the heir his livery, the itinerant justices or *justices in eyre,* had it formerly in charge to make inquisition concerning them by a jury of the county, commonly called an *inquisitio post mortem;* which was instituted to enquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who and of what age his heir was; thereby to ascertain the relief and value of the primer seizin, or wardship and livery accruing to the King thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance, it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII., that by colour of false inquisitions they compelled many persons to sue out livery from the Crown, who by no means were tenants thereunto."

(Instance of Kings and Landlords Disregarding Charter. (*Ibid,* Pp. 262, 263.)).

"But, before they came of age, there was still another piece

of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage* (*maritagium*, as contradistinguished from *matrimony*), which, in its feudal sense, signifies the power, which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality; which if the infants refused, they forfeited the value of the marriage, *valorem maritagii* to their guardian; that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance; and if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*. This seems to have been one of the greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord should have the restraint and control of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female wards intermarrying with the lord's enemy; but no tolerable pretence could be found why the lord should have the sale or value of the marriage. Nor indeed is this claim of strictly feudal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his female wards, which was introduced into England together with the rest of the Norman doctrine of feuds; and it is likely that the lords usually took money for such their consent, since, in the often cited Charter of Henry the First, he engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not married to his enemy. But this, among other beneficial parts of that Charter being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary, unequal manner, it was provided by King John's great charter that heirs should be married without disparagement, the next of kin having previous notice of the contract; or, as it was expressed in the first

draught of that Charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua.*"

(Instance of the King and Parliament Taking a Handle to Work Oppression from an Ambiguity of Phrase in Henry III.'s Charter, out of which Henry III. Himself Made a Good Thing. (*Ibid*, p. 263, p. 264.)).

"But these provisions in behalf of the relations were omitted in the Charter of Henry the Third; wherein the clause stands merely thus, "*hoeredes maritentur absque disparagatione*," meaning certainly, by *hoeredes,* heirs female, as there are no traces before this to be found of the lords claiming the marriage of heirs male; and as Glanvil expressly confines it to heirs female. But the King and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both, *sive sit masculus sive foemina,* as Bracton more than once expresses it; and also as nothing but disparagement was restrained by Magna Charta, they thought themselves at liberty to make all other advantages that they could. And afterwards this right, of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the Statute of Merton."

Note by the Editor (*Ibid*, p. 264).

"What fruitful sources of revenue these wardships and marriages of the tenants, who held lands by knight's service, were to the Crown, will appear from the two following instances, collected among others by Lord Lyttleton (Hist. Hen. II., 2 vol. 296): 'John, Earl of Lincoln, gave Henry III. 3,000 marks to have the marriage of Richard de Clare, for the benefit of Matilda, his eldest daughter; and Simon de Montford gave the same King 10,000 marks to have the custody of the lands and heir of Gilbert de Unfranville, with the heir's marriage, a sum

equivalent to a hundred thousand pounds at present.' In this case the estate must have been large, the minor young, and the alliance honorable. For, as Mr. Hargrave infroms us, who has well described this species of guardianship, 'the guardian in chivalry was not accountable for the profits made of the infant's lands, during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. And this guardianship, being deemed more an interest for the profit of the guardian than a trust for the benefit of the ward, was saleable and transferable, like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might devolve upon the most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence.' (Co. Litt. 88 n. II.) *One cannot read this without astonishment, that such should continue to be the condition of the country till the year 1660, which, from the extermination of these feudal oppressions, ought to be regarded as a memorable era in the history of our law and liberty.*")

(Showing How Kings Abused their Prerogative Until National Clamour Forced Magna Charta; Whereupon the Succeeding King, Henry III., Made a New Charter, Sinking in His Charter the Salutary Clause in Magna Charta. (*Ibid*, pp. 266, 267.)).

"But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction

at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti; scutum* being then a well known denomination for money; and in like manner, it was called in our Norman French, *escuage;* being indeed a pecuniary, instead of a military service. The first time this appears to have been taken was in the 5 Henry II., on account of his expedition to Toulouse; but it soon came to be so universal that personal attendance fell quite into disuse. Hence we find in our ancient histories that, from this period when our Kings went to war, they levied scutages on their tenants, that is on all the landholders of the kingdom, to defray their expenses and to hire troops; and these assessments in the time of Henry II. seem to have been made arbitrarily, and at the King's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and King John was obliged to consent by his Magna Charta that no scutage should be imposed without consent of Parliament. But this clause was omitted in his son, Henry III's, Charter, where we only find that scutages, or escuage should be taken as they were used to be taken in the time of Henry II.; that is, in a reasonable and moderate manner. Yet afterwards by Statute 25, Ed. I., c. 5, 6, and many subsequent statutes, it was again provided that the King should take no aids or tasks but by the common assent of the realm: hence it was held in our old books that escuage or scutage could not be levied but by consent of Parliament; such scutage being indeed the ground work of all succeeding subsides, and the land tax of later times."

(Showing that the Feudal Abuses in England after Magna Charta and in Spite Thereof were Such that They Required the Sword of a Cromwell to Destroy. Pp. 267, 268, 269, *ibid.*)).

"For the present I have only to observe that by the degener-

ating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia, composed of barons, knights, and gentlemen, bound by their interest, their honour and their oaths, to defend their King and country, the whole of this system of tenures now tended to nothing else but a wretched means of rasing money to pay an army of occasional mercenaries. In the meantime, the families of all our nobility and gentry groaned under the intolerable burthens which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which, however, were assesed by themselves in Parliament, they might be called upon by the King or lord paramount for aids, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance by way of relief and primer seizin; and if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith very feelingly complains, 'When he came to his own, after he was out of wardship, his woods decayed, house fallen down, stock wasted and gone, lands let forth and ploughed to be barren;' to reduce him still farther, he was yet to pay half a-year's profits as a fine for suing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this the untimely and expensive honour of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his partrimony, he had not even

that poor privilege allowed him without paying an exorbitant fine for a license of alienation.

"A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of Parliament, which assuaged some temporary grievances. Till at length the humanity of King James the First consented, in consideration of a proper equivalent, to abolish them all; though the plan proceeded not to effect. At length the military tenures, with all their heavy appendages (having during the usurpation been discontinued) were destroyed at one blow by the Statute 12 Car. II., c. 24, which enacts 'that the Court of wards and liveries, and all wardships, liveries, primer seizins, and ousterlemains, values, and forfeitures of marriage, by reason of any tenure of the King or others, be totally taken away. And that all fines for alienation, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter of knighting the son, and all tenures of the King *in capite*, be likewise taken away. And that all sorts of tenures, held by the King or others, be turned into free and common socage; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty.' A statute which was a greater acquisition to the civil property of this kingdom than even Magna Charta itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the Statute of King Charles extirpated the whole, and demolished both root and branches."

BLACKSTONE ON THE ORIGIN OF *THE ABSOLUTE RIGHTS OF INDIVIDUALS.**

"Both these undertakings of King Edgar and Edward the Confessor seem to have been no more than a new edition, or

*Chase's Blackstone.

fresh promulgation, of Alfred's Code or Dome Book, with such editions and improvements as the experience of a century and a half had suggested; for Alfred is generally styled by the same historians the *legum Anglicanarum conditor,* as Edward the Confessor is the *restitutor.* These, however, are the laws which our histories so often mention under the name of the laws of Edward the Confessor, which our ancestors struggled so hard to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws that so vigorously withstood the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the States of the continent; States that have lost, and perhaps upon that account, their political liberties; while the free consitution of England perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which give rise and origin to that collection of maxims and customs which is now known by the name of the common law, a name either given to it in contradistinction to other laws, as the statute law, the Civil law, the law merchant, and the like; or more probably, as a law common to all the realm, the *jus commune,* or folcright."

"But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach; nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase time whereof the memory of man runneth not the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs

which compose the common law or *lex non scripta* of this kingdom." (Pp. 32, 33, *ibid.*)

"Our laws," saith Lord Bacon, "are mixed as our language; and as our language is so much the richer the laws are the more complete." P. 31. ["The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature." (Kent's Comm. I., p. 471), p. 33, *ibid.*—Note by Editor.] *"For it is an established rule to abide by former precedents, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason, much more if it be clearly contrary to the Divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust it is declared, not that such a sentence was *bad law*, but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined."

"And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us that the law is the perfection of reason, that it always intends to conform thereto, and that "what is not reason

*Chase's Blackstone.

is not law," pp. 35-36.. "And thus much for the first ground and chief corner-stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the Courts of Justice, which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law," page 39.

"The second branch of the unwritten laws of England are particular customs or laws," page 40.

"When a custom is actually proved to exist the next inquiry is into the legality of it; for, if it is not a good custom, it ought to be no longer used, *'malus usus abolendus est'* is an established maxim of the law," page 43. [Note by Editor.—"But a custom - - - must be reasonable. - - - If it is unreasonable, evidence of it will be rejected. Thus in a case where there was a sale of sheep, and the seller before delivery sheared them and kept the wool, it was held incompetent to prove that by a local custom in the county where the transaction took place the wool of sheep in such cases does not go to the purchaser," (*Grant* vs. *Gile,* 51 N. Y. 431.) Page 43.]

"Customs must be reasonable; or, rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good, and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his is unreasonable, and therefore bad, for peradventure the landlord will never put in his, and then the tenants will lose all their profits."

"Customs ought to be certain. A custom that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain and therefore good," page 44. "Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever," pages 51, 52.

"By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. - - - - For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature," page 63.

"Hence it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals.

Such rights as are social and relative result from, and are posterior to, the formation of states and societies, so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind."

"Let us, therefore, proceed to examine how far all laws ought and how far the laws of England actually do, take notice of

these absolute rights, and provide for their lasting security," pages 63, 64. "Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty, so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."

"Hence we may collect that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: Whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society which alone can secure our independence. Thus the statute of King Edward IV., which forbade the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the Statute of King Charles II., which prescribes a thing seemingly as indifferent (a dress for the dead who are all ordered to be buried in woolen), is a law consistent with public liberty; for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive, but rather introductive of liberty; for, as Mr. Locke has well observed, where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government,

that system of laws, is alone calculated to maintain civil liberty which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint," page 64, page 65.

"The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties)" page 66, [are asserted,] "First by the great charter of liberties, which was obtained, sword in hand, from King John." .....

"Which charter contained very few new grants, but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *confirmatio cartarum*, whereby the great charter is directed to be allowed as the common law; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed, or counsel, act contrary thereto, or in any degree infringe," pages 66, 67. [Note by Editor.—Magna Charta contained a large variety of provisions calculated to redress numerous grievances, which at that time bore oppressively upon the people, but the provision which is of chief importance on constitutinal grounds is that which guaranteed the protection of life, liberty and property against arbitrary interference and spoliation, and secured the observance of due legal methods of procedure in proceedings against the citizen.

It is declared that "no freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any manner injured, nor will we proceed against him, nor send against him, unless by the lawful judgment of his peers, or by the law of the land." From this is derived the provision in the U. S. Constitution that "no person shall be deprived of life, liberty, or property, without due process of law."

Similar provisions have been embodied in the constitutions of the various States, page 66.]

Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two), from the first Edward to Henry the Fourth. Then after a long interval, by the *Petition of Right,* which was a Parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign," page 67.

[Note by Editor.—The *Petition of Right* was in the main a redeclaration and reassertion of rights and privileges already established and guaranteed, and contained also provisions for the redress of grievances which had grown up since the adoption of Magna Charta and the various confirmatory acts. - - - - The Petition provides, among other things, "that - - - - freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the King's special command, without any charge," page 67.] "Which (the Petition of Right) was closely followed by the still more ample concessions made by that unhappy prince to his Parliament before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the Second. To these succeeded the *Bill of Rights,* or declaration delivered by the lords and commons to the Prince and Princess of Orange, 13th of February, 1688; and afterwards enacted in Parliament when they became King and Queen, which declaration concludes in these remarkable words: "and they do claim, demand, and insist upon all and singular the premises as their undoubted rights and liberties," and the act of Parliament itself recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient, and indubitable rights of the people of this kingdom," page 67.

[Note by the Editor.—"The *Bill of Rights* is of much importance in the study of American constitutional history and jurisprudence, since a number of its provisions were copied

literally into the U. S. Constitution and have also been embodied in many of the State Constitutions," page 68.] "Lastly, these liberties were again asserted at the commencement of the present century, in the Act of Settlement, whereby the Crown was limited to his present majesty's illustrious house; and some new provisions were added, at the same fortunate era, for better securing our religion, laws, and liberties; which the statute declares to be 'the birthright of the people of England,' according to the ancient doctrine of the common law," pages 67, 68.

"And these (the rights of individuals) may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and right of private property; - - - - the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

"I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation," page 68.

"And the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law." *"Nullus liber homo,"* says the great charter, *"aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terrae,"* which words, *"aliquo modo destruatur,"* according to Sir Edward Coke, includes a prohibition, not only of killing and maiming, but also of torturing (to which our laws are strangers), and of every oppression by colour of an illegal authority. And it is enacted by the Statute 5 Edw. III. c. 9, that no man shall be forejudged of life or limb contrary to the Great Charter and the law of the land. And again by Statute 28 Edw. III. c. 3, that no man shall be put to death without being brought to answer by due process of law." page 73.

II. "Next to personal security, the law of England regards

asserts, and preserves the personal liberty of individuals - - - - concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. - - - By the Petition of Right, 3 Car. I. it is enacted that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law," pp. 73 and 74.

"And lest this act (the *habeas corpus* act) should be evaded be demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by I. W. and M. st. 2. e. 2., that excessive bail ought not to be required," page 75.

[Note by Editor.—"In the constitutional law both of England and the United States, the phrases, 'law of the land' and 'due process of law,' are deemed to have the same signification and are employed interchangeably. Mr. Webster gave the following definition in the Dartmouth College case (4 Wheaton, 519): 'By the law of the land is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' The meaning is that every citizen shall hold his life, liberty, and property under the protection of general rules which govern society," page 74.]

"Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest magistrate to imprison arbitrarily whomever he or his officers thought proper - - - there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the Commonwealth than such as are made upon the personal liberty of the subject.

"To bereave a man of life, or by violence to confiscate his

estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person by secretly hurrying him to goal where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government," page 75.

III. "The third absolute right, inherent in every Englishman, is that of property which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

"The laws of England are therefore in point of honour and justice extremely watchful in ascertaining and protecting this right. Upon this principle the Great Charter has declared that no freeman shall be disseized, or divested of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land, and by a variety of ancient statutes it is enacted that no man's lands or goods shall be seized into the King's hands against the Great Charter and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed and holden for none."

"In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides the public good is in nothing more essentially interested than in the protection of every individual's private rights as modelled by the municipal law," page 78.

"Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject in England can be constrained to pay any aids or taxes - - - but such as are

imposed by his own consent, or that of his representatives in Parliament," pages 79, 80.

"But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has, therefore, established certain other auxiliary subordinate rights of the subject which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property," page 81.

"In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen; liberties more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank and property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsory tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of Parliament be supported in its full vigour; and limits certainly known be set to the royal prerogative. And lastly, to vindicate these rights when actually violated or attacked, the subjects of England are entitled in the first place, to the regular administration and free course of justice in the Courts of law; next, to the right of petitioning the King and Parliament for redress of grievances; and lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire," page 84.

BLACKSTONE ON THE ORIGIN OF TRIAL BY JURY.

"The subject of our next inquiries will be the nature and method of the trial by jury, called also the trial *per pais,* or by the country; a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof. Some authors have endeavored to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is that they were in use among the earliest Saxon colonies, their institution being ascribed by Bishop Nicholson to Woden himself, their great legislator and captain. Hence it is that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, *'boni homines,'* usually the vassals or tenants of the lord, being the equals or peers of the parties litigant; and, as the lord's vassals judged each other in the lord's courts, so the king's vassals, or the lords themselves, judged each other in the king's court. In England we find actual mention of them so early as the laws of King Ethelred, and that not as a new invention, Stiernhook ascribes the invention of the jury, which in the Teutonic language is denominated *nembda,* to Regner, King of Sweden and Denmark, who was contemporary with our King Egbert. Just as we are apt to impute the invention of this, and some other pieces of juridicial polity, to the superior genius of Alfred the Great; to whom, on account of his having done much, it is usual to attribute everything; and as the tradition of ancient Greece placed to the account of their own Hercules whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be that this tribunal was universally established among all the Northern nations, and so interwoven in their very constitution that the earliest accounts of the one give us also some traces of the other.

"Its (the trial by jury) establishment, however, and use in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In Magna Charta it is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29, that no freeman shall be hurt in either his person or property; '*nisi per legale judicium perium suorum vel per legem terrae.*' A privilege which is couched in almost the same words with that of the Emperor Conrad, two hundred years before: "*Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium perium suorum.*' And it was ever esteemed in all countries a privilege of the highest and most beneficial nature," pages 786, 787.

"The trial by jury, or the country, *per patriam,* is also that trial by the peers of every Englishman, which as the grand bulwark of his liberties, is secured to him by the great charter: '*Nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo modo destruatur, nisi per legale judicium parium suorum, vel per legem terrae,*'" page 1023.

"In a former part of these Commentaries we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law.

"A doctrine coeval with the first rudiments of the English Constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman Conquest, asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of Magna Charta

and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful," page 689.

DIGEST OF BLACKSTONE ON THE ABSOLUTE RIGHTS OF INDIVIDUALS.

"The goodness of a custom depends upon its having been used time out of mind, or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority, and of this nature are maxims and customs which compose the common law or *lex non scripta* of this kingdom." Blackstone, *supra.*

"It is an established rule to abide by former precedents * * * Yet this rule admits of exception, where the former determination is most evidently contrary to reason, much more if it is clearly contrary to the Divine law. * * * And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law." Blackstone, *supra,* p. 2. "When a custom is actually proved to exist, the next inquiry is into the legality of it; for, if it is not a good custom, it ought to be no longer used; '*malus usus abolendus est*' is an established maxim of the law. *Ibid.* But a custom * * * must be reasonable. * * * If it is unreasonable, evidence of it will be rejected." *Ibid.* "Customs ought to be certain." *Ibid.* The common, if not universal custom nowadays of committing an alleged lunatic or incompetent without the interven-

tion of a jury, for an uncertain period, is, therefore, an uncertain custom, and *ipso facto,* should be abolished.

"By the absolute rights of individuals we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. * * * For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature. Hence it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies, so that to maintain and regulate these is clearly a subsequent consideration. And, therefore, the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple. And then such rights as are relative, which arising from a variety of connections, will be far more numerous and complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality, they are not, than the rights of the former kind." *Ibid.*

"The absolute rights of every Englishman, (which, taken in a political and extensive sense) are usually called their liberties" [are asserted,] "First, by the Great Charter of liberties, which was obtained sword in hand from King John" * * * [Note by Editor.—The provision (of Magna Charter) which is of chief importance on constitutional grounds, is that which guaranteed the protection of life, liberty, and property against arbitrary interference and spoliation, and secured the observance of due legal methods of procedure in proceedings against the citizen. It is declared that "No freeman shall be taken, or imprisoned, desseized, or outlawed, or exiled, or in any manner injured, nor will we proceed against him, nor send against him, unless by the lawful judgment of his peers or by the law of the

land." From this is derived the provision in the U. S. Constitution that "No person shall be deprived of life, liberty, or property, without due process of law. Similar provisions have been embodied in the constitutions of the various States."] "Which Charter (Magna Charta) contained very few new grants but, as Sir Edward Coke observes, was for the most part declaritory of the principal grounds of the fundamental laws of England. Afterwards, by the statute called *confirmatio cartarum*, whereby the Great Charter is directed to be allowed as the common law."

. . . . . .

"Next by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two) from the First Edward to Henry the Fourth. Then, after a long interval, by the *Petition of Rights* which was a Parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign." *Ibid.* [Note by Editor. —"The *Petition of Right* was, in the main, a redeclaration and reassertion of rights and privileges already established and guaranteed, and contained also provisions for the redress of grievances which had grown up since the adoption of Magna Charter, and the various confirmatory acts. * * * The petition provides, among other things 'that * * * freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the King's special command, without any charge.'" * * * To these succeeded the *Bill of Rights*, or declaration delivered by the lords and commons to the Prince and Princess of Orange, 13th of February, 1688; and afterwards enacted in Parliament when they became King and Queen; * * * and the Act of Parliament itself recognizes 'all and singular the rights and liberties asserted and claimed in the said declaration to be the true, "'ancient and indubitable rights of the people of this kingdom.'" *Ibid.* * * * [Note by the Editor.—"The Bill of Rights is of much importance in the study of American constitutional history and jurisprudence, since a number of its pro-

visions were copied literally into the U. S. Constitution, and have also been embodied in many of the State constitutions."]

"Lastly, these liberties were again asserted at the commencement of the present century, in the Act of Settlement, whereby the Crown was limited to his present Majesty's illustrious house: and some new provisions were added, at the same fortunate era, for better securing our religion laws, and liberty; which the statute declares to be the 'birthright of the people of England,' according to the ancient doctrine of the common law." *Ibid.* * * *

"And these (the rights of individuals) may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property, * * * the preservation of these inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense." *Ibid.*

"*Nullus liber homo,*" says the Great Charter, "*aliquo modo destruatur nisi per legale judicium parium suorum aut per legem terrae.*" * * * And it is enacted by the Statute, 5 Edw. III, c. 9, that no man shall be forejudged of life or limb contrary to the Great Charter, and the law of the land. And again by Statute 28 Edw. III, c. 3, that no man shall be put to death, without being brought to answer by due process of law." * * *

"Next to personal security, the law of England regards, asserts, and preserves, the personal liberty of individuals. * * * By the Petition of Right, 3 Car. I., it is enacted that no freeman shall be imprisoned or detained without cause shown to which he may make answer according to law." *Ibid.*

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"Of great importance to the public is the preservation of this personal liberty. * * * Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magis-

trate, are less dangerous to the Commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny througout the whole kingdom; but confinement of the person by secretly hurrying him to gaol where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore, a more dangerous engine of arbitrary government."

"The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. * * * The laws of England are, therefore, in point of honor and justice extremely watchful in ascertaining and protecting this right. Upon this principle the Great Charter has declared that no freeman shall be desseized, or divested of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land, and by a variety of ancient statutes it is enacted that no man's lands or goods shall be seized into the King's hands against the Great Charter, and the law of the land, and that no man shall be disinherited, nor put out of his franchises of freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed and holden for none." *Ibid.*

"In these several articles consist the rights, or as they are frequently termed, the liberties of Englishmen: liberties more generally talked of, than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank and property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property." *Ibid.*

"Its" (the trial by jury) "establishment, however, and use in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In Magna Charta it is more than once insisted on as the principal bulwark of our liberties, but especially by chapter 29, that no freeman shall be hurt in either his person or property, '*nisi per legale judicium parium suorum, aut per legem terrae*' a privilege which is couched in almost the same words with that of Emperor Conrad, two hundred years before: "*Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum.*" And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature." *Ibid.*

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"In a former part of these Commentaries we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English Constitution and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and affirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of Magna Charta, and a long succession of statutes enact-

ed under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful." *Ibid.*

PREFACE

To "Hard Cash," by Charles Reade, D. C. L.

Boston:

Dana, Estes & Company,

Publishers.

"Hard Cash," like "The Cloister and the Hearth," is a matter-of-fact romance; that is, a fiction built on truths; and these truths have been gathered by long, severe, systematic labor from a multitude of volumes, pamphlets, journals, reports, blue-books, manuscript narratives, letters, and living people, whom I have sought out, examined, and cross-examined, to get at the truth on each main topic I have striven to handle.

The mad-house scenes have been picked out by certain disinterested gentlemen who keep private asylums, and periodicals to puff them; and have been met with bold denials of public facts and with timid personalities, and a little easy cant about Sensation* Novelists; but in reality those passages have been written on the same system as the nautical, legal, and other scenes; the best evidence has been ransacked; and a large portion of this evidence I shall be happy to show at my house to any brother writer who is disinterested, and really cares enough

*This slang term is not quite accurate as applied to me. Without sensation there can be no interest; but my plan is to mix a little character and a little philosophy with the sensational element.

for truth and humanity to walk or ride a mile in pursuit of them.

CHARLES READE.

6 Bolton Row, Mayfair, December 5, 1863.

CORRESPONDENCE ELICITED BY THE FIRST EDITION OF "HARD CASH."

Private Asylums.

To the Editor of the Daily News:

Sir,—When a writer of sensation romances makes a heroine push a superfluous husband into a well, or set a house on fire, in order to get rid of disagreeable testimony, we smile over the highly-seasoned dish, but do not think it necessary to apply the warning to ourselves, and for the future avoid sitting on the edge of a draw-well, or having any but fire-proof libraries. But when we read, as in the novel "Very Hard Cash," now publishing in "All the Year Round," *that any man may, at any moment, be consigned to a fate which to a sane man would be worse than death, and that not by the single act of any of our Lady Audleys, or other interesting criminals, but as part of a regular organized system, in all compliance with the laws of the land—when we read this a thrill of terror goes through the pubic mind. If what Mr. Charles Reade says be possible, who is safe?* Allow me, as one thoroughly conversant with the working of the law of lunacy, to reassure the minds of your readers by informing them that it is not possible. So many are the checks and securities with which the legislature has most properly surrounded the person of an alleged lunatic; so vigilant, patient, and so zealous in the discharge of their duties are the Commissioners

in Lunacy and the officially appointed visitors of the asylums that any one (not a sensation writer) imagining that these checks and securities could be evaded, these visitors hoodwinked in the way the author describes, would himself be a fit subject for a commission *de lunatico inquirendo*.

So far from commissioners and visitors being put off with any "formula" such as the author quotes, and believ-
page 3) ing anybody rather than the patient himself, the exact contrary is the fact, and very properly so. In my own case, Earl Nelson, Viscount Folkestone, General Buckley, M. P., the Rev. Charles Grove, and Mr. Martin Coats, and in other asylums magistrates of equal intelligence and high standing fill the office of visitors; and never in any case do they refuse a private interview to any patient asking it. In these interviews no interference of any doctors or attendants, or any "formula" is possible, and the visitors will listen even to the most incoherent ravings if there appears to be the slightest clew to be gathered from them to any real grievance. I say nothing of the terrible slander cast upon a body of professional men to which I am proud to belong. There is no redress for that. There are certain offences with which no court of law can deal; offences against decency, good taste, and truth, which can be brought before no tribunal but that of public opinion. I would only challenge Mr. Reade, in conclusion, if he has the slightest grounds for any belief in the possibility of the incidents he has put in print, to state those grounds. Let him quote his case, and openly and fearlessly declare when and where such atrocities occurred. I do not ask for one in all points resembling that which he has published; but one that furnishes even the slightest excuse for such a libellous attack upon those medical men who, like myself, practice in lunacy.

I am, etc., J. S. BUSHNAN, M. D.

Laverstock House Asylum, Salisbury.

page 4) PRIVATE ASYLUMS.

To the Editor of the Daily News

Sir:—My attention is drawn to a letter written to you by J. S. Bushnan, M. D., to vent a little natural irritation on the author of "Very Hard Cash," and lull the public back into the false security from which that work is calculated to rouse them.

I pass by his personalities in silence; but when he tells you, in the round-about style of his tribe, that "Very Hard Cash" rests on no basis of fact; that sane persons cannot possibly be incarcerated or detained under our Lunacy Acts; that the gentlemen who pay an asylum four flying visits a year know all that passes in it the odd three hundred and sixty-one days, and are never outwitted and humbugged on the spot; that no interference of doctors or attendants between visitor and patient, and no formulae of cant and deception are possible within the walls of a mad-house—this is to play too hard upon *the credulity of the public, and the forgetfulness of the press.* I beg to contradict all and every one of his general statements more courteously, I trust, than he has contradicted me, but quite as seriously and positively. Dr. Bushnan knows neither the subject he is writing of, nor the man he is writing at. In matters of lunacy I am not only a novelist; I am also that humble citizen who, not long ago, with the aid of the press, protected a sane man who had been falsely imprisoned in a private lunatic asylum; hindered his recapture, showed him his legal remedy, fed, clothed, and kept him for twelve months with the aid of one true-hearted friend, during all which time a great functionary, though, paid many thousands a year to do what I was doing at my own expense—justice—did all he could to defeat justice, and break the poor suitor's back and perpetuate his stigma by tyrannically post-

page 5) poning, and postponing, and postponing, and postponing his trial to please the defendant. At last this great procrastinator retired, and so that worst enemy of jus-

tice, "the postponement swindle," died, and by it's death *trial by jury rose again from the dead, even for an alleged lunatic.* Well, sir, no sooner did we get him before thirteen honest men in the light of day, than this youth—whom the mad doctors had declared and still declare insane, whom two homuncules, commissioners in lunacy, had twice visited in the asylum, and conversed with, and done nothing whatever towards his liberation —stood up eight hours in the witness-box, was examined, cross-examined, badgered; yet calm, self-possessed, and so manifestly sane that the defendant resigned the contest, and compounded the inevitable damages, giving us a verdict, the costs, fifty pounds cash, and an annuity of one hundred pounds a year.

All this, says Dr. Bushman is impossible.

I closely examined this youth as to his fellow-patients, and, as he could minutely describe the illusions of the insane ones, I find it hard to doubt his positive statement that two patients in that same house were perfectly sane.

Of course, the main event I have related made some noise; real and alleged lunatics heard there was a Quixotic ass in this island who would, in his unguarded moments, give away justice at his own expense instead of selling it for so many thousands a year and not delivering the article; and I was inundated with letters and petitions, and opened a vein of private research by which the readers of "Hard Cash" will profit; all except Dr. Bushman. A lady called on me and asked me to get her sister out of a private asylum, assuring me she was sane, and giving me proofs. *Having observed that to get out of an asylum you must first be out of it,* I cudgelled my brains, and split
page 6) this prisoner in half; I drew up a little document
authorizing a certain sharp attorney to proceed in law or equity for her relief; and sent her sister into the asylum to get it signed by the prisoner. She did sign it, and thus armed her other self, the attorney, being outside the asylum, was listened to, though a deaf ear had always been turned to her.

After a correspondence, which has served me as a model in the current number of "Hard Cash," *after, in vain, suggesting her discharge to the parties pecuniarily interested in detaining her,* the board actually plucked up courage and discharged her themselves. We all saw her often after this, and were hours in her company. She was perfectly sane, as sane as I am, and much saner than some of the mad doctors are at this hour, as time will show. This case opened another vein of research, and my detective staff was swelled by a respectable ex-attendant (female) who gave me the names of two or three sane ladies at that time in durance vilest to her knowledge. Three years after the supposed date of Alfred Hardie's impossible incarceration came the flagrant case of *Matthew* vs. *Harty,* some of whose delicious incidents have been used in "Hard Cash," and will be contradicted by humbugs, and condemned as improbable by gulls; at least I venture to hope so. The defendant was one of that immaculate class, to criticise some of whom, if I understand Dr. Bushman aright, is to libel the whole body; and the plaintiff was a distinguished young scholar in Dublin. Defendant enticed him into a mad-house, and there left him in a common flagged cell; but to amuse his irrational mind, lent him what? Peter Parley, or Dr. Littlewit's conjectures about the intellect of Hamlet? Oh, dear! no; "Stack's Optics," "Lloyd's Mechanical Philosophy," "Brinkley's Astronomy," "Cicero de Officiis," and "Stock's Lucian."

page 7) *Enter the official inspector; is appealed to, admits his sanity, promises to liberate him, and with that promise dismisses the matter from his official mind, and goes* his way contented. This was sworn to afterwards and not contradicted. Then comes Dr. Harty and urges him to confession in these memorable words, sworn to, and not contradicted: "Your safety will consist in acknowledging you are insane, and your sanity will appear by admitting your insanity." Matthew saw the hook, and declined the bait. Now there was in this

asylum a boy called Hoolahan, whose young mind had not been poisoned, and whose naked eye was as yet undimmed by the spectacles of cant and prejudice. So he saw at a glance Matthew was sane, and, not being *paid* a thousand a year to pity him, pitied him.

Hoolahan took a letter to Matthew's college chum. In that letter Matthew poured out his wrongs and his distress. But suppose it should be *intercepted*? Matthew *provided* against this contingency; he couched his letter in Ciceronian Latin, humbly conceiving that this language would puzzle the doctors as much as the Latin in their prescriptions would puzzle Cicero. Mr. Hall got the letter, and not being paid to protect alleged lunatics, took the matter up in earnest, and so frightened Dr. Hardy that he discharged Matthew at once; and said, "Now, don't you be induced to bother me about this trifle; I'm an old man, and going to die almost immediately." On this Matthew took the alarm, and served a writ on him without loss of time. The cause came on, and was urged and defended with equal forensic ability. But evidence decides cases, and the plaintiff's evidence was overpowering. Then the defendant, despairing of a verdict bethought him how he might lower the inevitable damages; he instructed his counsel to reveal that "the young man who was
| now prosecuting him to death was his own illegitimate
page 8) son."

| At this revelation, ably and feelingly introduced by Counsellor Martly, the sensation was, of course, immense, and, being in Ireland, a gallery came down just then and the *coup de theatre* was perfect. Many tears were shed; the public was moved; the plantiff still more so. For it is not often that a man, who has passed for an orphan all his life, can plant a writ and reap a parent. "Japhet in Search of a Father" should have wandered about serving writs. The jury either saw that the relationship was irrelevant in a question so broad and civic, or else they were fathers of another stamp, and disapproved of

tender parents who disown their offspring for twenty-four years, and then lock them up for mad, and only claim kindred in court to mitigate damages. At all events they found for Mr. Matthew with damages one thousand pounds.

All this, says Dr. Bushman, was utterly impossible. Well, the impossibility in question disguised itself as fact, and went through the hollow form of taking place, upon the 11th, 12h, and 13th December, 1851, and the myth is recorded in the journals, and the authorized report by Elrington, jun., and W. P. Carr, barrister at law, is published in what may be an air bubble, but looks like a pamphlet by M'Glashan, 50 Upper Sackville street, Dublin. But I rely mainly on the private cases, which a large correspondence with strangers, and searching inquiry amongst my acquaintances, have revealed to me; unfortunately these are nearly always accompanied with a stipulation of secrecy; so terrible, so ineradicable is the stigma. *"Hall vs. Semple"* clearly adds its mite of proof that certificates of insanity are still given recklessly; but to show you how strong I am, I do not rely at all on disputable cases like Nottidge, Ruck, and Leech; though in the two latter of these cases the press leaned strongly against the insanity of the prisoners, and surely the press is less open to prejudice in this matter than Dr. Bushman is, who dates his confident conjectures from a mad-house. It seems I have related in "Hard Cash" that in one asylum (not Dr. Wycherley's), when Alfred Hardy went to complain to a visitor, a keeper interfered and said, "Take care, sir, he is dangerous."

And this I then and there call a formula, one out of many. "Dreamer," says Dr. Bushman, "there are no such things as formulae in madhouses; and no interference between patient and inspector is possible, for there are none in my asylum, and therefore there can be none in any other." Oh, logic of psychologicals!

Mr. Drummond, in a debate on lunacy, testified as follows:

"Now the honorable gentleman had remarked that it was very easy for persons in these establishments who had a complaint to make to make it. Was it really so? (Hear, hear.) He thought otherwise. He could only say that, whenever he had visited an asylum and went up to a lunatic who had stated that he had a ground of complaint, some keeper immediately evinced an unusual interest in his personal welfare, and cautioned him, saying, 'Take care, sir; he is a very dangerous man.' (Hear.) The length of this letter, which, after all, but skims the matter, arises out of the importance of the subject, and the nature of all argument based on evidence. It takes but a few lines to make many bold assertions, and to challenge Mr. Reade to prove them false. But the Readian proofs cannot be so compressed. *"Plus negabit in una hora unus doctor, quam centum docti in centum annis probaverint."*

I conclude by begging you to find space for the following extract from a respectable journal. I have many such extracts in my London house; this one is a fair representative of the press, and of its convictions and expressions at the time when it issued: Extract—"Here are two cases (Mrs. Turner and Mr. Leech): We have before us the particulars of a third, but we are not, unfortunately, in a condition to publish the names. Suffice it to say that an unfortunate gentleman who had been suffering from bodily disorder, which finally affected his brain, but who was not mad, was incarcerated in one of those horrid dens which are called private lunatic asylums, and there confined for months. By his own account he was treated with the greatest cruelty, strapped down to a bed with broad bands of webbing, and kept there until it was supposed he was dying. The result we will state in the sufferer's own words: "My back, from lying in one constrained posture, was a mass of ulcerated and sloughing sores; my right hand was swollen enormously, and useless; and two fingers of the left hand were permanently contracted, and the joints destroyed. I also lost several front

teeth." This poor man at last obtained his liberty, and applied to the commissioners for redress. Their letter in reply is now before us. The commissioners merely say that, although they do not in any degree impugn the integrity of the complainant's statements, they are not of the opinion that inquiry would answer any good purpose. They add, however, that, "in order to mark their opinion on the subject they have granted Mr. .... a license provisionally for the limited period of four months only, and that the renewal will depend upon the condition and management of his establishment being entirely satisfactory in the meantime." (As if any great criminal would not undertake to behave better or more cautiously if, after detecting him by a miracle, we were weak enough to bribe him to more skillful hypocricy by the promise of impunity.) Poor consolation this for all the misery the wretched sufferer had undergone. Here then, are three cases following one upon the other in rapid succession. How many remain behind of which we know nothing?

(page 11) *The fact would appear to be that under existing arrangements any English man or woman may, without much difficulty, be incarcerated in a private lunatic asylum when not deprived of reason. If actually deprived of reason when first confined, patients may be retained in duress when their cure is perfected, and they ought to be released.*

I am, etc.,

THE AUTHOR OF "VERY HARD CASH."

Magdalen College, Oxford, October 23, 1863.

To this letter I hear Dr. Bushman has replied *down in the country* By this, and by his not sending me a copy, may I not infer he prefers having it all his own way in the neighborhood of his asylum to encountering me again before the nation?

The extract above quoted is, I believe, from the Times, and

was accompanied by an admirable letter of three columns, thus entitled:

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LUNATIC ASYLUMS AND THE LUNACY LAW.

(By a Physician.)

This honest inquirers should read, and also the newspaper reports of false imprisonment and cruelty, during the last twelve years, and the contemporaneous comments of the press, before deciding to overrate my imaginative powers, and underrate my sincerity, and my patient, laborious industry.

In January, 1870, the editor of the *Pall Mall Gazette* drew attention to the fact that several lunatics had died of broken ribs in various asylums, and that the attendants had furnished no credible solution of the mystery. This elicited the following letter from the author of "Hard Cash:"

HOW LUNATICS' RIBS GET BROKEN.

To the Editor of the Pall Mall Gazette:

Sir,—The Pall Mall Gazette, January 15, deals with an im-
| portant question, "the treatment of lunatics," and in-
page 12) quires, *inter alia*, how Santa Nistri came to have his
| breastbone and eight ribs fractured at Hanwell; and how other patients have died at the same place of similar injuries; and how William Wilson came to have twelve ribs broken the other day at the Lancaster County Asylum. The question is grave; the more so, that, by every principle of statistics, scores of ribs must be broken, one or two at a time, and nobody the wiser, under a system which rises periodically to such high figures of pulverization, and so lets in the faint light of an occasional inquest, conducted by credulity in a very atmosphere of mendacity. I have precise information, applicable to these recent cases, but not derived from them, and ask leave to relate the steps by which the truth came to me.

On the 2d of January, 1851, Barnes, a lunatic died at Peckham House, with an arm and four ribs broken. The people of the asylum stuck manfully together, and agreed to know nothing about it; and justice would have been baffled entirely, but for Donnelly, an insane patient—he revealed that Hill, a keeper, had broken the man's bones. Hill was tried at the Central Criminal Court, and convicted of manslaughter on Donnelly's sole evidence, the people of the asylum maintaining an obdurate silence to the end. About 1858, I think, a lunatic patient died suddenly, with his breast-bone and eight ribs broken, which figures please compare with Santa Nistri's. As it had taken a keeper to break the five bones of Barnes, nobody believed that accident had broken the nine bones of Secker; that, I think, was the victim's name; but this time the people of the asylum had it all their own way; they stuck manfully together, stifled truth, and baffled justice. (See the Ninth Report of the Commissioners in Lunacy, p. 25.) Late in July, 1858, there was a ball at Conley Hatch. The press were invited, and came back singing the praises of that blessed retreat. What
page 13) order! What gayety! What non-restraint!

O fortunatos nimium sua si bona norint lunaticos.

Next week or so Owen Swift, one of the patients in that blest retreat, died of the following injuries: breast-bone and eleven ribs broken, liver ruptured. Varney, a patient—whose evidence reads like that of a very clear-headed gentleman, if you compare it with the doctor's that follows it—deposed to this effect: Thursday, at dinner time, Swift was in good health and spirits, and more voluble than Slater, one of the keepers approved. Slater said, "Hold your noise." Swift babbled on. Slater threw the poor man down, and dragged him into the padded room, which room then resounded for several minutes with "a great noise of knocking and bumping about" and with the sufferer's cries of agony till these last were choked, and there was silence. Swift was not seen again till Saturday morning; and

then, in presence of Varney, he accused Slater to his face of having maltreated him, and made his words good by dying that night or the very next morning. This evidence was borne out by the state of the body (fractured sternum, and eleven fractured ribs), and not rebutted by any direct, or, indeed, rational testimony. Yet the accused was set free. But the press and the country took this decision ill. A Middlesex magistrate wrote to the *Times*, August 21, 1860, to remonstrate, and drew attention to a previous idiotic verdict in a similar case. And whereas the medical man of the establishment had assisted to clear the homicide by his own ignorance of how bones can be broken wholesale without proportionate bruises or flesh wounds, a correspondent of the *Daily Telegraph* enlightened his professional ignorance on that head, and gave the public the only adequate solution of Owen Swift's death, which had been either spoken or written up that day.

page 14) That one adequate solution was the true one. *Daily Telegraph*, August 9, 1862. Time, 1860. Place, Hanwell. Matthew Geoghegan, a patient, refused to go to bed. Jones, a keeper, threw him down, and kicked him several times; then got a stick and beat him; then got a fire-shovel and beat him; then jumped on his body; then walked up and down his body; of which various injuries the man died, not immediately, but yet so speedily that the cuts and bruises were still there to show what had killed him. Bone, a bricklayer, and eye-witness of the homicide, swore to the above facts. Linch, Bone's laborer, another eye-witness, swore to the same facts. The resident engineer swore that Bone and Linch were both true men.

Dr. Jephson had found the man with bruises, one of which, on his abdomen, had been caused by the heel of a boot. *Per contra*, a doctor was found to swear as follows: "I swear that I *think* he died of pleuro-pneumonia. I swear that *I don't know* whether his external injuries contributed to his death." And upon this, though no pleuro-pneumonia could be shown in the mu-

tilated body, though Bone and Linch, disinterested witnesses, deposed to plain facts, and the doctor merely delivered a wild and improbable conjecture, and then swore to his own ignorance on the point in doubt, if doubt there could be; yet this jury, with their eyes to confirm what their ears heard sworn, and their ears to confirm what their eyes saw written on the mangled corpse, actually delivered the following verdict:

"Deceased died after receiving certain injuries from external violence; but whether the death was occasioned by natural causes, or by such violence, there was not sufficient evidence to show." They then relieved their consciences in the drollest way. They turned round on Bone and Linch, and reprimanded them severely for not having interfered to prevent the cruelty, which they themselves were shielding in the present and fos-
(page 15)
tering in the future by as *direct a lie as ever twelve honest men delivered.* Suppose the bricklayer and his man had replied, "Why, look ye, gentlemen; we came into the madhouse to lay bricks, not to do justice. But you came into the madhouse to do justice. We should have lost our bread if we had interfered; but you could have afforded to play the men —and didn't." I enclose herewith the evidence of the bricklayers, and the sworn conjectures of the doctor, *in re Geoghegan;* also the evidence of the doctor, and of the comparatively clear-headed lunatic *in re Swift.* About this time my researches into the abuses of private *asyla* (which abuses are quite distinct from the subject in hand) brought me into contact with multifarious facts, and with a higher class of evidence than the official inquirers permit themselves to hear. They rely too much on medical attendants and other servants of an asylum, whose interest it is to veil ugly truths and sprinkle hells with rose-water. I, on the contrary, examined a number of ex-patients who had never been too mad to observe, and ex-attendants, male and female, who had gone into other lines of life, and could now afford to reveal the secrets of those dark places. The ex-

keepers were all agreed in this—that the keepers know how to break a patient's bones without bruising the skin; and that the doctors have been duped again and again by them. To put it in my own words, the bent knees, big bluntish bones, and clothed, can be applied with terrible force, yet not leave their mark upon the skin of the victim. The refractory patient is thrown down and the keeper walks up and down him on his knees, and even jumps on his body, knees downwards, until he is completely cowed. Should a bone or two be broken in this process, it does not much matter to the keeper; a lunatic complaining of internal injury is not listened to. He is a being so full of illusions that nobody believes in any unseen injury he prates about.

page 16) In these words, sir, you have the key to the death of Barnes, of Secker, if that was the man's name, and of other victims recorded by the commissioners, of Nistri, and of William Wilson, at Lancaster.

I hope this last inquiry has not been weakly abandoned. It is a very shocking thing that both brute force and traditional cunning should be employed against persons of weak understanding, and that they should be so often massacred, so seldom avenged. Something might be done if the people of Lancashire would take the matter seriously. The first thing they should do is to inquire whether the keeper who killed a stunted imbecile by internal injuries in the Lancaster Asylum, May, 1863, is still in that asylum. See Public Opinion, November 19, 1863. The next step is to realize and act upon the two following maxims:

First, it is the sure sign of a fool to accept an inadequate solution of undeniable facts.

Secondly, to advance an inadequate solution of facts so indisputable as twelve broken ribs is a sign either of guilt or guilty connivance. Honest men in Lancashire should inquire who first put forward some stupid, impudent falsehood to account

for the twelve broken ribs of Wilson. The *first liar* was probably the homicide, or an accomplice. Just to prove the importance I attach to this inquiry, permit me, through your columns, to offer a reward of one hundred pounds to any person or persons who will give such evidence as may lead to the conviction of the person or persons who have killed William Wilson by kneeling on him, by walking knees downward upon him, and jumping knees downwards upon him. It is interest that closes men's mouths in these dark places. We must employ the same instrument to open them; it is our only chance.

I am, sir, yours very faithfully,

CHARLES READE.

2 Albert Terrace, Knightsbridge,
January 17, 1870.