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Confinement of the Insane

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CONFINEMENT OF THE INSANE.

The time is almost within the memory of living persons when it was deemed not only lawful but proper to confine persons afflicted with mental disease in dungeons and with chains, and to subject them to beating, at the discretion of their keepers, in order to subdue their senseless fury and drive away their delusions.² The notions of an ignorant and barbarous age justified such treatment, but the common law on the subject has been so much modified in the greater intelligence of the present century that opinions as to how much of the old rules remain must be expressed with some degree of hesitation. Moreover, new cases are constantly arising so peculiar as to convince us not only that much yet remains to be learned on the general subject of insanity, but also that it is difficult to prescribe, either judicially or by statute, the proper rules for the government, care, and custody of the unhappy persons who are afflicted with mental disorder.

We commonly find in this country that insane persons are cared for in one of the following ways:—

1. By friends in their own homes, or in families who consent to receive them for care and protection.
2. In private asylums, to which they are consigned by friends, who pay for the care and attention that is given them and provide for their various needs.
3. In public almshouses, to which they have been taken as paupers, and where they are detained only as a convenient method whereby the State may provide for their necessities, and discharge the obligation of the State to furnish them with food, clothing, and shelter.
4. In asylums established by the State, where they will

² 2 Roll. Abr. 546; Lofft, 243.

receive such medical care and attention as is calculated to restore to health the curable cases, and where the incurable can be made as comfortable as the nature of the case will permit.

In whichever of these methods the insane are provided for, the confinement will have in view one, or all of the following objects: Medical treatment of the person, with a view to restoration to health; provision for his comfort and physical welfare; protection of the public against dangerous manifestations of his disease. Of confinement in the common almshouses or poor-houses of the country, we need only remark that it is a barbarous method of treating this unfortunate class of people, for the reason that it places them in charge of persons not selected for any fitness to deal properly with them, and who will commonly be incapable of judging of any but mere physical needs. It makes no proper provision for treatment with a view to possible restoration to health, and is likely to subject insane persons to abuses from rough keepers, who will impute to evil passions the conduct attributable to mental disease. Happily this imperfect and cruel method of discharging a public duty is rapidly giving way to more wise and humane treatment in public asylums.

When the going at large of an insane person is dangerous to others, it is agreed on all hands that any person may arrest him and place him under restraint.¹ The right to do this is the same as the right to arrest persons actually engaged in committing crimes of violence, and the restraint is an act of self-defence by society through one of its members. But such an arrest is a mere temporary expedient; the party making it judges of the necessity at his peril, being liable for all mistakes, and he must continue the restraint without legal process only until more regular proceedings can be taken. As was said by Chief Justice Shaw in one case, the necessity which creates the law that justifies

¹ *Colby v. Jackson*, 12 N. H. 526; *Lott v. Sweet*, 33 Mich. 308; *Williams v. Williams*, 4 Thomp. & C. 251; *Scott v. Wakem*, 3 Fost. & Fin. 328; *Symm v. Frazer*, 3 Fost. & Fin. 859. See *Rex v. Gourlay*, 7 Barn. & Cress. 669.

him creates also the limitations of the law;¹ and in contemplation of law no restraint by mere private authority can be deemed necessary after opportunity has been afforded for judicial proceedings.² Strangers have no right whatever to arrest and confine a person whose going at large is not dangerous to others, unless they have the authority of judicial process.

The right of friends to put an insane person under restraint is the same with the right to treat any sick person who is incapable of acting for himself, with a view to his restoration to health, with the superadded right of self-defence. The difficulties in such cases arise mainly from the uncertainties which often attend the question of actual mental unsoundness, and the conflicting claims of friends to the custody of the person, or to determine what that custody and the accompanying treatment shall be.

In a considerable proportion of cases of alleged mental aberration there is controversy respecting the fact. The supposed insane person will dispute it,—sometimes with no little vigor and shrewdness; friends may disagree respecting it, and the general public—who will in most cases know little on the subject—will be likely to have impressions of the party's real condition derived as much from the supposed motives of those who make the allegation as from any known facts. A husband supposed to be harsh and tyrannical, who undertakes to put his wife under restraint as an insane person, is likely to find her relatives and the general community instinctively arrayed against him, and the case is prejudged upon prejudices. Indeed, when the most regular investigations are entered upon, the question of mental unsoundness is surrounded by so many difficulties that the most conscientious and intelligent experts are sometimes found unwilling to express positive opinions; and when they express them, any two may draw different conclusions from the same facts, according as they occupy

¹ *Matter of Oaks*, 8 Law Rep. 122; *The Commonwealth v. Kirkbride*, 2 Brews. 586.

² *Colby v. Jackson*, 12 N. H. 526.

different stand-points in respect to the surroundings. Neither legal nor medical science has any definite test whereby to judge of the existence of mental disease; and the law authorities are not agreed as to the persons who, as witnesses, may express opinions on the facts given in evidence. Some are of opinion that any one who has had opportunity to observe actions may testify as to the impression of the mental condition which these made upon him;¹ while others confine the testimony, as to opinions, exclusively to those authorized to speak as experts.² But the question who are experts, is almost as difficult as any other, and is likely in any case to complicate the legal problem. A medical practitioner may or may not have had the experience to render him expert in such cases; and it has sometimes been urged that clergymen, whose office makes it their duty to administer consolation to the sick and the dying, and to observe their mental condition, ought, after considerable experience, to be received as experts also;³ but this view is open to grave objections.

The question who, as a *friend*, is entitled to place a supposed *non compos* under restraint, is likely to come in controversy whenever the disease is denied; and also in other cases, where parties near in relationship may have conflicting,

¹ See the authorities to this effect collected by Doe, J., in *The State v. Pike*, 49 N. H. 399, 409. Also *Titlow v. Titlow*, 54 Pa. St. 216; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Pidcock v. Potter*, 68 Pa. St. 351; *Hathaway v. Life Ins. Co.*, 48 Vt. 335; *Beaubien v. Cicotte*, 12 Mich. 459; *The State v. Stickney*, 41 Iowa, 232; *Holcomb v. The State*, 41 Texas, 125; *Beller v. Jones*, 22 Ark. 92.

² *The Commonwealth v. Wilson*, 1 Gray, 337; *The Commonwealth v. Rich*, 14 Gray, 335; *The Commonwealth v. Fairbanks*, 2 Allen, 511; *Boardman v. Woodman*, 47 N. H. 120; *The State v. Pike*, 49 N. H. 399; *Wyman v. Gould*, 47 Me. 159; *Real v. The People*, 42 N. Y. 270. In New York the true rule is said to be that "a layman, when examined as to facts within his own knowledge bearing on the question of sanity, may be permitted to characterize the acts to which he testifies as rational or irrational. He may testify to the impression produced by what he witnessed, but he is not legally competent to express an opinion on the general question whether the mind of the individual be sound or unsound." *O'Brien v. The People*, 36 N. Y. 276, 282, following earlier cases.

³ In re *Toomes's Estate* (Sup. Ct. Cal.), 12 Ch. Leg. N. 374.

contingent, or presumptive interests in the property, or for other reasons might suspect each other's motives. Parents, no doubt, are the proper persons to take charge, as his friends, of an unmarried insane child, and their judgment of what his case demands should be entitled to the highest respect, and in most cases be conclusive. But parents, by their previous behavior to him, may have deprived themselves of all equity to this control, and others farther removed in kin may be nearer in kindness. But with the best and kindest motives, it may be found that their judgments cannot be harmonized. So children ought to decide for insane parents; but when they disagree, shall one be at liberty to release the parent as often as the other restrains him? The husband may, no doubt, judge for the wife, and the wife for the husband,¹ but the judgment cannot be conclusive; and the kindred of a wife whose husband should place her under restraint as a lunatic would have an undoubted right to bring his judgment to a judicial test, and in many cases would be inexcusable if they failed to do so. A power of final decision in either spouse would be so dangerous that grave abuses might be counted upon with certainty, and it might sometimes be found—as it has been heretofore—that the sane person was imprisoned, with the insane as keeper. Indeed, there is no class of cases so liable to the suspicion of improper motives, and of false and fabricated appearances, as those in which the allegation of insanity is made by husband or wife against the other, and none in which there is so often occasion for legal interference. But if the spouse by marital right may confine, and the father or mother by right of kin may release at discretion, the case would be left for decision to a species of mob law, and the party who could rally the largest and most reckless force would hold and control the unhappy person who was the subject of contention. Such a condition of things would be worthy of mediæval barbarism.

Common sense would seem to dictate that the mere fact of insanity should be no excuse for confinement, where the

¹ *Davis v. Merrill*, 47 N. H. 208; *Denny v. Tyler*, 3 Allen, 225.

authority is only that of kinship or affinity. The harmless lunatic whose peculiar vagaries threaten injury to the person or property of no one, it would seem, ought to be entitled to assert his right to liberty as against any one who would subject him to a restraint which neither the public protection nor his individual advantage required.¹ But restraint may always be made beneficial while there is a prospect of cure, and in any case the confinement of the most harmless *non compos* may be justified if it is had in an asylum specially designed for the comfort of such persons, and where their needs can be better provided for than in a private family. It has been said in one case that indefinite restraint for the purposes of medical treatment can only be made lawful by judicial proceedings;² but no court would interfere if the mental disease was proved, and if the patient was receiving treatment that seemed intelligent, judicious, and kind.³

It is a striking illustration of the uncertainties surrounding this general subject, that an officer in one of the leading States, whose duty requires him to have a general supervision of the treatment of insane and incompetent persons, and who has written much, and with large information and experience, on the subjects requiring his attention in his office, appears to hold the opinion that when once a person diseased in mind is confined by his friends in a private house, the State can exercise no supervision of the case, or in any manner interfere, until some overt act of wrongdoing is made out.⁴ The reason assigned is that the Constitution of

¹ See *Look v. Dean*, 108 Mass. 116.

² *Colby v. Jackson*, 12 N. H. 527.

³ *Denny v. Tyler*, 3 Allen, 225; *Davis v. Merrill*, 47 N. H. 208.

⁴ "Although it is against the danger of indefinite detention in custody, whether public or private, of an alleged lunatic that the law is most jealously watchful, it is nevertheless a fact that under the Constitution (Art. IV. of Amendments, guaranteeing protection to private houses against unreasonable searches) there is no legal method of testing the necessity for a continued detention of any alleged lunatic in the custody of his relatives, either in his own or in their private house. Until an act of overt wrong be alleged against them, no presumption of such arises from time alone. If the party has once been so insane as to justify restraint, we have at present no legal means of ascertaining whether his insanity still continues, or whether it has ceased and

the United States, in one of its amendments, guarantees the citizen against "unreasonable searches and seizures," and makes his house his castle. But this is a grave mistake. Waiving the facts that the provision in the Federal Constitution is designed as a security against Federal action only,¹ and that the Federal government has not been given authority for the protection of rights in the domestic relations,² it seems sufficient to say here that a "search" with a view to determine whether a sane person is wrongfully deprived of his liberty under the pretence of insanity, must be one of the most reasonable that can possibly be suggested, and that a State having an officer to whom the supervision of cases of insanity is committed, not only may provide, but ought to provide, as a regulation of police, that every such case shall be subject to his frequent inspection. No privacy is so sacred that the reasonable police regulations of the State may not inspect it; no "castle" is so impenetrable that its keeper may close its gates against the State when it demands entrance to inquire after one of its citizens confined therein without judicial process. No doubt legislation would be needful to impose on the officer the duty of examination, and upon the keeper the obligation of submission to it; but the power of legislation is ample, and without it the writ of *habeas corpus* may be sent into any dwelling, and it may be issued on the application of any friend who believes the restraint unwarranted,³ or even of a stranger.⁴ It is immaterial whether the confinement was unlawful in the beginning, or has only become so by a change of circumstances.

his custodians are now trespassers." Ordranax's *Judicial Aspects of Insanity*, 53. "Necessarily, therefore, no public supervision can now be exercised over lunatics in their own houses, or in those of a relative; for the law cannot intrude upon the privacy of domestic life, nor change its character, until some overt act of wrong has been committed. Const. U. S., Art. IV. of Amendments. It is under this indefeasible right that the privacy of every citizen's house is guaranteed against unlawful violation. It is in fact his castle." *Ibid.* 56.

¹ *Barron v. Baltimore*, 7 Pet. 243; *Twitchell v. The Commonwealth*, 7 Wall. 321; *Cooley's Const. Lim.* 19, and cases cited.

² *Barry v. Mercein*, 5 How. 103; *Ex parte Barry*, 2 How. 65.

³ *Cobbett's Case*, 15 Q. B. 181, note.

⁴ *Hottentot Venus Case*, 13 East, 195.

Even a private citizen who should assume that a sane person was thus unlawfully confined, and should forcibly break in for his release, would incur no greater responsibility than the custodian himself; for each would be justified if the facts were as he assumed them to be, and each would be a trespasser if they were otherwise. But the supervision of the State would not be confined to a determination of the question of sanity; it should extend to the whole treatment, and it should in many cases permit participation in supervision by other friends than the one in charge,—not merely as it might be for the benefit or comfort of the person confined, but for the quieting of any concern on their part respecting the nature of the care bestowed.

It is expected, however, that insane persons will commonly be secluded in asylums specially adapted to their needs, not only because this is most convenient for friends and most safe for the community, but also because curable cases can be best treated there, and incurable be made most comfortable. In foreign countries, asylums are not generally provided by the State, but are licensed, and certain precautions are established with a view to insure good faith and prevent abuse. The chief of these is that the certificate of one or more reputable physicians to the fact of insanity shall be furnished to the keeper when the person is delivered over. This certificate is based upon an examination of which the subject will commonly be ignorant, and his first knowledge that one has been made will be derived from the forcible possession taken of his person.

The idea that one's liberty can be certified away without his knowledge and without an opportunity to contest the grounds of the certificate, is naturally shocking to the mind, and the most satisfactory reasons of necessity ought to be required to reconcile one to it. But it is easy for the procedure under such a law to be worse than the law itself; and there is a widespread belief that in many cases the investigation is but a farce, and scarcely goes beyond inquiry of the person applying for the certificate,—the latter being in fact given by the physician without any personal knowledge

whatsoever of the facts attested. It may seem impossible that physicians entrusted with a duty so important should be so criminally confiding and so heedless of obligation; but the fact has sometimes been established on their own testimony when their conduct has been made the subject of judicial examination and the certificate has proved untrue in fact.¹ A person who from his youth has been familiar with the principles of the common law cannot fail instinctively to protest against such a system as being so vicious in principle that abuses are natural to and invited by it. To him the right to a judicial investigation seems a matter of course.

The professional training of physicians, however, inclines them to object to such investigations, as being unnecessary in most cases and likely to be highly injurious. A writer in one of the leading law journals of the country, some ten years ago, stated the reasons for this objection with more fulness and force than we find them elsewhere expressed, and we copy his language. After giving reasons against certain other tribunals, and supposing an intelligent commission appointed for the purpose of the investigation, he proceeds: "Any good which the procedure may possibly accomplish would be obtained at the sacrifice of many important objects,—for observe how it would work practically in a case of acute mania as it often appears. The patient is noisy, boisterous, and self-sufficient, bent on going out about his business, and threatening violence to all who endeavor to prevent it. He refuses proper food and medicine, perhaps insists on having stimulants, and requires the unremitting attention of two or three men. The house is in confusion, the family are frightened, attendants are obtained with difficulty, and every day reveals some fresh phase of the trouble. Endurance is possible no longer, and application is made to the commissioner. He appoints a day for hearing the case, and notice is given accordingly in the

¹ *Anderson v. Burrows*, 4 Car. & P. 210. This case holds the physician personally responsible in such a case. And see *Hall v. Semple*, 3 Fost. & Fin. 337.

public papers. Counsel appear for the patient and solicit more time for preparation. Of course the request must be granted, and another week or ten days of agony, care, and anxiety must be endured. At the trial, the affairs of the family are laid open to the public gaze,—the actions and the discourse of the patient are described in his presence by those who would, in the natural course of things, regard them as something they were bound by every sentiment of honor and propriety to conceal; and when at last the commissioner signs the order for his admission to the hospital, he goes with redoubled excitement, and with tenfold hostility to those who have never ceased to love and protect him. If the patient is really insane,—and such is admitted to be the fact in the great majority of cases,—what method could be better calculated to exasperate him to fury, and on recovery to overwhelm him with mortification and shame? In view of these objections, the writer declares that “it becomes a fair question whether we can do better than to retain the old method whereby the friends assumed the management of the case, acting according to their best judgment under the advice of friends and physicians, and legalize it by a statutory enactment.”¹

This is a vivid picture of an extreme case. We have already seen that the common law permits the friends to subject an insane person to restraint; but when they confine him, it is at their peril if the fact is not as they assume.² An enactment in aid of their common-law right might be desired, *first*, to prevent the interference of others; *second*, to render it compulsory that the keepers of asylums should receive the patient when brought there; *third*, to exempt all parties concerned from responsibility in case the alleged insanity should be disproved. To make it fully effectual, the judgment of friends upon the case should be made final. But to this there are objections on the score alike of expediency, justice, and constitutional right. Friends, as has already been said, may not always agree, either upon the

¹ Am. L. Rev., vol. 3, pp. 193, 213.

² Fletcher v. Fletcher, 1 El. & El. 420.

fact of insanity or upon the course that should be taken when its existence is conceded. Moreover, the persons who would decide are sometimes interested in making a false accusation for some dishonest end. This most often happens in the marital relation, but by no means exclusively; and when it does happen, leaving the decision to the party interested violates the first principles of common right and just government. The alternative, if there is to be no judicial investigation, must be statutory provision for some examination that shall be sufficient and at the same time avoid the evils so forcibly depicted as likely to attend a judicial inquiry.

These evils, shortly stated, are: *first*, that notice is publicly given; *second*, that the hearing is delayed for preparation to defend; *third*, that family matters and the conduct of the respondent are inquired into in public; *fourth*, that by these the party is excited; *fifth*, that in case of subsequent cure, the recollection of these overwhelms the party with mortification and shame. To avoid these, then, the statutory investigation must be, *first*, secret; *second*, without delay for defence; and *third*, without bringing out matters it might be supposed the respondent, if sane, would choose to conceal. But it would be ridiculous to call this an investigation. If the party is unquestionably insane, this may answer, because nothing more than mere form can then be needed; but assuming this is assuming the needlessness of any such enactment. An investigation supposes an inquiry into unknown facts, and assumes that there may be more than one side or aspect to the subject investigated; but if the proceeding is to be managed by one party only, and the party principally concerned is to be kept in ignorance of what is going on, it is worse than a misnomer to call it an investigation, for the result must be foredoomed in all cases which are not too plain for doubt. The officer investigating will see what the moving party desires him to see; and friends who may know of countervailing facts are likely to be kept in ignorance of the proceeding until the result is reached and the purpose executed. Apply similar proceed-

ings in other cases, and what wife would be secure in her rights whom the husband saw fit to divorce? what accused party would escape whom the State wished to convict, or be convicted when the government chose to shield him?

It is often complained that there is an unhealthy sentiment in the public mind on this subject, which has been created by writers of fiction, and which leads to our viewing the proceedings in these cases with unreasoning suspicion. To some extent this is true; but fiction would have done little to influence the public mind if it had not been felt that truth lay at the foundation. When, as the result of an inquiry which is as likely to be set on foot by malice or cupidity as by affection, an eccentric, nervous, and excitable person, who is perfectly sane notwithstanding his peculiarities, is seized without warning, dragged by force from his home, secluded from society in an asylum devoted by law exclusively to persons of disordered intellect, and there retained with the treatment of a madman, against his will, while he is smarting under a sense of outrage at the hands of those who should have shielded and cherished him, and is intensely concerned about property and business affairs, which without his consent have been taken from his hands and committed he knows not to what management, — perhaps to the person of all others he specially distrusts, — and while he feels confident that he might disprove the horrible charge under which he is confined, if he were allowed the fundamental right of defence which is conceded to the most petty offender, is there not a certainty that any excitement he before exhibited will be redoubled by his treatment? that any ill-will he before may have indulged for members of his family concerned in it will be increased many fold? that the treatment will have a direct and positive tendency to unsettle the mind? and that, finally, if he shall be fortunate enough to escape both insanity and the imprisonment, he will be “overwhelmed with mortification and shame” that those near to him in blood or affinity could be guilty of such unnatural and horrible cruelty? Now, such a case is not only possible, but it is one likely to occur when the

motive to bring it about is sufficiently powerful; and it is idle to expect that the care and caution of asylum-officers will constitute perfect protection against it, for they receive their patient with all presumptions and appearances against him, and will in most cases be slow in detecting the fraud, and never detect it if the outrage results in the condition of mind which it presupposes. Suppose the case be but one in a thousand; what right has the State to sacrifice thus, the rights, liberty, perhaps the mind itself, of the thousandth man for an assumed benefit to others? But the evils necessarily attending public examinations are enormously exaggerated; they are no doubt considerable in exceptional cases, but there are countervailing benefits even when insanity exists. When the patient retains his sense of right and wrong, the excitements of a trial conducted according to forms which he knows are established for effecting justice, before a tribunal which the community is accustomed to respect and obey, are likely to be far less violent and disturbing than a certificate from one who has condemned him unheard, and whose conclusion he fancies would have been different if he had been allowed the ordinary privileges which are accorded as of common right to every culprit.

It is certainly remarkable that so many, when insanity is in question, deem it reasonably safe to allow the judgment to be founded on a private inquisition managed by one side of the controversy only, and where family history, peculiarities, and controversies will be brought out only so far as the managers see fit to disclose them. These, in fact, are the important *res gestæ*, and to keep them from coming into controversy lest they may be mortifying, is to shut the eyes to facts that may be controlling. In many cases the mental condition can only be established by a series of facts and circumstances and acts and conduct extending over a considerable period of time;² and as a matter of common observation we know that in almost every case involving property rights or criminal conduct, experts draw different conclu-

² *Anderson v. The State*, 43 Conn. 514, 519.

sions from the state of facts presented by the respective parties to the controversy. For example, in a will case, the proponent presents his evidence, and then, stating his hypothesis, asks the expert whether, supposing it to be true, the decedent, in his opinion, was sane. The answer being favorable, the contestant presents the hypothesis his evidence tends to support, and asks the same question of the same witness, and is answered in the negative. The same expert, therefore, would find insanity or sanity according as he believed one story or the other to be true; and yet they may differ perhaps in particulars which a layman might overlook, and which even a fair examination, if *ex parte*, might not bring out at all. When, therefore, we assume that insanity is easily and readily discovered, with slight probability of error, we assume what the experience of experts, both legal and medical, is constantly disproving.

Reasons for a judicial investigation may be thus enumerated:—

1. Only thereby will the facts which tend to disprove insanity be brought to light in obscure and doubtful cases; and those are the very cases in which the danger of fearful and disastrous mistakes are likely to occur. And these mistakes, if they lead to insanity, may never be discovered even by conscientious and careful keepers, who will see their patients under the bias of an established charge, and will find in the very intensity of their sense of outrage some evidence of deranged intellect.

2. When an insane person retains his sense of justice and fair dealing, — as he usually does,¹ — the regular investigation is quite as apt to soothe as to excite him.

3. The public investigation is important for its effect upon the public mind. When a citizen is suddenly abducted and conveyed to a place of indefinite confinement, without any public investigation of cause, the public, unless prepared for it by previous knowledge, is likely to be startled, and to be reminded of horrible possibilities. Fair minds, unless the par-

¹ Ordonaux's Judicial Aspects of Insanity, Introd. xxxiv.

ties concerned have a well-known reputation for undoubted integrity, and are without conceivable motive for injustice in the particular case, are likely to feel strongly that such fearful consequences should only attend the fullest investigation by an impartial tribunal that hears all sides. The existence of distrust in such cases is a great public evil; for while it is important that there should be satisfaction with the law in all cases, it is especially so when it affects the cases of helpless persons.

4. Full and public inquiry is important to the protection of managers of asylums. We do not now have in view any legal responsibility which they may incur by reason of mistakes in receiving or detaining patients who are really sane, but to responsibility or suffering by reason of false accusations made by patients in respect to treatment in the asylum. Take for illustration a not uncommon case. A woman is dismissed as cured from one of our best-regulated asylums. She publishes, on her release, a most pathetic story of wrong, beginning with her incarceration while sane, at the instance of interested parties, and followed by brutal treatment while her seclusion continued. No doubt she believes the story, and she will have no difficulty in impressing the belief upon a considerable portion of the community. It will be in vain that the friends of the asylum call attention to the fact that the diseased imagination frequently pictures upon the mind atrocities that never occurred, and that the predisposition of the public to believe in their truth has come from the reading of sensational fiction; the fact of belief will remain, and it will cause all parties concerned much unhappiness, if not litigation and loss. A preliminary public examination before a competent tribunal would establish a *prima facie* case which such a story could not shake, and the officers of the asylum might rely upon it with confidence for their protection against unjust censure.

Our asylums for the insane are great public charities, and it is of the highest importance that they have the entire confidence of the public. Every thing that is reasonable should

be done to establish a conviction that they are places for the tender care of the unfortunate, and that they never become places of torment for the victims of malice, cupidity, or mistake. We cannot be too careful here; and if there exist unreasonable prejudices in the community, we cannot wisely or safely disregard them or set them at defiance. While they exist they will do mischief, and we can only overcome them by removing the causes from which they arise.

And here it may be well to refer to the fact that it is sometimes found that an impression prevails among those connected with the management of asylums that the person who has caused the seclusion of a patient has some special right of control to the exclusion of other friends. For example, in a State asylum to which a husband had caused his wife to be restrained, a parent called to see her recently, and was denied the privilege. Pressing for a reason, which at first was denied him, he discovered at last that it was because the husband had forbidden it. The asylum was one reputationably and conscientiously managed, but the keepers believed the husband had the power he assumed to exercise. In fact, every such patient is the ward of the State while in its charge, and the duty of the officers is to consult her interest exclusively, without being influenced by the wishes, feelings, and resentments which might prevail among her relatives.

We fully concede that in the statutes which provide for a judicial investigation little wisdom has generally been shown. The case is not a proper one for jury trial, and in the absence of statutes, would be disposed of in the Court of Chancery.¹

Nor is it a proper one to be left to an inferior magistrate, who from his education and opportunities may have acquired no fitness for such an inquiry. The hearing is one of the most important that any court can ever be required to enter upon, and it should be conducted by a tribunal specially created for the purpose, or by one of the superior courts. The question of guardianship has no necessary connection with it; the adjudication of insanity may well be required

¹ *Smith v. Carll*, 5 Johns. Ch. 118.

for the sole purpose of determining the need and advisability of restraint under the advantages which an asylum may offer.

5. A minor but not unimportant reason for a judicial determination is that the party removing the patient to an asylum will then have conclusive evidence of his right in writing and under official seal, and can exhibit it to those who demand it, and should exhibit it on demand. It is not impossible, under the practice generally prevailing, for a person who is perfectly sane to be seized and carried for considerable distances on public conveyances and finally removed therefrom on the pretence of taking him or her to an asylum, when the actual purpose is altogether different and perhaps criminal. The interference of others is prevented by assurances that the person is insane; and the more indignantly and vehemently this is denied, the more likely it is to be believed. There is a common belief that such cases of the abduction of women sometimes occur; and it is certain that insane persons are frequently taken by force to asylums, when the only evidence the public have of their condition is the word of those in charge of them. This proves how easily an outrage like the one suggested may be perpetrated.

That one is of right entitled to a trial before his insanity can be taken as conclusively established against him, is unquestionable. No certificate of a physician, however honestly given, can determine the fact, for the physician possesses no part of the State judicial power. His fiat cannot be "due process of law," to deprive any man of his liberty. Those who act upon it may use it as an item of evidence in making out good faith, but it cannot protect them if it proves mistaken and untrue, and no legislative power could make it protect them.² In England, a Parliament unfettered by con-

² It seems to have been once held in Pennsylvania, in a case in which relatives were sued for confining in an asylum an alleged lunatic, that if defendants "acted under such circumstances as would have induced a man of ordinary intelligence to have believed the plaintiff insane, and requiring medical treatment in a hospital, then the plaintiff cannot recover." *Hinchman v. Richie*, 2 Law Rep. (N. S.) 180, quoted in 47 N. H. 210; but no other authority countenances such a notion. Compare *Fletcher v. Fletcher*, 1 El. & El. 420; *Van Duesen v. Newcomer*, 40 Mich. 90, 142; *Look v. Dean*, 108 Mass. 116.

stitutional restraints may give protection to those concerned in the confinement of a sane person, in reliance upon such a paper, if it shall be deemed wise to do so;¹ but American legislatures exercise a delegated authority, and the power to legislate away the liberty of the citizen without the opportunity of a hearing has not been confided to them.² And it is proper to add that the approval of the physician's certificate by a court of record, which has sometimes been provided for by statute, is neither a hearing nor a substitute for a hearing. It may strengthen the presumption that the case is a proper one for restraint, but it cannot go further.³

The case of persons acquitted on criminal charges by reason of insanity, requires perhaps more thoughtful attention than it has hitherto received. The fact that the defence is often a fraud, but nevertheless successful, comes in to complicate the difficulty. Of course, if there was insanity at the time of the alleged offence, a verdict of acquittal does not prove that it still exists; but the verdict may nevertheless be *prima facie* evidence, sufficient to warrant confinement until an investigation under judicial forms can be had. But a party has a right to such an investigation, and the law that provides for the confinement should afford the means of obtaining it.⁴

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¹ Mackintosh *v.* Smith, 4 Macq. H. L. Cas. 913.

² Where, however, insanity in fact exists, the parties concerned in the arrest and detention will not be liable merely because of errors in attempting to comply with legal forms. Matter of Shuttleworth, 9 Q. B. 651.

³ See *Ex parte Jones*, 30 How. Pr. 446.

⁴ *Underwood v. The People*, 32 Mich. 1.