

# Determination of Insanity in Criminal Cases

Sam Parker

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

## Recommended Citation

Sam Parker, *Determination of Insanity in Criminal Cases*, 26 Cornell L. Rev. 375 (1940)  
Available at: <http://scholarship.law.cornell.edu/clr/vol26/iss3/6>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## THE DETERMINATION OF INSANITY IN CRIMINAL CASES\*

SAM PARKER

### INTRODUCTION

One of the progressive developments in recent criminal law and procedure has been the growth of psychiatry as a hand-maiden of the courts. This trend is reflected in legal problems, and in the establishment of cooperating committees of the American Bar Association and the American Psychiatric Association. This branch of the Law of Persons clearly concerns itself with a significant aspect of human behavior, so that ultimate influences from a psychological era were to be expected.

More recently this evolution has found expression in statutory amendments designed to furnish a more up-to-date, competent and unbiased expert opinion on the question of insanity in criminal cases. In New York a campaign to abolish the lunacy commission system led to the passage of the so-called Desmond Law which provides a completely new and exclusive system by which criminal courts may obtain expert medical opinion on the question of the present mental condition of any defendant.

The political objective of the legislation appears to have affected the perspective of the Legislature. This is noticeable in the drafting of the new provisions of the Criminal Code, which reveals conflicting concepts of procedure and historical background. The first six months of practice under the new procedure have evoked a number of complaints from defendants and a diversity of views and methods among the different courts and hospitals.

The largest bone of contention appears to be the question concerning the proper method of examination and final disposition of the issue. On the one hand, there is the position that the new procedure expressed in the 1939 amendments to the Code of Criminal Procedure has finally acknowledged the psychiatrists as the only valid source of expert opinion upon the question of insanity in criminal cases, and that the subject should be decided by a purely medical approach concluded by an advisory opinion to the court. The opposition, generally represented by the defendants' counsel, responds with the view that this legislation appears to provide for a quasi-administrative

---

\*This article was accepted by the New York University Law School, June, 1940 as a thesis for a degree of Doctor of Juridical Science (S.J.D.).

or quasi-judicial proceeding. Their reaction seems to be that any determination of this issue directly affects the liberty and property of the defendants in criminal cases. In any event, this view entails a demand that the examinations of the doctors be formal and subject to most of the strictures of court proceedings.

This dissertation is offered as an analysis of the problem put by such conflict of medico-legal concepts, and may serve as a clarification of the nature and character of the psychiatrists' role in the criminal law.

### I. STATEMENT OF PROBLEM

It has long been a fundamental principle of the common law that a person confined on a criminal charge cannot be tried, sentenced or punished for such crime while he is in such state of idiocy, imbecility or insanity as to be incapable of understanding the proceeding or making his defense.<sup>1</sup> The reasons for this rule at common law were that it was contrary to natural justice to try a man who could not make a defense due to present insanity,<sup>2</sup> although he might have one,<sup>3</sup> or to sentence a man when he might have something to say in his own behalf to arrest judgment were he not mentally disordered.<sup>4</sup>

This principle, established in New York at an early date by the courts,<sup>5</sup> is now embodied in Section 1120 of the Penal Code,<sup>6</sup> and is found in the common law or statutes of every state in the United States.<sup>7</sup> But, although the acceptance of this principle is unanimous, its concrete application is found to vary inversely to the constancy of the principle itself. For, while the decision as to the defendant's legal responsibility involves a legal as well as a medical determination, the decision of his present insanity is purely a medical determination.<sup>8</sup> The legislatures of the various states, well aware of the need for psychiatrists and medical experts in the determination of present insanity,<sup>9</sup> fully conscious of the interrelation of court and doctor in

<sup>1</sup>Freeman v. People, 4 Denio 9 (N. Y. 1847); I HALE P. C. 45; WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* (1933) 333 *et seq.*

<sup>2</sup>By "present insanity," throughout this treatise, is meant insanity which is evidenced at any time before, during or after the trial of the criminal charge, but subsequent to the date of commission of the crime; by "past insanity" is meant insanity at the time of commission of the crime. Incompetency is excluded from this discussion save where specifically discussed.

<sup>3</sup>1 BL. COMM. 303, 304, 306.

<sup>4</sup>WEIHOFEN, *op. cit. supra* note 1, at 334.

<sup>5</sup>Freeman v. People, 4 Denio 9 (N. Y. 1847).

<sup>6</sup>N. Y. PEN. LAW § 1120: "A person incapable, because of mental defect or insanity, of understanding the proceeding, of making his defense, cannot be tried, sentenced or punished." This section is substantially derived from REV. STAT. c. 1, pt. 4, § 2 [Laws 1852]; PEN. CODE § 21 [Laws 1881, c. 676]; and PEN. CODE §§ 20, 21 [Laws 1884, c. 384, § 1].

<sup>7</sup>*E.g.*, OHIO GEN. CODE ANN. (Page, 1939) §§ 13440-13441-I.

<sup>8</sup>Note (1939) 39 COL. L. REV. 1260, 1267.

<sup>9</sup>See Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial* (1935) 2 LAW & CONTEMP. PROB. 419, 422.

mental cases, and desirous of securing proper treatment for the criminal insane, have but recently begun to provide the courts with the proper instrumentalities<sup>10</sup> for deciding the issue of present insanity in criminal cases.<sup>11</sup> The New York legislature has not been lax in enacting laws in this field,<sup>12</sup> and, at present, Sections 658 to 662d,<sup>13</sup> and 870<sup>14</sup> of the Code of Criminal

<sup>10</sup>There are court diagnostic clinics for defendants in at least three states: Michigan [Recorder's Court, Detroit]; Illinois [Criminal Court, Chicago]; New York [Court of General Sessions, New York City].

<sup>11</sup>Six states [Delaware, Florida, Mississippi, Oregon, Vermont, Washington] had no statutory provisions for the method of decision of the issue of present insanity in 1937. By 1939, of these six, three states had enacted laws regulating the method of trial of this issue. [Fla. Sess. Laws 1939, c. 19554, § 203; Ore. Sess. Laws, 1937, c. 293, §§ 1, 2; Vt. Public Laws 1933, as amended by Pub. Acts No. 52, §§ 2429, 4020]. The remaining three states, failing to recognize the medical problem involved, leave the method of determination of this issue in the discretion of the court, as at common law. See pp. 422 *et seq.*, *infra*.

<sup>12</sup>*E.g.*, see N. Y. CODE CRIM. PROC. §§ 658, 870, prior to repeal by N. Y. Laws 1939, c. 861.

<sup>13</sup>N. Y. Laws 1939, c. 861, §§ 658-662d.

Section 658: "If at any time before final judgment it shall appear to the court having jurisdiction of the person of a defendant *indicted* for a felony or misdemeanor that there is reasonable ground for believing that [a] defendant is in such state . . . of . . . insanity that he is incapable of understanding the . . . proceedings . . . the court, upon its own motion, or that of the district attorney or the defendant, *may, in its discretion* order such defendant to be examined to determine the question of his sanity." (Italics supplied.)

Section 659: ". . . Such examination shall be made as follows: . . . [by two qualified psychiatrists of the division of psychiatry of the Department of Hospitals in cases in New York City]."

Section 661: "Procedure: Powers of Examiners: . . . [No definite procedure for the examination is outlined. Examinations may be made either in the place where the defendant is confined or within a hospital. The examining psychiatrists must take the oath of referees, *may* examine witnesses, administer oaths, and compel the attendance of witnesses, and the production of books, papers, *etc.*, deemed relevant or material.]"

Section 662: "Upon the completion of such examination . . . the superintendent of the hospital . . . must forthwith transmit to the court a . . . complete report . . . including the findings of the qualified psychiatrists . . . that the defendant is, or is not . . . in such state of . . . insanity . . . [as to be tried or not tried under N. Y. PEN. CODE § 1120]." "Such report shall include a recommendation as to which institution defendant should be sent if committed. . . . If such psychiatrists find the defendant *sane* . . . , the proceedings against such defendant shall be resumed as if no examination had been ordered. If the court does not concur with the findings of the psychiatrists, or if the two psychiatrists do not agree . . . , the proceedings against such defendant may be resumed . . . or the court may request . . . a third psychiatrist to examine . . . and . . . report . . ."

Section 662a: Procedure where Defendant is found insane. "If two . . . psychiatrists certify that such defendant is [insane], and the court after giving the district attorney and [defendant's] counsel . . . opportunity to be heard . . . , concurs in such findings, the trial must be suspended until [the defendant] becomes sane and [the defendant shall be committed] . . . to a state hospital for the insane [or for the criminally insane]. . . . [If the defendant becomes sane] the superintendent of the hospital . . . shall inform the court and the district attorney . . . whereupon the proceedings . . . shall be resumed. . ."

Section 662d: "[These provisions] shall not be deemed to be superseded by any provision of the mental hygiene law or other statute unless [specified]. . ."

<sup>14</sup>N. Y. Laws 1939, c. 861, § 870: Court Order for Examination as to Sanity of a Defendant not under indictment. "If . . . a defendant [is] charged with a felony or a misdemeanor but *not under indictment* . . . , or charged with an offense not a crime . . . [the court may use the same procedure specified in Section 658 to 662d, *supra* note 13]."

Procedure attempt to provide the courts with the proper machinery for the determination of the present mental condition of defendants confined, or held, on criminal charges.

But, whether due to the method of enactment of these sections,<sup>15</sup> or to the inherent nature of the problem, the present statute raises serious questions in constitutional and administrative law. A study of the "hearing" or determination provisions of Sections 658 to 662d reveals that the following issues, necessarily involved in the determination of present insanity, have been either unclearly treated or entirely neglected:

- (1) Is there a right to a jury trial of the issue of present insanity accorded
  - a) By the Constitution of New York<sup>16</sup> or the United States,<sup>17</sup>
  - b) By New York statutes.<sup>18</sup>
- (2) If there is such a right, is the verdict of the jury
  - a) Binding on the court, or
  - b) Advisory to the court.
- (3) If there is no right to a jury trial, is there a right to an examination by qualified medical experts
  - a) Under the constitutions, or
  - b) Under the statutes.
- (4) If there is such right in (3), must the examination be a formal one, on notice and by hearing,
  - a) Under the constitutions, or
  - b) Under the statutes.
- (5) Is the report at the conclusion of the examination in (4) binding on the court
  - a) If the report is "insanity,"
  - b) If the report is "sanity."
- (6) If the rights in (1) to (5) are non-existent, then the court is the final arbiter. What, then, are the minimal requirements in the determination by the court
  - a) Under the constitutions, or
  - b) Under the statutes.

---

<sup>15</sup>See Note (1939) 39 COL. L. REV. 1260, 1262, note 18, to the effect that the present sections, here considered, were the result of "buck-passing" by the legislature to the executive and, consequently, could not be models of perfection in draftsmanship.

<sup>16</sup>N. Y. CONST., Art. 1, § 2: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; . . ."

<sup>17</sup>U. S. CONST. Art. XIV: "No State shall deprive any person of life, liberty or property without due process of law."

<sup>18</sup>N. Y. CODE CRIM. PROC. §§ 658, 870 (1936); N. Y. CODE CRIM. PROC. §§ 658-662d, 870 (1939), cited *supra* notes 13 and 14.

(7) How can a defendant appeal from an adverse decision of his mental condition by the court?

These issues are vital, for, as a consequence of their decision, a defendant may be put to trial of the criminal charge while insane, or be incarcerated for present insanity in a state hospital, although sane, for a longer period of time than the maximum sentence for the criminal charge, without the minimal requirements of due process and fair hearings having been met.<sup>19</sup> These issues, moreover, have received scant attention by the courts and legal writers, with reference to the 1939 additions to the New York Code of Criminal Procedure; and the slight attention accorded has served not to clarify but to confuse the problems involved. Thus, in dealing with the grant of powers to the psychiatrists to call witnesses and compel their attendance,<sup>20</sup> one writer<sup>21</sup> states that the courts may interpret those provisions as:

“ . . . equivalent to a requirement that the psychiatrists shall in each case conduct their examination in the form of a quasi-judicial hearing, affording in each instance an opportunity for the district attorney and counsel for the defendant to be heard. . . . [But] constitutional requirements of ‘an opportunity to appear and be heard’ are amply met by allowing both the district attorney and the defendant to be heard before the court confirms or rejects a finding of insanity. . . . ”<sup>22</sup>

The courts, in the few decisions available since the passage of these sections, have had requests to interpret the statutes and lay down a mode of procedure for the psychiatrists, district attorney and defense counsel. Thus, in *People v. Pershaec*<sup>23</sup> the corporation counsel made application to the court to advise the psychiatrists as to whether they must hold formal hearings and examinations, as they saw fit,<sup>24</sup> but that case, at best, affects only that particular proceeding and is not an authoritative holding as to any of the provisions of the new sections of the Code. On the other hand, in *People v.*

<sup>19</sup>See proposed amendments to Sections 658-662d, *infra* notes 208, 209, 212, 218, 223, 230, 235, 236, 238, 239, 241.

<sup>20</sup>N. Y. CODE CRIM. PROC. § 661.

<sup>21</sup>Note (1939) 39 COL. L. REV. 1260, 1265, 1266.

<sup>22</sup>Assuming that this is true, what should be done if the psychiatrists report defendant sane? The Code [Section 662, *supra* note 13] does *not* provide for a hearing by the court in such cases. Section 662a requires a hearing by courts only if the report is insanity and is confirmed. The Code, therefore, entirely neglects the probability that the putting to trial of a person (allegedly insane) is a deprivation of life and liberty without due process of law. If the defendant is, in fact, incapable of consulting with counsel, he is deprived of his right to be represented by counsel in a criminal case—a right which is constitutionally guaranteed by the Fourteenth Amendment. See *Powell v. Alabama*, 296 U. S. 412, 59 Sup. Ct. 280 (1936). On the effect of the psychiatrists' reports on the courts, generally, see Note (1937) 37 COL. L. REV. 153 *et seq.* (Sections 658 and 870 in 1936).

<sup>23</sup>172 Misc. 324, 15 N. Y. S. (2d) 215 (Gen. Sess. N. Y. 1939).

<sup>24</sup>In New York City, the corporation counsel is to assist the psychiatrists examining a defendant, as provided by N. Y. CODE CRIM. PROC. § 659.

*O'Connor*<sup>25</sup> an informal examination was held by the psychiatrists but the Justice required an open hearing in court and called in the psychiatrists to reiterate, on the witness stand, what they had written in their report of insanity.<sup>26</sup>

Other instances of confusion, besides those apparent on the mere reading and study of Sections 658 to 662d, and 870, as to the type of hearing to be accorded a defendant respecting his present mental condition, are not lacking;<sup>27</sup> but the illustrations mentioned serve to indicate the substance of the questions herein discussed. To answer these questions, one must go back to the earliest times and trace the growth and change of these types of hearings in New York and other states. But, before such a consideration, there are four other types of hearings of lunacy or insanity covered by law,<sup>28</sup> which must, for cogent reasons, be distinguished from and not confused with the hearings on, or trial of, the corollary issue of present insanity.

The first of these hearings is that type accorded by the Mental Hygiene Law. Under this law any person alleged, on application to the court, to be insane or mentally defective,<sup>29</sup> may be summarily committed by the court to a state institution, if he is not being held on a criminal charge.<sup>30</sup> Upon the demand of the alleged insane or mentally defective person the court may hold a hearing and take evidence in or out of court, but this hearing and the determination to commit the defendant is not an adjudication of his present insanity.<sup>31</sup> However, within thirty days of the signing of the order of commitment, the committed person, on request, must be granted a "re-hearing"<sup>32</sup> by any justice of the Supreme Court of New York other than

<sup>25</sup>16 N. Y. S. (2d) 156 (Co. Ct. Queens 1939).

<sup>26</sup>If the statute requires only a report for the advice of the court, it would seem needless duplication to resort to examination and cross-examination of doctors in a formal corollary proceeding in the criminal court. The reason for this application of the rigid forms of criminal procedure and substantive law to the preliminary issue of present insanity is to be found in the court's mistaken view of the insanity issue as a part of the substance of the criminal charge, and the fear that no commitment of an insane defendant to a hospital would be a valid judicial act unless based on something akin to a trial.

<sup>27</sup>See pp. 402-404, *infra*.

<sup>28</sup>*I.e.*: (1) On the issue of insanity where there is an application for commitment of a person who, although insane, is not held on a criminal charge, in accordance with the New York Mental Hygiene Law; (2) On the issue of feeble-mindedness under the (former) New York Insanity Law; (3) On the issue of insanity (*non compos mentis*) before the appointment of a committee of the person and/or property of an incompetent under Section 1364 of the Civil Practice Act; and (4) On the issue of past insanity under Section 1120 of the Penal Code (which embodies the common law rule as to insanity at the time of an act of crime).

<sup>29</sup>N. Y. MENT. HYG. LAW §§ 70, 121, as amended 1933.

<sup>30</sup>*Id.*, §§ 74, 124.

<sup>31</sup>*Finch v. Goldstein*, 245 N. Y. 300, 157 N. E. 146 (1927).

<sup>32</sup>It is not a "Re"-hearing in reality, but the first hearing, since the so-called hearing before the committing justice is not a constitutional necessity. See *Sporza v. Bank*, 192 N. Y. 8, 84 N. E. 406 (1906).

the one who committed him. At this hearing, the defendant has the right to a jury trial on the issue of his present insanity<sup>33</sup> in the same manner as if this were a special proceeding to secure the appointment of a committee for an incompetent.<sup>34</sup> The court is bound by the verdict of the jury, whether it be sanity or insanity, the jury trial granted by this law and by the Civil Practice Act being regular, non-advisory jury trials.<sup>35</sup> If the jury finds the defendant insane, and he is then remanded to the state institution, he may have a writ of *habeas corpus* at any time he believes he has again regained normal mental order.<sup>36</sup> Although the decision on the writ is usually summary,<sup>37</sup> the court may call a jury to render an advisory opinion on the defendant's present mental condition, but their verdict cannot bind the court.<sup>38</sup>

The proceedings under these statutes are clearly defined and the hearings by court and jury are specifically provided for, leaving no "hearing" questions to be answered. The preliminary commitment by the court without notice and hearing is constitutional, being merely temporary and for the protection of society and the defendant,<sup>39</sup> and the right of the defendant to his liberty is constitutionally protected by the use of the constitutional jury on demand.

A comparison of the provisions of the Criminal Code [Sections 658-662d, 870] with those of the Mental Hygiene Law as to the nature of the judicial or quasi-judicial hearing accorded, leaves one question to be answered. Why the jury trial under the latter and not under the former?<sup>40</sup> Insofar as the decision of the question of present insanity in criminal cases is concerned, the weight of authority holds that this issue is ancillary to the trial of the criminal charge, and merely a *civil* proceeding.<sup>41</sup> Thus it would seem as though the proceedings under the Criminal Code and Mental Hygiene Law partake of a similar character—civil—and should be identical but for the specific provision in the Code and the Mental Hygiene Law that the Mental Hygiene Law is not applicable to persons in confinement on criminal charges.<sup>42</sup> As a practical matter it may well be that defendants held on criminal charges

<sup>33</sup>N. Y. MENT. HYG. LAW §§ 76, 125, as amended 1933.

<sup>34</sup>N. Y. CIV. PRAC. ACT § 1364.

<sup>35</sup>See NEW YORK STATE LAW REVISION COMMISSION REPORT (1939) 353 *et seq.*; *Matter of Walker*, 57 App. Div. 1, 67 N. Y. Supp. 647 (4th Dep't 1900); *Parker v. Hospital*, 50 App. Div. 622 (4th Dep't 1897).

<sup>36</sup>N. Y. MENT. HYG. LAW § 204, as amended 1933.

<sup>37</sup>See N. Y. CIV. PRAC. ACT § 1259.

<sup>38</sup>*Hoff v. State*, 279 N. Y. 490, 18 N. E. (2d) 671 (1939); *People ex rel. Woodbury v. Hendrick*, 216 N. Y. 339, 109 N. E. 486 (1915).

<sup>39</sup>*Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 (1878).

<sup>40</sup>Under the 1936 provisions of N. Y. CODE CRIM. PROC. § 870, par. 2, the court *must* call a jury on the demand of the defendant. It is questionable whether this jury was to render an advisory or binding verdict. See note (1937) 37 COL. L. REV. 151, notes 2-6.

<sup>41</sup>See *In re Bresee*, 82 Iowa 573, 48 N. W. 991 (1891); *Gaston v. Babcock*, 6 Wis. 503 (1838). *Contra*: *State v. Lange*, 168 La. 958, 123 So. 639 (1928). See *infra* note 71.

<sup>42</sup>N. Y. CODE CRIM. PROC. § 662d (1939).



are more dangerous to society, if presently insane, than those not so held. But this distinction in potentiality of danger to the public at large does not appear to be articulated by the granting of a jury trial in the one case and not in the other. True, the non-criminally insane person may be less easily committed by jury than by court or psychiatrist, but since present insanity is purely a medical question it would appear that both types of defendants should be accorded similar hearings by *psychiatrists*. Whatever may possibly be said about the divergence in treatment of the criminally and non-criminally insane, it is apparent that under the present New York statutes the two types of insane persons will, and must, be accorded different hearings. The issue with which this paper is solely concerned is that of the hearings accorded the criminally insane, and it must be kept in mind throughout that, due to the statutes discussed above, the non-criminally insane cases are to be distinguished from those dealing with hearings on the issue of present criminal insanity.

The second type of hearing to be contrasted to and distinguished from the present insanity hearings under discussion is that on the issue of feeble-mindedness under the old New York Insanity Law.<sup>43</sup> Under this statute the courts were permitted to commit non-criminally feeble-minded persons after a hearing on notice in open court. It has been clearly held<sup>44</sup> that the federal and state constitutions do not preserve the right to a jury trial of the issue of feeble-mindedness since the jury had not been so used at common law before the adoption of the constitutions.<sup>45</sup> Feeble-mindedness, at common law, was not a ground for commitment to an asylum, and consequently any procedure which is fair—gives notice to the defendant with an opportunity to be heard—is constitutional.<sup>46</sup> However, insanity—the present insanity which results in the suspension of a criminal trial of the insane person—was known and recognized at common law.<sup>47</sup> Thus, the type of hearing to be accorded in the former class of cases will depend upon the entire absence of such procedure at common law<sup>48</sup> whereas that in the latter must substantially

<sup>43</sup>N. Y. STATE CHARITIES LAW § 461.

<sup>44</sup>*In re Miller* [Matter of Perkins], 105 Misc. 534, 173 N. Y. Supp. 520 (Sup. Ct. 1919).

<sup>45</sup>*Accord*, *People v. Presmeyer*, 59 N. Y. 92 (1874); *cf.* *John v. Paullin*, 231 U. S. 583, 34 Sup. Ct. 178 (1913).

<sup>46</sup>*Stuart v. Palmer*, 74 N. Y. 19, 30 Am. St. Rep. 289 (1878). *But cf.* *Wynehamer v. People*, 13 N. Y. 378 (1856).

<sup>47</sup>*Bateman's Case*, 11 How. St. Tr. 467, 474-476 (1685); *Hamilton v. Traber*, 78 Md. 34, 27 Atl. 229 (1893); 1 HALE P. C. 35.

<sup>48</sup>If at common law there was no jury trial accorded in this type of proceeding, none need be granted today. *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836 (1901). But, if the defendant's rights to life, liberty and property are affected directly by the hearing and order thereon, then there must be an opportunity to be heard under the "due process" clause. *Simon v. Craft*, *supra*. Thus, a statute providing for commitment (permanent),

follow the procedure at common law. It is, therefore, apparent that the civil commitment statutes, and cases dealing with the degrees of mental defectiveness cannot be cited as authorities in criminally insane commitments and thus must be distinguished from these latter cases.

The third type of hearing to be mentioned here as distinct from those provided for by the present Code of Criminal Procedure of New York, is the hearing leading to the judicial determination of the fact of incompetency and the consequent appointment of a committee of the person and/or property of the incompetent person. In New York a guardian cannot be appointed until there has been a jury trial of the issue of incompetency, but this requirement is statutory.<sup>49</sup> Recent additions to this statute, however, dispensing with the right to trial by jury in certain incompetency cases,<sup>50</sup> have raised the serious question whether the trial by jury must be accorded as a matter of right. This question has been the subject of recent investigation by the New York State Law Revision Commission.<sup>51</sup> The fruit of this research has been the demonstration that the right to jury trial of the issue of incompetency must be granted by the courts and legislature under our constitution. At common law, in England, the Chancery Court had no jurisdiction, inherently, over idiots and lunatics. The jurisdiction exercised by the Lord Chancellor over lunatics was possessed not judicially, but by virtue of the fact that the King, as *parens patriae*, the custodian of lunatics, had delegated to the Chancellor—as the King's first personal representative—the King's power over lunatics by his *sigu manual*.<sup>52</sup> Since the King had no power to deal with lunatics until lunacy had been established, and it had long been the custom to grant a jury trial of the issue of lunacy, the Chancellor had no jurisdiction until a jury had first found the fact of lunacy. The verdict of the jury was not in aid of the Chancellor's conscience, but served to form the basis for any future acts by the Chancellor. This being the common law in England at the date of the entrance of the American colonies into the union, it is to be followed by virtue of its codification by the New York State Constitution of 1777, which preserved the right to jury trial in all cases "where heretofore used."

In determining whether the right to jury trial in the ordinary incompetency proceeding is accorded by the Constitution, the New York Law Revision Commission was faced with four main problems:

---

without the chance to be heard is unconstitutional [*Re Michael Gannon*, 16 R. I. 12 (1889)] and if the statute is silent as to opportunity to be heard the court will read in this requirement to preserve the constitutionality thereof. *Re Lydia Ann Allen*, 82 Vt. 365, 73 Atl. 1078 (1909).

<sup>49</sup>N. Y. CIV. PRAC. ACT § 1364, directing a regular jury, or one secured by commission to the sheriff, to try the issue of incompetency.

<sup>50</sup>N. Y. CIV. PRAC. ACT art. 81a.

<sup>51</sup>NEW YORK STATE LAW REVISION COMMISSION REPORT (1939) 353-372.

<sup>52</sup>*I. e.*, the great seal.

- (1) The state of the common law in England before 1777;
- (2) The state of the common law in New York until 1874, the time of the adoption of the first code provisions *re* incompetency trials;<sup>53</sup>
- (3) The confusing *dicta* in cases where deeds or contracts of incompetents were attempted to be set aside as voidable instruments;
- (4) The confusing *dicta* in cases involving commitment for present criminal insanity.

The first problem has already been discussed, and the second problem is merely a continuation thereof and not germane to our immediate issue.<sup>54</sup>

The third problem was born in a group of cases dealing with civil incompetency in which the courts used such loose language in speaking of incompetency as would apparently authorize the proposition that at common law an insane person was not entitled to a trial by jury, but only to notice and judicial determination of the issue of insanity, lunacy or incompetency.<sup>55</sup> A common factual pattern in these cases is as follows:

In 1900 *L* is committed to an asylum as insane under the New York Insanity Law. In 1901 he conveys land to *C*. In 1902 a committee of the person and property of *L* is duly appointed. The committee then brings suit to have the conveyance set aside and offers the proof of commitment in 1900 and continual confinement thenceforth as evidence of incompetency at the date of the conveyance. *C* then alleges that the evidence of commitment cannot be admitted because the proceedings there were unconstitutional, there

---

<sup>53</sup>Until 1874 the New York Statutes pertaining to competency were silent as to the method of appointing committees. In that year [Laws 1874, c. 446] the Chancellor was granted the power to issue a commission to the sheriff to secure a jury to pass on the issue of incompetency. The commission method was in use from 1874 to 1880 because Chancery had no available machinery (a non-advisory jury) to decide the issue. When the Supreme Court took over the powers of Chancery it still had no available machinery, sitting as a court of equity. Thus, in 1880 the Code of Civil Procedure [Section 2327] provided that the Supreme Court could use the commission method, or send the issue to be heard by a regular jury at a trial term of the court. The latter method was cheaper and faster, but to prevent embarrassment to certain defendants by the public airing of the proceedings, the commission method was also retained. These provisions are substantially the same as those to be found in the present Section 1364 of the Civil Practice Act. See, for an excellent discussion of incompetency in law, NEW YORK STATE LAW REVISION COMMISSION REPORT (1939) 353-372.

<sup>54</sup>See *Matter of Barker*, 2 Johns. Ch. 232 (N. Y. 1816) indicating that at common law in New York there was a jury trial, of right, of the issue of incompetency.

<sup>55</sup>*People v. Carl*, 5 Johns. Ch. 118 (N. Y. 1821) was a bill by the committee of an incompetent to set aside a deed previously made and delivered by the incompetent. The court found insanity—*i.e.*, incompetency—existed at the time of the making of the deed, and ordered the transfer set aside. The defendant, in seeking to have the deed declared valid, argued that the court must require a jury trial of the issue of insanity. The holding in this case is merely that a court of equity can set aside deeds of incompetents after office found. The *dictum*, however, is to the effect that the issue of insanity, in any case, need never be tried by jury save where a divorce is sought. See also *Matter of Colah*, 3 Daly 529, 537 (N. Y. 1871); *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446 (1889):

having been no notice, hearing or trial of the issue of insanity by a jury before commitment. The holding on this allegation is merely that the prior commitment proceedings are not open to collateral attack, but must be contested by a motion to reopen. The *dictum* is a broad statement that the commitment proceedings were constitutional even without notice and hearing. Thus it is a grave error to follow the *dicta* in these cases in treating of lunacy, incompetency or insanity in general. And, more particularly, even if the *dictum* above were to be taken to rise to the level of a rationale (which it cannot), it must be remembered that there can be no inference drawn from incompetency cases which can be applicable to cases dealing solely with present criminal insanity. Although legal writings are available where the two have been confused,<sup>56</sup> the Law Revision Commission has taken great care to point out that the hearings accorded in criminal insanity have nothing to do with hearings in proceedings for the appointment of committees for incompetent persons, due, primarily, to the fact that the history and growth of the two procedures are basically divergent.<sup>57</sup>

The fourth and last type of judicial hearing to be distinguished from that in issue is the hearing accorded on a plea of insanity to a criminal charge. The Penal Code of New York provides that no person may be convicted if at the time of the act of crime he was legally irresponsible; and that a person who cannot understand the proceedings may not be put to trial, *etc.*<sup>58</sup> The first provision is a codification of the common law rule of *McNaghten's Case*,<sup>59</sup> and is a rule of substantive law directly involved in the trial of the criminal charge. The second provision is a rule of procedural law—a corollary

<sup>56</sup>See, especially, Note (1932) 80 U. OF PA. L. REV. 556, 560, 562, "Most states have statutes in . . . proceedings . . . [for appointment of guardians] . . . for an incompetent. . . . There is a split of opinion as to whether a jury trial in a lunacy proceeding is a matter of right. . . . Some cases hold that it depends on the status of the common law at the time jury trials were given as a matter of right by [state] constitution [citing *Matter of Perkins*, 105 Misc. 534 (Sup. Ct. 1909)]. From the foregoing . . . it would seem that in some states [there will be] constitutional difficulties [if no jury trial is provided in the proceedings on incompetency] [citing *State v. Billings*, 55 Minn. 467, 57 N. W. 206 (1893); *Ex Parte Dagely*, 35 Okla. 180, 128 Pac. 699 (1912); *White v. White*, 108 Tex. 570, 196 S. W. 508 (1917); *In re Brown*, 39 Wash. 160, 81 Pac. 552 (1905)]." All of the cases cited in this article deal with the commitment to an asylum of criminally or civilly insane persons. None deals with hearings on appointments of committees for incompetents.

<sup>57</sup>NEW YORK STATE LAW REVISION COMMISSION REPORT (1939) 353, 359, note 16: "It has been said that it [jury trial] is not a matter of right: *In re Brown*, 39 Wash. 160 (1905); *Ex parte Dagely*, 35 Okla. 180 (1912); but in these cases the question decided was whether there is a right to jury trial *before commitment* and not . . . a right . . . *before the appointment of a committee*. . . . See Note (1932) 80 U. of Pa. L. Rev. 556, 562-3—the cases cited there, as indicated in this footnote, do not sustain the proposition that there was no right to jury trial before the appointment of a committee." Also see *infra* pp. 390 *et seq.*

<sup>58</sup>N. Y. PEN. CODE § 1120. See *supra* note 6.

<sup>59</sup>10 Cl. & F. 200 (H. L. 1843).

to the main question of guilt—and has no direct bearing on the trial on the merits.<sup>60</sup> There is no doubt that the issue of insanity at the time of the act of crime must be tried by a jury.<sup>61</sup> Although there have been enactments authorizing the court to allow psychiatrists to render advisory reports on both questions<sup>62</sup>—that of past as well as present insanity—the psychiatrists' verdict can merely be advisory to the jury. The prime reason for this hearing by jury is that under a constitutional provision preserving the right to jury trial as heretofore used or constitutionally guaranteed, the issue of past insanity is part and parcel of the criminal case—as at common law—and jury trial on that issue must consequently be accorded.

Thus, although the trial of the issues of past and present insanity may be provided for in the same sections of a criminal code, as in Louisiana,<sup>63</sup> different considerations of constitutionality must apply to each issue. The Louisiana code provides that insanity as a defence, or as a reason for suspension of trial, must be raised by a special plea of insanity,<sup>64</sup> and both issues must be disposed of prior to trial. If such plea is filed, two superintendents of state hospitals, with one coroner of the parish, constitute a lunacy commission to try the plea.<sup>65</sup> The commission is freely to examine the defendant and may compel witnesses to attend.<sup>66</sup> If the commission reports the defendant presently insane, or insane at the time of the act, he is committed and held until discharged by law. If reported sane at both periods of time the trial proceeds in accordance with the next article.<sup>67</sup> Under the latter article it is provided that *every* plea of insanity shall be tried by a judge, or jury, dependent upon the method by which the criminal charge itself is triable under

<sup>60</sup>People v. Farmer, 194 N. Y. 215, 87 N. E. 457 (1909). The bearing is indirect. Thus, if a defendant is presently insane but nonetheless put on trial, he is in all probability incapable of consulting with counsel, and may consequently lose the opportunity to present a real defense which he might have (as self-defense, past insanity, etc.). Again, if found presently sane, and acquitted by the jury because of past insanity, the defendant may still be committed to an asylum under N. Y. CODE CRIM. PROC. § 454; and the evidence as to present mental condition may be weighed by the court in its decision to commit defendant under Section 454. Also, People v. Haight, 3 N. Y. Cr. 60 (1883) holds that evidence of present insanity is admissible on the trial as bearing on the question of past insanity, or responsibility.

<sup>61</sup>People v. Egnor, 175 N. Y. 419, 67 N. E. 906 (1903); WEIHOFEN, *op. cit. supra* note 1.

<sup>62</sup>N. Y. PEN. CODE § 836 [Laws 1910, c. 557] before repeal by N. Y. PEN. CODE § 870 [Laws 1936] provided solely for inquiry by lunacy commissioners into the question of past insanity. The courts, however, permitted an inquiry into present insanity, likewise. People v. Whitman, 149 Misc. 159, 266 N. Y. Supp. 844 (Gen. Sess. N. Y. 1933). The present provisions, Sections 658-662d and Section 870 [Laws 1939, c. 861] allow an examination and hearing by *psychiatrists* on the issue of present insanity only.

<sup>63</sup>LA. CODE CRIM. PROC. ANN. (Dart, 1932) Arts. 267-273.

<sup>64</sup>Article 267.

<sup>65</sup>Article 268.

<sup>66</sup>*Ibid.*

<sup>67</sup>*Ibid.*

the state constitution and statutes.<sup>68</sup> If the defendant is found presently insane by judge or jury, as the case may be, he is then committed until he again becomes sane or until the District Attorney moves the case for trial. When the District Attorney so moves, then the whole procedure outlined above is recommenced and followed anew,<sup>69</sup> and no ruling by the court on any phase of the plea of insanity is reviewable by an appellate court until sentence has been passed.

This statute is novel in that it makes the lunacy commission's report binding upon the state and the defendant where the report is *insanity* at any time, and yet does not bind the *defendant* where the report is *sanity* at either time. The attempt, therefore, has been to constitute the commission a true administrative quasi-judicial board for one purpose, but not for the other.<sup>70</sup>

A consideration of the statutes of Louisiana and comparison with those in New York brings us to a serious question: Is the hearing accorded under these provisions a true administrative hearing as that term is commonly understood in the field of administrative law generally? Although this problem will be discussed in more detail in the intensive study of the New York laws, it is important that we review the salient principles of administrative law relevant to this issue.

It is an accepted principle of law that an administrative agency is constituted a quasi-judicial tribunal only where the statute creating the agency has endowed it with quasi-judicial functions.<sup>71</sup> The statute usually does not expressly state that the agency is a quasi-judicial one; nor are the powers

---

<sup>68</sup>Article 269.

<sup>69</sup>Article 270.

<sup>70</sup>In *State v. Burris*, 169 La. 520, 125 So. 580 (1929), defendant, indicted for murder, set up a special plea of insanity under the statutes discussed above. The commission found him presently sane, but insane at the time of the act of crime. Defendant moved to be committed under Articles 268-273, but the court refused, holding the articles unconstitutional. On mandamus, the decision was reversed and defendant committed. The statute was declared constitutional, even though the state has no appeal from the commission finding of insanity, past or present. The Louisiana constitution [Art. 1, § 41] provides for jury trial in criminal cases, but the decision to commit for insanity decides only a preliminary issue, not involved in the criminal case. If the defendant is brought back for trial, when sane, the finding of the commission as to past insanity is not *res judicata*. It is merely a finding that defendant should be committed. Cf. *State v. Lange*, 168 La. 958, 123 So. 639 (1928). *Quaere* whether the statute will be held constitutional if the reverse situation arises, *i.e.*, the commission finds defendant presently insane, seeks to commit him, and defendant claims he cannot be committed until a jury decides the issue of present insanity. The opinion in *State v. Burris*, *supra*, seems to indicate that the commission's finding is conclusive if the report is insanity. But there is no notice and hearing provided for, and if the commission is regarded as a quasi-judicial tribunal, it seems there is a constitutional objection, for the defendant is deprived of his liberty without an opportunity to be heard. See note 22 *supra*.

<sup>71</sup>*Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507 (1916); GELLHORN, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* (Unpublished Columbia Law School, 1939), pt. II.

granted by the legislature defined in language of "quasi-judicial" or "non-judicial." To decide whether a tribunal is in fact exercising quasi-judicial functions two questions must be answered, namely: (1) Is the tribunal granted the power finally to decide the issues involved; and (2) does the decision of the tribunal directly affect the life, liberty or property of the individual involved?<sup>72</sup>

To determine whether *psychiatrists* are exercising quasi-judicial functions under the New York or Louisiana statutes, for example, one must look at the finality of the effect of their examination, or hearings, or reports and determinations on the rights of defendants. Generally speaking, a preliminary restraint or commitment decides nothing as to the capability of the defendant to undergo trial or sentence. Preliminary restraints usually consist of the confinement of the defendant for a short period of time for purposes of examination and observation.<sup>73</sup> This confinement not being final or determinative, the exercise of the power to order confinement does not constitute a judicial or quasi-judicial function. Different results are achieved where an order committing the defendant "until he becomes sane," or refusing to commit and ordering the defendant to trial, is issued by psychiatrists or courts. If the psychiatrists decide that the defendant is insane, and if their decision is binding on the courts under the applicable statutes,<sup>74</sup> then a commitment "until defendant becomes sufficiently sane to stand trial," *cannot be termed suspensory or temporary*. The defendant may never regain sanity, and therefore be confined for life, without notice and hearing.<sup>75</sup> On the other hand, if there is a refusal to commit, then if the defendant in fact had a real defense which he was prevented from asserting due to his incapacity to consult with and inform counsel, it would also appear that defendant is being deprived of his right to a fair trial of the criminal charge.<sup>76</sup> Both of these situations where the defendant may be deprived of his liberty are aggravated by the fact that a review of, or appeal from, the decisions of the psychiatrists or courts (dependent upon which decision is final) is practically unavailable. If the defendant is found presently sane, and yet asserts he is insane at the criminal trial, he may only have a review of the refusal to stay proceedings, generally, by moving for a new trial and appealing from a denial of this motion as an abuse of discretion.<sup>77</sup> On the other hand, appellate courts are

<sup>72</sup>GELLHORN, *op. cit. supra* note 71, pts. I, II.

<sup>73</sup>Under N. Y. CODE CRIM. PROC. §§ 658-662d (1936) the court could commit the defendant for preliminary observation, without notice and hearing.

<sup>74</sup>*E.g.*, LA. CODE CRIM. PROC. ANN. (Dart, 1932) Arts. 268-273.

<sup>75</sup>Other results flow from this commitment. There will be a consequent loss of evidence and witnesses as time goes by. Further, the defendant may be held in the asylum for a longer period of time than if serving the sentence which he could receive if found guilty on the criminal charge.

<sup>76</sup>*Supra* note 22.

<sup>77</sup>*Freeman v. People*, 4 Denio 9 (N. Y. 1847).

slow to reverse lower courts' decisions for abuse of such discretion.<sup>78</sup> And, if defendant is found insane, and committed, there can be no appeal to a higher court because the order to commit does not constitute a final judgment in a criminal trial, but only an interlocutory decision on a preliminary issue.<sup>79</sup> The sole relief in this case is on writ of *habeas corpus*,<sup>80</sup> which is a corrective writ and not intended for ordinary review purposes, or on a certificate of the superintendent of the hospital.<sup>81</sup>

At all events, in the writer's judgment, a commitment or refusal to commit for present insanity by psychiatrists<sup>82</sup> or court<sup>83</sup> is a final disposition, by the appropriate arbiter under the statutes, directly affecting the life, liberty, or property of the individual and, therefore, at least quasi-judicial in nature. Consequently, refusals of, or orders for, commitment must be made—if permanent, until sanity is regained—on notice and hearing.

This premise being established, we must decide now what is the minimal hearing which must be accorded to defendants, allegedly presently sane or insane, under the Federal and State Constitutions, and determine whether the state statutes preserve these minimal requirements.

The Federal Constitution<sup>84</sup> states that the right to jury trial in criminal cases where used at common law is preserved. This provision, however, applies only to criminal trials in United States courts.<sup>85</sup> And although the 14th Amendment provides that no state shall deprive any person of life, liberty or property without due process of law, this provision does not result in a guarantee of jury trial, but only in an assurance that proceedings affecting the defendant's rights in a state court are fair, based on notice and an opportunity to be heard.

The state constitutions ordinarily provide that the right to jury trial shall be preserved, and that no person shall be deprived of life, liberty or property without due process of law.<sup>86</sup> The prime purpose of these provisions is to protect civil liberties in criminal cases. In order to ascertain whether a jury trial must be accorded under the New York Constitution, one must look at

<sup>78</sup>One shocking example of this laxity is found in *State v. Kelly*, 74 Vt. 278, 52 Atl. 434 (1902).

<sup>79</sup>*Freeman v. People*, 4 Denio 9 (N. Y. 1847).

<sup>80</sup>*Ibid.*

<sup>81</sup>N. Y. CODE CRIM. PROC. § 622a.

<sup>82</sup>LA. CODE CRIM. PROC. ANN. (Dart, 1932) Arts. 268-273.

<sup>83</sup>N. Y. CODE CRIM. PROC. § 661.

<sup>84</sup>Art. III, § 2, cl. 3.

<sup>85</sup>*Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448 (1900); *accord*, *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836 (1904).

<sup>86</sup>*E.g.*, N. Y. CONST. Art. 1, § 2: "Trial by jury in all cases where it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; . . ." This provision applies to every proceeding or action, civil or criminal. *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302 (1897).



the common law practice prior to the adoption of the constitution in 1777, or at the state practice and statutes prior to the last repromulgation of the constitution.<sup>87</sup> This historical approach is in use in practically every state in the union.<sup>88</sup> Thus, to determine the scope of the jury trial provisions in state constitutions, it is necessary to discover what the common law was in England, as well as in the Colonies before their entrance into the union and their adoption of constitutions preserving the jury trial.<sup>89</sup>

## II. MINIMAL REQUISITES AND HEARINGS UNDER THE CONSTITUTIONS

In England prior to 1777, the situation frequently arose where a defendant in a criminal case either stood mute and refused to plead, or was too mentally disordered to understand what was taking place.<sup>90</sup> Although it appears that a jury trial of the issue of incompetency was accorded as of right,<sup>91</sup> the right to such trial of the issue of present insanity in criminal cases is, at best, undecided. In the *Proceeding of John Frith*<sup>92</sup> the court stated:

"Such is the humanity of the law of England, that . . . at the time when the prisoner makes his defense . . . it is important to settle what his state of mind is; . . . therefore . . . there ought now to be an inquiry made, touching the sanity of this man at this time; . . . then get a jury together to inquire into the present state of his mind; the twelve men that are here will do. . . ."<sup>93</sup>

"*The Jury sworn as follows*:—"You shall . . . inquire . . . [for] the King, whether . . . the prisoner . . . be of sound mind . . . , and a true verdict give . . . , so help you God. . . ."

"*Jury*: My Lord, we are all of opinion that the prisoner is quite insane.

"*Court*: He must be remanded for the present."<sup>94</sup>

<sup>87</sup>PROBLEMS RELATING TO THE BILL OF RIGHTS (N. Y. Const. Convention Committee 1938) Vol. VI, pp. 6-10, 18-24.

<sup>88</sup>See *People v. Bellinger*, 269 N. Y. 265, 199 N. E. 213 (1935); *Duffy v. People*, 6 Hill 75 (N. Y. 1843); Myers, *The Constitutional Guarantee of Trial by Jury in New York* (1937) 7 BROOKLYN L. REV. 180.

<sup>89</sup>See, generally, Goebels, *Development of Legal Institutions* (Unpublished thesis in Columbia Law School Library, 1939).

<sup>90</sup>2 HUME'S C. P. 342: ". . . At receiving the verdict of the jury in the case of Thomas Gray, such objection [present insanity] was raised, and the diet [cause] adjourned by the Court from time to time, till at last . . . the case was dropped from the record . . . and I have not been able to discover if it ever came to issue. . . ." And see 1 HALE P. C. 34, 35.

<sup>91</sup>N. Y. STATE LAW REVISION COMMISSION REPORT (1939) 353, 362. See SELECTED CASES IN CHANCERY IN GREAT BRITAIN (1724-1733) 47: "Special return was made to a commission of lunacy, which was filed. Chancellor: 'He must be found either mad or not mad. . . . It [the return] must be quashed, and an alias commission go. . . .'" See also in the *Matter of Heli*, 3 Atk. 635, 26 Eng. Rep. 1165 (Ch. 1748); *Bailiffs of Burford v. Lenthall*, 2 Atk. 551, 26 Eng. Rep. 731 (Ch. 1743).

<sup>92</sup>22 How. St. Tr. 307, 311 (1790).

<sup>93</sup>*I.e.*, the jurors already selected to try the criminal charge.

<sup>94</sup>The prisoner was then removed.

It appears here that a jury trial was granted and the jury's verdict followed.<sup>95</sup> But in *Bateman's Case*<sup>96</sup> no jury was called to try this issue, and it is to be noted that it was not until 1800 that Parliament enacted a law directing a jury trial in these cases.<sup>97</sup> The statement in *Bateman's Case* that the calling of a jury is discretionary with the court, and the enactment of the law of 1800 lead to the inference that the practice followed in the *Frith* case was unusual, at least before 1777, in England.<sup>98</sup> The legal writers are in accord with this proposition. Thus, Lord Hale states:<sup>99</sup>

"And . . . such person . . . shall not be tried. . . .<sup>100</sup> But because there may be great fraud in this matter . . . the judge before such respite of trial or judgment may do well to impanel a jury to inquire *ex officio* touching such insanity, and whether it be real or counterfeit.

". . . It seems in such a case it is prudence to swear an inquest . . . to inquire touching his madness. . . . But in case a man in a phrenzy happened by some oversight . . . to plead, . . . and is put upon his trial, and it appears to the court . . . that he is mad, the judge in *his* discretion<sup>101</sup> may discharge the jury, and remit him to gaol to be tried after . . . recovery. . . ."<sup>102</sup>

There are thus two conflicting sources of authority in England as to jury trial of the present mental condition of criminal defendants. Perhaps the authority weighs more heavily on the one side than on the other, but it is certain that the state courts, when faced with conflicting authorities in the law of England, may, and do, decide that the one or the other *is* the common law of that state to the exclusion of the other; for the interpretation of precedents and the doctrine of *stare decisis* readily give way to the predilec-

<sup>95</sup>But see 22 How. St. Tr. 1255: "It . . . seems . . . doubtful, . . . if we have yet sufficient authority [in Scotland] for annexing to the province of the jury, a pre-judicial inquiry of this nature. . . . As . . . the man is under the eye of the . . . Court . . . , there seems not to be any reasonable cause for jealousy of judges, . . . as in . . . weighing the proof . . . [of] guilt or . . . innocence. And indeed, after his plea of insanity has been repelled by the judge, the pannel [defendant] has still his refuge with the assize, who may do with respect to his *conviction*, as they themselves shall see cause." (Italics supplied.)

<sup>96</sup>11 How. St. Tr. 467, 474-6 (1685).

<sup>97</sup>39 & 40 GEO. III, c. 94 (1800).

<sup>98</sup>See *Shumway v. Shumway*, 2 Vt. 339 (1876), discussing the English common law.

<sup>99</sup>1 HALE P. C. 34, 35.

<sup>100</sup>*I.e.*, for the crime.

<sup>101</sup>In accord, as to the court's discretion, see *Bateman's Case*, 11 How. St. Tr. 467, 474-6 (1685).

<sup>102</sup>But cf. 1 BL. COMM. 303-6: "[Before 1300 the Lords of the Manors took advantage of idiots and lunatics by taking their property. *Circa* 1324, 17 EDW. 2, the Statute *De Prerogativa Regis* was enacted. It gave the King custody over the estates of idiots—fools from birth—and lunatics—those with lucid intervals.] By the old common law there is a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not; . . . which *must* be tried by a jury of twelve men: and, if they find him *puris idiota*, the profits of his lands, and the custody of his person may be granted by the King to some subject. . . ." (Italics added.)

tions of any court. It is simple to adopt either view, because neither is the exclusive one.<sup>103</sup>

Thus, we shall expect to find some divergence in treatment by the various state courts of the common law of England when faced with the problem of what the state constitutional provision preserving the right to trial by jury as at common law embraces. But, while examining state constitutional provisions, one caveat must be borne in mind. There are various forms of such provisions, and differently worded provisions engender varied results. Thus, the Wisconsin Constitution provides: "The right to jury trial shall remain inviolate and extend to all *cases* at law."<sup>104</sup> Under this provision, the right to trial by jury of the issue of present insanity, and even incompetency, is of no consequence, since those issues are only involved in special proceedings, not cases at law.<sup>105</sup> And where the jury trial is preserved in criminal prosecutions alone, the same holds true—a commitment being the result of a special proceeding and not a trial of the criminal charge.<sup>106</sup>

Finally, before discussing the common law of New York and other states, it must be reiterated that in those states where the right to trial by jury is preserved as heretofore used or constitutionally guaranteed in all proceedings and actions, the common law of such states does not consist purely and simply of the law of England before 1777, but all those statutes and laws of England received in the colonies which were not repugnant to their constitutions at the time of ratification. Thus, in Texas, where the jury trial provision was first adopted in the Texas Constitution of 1840, the practice in Texas and the applicable statutes are determinative of the type of hearing preserved, and the common law of England prevails only in the absence of such statutes and practice.<sup>107</sup>

---

<sup>103</sup>See, generally, Goebels, *supra* note 89.

<sup>104</sup>Italics added.

<sup>105</sup>*Gaston v. Babcock*, 6 Wis. 503 (1888).

<sup>106</sup>See the Iowa Constitution as interpreted in *In re Bresee*, 82 Iowa 573, 48 N. W. 991 (1891).

<sup>107</sup>*White v. White*, 108 Tex. 570, 196 S. W. 508 (1917). In this case, an act of Texas [Tex. Acts 1913, c. 163] permitted a person, mentally disordered, to be committed civilly after a determination on notice and hearing by a commission. The act was held unconstitutional since the right to trial by jury was preserved in all cases and proceedings by the state constitution and, at the time of the adoption of this constitution, the jury trial was utilized in Texas, in practice or by statute, or required by the common law. *Contra: Ex Parte Dagely*, 35 Okla. 180, 128 Pac. 699 (1912) where the court said there was no jury trial granted of this issue in that territory before the promulgation of the state constitution, nor at common law in England. (The court does not cite any prior Oklahoma or English authorities.) The statute involved [OKLA. COMP. LAWS (1909) § 3701-20] allowed commitment civilly without any notice and hearing whatsoever. (The Texas Statute, *supra*, set up a regular quasi-judicial tribunal.) The court held the restraint reasonable since only preliminary, with the statement that the restraint, if becoming permanent, could always be tested in a judicial hearing on writ of *habeas corpus*.

### III. HEARINGS AT COMMON LAW: HEREIN OF THE NEW YORK PRACTICE

No New York court has ever held that a jury trial is constitutionally required for the issue of present insanity in criminal cases. Although many early cases merely indicate that no jury trial is required,<sup>108</sup> *People v. Rhineland*<sup>109</sup> is explicit on the point. Under a statutory provision allowing the court to call in a lunacy commission to aid it in determining present insanity,<sup>110</sup> the defendant contended that the decision of the commission effectively bound the court. The court denied this contention in these terms:<sup>111</sup>

"At common law the trial . . . of an insane person for a crime . . . was prohibited, and the court in which an indictment was pending *might*, by aid of a jury, or by other discreet and proper methods *in the discretion of the court*, inquire into and determine the question of sanity. . . .

". . . [In] *Freeman v. People* (4 *Denio*, 9), it was held that as the statute . . . did not state in what manner the fact of insanity should be ascertained, that fact was to be ascertained as the common law provided.

"In no part of this chapter or in the section above referred to, does it appear that the power to determine the question . . . [of insanity] . . . is conferred on the commission, nor do I find any provision which either takes from or in any way limits the power which has heretofore been exercised by criminal courts, both at common law and by statutes existing prior to the adoption of the Code, to inquire into such matters by and with the aid of a jury, or in such other way as may be found to be discreet and convenient."<sup>112</sup>

Finally in 1891, the Court of Appeals intimated, in the well known case of *People v. McElwaine*,<sup>113</sup> that the decision as to the use of a jury was properly in the discretion of the lower courts.

The rationale of the New York decisions is this: At common law in England the trial of the issue of present insanity was in the sound discretion

<sup>108</sup>*Freeman v. People*, 4 *Denio* 9 (N. Y. 1847) is often cited for the proposition, but the statement therein is pure *dictum*. In that case, after arraignment and before trial, defendant moved the court to impanel a jury to inquire as to the defendant's mental condition. The jury found defendant knew the difference between right and wrong. Counsel moved the court to instruct the jury to determine defendant's present mental condition, and not the issue of knowledge of right against wrong. This motion was denied and excepted to. The holding was that this ruling, if erroneous, had not been properly brought before the court, the proper procedure being to move for a new trial and then have a writ of error on the denial thereof. The question of the type of hearing to be accorded on the issue of present insanity was not before the court. However, by way of *dictum*, the court, at page 20, stated that the type of hearing to be allowed was in the court's discretion.

<sup>109</sup>2 N. Y. Cr. 335 (Gen. Sess. N. Y. 1884).

<sup>110</sup>N. Y. CODE CRIM. PROC. § 658 (1881).

<sup>111</sup>*People v. Rhineland*, 2 N. Y. Cr. 335, 339 (Gen. Sess. N. Y. 1884).

<sup>112</sup>Italics added. Cf. *People v. Haight*, 3 N. Y. Cr. 60 (1883).

<sup>113</sup>125 N. Y. 596, 600, 601, 26 N. E. 929 (1891); *accord*, *People v. Tobin*, 176 N. Y. 278, 68 N. E. 359 (1903). See *People ex rel. Thaw v. Lamb*, 118 N. Y. Supp. 389, 133 App. Div. 159 (2nd Dep't 1909), *aff'd*, 196 N. Y. 525, 89 N. E. 1109 (1910).

of the court; whether or not there existed a statute declaring that insane persons were not to be tried,<sup>114</sup> it was the inherent right of the court to suspend a trial if a man appeared insane; and it was also the inherent right of the court to try the issue as it saw fit, so long as the decision thereon was judicial in nature.<sup>115</sup>

It appears that the overwhelming weight of authority accepts and follows this rationale. Thus, in Wisconsin, a statute allowing the commitment of criminally insane defendants by the court without a jury was declared constitutional since at common law there was no right to trial by jury in these instances.<sup>116</sup> The same rule holds true in Massachusetts,<sup>117</sup> Washington<sup>118</sup> and Maryland<sup>119</sup> and in at least thirty other states.<sup>120</sup> This is not to say that insane defendants may be committed without notice and hearing, but merely to point out that the hearing accorded is not one by a non-advisory jury. Thus, in *State ex rel. Blaisdell v. Billings*<sup>121</sup> a statute allowing civil commitment for insanity by the court on certificate of two physicians, without the chance for the patient to be heard,<sup>122</sup> was held unconstitutional. Due process under the constitution requires at least the right to have the opportunity to be heard.<sup>123</sup>

From the above authorities it is apparent that a trial by jury of the subsidiary issue of present insanity in criminal cases need not constitutionally be accorded in most states. The problem of determining the type of hearing which must be afforded, therefore, narrows down to the questions whether constitutionally there need be any hearing at all and, if so, whether the decision of the question must be by a court or may permissibly be left to a quasi-judicial tribunal, *i.e.*, a jury of psychiatrists and/or psychologists.<sup>124</sup>

Among those states where a jury trial has been declared not to be a neces-

<sup>114</sup>No such statute existed in England until 1800.

<sup>115</sup>See cases cited *supra* note 113.

<sup>116</sup>*Crocker v. State*, 60 Wis. 553, 19 N. W. 435 (1878), citing 1 HALE P. C. 33-35; *Freeman v. People*, 2 N. Y. Cr. 335 (1847); *Queen v. Goode*, 7 A. & E. 536 (K. B. 1837).

<sup>117</sup>*In re Dowdell*, 169 Mass. 387, 47 N. E. 1033 (1897).

<sup>118</sup>*In re Brown*, 39 Wash. 160, 81 Pac. 552 (1905).

<sup>119</sup>See *Hamilton v. Traber*, 78 Md. 26, 27 Atl. 229 (1893).

<sup>120</sup>*Contra*: *White v. White*, 108 Tex. 570, 196 S. W. 508 (1917). For a collection of authorities in other states, consult WEIHOFEN, *op. cit. supra* note 1, at 332 *et seq.*

<sup>121</sup>55 Minn. 467, 57 N. W. 206 (1893).

<sup>122</sup>Minn. Gen. Stat. 1878, c. 80, § 3.

<sup>123</sup>*State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 473, 57 N. W. 206: "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 . . . , defend, enforce, and protect his rights . . . [and the tribunal must proceed in due form of law]."

<sup>124</sup>This is the narrow constitutional problem. Once this has been answered the question remains as to what interpretation state courts will place upon the statutes which grant more than the constitutional necessity.

sity<sup>125</sup> there are only two which have attempted to constitute psychiatrists as administrative boards to determine the issues of insanity in criminal cases. In Louisiana, as we have seen,<sup>126</sup> the commission is quasi-judicial for but half the problem, since defendants may appeal to a jury where the commission finds present *sanity*. In Connecticut, the court appoints three reputable doctors to examine defendants and hold hearings. Their findings are conclusive on the court.<sup>127</sup> The remaining forty-six states have no such provisions.<sup>128</sup> As to whether statutes such as those of Louisiana and Connecticut will be declared constitutional<sup>129</sup> if adopted in some form or another in the various states it is this writer's firm belief that once the high barrier of jury trial is cleared, then the commission quasi-judicial determination of insanity will be declared constitutional.<sup>130</sup> So long as the commission, if it has the power to commit permanently, acts only on notice and hearing,<sup>131</sup> there is no question but that a strictly judicial determination by a court<sup>132</sup> will meet the requirements of the Federal and State Constitutions.<sup>133</sup>

With this constitutional background, the present state statutes may now be examined and passed upon with an eye to constitutional observance and, which is more important, to determine their application in practice.

New York has been particularly active in legislation in this field. In 1842 there was enacted the first provision providing the court specifically with the lunacy commission as an instrumentality for determining the mental condition of criminal defendants.<sup>134</sup> This provision was substantially embodied, after slight changes,<sup>135</sup> in the first Code of Criminal Procedure in the years 1880-1881.<sup>136</sup> Essentially, this section provided that where a defendant was in confinement under indictment and appeared at any time to be insane, the court might appoint a commission to examine him as to his insanity at the time of the offense and at present; and where defendant raised a special plea of insanity to the indictment, the court might do likewise.<sup>137</sup> But, from the

<sup>125</sup>This excludes states such as Texas. See *White v. White*, 108 Tex. 570, 196 S. W. 508 (1917).

<sup>126</sup>*Supra* p. 386. Cf. McNaboe Bill, S. B. No. 915 (1936).

<sup>127</sup>CONN. GEN. STAT. (1918) § 6584.

<sup>128</sup>For a classification and discussion of the statutes of these states, see p. 422 *infra*.

<sup>129</sup>As in *State v. Burris*, 169 La. 520, 125 So. 580 (1929). See *supra* note 70.

<sup>130</sup>See *White v. White*, 108 Tex. 570, 196 S. W. 508 (1917).

<sup>131</sup>See *State ex rel. Blaisdell v. Billings*, *supra* note 123.

<sup>132</sup>See discussion *supra* pp. 390-392.

<sup>133</sup>*Maxwell v. Dow*, 176 U. S. 603, 20 Sup. Ct. 1025 (1900).

<sup>134</sup>Laws 1842, c. 135, § 32.

<sup>135</sup>Laws 1874, c. 446, § 20, amending Laws 1871, c. 666, § 1.

<sup>136</sup>N. Y. CODE CRIM. PROC. § 658 [Laws 1881], § 659.

<sup>137</sup>As for persons held in confinement but not under indictment, see REV. STAT., pt. 1, c. 20, § 34; as amended by Laws 1874, c. 446, § 26, Laws 1897, c. 451, § 1, Laws 1898, c. 417, § 1, amended in 1909, 1910, 1924, 1933; known as N. Y. CODE CRIM. PROC. § 836 from 1881-1936, renumbered as Section 870 by Laws 1936, amended Laws 1939, c. 861, § 870.

very first year of these provisions—from 1842 to date—great difficulty and confusion arose in the application of these laws.<sup>138</sup>

First there was the question whether these laws did not violate the constitutional provision with respect to jury trial. Although many New York court decisions have been cited as authorities for the proposition that no jury trial need be accorded, upon examination—especially of *Freeman v. People*, *People v. McElwaine*, and *People v. Rhineland*—it is found that no Court of Appeals or Appellate Division case has ever directly held to that effect. True, there are strong *dicta* rife in many cases to that effect, but no holding. This is not to say that the *dicta* are incorrect. As already stated, it is this writer's belief that no jury is constitutionally necessary in these proceedings.

The more difficult problem was whether a special plea of insanity, *ipso facto*, or a motion for a commission, automatically compelled the court to call in a commission in lunacy. *Freeman v. People* did not supply a solution to this problem, the case going off on procedural grounds;<sup>139</sup> and even were one to argue that the procedural ground dismissal was only one unimportant factor, it is to be noted that the *dictum* went only so far as to state that the court might use its discretion as to whether it should call in a jury or commission, and did not state that the court might *entirely refuse* to have the issue of present insanity tried by lunacy commission or jury.<sup>140</sup> *People v. Rhineland* merely held that the court was not bound to follow a finding of insanity by a commission, where the court found the defendant sufficiently sane to undergo trial.

In *People v. McElwaine*, however, the problem was met, and the court clearly held that it was discretionary with the trial tribunal to appoint or to refuse to appoint the lunacy commission. Thus, if there were a reasonable amount of evidence, especially of demeanor, before the court of first instance to lead it to believe the defendant sane,<sup>141</sup> then it might properly refuse to call in a lunacy commission.<sup>142</sup> The court did not go into the related question, *i.e.*, that of the extent of this discretion, and when it would be declared to

<sup>138</sup>See *People v. Pershaec*, 172 Misc. 324, 15 N. Y. S. (2d) 216 (Gen. Sess. N. Y. 1939).

<sup>139</sup>See p. 393 *supra*.

<sup>140</sup>*Denio* 9, 20 *et seq.* (N. Y. 1847).

<sup>141</sup>In the *McElwaine* case there had been a first trial, conviction and reversal. Thus at the second trial the lower court had already seen the defendant and his actions, over a period of time, and might have formed a reasonable opinion as to his present sanity.

<sup>142</sup>*Accord*, *People v. Tobin*, 176 N. Y. 278, 68 N. E. 359 (1903); *People v. Whitman*, 149 Misc. 159, 267 N. Y. Supp. 1107 (Gen. Sess. N. Y. 1933); *People v. White*, 140 Misc. 701, 251 N. Y. Supp. 396 (Gen. Sess. N. Y. 1931). And in those twenty states where a jury trial has been made mandatory by statute, the court has discretion to refuse to call a jury. *Rohn v. State*, 186 Ala. 5, 65 So. 42 (1914); *Bulger v. People*, 61 Colo. 187, 156 Pac. 800 (1916); *State v. Peterson*, 25 Mont. 81, 63 Pac. 799 (1912); *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982 (1894). *Contra*: *People v. Geary*, 298 Ill. 236, 131 N. E. 652 (1921); *but see People v. Preston*, 345 Ill. 11, 177 N. E. 761 (1931).

have been abused.<sup>143</sup> In the *McElwaine* case, the lower court appears to have relied solely upon the appearance and conduct of the defendant in arriving at the decision to refuse to appoint the examiners in lunacy. Later, the custom seems to have arisen of appointing doctors to inform the court as to defendant's mental condition and, if their informal report was insanity, the court would then use the machinery of the Code. Thus, in *People v. Tobin*<sup>144</sup> counsel for the defendant in a first degree murder trial asked the court to appoint three competent doctors to determine whether the defendant was presently sane. The court granted the request. Two doctors then reported the defendant sane, and one insane. Counsel then moved the court to appoint a lunacy commission under Sections 658 and 659. The Court of Appeals affirmed the denial of this motion, stating that the appointment of the commission was in the discretion of the lower court under the statutes, and that this discretion had been properly exercised,<sup>145</sup> since the two doctors' opinions were based on affidavits and proofs which could reasonably have laid the basis for the court's refusal to act.

Whatever may be the limits of the proper exercise of discretion in any given case, it is apparent that no matter how strictly trial courts are held in such exercise, the resulting protection to the defendant would be vitiated if the report of the commission were made binding on the court. And, although Section 658 provided in 1881 that "if the commission find the defendant insane the court must suspend the trial," *People v. Rhineland* held that, despite a report of *insanity* by the majority of the commission, the court need not follow the report and could send the defendant to trial. In the face of this mandatory language of the statute it is surprising to find such an interpretation changing "must" to "may." It is equally confusing to discover in *People ex rel. Forrester v. The Sheriff*<sup>146</sup> the holding that the court cannot find the defendant insane and commit him where the lunacy commission's report is that the defendant is presently *sane* or the report is unclear as to sanity.<sup>147</sup> The explanation of these two rules, in 1906, lies in the fact that courts are reluctant to suspend trials since suspension usually results in the loss of witnesses and the "cooling off" of the evidence. Thus, a finding of insanity by the commission was not binding but a contrary finding was binding under—or in spite of—Sections 658 and 659 as they read in 1906.

The decisions in *People v. Rhineland* and *People ex rel. Forrester v. The Sheriff*, while not handed down by the Court of Appeals, are significant even

---

<sup>143</sup>The Court of Appeals did not decide that the trial court could, without calling a lunacy commission, find the defendant *insane*. See Note (1937) 37 Col. L. Rev. 151.

<sup>144</sup>176 N. Y. 278, 68 N. E. 359 (1903).

<sup>145</sup>Citing the *McElwaine* case.

<sup>146</sup>114 App. Div. 861, 100 N. Y. Supp. 193 (2d Dep't 1906).

<sup>147</sup>See Note (1937) 37 Col. L. Rev. 151.



under the present day statutes.<sup>148</sup> At a later point their application to these statutes will be discussed, but for the present it is apparent that if the decisions of the psychiatrists or doctors are to be binding in some cases, then their examinations or hearings must be conducted on notice and hearing.<sup>149</sup> During the years from 1871 to 1906 (the date of the *Forrester* case), there had been no problem as to the type of examination the three disinterested experts were to conduct. The informal examination and hearing had been regularly conducted.<sup>150</sup> After that date the practice appears to have been to hold formal hearings, on notice, with counsel for the defendant and the District Attorney present.<sup>151</sup> It is relevant to suggest here that the procedure of expert psychiatrists is stultified by the holding of formal hearings.<sup>152</sup> How can a spinal test be made and cross-examined? How can syphilis of the brain be recognized by question, answer and cross-examination? Is it feasible to hold formal hearings in a hospital or prison if the defendant is in such condition that it is impracticable that he be moved?

Leaving these questions for a moment, we come to the remaining implication of the *Forrester* and *Rhineland* cases. If the court is not bound by a commission finding of insanity, then what evidence must the court receive and what judicial hearing, if any, must the court grant before declaring the defendant sane? *People ex rel. Peabody v. Chanler*<sup>153</sup> is directly in point here. Under Section 454 of the Code of Criminal Procedure, where the jury acquits a defendant because of insanity at the time of the act of crime, the court may summarily commit him to a state hospital if it is of the opinion that his release, while he is mentally disordered, would be dangerous to the public.<sup>154</sup> In the *Peabody* case, the court had appointed a commission to investigate the defendant's sanity. The commission's opinion being that he was presently sane, the trial was continued, but resulted in a jury disagreement. A new trial was ordered and the defendant acquitted due to past

---

<sup>148</sup>See Section 662: "If such psychiatrists find [the defendant sane] . . . , the proceedings against such defendant shall be resumed as if no examination had been ordered. If the court does not concur with the findings of the psychiatrists, . . . the proceedings against such defendant may be resumed. . . ." Also see Section 662 (a) dealing with finding of insanity.

<sup>149</sup>See discussion of the administrative law involved, *supra* pp. 388 *et seq.*

<sup>150</sup>*E.g.*, *People v. Tobin*, 176 N. Y. 278, 68 N. E. 359 (1903).

<sup>151</sup>See *People v. Nyhan*, 37 N. Y. Cr. 74, 171 N. Y. Supp. 466 (Gen. Sess. N. Y. 1918). Cf. *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275 (1893). Especially note *People v. Irwin*, 166 Misc. 751, 4 N. Y. S. (2d) 548 (Gen. Sess. N. Y. 1938), where the lunacy commission under the 1936 act held twenty-two formal hearings before reporting to the court that defendant was sane. The court then confirmed the report after giving defendant's counsel and the district attorney the opportunity to be heard.

<sup>152</sup>This subject is discussed *infra* pp. 419 *et seq.*

<sup>153</sup>133 App. Div. 159, 118 N. Y. Supp. 389 (2d Dep't 1909), *aff'd*, 196 N. Y. 525, 89 N. E. 1110 (1910).

<sup>154</sup>N. Y. CODE CRIM. PROC. § 454 (1903).

insanity. However, the court committed him to Matteawan Hospital as insane. The defendant appealed from this decision contending that he had either a right to a jury trial before commitment, or at least to notice and hearing in open court. The appellate court split on this decision, three justices concurring in the majority opinion of affirmance, one justice concurring in result alone, and one dissenting.

The majority held that the statute impliedly provided notice and hearing, for two reasons: (1) Since the defendant had filed a special plea of insanity, he was on notice that, if found by the jury to be insane in the past, the insanity would be presumed to continue until the present, unless rebutted; and (2) since the court could regard him and his actions during the trial, that in itself was a proper hearing. The appellate court then went on to state that the Legislature might constitutionally provide for the commitment of defendants who were acquitted by reason of insanity, without any notice and hearing, because the commitment settled nothing, not being a judicial determination, and could be attacked on writ of *habeas corpus*, which was the sole judicial proceeding required to safeguard the defendant's rights.<sup>155</sup>

The second written opinion proceeded on other grounds. First, it intimated that even were the defendant constitutionally entitled to a jury trial, he had waived it by his failure to demand such trial. Then the Justice compared the proceedings under Section 454 with those under the Mental Hygiene Law and found that the commitment by the court was merely provisional in both instances and therefore constitutional, being non-determinative of the issue of insanity.

The dissent took issue with both opinions, and found the statute unconstitutional. It conceded that the legislature could, as a proper exercise of the police power, provide for a *temporary* commitment without notice and hearing. But the statute here definitely was not one providing for such commitment, and therefore, was unconstitutional unless it provided for notice and hearing before commitment. There could be no legal support for the presumption indulged in by the majority of the court, based on the plea of insanity. There was no adequate notice and, at all events, there was no hearing, for a hearing comprises the opportunity to defend, and the mere observance of defendant's demeanor by the court could not constitute a hearing. Finally, the statement that the hearing on writ of *habeas corpus* was a sufficient judicial determination must be rejected, said the dissent, because that writ is corrective, merely intended to review prior judicial determinations and not to supply the judicial requisites which were lacking in the earlier proceedings.

---

<sup>155</sup>But see the discussion *supra* p. 386.

The most recent indication of an answer to these issues is found in *People v. Frasquery*.<sup>156</sup> The defendant had pleaded guilty to a charge of petty larceny and, after examination by two doctors under Section 836 of the Code of Criminal Procedure, was committed to the Napanoch Institution for mentally defective delinquents. Upon examination there he was found insane and remanded to the sheriff to be held for further court action. The court, as a precautionary measure, ordered the defendant committed to a hospital. Upon examination he was found to be suffering from schizophrenia and to require treatment for insanity. The case then, strange to relate, went to trial and defendant's counsel waived a hearing in court on the issue of present insanity. Judge Freschi, however, refused to allow this waiver and ordered defendant committed for observation by a lunacy commission under Sections 658 of the Code, for he had grave doubts whether a permanent commitment could be made without a legal and judicial determination of the fact of insanity.<sup>157</sup>

The problem discussed thus far under the New York statutes and decisions received but nebulous solutions until 1936, when a major amendment was added to the Code in an effort to bring the best psychiatric knowledge to the task of determining present insanity and to provide a definite procedure of hearing and decision of this issue. The 1936 amendments, however, being patterned after the earlier statutes,<sup>158</sup> did not dispel the confusion rampant since 1871.

The first and major additions were the new Sections 658 to 662a, found in that portion of the Code relating to "Proceedings by Indictment":

Section 658: "Under a special plea of insanity to an indictment, or at any time before a final judgment, whenever it shall appear upon sufficient and satisfactory proof,<sup>159</sup> that there is reasonable ground for believing that a defendant is insane, . . . the court may upon motion of either the people or the defendant, or on its own motion, appoint a commission of not more than three . . . persons, at least one of whom shall be an attorney . . . ,<sup>160</sup> and . . . one . . . a qualified psychiatrist . . . , to conduct an examination and hearing relating to the sanity of such defendant, and report to the court as provided by this section. The court may in its discretion, as an aid in determining whether there is reasonable ground for believing . . . defendant . . . insane, commit the defendant . . . , for observation for a reasonable period, to be advised as to the mental condition of the defendant, and the information thus

<sup>156</sup>146 Misc. 137, 261 N. Y. Supp. 412 (Gen. Sess. N. Y. 1933).

<sup>157</sup>*Cf. Trust Co. v. Safe Deposit Co.*, 109 App. Div. 655, 96 N. Y. Supp. 585 (1st Dep't 1905); *SMOOTH, INSANITY* (1934) c. 6, § 124.

<sup>158</sup>Laws 1871, c. 666, § 1; Laws 1910, c. 557, § 2.

<sup>159</sup>This phrase was derived from Laws 1910, c. 557.

<sup>160</sup>As that term is defined in the Mental Hygiene Law [Laws 1936, c. 459, § 27].

obtained shall be available as evidence, in the event of the appointment of a commission. . . .

"The commission must summarily proceed to make their examination, and conduct their hearing. Before commencing, they must take the oath . . . [of] referees. A majority . . . shall constitute a quorum. They must be attended by the District Attorney . . . , and defendant . . . be represented by counsel. The commission may receive evidence . . . , call and examine witnesses, . . . under oath, . . . and may conduct a personal examination of the defendant, within the scope of the rules of evidence. . . . When the examination is concluded, they must . . . report the facts to the court with their opinion or opinions, as to the sanity or mental condition of the defendant as defined by section eleven hundred twenty of the penal law, at the time of such examination and at the time . . . of the crime. . . ." <sup>161</sup>

Section 659: "If the commission find the defendant insane, and the court confirms its report . . . trial . . . must be suspended until he becomes sane; and the court, if it deem his discharge dangerous . . . , must order that he be, in the meantime, committed. . . ."

Section 661: "When [defendant] becomes sane, the superintendent must give a written notice . . . to a judge of the supreme court. . . . The judge . . . must require the sheriff . . . to bring the defendant from the hospital and place him in proper custody until he be brought to trial, judgment or execution. . . ."

Section 662a: "The cost of any commission of lunacy, pursuant to the provisions of this article, shall be a charge upon the county. . . ."

A second major provision was that in Section 870 in 1933, <sup>162</sup> appearing in that part of the Code dealing with "Special Proceedings":

"If any person not held for a felony is in confinement under a criminal charge . . . , or under any other than civil process, shall appear to be insane or . . . a mental defective, . . . the court . . . may commit such . . . person . . . [in cases within the city of New York] . . . to a hospital under the jurisdiction of the Department of Hospitals . . . ; who shall keep such person . . . until the question of his sanity, or mental condition be determined, as provided in the Mental Hygiene Law, . . . [and defendant to be lawfully committed, or returned to the court]. In either event the superintendent of the hospital shall . . . report to the court . . . stating the conclusion reached or disposition made; or

". . . [In felony cases] . . . , where it appears to the satisfaction of a judge of a court of record . . . that [the defendant] is insane, [the judge] may [investigate], . . . and may, if . . . there is reasonable ground for believing . . . defendant [insane], call two physicians, . . .

<sup>161</sup>Under Laws 1910, c. 557, the earlier provision as to present insanity was repealed. From 1910 to 1936 the commission was not authorized to inquire into present insanity by statute, but it was held that the court had the inherent right to demand that they do so. *People v. Whitman*, 149 Misc. 159, 266 N. Y. Supp. 844 (Gen. Sess. N. Y. 1933).

<sup>162</sup>Formerly Section 836, renumbered 870 by Laws 1936, c. 460.

and if he deem it necessary, or if a demand is made by [the] defendant or . . . district attorney, after a finding by said physicians . . . , shall call a jury, . . . and if it be satisfactorily proved and it is certified by both . . . physicians, that the defendant is insane, . . . [the] judge shall . . . commit him [until he is sane]. . . . [When sane, the superintendent shall so inform the court and the defendant is then to be tried]. . . . Nothing in this section shall be deemed to contravene the provisions of law relating to the appointment and procedure of a commission to inquire into the sanity of a defendant, as hereinbefore provided."

Section 658 effected an obvious invasion of Section 870, in that the latter provided for reports by doctors at any time. Since the sections overlapped, there was bound to be confusion in the application of the one or the other. Basically, the new sections constituted an apparent effort to bring to the investigation of insanity the experience and knowledge of trained psychiatrists, rather than the jury,<sup>163</sup> but there were many defects which soon became apparent.<sup>164</sup> These defects will be discussed later in the light of the 1939 amendments, but for a proper background to consider these amendments, it is imperative that the practice under the 1936 statutes be outlined.

In practice, the courts in indictable cases began to use Section 658 and to disregard Section 870. Since the commission's cost was chargeable to the county, the patronage ran exorbitantly high.<sup>165</sup> Further, the courts in the various counties of New York City adopted different modes of procedure under the statutes. Thus, in one county, defendants were committed to the hospital under Section 870 if they were too obviously ill to be humanely housed in jail. At the same time, a commission under Section 658 would be appointed to examine the defendant at the hospital, although the psychiatrists there were working up a complete case. At other times, the report on the hospital commitment was used not only as a preliminary report for the convenience of a commission when later appointed, but would serve, after a commission finding, as a check-up for a cautious court. The number of commissions always exceeded the hospital commitments.<sup>166</sup> In another county in New York City, the report under the hospital method of Section 870 was used frequently as a basis for commitment of mental defectives to Napanoch, but commissions were appointed whenever the hospital reported insanity. This additional procedure was required because Section 870 in 1936 did not provide for a commitment based on hospital reports, but provided only for a

---

<sup>163</sup>See Note (1937) 37 COL. L. REV. 151, 153, note 22.

<sup>164</sup>*Id.* at 155, 156: "Whatever substantive and procedural improvements have been effected by the amendments, they complicate rather than simplify . . . [the] criminal insanity provisions. . . . A comprehensive revision of the entire statutory frame work is definitely required."

<sup>165</sup>See Note (1939) 39 COL. L. REV. 1260-1262.

<sup>166</sup>See *supra* note 25.

commitment based on a finding of insanity by a commission under Section 658. In still another county, the criminal court of record adhered to a policy of refusal of appointment of any commissions at all. Cases were sent to the hospital, but, since those reported insane were rejected by Matteawan for the reason stated above, this court developed the procedure of service of subpoenas upon the hospital psychiatrists and all witnesses so as to prepare a record, at a formal hearing before the county judge, upon which the commitment of the insane defendant could issue. This last mentioned court persists in this practice even under the 1939 provisions, despite the absence of the original reason for the development thereof, and gives as its new reason for an old method the desire to accord a constitutional hearing in a criminal case.

Further, while some courts appointed commissions but rarely, others appointed them in a quite amazing number of cases. Moreover, of these commissions many members were so unqualified that the courts which appointed them, in many instances, had to disregard their findings entirely and rely on the hospital reports secured under Sections 658 and/or 870.

In an attempt to eliminate the duplications, over-formal procedure, exorbitant expense, and gross inefficiency of the lunacy commissions under Section 658, the Desmond Act was passed in 1939, repealing the old Sections 658 to 662a and 870 of the Code and providing in their stead for a single method for the investigation of present insanity.<sup>167</sup> The old difficulty of application, however, still holds sway, and many problems raised are, as will appear, still unanswered.<sup>168</sup>

The statute intends to provide the courts with the machinery for deciding a purely medical issue, namely, that of present insanity. The new Sections 658 and 870 embody the rule of *People v. Tobin* in that the setting in motion of the examinations, *etc.*, rests in the sound discretion of the court. It must appear to the court that there is a reasonable ground for believing defendant is insane; and even if there is such reasonable ground the court's action is discretionary. The statute is silent as to how it shall be made to appear that such reasonable ground exists. If there is a special plea of insanity to an indictment under Section 658, there need be no such showing for the initiation of procedure thereunder. Where there is no such plea, however, the issue of insanity may be raised in any practicable manner—by *ex parte* information to the court or by motion of either counsel. The burden of proof of such reasonable ground is probably not upon the defendant since the court

---

<sup>167</sup>The new sections are set forth *supra* notes 13 and 14.

<sup>168</sup>See discussion in *People v. Pershaec*, 172 Misc. 324, 15 N. Y. S. (2d) 215 (Gen. Sess. N. Y. 1939), noted (1940) 14 ST. JOHNS L. REV. 439.

may on its own motion avail itself of the machinery specified.<sup>169</sup> The failure of the statute to state the mode of informing the court in the first instance cannot be criticized sharply, for the period of time provided by the statute within which to raise the point, *i.e.*, "any time before final judgment," is broad enough so that there are countless practical methods of procedure; and that which would be practical before trial may not be so during or after trial and before sentence. The loose and flexible manner of this initial determination is, therefore, to be welcomed by the court, defendant and District Attorney.<sup>170</sup>

Assuming in any given case that there is an appearance of insanity or reasonable ground for belief thereof, the next question dealt with in the new sections is this: Which court, or courts, may initiate proceedings thereunder? Under Section 658 it is clear that the court having jurisdiction of the *person* of a defendant indicted for a felony or misdemeanor is the exclusive tribunal which can act. This provision yields no problem since it has reference only to courts of record such as the county courts of New York City. Section 870, however, has yielded some trouble in this respect. Under this section any court having jurisdiction of a *defendant* charged with, but not under indictment for, any offense, may stay proceedings entirely and order an examination as specified in Sections 658 to 662d. Thus if a defendant is charged with felony, but not under indictment therefor, a court not of record, such as Magistrate's Court, may—if the sections are read literally—stay proceedings and commit the defendant for examination. The practice in the Court of Special Sessions and Magistrate's Court, in the past, has been to commit defendants charged with crimes less than felony under the first paragraph of Section 870 of the present Code, and there is no doubt but that such procedure is proper. In *People v. Pershaec*, however, it was intimated by way of *dictum* that courts not of record have today no power

---

<sup>169</sup>The 1936 Act allowed the court to act if upon satisfactory proof there was a reasonable ground for believing defendant was unable to comprehend the proceedings.

<sup>170</sup>In *People v. Pershaec*, *supra* note 168, the court stated that judges could still send defendants to hospitals for preliminary observation so that the judge would be able to ascertain whether there were reasonable grounds for believing defendant insane. Under the 1936 act the court was specifically granted this power but it was eliminated in 1939. In the main case, Collins, J., states that this elimination is not effective to bar the court from continuing the former practice. This interpretation is not too sound, for it will result in duplications of procedure, since, if the preliminary report shows defendant insane, he will then be sent back to the hospital again for examination under Section 659. While it is true that the results of the first observation may be of value in this further procedure under the statute, the sending back and forth of defendants wastes time and money, and taxes the facilities of the Department of Hospitals. Moreover, the very nature of the defendant's acts and/or his physical appearance will ordinarily suffice to raise a reasonable doubt as to his sanity. Thus, if the court feels it necessary to commit the defendant for the preliminary observation, the proper procedure should be immediately to commit under Section 659. The repeal of the former sections of the code has done away with the necessity for any hospital procedure preliminary to a commission.

so to proceed under Section 870. Judge Collins, in that case, felt that only a court having jurisdiction of the *criminal action* could avail itself of Section 870 before indictment. It is Judge Collins' fear that if any court not of record may stay proceedings, then that would result in those courts having the power to stay the proceedings of a grand jury and its indictments. The legislature, he feels, never intended such a result, since it would be to grant jurisdiction over felonies to courts which cannot have that jurisdiction under the New York Constitution. Let us examine the argument on its merits.

The statutory language of Section 658 differs from that of 870. The former refers to any court having jurisdiction of the *person* of a defendant indicted, while the latter refers solely to any court having jurisdiction of a defendant charged with crime. The omission of the word *person* in the latter section may therefore be significant and sustain the view expressed in *People v. Pershaec*. The effect of this omission, however, can only be interpreted in the light of the practical problem presented. Assume a defendant is arraigned before a magistrate and is charged with felonious assault. The magistrate, upon regarding the accused, before *plca*, believes the accused may be insane. If this is the case, and if the magistrate has such power, he may stay the proceedings against the accused and commence proceedings under Section 658. But if the magistrate has not such power, then he will be required to compel a plea from an insane person—a requirement which Section 1120 of the Penal Code seeks to obviate<sup>171</sup>—and the insane person will be confined in a prison rather than in a hospital where he may be properly treated. On the other hand, if the magistrate does have the power to stay proceedings and order the accused examined, may he stay the proceedings of the grand jury or any other proceeding not before him?<sup>172</sup> It would appear that the authority to enforce a stay only refers to proceedings *in the court which is committing the defendant*; if so, the magistrate cannot interfere with the grand jury or any other court. This interpretation, it is believed, is in order and, if followed, will result in the immediate care and treatment of persons who appear insane before magistrates. If the grand jury then indicts, and a court of record secures jurisdiction of defendant, it may investigate further and determine whether the proceedings were appropriate. To say that the grant of such power to magistrates is a grant of felony jurisdiction goes too far, for the investigation of present insanity is merely preliminary and a corollary to the criminal trial and criminal jurisdiction.

Once the proper court has determined to make use of the provisions of the Code, the personnel of the body which will examine the defendant is selected,

---

<sup>171</sup>See *supra* notes 1-6.

<sup>172</sup>See Letter of Senator Desmond, *infra* note 202.



but not by the court. The examiners in New York City are two qualified psychiatrists selected by the Director of Psychiatry of the Department of Hospitals to make the examination,<sup>173</sup> aided by an assistant corporation counsel of the city.<sup>174</sup> The present Act states that these psychiatrists are to make an examination of the committed person and drops the phrase "examination and hearing" of the former repealed sections. The examination is to take place at the site where the defendant is detained or at a hospital. Under the 1936 act the examination and hearing was the last word in formality, the numerous hearings being conducted like miniature trials.<sup>175</sup> A requirement of formal hearings serves only to impede and obstruct the technique of the psychiatrists, and it would have been desirable for the Legislature to have provided specifically that formal hearings need not be held. There is no statement in the statute as to the procedure which the psychiatrists *must* follow. The only provisions which might possibly afford a solution as to their procedure are those compelling the psychiatrists to take the oath of referees, granting them the assistance of counsel, and allowing them to compel the attendance of witnesses and production of books, records and documents. These statutory provisions, unfortunately, may be interpreted by the courts as envisaging formal hearings by the examiners.<sup>176</sup> However, if the courts recognize the value of allowing psychiatrists to conduct their examinations informally according to the exigencies of the particular case, misinterpretation of the statute will be avoided and there will be a fulfillment of the intent of the legislature to bring medical knowledge to bear on this medical question.

To make the interpretation that formal hearings are not required the courts must jump two constitutional hurdles. As the statutes read in 1936, in cases before an indictment was returned the examination and commitment of the defendant was made either pursuant to Sections 70 to 76 of the Mental Hygiene Law or under the second paragraph of Section 870 of the Code. In the procedure under the Mental Hygiene Law the defendant was entitled upon demand to a jury trial of the issue of insanity. Although this jury trial was said in various *dicta* not to be of right or, at least, not to be a regular constitutional jury trial,<sup>177</sup> a close reading of the law nevertheless

---

<sup>173</sup>This provision succeeds in entirely eliminating the expense entailed in court selection of medical personnel.

<sup>174</sup>The 1936 act provided for the appointment of an attorney. The value of legal aid depends entirely upon the type of hearing which the psychiatrists are to conduct. If informal, then the provision is not necessary.

<sup>175</sup>See, e.g., *People v. Irwin*, 166 Misc. 751, 4 N. Y. S. (2d) 548 (Gen. Sess. N. Y. 1938).

<sup>176</sup>Note (1939) 39 COL. L. REV. 1260, 1265.

<sup>177</sup>See *Sporza v. Bank*, 192 N. Y. 8, 84 N. E. 406 (1908), where it was said, in a *dictum*, that the jury trial accorded under the Mental Hygiene Law was not one of right. Cf. *People v. Haverstraw*, 151 N. Y. 75, 45 N. E. 384 (1896).

reveals that the trial *was* one of right. The procedure under the second paragraph of Section 870, however, provided that the judge might call a jury or, on demand, must call a jury, and if it were satisfactorily proved, and certified by two doctors, that defendant was insane, the judge should commit the defendant until sane. It is not clear whether, under this paragraph, the verdict of the jury was advisory to the court or determinative.<sup>178</sup> If it was determinative, then it was preserved by the adoption of Article 1, Section 2 of the New York Constitution of 1938, and cannot be repealed by the present Section 870. If it was non-determinative—as in all probability will be held, due to the statutory wording and the intent of the legislature not to provide for a mandatory jury trial—then the jury in this instance has not been preserved by the 1938 Constitution. If this is so, then the first paragraph of Section 870 in 1936, which also provided for jury trial, was likewise effectively repealed in 1939, since the second paragraph was merely an alternate to the first.

Assuming then that the jury trial above discussed was only effective to yield an advisory opinion to the court, there now comes the second obstacle to the court's allowing the examiners to conduct informal hearings today: Does the statute make the report of the psychiatrists binding on the court? If so, then the psychiatrists constitute a quasi-judicial tribunal and must hold formal hearings on notice. This is the problem left by *People v. Rhineland* and *People ex rel. Forrester v. Sheriff*.

As far as a report of insanity is concerned, Section 662a specifies that the findings of the psychiatrists that the defendant is insane will result in the commitment of defendant only if the court concurs therein. If the court does not concur with the findings, then, under Section 662, the trial will be resumed. This provision appears to be a complete adoption of the rationale of *People v. Rhineland*. However, where the psychiatrists report sanity, the case is not so clear. Section 662 reads:

"If such psychiatrists find . . . defendant is not in such state of . . . insanity *and the court concurs*, the proceedings against such defendant shall be resumed as if no examination had been ordered. If the court does not concur with the findings of the psychiatrists, . . . the proceedings against such defendant may be resumed or the court may request the . . . director . . . to appoint a third psychiatrist to examine the defendant and submit a report to the court. . . ."

This section appears to give the court the power to reject the finding of insanity. However, even if the court does not concur, the court can only resume the proceedings—*i.e.*, the trial of the criminal charge—or appoint

---

<sup>178</sup>Note (1937) 37 COL. L. REV. 151, 152, note 12.

another psychiatrist. If the psychiatrists divide, two for sanity and one for insanity, can the court now reject the majority report? The statute stops here and leaves the problem suspended in mid-air. Although the statutory draftsmanship is subject to some criticism, an interpretation of the statute can be made. Logically, there should be less leeway for the courts to reject findings of sanity than of insanity, for if the defendant is sane he goes to trial immediately and there will be no delay.<sup>170</sup> However, since the statute leaves findings of insanity to be rejected by the courts, it should also be held that findings of *sanity* do not bind the courts.

There is a strong argument in favor of this interpretation. If the psychiatrists' decision binds the court in only one of the two cases, then, before the decision of the psychiatrists is made, they will be forced to hold formal hearings, for, in advance of the event, they do not know whether the prospective examinee is sane or insane. Under the above hypothesis—*i.e.*, if defendant is found insane, the court may disagree; but if sane the court cannot—the psychiatrists would be judges and have to proceed as such. It is therefore submitted that, despite the gap in the laws, the reports of the psychiatrists are intended to be advisory only, and the psychiatrists may, therefore, conduct informal hearings at any time.

As the procedure of the psychiatrists, then, results in merely an advisory report, it is evident that the final determination of sanity or insanity is made by the court. Thus the court must, under Section 662a, give the defense and prosecution the opportunity to be heard before confirming a report of insanity. Under Section 662, however, assuming a report of sanity by the psychiatrists is not binding, there is no provision for affording counsel a hearing in court before confirmation. This omission is traceable either to poor drafting or else to a finding by the drafters that a defendant can be compelled to stand trial, although insane, without a true judicial determination after hearings on notice. This writer's view, as already expressed, is that the procedure should constitutionally afford defendant judicial notice and hearing in both situations. This is not to say that the court must use the machinery of Sections 658 or 870 on mere request, but that once the request is granted there must be a judicial determination of sanity as well as of insanity. As a matter of fact, however, despite the omission in the statute, the practice has been to afford defendants their opportunity to be heard, whether the report of the psychiatrists was insanity or sanity.<sup>180</sup>

---

<sup>170</sup>Under Section 662a the court must give the defendant's counsel and the district attorney the chance to be heard before concurring in a finding of *insanity*. Section 662, dealing with *sanity*, does not so provide, although in practice such opportunity is there also accorded. See *People v. Irwin*, 166 Misc. 492, 2 N. Y. S. (2d) 686 (Gen. Sess. N. Y. 1938).

<sup>180</sup>See *People v. Irwin*, 166 Misc. 492, 2 N. Y. S. (2d) 686 (Gen. Sess. N. Y. 1938).

Once there has been a hearing by the court and a decision, the defendant must either be ordered to trial or be committed to a hospital for the insane until he recovers sufficient mental order to undergo trial or sentence as defined in Section 1120 of the Penal Code. Assuming there has been a decision, the logical question that arises is this: How can the defendant, if committed, be released from the asylum, or be committed to the asylum and trial stayed, after a decision of the court that was erroneous?

Taking first the decision by the court that defendant is sane, it is found that there is no possible method of review of or appeal from the order forcing the defendant to trial until the trial of the criminal charge has been completed. The court's decision is an interlocutory one, subject to review only after final judgment, and, therefore, the only proper procedure to follow is to move for a new trial of the criminal charge on the ground that the court has abused its discretion in failing to make use of the provisions of Sections 658 or 870, or has declared the defendant sane where reasonable men, given the same set of facts, would have declared defendant insane.<sup>181</sup> If the motion is denied, an exception taken to such denial lays the ground for a review of the insanity issue by the Appellate Division. It is to be noted, however, that appellate tribunals generally hesitate to reverse lower courts for abuse of discretion save in instances of most flagrant abuse. In criminal cases there is usually no reversal, because the defendant, whether acquitted or convicted by the jury on a criminal charge, can still be put in an asylum for confinement and treatment.<sup>182</sup> Reversals for error in these preliminary proceedings are very slow in forthcoming because of the expense attached to the requirement of a second trial of the preliminary issue and, perhaps, of the question of guilt. This latter defect might be cured by a statutory allowance of an appeal from a decision on present insanity directly to the Appellate Division before the trial of the criminal charge. Whether or not such provision is necessary or wise, it is apparent that the Legislature, in the present act, has paid little attention to a decision of sanity and its resultant effect upon the procedural rights of a defendant. This neglect should be cured by a better drafted statute.<sup>183</sup>

On the other hand, what occurs where the defendant has been found by the court to be insane and is committed? Must he remain in confinement to await the pleasure of the court?<sup>184</sup> Initially, it is noticed that there can be no appeal to a higher court because the criminal charge has not yet been

---

<sup>181</sup>People v. Bechtel, 297 Ill. 312, 130 N. E. 728 (1920).

<sup>182</sup>N. Y. CODE CRIM. PROC. § 454; N. Y. CORR. LAW §§ 438, 438a.

<sup>183</sup>See Section 662, and proposed amendment Section 662a and Section 662b, *infra* notes 196, 197.

<sup>184</sup>In early times in England, defendants were committed to "await the King's pleasure, until it be known." See 1 BL. COMM. 201.

tried, and there can therefore be no final judgment from which an appeal may be taken. However, this does not leave the defendant in too great difficulty, because he can always sue out a writ of *habeas corpus* and test his sanity before a justice of the Supreme Court whenever he believes he has regained his sanity.<sup>185</sup> But suppose the defendant, after commitment, must be sent back to the court by the Superintendent of Hospitals to stand trial, as provided in the act? Section 662a provides:

“A defendant so committed shall remain in such institution until he is no longer in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or of making his defense thereto. In that event the superintendent of the hospital . . . shall inform the court and the district attorney,<sup>186</sup> or their successors,<sup>187</sup> of such fact so that the person so confined may be returned forthwith to the authority by which he was originally held in confinement. The court from which such defendant was committed shall cause the sheriff without delay to bring the defendant from such institution and place him in proper custody, whereupon the proceedings against such defendant shall be resumed and he shall be brought to trial or legally discharged.”

There is thus again a total absence of the requirement of a judicial hearing before the defendant goes to trial, much the same as in the first instance where the court decides—without a hearing—that the defendant is sane. Again, the writer reiterates his belief that where a defendant claims he is insane, he cannot constitutionally be put on trial until there has been a judicial determination, on notice and hearing, of his sanity; and the examination and reports of psychiatrists, in the first instance, or of the Superintendent of Hospitals, after commitment, do not constitute the necessary judicial determination.

This detailed discussion of the present New York Code of Criminal Procedure has demonstrated that there are defects and inconsistencies pervading the act. It is therefore appropriate to look at the amendments proposed to cure these defects and to suggest further possible amendments.

Senator Desmond, the author of the 1939 amendments, with an aptitude for perceiving the defects pointed out above, introduced on February 21, 1940 a series of proposed amendments to the Code of Criminal Procedure, with the intent of remedying such defects and of clearing up the various problems encountered by courts and psychiatrists.<sup>188</sup> The proposed act would

---

<sup>185</sup>N. Y. CIV. PRAC. ACT § 1269. Section 662a, N. Y. CODE CRIM. PROC.

<sup>186</sup>Note that there is no provision for informing the defendant or his counsel.

<sup>187</sup>This indicates that the statute contemplates situations where the commitment will remain indefinite.

<sup>188</sup>N. Y. Senate Introd. No. 1290, Print No. 1520, Feb. 21, 1940.

amend Sections 658 to 662a in many respects.<sup>189</sup>

The new Section 658 would apply in all cases where an information has been filed, as well as where an indictment has been handed down.<sup>190</sup> The purpose of this addition is to assure the Court of Special Sessions the power to commit defendants charged with misdemeanors but not indicted therefor.<sup>191</sup> This section also specifies that the question to be determined is not that of defendant's insanity, but "whether he is incapable of understanding the charge, indictment or proceedings or of making his defense because he is in the aforesaid state." This new feature is to be welcomed because it follows the language of Section 1120 of the Penal Code and expressly indicates the answer which the psychiatrists are to give after their examination. The new section, however, preserves the language of the old as to the requirement of "reasonable ground" for believing a defendant is insane before the court shall act. This phrase could well be omitted, for, after all, the issue is a medical question, and if there is *any* doubt—not a reasonable doubt or ground therefor—that defendant is insane, then the procedure should be followed. The basic purposes of the act were and are to provide a single procedure and standard for the determination of this medical issue. Therefore, it would seem to be unnecessary to commit for preliminary observation or to require prolonged hearings before use of Section 658.<sup>192</sup> On any belief that the defendant is insane the court should in its discretion avail itself of Section 658; and, if the court finds that the appearance of insanity is feigned or simulated for dilatory purposes, it may in its just discretion refuse to use the machinery of Section 658.

The proposed Section 659 remains the same as the present section, except for the dropping of the provision which allows the assistant corporation counsel to aid in the psychiatric examination. This omission is sound because

---

<sup>189</sup>*Id.*, § 1: "Section 1. Sections six hundred and fifty eight, six hundred and fifty-nine, six hundred and sixty, six hundred and sixty-one, six hundred and sixty-two and six hundred sixty-two-a of the code of criminal procedure are hereby amended to read as follows: . . . (Matter in brackets is old matter, to be omitted; matter in italics is new)."

<sup>190</sup>Section 658: "Court order for examination as to sanity of defendant. If at any time before final judgment it shall appear to the court having jurisdiction of the person of a defendant indicted for a felony or a misdemeanor *or against whom an information has been filed by the district attorney* that there is reasonable ground for believing that such defendant is in such state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense, or if the defendant makes a plea of insanity to the indictment *or information*, instead of proceeding with the trial, the court, upon its own motion, or that of the district attorney or the defendant, may in its discretion order such defendant to be examined to determine [the question of this sanity] *whether he is incapable of understanding the charge, indictment or proceedings or of making his defense because he is in the aforesaid state.*"

<sup>191</sup>See *People v. Pershaec*, 172 Misc. 324, 15 N. Y. S. (2d) 215 (Gen. Sess. N. Y. 1939), denying such power to the Court of Special Sessions.

<sup>192</sup>*But see* *People v. Pershaec*, 172 Misc. 324, 15 N. Y. S. (2d) 215 (Gen. Sess. N. Y. 1939).

it recognizes, as do the proposed Sections 661, 662a and 662b, that the examinations of a psychiatrist should be and are informal; and, therefore, there is no need for formal procedure or legal advice thereon. That the procedure of the doctors is truly informal is evidenced in the proposed Section 661, repealing the present Section 661 which permits the examining psychiatrists to hold formal hearings.<sup>193</sup> While this is as it should be, the phraseology of the proposed section—but not its meaning and effect—is open to the criticism that it might be better to allow the psychiatrists to “interrogate any person as to any matter relevant to their examination,” without specifying the matters concerning which they may require persons to testify.

The new Section 662, aside from requiring for administrative purposes that the psychiatrists report in quadruplicate,<sup>194</sup> eliminates the provisions as to the findings of the psychiatrists,<sup>195</sup> such provisions being consolidated into the proposed Sections 662a,<sup>196</sup> 662b<sup>197</sup> and 662c.<sup>198</sup> The new Section 662a

<sup>193</sup>Proposed Section 661 (This whole section is new.): “Procedure. Such psychiatrists shall not hold formal hearings nor take testimony. Where in order to reach a determination on the question referred to them they find it necessary to interrogate persons as to the personal or family history or social background of the defendant they may in the city of New York through the director of the division of psychiatry and outside the city of New York through the superintendent of the hospital, as the case may be, request the court having jurisdiction of the defendant to issue and cause to be served subpoenas commanding the persons named therein to appear before the said psychiatrists and answer the questions put to them.”

<sup>194</sup>One copy for the district attorney, one for the defense counsel, one for the court, and one for the superintendent of the hospital.

<sup>195</sup>Proposed Section 662: “Reports to court. Upon the completion of such examination of a defendant the superintendent of the hospital or Director of the Division of Psychiatry of the Department of Hospitals of New York City, as the case may be, must forthwith transmit to the court in [duplicate] *quadruplicate* a full and complete report including the findings of the qualified psychiatrists who have conducted the examination to the effect that the defendant is, or is not, at the time of such examination in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense. Such report shall include a recommendation as to the appropriate institution to which such defendant should be sent if committed. [If such psychiatrists find that the defendant is not in such state of idiocy, imbecility or insanity and the court concurs, the proceedings against such defendant shall be resumed as if no examination had been ordered.] If [the court does not concur with the findings of the psychiatrists, or if] the two psychiatrists do not agree in their findings, [the proceedings against such defendant may be resumed or] the court may request the superintendent of the hospital or the director of said division of psychiatry, as the case may be, to appoint a third psychiatrist to examine the defendant and submit a report to the court. The report of the psychiatrists made pursuant to this section shall not be received in evidence. . . .”

<sup>196</sup>Proposed Section 662a: “Hearings before the court. . . . If either counsel . . . does not accept the findings of the psychiatrists and wishes to contravert them, the court shall accord counsel . . . full opportunity to be heard . . . and to present witnesses and evidence.”

<sup>197</sup>Proposed Section 662b: “Procedure where defendant is not found insane. If, after receiving the report . . . and giving counsel . . . full opportunity to be heard, the court does not find . . . the defendant . . . incapable, . . . the proceedings . . . shall be resumed as if no examination had been ordered.”

<sup>198</sup>Proposed Section 662c: “Procedure where defendant is found insane. If after

eliminates the distinction between a finding of insanity and sanity by the psychiatrists. Under this section the defendant receives—as was suggested herein—a notice and hearing no matter what the psychiatrists find, if he disagrees with their findings. Although the court is left finally to decide the issue of sanity, whether the report be sanity or insanity, and even though the court may therefore disregard the findings of the medical experts, it is apparent that, in view of the nature of the subject matter dealt with, the court must necessarily be the final arbiter unless a quasi-judicial tribunal of experts is to be set up—as in Louisiana and Connecticut—to decide this issue.

Aside from the hearing provisions of the proposed Section 662a, there are the provisions of proposed Section 662c allowing the commitment of defendants to institutions for mental defectives under the supervision of the Department of Mental Hygiene or Department of Correction. These provisions meet a crying need today, for under Section 438 of the Correction Law, institutions for mental defectives, such as Napanoch Institution, are required to admit only persons convicted of crime, and it has been customary to refuse to admit patients who were sought to be admitted under the present Sections 658 or 870. The proposed section does away with this conflict. It is, nevertheless, this writer's belief that this purpose should be carried out in the repeal clause of the proposed enactment<sup>199</sup> by a statement that the proposed sections, if enacted, should supersede all conflicting statutes of New York State; or there should, alternatively, be a companion amendment to Section 438 of the Correction Law stating, in terms, that all persons against whom proceedings have been taken under the proposed sections shall be eligible for admission to the Napanoch Institution. Either of these alternate additions will prevent the overlapping of the Code of Criminal Procedure and the Correction and other laws.

The final feature of the proposed Section 662a is that providing for the return to court of persons committed while insane who have now become sane. Under the present and proposed acts a defendant will be returned when the superintendent of the hospital or institution certifies and reports to the court that the defendant is no longer incapable of understanding the proceedings against him. Thus, aside from release on *habeas corpus*, a de-

---

giving . . . counsel full opportunity to be heard . . . the court finds that the defendant . . . is incapable . . . the trial must be suspended until he becomes sane and the court shall commit the defendant to a state hospital . . . or to a school or institution for mental defectives under the department of mental hygiene or the department of correction. . . . A defendant so committed shall, except as otherwise provided in Section six hundred and sixty-two-d, . . . remain in such institution until he is no longer . . . incapable of understanding. . . ."

<sup>199</sup>Section 6: "The provisions of this code shall govern and . . . not be superseded by any provision of the mental hygiene law or other statute unless specifically so provided. . . ."



fendant who is sane can only be released for trial by action of the superintendent. This appears to be wrong in principle, for if a defendant is to be accorded a hearing under the proposed Section 662a in the first instance, he should also receive a hearing before his return to the court by the superintendent of the hospital, the return being but part and parcel of the first hearing. This writer would, therefore, add to the proposed Section 662a the following:

"The court from which such defendant was committed shall cause the sheriff without delay to bring the defendant from such institution and place him in proper custody, whereupon the court shall hold a hearing, as provided in Section 662a, affording the defendant and district attorney full authority and opportunity to be heard, upon request. If the court finds defendant is capable, . . . he shall be brought to trial or legally discharged; if the court finds him incapable . . . he shall be returned to the institution from whence discharged by the superintendent."

This provision would take care of defendants who have become sane after commitment. However, there are many defendants who will remain, in all probability, insane for life. The purpose of the commitment under the Code being to *treat and cure* criminally insane defendants, the question has many times been asked whether it is just to continue in confinement defendants in that condition who are not a danger to society. The proposed Section 662 rectifies this possibility, providing for the release of mental defectives who cannot be cured, but who may not be a menace to society if released.<sup>200</sup> The justice of the principle enunciated in this section is apparent. Assume a defendant is charged with the commission of a misdemeanor and committed under Section 658 before trial. The maximum sentence he could possibly receive on the criminal charge, if found guilty, would be one year. Yet he could, if the proposed Section were not enacted, be kept in a hospital for life, even though not dangerous to society. However, though the principle of the section is just, its application may be found difficult.

Initially, the decision to release these defendants lies in the discretion of the superintendent of the hospital. If he should refuse to certify to a justice of the Supreme Court that the defendant is one of those persons eligible for

---

<sup>200</sup>Proposed Section 662d: "Release of certain defendants who are mental defectives. Where a defendant charged with a crime or offense other than the one punishable by death has been committed . . . and has been in such hospital or institution for a considerable time, if the superintendent . . . is of the opinion that the defendant is a mental defective who will never be capable of understanding, . . . and that his release will not be dangerous to the public peace or safety, such superintendent shall certify that fact to the commissioner of mental hygiene and a justice of the Supreme Court . . . and shall give notice to the district attorney. Whereupon such justice . . . shall inquire into the . . . facts . . . and if satisfied . . . may authorize the release of such defendant. . . ."

release under the section, it is doubtful whether any proceeding could be used to force him to act. Since the decision is to be finally made by the Supreme Court justice, it is here submitted that the best procedure would be to omit any reference to the superintendent of the hospital and to let the issue be tried before such justice on writ of *habeas corpus*—that is, amend Section 1329 of the Civil Practice Act relative to *habeas corpus* to permit the release of defendants dealt within the proposed Section 662d, even though mentally defective, on writ of *habeas corpus*.<sup>201</sup>

Thus far the proposed sections deal with commitments by courts of record—the county courts and the Court of General Sessions. The procedure outlined in the above proposed sections is applied to cases before the magistrates and justices of Special Sessions, but due to the prevalent strong feeling that courts not of record lack the power, under the constitution of New York state, to commit criminally insane defendants, Senator Desmond has attempted specifically to cover all types of cases arising in those courts, in proposed Section 870-876.<sup>202</sup> Thus, under Section 870, as proposed, the magistrate is specifically given the power to require examination under Sections 658 to 662d;<sup>203</sup> and to insure the constitutionality of the commitment it is specifi-

<sup>201</sup>N. Y. JUD. LAW § 31, still allows the court on *habeas corpus* to appoint three medical experts to examine defendants, and testify as to their examinations. This section should be repealed as it meets with the same objections voiced against the lunacy commissions as they existed prior to 1939. In lieu of this section a new section should be added allowing the court to avail itself of a procedure similar to that allowed under the present code in New York, Sections 658-662d.

<sup>202</sup>See letter of Senator Desmond, printed in N. Y. L. J., Nov. 21, 1939, p. 1728, *Interpretation of Section 870 of the Code of Criminal Procedure*:

"... I would state that it was the intention of the framers . . . , in enacting Section 870 . . . , to give to the Magistrates . . . , the power . . . to order the defendant to be examined to determine . . . his sanity. . . . The procedure to be followed should be exactly identical . . . with the method employed . . . in Sections 659-662c. . . ."

"It was our intent that . . . the Magistrate should proceed as would a Judge of the Court of General Sessions or of the County Courts. . . ."

"Now with regard to another question . . . , namely, as to the power which section 870 is believed by some to confer upon Magistrates 'to stay all proceedings in the case.'"

"That was *not* the intention of the framers of the Law; nor do we think that the language . . . warrants such construction and we doubt very much that the appellate courts . . . would so hold. All that was intended was to provide that the Magistrate . . . might . . . stay the proceedings *before him*. . . . There was no thought, whatever, of thus conferring upon Magistrates and Judges of courts not of record the power to stay all further proceedings. . . ."

"It would seem that the practical procedure to follow . . . [would be to have the district attorney] proceed to take up the question of the defendant's indictment by the Grand Jury. . . ."

"As you will recognize, as soon as the indictment is secured, the Magistrate would lose jurisdiction of the defendant and the Court of General Sessions in New York County . . . would acquire jurisdiction over him."

"Undoubtedly, the Judge of General Sessions . . . , under such circumstances, would instruct the Psychiatrists to complete their examination . . . , and render their report to him, instead of to the Magistrate. . . ."

<sup>203</sup>Proposed Section 870: "Where a person is charged with either a felony or a

cally provided that the magistrates can only stay those proceedings which are ordinarily conducted by magistrates.<sup>204</sup> If the defendant is subsequently indicted, it is clear that neither the court of record nor the grand jury can be interfered with by the magistrate.<sup>205</sup> If no indictment is returned, however, there is still the objection in many quarters that to allow the magistrate to commit is to allow him, unconstitutionally, to exercise jurisdiction over felonies. This objection must be rejected since the issue determined is only preliminary to the trial of the criminal charge. Even if it be conceded, however, that the magistrate has no power beyond the ordering of the examination, there can be still another method of committing the defendant. In the proposed Section 872, the magistrate, after the receipt of the report and the finding of insanity where the defendant is not indicted, must order the superintendent or director to apply to the Supreme Court for commitment.<sup>208</sup> There can be no quarrel with the shifting of the determination of the issue to the Supreme Court, but for the saving of time and money it might be better to provide for the return of the report directly to a justice of the Supreme Court, thus leaving the magistrate only the power to initiate the examination but not to determine the issue and eliminating thereby an unnecessary duplication.<sup>207</sup>

Sections 874. through 876, as proposed, deal with defendants charged with offenses less than crimes. Since these Sections are similar to those already discussed, they need not be re-examined here.

There is yet one final section that needs treatment, *viz.*, Section 6, the repeal clause of the proposed act. This repeal clause raises the questions

---

misdeanor and an indictment or information has not been filed, if at the hearing before the magistrate there is reasonable ground for the magistrate to believe that such defendant . . . is incapable of understanding . . . the magistrate . . . may . . . stay the proceedings before *him* and order such defendant to be examined. . . . The procedure shall be as set forth in sections six hundred and fifty-nine to six hundred and sixty-two. . . ."

<sup>204</sup>Although here, again, the magistrate must have a reasonable ground before acting, this provision is unnecessary to some extent. See the discussion of this phrase, *supra* pp. 409 *et seq.*

<sup>205</sup>Proposed Section 871: "If before the magistrate renders his findings upon the report of the psychiatrists . . . the defendant is indicted . . . , the report . . . shall be presented to the court in which the indictment of information is triable. Such court may take cognizance of the examination order by the magistrate and may receive the report of the psychiatrists as if originally ordered by such court. . . ."

<sup>208</sup>Proposed Section 872: ". . . If the defendant is not indicted, . . . the report of the psychiatrist shall be made to . . . magistrate. . . . If the magistrate finds . . . defendant . . . incapable of understanding the charge, . . . the magistrate shall order the superintendent . . . , or . . . the director of the division of psychiatry, to take measures for . . . commitment as provided in the Mental Hygiene Law for the commitment of a person not in confinement on a criminal charge. . . . A justice of the Supreme Court may commit the defendant to a state hospital . . . or to a school or institution for mental defectives."

<sup>207</sup>It should be noted that the last two sentences of Section 872 meet with the same objections as found in proposed Section 662c.

commonly found in clauses of such nature: Shall they be general, and therefore in danger of erroneous court interpretation; or specific, and in danger of omitting reference to conflicting statutes? If it is a practical impossibility to force a specific repeal statute through the legislature, then Section 6 is good as it stands. If feasible, however, it would be well to go through the provisions of the Correction, Mental Hygiene, and Judiciary Laws, and the Code of Criminal Procedure itself, and to draft amendments repealing the provisions of those statutes which, at least on their face, conflict with the present and proposed sections.

It is evident from this discussion of the New York Code of Criminal Procedure, the amendments proposed thereto, and this writer's suggested revisions that the basic principle of these acts is that justice is best served in these cases, both theoretically and practically, by requiring the psychiatrists to render *advisory* reports after informal examinations and by leaving the existing judicial tribunals finally to determine the defendant's capability of facing trial. In recent years, however, there has been some agitation for a radical change in the existing system by the establishment of expert, psychiatric, quasi-judicial commissions with power to foreclose the courts on the fact of insanity. Among the leading advocates of this change from the advisory to commission system is Dr. Israel Strauss, who is well known in medical circles. After much study he has advanced a set of informal proposals to amend the existing Laws of New York respecting the determination of present and past insanity and the legal force of such determination. His proposals may be summarized, in part, as follows:<sup>208</sup>

There is to be set up a Board of Forensic Psychiatrists for the State of New York, headed by a director appointed by the Governor with the advice of the head of the Department of Mental Hygiene and subject to confirmation by the Senate, and composed of nine psychiatrists qualified under Section 27 of the Mental Hygiene Law, three psychologists and one experienced lawyer.<sup>209</sup> This board is to have an office in New York City, but three members are to be stationed in Syracuse to render service in any area further than 150 miles from New York City. The appropriation for this Board is not to exceed \$85,000 (exclusive of travelling and clerical expenses) for the first year, but the amount is to be increased as the staff is enlarged to carry the case load. It is the duty of the Board to determine the mental condition and level of criminal defendants, and in every instance where it appears to any court of criminal jurisdiction that there is, upon satisfactory proof,

---

<sup>208</sup>STRAUSS, SHOENFELD, AND GLASER, A MEMORANDUM AND RECOMMENDATIONS BY CERTAIN MEMBERS ON THE COMMITTEE OF MEDICAL JURISPRUDENCE OF THE NEW YORK ACADEMY OF MEDICINE (1936).

<sup>209</sup>All Board members, save the director, are to be put under civil service.

reasonable ground for believing a defendant insane, the court shall order him to be examined by the Board. The examination must be conducted by at least one psychologist member, and two psychiatrist members. In their examination they have the power to administer oaths, take testimony, compel the attendance of and interrogation of witnesses, *etc.* They are then to report to the Board as a whole, and the report is to be approved by the director and lawyer member before transmission to the court. If the report be one of sanity, the criminal trial must proceed. However, where the report states that the defendant is mentally defective or insane, the diagnosis must be sent to a Board of Review (composed of the Commissioner of the Mental Hygiene Department, the director of the Board of Forensic Psychiatry, and a legal representative of the Attorney-General) for determination, and the Review Board's decision thereupon is final.<sup>210</sup>

Although these proposals have not been drafted in legislative form and it is therefore not clear to what extent both Boards will exercise quasi-judicial powers, if at all, it appears that the attempt has been to create an expert medical commission to determine the mental condition of defendants finally so as to bind the courts on that issue. There is no point, however, in having a hierarchy of Boards. In theory it may seem as though the establishment of an expert administrative agency to handle this medical problem fits neatly into the purposes and aims of recent legislation, *i.e.*, to bring special knowledge to bear on the problem where it is needed and to foreclose the court or jury whenever not possessed thereof. But theory and practice often diverge to great extents. Thus, granted the theoretical basis therefor is correct, is the commission system well-adapted to this field *practically*?

There is, first, the physical impossibility of handling the case load with twelve members assigned to cover the whole state. This staff would hardly suffice to cover the cases normally admitted to the Psychiatric Division of Kings County and Bellevue Hospitals alone.<sup>211</sup> Even if sufficient members were added to overcome this physical obstacle, it is apparent that the cost of the procedure would reach staggering proportions. That the legislature will not permit high costs is evidenced by the attempt in the 1939 enactments drastically to curtail the costs of examination procedure by making use of

---

<sup>210</sup>Testimony taken by the Board is not to be received in evidence at the trial (the Board reports as to past as well as present insanity), but the members may be called to testify by either party *at no extra fee*. Thus, if an insane defendant becomes sane after commitment, and if returned to court, the Board must again examine him and report to the court. All expenses of the system are to be pro-rated over the counties in the ratio of the number of examinations conducted in that county. It is proposed that the plan (which is to be supplemented by the adoption of another system similar to the Briggs Law of Massachusetts) be tried out in New York City.

<sup>211</sup>In seven months after the passage of the 1939 acts in New York, there were 1100 cases of this type in Bellevue and Kings County Hospitals alone.

available state and city functionaries.<sup>212</sup>

Aside from these objections, there is one that goes to the heart of the proposed system: Where a defendant is actually insane, he cannot be kept safely in prison but must be held in a hospital. The Strauss proposals recognize this fact by providing that the Board may make preliminary commitments of this nature. The psychiatrists in attendance at the hospital, however, must necessarily examine and treat the defendant so committed, regardless of the fact that the Board must also do likewise. The Board, then, duplicates the practice under the old lunacy commission system, *and is itself not equipped to carry out the excellent type of examinations conducted today because the members cannot physically examine defendants during observation over periods of time, as is usually required.* The superimposition of a Review Board to "doubly insure the people of the State of New York that such person cannot readily understand the proceedings against him" is entirely superfluous, since it does not envisage detailed examination of the defendant by the Review Board, and therefore the Upper Board is even less well-equipped than the Forensic Board. On the other hand, if such examination were envisaged, it would be but a further duplication of the first Board's work.

Finally, if the Forensic or Review Boards' findings of fact are to bind the court, their procedures must be based on formal notice and hearing.<sup>213</sup> This requirement is a boomerang and defeats the purpose of the proposed system, since it is apparent that the procedures of examiners will be stultified by formality. Even though this objection does not apply to the Forensic Board where it reports insanity, it still holds as to the Review Board. In the absence of evidence to indicate that there is an existing abuse by the courts of their power to reject the present day advisory reports of psychiatrists, it is submitted that there is no warrant for the substitution of a single or dual board to be vested with that power wrenched from the courts. The Strauss proposals, or any proposal,<sup>214</sup> for a change to the commission system as in force in Louisiana, must be criticized as being impractical since the commission system (1) is overcostly, (2) superfluous, (3) involves duplication of necessary procedures, (4) corrects an evil which is not existent, and (5) does not fit into the normal pattern of administrative law since it is not based upon the controlling principle of *expediency*.<sup>215</sup>

---

<sup>212</sup>See Note (1939) 39 COL. L. REV. 1260, 1261, 1262.

<sup>213</sup>This is directly at odds with the 1939 proposals of Senator Desmond. See *supra* pp. 409 *et seq.*

<sup>214</sup>See Senator McNaboe's proposal, S. B. No. 915 (1936), which died by executive veto. This bill was basically of the same tenor as the Strauss proposals, envisaging a quasi-judicial commission system.

<sup>215</sup>It is a settled principle of administrative law that the degree of expediency involved should vary directly with the necessity for an administrative board. The degree of

IV. PRACTICE IN JURISDICTIONS OTHER THAN NEW YORK:  
FEDERAL AND STATE SYSTEMS

There are statutes in 44 of the other states covering the determination of insanity, and it is fitting, for such light as they may shed on the problems confronted in New York, that they be analyzed and grouped. Four jurisdictions—the Federal Government, Delaware, Mississippi and Washington—have no express statutory provision concerning the matter in issue.

The Federal statutes contain no provision for suspension of proceedings against a criminally insane defendant, and consequently have no provisions along the lines of the New York Code of Criminal Procedure. The nearest approach to applicable legislation is found in Section 211 of Title 24 of the U. S. Code.<sup>216</sup> But this provision has been interpreted to apply only in criminal cases arising in the courts of the District of Columbia.<sup>217</sup> Thus the federal courts, in the absence of statute, have been compelled to rely upon common law. In *Youtsey v. United States*<sup>218</sup> the Circuit Court of Appeals stated that it was not in conformity with due process to try a man while he was insane, and though the trial of this issue lay in the discretion of the lower federal court, it must be tried if the circumstances warranted it. Some federal courts have seen fit to call in outside experts to examine the defendants and report to the court.<sup>219</sup> Others have taken counsel, defendant and physicians into chambers for an examination of the defendant, and then left the issue of present insanity to the jury, conducting the trial of this issue

---

expediency in this field is very minute and cannot be compared to that in Labor (NLRB), Commerce (ICC) or Trade (FTC, FCC), etc.

<sup>216</sup>24 U. S. C. A. § 211 (1927): "If any person, charged with crime, be found, in the court before which he is so charged, to be an insane person, such court shall certify the same to the Secretary of the Interior, who may order such person to be confined in Saint Elizabeths Hospital . . . [in Washington, D. C.]"

<sup>217</sup>See 17 OP. ATT'Y GEN. (1881) 211 (letter addressed to Hon. S. J. Kirkwood, Sec'y of the Interior. The Secretary had in custody a man who had not been convicted, but declared insane before trial in a Federal District Court in Texas. Under a Statute similar to 24 U. S. C. A. § 211 the Secretary desired to have the defendant committed to Saint Elizabeths Hospital. *Held*, that the Statute was intended to apply solely to residents of the District of Columbia, or men in the military service).

<sup>218</sup>97 Fed. 937 (C. C. A. 6th 1899). The court held there was no right to jury trial, and none was demanded; that although there was a jury trial in *Fritth's Case*, it was discretionary, to be used only in cases of doubt; and that there was no statute nor any provision of the United States Constitution which required a jury trial on this preliminary issue. The method of trial was therefore in the discretion of the court [*People v. McElvaine*, 125 N. Y. 596, 26 N. E. 929 (1891)] and it might be sufficient that the court only inspect the defendant personally. . . . But here the lower court had refused to act; it had not exerted its discretion one way or the other, nor stated on the record the reasons for refusal of allowance of a continuance. For these reasons, the judgment of the lower court was reversed and the case remanded for further proceedings.

It should be noted that the upper court seemed to believe that defendant could be committed to Saint Elizabeths Hospital. *But see* note 217 *supra*.

<sup>219</sup>*German v. U. S.*, 115 Fed. 987 (S. D. Ky. 1902).

prior to, and in the same manner as, the trial of the criminal charge.<sup>220</sup> The most recent form of procedure used is exemplified in *United States v. Hariman*,<sup>221</sup> where defendant's mental condition was determined before trial. The court stated:<sup>222</sup>

"The form of the procedure is in the discretion of the court. . . .<sup>223</sup>  
In the law . . . there are four available methods:

- 1) Committal of the defendant to an institution for observation and report.<sup>224</sup>
- 2) Appointment of a commissioner to make inquiry and report.
- 3) Calling in the assistance of a jury,
- 4) Conduct of the inquiry by the judge alone.

"In this court committing to institutions for observation and report has prevailed for a long time in such cases. There being no statute on the subject, it has been usual, within my experience, to ask the defendant or his counsel whether he consents to this method. I do not know that consent is essential; but it has been prudent, or has heretofore been regarded by the judges as prudent, to obtain it.

"Procedure through a commission exists in the courts of the state of New York. . . . There is no like Federal Statute. . . . Even if, however, there were an inquiry by a commission, its report would only be advisory. There would still remain the responsibility for an examination by the court itself.

"Neither side has requested submission of the question to a jury. The defendant is not entitled to a jury trial. . . . Lastly, after a jury verdict, the responsibility would still remain on the court. . . . I have decided that it is the duty of the court itself to conduct the inquiry. . . ."<sup>225</sup>

While it is true that the procedure will vary from district to district, it is evident that the court neglects the fact that commissions should be used, if impartial and not costly, as in New York, since the difficult issue involved is a medical one. The report of commissioners, though advisory, may and usually does, result in so informing the court that justice is attained. However, the court is hampered by the lack of statutory provisions for the employment of psychiatrists and their payment. Some attempt has been made in recent years to provide the federal courts with the machinery for dealing with criminally insane defendants. The Attorney-General, in 1930, was authorized to select a site for the erection of a hospital where persons charged

<sup>220</sup>*U. S. v. Chisholm*, 149 Fed. 284 (C. C. S. D. Ala. 1906).

<sup>221</sup>14 F. Supp. 186 (S. D. N. Y. 1935).

<sup>222</sup>*Id.* at 187, 188.

<sup>223</sup>Citing *Youtsey v. U. S.*, *supra* note 218, and *U. S. v. Chisholm*, 149 Fed. 284 (C. C. S. D. Ala. 1906).

<sup>224</sup>Where? To a local hospital not under federal jurisdiction? To Saint Elizabeths despite the ruling of the Attorney General?

<sup>225</sup>The court then states that it will hold a hearing and allow defendant's counsel and the prosecution to call witnesses, reserving to the court the power to call in additional witnesses.



with, as well as convicted of, federal crimes could be confined and treated.<sup>226</sup> However, even if such hospitals were erected (and it does not so appear) there is still a total lack of legislation concerning examination of these defendants, and it is for Congress to correct this situation.<sup>227</sup>

#### V. TREND OF RECENT LEGISLATION

Of the three remaining jurisdictions where this field has not been touched by legislation, Delaware is the least progressive. The Legislature of that state has enacted a series of excellently written and minutely careful provisions for the examination, commitment and treatment of non-criminally insane defendants,<sup>228</sup> and persons convicted of crimes.<sup>229</sup> However, in a situation where suspension of trial, examination and treatment would best serve the state and individual—that is, present insanity cases before or during criminal trials—the legislature has left a gap, and the courts must flounder with common law procedures, decidedly outmoded today. Both Mississippi,<sup>230</sup> and Washington,<sup>231</sup> have provisions for examination and commitment of criminal defendants acquitted by reason of past insanity, but none concerning the issue of present insanity, and, therefore, the latter lies in the discretion of the courts;<sup>232</sup> Florida, Oregon and Vermont have but recently departed from common law practice and now have provisions which, to some extent, compare favorably with those in the New York Code of Criminal Procedure.<sup>233</sup>

Of the remaining states, about fourteen leave it in the discretion of the court, under statutory provision, to try the issue by medical commission, jury, or alone.<sup>234</sup> The most typical of these jurisdictions is Ohio:<sup>235</sup>

---

<sup>226</sup>18 U. S. C. A. § 871 (Supp. 1940): "The Attorney General is . . . directed to select a site, . . . for a hospital for the . . . treatment of all persons charged with or convicted of offenses against the United States, . . . and who at the time . . . of their detention . . . are or shall become insane . . . so to require special medical care." See also 18 U. S. C. A. §§ 591, 695, 698 (1927); 18 U. S. C. A. §§ 751, 876, 907 (Supp. 1940).

<sup>227</sup>England appears to be similarly backward. See 39 and 40 GEO. III, c. 94 providing for a jury trial of insanity past and present. See, generally, *Rex v. Dyson*, 7 C. & P. 303, 173 Eng. Rep. 135 (N. P. 1831).

<sup>228</sup>DEL. REV. CODE (1935) § 3074, as amended Del. Laws 1939, c. 134.

<sup>229</sup>*Id.*, §§ 3082, 3083, 3084.

<sup>230</sup>MISS. CODE ANN. (1938) § 1324.

<sup>231</sup>WASH. REV. STAT. ANN. (Remington, 1935) § 6974.

<sup>232</sup>MISS. CODE ANN. (1938) §§ 1324, 1325.

<sup>233</sup>Fla. Sess. Laws 1939, c. 19554, §§ 203-205, *Williams v. State*, 45 Fla. 128, 34 So. 279 (1904) (discussing the common law); ORE. CODE ANN. (Supp. 1935) §§ 13-922, 13-953; Vt. Pub. Acts 1935, Nos. 51, 53. The Oregon Statute is fairly similar to the New York Code of Criminal Procedure of 1936 and to the Proposed Chapter 17, Section 317 of the Final Draft of the American Law Institute Committee on Criminal Procedure (1930).

<sup>234</sup>*E.g.*, Indiana [IND. STAT. ANN. (Burns, 1926) § 2295]; Kansas [KAN. REV. STAT. ANN. (1923) § 62-1531]; Maryland [MD. ANN. CODE (Bagby, 1924) art. 59, § 8]; and Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, Wisconsin.

<sup>235</sup>OHIO GEN. CODE ANN. (Page, 1939) §§ 13441-1 to 13441-4.

"If the attorney for a person accused of crime . . . whether before or after trial suggests to the court that such person is not then sane . . . or if the grand jury represents to the court that any such person is not then sane or if it otherwise comes to the notice of the court that the person is not then sane, the court shall proceed to examine . . . or . . . may impanel a jury for such purpose. . . .

" . . . the court shall have the power to commit the defendant to a local insane hospital . . . for such time as the court may direct not exceeding one month; and the court may appoint [psychiatrists] to investigate<sup>236</sup> [to be called by the court and be cross-examined.]"<sup>237</sup>

Twenty states have statutes providing that the issue of present insanity must be tried by a jury, whose verdict is determinative.<sup>238</sup> The typical provisions are those in Montana:<sup>239</sup>

"When an action is called for trial, or at any time during the trial, . . . if a doubt arises as to the sanity of the defendant, the court *must* order the question as to his sanity to be submitted to a jury, which must be drawn and selected as in other cases; . . . and the trial jury may be discharged or retained . . . during the pendency of the issue of insanity.<sup>240</sup>

"[The verdict of the jury is determinative of the issue.]"

However, in these states the calling of the jury rests in the discretion of the court, and a refusal to try the issue by jury will not be reversed unless there was a palpable abuse of discretion,<sup>241</sup> and the appellate courts are slow to reverse even in the most flagrant instances. Thus, in *State v. Kelly*<sup>242</sup> the defendant had gone to trial without a lawyer for two days before the

<sup>236</sup>The decision of the court constitutes only an interlocutory judgment reviewable only at the close of the criminal trial, or on *habeas corpus*. See *Wyman v. Turk*, 62 Ohio App. 227, 23 N. E. (2d) 644 (1939).

<sup>237</sup>*Cf.* Pennsylvania [P.A. STAT. ANN. (Purdon, 1930) tit. 19, §§ 1351, 1352; *id.*, tit. 50, § 48] and Iowa [IOWA CODE (1939) §§ 13905-13909].

<sup>238</sup>Arizona [ARIZ. REV. STAT. (1913) Pen. Code § 1265]; Arkansas [ARK. DIG. STAT. (Crawford & Moses, 1921) § 3055]; California [CAL. PEN. CODE (Deering, 1937) § 1368]; Georgia [GA. CODE ANN. (Michie, 1926) Pen. Code §§ 976, 978]; Idaho; Illinois; Iowa; Kentucky; Missouri; Montana; Nebraska; New Mexico; Oklahoma; South Dakota; Tennessee; Texas; Utah; West Virginia; Wyoming; Alabama [ALA. CODE ANN. (Michie, 1928) § 4575] (felony cases only).

<sup>239</sup>MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§ 12213-12216. Italics supplied.

<sup>240</sup>Of the 20 states providing for a mandatory jury trial 17 provide for the selection of a special jury, but three (Iowa [IOWA CODE (1939) §§ 13905-13907]; New Mexico [N. M. STAT. (1915) § 4448]; Tennessee [TENN. CODE (Shan., 1917) § 2631]) provide for the trial of this issue by the jury drawn to decide the criminal charge. The minority jurisdictions' provisions should be changed to conform to the majority, since the decision of present insanity, although casting light on past insanity, is purely medical, and may unfavorably move the jury on the issue of responsibility.

<sup>241</sup>*State v. Howard*, 30 Mont. 518, 77 Pac. 50 (1916); *State v. Peterson*, 25 Mont. 81, 63 Pac. 799 (1912); *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982 (1894); *Contra*: *People v. Geary*, 298 Ill. 236, 131 N. E. 652 (1921). *But cf.* *People v. Preston*, 345 Ill. 11, 177 N. E. 76 (1931).

<sup>242</sup>74 Vt. 278, 52 Atl. 434 (1902).

court appointed counsel for his defense. There was no claim of present insanity made, but the defendant talked and muttered incoherently to himself, and had to be restrained at various times when he got into a frenzy. Yet, the highest court of the state said:<sup>243</sup>

"[If] the judge had any reasonable doubt about it he should have it determined by a preliminary trial of some sort. . . . [But] when the court, in the exercise of a sound discretion, entertains no doubt of the prisoner's sanity, no preliminary trial is required. . . . We cannot say from the record before us that the court abused [its discretion]."

Not only is it evident that the jury did not qualify to pass on this medical issue, but the jury cannot possibly qualify; and it is apparent that the issue may be withdrawn from them by the court without the advice of competent, unbiased experts. It is this writer's belief that the use of a jury, or of the court's discretion, that prevails in these twenty states is backward in principle, and in the light of modern psychiatric aids to the law. Such antiquated usage frustrates the goal of the law which is to achieve justice. However, the so-called Briggs Law in Massachusetts offers a hope for better legislation.<sup>244</sup> In that state, any person coming before any court in any case, civil or criminal, may be sent by the presiding justice for examination by a member of the medical staff of a state hospital.<sup>245</sup> Under the Briggs Law, in a limited number of cases the defendant *must* be sent for such examination:<sup>246</sup>

"Whenever a person is indicted by a grand jury for a *capital* offense, or whenever a person, who is known to have been indicted for one or more offenses or convicted of a felony, is *indicted* . . . or *bound over* for trial, the *clerk* of the court . . . shall give notice to the Department of Mental Diseases, and the Department shall examine him as to his *mental condition and criminal responsibility*. The Department shall file a report with the clerk of the court . . . and this report shall be accessible to the court, district attorney and defendant. . . ."<sup>247</sup>

This provision for *routine examination* of defendants in certain cases has been the subject of much comment,<sup>248</sup> and must be commended because of its basic recognition that insane people, whether or not they are criminals, constitute medical, rather than legal, problems to be dealt with by hospitals and not courts.

The most recent and modern attempt to deal with persons who are mentally

<sup>243</sup>*Id.* at 282.

<sup>244</sup>MASS. ANN. LAWS (Lawyer's Co-op., 1938) c. 278, §§ 99, 100.

<sup>245</sup>*Main v. County*, 223 Mass. 66, 111 N. E. 694 (1916).

<sup>246</sup>MASS. ANN. LAWS (Lawyer's Co-op., 1938) c. 278, § 100a. Italics supplied.

<sup>247</sup>In 1938 the name of the Department was changed to the Department of Mental Health. Mass. Acts 1938, c. 486.

<sup>248</sup>Overholser, *The Briggs Law of Massachusetts* (1935) 2 LAW & CONTEMP. PROB. 436.

disordered is that revealed in 1938 in Illinois.<sup>249</sup> Under a new statute, it is provided that persons who are mentally disordered and charged with crime may be committed to a hospital. The procedure consists of the filing of a petition for commitment, in court, by the district attorney; an examination by designated psychiatrists who report to the courts; and a jury trial, wherein the jury must finally decide whether the defendant is criminally sexually psychopathic.

It is unfortunate that the jury trial is retained, since this legislation evinces a new trend, namely, to break up the types of mental disorders of criminal defendants and to deal with each appropriately, taking into account the subject matter involved.<sup>250</sup> Further comment on such legislation must await a few years experience and practice.

## VI. CONCLUSIONS

Of the jurisdictions discussed, it is evident that New York State is among the foremost (as is Massachusetts) in the treatment of the questions, both legal and medical, involved in the medical determination of present insanity in criminal cases. Whatever may be the defects in present practice in New York, at least there is sufficient enlightenment to keep the issue from non-expert juries and to require the opinions of expert psychiatrists who should conduct their examination, as psychiatrists, in an informal manner. The fact thus remains that the principle of the laws of New York, as we have conceived them in this discussion, is correct. Necessary changes will no doubt be made to cope with the practical problems presented and the rapid strides of the medical profession in the field of psychiatry and psychology.

---

<sup>249</sup>ILL. ANN. STAT. (Jones, Supp. 1938) § 37.665.

<sup>250</sup>See Note (1939) 39 COL. L. REV. 534, commenting on this law.