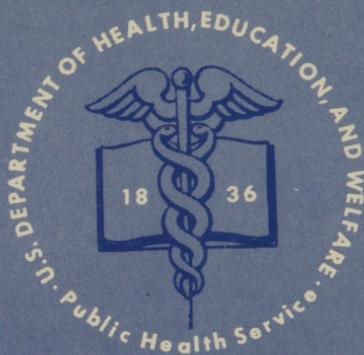




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# SUGGESTION OF INSANITY

IN

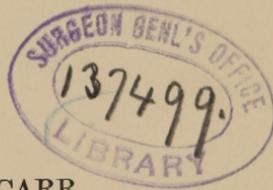
## CRIMINAL CASES

AND THE

TRIAL OF THE COLLATERAL ISSUE.

BY

WM. WILKINS CARR.



PHILADELPHIA :

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## PREFACE.

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WITHIN recent years criminal procedure, in capital cases, has maintained the right to hang offenders against the law although insane; and the assassination of the late President Garfield, the conviction and execution of Guiteau in this country, in 1881, and the respective murder trials of Gouldstone and Cole in England, in 1883, have directed the widest public attention to the change from the practice at common law.

The following pages treat of the corollary to the proposition, and discuss the right of society to put insane offenders upon trial as indicated in the recent act of Parliament known as "The Trial of Lunatics' Act," of 25th August, 1883, 46 and 47 Vict., ch. 38. The question is of practical importance by reason of the judicial action in the case of Oscar H. Webber, hereinafter referred to, tried and convicted of murder in Philadelphia, in 1886, notwithstanding the fact of insanity at the time of arraignment; when, for the first time in the history of criminal law, a court of final resort, in effect, upheld the right of trial contended for under modern criminal procedure.

Having been assigned of counsel in that case, the writer has experienced the difficulty of meeting the popular prejudice against the defense of insanity; and the effort of preparing these pages will be repaid, if they assist some member of his profession, placed under one of the gravest responsibilities incident to its practice.

PHILADELPHIA, May, 1890.



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## CHAPTER I.

### THE CARE AND CONTROL OF LUNATICS.

UNDER the feudal system and at common law the care, custody and control of the persons and estates of lunatics were in the lord of the fee and afterwards in the king, being *parens patriæ*,<sup>1</sup> by whom it was delegated to the chancellor.<sup>2</sup>

The constitutions of many of the American States declare what courts shall have such custody and care so far as civil matters are concerned; and different statutes regulate the manner in which the control shall be exercised, and the means by which the question of sanity in civil matters shall be determined.<sup>3</sup>

<sup>1</sup> Act of 17 Edw. II., c. 9.

<sup>2</sup> See 1 Blackstone, \*303; 4 Blackstone, \*24; Bispham Eq., pp. 26, 49; 1 Hale, P. C., \*33. See Adams' Eq. \*290, *et seq.*

<sup>3</sup> For instance, the Pennsylvania Constitution of 1790, in Art. V., Sec. 6, gives the care of the persons and estates of lunatics to the supreme and common pleas courts, having the power of a court of chancery; "and the legislature shall vest in the said courts such other powers to grant relief in equity, as shall be found necessary, and may, from time to time, enlarge or diminish these powers; or vest them in such other courts as they shall deem proper, for the due administration of justice." The constitution of 1874, Art. V., Secs. 6 and 20, continues the chancery jurisdiction of the courts of common pleas, and the schedule, Sec. 2, continues all rights, actions, and prosecutions not inconsistent therewith, and the act (Penna.) of 13 June, 1836 (2 P. D., p. 979), and its many supplements had conferred jurisdiction upon the courts of common pleas as to commissions in lunacy, and defined their powers and duties.

And it would appear that in civil matters, the question of sanity can be only determined according to the statutory regulations; as was decided in Pennsylvania in a recent case in equity in which the bill averred that the complainant was a lunatic and prayed for the cancellation of certain deeds,<sup>1</sup> and the court summarily declared him to be insane, but was reversed upon appeal, it being held that even a chancellor has no power at the instance of a third party to institute a summary inquiry as to the sanity of a suitor before him, decree him insane, and proceed to make such orders and decrees as are necessary to protect his property. Moreover, in this case, the court said that as in Pennsylvania the mode of proceeding to determine the fact of insanity was regulated by the act of June 13, 1836,<sup>2</sup> under the provisions of the act of March 21, 1806,<sup>3</sup> (which require that where a remedy is provided by an act of assembly, its directions shall be strictly pursued), all inquiries as to sanity must be conducted in the mode prescribed by the act of 1836.<sup>4</sup>

In criminal matters, however, although in many States, it is not so declared by either constitutional or legislative provisions, the sanity or insanity of an offender may be decided by a court of oyer and terminer. The jurisdiction of such a court over the person of

<sup>1</sup> Appeal of Charles Meurer, 21 W. N. C., 107.

<sup>2</sup> P. L., 592.

<sup>3</sup> 4 Sm. L., 332.

<sup>4</sup> If a party, however, to a suit in equity is insane or becomes so pending the proceeding, and that fact becomes apparent to the chancellor, he has the power to make such orders in the premises as will preserve the *status quo* of the cause, and afford an opportunity to have the question of insanity determined in the manner prescribed by the Act of 1836, but he has no power to assume jurisdiction and determine the fact of insanity himself.—Appeal of Charles Meurer, *supra*.

an alleged lunatic appears, perhaps, to have existed at common law;<sup>1</sup> and in England, in 1800, the first statute was enacted which refers to that jurisdiction, and the power of the court to decide the question of mental condition in the trial upon the crime alleged in the bill of indictment, and subsequent confinement upon conviction thereon.

It is proposed to trace the provisions for the legal treatment of insane offenders in custody and charged with crime; and in the first place may be considered the legal maxim which prevents the trial, sentence or execution of the insane. How the question of sanity is determined, in modern criminal procedure showing, perhaps, a change in that rule, will be thereafter referred to. The earliest text-book announcing the common law rule which forbade the trial or punishment of an insane offender is that of Sir Edward Coke (1550-1634), and the character of the procedure of his time, is doubtless illustrated in the familiar trial of Mary Queen of Scots who was condemned in the obscure castle of Fotheringay in 1586. The judgment was rendered against her by a commission without constituted authority to deprive a prisoner of life, and composed of Lord Burleigh and other ministers of the crown. Notice was not given her of the intended trial and examination, nor counsel procured to defend her, and the proceedings were conducted without observing the formalities of trial most common in modern criminal procedure. In 1592, Lord Coke was in parliament with the reputation of being a high prerogative lawyer, and afterwards as attorney-general to Elizabeth in 1600, with much abuse conducted the trials of Essex and Southampton in

<sup>1</sup> See trial of James Hadfield, 27 How. St. Tr., 1356.

Westminster Hall for high treason: and again in the famous trial of Sir Walter Raleigh in 1603 for the same offence, the legal procedure of the times was illustrated in exhibitions of temper unequalled in the reports of the State trials, and yet in writing upon the subject of high treason about the year 1625, Lord Coke said:<sup>1</sup>

“A man that is *non compos mentis*, or an infant within the age of discretion is not (*un homo*) within this statute, for the principal end of punishment is, that others by his example may fear to offend, *ut poena ad paucos, metus ad omnes perveniat*; but such punishment can be no example to madmen or infants that are not of the age of discretion. And God forbid that in cases so penall, the law should not be certain; and if it be certaine in case of murder, and felony, *a fortiori*, it ought to be certain in case of treason.

“If a man commit treason or felony and confesseth the same, or be thereof otherwise convict, if afterwards he become *de non sane memorie* (*qui potitur exilium mentis*), he shall not be called to answer; or if after judgment he become *de non sane memorie*, he shall not be executed, for it cannot be an example to others.”

In the criminal procedure of the present day, as has been said, there is an inclination to change this rule at common law, so that it may be here observed that even in the political and religious persecutions of the reigns of Charles II. and James II. that rule was followed. It was declared to recognize the humane sentiment which does not permit insane prisoners to be put upon trial for their lives; and criminal procedure as administered by Hyde, Scroggs, Kelyng and Jeffries respected it, even in times when witnesses in giving their testimony, did

<sup>1</sup> 3 Inst., p. 4.

not confront the prisoner, when the originals of documents were not required to be produced, and when there was no indictment nor right of appeal. Sir Matthew Hale, who at Suffolk, in 1665, in accordance with the law of the age, presided over the trial and condemnation of a woman accused of witchcraft, afterwards states the rule<sup>1</sup> in the following language :

“ If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed ; the reason is because he cannot advisedly plead to the indictment ; and this holds as well in cases of treason, as felony, even though the delinquent in his sound mind was examined and confessed the offence before his arraignment.”

The first reported preliminary trial of insanity<sup>2</sup> by a court of oyer and terminer was in 1685, and so offensive was the criminal procedure of that date, that during the trial of Lord Russell his wife was driven from the court-room by the tipstaves because she persisted in prompting him how to cross-examine one of the informers used by the Crown in order to show that he was committing perjury.

Another authority says :<sup>3</sup> “ And by the common law, if it be doubtful whether a criminal who at his trial is in appearance a lunatic, be such in truth or not, it shall be tried by an inquest of office, to be returned by the sheriff of the county wherein the court sits ; and if it be found by them that the party only feign himself

<sup>1</sup> Hale's Pleas of the Crown (1680), \*35.

<sup>2</sup> Charles Bateman, 11 How. St. Tr., 473 [1685].

<sup>3</sup> 1 Hawkin's P. C., p. 3.

mad, and he still refuse to answer, he shall be dealt with as one that stands mute."

Afterwards in 1765, Blackstone announced the rule in the following sentence:<sup>1</sup> "Also, if a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of non-sane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."

Again in 1790<sup>2</sup> a preliminary trial by a court of criminal jurisdiction of mental ability to plead was held; and ten years later, the common law rule that no insane man shall be put upon trial or executed, appeared upon the English statutes in the act of 39 and 40 Geo. III., c. 94; and will now be found in express language among the statutes of many of the American States.<sup>3</sup>

<sup>1</sup> 4 Blackstone, \*24.

<sup>2</sup> *Rex. v. Frith*, 22 How. St. Tr., 310.

<sup>3</sup> Alabama Sts., 1886, vol. 2, Crim. Code, p. 241, Sec. 4.  
 Arizona, R. S., 1887, p. 683, Sec. 30; p. 824, Sec. 2108.  
 Arkansas, R. S., 1874, Sec. 1961; Dig., 1884, Sec., 2155.  
 California, Code 1876, Sec. 14,367; 4 Deering, P. C., 1885, Sec. 1367.  
 Colorado, G. L., 1883, Sec. 700.  
 Dakota, R. C., 1877-1883, C. P., Sec. 514.  
 Idaho, R. L., 1874-1875, C. P., Sec. 566; Rev. Stat., 1887, Sec., 8194.

In Arkansas it is provided that a lunatic or insane person without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged; and a person who becomes insane or lunatic, after the commission of a crime or misdemeanor, shall not be tried for the offence during the insanity or lunacy.<sup>1</sup>

In California the provision is that a person cannot be tried, adjudged to punishment or punished for a public offence, while he is insane.<sup>2</sup>

Illinois, R. S., 1883, Chap. 38, Secs. 284, 285; Starr & Curtis, Ann., 1885, p. 830.

Iowa, McClain's Sts., 1880, Sec. 4620; R. C., 1888, Sec. 4620.

Kansas, C. L., 1879, Sec. 4757; 1885, Sec. 5036, Chap. 82, p. 754.

Kentucky, C. C., 1876, Sec. 287.

Louisiana, R. S., 1876, Sec. 1778, *et. seq.*

Massachusetts Sts., 1882, Chap. 214, Sec. 16.

Minnesota Sts., vol. 2, Supp., 1888, p. 944, Sec. 18.

Missouri, Act of 1883, p. 79, Sec. 2.

Montana, C. S., 1887, p. 500, Secs. 2, 3.

Nebraska, G. S., 1881, pt. 3, Sec. 454.

Nevada, G. S., 1885, Sec. 4451.

New Mexico, G. S., 1880, Chap. 74, Sec. 30; Comp., L., 1884, Sec. 1357.

North Carolina, Code, vol. 2, 1883, p. 29, Sec. 2255.

Texas, R. S., 1879, P. C., Sec. 39; Willson's Crim. Sts., 1888, Art. 722.

Utah, Act, 1878, C. C., Sec. 454.

Virginia, Code 1873, Chap. 202, Sec. 16; Re-enacted 1878, Chap. 17, Sec. 15; Code, 1887, Sec. 4030.

Vermont, R. L., 1880, Sec. 1702.

West Virginia, R. S., 1879, Chap. 55, Sec. 9; Code, 1887, Chap. 159, Sec. 9.

Wyoming, R. S., 1887, Sec. 858.

<sup>1</sup> Arkansas, R. S., 1884, Secs. 1495, 1496.

<sup>2</sup> Code of 1876, Sec. 14,367; 4 Deering, Penal Code (1885), Sec. 1367.

So in Colorado<sup>1</sup> it is provided that a lunatic or insane person without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged ; provided, the act so charged as criminal shall have been committed in the condition of insanity.<sup>2</sup>

In New York it has been declared that an act done by a person who is an idiot, imbecile, lunatic or insane, is not a crime ; and a person cannot be tried or sentenced to any punishment, while he is in such insane state so as to be incapable of understanding the proceeding or making his defence.<sup>3</sup>

And a similar provision is found in Texas,<sup>4</sup> that no act done in a state of insanity can be punished as an offence, and no person who becomes insane after he committed an offence, shall be tried for the same while in such condition ; nor shall any person who becomes insane after he is found guilty be punished for the offence while in that condition.

In Germany, persons who have committed crimes during insanity,<sup>5</sup> are not liable to any judicial prosecution ; but are generally, through the intercession of the police court, put into asylums, where they are retained until they may be cured.<sup>6</sup> In Russia,<sup>7</sup> among the causes in consequence of which a crime or misdemeanor is

<sup>1</sup> Colorado, G. L., 1883, Sec. 693.

<sup>2</sup> In Georgia, Code 1882, Sec. 4296, the language of the statute is like that of Colorado, and in Sec. 4673, in Georgia, it is also provided that a lunatic shall not be put upon trial.

<sup>3</sup> New York, R. S., 1882, Banks & Bro., 7th ed., vol. 4, Penal Code, Sec. 20.

<sup>4</sup> Texas, R. S., 1879, P. C., Sec. 39 ; See Willson's *Crim. Sts.*, Arts. 722, 946-960 (1888).

<sup>5</sup> Par. 51 of Penal Code (*Reichstrafgesetzbuch*).

<sup>6</sup> See Provisions as to the Insane, Harrison (1884), p. 1042.

<sup>7</sup> Russia, *Crim. Code*, 1847, Arts. 99, 100, 103.

not considered punishable, are idiocy, insanity, and attacks of sickness which produce confusion of mind or entire absence of consciousness; and an idiot is not accountable for a crime or misdemeanor when there is any doubt, in consequence of his mental condition, that he realized, at the time of the action, the unlawfulness and nature of his deed. A crime or misdemeanor is also not punishable in Russia when it is proven that it has been committed in an attack of mental disturbance or complete unconsciousness that is caused by disease but not by intoxication.

Moreover, the provisions of the English act of 39 and 40<sup>1</sup> Geo. III., c. 94, have been substantially copied upon the respective statute books of the American States, and its history is as follows:

In May, 1800, an attempt was made by James Hadfield to shoot George the Third, in Drury Lane Theatre, and he was tried in June, 1800, Lord Chief Justice Kenyon presiding, and among the counsel for the Crown, were Attorney-General Sir John Mitford, afterwards Lord Redesdale, Solicitor-General Sir William Grant, and also Mr. Law, afterwards Lord Ellenborough, and among the counsel for the prisoner were Lord Erskine and Sergeant Best.<sup>2</sup>

The evidence of insanity having been presented on the trial, the prosecution was abandoned, and the jury was directed to acquit the prisoner on the ground of insanity. A discussion then arose, Hadfield having been shown to be a lunatic, with homicidal impulse, as to what should be done with him. It was doubted if at common law there was jurisdiction in a court of oyer and terminer to confine a prisoner after acquittal, even if insane. Therefore, to meet the dif-

<sup>1</sup> *Infra.* pp. 10, 11. <sup>2</sup> See *Rex v. Hadfield*, 27 How. St. Tr., 1282.

ficulty, on June 30, 1800, in the House of Commons, an act was introduced by the Attorney-General, known as the Insane Offenders Bill, the debate upon which was taken part in by Mr. Pitt,<sup>1</sup> and which became the 39 and 40 Geo. III., c. 94 (28th July, 1800), the second section of which reads as follows :

SEC. 2. And be it further enacted, that if any person indicted for any offence shall be insane, and shall, upon arraignment, be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment, or if upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment, to be insane, it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure shall be known ; and if any person charged with any offence shall be brought to any court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such court to order a jury to be impanelled to try the sanity of such person ; and if a jury so impanelled shall find such person to be insane, it shall be lawful for such court to order such person to be kept in strict custody, in such place and in such manner as to such court shall seem fit, until His Majesty's pleasure shall be known ; and in all cases of insanity so found, it shall be lawful for His Majesty to give such order for the safe custody of such person so found to be insane, during his pleasure, in such place and in such manner as to His Majesty shall seem fit.<sup>2</sup>

<sup>1</sup> See 35 Hansard's Parl. Hist., p. 389.

<sup>2</sup> The preamble and first section of the act are in substance

This act has since been amended several times and finally in 1883, was in part repealed by an act, the title to which is said to indicate the change in modern criminal procedure, of putting the insane on trial upon an indictment, and which is known as the Trial of Lunatics Act, providing for a verdict of guilty but insane.<sup>1</sup>

as follows: Whereas, persons charged with high treason, murder, or felony, may have been or may be of unsound mind at the time of committing the offence wherewith they may have been or shall be charged, and by reason of such insanity may have been or may be found not guilty of such offence, and it may be dangerous to permit persons so acquitted to go at large: Be it therefore enacted . . . that in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity: whereupon he shall be held in confinement as a person dangerous to be at large.

<sup>1</sup> The act of 39 and 40 Geo. III., c. 94, was amended by the act of 1 and 2 Vict., ch. 14, Sec. 2, which provides that if any person shall be in custody and about to be tried, a commission may be appointed of two justices, to determine whether he is insane; and in Sec. 2 it is provided, that if there is fear that a person at large may commit a crime, a commission may also be appointed to determine whether he is insane.

Another amendment was that of 4th August, 1840, 3 and 4 Vict., ch. 54, Sec. 1, providing that if any person is under sentence of death, such a commission may be appointed to determine the mental condition. And again it was amended by the act of 6th August, 1860, 23 and 24 Vict., ch. 75, so that these proceedings may be taken upon an application of one of her Majesty's principal Secretaries of State. The most recent amendment is that of the act above referred to, of 25th August, 1883, 46 and 47 Vict., ch. 38, Trial of Lunatics Act, repealing Sec. 1 of 39 and 40 Geo. III., c. 94, as follows:

“Where in any indictment or information any act or omis-

## CHAPTER II.

### THE PRELIMINARY ISSUE IN CASES OF LUNATICS CHARGED WITH CRIME.

IN order to protect an insane person charged with crime, and to enforce the common law that he shall not be tried, the statutes of many States affirming the common law, make provision for a preliminary trial of the question of mental condition, before he is put upon trial for the crime. Before considering those provisions

sion is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission."

The discussions as to insanity in relation to crime frequently deride a criminal procedure which, as it is alleged, has been without improvement or change during this century, and inasmuch as the provisions of the act of 39 and 40, Geo. III., c. 94, copied upon the statute books of many of the American States, are still effective in directing criminal procedure in this country, it is of interest to consider, in passing, the extent of knowledge regarding the disease of insanity in 1800, and the physical treatment of the insane in the asylums of that day. The opinion then so common, that the moon's phases had influence upon the mental condition appears in the questions asked by

in detail, however, it may be observed, that there is an imperative reason in many States, why the question of insanity and inability to plead, should be presented to a court of oyer and terminer, at or before the arraignment. That is to say, it is only at that stage of the procedure in many States that the first opportunity is given to allege it, and should it not be then presented, prejudice against the averment of insanity may be excited. In other words, the rule at common law was, and it may be said to be now the general rule both in England and in this country, that evidence of an accused person's insanity is not to be considered by a grand jury before whom a bill of indictment is brought. If there be

Lord Erskine in examining witnesses in the case of *Rex v. Hadfield*, *supra*, the last criminal case in which the distinguished advocate, then in the height of his practice, was engaged; and in 1804, as Dr. Haslam says, "lunatics, being supposed to be under the influence of the moon, were bound, chained, and even flogged at particular periods of the moon's age, to prevent the accession of violence—an atrocity almost too shocking for belief."—See "Connolly's Treatment of the Insane," 1851.

In France the writings of Pinel and Esquirol at the end of the eighteenth century attracted attention to the cruelties practiced in the insane hospitals of Bicêtre and Salpêtrière. In England, down to 1770, the pauper insane were exhibited to the public at two-pence, afterwards one penny per head. Descriptions of the machines used for the purpose of restraint may be found in any of the books upon the subject; and the first attempt at amelioration of their condition was made in 1791, in the establishment of the Retreat at York by William Tuke. There can be no doubt, however, that the most violent abuses in treatment continued even later than 1815, as appears from the testimony taken in that year before a committee appointed by the House of Commons in May, 1815, to investigate the condition of mad-houses in England.—See "What Asylums Were and Ought to Be," Dr. W. A. F. Browne (1837); *A History of the York Asylum* (1815).

sufficient proof of the commission of a crime, a true bill must be returned.<sup>1</sup>

In a few American States, however, under statutory provisions,<sup>2</sup> evidence of insanity may be considered by a grand jury; or it will even prevent the presentation of an indictment, or the finding of a true bill. For instance, in Maryland, it is provided that where any person arrested for improper or disorderly conduct, or charged with any crime, offence, or misdemeanor, against whom no indictment has been found, shall appear to the court, or be alleged to be a lunatic or insane, the court shall cause a jury to be impanelled forthwith, and shall charge said jury to inquire whether such person was at the time of the commission of the act complained of, insane or lunatic, and still is so; and if such jury shall find that the person was at the time of the commission of such act, insane or lunatic and still is so, the

<sup>1</sup> 1 Hale P. C., p.\* 37. U. S. v. Lawrence. 4 Cranch. C. C. 514.

In *Regina v. Hodges*, 34 E. C. L. R., 8 C. & P. 195 (1838), the grand jury came into court, and the foreman stated that a bill had been presented to them and they had thrown it out because the evidence of all the witnesses went to show that the woman was insane: but Alderson, B., said: "Then gentlemen you did wrong; you ought not to try that question. If you are of opinion that the acts done by her were such as, if they had been done by a person of sound mind, would have amounted to murder, it is your duty to find the bill: otherwise you afford no security to the public by the confinement of the insane person."

<sup>2</sup> Maryland, R. C. 1878, Art. 53, Sec. 7; Code 1888, p. 955, Sec. 1, Art. 59; Virginia, Code 1873, ch. 201, Sec. 14. Re-enacted 1878, ch. 16, Sec. 14: Code 1887, Sec. 4002; W. Virginia, R. S. 1879, ch. 54, Sec. 13; Code 1887, ch. 158, Sec. 13; Iowa, McClain Sts. 1880, Sec. 1412, R. C. 1888, p. 1423; New Jersey, R. S. 1877, p. 625, Sec. 110; see also, Alabama Code (1886) vol. 2, p. 241, Sec. 4815; Mississippi, R. C. 1880, Sec. 3140; Vermont, R. L. 1880, Sec. 1702.

court shall direct him to be confined until he shall have recovered and been discharged by due course of law.<sup>1</sup>

So, in Ohio,<sup>2</sup> the act of the legislature is, that if at any time before the indictment of a person confined in jail, charged with an offence, notice in writing be given by any citizen, to the sheriff or jailor, that such person was insane or an idiot at the time the offence was committed, or has since become insane, the sheriff or jailor, shall forthwith give notice, and an examining court shall be held, and if the judge find that such person was an idiot when he committed the offence, or was then and still is insane, or afterwards became and still is insane, he shall at his discretion proceed as required by law after inquest held.

And in Virginia,<sup>3</sup> when a person in jail on a charge of having committed a criminal offence, appears, from a certificate of a grand jury, or otherwise to the satisfaction of the court in which he is held to answer, to have been insane at the time of committing the act, and continues to be so insane, the court, in its discretion, may order him to be sent to one of the lunatic asylums of the State, or to be delivered to his friends.<sup>4</sup>

But, keeping in view the common law rule that no insane person shall be tried, if a true bill of indictment has been found by a grand jury, and if before the trial of the prisoner for the crime charged, it is suggested to the court, or there is reason to believe that he is insane, many of the States and territories provide by statute

<sup>1</sup> Maryland, G. L. 1888, p. 957, Sec. 6.

<sup>2</sup> Ohio, R. S. 1880, Sec. 7166, R. S. 1890, vol. 2, Sec. 7166.

<sup>3</sup> Virginia Code 1873, ch. 201, Sec. 14. Re-enacted 1878, ch. 16, Sec. 14, Code 1887, Sec. 4002.

<sup>4</sup> A provision similar to this is in force in West Virginia. R. S. 1879, ch. 54, Sec. 13, Code 1887, ch. 158, Sec. 13.

that the proceedings upon the indictment shall be thereupon suspended until the question of insanity and ability to plead be determined. The mode of this preliminary trial is declared in some States to be by jury, in others, by the court, and in others by a commission of experts. If the prisoner is found to be insane upon the preliminary investigation, he is removed to an asylum for treatment, and upon recovery the proceedings upon the indictment are resumed. It will be, moreover, observed, that in many States, the trial as to the mental condition or ability to understand the nature of the proceedings may be had at any stage during the actual trial upon the indictment, which in the meantime shall remain suspended.

For instance, in Arkansas, if the court<sup>1</sup> shall be of the opinion that there are reasonable grounds to believe that the defendant is insane, all proceedings in the trial shall be postponed until a jury be impanelled to inquire whether the defendant is of unsound mind; and if the jury shall find that he is of unsound mind the court shall direct that he shall be imprisoned, or conveyed by the sheriff to the lunatic asylum, and there be kept in custody by the officers thereof until he is restored, when he shall be returned to the sheriff on demand, to be reconveyed by him to the jail of the county.

So, in California,<sup>2</sup> when an action is called for trial, or at any time during the trial, if a doubt arise as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be sus-

<sup>1</sup> Arkansas, R. S., 1874, 1828; and see Sts., 1884, Sec. 2155.

<sup>2</sup> California, code of 1876, Sec. 14,368; Deering's Ann. Sts., 1885, vol. 4, Sec. 1368.

pended until the question is determined by their verdict, and the trial jury may be discharged or retained according to the discretion of the court, during the pendency of the issue of insanity.<sup>1</sup>

Again in Iowa,<sup>2</sup> the statutory provisions are that if any person after commission of an offence and before conviction shall become insane, an inquest, at the request of any citizen, may be instituted by a lunacy commission; and when a defendant appears for arraignment, trial, judgment, or upon any other occasion when he is required, if a reasonable doubt arise as to his sanity, the court must order a jury to be impanelled from the trial jurors in attendance at the term, or who may be summoned by the direction of the court, to inquire into the fact; and the arraignment, trial, judgment, or other proceeding, as the case may be, must be suspended until the question of insanity is determined by the verdict of the jury.

In Illinois<sup>3</sup> it is the duty of the court to impanel a jury to try the question whether the accused be at the time of impanelling insane or lunatic.

So, in Kentucky,<sup>4</sup> if the court shall be of opinion that there are reasonable grounds to believe that the defendant is insane, all proceedings in the trial shall be postponed until a jury be impanelled to inquire whether

<sup>1</sup> Provisions almost identical with those of California are found in Dakota, R. Code, 1877, Crim. Proc., Sec. 515, 516, and C. L., 1887, Sec. 7565; Idaho, R. L., 1874-75, Crim. Proc., Sec. 567, 568, and R. S., 1887, Sec. 8016.

<sup>2</sup> Iowa, McClain's Sts., 1880, Secs. 1412, 4620, 4621; R. C., 1888, p. 1423.

<sup>3</sup> Illinois Rev. Sts., 1883, chap. 38, Sec. 285; R. S., 1887, chap. 38, Sec. 285.

<sup>4</sup> Kentucky, Crim. Code, 1876, Sec. 156.

the defendant is of unsound mind, and if the jury find that he is of unsound mind, the court shall direct that he be kept in prison or conveyed by the sheriff to the nearest lunatic asylum, and there kept in custody by the officers thereof until he be restored, when he shall be returned to the sheriff on demand, to be reconveyed by him to the jail of the county.

In Missouri<sup>1</sup> the provisions of the legislature are that if any person indicted for any crime shall after his indictment and before his trial on such charge, become insane, and the court wherein he stands charged shall have reason to believe that he has so become insane, it shall be the duty of the court to suspend all further proceedings, until that fact be inquired into by a jury; and if upon such inquiry, the jury shall become satisfied that such person has so become insane, they shall so declare in their verdict, and the court shall, by proper warrant to the sheriff, marshal, or jailor, order him to be conveyed to a lunatic asylum and kept until restored to reason. And when he shall be restored to reason he shall be returned to the county from whence he came, and the proceedings against him shall be continued and be prosecuted, and his trial had as though no such inquiry and proceedings thereon, as above mentioned, had been made and had. But if upon such inquiry it shall be determined that the person has not so become insane, the criminal proceedings against him shall be continued and prosecuted, and his trial had in the same manner as though no such inquiry had been made and had.

In Maine,<sup>2</sup> when any person is indicted for a criminal

<sup>1</sup> Missouri, Act, 1883, p. 79, Secs. 1, 2, 3, 4.

<sup>2</sup> Maine, R. S., 1883, chap. 137, Sec. 1.

offence, or is committed to jail on charge thereof by a trial justice, or judge of police, or municipal court, any judge of the court before which he is to be tried, when a plea of insanity is made in court, or he is notified that it will be made, may, in vacation or term time, order such person into the care of the superintendent of the insane hospital, to be detained and watched by him till the further order of the court, that the truth or falsity of the plea may be ascertained.

And in Massachusetts,<sup>1</sup> when a person indicted, is at the time appointed for the trial found to the satisfaction of the court to be insane, the court may cause him to be removed to one of the State lunatic hospitals for such a term and under such limitations as it may direct.

So, in Michigan,<sup>2</sup> if any person is in confinement under indictment or under a criminal charge and shall appear to be insane, the circuit court commissioner of the county where he is confined, shall upon application institute a careful investigation, and if insanity be shown, the person so held under indictment shall be confined in an asylum, and all proceedings upon the indictment be suspended.<sup>3</sup>

In New Jersey,<sup>4</sup> the provision is, that if any person in confinement under indictment, or for want of bail for good behavior, or for keeping the peace, or appearing as a witness, or in consequence of any summary conviction, or by order of any justice, or under any other civil

<sup>1</sup> Massachusetts Statutes 1882, chap. 214, Sec. 16.

<sup>2</sup> Michigan Sts. 1882, Sec. 1909.

<sup>3</sup> The Act of 1883, No. 190, Sec. 19, in the State of Michigan gives the circuit court power summarily to inquire into the question of insanity and for that purpose to appoint a commission.

<sup>4</sup> R. S. 1877, p. 625, Sec. 111.

process, shall appear to be insane, the judge of the circuit court of the county where he is confined, shall institute a careful investigation.

And in New York,<sup>1</sup> if any person in confinement under indictment for the crime of arson, murder, or attempt at murder, or highway robbery, shall appear to be insane, the court of oyer and terminer in which such indictment is pending, shall have power, with the concurrence of the presiding judge of such court, summarily to inquire into the sanity of such person and the degree of mental capacity possessed by him, and for that purpose may appoint a commission to examine such person and inquire into the facts of his case, and report thereon to the court, and if the court shall find such person insane, or not of sufficient mental capacity to undertake his defence, they may by order remand such person to such State lunatic asylum as in their judgment shall be meet, there to remain until restored to his right mind, when he shall be remanded to prison and criminal proceedings be resumed, or otherwise discharged according to law.

In North Carolina,<sup>2</sup> whenever any person shall be confined in any jail charged with a criminal offence, and it shall be suggested to the court, wherein such indictment is pending, that he is insane and incapable of being brought to trial, the court shall impanel a jury to inquire into the truth of the suggestion; and if the jury shall by their verdict find the prisoner to be insane, the judge may cause such prisoner to be removed to the asylum for the insane, or to be otherwise provided for,

<sup>1</sup> New York R. S. 1882, vol. 4, Banks & Bro., 7th ed. Penal Code, Sec. 20.

<sup>2</sup> N. Carolina, Act 1873, chap. 57, Sec. 9.

according to law, to the end that proper means be used for his cure.

In Ohio,<sup>1</sup> it is provided that if at any time before the indictment of a person confined in jail, charged with an offence, notice in writing be given by any citizen to the sheriff or jailor, that such person is insane, there shall then follow proceedings to determine the fact; and when the attorney of a person indicted for an offence suggests to the court in which the indictment is pending, at any time before sentence, that such person is not then sane, a jury shall be impanelled.

The statute in Pennsylvania<sup>2</sup> is taken almost literally from the act of 39 and 40 Geo. III., c. 94, and first appeared upon the statute books in 1836, but afterwards was re-arranged in the Criminal Code of 1860, and provides that in every case in which it shall be given in evidence upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offence, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether he was acquitted by them on the ground of such insanity; and if they shall so find and declare, the court before whom the trial is had, shall have power to order him to be kept in strict custody, in such place and in such manner as to the said court shall seem fit, at the expense of the county in which the trial is had, so long as such person shall continue to be of unsound mind. The same proceedings may be had, if any person indicted for an offence shall, upon arraignment, be found to be a lunatic, by a jury lawfully

<sup>1</sup> Ohio, R. S. 1890, Secs. 7166 and 7240.

<sup>2</sup> Pennsylvania, Act of 31 March, 1860, Secs. 66 and 67.

impanelled for the purpose ; or if, upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be a lunatic, the court shall direct such finding to be recorded, and may proceed as aforesaid.<sup>1</sup>

<sup>1</sup> The only Pennsylvania Acts of Assembly prior to 1836, are act of 14th April, 1794, to carry into effect lunatics' contracts relating to land ; act of 7th February, 1814, to enable committee of lunatics to sell land ; act of 24th March, 1818, to give the committee of lunatics larger powers.

The Pennsylvania act of 13th June, 1836, P. L. 592, provided for the issuance of a commission in the nature of a writ *de lunatico inquirendo* as then practiced and for inquiry into the lunacy of any person being within the Commonwealth or having real or personal estate therein, and gave jurisdiction to the courts and regulated the practice and proceeding in such an inquiry ; the number of commissioners, costs, etc. This act also provided for the appointment of a committee and its powers and duties ; and regulated the procedure in cases of lunatics' contracts for sale of land, and provided also for proceedings in civil actions against them. It contained also the provisions taken from the second section of the act of 39 and 40 Geo. III., c. 94, as above quoted, concerning criminal proceedings against lunatics ; and also provided that on restoration to reason the commission should be superseded.

The act of 13th June, 1836, was the first general act relating to lunatics and the custody of their persons and estates passed in Pennsylvania, and its provisions in that State, are the foundation of the statutory enactments relating to the subject and have since been modified by various amendments. For instance, the act of 16th April, 1849, Pennsylvania P. L., 663, relates to the decree as to costs and fees of witnesses in lunacy proceedings, and also to authorizing the committee to sell timber lands. Again, the act of 15th April, 1851, Pennsylvania P. L., 714, relates to the proceedings where the alleged lunatic had no relatives within the State and the acts of 28th October, 1851, Pennsylvania P. L., 725 ; 11th April, 1866, Pennsylvania P. L., 780 ; and 28th March, 1879, Pennsylvania P. L., 14, to proceed-

In Rhode Island,<sup>1</sup> upon the petition of the agent of State charities and corrections, or the clerk of the supreme court or court of common pleas in any county of the State other than the county of Providence, setting forth that any person awaiting trial and imprisoned

ings in case of the insanity of a married woman. Again, the Pennsylvania acts of 22d March, 1865, Pennsylvania P. L., 31, and 20th February, 1867, Pennsylvania P. L., 30, confer upon lunatics' committees increased powers in proceedings for the partition and valuation of real estate and the Act of 13th April, 1868, Pennsylvania P. L., 94, again gives wider powers to such committees.

The act of 8th May, 1874, Penna. P. L., 122, modifies the proceedings upon the inquisition, and the act of 14th May, 1874, Penna. P. L., 160, again changing the provisions relating to criminal proceedings against lunatics, provides that whenever any person is imprisoned within the commonwealth convicted of any crime whatsoever, or charged with any crime and acquitted on the ground of insanity, application in writing may be made by the warden or superintendent, and shall request the removal of such prisoner to a hospital for the insane; whereupon a commission shall be appointed and the proceedings are specified. It has been decided, however, by the common pleas courts of the State that this act does not apply to convicted murderers. *Ex-parte* Jno. M. Wilson, 19 W. N. C., 37 (Montgomery county, 1886); *in re* McGinnis, 14 W. N. C., 221 (Philadelphia county); *in re* Briggs, 14 W. N. C., 341 (Philadelphia county).

The recent act of 8th May, 1883, Penna. P. L., 30, modifies the act of 13th June, 1836, in its provisions as to the powers and duties of lunatics' committees.

As to lunatic asylums in Pennsylvania, it may be added, that the act of 4th March, 1841, Penna. P. L., 57, was the first which provided for a public asylum for the reception and relief of the insane of this commonwealth. Its provisions were supplied and repealed by the act of 14th April, 1845, Penna. P. L., 441, relating to the Pennsylvania State Lunatic Asylum and Union

<sup>1</sup> Rhode Island, Sts. 1882, chap. 74, Secs. 35 and 37.

is insane, any justice of the supreme court may make such an examination of the said person as in his discretion he shall deem proper; and upon restoration to reason such person may, by order of any of the justices

Asylum for the insane by which were regulated the appointment of the trustees, their powers and duties, the appointment of physicians, superintendents, regulation of the admission of patients, rates, and it also provided that insane paupers should be sent to the asylum, and for the collection of expenses. Subsequently by act of 11th April, 1848, Penna. P. L., 535, the name was changed to Pennsylvania State Lunatic Hospital, and the act of 4th May, 1852, Penna. P. L., 551, provided that prisoners in the Eastern Penitentiary may be transferred to the asylum, and the act of 17th February, 1854, Penna. P. L., 85, also related to the expense and maintenance of lunatic paupers.

The act of 8th April, 1861, Penna. P. L., 248, modified the act of 14th April, 1845, Sec. 14, by giving power to the court to inquire into the fact of insanity in a summary way; and the provisions of the act 22d April, 1863, Penna. P. L., 539, created and regulated The Western Pennsylvania Hospital.

The act of 20th April, 1869, Penna., P. L., 78, again modified and changed the provisions of the law relating to the commitment of insane persons in asylums, indicating upon what evidence insane persons may be placed in them, the proceedings under habeas corpus and the power of the court to detain in custody persons acquitted on the ground of insanity. It also provided in Sec. 6 for the appointment of a commission by order of any court upon a statement alleging that the person was insane and that his and the welfare of others required his restraint; but as it has been seen the act of 14th May, 1874, Penna. P. L., 160, did not apply to convicted murderers, so it may be doubted whether this act applies to such persons who are already under restraint.

The act of 8th May, 1883, Penna. P. L., 21, relates to the supervision and control of hospitals or houses in which the insane are placed for treatment or detention and appoints a committee of five out of the board of charities to act as the committee on lunacy. The act contains ample provisions in regard to the visitation, admission and detention of the insane,

of the supreme court, in their discretion, be remanded to the place of his original confinement to await his trial for the offence for which he stands committed.

In Texas,<sup>1</sup> when a jury has been impanelled to assess the punishment upon a plea of guilty, they shall say in their verdict what the punishment is which they assess; but where the jury are of the opinion that a person pleading guilty is insane they shall so report to the court, and an issue as to that fact be tried before another jury, and if upon such trial it be found that the defendant is insane, he shall be removed to an asylum; and such a jury shall be impanelled when information to the court as to the insanity of the defendant is given by the written affidavit of any respectable person, setting forth that there is good reason to believe that the defendant has become insane.

So, in Utah,<sup>1</sup> when an indictment is called for trial, if a doubt arise as to the sanity of the defendant, the court must order the question to be submitted to a jury, and the trial upon the indictment must be suspended.

and in Sec. 29 it is provided that its provisions in respect of the admission or discharge of patients shall not extend to insane criminals in custody, but that whenever any person detained in any jail or prison is insane or in such a condition as to require treatment in a hospital for the insane, it shall be the duty of any law judge of the court under whose order the person is detained upon application to direct an inquiry into the circumstances by a commission and remove him from the jail or prison to a State hospital. There have, however, been no decisions of the courts upon the meaning of this act, as to whether it applies to the cases of insane offenders charged with crime and awaiting trial upon the indictment.

<sup>1</sup> Texas, R. S., 1879, C. C. P., Secs. 723 and 948; Willson's Crim. Sts., p. 2, 1888, Secs. 723 and 948.

<sup>2</sup> Utah, Act of 1878, Sec. 455, Crim. Code.

Moreover, in Virginia,<sup>1</sup> if a court in which a person is held for trial, see reasonable ground to doubt his sanity at the time at which but for such doubt, he would be tried, it shall suspend the trial until a jury inquires into the fact as to such sanity. Such jury shall be impanelled at its bar. If the jury find the accused to be sane at the time of their verdict, they shall make no other inquiry, and the trial in chief shall proceed. If they find that he is insane, they shall inquire whether or not he was so at the time of the alleged offence. If they find that he was so at that time, the court may dismiss the prosecution, and either discharge him, or to prevent his doing mischief, remand him to jail, and order him to be removed thence to one of the lunatic asylums of this State. If they find that he was not so at that time the court shall commit him to jail, or order him to be confined in one of the said asylums until he is restored, that he can be put upon his trial.<sup>2</sup>

In Wisconsin,<sup>3</sup> when any person is indicted or informed against for any offence, if the court shall be informed, in any manner, that there is a probability that he is, at the time of his trial, insane, and thereby incapacitated to act for himself, the court shall, in a summary manner, make inquisition thereof, by a jury or otherwise, as it deems most proper; and if it shall be thereby determined, that he is so insane, his trial for the offence shall be postponed indefinitely, and the court shall thereupon order that he be confined in one of the

<sup>1</sup> Virginia Code, 1873, chap. 202, Sec. 17; Code, 1887, Sec. 4031.

<sup>2</sup> A statute similar to this is in force in West Virginia, R. S., 1879, chap. 55, Sec. 10; Code, 1887, chap. 159, Sec. 10.

<sup>3</sup> Wisconsin R. S., 1878, and supplement, 1883, Sec. 4700; Sts. 1889, Sec. 4700.

State hospitals for the insane, the superintendent of which shall receive him upon such order, and confine and treat him as other insane persons are kept and treated therein, and upon his recovery from insanity, the said superintendent shall notify the sheriff of the county in which the indictment or information shall be pending, and the sheriff shall thereupon take him into his custody, and he shall be committed to the county jail of the county, or held to bail for his appearance at the next succeeding term of said court, for trial for the offence; but in case it shall be determined by the proper authorities of the hospital that the insanity of the accused person is incurable, he shall then be treated and disposed of as other cases of incurable insanity, according to law.<sup>1</sup>

The first amendment<sup>2</sup> in England to the act of 39 and 40 Geo. III., c. 94, provided that in all cases where any person shall be in custody at that time under or by virtue of any warrant for commitment made or issued by any of the justices of the peace, and if he shall be discovered and apprehended under circumstances that denote a derangement of mind and purpose of committing some crime for which, if committed, such person would be liable to be

<sup>1</sup> Similar provisions will also be found in the statutes of the following States :

Alabama, 1886, vol. 2, c. c., p. 241, Sec. 4816.

Arizona R. S., 1887, p. 824, Sec. 2109.

Colorado G. S., 1883, Sec. 700.

Minnesota Sts., vol. 2, supp., 1888, p. 944, Sec. 18.

Montana Comp. Sts., 1887, p. 490, Sec. 466, *et seq.*

Nevada General Sts., 1885, Sec. 4452

Washington Code, 1881, Sec. 2262.

Wyoming R. S., 1887, Sec. 858.

<sup>2</sup> England, 1 and 2 Vict., chap. 14, Sec. 2.

indicted, it shall and may be lawful for any two justices of the peace of the county, city, borough, or place where such person shall be so kept in custody or apprehended to call to their assistance a physician, surgeon, or apothecary, and if upon view and examination of said person so in custody or apprehended, or from other proof, the said justice shall be satisfied that such person is insane or a dangerous idiot, the said justices, if they shall so think fit, by an order under their hand and seal, directed to the keeper of the gaol or house of correction, if in custody at the time, or if afterwards apprehended, to the constable or overseer of the poor of the parish, township or place where such person shall be apprehended, shall cause the said person to be conveyed to and placed in the county lunatic asylum, provided that there be one situated within or belonging to the county, in which such person shall be in custody at the time, or shall be afterwards apprehended, and if there be no such asylum, then to some public hospital, or some house duly licensed for the reception of insane persons. The amendment referred to also provides that the said justices shall inquire into and ascertain by the best legal evidence that can be procured under the circumstances of the personal legal disability of such insane person or dangerous idiot, the place of the last legal settlement of such person; and it shall and may be lawful for such two justices to make an order under their hands and seals upon the overseer or churchwardens of such parish, township, or place where they adjudge him or her to be legally settled, to pay all reasonable charges of examining such person, and conveying him or her to such county lunatic asylum, public hospital, or licensed house, and to pay such weekly sum for his or her maintenance in such place of custody as they or any two

justices shall by writing under their hands from time to time direct. Where the place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county, city, borough or place where such person shall have been in custody or apprehended. But it was also provided that nothing contained in the act referred to should be construed to extend to restrain or prevent any relative or friend from taking such insane person or dangerous idiot under their own care and protection, if he shall enter into sufficient recognizance for his or her peaceable behavior or safe custody, before two justices of the peace, or the court of quarter sessions, or one of the judges in Westminster Hall; but the churchwarden and overseers of the parish in which the justice shall adjudge any insane person or dangerous idiot to be settled may appear against any such order to the next general quarter sessions of the peace to be holden for the county where such order shall be made in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace of the county, riding or division, or to the town clerk of the city, borough, or place, as the case may be, upon whose rates the burden of maintaining such insane person or dangerous idiot might fall, if such order shall be invalid, and such clerk of the place or town clerk shall be respondent to such appeal, which appeal the justices of the peace assembled at the said general quarter sessions are hereby authorized and empowered to hear and determine, in the same manner as appeals against orders of removal are now heard and determined.<sup>1</sup> There was also a subsequent amendment to the act of 39 and 40

<sup>1</sup> England, 1 and 2 Vict., chap. 14, Sec. 3.

Geo. III., c. 94, which provided that if upon examination it shall appear to the physician, surgeon, or apothecary present at the examination of any person then in custody that he or she is not an insane person or a dangerous idiot, and that such persons may be suffered to go at large with safety, it shall and may be lawful for such medical person and he is hereby required to give a certificate to that effect, signed by him, to the visiting justices of the gaol or house of correction in which such person is in custody, who are hereby required to transmit the same forthwith to her Majesty's principal Secretary of State for the home department, who, if he shall so think fit, shall order the liberation of such person from custody.

In Germany, persons who are prosecuted on account of misdemeanors or crime, and concerning whom it is doubtful whether they are to be considered responsible for their acts, according to the precepts of the government criminal and civil code,<sup>1</sup> are placed in a public asylum in order to observe their mental condition. Thereupon the supervising physician shall give his opinion, stating whether the patient, at the time of the commission of the deed, was in such a condition of mental disturbance as to interfere with volition and whether he was to be considered as irresponsible. According to the result of such examination, which does not exclude an appeal to higher authorities or chief medical colleges, the accused will either be committed, acquitted, or the legal authorities dispense their judgment altogether, until the accused shall be pronounced mentally sane. The length of detention in the asylum does not generally exceed six weeks, but may be prolonged.<sup>2</sup>

<sup>1</sup> Reichsstrafgerichtordnung, Par 91, ff.

<sup>2</sup> See Provisions for the Insane: Harrison (1884), p. 1042.

## CHAPTER III.

### THE PRELIMINARY ISSUE A MATTER OF RIGHT OR WITHIN JUDICIAL DISCRETION.

IN the practical application of the American statutes relating to the preliminary issue, an important question here arises whether the issue is a matter of right or merely in the discretion of the court, even if the fact of insanity be pleaded at the time of arraignment and before a plea of not guilty be entered.

Upon the one hand, it may be considered, that under the rules which regulate criminal pleading, such an issue of fact if properly raised upon the record, must be first decided by a jury under the constitutional provision which makes the right to trial by jury inviolate. For, in criminal procedure, arraignment is that stage in which the prisoner is called to the bar of the court to answer the accusation contained in the indictment. It consists of three steps: calling the defendant to the bar by name and commanding him to hold up his hand for the purpose of identification: reading the indictment so that he may understand the charge against him: and then the question, How say you, guilty or not guilty?<sup>1</sup>

Pleading then begins, and a bill of indictment would appear to correspond to a narr or declaration in a civil suit, or a bill of complaint in equity, containing the formal averment of the injury for which redress is sought: and the use of pleading, whether in civil or criminal

<sup>1</sup> Archibald Crim. Plead., ed. 1859, 128.

procedure, is to reach an issue or a question of fact or law affirmed upon one side and denied by the other, to be thereupon decided by a jury or the court, as the case may be. Therefore the indictment having been read to the prisoner in arraignment, he may either stand mute, or confess, or plead: and his plea is "either 1. A plea to the jurisdiction. 2. A demurrer. 3. A plea in abatement. 4. A special plea in bar; or 5. The general issue."<sup>1</sup>

Thus, upon principle, it would seem that to an indictment for murder, for instance, before the prisoner shall be required to plead not guilty and be tried upon that issue, he may demur or plead by averring any matter of law or fact as indicated by Blackstone. Indeed that writer mentions a declinatory plea, such as the privilege of sanctuary or the benefit of clergy, no longer in use, but a plea in abatement still in use is where the prisoner is misnamed in the indictment, and that fact is alleged by the plea; and cases of special pleas in bar are, as stated by Blackstone *supra*, of four kinds; a former acquittal, a former conviction, a former attainder or a pardon. If criminal procedure were, therefore, to follow that of civil, any one or all of these pleas might be made use of by the prisoner, or on his behalf, before he could be tried upon the general issue plea of not guilty, and if a fact alleged in any of them, were denied by the commonwealth, which, in turn, at each step of the pleading, should plead either by way of demurrer or join in the issue of fact set up in such dilatory plea, a jury would then be lawfully impanelled by the court to try and decide the question or issue of fact so framed.

<sup>1</sup> 4 Blackstone, p. \* 332.

And it is to be observed, moreover, that while in civil actions, where a man has elected to plead any special plea in bar, "he is concluded by that plea, and cannot resort to another if that be determined against him, *quia interest rei publicæ ut sit finis litium*; yet in criminal prosecutions, *in favorem vitæ*, when a prisoner's dilatory plea is found against him upon issue tried by a jury, or adjudged against him in point of law by the court, still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony, the general issue, not guilty."<sup>1</sup>

Under the English act of 39 and 40 Geo. III., c. 94, and its amendments, the practice has been sometimes to award a preliminary trial of the mental capacity to plead.<sup>2</sup>

<sup>1</sup> 4 Blackstone, \* 338.—Moreover, it might appear that so far as the nature of the fact alleged by way of a dilatory plea is concerned, it would be difficult to perceive why the process of criminal law should be delayed or arrested on its way to judgment, upon a plea raising a question of jurisdiction, and process should not also be stopped when the fact of insanity and inability to plead is averred, and it may be as unlawful for a court, having no jurisdiction, to try a defendant for murder as it would be to try him when he was insane. It is to be doubted if a preliminary issue should be granted as a matter of right, if, for instance, the defendant be misnamed in the indictment, and yet such an issue remain merely in judicial discretion, if mental incapacity to plead is alleged. A demurrer, for instance, will raise an issue upon the merest technicality and yet it has been held that when the substantial fact of sanity, upon which rests the right to put a defendant upon trial, is alleged to be absent, the granting of a preliminary issue rests merely in discretion.

<sup>2</sup> *Rex v. Pritchard*, 7 C. and P., 303; (1836), 32 E. C. L. R., 517; *Rex v. Dyson*, id., 305; (1831), 32 E. C. L. R., 518; *In re, Whitaker*, 4 Myl. and Cr., 441 (1839); *Ley's Case*, 1 Lewin. C. C., 239 (1828); *The Queen v. Goode*, 7 A. and E., 536 (1837);

But the question as to whether such a trial is a matter of right or only in judicial discretion has in England never arisen. So, also in the American States under the various statutes to which reference has been made, the preliminary trial is frequently mentioned by the courts as being the means by which the conscience of the commonwealth is informed lest an insane defendant be put upon trial.<sup>1</sup>

34 E. C. L. R., 150; *Regina v. Whitfield*, 3 C. and K., 121 (1844); and in the case of *Queen v. Israel*, 2 Cox. Crim. Case, 263 (1847) where upon being arraigned, the defendant appeared to be dumb, and the court called a witness who testified that the dumbness was feigned, and that the prisoner had cross-examined witnesses at the hearing when arrested; yet, semble, it required a jury, and not the court, to say whether he was in a fit state of mind to plead.

<sup>1</sup> In Philadelphia county, Pennsylvania, the unreported cases are: *Commonwealth v. Maguire*, Q. S. Docket, 1864, No. 137; *Commonwealth v. Tuch*, id., Nov. Term, 1875, No. 372; *Commonwealth v. King*, id., Feb. Term 1878, No. 355. In other States the reported cases are as follows: *Freeman v. The People*, 4 Denio, 9 (1847); *Guagando v. The State*, 41 Tex. 626 (1874); *Taffe v. The State*, 23 Ark., 34 (1861); *Com. v. Brailey*, 1 Mass., 103 (1804); *U. S. v. Lancaster*, 7 Biss., 440 (1877); *Com. v. Hathaway*, 13 Mass., 299 (1816); *Gruber v. The State*, 3 W. Va., 699 (1869); *Jones v. The State*, 13 Ala., 157 (1848); *Schultz v. The State*, 13 Tex., 401 (1855); *The People v. Lake*, 2 Parker Crim. (N. Y.), 215 (1855); *People v. Klein*, 1 Edm. Sel. Cas., 13 (1845); *People v. Ah Ying*, 42 Cal., 18 (1871).

In an English case, *Hallock B.*, said to the jury: "If there be a doubt as to the prisoner's sanity, and the surgeon says that it is doubtful, you cannot say that he is in a fit state to be put upon his trial;" *Ley's case*, *supra*. And in an American case, *Gruber v. The State*, *supra*, it was held that if there is reasonable ground to doubt the sanity of the accused at the time of trial and after a jury is impanelled, it is the duty of the court to suspend the trial, and to impanel another jury, to inquire into the fact of such sanity; and if they find the accused to be insane

In New York the code provides that no insane person can be tried, sentenced to any punishment, or punished for any crime while he continues in that state;<sup>1</sup> and in one case it is said: "This, although new as a legislative enactment in this State, was not introductory of a new rule, for it was in conformity with the common law on the subject. The statute is explicit that 'no insane person can be tried,' but it does not state in what manner the fact of insanity shall be ascertained. That is left as at common law, and although in the discretion of the court, other modes than that of a trial by jury may be resorted to, still in important cases that is re-

at the time of the trial, it shall then inquire as to his sanity at the time of committing the offence; and if insane at the time the offence was committed, that fact is a good defence in bar of further prosecution.

In Wharton's Am. Crim. Law, Sec. 58, 9th ed., it is said: "By the common law, if it is doubtful whether a criminal who, at his trial, in appearance is a lunatic, be such in truth or not, it shall be tried by the jury who are charged to try the indictment, by an inquest of office to be returned by the sheriff of the county wherein the court exists; or, being a collateral issue, the fact may be pleaded and replied to *ore tenus* and a *venire* awarded, returnable instant, in the nature of an inquest of office. If it be found by the jury that the party only feigns himself a lunatic, and he still refuse to answer, he was, before the 7 and 8 Geo. 4, c. 28, s. 2, dealt with as one who stood mute, and as if he had confessed the indictment; but now, by virtue of that enactment, a plea of not guilty may be pleaded. The principal point to be considered by the jury would be, whether the defendant was of sufficient intellect to comprehend the course of the proceedings on the trial, so as to be able to make a proper defence. Whether the prisoner was sane or insane at the time the act was committed is a question of fact triable by the jury, and depending upon the previous and contemporaneous acts of the party."

<sup>1</sup> *Freeman v. The People*, 4 Denio., 9 (1847).

garded as the most discreet and proper course to be adopted."

Again in Alabama,<sup>1</sup> the supreme court said: "But in the case before us, the judge did not see proper to test the prisoner's sanity by a preliminary inquiry to ascertain whether he was capable of pleading to the indictment or not—he did plead, and a trial and conviction was the result, although we are of the opinion that the facts disclosed in the bill of exceptions might well have warranted the preliminary inquiry as to the prisoner's mental condition, yet this must be left to the sound discretion of the court below. We cannot from the record see that error, such as we can judicially notice, has been committed."

So, also, the revised statutes of the State of Iowa containing a provision prohibiting trial if there is a doubt whether or not the prisoner be insane, in one of the cases<sup>2</sup> the supreme court said: "The court is to inquire into the prisoner's mental condition at the time he appears for arraignment. In determining whether a reasonable doubt exists as to his sanity, before impanelling a jury, the judge is not confined alone to the case made by the counsel . . . but may in his discretion investigate the whole matter and determine whether the necessity exists for the inquiry. But the inquiry should not be allowed if from all the circumstances he has no reason to doubt his sanity."

In Pennsylvania,<sup>3</sup> however, the supreme court have passed upon the question, and held that the preliminary issue is in the discretion of the trial judge, only, and not

<sup>1</sup> Jones v. The State, 13 Alabama, 157.

<sup>2</sup> State v. Arnold, 12 Iowa, 483.

<sup>3</sup> Webber v. Commonwealth, 21 W. N. C., 413 (1888).

a matter of right. In the case in which this decision was rendered, the record showed, as appears from the dissenting opinion filed by Sterrett, J., that: "The prisoner being without counsel, the court, sometime before the case was called for trial, appointed two reputable gentlemen of the bar to represent him; and they are entitled to great credit for the marked ability and energy with which they have performed their duty. Having obtained such information as was within their reach as to the mental condition of the prisoner, etc., when the case was called for trial on October 17, 1887, they moved a stay of proceedings for the purpose of having the question of the prisoner's insanity determined in the common pleas. That being denied, they then asked leave to file a special plea, setting forth his then insanity, in order that an issue might be formed to determine that question. That also being refused, they then signed and presented to the court a suggestion, setting forth that the prisoner then in court 'is a lunatic of non-sane mind, and has not sufficient intelligence to comprehend the course of proceedings on the trial so as to make a proper defence, nor conduct it with discretion, and before the court should compel him to plead to the bill of indictment, a jury be lawfully impanelled to find whether such facts be true or not, so that the court may take action in the case, as in the Act of March 31, 1860, is provided.' In connection therewith they offered to support their motion and inform the discretion of the court (if any) by producing affidavits or witnesses *viva voce* that the prisoner is now insane, and therefore incompetent to plead or conduct his defence.' That was also refused, the learned judge saying: 'I consider that it is a matter in my discretion.' Thereupon the prisoner was arraigned, and, in answer

to the question 'whether he was guilty or not guilty,' said: 'I do not think it necessary for me to do so; I do not consider myself guilty of anything at all.' The learned judge pronounced his answer a plea of not guilty, and, by his direction, it was so entered of record. Counsel for the prisoner then renewed their suggestion that he 'is insane upon arraignment,' moved that that issue be first tried, and again offered 'to accompany their motion with affidavits of witnesses, *viva voce*, that the prisoner is incompetent to plead or conduct his defence.' The motion being denied, a jury was impanelled and the trial proceeded. The foregoing and other rulings of the court were duly excepted to, and form the first nineteen specifications of error."<sup>1</sup>

In the opinion of the majority of the court, affirming the judgment of the court below, it is said, referring to the English and American cases above mentioned: "The question principally discussed in this case is a novel one. It does not appear to have ever been determined or even presented in this court before. Briefly stated it is this: Whether a defendant in a criminal case,

<sup>1</sup> The following form of a plea taken from the 1 Crim. Law Mag., 432, was offered in Webber's case, *supra*, at arraignment and before the plea of not guilty was entered: "And the said Oscar Hugo Webber by his attorneys cometh into court here and having heard the said indictment read saith that the said indictment, and the matter therein contained in manner and form as the same are set forth, are not sufficient in law, and that he, the said Oscar Hugo Webber, is not bound by the law of the land to answer the same, because he, the said Oscar Hugo Webber, is now insane, and this they are ready to verify; wherefore, for want of sufficient indictment in this behalf, the said Oscar Hugo Webber, by his counsel, prays that this honorable court may give oyer to such plea in the manner provided by law."

who alleges his insanity at the time of arraignment, is entitled, as a matter of legal right, to have a separate, independent and preliminary trial of that question by a jury, specially impanelled for the purpose. It is certainly the fact that the 66th and 67th Sections of our Criminal Code of 1860, are substantially, almost literally, taken from the English Statute of 39 and 40 Geo. III., 94, and that, under that statute, the English criminal courts do, not unfrequently, award preliminary issues to determine the sanity of prisoners by the verdict of a jury. The same is true of the practice in several of our sister States. We have examined with much care the various authorities cited in the very able and exhaustive argument of the learned counsel for the plaintiff in error, and we find that in all of them the inquest was directed, generally by the court of its own motion, and sometimes at the instance of the attorney-general, but always in cases where the appearance and actions of the prisoner were such as to manifestly indicate a condition of insanity either real or simulated. In point of fact, the purpose of the inquiry was to inform the conscience of the court as to the prisoner's real condition at the time of the trial, but before the trial proceeded. There was an obvious propriety in directing an inquiry by the verdict of a jury in all such cases, because the fact itself required determination before any further proceedings were had, if there was probable ground for belief that a condition of insanity existed. If, upon an examination of the prisoner, there was no apparent reason to suppose him insane, but on the contrary, he seemed quite capable of pleading to the indictment, there was no necessity for a preliminary trial, because every right to set up insanity, either when the offence was committed, or at the time of the trial, still

remained, and could be thoroughly tried by the jury who were to try the indictment.

The existence of the doubt as to the prisoner's present insanity is a matter which, by the very necessity of the case, could only be determined by the court itself. Up to the time of pleading there is no other tribunal which has the prisoner in charge, and there is no other which can say whether there is a doubt upon that subject. It is one of the functions which must be entrusted to the court, and it is not to be presumed that it will in any case be abused. If it should be, there is still the remedy available in all cases where abuse of discretion has taken place. In the cases in which this subject has received consideration, the doctrine has been expressed in accordance with these views."<sup>1</sup>

In civil actions, it will be observed, however, that the right to a trial by jury is not limited or restricted only to such issues of fact as are raised by the use of the general issue pleas. The right extends also to such issues as are raised upon any of the dilatory pleas. And in view of some of the decisions of the courts as to the matter of judicial discretion in the trial of the preliminary question of inability to plead, the language of

<sup>1</sup> In the Webber case, *supra*, no personal examination of the prisoner was made by the court; nor were witnesses called by the commonwealth in open court to testify that he was able to plead. It would appear also to be doubtful if, as stated in the opinion of the supreme court, "Up to the time of pleading there is no other tribunal which has the prisoner in charge;" for the jurisdiction of a court of oyer and terminer would seem to attach at an earlier stage of procedure, namely, upon the finding of a true bill, and arraignment is, perhaps, for a different purpose, pleading being used in order to reach an issue of fact or law to be decided either by a jury or the court. See 4 Blackstone\* 331.

the late chief justice Gibson<sup>1</sup> may be quoted from a case in which was discussed the right to make use of the plea of once in jeopardy: "Why it should be thought," he said, "that the citizen has no other assurance than arbitrary discretion of magistrates for the enforcement of the constitutional principle which protects him from being twice put in jeopardy of life or member for the same offence, I am at a loss to imagine. If discretion is to be called in, there can be no remedy for the most palpable abuse of it, but an interposition of the power of pardon which is obnoxious to the very same objection. Surely every right secured by the constitution is guarded by sanctions more imperative. But in those States where the principle has no higher sanction than what is derived from the common law, it is nevertheless the birthright of the citizen, and consequently demandable as such. But a right which depends on the will of the magistrate, is essentially no right at all; and for this reason the common law abhors the exercise of a discretion in matters which may be subjected to fixed and definite rules."

After quoting Wharton's Criminal Law, 8th ed., vol. 1, Sec. 58, *supra*, the opinion in the Webber case, *supra*, commenting upon the law as there stated, says as to the change made in the rule at common law by the act of 39 and 40 Geo. III., c. 94: "The defence of insanity at the time the crime was committed must be tried by the jury charged with the trial of the indictment, and if the question of sanity at the time of the trial is raised, it may be tried either by a special jury impanelled for that purpose, or by the jury who are to try the indictment. This is the undoubted meaning of the text, and

<sup>1</sup> Commonwealth v. McCue, 3 R. 498.

it expresses the rule as it was at the common law, and also as it was changed by the act of George III."

The opinion then cites several of the cases and text-books already hereinbefore noted, and then holds that an absolute right of the prisoner by the judgment of the court below, was not affected. It is said: "The foregoing are the only text-books and reports of cases which we have met with, in which the subject we are considering has been discussed or decided, and they all concur substantially in the proposition that it is only in cases of doubt as to the sanity of the prisoner upon arraignment, that a preliminary inquiry is to be ordered. This being so, it is manifest that neither the assertion of the prisoner or his counsel, nor the production of affidavits, nor the entering of a plea of present insanity upon the record, can of themselves alone suffice to produce the state of doubt, which is a necessary prerequisite to the ordering of the inquiry. They are all necessarily addressed to the court, and there is no other tribunal to entertain them, and it is the court, after all, which must be affected by the various considerations which are supposed to, or in fact do, produce the doubt which must precede any order for an inquiry. It follows, of course, that other considerations than those stated may affect the judicial mind and induce the existence of a doubt. A personal inspection of the prisoner, an examination of him, whether public or private, inquiry from an attending physician, or from those around the prisoner who have means of knowledge. All of these, and doubtless other facts or testimony, may contribute to the creation of doubt in the mind of the judge, and, for that reason, all may be resorted to, but if, after all have transpired, the judge has no doubt of the prisoner's sanity, he is neither bound, nor would

he be justified in ordering an inquest. It is the judicial conscience alone which can determine this question. And it is that conscience only which must be informed, so that it may act intelligently. These views dispose of the question. The absolute right of the prisoner to have the question of his sanity tried by a jury is not at all affected.”<sup>1</sup>

<sup>1</sup> It may be observed that in this case the averment of the fact of present insanity and inability to plead set up both in the plea in abatement offered and in the suggestion filed, was decided by the court and not by a jury lawfully impanelled for the purpose, without personal examination, or calling witnesses in open court. There is no more difficult question to decide than that of mental derangement; and for illustration may be used the instance given by Lord Erskine in *Rex v. Hadfield, supra.*, who, referring to Hadfield's appearance, and the difficulty of deciding upon his mental condition, said :

“ I admit that every person who listened to his (Hadfield's) conversation and observed his deportment upon his apprehension, must have given precisely the evidence delivered by His Royal Highness, the Duke of York, that nothing like insanity appeared to those who examined him. But what then? I conceive, gentlemen, that *I* am more in the habit of examination than either that illustrious person or the witnesses from whom you have heard this account; yet I well remember (indeed I never can forget it) that since the noble and learned judge has presided in this court, I examined for the greater part of the day, in this very place, an unfortunate gentleman who had indicted a most affectionate brother, together with the keeper of a mad-house at Hoxton, for having imprisoned him as a lunatic; whilst according to his evidence he was in his perfect senses. I was, unfortunately, not instructed in what his lunacy consisted, although my instructions left me no doubt of the fact; but, not having the clue, he completely foiled me in every attempt to expose his infirmity. You may believe that I left no means unemployed which long experience dictated; but without the smallest effect. The day was wasted and the prosecutor, by the most affecting history of unmerited suffering, ap-

Besides contending in the supreme court that the preliminary issue was of right, in the Webber case, it was also argued in his behalf, that the ruling of the trial judge in disregarding the suggestion filed by counsel nullified the constitutional provision as to prisoners being entitled to the assistance of counsel; inasmuch as the knowledge of the existence of insanity was confined to his friends and relatives, and that at no other stage of procedure was he so much in need of the assistance of counsel as at that in which he was to plead, and his life to be put into jeopardy. It was also contended that the suggestion of insanity filed having remained upon the record undisposed of by a jury, the conviction of the prisoner was against the law of the land, in that he was insane when put upon trial.<sup>1</sup>

peared to the judge and jury, and to a humane English audience, as the victim of the most wanton and barbarous oppression; at last Dr. Sims came into court, who had been prevented by business from an earlier attendance; and whose name, by the by, I observe to-day in the list of the witnesses for the Crown. From Dr. Sims I learned that the very man whom I had been above an hour examining, and with every possible effort which counsel are so much in the habit of exerting, believed himself to be the Lord and Saviour of mankind; not merely at the time of his confinement, which alone was necessary for my defence; but during the whole time that he had been triumphing over every attempt to surprise him in the concealment of his disease. I then affected to lament the indecency of my ignorant examination, when he expressed his forgiveness, and said with the utmost gravity and emphasis, in the face of the whole court, 'I am the Christ,' and so the cause ended."

<sup>1</sup> The constitution of the United States, 1787, provides, amendments, Art. V., that no person shall be deprived of life, liberty, or property, without due process of law; and the constitution of Pennsylvania, both in 1790, Art. IX., and in that of 1874, Art. I., declared that the accused cannot be deprived of his life, liberty or property, without the

Moreover, the prisoner's counsel contended that assuming it to be within the judicial discretion of the judgment of his peers or the law of the land, and it may be said the provisions as to trials for crimes, and the rights of defendants in criminal cases indicate that they contemplated the common law rule, that it was the right of a prisoner not to be tried if he were insane. Sanity of the prisoner may be said to be the postulate of such constitutional provisions. Moreover, the two phrases, the law of the land, and due process of law, are synonymous, and their meaning is that such principles in the administration of law as were in force under the common law in England, at the time when the constitution of the United States or the constitution of Pennsylvania was adopted, became part of the American law by force of those constitutional enactments. Therefore, as it was a common-law right to be enforced in favor of a prisoner who was insane that he could not be tried until sanity was restored, or the fact decided by a jury, it may be contended that it became an indefeasible and inalienable right under these provisions of the bill of rights.

The meaning of the phrases, due process of law, and law of the land, is said in one of the cases, *Brown v. Hummel*, 6 Pa. St., 86, relating to property, to mean the law of an individual case, as established in a fair open trial, or an opportunity given for such a trial in open court, and by due course and process of law. In *Fetter v. Wilt*, 46 Pa. St., 460, it is said in a suit for trespass in which an act of assembly was relied upon in defence, that the two phrases have the same origin, and mean the judgment of law in its regular course of administration through courts of justice. In *Huber v. Riley*, 53 Pa. St., 112, in a suit in trespass on the case for refusing to receive a ballot on the ground that plaintiff was a deserter, and in which an act of congress was relied upon as defence, was quoted the definition of Curtis J. in *Dem. v. Murray*, 18 How. 272, that it ordinarily implies and includes a complainant, a defendant, and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding. In *Craig v. Kline*, 65 Pa. St., at p. 413, it is said, the law of the land means the due process of law, and does not mean merely an act of the legislature, for that would abrogate all restriction of legislative power. See, also, *Menges v. Dentler*, 33 Pa. St., 495. *Norman vs. Heist*, 5 W. & S., 172.

court below to allow a preliminary issue, there was in

For the cases in other States defining the meaning of the expressions, see Pomery on Const. Law, Sections 245, 250, 256, and for the law relating to criminal prosecutions, reference may be made to Cooley on Const. Lim., \*p. 351; *People v. Supervisors*, 70 N. Y., 234; *Rowan v. The State*, 30 Wis., 144; *Kalloch v. Supt. Ct.*, 56 Cal., 229; *Taylor v. Porter*, 4 Hill, 146; *Hurtado v. California*, 110 U. S., 516; *Hopt v. Utah*, id., 574.

The meaning of due process of law is, that a man should be entitled to all the safeguards which the law gives him, and be tried according to the law of the land, and according to the settled maxims of the law; and a prisoner should be given every opportunity to defend himself which the law allows: *Ah Fook*, 49 Cal., 402; and be properly brought into court, and allowed to prove any fact which by law is a protection to him: *People v. Essex*, 70 N. Y., 229. The phrase means the due course of legal proceeding according to those views and forms which have been established for the protection of private rights: *Edwards, J., in Westervelt v. Gregg*, 12 N. Y., 202.

Chancellor Kent says, 2 Com., 13, "The better and larger definition of the due process of law is, that it means law in its regular course of administration through courts of justice," and it has been held that the provision was designed to protect the citizen against all overt acts of power, whether flowing from the legislative or executive branches of the government; see *Westervelt v. Gregg*, *supra*. The opinion of the Supreme Court in *Rowan v. State*, 30 Wis., 146, quotes Sedgwick on Constitutional Law, 531, that "perhaps, in most respects, there is nowhere to be met with a better definition of the phrase than in Webster's argument in the Dartmouth College case: 'By the law of land is more clearly intended general law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that any citizen shall hold his life, liberty, property and immunities under protection of general rules which govern society. Everything which may pass under the form of enactment is not law of the land.'"

In *People v. Supervisors*, *supra*, it was held that due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity when there to prove any

Webber's case such abuse of discretion as would be reversed upon a writ of error.<sup>1</sup>

fact which, according to the constitution and the usages of the common law, would be a protection to him or his property.

In the Webber case it was argued before the supreme court, that there being upon record, a suggestion or plea of insanity before arraignment, that fact could only be decided by a jury, and not the court. The act of 1860, Sec. 67, says, "a jury lawfully impanelled," and such was the rule at common law, and also the practice after the Stat. 39 and 40 Geo. III., as appears from the case of the Queen *v.* Israel, *supra*, in which although the simulation of dumbness was most apparent, yet the court impanelled a jury to decide the fact. It was contended that it was not the law of the land for the court below to decide the question of fact raised in the plea or suggestion of present insanity. That suggestion having been filed, no discretion was left in the court but to try that question first, because the prisoner had an inalienable right to be tried only when he was sane, and that right is one which neither the prisoner nor his counsel could waive, nor the court or the legislature take from him: see *Prine v. The Commonwealth*, 18 Pa. St., 104; *Dougherty v. Commonwealth*, 69 Pa. St., 291.

In *Hopt v. Utah*, 110 U. S., 574, it is said as to the waiver of the right of a prisoner to be in court: "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

In *Prine v. Commonwealth*, *supra*, chief justice Gibson said in a case in which the prisoner's presence was waived when being sentenced for burglary: "It is undoubtedly error to try a person for felony in his absence, even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence. Never has there, heretofore, been a prisoner tried for felony in his absence."

<sup>1</sup> The general rule of law that matters within judicial discretion are not subject to review makes exceptions in cases in which it is exercised improperly: *Ingle's Estate*, 76 Pa. St., 430;

Upon this point, the opinion of the majority of the court, in interpreting the provisions of the Pennsylvania Criminal Code with reference to its ruling that the preliminary issue was not a matter of right, says: "There is nothing in the 66th and 67th sections of our Criminal Code of 1860 which requires a different conclusion from the one we have reached. The 66th section directs, that if, upon the trial, the prisoner shall be acquitted by the jury, upon the ground that he was insane at the time of the commission of the offence, they shall so declare specially, and thereupon the court shall order him to be kept in strict custody so long as he shall continue of unsound mind. The 67th section merely provides that if, upon arraignment, he shall be found to be a lunatic by a jury lawfully impanelled for the purpose, the same proceedings shall be had. Certainly this ought to be so, for if the fact of insanity be found by a jury, whether before the trial or on the trial, the same power to hold him in custody during the continuance of the insanity ought to be exercised. The court cannot find the prisoner to be insane, for that is matter of fact to be found by a jury. But if the court has, upon arraignment, reason to think him insane, or even has

*Chew v. Chew*, 28 Pa. St., 17, or if it is exercised in excess of law, the act will be annulled; *Cantlin v. Robinson*, 2 W., 373. In *Meyer v. Cullen*, 54 N. Y., 392, where the court refused evidence offered at the close of the testimony and before the case went to the jury, it was held to be the kind of discretion which an appellate court would review. So although the amount of alimony and expenses in a divorce are discretionary, yet, when evidently excessive, the matter will be reviewed by a court of appeal; *Llamosas v. Llamosas*, 62 N. Y., 618; and the opening of a judgment by default is in the discretion of the court below, which may be reviewed if discretion is abused: *Lawrence v. Farley*, 73 N. Y., 187.

doubt upon that subject, they may order an inquest for the purpose of trying that question, and then, if the inquest should find him insane, the order for custody may be made, and this is the whole meaning of the act. There is nothing in its letter or spirit which makes it obligatory upon the court to order a preliminary inquest. In view of the evidence offered and admitted on the trial in support of the allegation of insanity, we think the learned court below could, with entire propriety, have heard the testimony offered when the application for a preliminary inquiry was made. And if, after hearing it, the judge had entertained doubt as to the present sanity of the prisoner, it would have been his duty to award an inquest for the trial of that fact before any further proceedings were had. This was not done, but the jury has now found that the prisoner was not insane, either at the time of the trial or at the commission of the offence. The verdict was reached after a patient hearing of all the testimony relied upon by the prisoner, and after a fair and perfectly impartial charge by the judge, who said nothing tending to bias, or even to lead the mind of the jury against the prisoner. After the verdict, upon a motion for a new trial, the learned judge expressed his satisfaction with the result and refused the motion. Both his own opinion, after hearing all the testimony, and the verdict of the jury, concur in the conclusion that the prisoner was not insane, either when the offence was committed or at the time of the trial. In consideration of this state of the record, we do not see how we could with any propriety, say that the learned judge abused his discretion in refusing the preliminary inquest. His action has been justified, both by the verdict and his own freedom from doubt, after hearing all the testimony. It would be indecorous

and without warrant for us to say now that the judgment should be reversed in order that a preliminary inquest should still be had before the indictment can be again tried. Whether the prisoner was insane when he was arraigned or before is no longer a practical question, and could not be tried if a reversal were granted, and it would be impossible for us now to reverse, in order merely that the prisoner may be again arraigned, may plead his insanity at such arraignment and have a special inquest to try that plea. He has already been tried upon that issue, and it has been found against him. We would be compelled to set aside this finding as unwarranted by the testimony, in order to give the prisoner any practical relief upon his own theory, but, upon our views of the testimony, we have neither the right, nor the inclination to take such a step."

The court, however, was not in accord upon the question of the abuse of judicial discretion. In a long dissenting opinion, Sterrett, J., says: "Being in accord with a majority of my brethren, except as to certain specifications of error, which in my humble opinion imperatively demand a reversal of the judgment, I propose to address myself, as briefly as possible, to the general question involved in those specifications, viz.: Did the learned judge of the oyer and terminer err in either of his rulings relating to the application of prisoner's counsel for a preliminary inquiry, such as is contemplated by the first clause of the 67th section of our criminal procedure act, to determine 'by a jury lawfully impanelled for the purpose,' whether the prisoner was, at the time of his arraignment, a lunatic or not?"

"If it were not for what I conceive to be manifest error in the rulings of the learned judge in that regard,

especially his refusal to even hear any evidence in support of the application, I would be in favor of affirming the judgment; but, with these radical errors patent upon the face of the record, resulting, as I believe, in an improper conviction of the prisoner, who, according to the weight of the evidence, was insane when he was compelled to plead to the indictment, and probably in the same condition of mind when he committed the homicide, I am constrained to dissent, and put on record my reasons for so doing.

“I have no sympathy whatever with the pettifogging and groundless defenses of insanity that are too often interposed to shield the guilty from merited punishment; but the case at bar is not one of that class, as the evidence, which the learned counsel, by their diligence, unaided by the prisoner, were able to adduce on the trial will show. That evidence tends to prove that, before the marked change in his mental condition occurred and he became the victim of delusions, the prisoner was peaceable, industrious and thrifty; a kind and affectionate son, husband and father, exemplary in all the relations of life. But let the testimony of a few witnesses speak for itself.”

After quoting at length the testimony produced at the trial, as to the insanity of the prisoner, the dissenting opinion says: “This is the general character of the evidence with which prisoner’s counsel were prepared to support their application for a preliminary inquiry as to his insanity at the time he was arraigned, and the kind of evidence the learned judge resolutely refused even to hear, either in the form of affidavits or by examination of the witnesses in open court. If that was an exercise of sound judicial discretion, it would be

difficult indeed to say what, in a legal sense, constitutes abuse of discretion."

Agreement is then expressed with the rule laid down by the majority of the court, that the issue is within judicial discretion, and the dissenting opinion then continues: "This construction of the act is quite as favorable as the commonwealth can possibly ask, and I agree with the majority in saying it is the proper construction; but in the practical application of the law, as thus construed, to the undisputed and indisputable facts of this case, we reach entirely opposite conclusions as to the legality of the court's action in this case.

"Granting that it is discretionary with the trial judge to award or refuse the preliminary inquiry contemplated by the first clause of the 67th section, above quoted, it must, of course, be understood to mean a sound, legal discretion, not an arbitrary or unreasonable exercise of judicial power; nor can it be the preconceived opinion, however strong, of a judge who refuses to hear evidence tending to show that the application is meritorious and not frivolous. If it is the 'judicial conscience alone' that must be enlightened so that it can act intelligently, it would seem to follow that affidavits and oral testimony of witnesses in open court, calculated to shed light on the subject, should not be waived aside as unworthy even of being heard. That is substantially what was done in this case, as abundantly appears by the bill of exceptions."

The dissenting opinion then sets out in detail the motions made by counsel above referred to<sup>1</sup> in order to inform judicial discretion, and says; "That the application for a preliminary inquiry as to the insanity of

<sup>1</sup> *Supra*, p. 37.

the prisoner was prompted by a sense of duty to the unfortunate prisoner, and made in perfect good faith, cannot be doubted. The evidence which the learned counsel were able to adduce on the trial is convincing proof that they were prepared to sustain their application by affidavits or witnesses *viva voce*, and if the court had not persistently turned a deaf ear to both, facts would have been presented, which, in the exercise of a sound judicial discretion, would have not only justified, but demanded a preliminary inquiry as to the then mental condition of the prisoner." And as to the method taken to inform the judicial discretion the dissenting opinion says: "The learned judge having refused to hear the evidence offered by prisoner's counsel, in what way, it may be asked, was the 'judicial conscience' enlightened, and upon what did he base his judgment in refusing the application? The only answer that can be given is what he himself says in his opinion over-ruling the motion in arrest of judgment and for a new trial, viz: "The prisoner was about to be arraigned when a suggestion was filed by counsel that the prisoner was insane at the time. An elaborate and learned argument was made by the counsel of the prisoner in his hearing. Nearly two hours were occupied in arguing and considering the motion, during which time I had the opportunity of observing the appearance and conduct of the prisoner, and the attention he gave to the proceedings. I had also the benefit of the information of the physician of the prison and others to assist me in coming to that sound judgment which it was my duty to exercise. Giving the matter the due consideration to which it was entitled, I came to the conclusion that the prisoner knew where he was, what he was here for, and what was being done."

"As to the information acquired by 'observing the

appearance and conduct of the prisoner,' etc., it is perhaps all well enough, so far as it goes, but it should not have been permitted to exclude the evidence of competent experts and others at hand. As to the information of the jail physician 'and others,' we are not informed how or when it was communicated. It does not appear, however, to have been in the shape of testimony in open court, and for aught we know, it may have been mere hearsay. At best, neither of the sources of information referred to should ever be accepted as a substitute for competent evidence adduced in open court in the regular and orderly way. It would be a most dangerous precedent to sanction such a course of proceeding in any case."

It would seem that in cases like that of Webber, the injury done an insane person put upon trial for his life, is irreparable. If he were insane, he could challenge neither the judge nor jury; nor direct the cross-examination of the witnesses against him nor prepare his own case.

But in a preliminary issue, it would appear, as will be hereafter seen, that the prisoner is entitled to the beginning and conclusion of the issue, having the affirmative. Of this advantage Webber was deprived, and had the court allowed the preliminary issue, then he would not have been upon trial for the crime, as was stated to the jury, but the question would have been as to his mental capacity.

Upon this point, the dissenting opinion says: "It has been suggested that the jurors, impanelled to determine the guilt or innocence of the prisoner, were also authorized to pass upon the question of his insanity at the time of trial; and, inasmuch as they did not find, as part of their verdict, that he was then a

lunatic, he has no right to complain that the preliminary inquiry was refused in the manner it was. That is a *non sequitur*. If his counsel had a right, as they undoubtedly had, to make the application in question, it was the plain duty of the court to hear the testimony they had to offer in support of it. If that had been done, it can scarcely be doubted the learned judge, in view of the evidence, would have been constrained to grant the request, and thus the prisoner would have had the benefit of the single inquiry as to whether he was then insane, and, therefore, incompetent to plead, exercise his right of challenge, and otherwise assist in conducting his defence.

“I am clearly of opinion that the judgment should be reversed for manifest abuse of judicial discretion in not granting the application referred to, and especially in refusing to hear any competent evidence in support of it.”

The judgment in the Webber case in interpreting the provisions of the criminal code in Pennsylvania, which provide for a preliminary issue, may warrant some doubt whether the rule at common law has not been changed, and insane persons may, under more modern criminal procedure, be put upon trial. The subject of the execution of insane offenders has recently received much attention. The common law reason first announced by Lord Coke and afterwards repeated by other early textbook writers<sup>1</sup> that “such punishment can be no example to madmen,” appears from modern investigation of the disease of insanity to have lost its force, and some modern writers advocate their punishment.

The right was asserted by implication in the Guiteau

<sup>1</sup> *Supra*, p. 4, *et seq.*

case in 1881; in that of Joseph Taylor at Philadelphia in 1884, and of Dr. L. M. Beach in 1885 at Hollidaysburgh, Pa. In England the subject has received much attention from the cases of Goldstone and Cole, the former of whom was tried and convicted in September, 1883, in London, for the murder of his five children; but subsequently a formal inquiry, directed to be made by Sir William Harcourt, the Home Secretary, found that he was insane, and he was reprieved by the government. The prisoner had drowned three of his children in a cistern and broken the skulls of the remaining two with a hammer, and the verdict was guilty of wilful murder. The trial and conviction of James Cole was held in October, 1883, for the murder of his child, aged three years and eight months; but the Home Secretary again ordered a medical examination which, pronouncing him to be insane, he also was reprieved.<sup>1</sup>

Nor is the practice of hanging insane offenders altogether unsupported by principle; for, assuming it to be true that the study of the disease of insanity during the last century has shown that the punishment of the insane is valuable as a preventive or protective measure to society, there then follows the right to inflict such punishment upon them, as well as upon sane offenders. On the other hand, the conviction and hanging of insane defendants conflicts with the other fundamental principle of criminal law, that there can be no "crime" in the absence of proof of a rational motive or intention. Nevertheless, an eminent legal writer has said: "It should not be forgotten, in connection with this subject, that little or no loss is inflicted either on the

<sup>1</sup> See "Madness and Crime," by Clark Bell, Esq., 2 *Medico-Legal Jour.*, p. 339.

madman himself or on the community by his execution. It is, indeed, more difficult to say why a dangerous and incurable madman should not be painlessly put to death as a measure of humanity, than to show why a man, who being both mad and wicked, deliberately commits a cruel murder, should be executed as a murderer.<sup>1</sup>"

<sup>1</sup> 2 Stephen's History of the Criminal Law of England, p. 178. See 3 Medico-Legal Jr. 1, for a paper read before the Medical Jurisprudence Society of Philadelphia, April 14th, 1885, by Clark Bell, Esq., of New York, entitled, "Shall we Hang the Insane who Commit Homicides?" in which the subject is discussed and reference made to the cases above mentioned. Mr. Bell says: "There is much to be said in favor of the public execution of the insane for capital offences, and there can be little doubt that society has the same right to execute insane criminals, if such a term is admissible, if it can be felt that it would tend to the prevention of offences by others, or could be regarded in any broad and strong sense as protecting society from the danger of assaults that threatened seriously its peace or permanent good. The sane criminal is not executed by operation of law as a punitive, but as a preventive measure; and it is only defensible when, for the greater good of the living, governments justify themselves in instituting proceedings under recognized forms of law to take human life, even as a *quasi* punishment for crime. If the public executioner has a restraining influence upon those liable to commit high crimes, if the fear of the scaffold deters the murderer from the awful act, who can say that the sanity or insanity of the homicide effects the moral or restraining power of the scaffold, as a repressive force, in its effect upon the minds of men likely or even liable to commit crime? Dr. William A. Hammond, the eminent alienist, not long since publicly advocated the execution of Guiteau, of whose insanity he entertained no doubt. He regards the execution of the insane as an important factor in its general influence upon the insane themselves, and claims with great force that these unfortunates are susceptible to restraining influences from the penalties thus inflicted, in which opinion I do not doubt many superintendents of asylums would concur."

The change in the treatment of the insane and from the common law rule is best indicated in the frequent use of the modern expression "insane criminals," and in the use of the word "offenders," in the title of the act of George III., c. 94, 1800, but when its first section is repealed in 1883 (act of 25th Aug., 1883, 46 and 47 Vict., ch. 38,) the latter act is called The Trial of Lunatics' Act, and provides for a verdict unknown to the common law, of guilty but insane. If it be conceded however, that society has the right to hang its offenders even though insane, there then must follow its corollary, the right to put them upon trial. And in this view of the question and with reference to the decision in Webber's case *supra* and assuming the rule there announced to be the correct interpretation of the law, that the preliminary issue is not of right but merely in discretion, it is of importance to examine what reasons are sufficient to secure the preliminary trial under the provisions of the American statutes, to which reference has already been made.

In Arkansas<sup>1</sup> the preliminary issue will be granted if the court shall be of the opinion that there are reasonable grounds to believe the prisoner to be insane at or before arraignment. In other states<sup>2</sup> the issue is ordered if a doubt arises as to the sanity of the defendant, or at the request of any citizen.<sup>3</sup>

<sup>1</sup> Arkansas, R. S., 1874, Sec. 1828; R. S., 1884, Sec. 2155.

<sup>2</sup> California, Code of 1876, Sec. 14,368; Deering, Ann. Code, 1885, vol. 4, 1368.

Dakota, R. Code, 1877; Crim. Proc., Sec. 515; C. L., 1887, Sec. 7565.

Idaho, R. L., 1874-75; Crim. Proc., Sec. 567; R. S., 1887, Sec. 8016.

Utah, Act, 1878, Sec. 455.

<sup>3</sup> Iowa, McClain's Sts., 1880, Sec. 1412; R. C., 1888, p. 1423.

Again, in other States<sup>1</sup> the issue shall be framed if the court shall be of opinion that there are reasonable grounds to believe that the defendant is insane when called for trial; or, if the court shall have reason to believe;<sup>2</sup> or, if it be found to the satisfaction of the court;<sup>3</sup> or when he shall appear to be insane.<sup>4</sup>

It is to be observed that the attempts made in the Webber case, *supra*, were more persistent than would have been necessary under the provisions of the statutes in other States. Indeed, in North Carolina<sup>5</sup> it is only necessary that insanity be suggested to the court, or in Ohio<sup>6</sup> that notice in writing be given by any citizen to the sheriff or jailor that the person is insane, and in Rhode Island<sup>7</sup> it is allowed upon the petition of the agent of the State charities and corrections or the clerk

<sup>1</sup> Kentucky, Crim. Code, 1876, Sec. 156.  
Virginia, Code, 1873, ch. 202, Sec. 17; Code, 1887, Sec. 4031.  
West Virginia, R. S., 1879, ch. 55, Sec. 10; Code, 1887, ch. 159, Sec. 10.

<sup>2</sup> Missouri, Act of 1883, p. 79, Sec. 1.

<sup>3</sup> Massachusetts, 1882, ch. 214, Sec. 16.

<sup>4</sup> Michigan, Sts., 1882, Sec. 1909.

New Jersey, R. S., 1877, p. 625, Sec. 111.

New York, R. S., 1882, vol. 4., Banks & Bro. 7th ed.; Sec. 20, Penal Code.

<sup>5</sup> North Carolina, Bat. Rev., 1873, ch. 57, Sec. 9.

<sup>6</sup> Ohio, R. S., 1880, Sec. 7166; R. S., 1890, vol. 2, Sec. 7166.

<sup>7</sup> Rhode Island, Sts., 1882, ch. 74, Sec. 35. So in Texas, if the jury impanelled to assess the damages shall report to the court that they believe the prisoner to be insane, the court shall impanel another jury to determine that question: or information as to the insanity of a defendant may be given by the written affidavit of any respectable person setting forth that there is good reason to believe that the defendant is insane.—Texas, Willson's Crim. Sts., pt. 2 (1888), Sec. 723, Sec. 948.

of the supreme court or court of common pleas setting forth that the person awaiting trial is insane, and in Wisconsin,<sup>1</sup> if the court shall be informed in any manner that there is a probability that the accused is insane and thereby incapacitated to act for himself the issue shall be granted.

As to the means by which a preliminary issue is decided, it may be noted that many of the States still use the jury system.<sup>2</sup> In others, however, by a commission of experts,<sup>3</sup> and in others, again, the statutes do

<sup>1</sup> Wisconsin, R. S., 1878, and Supp., 1883, Sec. 4700; Sts., 1889, Sec. 4700.

<sup>2</sup> Arkansas, R. S., 1874, Sec. 1828; R. S., 1884, Sec. 2155. California, Code of 1876, Sec. 14,368; Deering, Ann. Code, 1885, vol. 4, Sec. 1368.

Dakota, R. Code, 1877; Crim. Proc., Sec. 515; C. L., 1887, Sec. 7565.

Idaho, R. Laws, 1874-75; Crim. Proc., Sec. 567; R. S., 1887, Sec. 8016.

Iowa, McClain's Sts., 1880, Sec. 4620; R. C., 1888, Sec. 4620. Illinois, Rev. Sts., 1883, ch. 38, Sec. 285; R. S., 1887, Sec. 285.

Kentucky, Crim. Code, 1876, Sec. 156.

Missouri, Act, 1883, p. 79, Sec. 1.

North Carolina, Bat. Rev., 1873, ch. 57, Sec. 9.

Ohio, R. S., 1880, Sec. 7166; R. S., 1890, Sec. 7166.

Pennsylvania, Crim. Code, 1860, Secs. 66 and 67.

Texas, R. S., 1879; Penal Code, Sec. 723 and Sec. 948; Willson's Crim. Sts., pt. 2 (1888), Sec. 948.

Utah, Act, 1878, Sec. 455.

Virginia, Code, 1887, Sec. 4031; Code, 1873, ch. 202, Sec. 17.

West Virginia, R. S., 1879, ch. 55, Sec. 10; Code, 1887, ch. 159, Sec. 10.

<sup>3</sup> Iowa, McClain's Sts., 1880, Sec. 1412; R. C., 1888, p. 1423.

New York, R. S., 1882, vol. 4, Banks & Bro. 7th ed., Sec. 20., P. C.

not prescribe any particular method of procedure,<sup>1</sup> but in some it is in the discretion of the judge.<sup>2</sup>

From the foregoing American statutes it has been observed that some of them contain also the common law rule that if insanity appeared at any stage of the trial upon the indictment, the proceedings therein should be suspended. There do not appear to be any reported decisions of the courts upon such provisions in cases in which the preliminary issue was asked for, after the plea of not guilty had been entered, except in Pennsylvania; and in a case subsequently appealed to the supreme court of that State, decided in 1885, the preliminary issue was refused after the trial upon the indictment had begun.<sup>3</sup>

In that case the plaintiff in error was tried and convicted upon the plea of not guilty of the murder of Michael F. Doran, an overseer in the Eastern Penitentiary, Philadelphia. The opinion of the supreme court states that the crime had been committed in a manner indicating great wickedness and depravity, and the facts as taken from the statement of the case in the paper-book of the plaintiff in error are as follows:

Taylor was serving a term of imprisonment, and Doran was found on the morning of May 31st, 1884, between 8 and 9 o'clock, lying in the yard communicating with Taylor's cell. Woltemate, another overseer, let Taylor out of his cell into the yard that morning.

<sup>1</sup> Massachusetts, 1882, ch. 214, Sec. 16.

Michigan, Sts., 1882, Sec. 1909.

New Jersey, R. S., 1877, p. 625, Sec. 111.

<sup>2</sup> Rhode Island, Sts., 1882, ch. 74, Sec. 35.

Wisconsin, R. S., 1878 and Supp., 1883, Sec. 4700; R. S., 1889, Sec. 4700.

<sup>3</sup> Taylor v. Commonwealth, 109 Pa. St., 269.

When Woltemate unlocked the cell door he took the iron bar, with which the blow was afterwards struck, and the lock outside the gate, put them down there, and fastened the gate from the outside. Doran was not there at that time. He came, however, at the end of the exercise hour, and went into Taylor's yard to put him into his cell, when Taylor asked him what he gave him (Taylor) that medicine for; Doran denied giving him medicine; Taylor called Doran a liar; Doran struck at Taylor with the lock, or made a feint to do so, when Taylor struck Doran with his fist, knocked him down, and then took the iron bar and struck him on the head. Taylor was not aware that he had killed Doran, and when told of his death, expressed sorrow.

During April and May, 1884, the prisoner had complained to the prison officials that drugs or poison was being given him in his food, and up to the time of trial he continued the same complaints; that he was being slowly killed; that there was a conspiracy against him because he was not a Catholic, but he protested to the experts that he was not insane, and did not want such a defence put in.

No evidence was produced as to what occurred at the killing, except the voluntary statements of the prisoner, made to any of the officers of the penitentiary who saw proper to talk with him, and he made no concealment, and told substantially the same story to each, and there was no evidence of any ill-feeling between Doran and the prisoner, but so far as appeared, their relations were amicable; and it was contended at the trial that the evidence failed to show a motive for the crime; and there was nothing to show that the prisoner knew on that morning, after Woltemate let him into the yard, that Doran would be there to put him into his cell.

Three experts, after a full and careful examination, gave it as their unqualified opinion that the prisoner was insane, and the commonwealth offered no expert witness to the contrary, and besides these, other witnesses gave accounts of his complaints and peculiar conduct. On October 27th, 1884, after a jury had been called and sworn, the prisoner's counsel moved for leave to file a plea, under the act of March 31st, 1860, that the prisoner was then a lunatic, which motion was overruled.

They then moved for leave to file a suggestion to the same effect, which motion was also overruled.<sup>1</sup>

<sup>1</sup> "And now, this 27th day of October, A.D. 1884, the counsel assigned by the judges of the said court of oyer and terminer to defend the said Joseph Taylor against the charge of which he stands indicted, as aforesaid, suggest upon the record and say on his behalf for further plea that the said commonwealth ought not further to prosecute the said indictment against him, the said Joseph Taylor, because they say that the said Joseph Taylor is now a lunatic. And this, on his behalf, they are ready to verify; wherefore they pray judgment on his behalf, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified."

Objected to.

Objection sustained.

Exception.

*By the Court:* "The prisoner, on being arraigned, October 19th, 1884, pleaded not guilty. On the 27th day of October, 1884, the trial has proceeded, without a request being made to the court to permit the prisoner to withdraw his plea of not guilty, in order that the question of his present insanity may now be determined.

"After the prisoner has exercised his right of challenge, and has without objection, although represented by three counsel, permitted the jury to be sworn, an attempt is now made to file a paper, which is but a suggestion of counsel, the effect of which would be to change the issue now to be tried from one which

The charge of the court began by the statement: "This bill of indictment charges Joseph Taylor with having murdered Michael F. Doran on the 31st day of May, 1884," and then, after discussing the evidence upon the three points necessary to prove a crime—(1) Death; (2) Violence, accident, or suicide; (3) Was the prisoner the guilty actor,—it referred to the law of felonious homicide, of murder, of voluntary manslaughter, and of malicious intent. The charge next considered the defence of insanity, discussing the legal rules and the evidence, both in behalf of the prisoner and that of the commonwealth in rebuttal, as bearing upon the punishability of the prisoner; but the only reference to the preliminary matter of the prisoner's condition of mind or ability to understand legal proceedings was as follows:

"Under the act of assembly a jury may pass upon the question of the condition of a prisoner mentally after they have been charged with the indictment. As the evidence produced concerning the mental condition

involves the merits of the case to one which presents a collateral issue.

"The prisoner, by exercising his right of challenge after pleading to the issue, has waived his right to file this paper in this cause.

"If the prisoner should appear to be insane during the trial, but not at the commission of the crime, the jury, if that fact appears, may so say in their verdict, or the court would delay judgment, or an execution would be stayed, if issued."

The counsel for defendant then moved for leave to file the following suggestion, which the court also overruled, and sealed an exception for the defendant.

"And now, this 27th day of October, A.D. 1884, the counsel assigned by the judges of the said court of oyer and terminer to defend the said Joseph Taylor against the charge of which he stands indicted, suggest upon the record and further say upon his behalf that the said Joseph Taylor is now a lunatic."

of the prisoner extends down to the present time, I have been requested to charge you; 'If the jury believe that the defendant is now a lunatic, although they may not find him insane at the time of the commission of the act, they should find that he is now a lunatic.' I desire to say that if you convict the prisoner of any degree of murder, you may also declare as follows: We find that upon the trial of this issue the prisoner to be a lunatic; or, that we find the prisoner upon the trial to have been sane."<sup>1</sup>

<sup>1</sup> Upon a motion for a new trial and in arrest of judgment the court below filed an opinion, which, after quoting the language of its order upon the trial above referred to, says:

"We adhere to the opinion thus expressed. The act of March 31st, 1860, *Purd.*, 391, §§ 71, 72, declares what shall be done in three distinct cases. 1. Where the defence is insanity 'at the commission of the offence.' 2. Where the prisoner 'shall upon arraignment be found to be a lunatic by a jury lawfully impanelled for the purpose.' 3. Where upon the trial 'such person shall appear to the jury charged with such indictment to be a lunatic.' In each of these cases the court shall have power to order the prisoner 'to be kept in strict custody . . . so long as such person shall continue to be of unsound mind.' In the first two cases above designated the act is clear, and can easily be interpreted and executed. In one instance, within my own official knowledge, a prisoner was found to be insane by a jury upon arraignment, and was confined two years before he was tried for his life. But here is a cause in which a jury was sworn, and to interfere with its functions, to permit it to declare the prisoner to be now insane, upon a separate plea, or suggestion and issue, was to endanger the whole case upon its merits, and probably lead to an absolute discharge of the prisoner. It is too clear for argument, that a verdict upon the main issue must be rendered, and the court had no legal power to stop the trial, discharge the jury, and continue the case to another term. The language of this section of the act is peculiar: 'if upon trial such person shall appear to the jury' to be a lunatic the court shall order him into strict custody. Evidently the verdict must

Upon this question of the separate and preliminary

be announced, and then, with the verdict, from what appears at the trial, a jury may say we think this prisoner, whether guilty or not guilty of the crime, is now insane, and the court will then order him into confinement, either until, if guilty, and he becomes sane, judgment is pronounced, and, if not guilty, he is discharged. In the absence of any precedent whatever, for none is known to exist in Pennsylvania, I concluded that in practice it would best answer the ends of justice to permit the prisoner to produce evidence of his mental condition down to the day of trial, and during its continuance, and then to instruct the jury to say that the prisoner, whether guilty or not guilty of the crime, was or was not now insane. Whatever may be said of the practice adopted, the case is relieved of all embarrassment, because, in answer to the point submitted by counsel, the court charged the jury as follows: 'You may declare either, we find upon the trial of this issue the prisoner to be a lunatic, or we find the prisoner upon this trial to be sane.' The jury rendered a verdict of guilty of murder of the first degree, without another word, which finding, if under the special instructions of the court it means anything, clearly declares that the jury thought, not only that the prisoner was a sane man when he committed the murder, but that, in the language of the act, he did not appear to this jury to be a lunatic during the trial of this cause. Upon a review of what occurred, it is clear, so far as this point is concerned, no injustice was done to this prisoner. The jury fully understood the nature of their duty, for they were pointedly and carefully instructed upon this very subject. The words of the chief justice, in *Laros v. Commonwealth*, 84 Penna. St., 200, are apposite: 'The rights of the prisoner as an offender on trial for an offence are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity.' And again: 'There must be a sound discretion to be exercised by the court. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury.' This, I may add, was done thoroughly in this case."

It was argued in behalf of Taylor, the prisoner, in the supreme court, that under the act of March 31, 1860, the jury which was to find the fact of lunacy must be that which tries the ques-

trial of the prisoner's sanity, the supreme court, in affirming the judgment below,<sup>1</sup> said:

"When the prisoner was arraigned he pleaded not guilty. Eight days thereafter the jury was called; he exercised his right of challenge and permitted them to be sworn. Complaint is made that after this the court refused to permit the plea of not guilty to be withdrawn, in order to determine the question of the prisoner's present insanity. This application is so novel that no authority was cited to sustain it. In refusing it the learned judge said, if the jury should find the prisoner to be insane during the trial, but not at the commission of the crime, they might so say in their verdict, and then the court would either delay judgment or stay execution if issued. In view of the time this application was made, the prisoner received all the protection he was entitled to demand. All evidence of insanity when he committed the homicide was admissible under his plea of not guilty. The administration of justice should

tion of guilt, because the act provides that the prisoner must be upon trial on the indictment, and it must be after arraignment, because the first part of the section provides for insanity on arraignment. Besides, the jury to find the fact must be the jury charged with the indictment. But the act not only provides that if such person shall appear to be a lunatic he shall be ordered into custody, but that the court shall direct such finding to be recorded. It must, therefore, be an essential part of the verdict. Therefore there must be an issue as to the fact, in order to have a finding by the jury. An issue is the only way in which a question of fact can be tried. Nor does it come properly under the general issue, because not guilty applies to the guilt at the time of the act, and the general issue is framed at the time of arraignment, while this part of the act applies to the subsequent time of trial; and, moreover, no issue can cover a separate and distinct fact arising after its formation.

<sup>1</sup> 109 Penna. St., 269.

not be delayed, and the regularity of the trial be embarrassed by introducing methods not sanctioned by authority. While one on trial for his life is entitled to all that due protection which the law has wisely thrown around him (*Coyle v. Commonwealth*, 4 Out., 573), yet he cannot be permitted, by cunningly devised side-issues, to prevent a just and fair trial on the indictment to which he has previously pleaded. In fact the court, in its charge to the jury, did submit to them to find whether the prisoner was a lunatic at the time of the trial, although they did not find him insane at the time of the commission of the act. So he obtained the full benefit of the question raised without producing confusion in the regular order of the trial."

But it does not appear that a motion was made on behalf of the prisoner, so far as his paper-book shows, to withdraw the plea of not guilty. Besides, if it be true that the common law rule was that no insane defendant should be put upon trial for his life, and if the reason therefor be valid, viz., that he had not sufficient intelligence to exercise his right to challenge the judge or the jurors, or to understand and protect himself from the evidence produced against him, then, although the jury has been sworn upon the indictment, the suggestion may even at that stage of the trial be urged on his behalf, because if a court is without authority to put an insane defendant upon trial, there is none to continue his trial if he become insane, inasmuch as the danger of inflicting cruelty upon him continues throughout all of its stages. But even if the prisoner had exercised his right to challenge and permitted the jury to be sworn, was the suggestion in Taylor's case properly refused? It may be said that like other constitutional and indefeasible rights, the prisoner

had in him also the right to be tried only when he was sane, which is an inalienable right, and could not be waived by himself nor counsel, nor taken from him by the court nor legislature.<sup>1</sup>

As to the statement in the opinion of the supreme court of an absence of authority, the passage from Blackstone, already quoted, may be again referred to:<sup>2</sup> "And if, *after he has pleaded*, the prisoner becomes mad, he shall not be tried; for how can he make his defence?" And this is a common law rule which has been recognized, as has been seen, in many States by statute, where the practice is not to withdraw the plea of not guilty, but to suspend merely the trial upon the indictment until the present sanity or insanity be determined by a jury. Besides, if Taylor were in fact insane, and the court, usurping the province of a jury by deciding the fact, compelled the trial to continue, then the injury became irreparable and could not be cured by anything the judge might say in his charge. Being insane, the prisoner was unable to understand the course of the legal proceedings being taken against him, or direct his counsel in his defence. Moreover, in such preliminary issue he could have had the right to begin and conclude to the jury, having the affirmative side, a right which is supposed to have substantial value, and of which he was deprived.<sup>3</sup>

<sup>1</sup> See *Prine v. Commonwealth*, 18 Penna. St., 104, *supra*, p. 47.

<sup>2</sup> *Supra*, p. 6.      <sup>3</sup> *Freeman v. the People*, 4 Denio. 9.

Nor did the subsequent charge of the court in Taylor's case give him in fact the full benefit of the question raised. Reference to it shows that the first nine pages relate entirely to the charge contained in the indictment, whereas the last twelve lines only indirectly relate to the question which was really preliminary of his mental capacity to be tried, and nowhere in the

In the court below, in Taylor's case, a fear of a subsequent plea of once in jeopardy appears to have controlled its judgment. But if the man were insane when the jury was sworn, he never was in jeopardy; and if the preliminary issue of mental capacity were decided against his insanity, the trial of the charge in the indictment would then continue. The right to file the suggestion was argued upon appeal as being the means by which the issue contemplated by the statute should appear upon the record. But it could have been contended, also, that it was a constitutional right belonging to the prisoner, to be asserted by counsel at any stage of the trial, that the commonwealth can proceed to judgment only when he is sane.<sup>1</sup>

The distinction between the pleading in the Webber case and that of Taylor is that in the latter the plea of not guilty had already been entered before the suggestion of insanity was filed. This fact the court below, in Taylor's case, appeared to consider of importance, and of which it said: "At the trial a paper called a suggestion or plea was presented after a plea of not guilty had been entered of record, and after the jury had been sworn upon the merits of the case, and when upon all the authorities the prisoner's life was in peril;"

charge is the attention of the jury distinctly called to the real questions involved in the preliminary issue and the rules of law bearing upon it.

<sup>1</sup> It has been remarked that the discussion of the question in these cases of Webber, in 1887, and of Taylor, in 1885, tend to show how clumsy and inadequate are the provisions of statutes similar to that of Pennsylvania which, while they may bear later dates, in fact reflect, being copied from the act of 39 and 40 Geo. III., ch. 94, no greater knowledge of the disease of insanity nor a better legal treatment of the difficult question than at the beginning of this century.

and the supreme court, upon appeal, says: "In view of the time this application was made the prisoner received all the protection he was entitled to demand."

In support of the judgment of the supreme court, in the Taylor case, it may be added that in civil suits after the general issue has been pleaded it becomes a matter of judicial discretion whether that plea may be withdrawn and other pleas of a dilatory character be filed; a rule which is also observed in applications for bills of particulars after issue joined.

## CHAPTER IV.

### AFTER CONVICTION UPON THE INDICTMENT, ISSUE AWARDED AS TO MENTAL CONDITION IN BAR OF JUDGMENT.

AFTER a trial and conviction by a jury upon the indictment, the statutes of the different American States and in England also make provision to determine the question of insanity, in order that sentence shall not be pronounced or punishment inflicted. At this stage of criminal procedure, as in the determination of the ability to plead before trial upon the indictment, some of the statutes provide that the question shall be again referred to a jury; in others it is the practice to decide by means of a commission of experts or by the court. And similar proceedings may be taken after sentence and in arrest of execution. Thus in Arkansas<sup>1</sup> if, after conviction, the court is of opinion that there is reasonable ground for believing that the prisoner is insane, the question of his insanity shall be determined by a jury of twelve qualified jurors, to be summoned and impanelled as directed by the court. If the jury do not find him insane, judgment shall be pronounced. If they find him insane, he must be kept in confinement, either in the county jail or lunatic asylum, if there be one in the State, until, in the opinion of the court, he becomes sane, when judgment shall be pronounced.<sup>2</sup>

<sup>1</sup> R. S., 1874, Sec. 1988; R. S., 1884, Sec. 2293.

<sup>2</sup> In Arkansas, it is also provided that (R. S., 1874, Sec. 2002; R. S., 1884, Sec. 2329) when the sheriff is satisfied that there are

In California,<sup>1</sup> when a prisoner is brought up for judgment, if a doubt arises as to his sanity, the court must order the question to be submitted to a jury,<sup>2</sup> and in the District of Columbia,<sup>3</sup> if any person charged with crime be found in the court before which he is so charged, to be an insane person, the court shall certify the same to the Secretary of the Interior, who may order him to be confined in the hospital for the insane.

And in Delaware<sup>4</sup> the act of the legislature provides that whenever, in a capital case, it shall appear to the court in any manner that the prisoner has become insane after conviction and before sentence, the said court shall have power, with a view of informing its own mind upon the subject, to appoint a commission, to be composed of experienced and practical men, two at least of whom shall be practicing physicians, to inquire into the mental condition of such prisoner, and make report of their finding to said court within one month from the

reasonable grounds for believing that the defendant is insane, he may summon a jury of twelve persons on the jury list, drawn by the clerk, who shall be sworn by the sheriff, well and truly to inquire into the insanity of the defendant and a true inquisition return; and they shall examine the defendant and hear any evidence that may be presented, and by a written inquisition, signed by each of them, find as to insanity, and unless the inquisition find the defendant insane, the sheriff shall not suspend the execution; but if the inquisition finds the defendant insane, he shall suspend the execution, and immediately transmit the inquisition to the governor.

<sup>1</sup> California, Code of 1876, Sec. 14,368; Deering Ann. Sts., 1885, vol. 4, Sec. 1368.

<sup>2</sup> Similar provisions are in force in Dakota, R. Code, 1877; Crim. Proc., Sec. 515; C. L., 1887, Sec. 7565, and also in Idaho, R. S., 1874-75, Crim. Proc., Sec. 567; R. Sts., 1887, Sec. 8195.

<sup>3</sup> District of Columbia, R. S. U. S., 1878, Sec. 4851.

<sup>4</sup> Delaware, Laws 1883, vol. 17, ch. 79, Sec. 1.

date of their appointment by writing, under their hands and seals. They shall have power to examine witnesses on oath, and to order the taking of testimony out of the state by commission, to be issued in the usual form by the clerk of the court of oyer and terminer. And in Georgia,<sup>1</sup> if, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with concurrence and assistance of the ordinary thereof, shall summon a jury of twelve men to inquire into such insanity; and if it be found by the inquisition of such jury that the convict is insane, the sheriff shall suspend the execution of the sentence directing the death of such convict, and make report of the said inquisition and suspension of execution to the presiding judge of the district, who shall cause the same to be entered on the minutes of the superior court of the county where the conviction was had. And at any time thereafter, when it shall appear to the said presiding judge, by inquisition or otherwise, that the said convict is of sound mind, the said judge shall issue a new warrant, directing the sheriff to do execution of the said sentence on said convict, at such time and place as the said judge may appoint and direct in the said warrant, which the sheriff shall be bound to do accordingly. And the said judge shall cause the said new warrant and other proceedings in the case to be entered on the minutes of the said superior court.

In Iowa,<sup>2</sup> when a defendant appears for judgment, if a reasonable doubt arises as to his sanity, the court must order a jury to be impanelled from the trial jurors in attendance at the term to inquire into the fact. It is

<sup>1</sup> Georgia, Code 1882, Sec. 4666.

<sup>2</sup> Iowa, McClain's Sts., 1880, Sec. 4620 and Sec. 1414; R.C., 1888, p. 1423.

also provided that any person, after being convicted of any crime or misdemeanor, and before the execution in whole or part of the sentence of the court, becomes insane, the governor shall inquire into the facts, and he may pardon such lunatic, or commute or suspend the execution in such manner and for such a period as he may think proper, and may, by his warrant to the sheriff of the proper county, or warden of either penitentiary, order such lunatic to be conveyed to the hospital and there kept until restored to reason. If the sentence of any such lunatic be suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor.

In Indiana,<sup>1</sup> when a person tried upon an indictment or information for a public offence is acquitted on the sole ground that he was insane at the time of the commission of the offence, the fact shall be found by the jury in their verdict, or by the court, if tried by it; and the defendant shall not be discharged, but shall be forthwith proceeded against upon the charge of insanity; and the verdict of the jury, or the finding of the court, shall be *prima facie* evidence of his insanity. The proceedings shall conform to those prescribed for the admission of the insane, but no preliminary statement in writing shall be required. So, also, in Illinois,<sup>2</sup> it is provided that if, after the verdict of guilty and before judgment is pronounced, such person become lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judg-

<sup>1</sup> Indiana Rev. Sts., 1881, Sec. 1765; R. S., 1888, vol. 1, Sec. 1765.

<sup>2</sup> Illinois R. S., 1883, ch. 38, Sec. 285; R. S., 1887, ch. 38, Sec. 285.

ment and before execution of the sentence, such person become lunatic or insane, then, in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all of these cases it shall be the duty of the court to impanel a jury to try the question whether the accused be, at the time of impanelling, insane or lunatic.

In Kansas,<sup>1</sup> an act provides that, in case any person confined in the penitentiary shall become insane, it shall be the duty of the warden to at once notify the physician in writing of the fact, who shall, if he deem the statement to be true, summon to his assistance the two nearest resident physicians, and proceed to make inquisition of the facts charged. If they shall deem the person insane they shall so certify in writing to the warden, and the warden shall at once cause such insane person to be delivered to the superintendent of the asylum for the insane, and take his receipt for such insane convict, there to be kept at such asylum until he shall recover from such insanity, or be discharged by reason of expiration of term of sentence, pardon or reprieve. If the said insane convict recover before the term for which he was sentenced expire, the superintendent of the asylum for the insane shall at once notify the warden of such recovery, and the warden shall immediately take such convict into his charge.<sup>2</sup>

<sup>1</sup> Kansas Comp. Laws, 1879, Sec. 3416; C. L., 1885, Sec. 3675.

<sup>2</sup> Kansas Comp. Laws, 1879, Sec. 4757; C. L., 1885, Sec. 5036. There is another act in Kansas which provides that, in case of an appeal or writ of error taken by a person convicted and sentenced to death as aforesaid, the sentence of the law shall not be carried into effect until after the hearing and determination of such appeal or writ of error. In case a person convicted and sentenced to death becomes insane he shall not be executed

In Kentucky<sup>1</sup> it is provided that, if the defence be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact in their verdict, and thereupon, if the court, after hearing any testimony offered by the commonwealth or the defendant, be satisfied that he is insane at the time the verdict is rendered, it may order him to be taken to a lunatic asylum. And again,<sup>2</sup> it is enacted that the prisoner may show, for cause against the judgment, any sufficient ground for a new trial, or for arrest of judgment, and may also show that he is insane. If the court be of opinion that there is reasonable ground for believing him to be insane, the question of his insanity shall be determined by a jury of twelve qualified jurors, to be summoned and impanelled as directed by the court. If the jury do not find him insane judgment shall be pronounced; but if they find him insane he must be kept in confinement, either in the county jail or lunatic asylum, until, in the opinion of the court, he becomes sane, when judgment shall be pronounced.<sup>3</sup>

until the governor shall be satisfied, upon the oath of twelve men, to be named and summoned by the warden, upon proper inquiry and investigation being made under direction of the warden, that such insanity no longer exists.

<sup>1</sup> Kentucky Crim. Code, 1876, Sec. 268.

<sup>2</sup> Kentucky Crim. Code, 1876, Sec. 287.

<sup>3</sup> Kentucky Crim. Code, 1876, Sec. 296. Another section in Kentucky provides that, if the sheriff be satisfied there are reasonable grounds for believing that the defendant is insane, he may summon a jury of twelve persons on the jury list, drawn by the clerk, who shall be sworn by the sheriff, well and truly to inquire into the insanity of the defendant, and a true inquisition return; they shall examine the defendant and hear any evidence that may be presented; and by a written inquisition, signed by each of them, find as to the insanity. Unless the

In Minnesota,<sup>1</sup> whenever any person who now is or who may hereafter become a convict in the State prison shall, in the opinion of the warden or board of inspectors thereof, be regarded as insane, it shall be the duty of the said board to call in two physicians skilled in their profession, one of whom may be the prison physician, who shall, without employing cruel or inhuman tests, make a careful and thorough examination as to the insanity of such convict, and report the result of their examination, which report shall be in duplicate and entered on the prison records, and be regarded as conclusive evidence in the case.<sup>2</sup>

In Massachusetts,<sup>3</sup> if a person convicted of a capital crime is, at the time when motion for sentence is made,

inquisition find the defendant insane the sheriff shall not suspend the execution; but, if the inquisition find the defendant insane, he shall suspend the execution, and immediately transmit the inquisition to the governor.

<sup>1</sup> Minnesota Statutes, 1878, and Supplement, 1883, ch. 35, Sec. 33.

<sup>2</sup> Minnesota, Stat. 1878, and Supplement, 1883, ch. 35, Sec. 34 and Sec. 35. It is also provided that whenever in the manner above stated any convict shall be pronounced insane, the board shall notify the governor of the fact by forwarding to him the duplicate report, to which shall be appended a transcript of the prison records relating to the convict. Upon the receipt of the notice the governor shall endorse thereon his approval, and shall at the expense of the State cause the convict to be removed from prison and delivered to the superintendent of the hospital for insane for treatment in that institution, and shall at the same time forward to the superintendent the duplicate notice of the officers of the State prison, which notice shall be to him a warrant to receive and provide for the convict such treatment as that afforded in the hospital in similar cases of insanity, except that the convict shall be kept separate and apart from other patients, so far as practicable.

<sup>3</sup> Massachusetts Statutes, 1882, ch. 215, Sec. 34 and Sec. 35.

found to the satisfaction of the court to be insane, the court may cause him to be removed to one of the State lunatic hospitals for such a term and under such limitations as it may direct, and if it appear to the satisfaction of the governor and council that a convict under sentence of death has become insane, the execution of the sentence may be respited by the governor by and with the advice of the council from time to time for stated periods, until it appear to their satisfaction that the convict is no longer insane.<sup>1</sup>

<sup>1</sup> In Massachusetts Statutes, 1882, ch. 222, Sec. 10 and Sec. 11, it is also provided that the State board of health, lunacy and charity shall designate two persons, expert in cases of insanity, to examine convicts in the State prison or reformatory prisons, alleged to be insane. When any of the convicts appear to be insane, the warden or superintendent shall notify one of the persons so designated, who shall, with the physician of the prison, examine him and report to the governor the result of their investigation. If upon such report the governor deem the convict insane and his removal expedient, he shall issue his warrant, directed to the warden or superintendent, authorizing him to cause the convict to be removed to one of the State lunatic hospitals, there to be kept until, in the judgment of the superintendent and trustees of the hospital to which he may be committed, he should be returned to prison. When the superintendent and trustees of the hospital have come to such judgment, the fact shall be certified upon the warrant of the governor, and notice shall be given to the warden or superintendent of the prison, who shall thereupon cause the convict to be reconveyed to the prison, there to remain pursuant to the original sentence, computing the time of his detention or confinement in the hospital as part of the term of his imprisonment, and any officer authorized to serve criminal process may execute an order for the removal of a convict to or from any prison under these provisions. The person making such an examination of a convict shall, if he is not a salaried officer of the State board of health, lunacy and charity, receive for his services his actual

So in Nebraska,<sup>1</sup> if any convict sentenced to the punishment of death shall appear to be insane, the sheriff shall forthwith give notice thereof to a judge of the district court of the judicial district, and shall summon a jury of twelve impartial men to inquire into such insanity, at a time and place to be fixed by the judge, and shall give immediate notice thereof to the district attorney. If, after verdict of guilty and before judgment pronounced, such person become lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judgment and before execution of the sentence, such person shall become lunatic or insane, then, in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all such cases it shall be the duty of the court to impanel a jury to try the question, whether the accused be, at the time of impanelling, insane or lunatic.

In New Jersey,<sup>2</sup> when a person shall have escaped indictment or have been acquitted of a criminal charge upon trial on the ground of insanity, upon the plea pleaded of insanity or otherwise, the court, being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain whether his insanity in any degree continues, and if it does, shall order him in safe custody, and to be sent to an asylum.

In New York<sup>3</sup> it is provided that the governor shall travelling expenses and three dollars a day for each day so employed, which shall be paid from the annual appropriation of the prison in which the convict is examined.

<sup>1</sup> Nebraska, G. S., 1881, part 3, Secs. 553 and 554; C. S., 1885, Secs. 553, 554.      <sup>2</sup> New Jersey, R. S., 1877, p. 625, Sec. 110.

<sup>3</sup> New York, R. S., 1882, Banks & Bro. 7th ed., p. 1905; L., 1874, ch. 446, Tit. 1, Art. 2, Sec. 21; 3 R. S., Banks & Bro. 8th ed., 1889, p. 2159.

possess the same powers conferred upon courts of oyer and terminer in the case of persons confined under conviction for offences for which the punishment is death. And whenever any person under sentence of death shall be declared insane and irresponsible by a commission duly appointed for that purpose, the governor may, in his discretion, order his removal to the State lunatic asylum for insane criminals, there to remain until restored to his right mind, and it shall be the duty of the medical superintendent of such asylum, whenever in his opinion the convict is cured of his insanity, to report the fact to the State commissioner in lunacy and a justice of the supreme court of the district in which the asylum is situated, who shall thereupon inquire into the truth of such fact, and if the same be proved to their satisfaction they shall so certify it under their official hands and seals to the clerk of the court in which such convict was sentenced, and cause him, the said convict, to be returned to the custody of the sheriff of the county whence he came and at the expense thereof, there to be dealt with according to law.<sup>1</sup>

<sup>1</sup> New York, R. S., 1882, Banks & Bro. 7th ed., vol. 4; Crim. Code, Sec. 496.

In New York it has also been provided that if after a defendant has been sentenced to the punishment of death there is reasonable ground to believe that he has become insane the sheriff of the county in which the conviction took place, with the concurrence of a justice of the supreme court, or the county judge of the county, who may make an order to that effect, must impanel a jury of twelve persons of that county, qualified to serve as jurors in a court of record, to examine the question of the sanity of the defendant. The sheriff must give at least seven days' notice of the time and place of the meeting of the jury to the district attorney of the county. Section 108 of the Code of Civil Procedure regulates the impanelling of such a

In Ohio,<sup>1</sup> when the attorney of a person indicted for an offence suggests to the court in which the indictment is pending at any time before sentence that the defendant is not sane, a jury shall be impanelled.<sup>2</sup>

jury and the proceedings upon the inquisition so far as it is applicable.

<sup>1</sup> Ohio R. S., 1880, Sec. 7240; R. S., 1890, Sec. 7240.

<sup>2</sup> After conviction for an offence, proceedings similar to those already mentioned in the case of insanity at or before arraignment, are in force in Pennsylvania, Rhode Island, Texas, Utah, Virginia, West Virginia; See *supra*, chap. 2, p. 12.

The laws of New Mexico (G. S., 1880, ch. 74, Sec. 30, 31 and 32; C. L., 1884, Secs. 1353, 1354, 1355) is that, if any person, found by inquisition to be a lunatic, shall be arrested or imprisoned as aforesaid, in any civil action, it shall be the duty of the court from which the process shall have issued, and of any judge thereof, in vacation, on the application of any person on behalf of the defendant, and a production of a certified copy of the proceedings upon such inquisition, to discharge the defendant from arrest and imprisonment without bail. And if any person, arrested or imprisoned in any civil action, shall appear to be of unsound mind, it shall be the duty of the jailor or keeper of the prison forthwith to give notice of the fact to two justices of the peace, who shall within five days attend at the prison, and upon the oath or affirmation of such persons as they shall think fit to examine, proceed to inquire into the state of mind of the prisoner, and if they shall find him to be a lunatic, as was alleged, they shall forthwith make a record of the fact, and certify the same to the clerk of the district court. Thereupon the clerk of the court shall immediately make known such record to the district court, if in session, or to the judge thereof, in vacation, and thereupon such court, or such judge shall appoint a day, as soon as may be convenient to him, for hearing any objection to the discharge of the prisoner; and it shall be the duty of the clerk of the court to issue notice in not less than six hand-bills, and also to the creditor at whose suit said prisoner is detained, at least one week before the time of hearing, that application will be made to the court, or the

In England,<sup>1</sup> if any person, while imprisoned under sentence of death, transportation, or imprisonment, or under a charge of any offence, or for not finding bail for good behavior, or to keep the peace, or to answer a criminal charge, or in consequence of any summary

judge thereof, as the case may be, for the discharge of such prisoner, on the day therein specified.

In Texas (R. S., 1879, C. C. P., Secs. 947, 948 and 949; Willson's Crim. Sts., pt. 2, Secs. 947, 948, 949), if it be made known to the court at any time after conviction, or if the court has good reason to believe that a defendant is insane, a jury shall be impanelled to try the issue; and information to the court as to the insanity of a defendant may be given by the written affidavit of any respectable person, setting forth that there is good reason to believe that the defendant has become insane; and for the purpose of trying the question of insanity the court shall impanel a jury, as in the case of a criminal action. So in Utah (act of 1878, Sec. 455, Crim. Code), when an indictment is called for trial, if a doubt arises as to the sanity of the defendant, the court must order the question to be submitted to a jury; and if the doubt arise when the defendant is before the court for judgment on conviction, it must order a jury to be summoned from the list of jurors provided by law to inquire into the fact; and the trial of the indictment, or the pronouncing of the judgment, must be suspended until the question of insanity is determined by the verdict of the jury.

Similar proceedings as to insanity after conviction are to be found in the statutes of the following states:

Alabama, 1886, vol. 2, Crim. Code, p. 241, Sec. 4815.

Arizona, R. S., 1887, p. 806, Sec. 1840.

Colorado, G. S., 1883, Sec. 700.

Connecticut, G. S., 1888, Sec. 3617.

Idaho, R. S., 1887, Sec. 7990.

Montana, Comp. Sts., 1887, p. 473, Sec. 381 *et seq.*

Nevada, G. S., 1885, Sec. 4452.

Vermont, R. S., 1880, Sec. 4407.

Wyoming, R. S., 1887, Sec. 865.

<sup>1</sup> 3 and 4 Vict., ch. 54, Sec. 1.

conviction or order by any justice or justices of the peace, or under any other than civil process, shall appear to be insane, it shall be lawful for any two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire, with the aid of two physicians or surgeons, as to the insanity of such person, and if it shall be duly certified by such justices and such physicians or surgeons that such person is insane, it shall be lawful for one of her majesty's principal secretaries of state, upon receipt of such certificate, to direct, by warrant under his hand, that such person shall be removed to such county lunatic asylum or other proper receptacle for insane persons, as the said secretary of state may judge proper and appoint; and every person so removed under this act, or already removed or in custody under this act relating to insane prisoners, shall remain under confinement in such county asylum, or other proper receptacle as aforesaid, or in any other county lunatic asylum or other proper receptacle, to which such person may be removed or may have been already removed, or in which he may be in custody by virtue of any like order, until it shall be duly certified to one of her majesty's principal secretaries of state by two physicians or surgeons that such person has become of sound mind, whereupon the said secretary of state is hereby authorized, if such person shall still remain subject to be continued in custody, to issue his warrant to the keeper or other person having the care of any such asylum or receptacle as aforesaid, directing that such person shall be removed back from thence to the prison or other place of confinement from whence he or she has been taken, or, if the period of imprisonment or custody of such person shall have expired, that he or she shall be discharged.

In England<sup>1</sup> there is also in force another act which provides that it shall be lawful for her majesty from time to time, by warrant under her royal sign manual, to appoint that any asylum or place in England which her majesty may have caused to be provided or appropriated, and may deem suitable for this purpose, shall be an asylum for criminal lunatics, and the provisions of this act shall be applicable to every such asylum.

It shall be lawful for one of her majesty's principal secretaries of state, by warrant under his hand, to direct to be conveyed to and kept in any such asylum any person for whose safe custody during her pleasure her majesty is authorized to give order, or whom such secretary of state might direct to be removed to a lunatic asylum under any act of parliament, or any person sentenced or ordered to be kept in penal servitude, who may be shown to the satisfaction of the secretary of state to be insane, or to be unfit from imbecility of mind for penal discipline, and the secretary of state may direct to be removed to and kept in such asylum any such persons who, under any previous order of her majesty or warrant of the secretary of state, may have been placed and remain in any county lunatic asylum or other place of reception of lunatics, and every person directed by the secretary of state to be conveyed or removed to and kept in an asylum, under this act, shall be conveyed to such asylum accordingly, and shall be kept therein until lawfully removed or discharged, and with every person so conveyed or removed there shall be transmitted a certificate, as set forth in this act, duly filled up and authenticated, the contents of which shall be transcribed into the general register to be kept in every such asylum.

<sup>1</sup> England, 23 and 24 Vict., ch. 75, Sec. 1 and Sec. 2.

In Germany, if a criminal while serving his term becomes insane, he will be treated differently in different provinces. In some provinces such insane are received into the asylums, and the prison authorities are responsible for their expenses until eventually pronounced to be incurable. After incurability has been established the term of imprisonment ends, and the former criminals are classed among the incurable insane, and are then sent back into their home communities, or are permitted to remain. Some provincial administrations<sup>1</sup> are, by particular regulations, freed from the necessity to receive criminals into their own asylums, but they are compelled to place them in other asylums or hospitals, in order to try to effect a cure. Other provinces,<sup>2</sup> again, entirely refuse, on principle, the reception of any criminals into their asylums, and leave to the State the immediate care of such; in such cases insane criminals are placed in the hospital department of correction houses or penitentiaries.<sup>3</sup>

The question which arose in the Webber case,<sup>4</sup> as to whether the preliminary issue was a matter of right or only within judicial discretion in the proceedings at or before arraignment and before the plea of not guilty was entered, has also arisen as to the right to issue after

<sup>1</sup> Hesse Cassel.

<sup>2</sup> Schleswig-Holstein.

<sup>3</sup> Against the forcible detention of mentally sound persons in the asylums a guarantee is found in par. 239 of the Criminal Code Reichstrafgesetzbuch, which appoints for illegal detention or deprivation of liberty a penitentiary term of not more than ten years; likewise, if such illegal deprivation of liberty is prevented by the privilege of investigation of the chief administrative authorities.—See Provisions for the Insane, Harrison (1884), p. 1042.

<sup>4</sup> *Supra*, p. 36; 21 W. N. C., 413, Penna., 1888.

conviction under the statute in force in Pennsylvania.<sup>1</sup>

In the decision in Webber's case it was held to be not of right, but merely in discretion; so with reference to the inquiry as to mental condition as a bar to the sentence it has been held to be also within discretion only. It is to be observed, however, that in as much as the stage of criminal procedure known as pleading has been passed at the time when, after conviction, the issue as to insanity in bar of sentence is asked for, the point as to a constitutional right may not be involved.

In the case referred to in Pennsylvania,<sup>2</sup> Laros, the plaintiff in error, was convicted of the murder in the first degree, by poison, of his father, Martin Laros; and when called to the bar for sentence his counsel filed what was called a plea in bar of sentence; that the prisoner had become insane, which the commonwealth denied by writing filed in the form of a replication, to which a demurrer was put in, and overruled by the court. Whereupon the prisoner's counsel filed another plea in bar of sentence, "that at the time of the delivery of the charge of the court upon the trial of not guilty and of the delivery of the verdict the prisoner was insane and incapable of understanding the proceedings." The district attorney moved that the plea be stricken off, which was accordingly done, and the prisoner having been examined by the court previously as to his mental condition, was sentenced to be hanged. Upon review the supreme court say, Agnew, C. J., "The last three assignments of error raise a single

<sup>1</sup> *Supra*, p 21.

<sup>2</sup> *Laros v. Commonwealth*, 84 Penna. St., 200, 1877.

question upon the power of the court to inquire by inspection and *per testes* into the sanity of the prisoner since verdict. We have no precedents in this State known to us how the inquiry shall be conducted when such a plea in bar of sentence is put in. It seems to us, however, that no right of trial by jury is involved in the question. A jury having found a verdict against the plea of insanity, when set up as a defence to conviction, subsequent insanity cannot be set up in disproof of the conviction. The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation."<sup>1</sup>

Since, however, the proceeding is within judicial discretion, it becomes important to consider from the statutes hereinbefore referred to what is sufficient to inform discretion and require the investigation after conviction. The inquiry in many other jurisdictions would have followed upon action similar to that taken by the counsel for the prisoner Laros. For instance, in some States it is provided that the investigation shall be made in bar of sentence if the court is of opinion that there

<sup>1</sup> The court in this case also held: "The rights of the prisoner as an offender on trial for an offence are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity. If the right of trial by jury exist at all it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of justice. There must be a sound discretion exercised by the court. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury."

are reasonable grounds for belief that the prisoner is insane.<sup>1</sup>

In others it is taken if he shall appear to be insane ;<sup>2</sup> or when the sheriff is satisfied that there are reasonable grounds so to believe ;<sup>3</sup> and in some it follows when a doubt arises as to his insanity.<sup>4</sup>

In Delaware,<sup>5</sup> whenever in a capital case it shall appear to the court in any manner that he is insane ; or in Ohio,<sup>6</sup> when the attorney of the prisoner suggests insanity to the court ; and again, in Iowa,<sup>7</sup> it is at the request of any citizen ; but in other States,<sup>8</sup> a notification of the warden of the prison is required.

And in view of the course taken by the court of per-

- <sup>1</sup> Arkansas R. S., 1874, Sec. 1988 ; R. S., 1884, Sec. 2293.  
Kentucky, Crim. Code, 1876, Sec. 268.  
New York, R. S., 1882, vol. 4, Banks & Bro., 7th ed. ; Crim. Code, Sec. 496.
- <sup>2</sup> Michigan, act of 1883, No. 190, Sec. 19.  
Nebraska, G. S., 1881, Part 3, Sec. 554 ; C. S., 1885, Sec. 554.  
New Mexico, G. S., 1880, p. 387, ch. 74, Sec. 31 *et seq.* ; C. L., 1884, Sec. 1354.
- <sup>3</sup> Arkansas, R. S., 1874, Sec. 2002 ; R. S., 1884, Sec. 2329.  
Texas, R. S., 1879, C. C. P., Sec. 947 ; Willson's Crim. Sts., p. 2, 1888, Sec. 947.
- <sup>4</sup> California, Code of 1876, Sec. 14,368 ; Deering, Sts. 1885, vol. 4, Sec. 1368.  
Dakota, R. Code, 1877, Crim. Proc., Sec. 515 ; C. L., 1887, Sec. 7565.  
Idaho, R. S., 1874-75, Crim. Proc., Sec. 567 ; R. S., 1887, Sec. 8195.  
Iowa, McClain's Sts., 1880, Sec. 4620 ; R. C., 1888, p. 1423.  
Utah, act of 1878, Sec. 455, Crim. Code.
- <sup>5</sup> Delaware, act 1883, vol. 17, ch. 79, Sec. 1.
- <sup>6</sup> Ohio, R. S., 1880, Sec. 7240 ; R. S., 1890, Sec. 7240.
- <sup>7</sup> Iowa, McClain, 1880, Sec. 4620 ; R. C., 1888, p. 1423.
- <sup>8</sup> Kansas, Comp. Laws, 1879, Sec. 3416 ; C. L., 1885, Sec. 3675.  
Minnesota, 1878, Sts., Supp., 1883, ch. 35, Sec. 33.

sonal examination in the Laros case in Pennsylvania it may be added that in some States the issue is decided by a jury only;<sup>1</sup> and in others,<sup>2</sup> again, by the court; or in others<sup>3</sup> by a commission, or by the governor.<sup>4</sup>

- <sup>1</sup> See *Supra*, p. 60, as to the preliminary issue.  
 Arkansas, R. S., 1874, Sec. 1988; R. S., 1884, Sec. 2293.  
 Dakota, R. Code, 1877; Crim. Proc., Sec. 515; C. L., 1887, Sec. 7565.  
 Idaho, R. S., 1874-75; Crim. Proc., Sec. 567; R. S., 1887, Sec. 8195.  
 California, Code 1876, Sec. 14,368; Deering, Sts. 1885, vol. 4, Sec. 1368.  
 Georgia, Code 1882, Sec. 4666.  
 Iowa, McClain, 1880, Sec. 4620; R. C., 1888, p. 1423.  
 Indiana, Rev. Sts., 1881, Sec. 1765; R. S., 1888, vol. 1, Sec. 1765.  
 Illinois, Rev. Sts., 1883, ch. 38, Sec. 285; R. S., 1887, ch. 38, Sec. 285.  
 Kansas, Comp. Laws, 1879, Sec. 4757; C. L., 1885, Sec. 3675.  
 Kentucky, Crim. Code, 1876, Sec. 268 *et seq.*  
 Nebraska, G. S., 1881, part 3, Sec. 554; C. L., 1885, Sec. 554.  
 New Jersey, R. S., 1877, p. 625, Sec. 110.  
 New York, R. S., 1882, Banks & Bro. 7th ed., vol. 4; Crim. Code, Sec. 496.  
 Ohio, R. S., 1880, Sec. 7240; R. S., 1890, Sec. 7240.  
 Texas, R. S., 1879; C. C. P., Sec. 947; Willson's Crim. Sts., pt. 2 (1888) Sec. 947.  
 Utah, Act of 1878, Sec. 455, Crim. Code.
- <sup>2</sup> District of Columbia, R. S. U. S., 1878, Sec. 4851.  
 Kentucky, Crim. Code, 1876, Sec. 268.  
 Michigan Sts., 1882, Sec. 1909.  
 New Jersey, R. S., 1877, p. 625, Sec. 110.
- <sup>3</sup> Delaware, Act 1883, vol. 17, ch. 79, Sec. 1.  
 Iowa, McClain's Sts., 1880, Sec. 1412.  
 Minnesota Sts., 1878, Supp., 1883, ch. 35, Sec. 33.  
 Massachusetts Sts., 1882, ch. 222, Sec. 10.
- <sup>4</sup> Iowa, McClain's Sts., 1880, Sec. 1414; R. C., 1888, p. 1423.  
 New York, L., 1874; R. S., 1882, Banks & Bro., 7th ed., ch. 446, Tit. 1, Art. 2, Sec. 21; 3 R. S., Banks & Bro., 8th ed. (1889), p. 2159.

## CHAPTER V.

### THE TRIAL OF COLLATERAL ISSUE AS TO INSANITY— PLEADING AND PRACTICE.

THERE are but few reported cases upon the mode of the trial of the preliminary issue, prescribing the form of oath, or the number of challenges to jurors, but in an English case,<sup>1</sup> a party having been indicted for seditious libel, and, upon his arraignment, refusing to plead, and showing symptoms of insanity, and an inquest being forthwith taken under the English Stat. 40 Geo. III., ch. 94, Sec. 2, to say whether he was insane or not; the form of oath used was: "You shall diligently inquire and true presentment make, whether the defendant, who stands indicted for a misdemeanor, be now insane or not, and a true verdict give according to the best of your understanding, so help you God."<sup>2</sup>

The proceeding appears to be regulated, in so far as is concerned the number of challenges to persons called for jurors, where such is the method taken to determine the question, by the number of challenges allowed in civil and not in criminal cases. For the preliminary issue is not a trial upon the charge framed in the indictment, but to inform the conscience of the commonwealth, being *parens patriæ*, and having in its custody and control the persons and estates of lunatics, whether

<sup>1</sup> The Queen *v.* Goode, 7 A. and E. 536, 34 E. C. L. R., 150, 1837.

<sup>2</sup> See also for form of oath Commonwealth *v.* Hathaway, 13 Mass. \*299. Freeman *v.* the People, 4 Denio. 9. Rex *v.* Frith, 22 How. St. Tr. 310.

the prisoner has sufficient capacity to plead and understand the nature of the proceedings taken against him. Therefore, in one case in New York<sup>1</sup> it was held that in such preliminary trial the defendant is not entitled to peremptory challenges, but challenges for cause may be made.

The right to begin and conclude to the jury is with the prisoner, as the affirmative of the issue in the preliminary inquiry is with him;<sup>2</sup> and as to what is the fact for the jury to decide, it has been said:<sup>3</sup> "The preliminary points to be answered in all cases before trial are: 1. Whether the defendant is of sufficient intelligence to plead to the indictment. 2. Whether he has mental capacity to comprehend the nature of the proceedings constituting a trial, and to follow them so as to be able properly to make his defence. For it is not sufficient that he has a general capacity of communicating upon ordinary matters. If this mental capacity is wanting in either case, he should not be made to plead until a judicial inquiry has first determined his mental status. Where the infirmity of the prisoner is patent the duty of making such inquiry devolves primarily upon the state as *parens patriæ*, and the natural guardian of all its citizens."<sup>4</sup>

<sup>1</sup> Freeman *v.* People, *supra*.

<sup>2</sup> See 1 Hawkins, P. C., p. 3; Freeman *v.* People, *supra*; U. S. *v.* Lancaster, 7 Biss., 440.

<sup>3</sup> See an article by John Ordronneau, 1 Crim. Law. Mag., 1880, p. 435.

<sup>4</sup> See also Rex *v.* Pritchard, 7 C. & P., 303, 32 E. C. L. R., 517; Rex *v.* Dyson, 7 C. & P., 310, 32 E. C. L. R., 318; see *supra*. In U. S. *v.* Lancaster, 7 Biss., 440 (Ill.), Blodgett, J., said: "Suppose his trial was not impending, and his counsel should come into court and suggest that his client was so far insane as that he ought not to be tried, and the court, as a preliminary step,

The rule which is to control the jury in its decision is generally stated to be that the defendant should not be put upon trial if there is a reasonable doubt that he is insane. It was the rule at common law, and has since been followed. In an English case, for instance, it was said,<sup>1</sup> *per* Hallock, B., to the jury: "If there be a doubt as to the prisoner's sanity, and the surgeon says that it is doubtful, you cannot say that he is in a fit state to be put upon his trial."<sup>2</sup>

In the supreme court of New York,<sup>3</sup> under the former practice, it has been held that one capable of rightly comprehending his own condition in reference to the criminal proceeding against him, and of conducting his defence in a rational manner, is not insane within the

had ordered a jury to be impanelled to try the question of his sanity or insanity, the duty would be what is yours—to inquire into, find whether the defendant was so far insane as to be incapable of realizing the peril in which he was placed, and taking such steps as a prudent man, under the circumstances, would have taken to prepare for his trial, and whether that insane condition still continues."

See also *People v. Kleins*, 1 Edm., Sel. Cas., 13, 1845; *People v. Ah Ying*, *supra*, 1871, in which it is said: "No plea of present insanity is required. If at any time during the proceedings in a criminal trial a doubt arises as to the sanity of the prisoner, it is the duty of the court, of its own motion, to suspend further proceedings in the case until the question of sanity has been determined."

See also *State v. Arnold*, 12 Iowa, 479, 1861.

<sup>1</sup> *Ley's Case*, 1 Lewin, C. C., 239, 1828.

<sup>2</sup> If there is reasonable doubt of the prisoner's sanity he must not be tried: *People v. McCann*, 16 N. Y., 58; *State v. Jones*, 50 N. H., 370; *People v. Garbutt*, 17 Mich., 9; *Morgan v. People*, 4 Abb., Ct. App., Dec., 509; *Stevens v. State*, 31 Ind., 485; *State v. Crawford*, 11 Kan., 32; *State v. Johnson*, 40 Conn., 136; *Com. v. McKee*, 1 Gray (Mass.), 61; *State v. Marler*, 2 Ala., 43.

<sup>3</sup> *Freeman v. People*, 4 Denio, 9, 1847.

meaning of the rule, though on some other subjects his mind may be deranged. In this case a jury was impanelled in a preliminary issue to try whether the person indicted for murder was then insane, and were instructed by the court that they were to decide "whether the prisoner knew right from wrong; and if he did, then he was to be considered sane." But it was held in appeal that the charge so delivered was erroneous; and the jury having found that the prisoner was sufficiently sane in mind and memory to distinguish between right and wrong, it was also held that such a verdict was defective. The supreme court in that case said: "The test of insanity here set up to prevent a trial is, whether the prisoner is mentally competent to make a rational defence; and, when alleged as a defence to an indictment, it is whether, at the time of committing the act, he was laboring under such mental disease as not to know the nature and quality of the act he was doing, or that it was wrong."<sup>1</sup>

<sup>1</sup> For the present practice in New York see *infra*. In the Webber case, *supra*, p. 36, a different rule appears to have controlled the trial judge, although, as appears by the statement of fact in the opinion quoted, no personal examination was made, nor witnesses called in open court by the commonwealth, to inform its discretion; it was said by the court, in its written opinion, overruling the motion for a new trial and in arrest of judgment: . . . . "In the present case the prisoner was about to be arraigned, when a suggestion was filed by counsel that the prisoner was insane at the time. An elaborate and learned argument was made by the counsel of the prisoner in his hearing. Nearly two hours were occupied in arguing and considering the motion, during which time I had the opportunity of observing the appearance and conduct of the prisoner, and the attention he gave to the proceedings. I had also the benefit of the information of the physician of the prison and others to assist me in coming to that sound judgment which it

The difficulty of determining a satisfactory rule as to when a prisoner is sane within the meaning of the law, as to his trial, may be appreciated by considering the various changing rules or tests of insanity which the courts have adopted where he is upon trial for the crime.

In Wharton's Criminal Law<sup>1</sup> it is said that prior to 1800, owing to the law as to the incarceration of insane offenders, the old rule or tests of insanity need not be regarded, and that the present defect is not so much in the law as in the working of the law. If a change be made in the legal treatment of insane offenders, and the common law abrogated as to their immunity from trial, then it is of moment that some fixed rule or test of mental capacity to plead be adopted. A short review of the law in regard to the tests of insanity used in the trial upon the indictment may not be entirely useless, and the decisions of some of the courts illustrate the changes in the law. The fifteen judges in England in 1843 first proposed the right and wrong test. It appears in the phrases "unable to distinguish right from wrong," or to discern "that he was doing a wrong act," or was "not conscious of the moral turpitude of the act," or was "deprived of his understanding and memory," or was "ignorant that he was committing an offence against the laws of God and nation." Afterwards, in 1846, in Pennsylvania, the late Chief Justice Gibson endeavored to formulate a rule which jurors might understand, and which also would protect society,

was my duty to exercise. Giving the matter the due consideration to which it was entitled, I came to the conclusion that the prisoner knew where he was, what he was here for, and what was being done."

<sup>1</sup> 7th ed., p. 14.

and in a case which then arose said:<sup>1</sup> "A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity; but if it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defence to an accusation of crime. It must be so great as entirely to destroy his perception of right and wrong, and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will, and making the commission of the act, in his apprehension, a duty of overruling necessity. The most apt illustration of the latter is the perverted sense of religious obligation, which has caused men sometimes to sacrifice their wives and children.

"Partial insanity is confined to a particular subject, the man being sane on every other. In that species of madness it is plain that he is a responsible agent, if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may have been laboring under an obliquity of vision. A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints. On this point there has been a mistake, as melancholy as it is popular. It has been announced by learned doctors that if a man has the least taint of insanity entering into his mental structure it discharges him of all responsibility to the laws. To this monstrous error may be traced both the fecundity in homicides, which has dishonored this country, and the immunity that has attended them. The law is, that whether the insanity

<sup>1</sup> *Commonwealth v. Mosler*, 4 Barr, 264, 1846.

be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action. But there is a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance."

Afterwards, in 1858, the doctrine of moral insanity was doubted and condemned, and in a murder case a jury was charged that:<sup>1</sup> "If the prisoner at the bar, at the time he committed the act, had not sufficient capacity to know whether his act was right or wrong, and whether it was contrary to law, he is not responsible; that is, in fact, general insanity, so far as the act in question is concerned, and it must be so great in extent and degree as to blind him to the natural consequences of his moral duty, and must have utterly destroyed his perception of right and wrong.

"The test in this instance, as you perceive, is the power or capacity of a prisoner to distinguish between right and wrong in reference to the particular act in question; for, although a man may be sane upon every other subject, yet if he be mad, to use an expressive phrase, upon the subject, and so far as the act under immediate investigation is concerned, he thereby loses that control of his mental powers which renders him a responsible being. The test thus suggested has been adopted by the judges of England and by the courts of our own State, and is too well settled to be shaken."<sup>2</sup>

<sup>1</sup> Commonwealth v. Freth, 3 Phila. 105, 1858, per Ludlow, J.

<sup>2</sup> In this case the jury were also charged that "partial insanity,

In 1874, in a murder case,<sup>1</sup> it was held that a reasonable doubt of the fact of insanity in a criminal case is not a true basis for the finding of it as a fact and as a

hallucination or delusion, coupled with the power of discriminating between right and wrong, was no excuse for crime, has been ruled to be the law of England, and to this point did the judges of England refer, in *McNaughten's case*,\* in their first answer to the questions propounded to them by the House of Lords. This doctrine was also stated to be the law by our predecessors upon this bench in the case of *Commonwealth v. Far-kin*,† and would have remained the law of this State but for the opinion and charge of Gibson, C. J., in *Commonwealth v. Mosler*,‡ where the chief justice says: 'It (insanity) must amount to delusion or hallucination controlling his will, and making the commission of the act a duty of overruling necessity.' And again he says: 'The law is, that whether insanity be general or partial, it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action.'

"If the prisoner, although he labors under partial insanity, hallucination or delusion, did understand the nature and character of his act, had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and knew if he did the act he would do wrong and would receive punishment; if further, he had sufficient power of memory to recollect the relation in which he stood to others and others stood to him, that the act in question was contrary to the plain dictates of justice and right, injurious to others and a violation of the dictates of duty, he would be responsible.

"A man must, therefore, labor under something more than 'a mere moral obliquity of perception,' and a man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints."

<sup>1</sup> *Ortwein v. Com.*, 76 Penna. St. 414, 1874.

\* 10 Clark and Fin. 210.

† 2 Parson's Se. Eq. Ca., p. 439.

‡ 4 Barr, 266.

ground for acquittal; and insanity, as a defence, must be so great as to have controlled the will and take away the freedom of moral action. And in the year following, 1875, after commenting upon the misleading language, refinements of speech and idiomatic expressions used in referring to the tests of insanity, it was held that if a prisoner<sup>1</sup> had force of mind enough to be conscious of what he was doing at the time, then he is responsible to the law for that act.<sup>2</sup>

In 1885, however, the supreme court in Pennsylvania have said<sup>3</sup> that the question of the degree or extent of unsoundness of mind necessary to acquit one who has committed a homicide has so often been considered, that certain rules of law applicable thereto must be considered well settled. Among them may be stated: "1. Moral insanity is not sufficient to constitute a defence, unless it be shown that the propensities in question exist to such an extent as to subjugate the

<sup>1</sup> *Brum v. Com.*, 78 Penna. St. 128, 1875.

<sup>2</sup> In *Sayres v. Com.*, 88 Penna. St. 298, 1879, Ludlow, J., repeated the law as stated in *Com. v. Freth*, 1858 (*supra*), and his judgment was affirmed by the supreme court.

In the case of *Com. v. Freth*, the language in *Com. v. Mosler* had been deprecated; but in 1882, in the case of *Coyle v. Com.*, 12 W. N. C. 277, the latter case was approved and followed, and it was said that where in a murder case the defence of homicidal mania is set up, the court is justified in instructing that that doctrine is dangerous, and can be recognized only in the clearest cases, and that the mania ought to be shown to have been habitual, or at least to have been evinced in more than a single instance. It was also said that the court should instruct the jury that the presumption is in favor of sanity, and that this presumption can only be overthrown by fairly preponderating evidence. It is error to charge that such presumption can be overcome only by clearly preponderating evidence.

<sup>3</sup> *Taylor v. Com.*, 109 Penna. St. 270, 1885.

intellect, control the will, and render it impossible for the person to do otherwise than yield thereto. 2. No mere moral obliquity of perception will protect a person from punishment for his deliberate act. The jury should be satisfied with reference to the act in question that his reason, conscience and judgment were so entirely perverted as to render the commission thereof a duty of overwhelming necessity. 3. Another species of delusion is this: If the prisoner commits the act under a fixed *bona fide* belief, which is a delusion, that certain facts existed which were wholly imaginary, but which, if true, would have been a good defence, and the jury are satisfied that such delusion clearly existed, it will entitle the prisoner to an acquittal. (Sayres *v.* Com., 7 N. 291.) While a slight departure from a well-balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognized in the administration of the law when a person is on trial for the commission of a high crime. The just and necessary protection of society requires the recognition of a rule which demands a greater degree of insanity to exempt from punishment.”

As to the effect of the trial of the preliminary issue, it may be added that the finding of a jury that the prisoner was then sane, cannot be taken into consideration upon the question of insanity set up as a defence upon the trial of the indictment. And it was held to be error where the court in the trial of the indictment (a preliminary issue as to insanity having been tried) refused to permit evidence to be given that the prisoner was insane any time after the finding of the verdict upon the preliminary issue, and where it excluded the opinions of medical witnesses formed from an observation of the

prisoner after that time as to his insanity when the offence was committed.<sup>1</sup>

At common law the well-known rule was that there was no right of appeal in criminal cases, so that bills of exceptions are regulated in modern criminal practice by the statutes which permit appeals or writs of error to be taken. Under the statute in force in the State of New York in 1847, it was held that a bill of exceptions does not lie to review questions determined upon the trial of a collateral issue; and therefore where exceptions were taken upon a preliminary trial of a question of present insanity which were incorporated in a bill of exceptions taken upon the trial of an indictment, it was held that such exceptions were not properly before the court.<sup>2</sup>

In very many of the American States, however, the order of trial in the preliminary issue, or in that framed after conviction upon the indictment, is regulated by statute. For instance, in California, the trial of the question of insanity must proceed in the following order:<sup>3</sup> 1. The counsel for the defendant must open the case, and offer evidence in support of the allegation of insanity. 2. The counsel for the people may then open their case, and offer evidence in support thereof. 3. The parties may then respectively offer rebutting testimony only, unless the court, for good reason in furtherance of justice, permit them to offer evidence upon their original cause. 4. When the evidence is concluded, unless the case is submitted to the jury, on either or both sides without argument, the counsel for the people

<sup>1</sup> *Freeman v. The People, supra.*

<sup>2</sup> *Ibid.*

<sup>3</sup> California, Code of 1876, Sec. 14,369; Deering's Ann. Sts., 1885, vol. 4, Sec. 1369.

must commence, and the defendant or his counsel may conclude the argument to the jury. 5. If the indictment be for an offence punishable with death, two counsel, one on each side, may argue the cause to the jury, in which case they must do so alternately. In other cases the argument may be restricted to one counsel on each side. 6. The court must then charge the jury, stating to them all matters of law necessary for their information in giving their verdict.<sup>1</sup>

Other statutes in California<sup>2</sup> also provide that if, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon, from the list of jurors selected by the supervisors for the year, a jury of twelve persons to inquire into the supposed insanity, and must give immediate notice thereof to the district attorney of the county. The district attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court. If it is found by the inquisi-

<sup>1</sup> In California (California, act 1876, Sec. 14,370 as amended April 9, 1880; Deering's Ann. Sts., 1885, vol. 4, Sec. 1370) it is provided that if the jury find the defendant sane the trial must proceed, or judgment be pronounced, as the case may be. If the jury find the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be in the meantime committed by the sheriff to the state insane asylum, and that upon his becoming sane he be re-delivered to the sheriff.

<sup>2</sup> California, Code of 1876, Secs. 14,221, 14,222 and 14,224; Deering's Ann. Sts., 1885, vol. 4, Secs. 1221, 1222, 1224.

tion that the defendant is sane the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the governor, or from the judge of the court by which the judgment was rendered, directing the execution of the judgment. If the inquisition finds that the defendant is insane, the sheriff must immediately transmit it to the governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment.<sup>1</sup>

<sup>1</sup> Statutes similar to that of California in directing the order of trial are in force in:

Arizona, R. S., 1887, Sec. 2110.

Dakota, R. Code, 1877, Cr. Pr., Sec. 517, 518, 519, 520; C. L., 1887, Sec. 7567 *et seq.*

Idaho, R. L., 1874-75, Cr. Pr., Sec. 569, 571 and 572; R. S., 1887, Sec. 8196.

Iowa, McClain's Sts., 1880, Sec. 4622, 4623, 4624; R. C., 1888, p. 1423.

Nevada, G. S., 1885, Sec. 4454.

Utah, act 1878, Secs. 456-7 Cr. Code.

In Indiana (R. S., 1881, Sec. 1765; R. S., 1888, vol. 1, Sec. 1765), when a prisoner is acquitted on the ground of insanity he shall not be discharged, but shall be forthwith proceeded against upon the charge of insanity; and the verdict of the jury or finding of the court shall be *prima facie* evidence of his insanity, and the proceedings shall conform to those prescribed for the admission of the insane, but no preliminary statement shall be required.

In the following States, in addition to those heretofore mentioned in the text, it is directed that, in all cases of acquittal upon the ground of insanity, it shall be so stated by the jury in their verdict:

Connecticut, G. S., 1888, Sec. 3615.

Idaho, R. S., 1887, Sec. 7919.

Louisiana, R. S., 1876, Sec. 1780.

Mississippi, R. C., 1880, Sec. 3141.

Vermont, R. S., 1880, Sec. 4407.

Washington, Code, 1881, Sec. 1101.

In Michigan,<sup>1</sup> if any person in confinement under indictment, or under sentence of imprisonment, or under criminal charge, or for want of bail for good behavior, or keeping the peace, or to appear as a witness, or in consequence of any summary conviction, or by order of any justice, or under any other than civil process, shall appear to be insane, the circuit court commissioner of the county where he is confined, or, if he be absent, the judge of the circuit court shall, upon the application of the prosecuting attorney, institute a careful investigation, call two respectable physicians and other creditable witnesses, whom he is authorized to swear as such; and if it be satisfactorily proved that he is insane, said commissioner or judge may relieve him from such imprisonment, and order his safe custody and removal to the asylum where he shall remain until he is restored to his right mind; and then the superintendent shall inform the said commissioner or judge and the county clerk and prosecuting attorney of said county, so that the person so confined may, within sixty days thereafter, be remanded to prison and criminal proceedings resumed or otherwise discharged; or, if the time of his sentence shall have expired, he shall be discharged.

In the State of New York<sup>2</sup> the practice is, that when a defendant pleads insanity by special plea as required by statute, the court in which the indictment is pending, instead of proceeding with the trial of the indictment, may appoint a commission of not more than three disinterested persons to examine him and report to the court as to his sanity at the time of the commission of

<sup>1</sup> Michigan Sts., 1882, Sec. 1909.

<sup>2</sup> New York, R. S., 1882, Banks & Bro., 7th Ed., vol. 4; Code Crim. Proc., Sec. 658 and Sec. 659.

the crime. If a defendant in confinement, under indictment, appears to be at any time, before or after conviction, insane, the court in which the indictment is pending, unless the defendant is under sentence of death, may appoint a like commission to examine him and report to the court as to his sanity at the time of the examination. The commission must summarily proceed to make their examination, and before commencing they must take the oath prescribed in the code of civil procedure, to be taken by referees, and they must be attended by the district attorney of the county, and may call and examine witnesses and compel their attendance. The counsel of the defendant may take part in the proceedings, and when the commissioners have concluded their examination, they must forthwith report the fact to the court with their opinion thereon. If the commission find the defendant insane, the trial or judgment must be suspended until he becomes sane; and the court, if it deem his discharge dangerous to the public peace and safety, must order that he be in the meantime committed by the sheriff to a state lunatic asylum, and that upon his becoming sane he be redelivered by the superintendent of the asylum to the sheriff.

The Ohio statute<sup>1</sup> provides that when the attorney of a person indicted for an offence suggests to the court in which the indictment is pending at any time before sentence that such person is not then sane, and a certificate of a respectable physician to the same effect is presented to the court, it shall order a jury to be impanelled to try whether or not the accused is sane at the

<sup>1</sup> R. S., 1880, Sec. 7240 and Sec. 7241; R. S., 1890, vol. 2, Secs. 7240, 7241.

time of such impanelling; and thereupon a time shall be fixed for a trial, and a jury shall be drawn from the jury-box and a *venire* issued, unless the prosecuting attorney, or the attorney of the accused, demand a struck jury, in which case such jury shall be selected and summoned as required by law; the jury shall be sworn to try the question whether the accused is or is not sane, and a true verdict give according to the law and the evidence; and on the trial the accused shall hold the affirmative, and if three-fourths of the jurors agree upon a verdict, their finding may be returned as the verdict of the jury, and a new trial may be granted on the application of the attorney of the accused for the causes and in the manner provided in the criminal procedure.

If three-fourths of the jurors do not agree, or the verdict be set aside, another jury shall be impanelled to try the question; if the jury find the accused to be sane, and no trial has been had on the indictment, a trial shall be had thereon as if the question had not been tried; if the jury find him to be not sane, that fact shall be certified by the clerk to the probate judge, and the accused shall, until restored to reason, be dealt with by such judge as upon inquest had; if he be discharged the bond given for his support and safe keeping shall contain a condition that he shall, when restored to reason, answer to the offence charged in the indictment, or of which he has been convicted, at the next term of the court thereafter, and abide the order of the court, and such lunatic, when restored to reason, may be prosecuted for an offence committed by him previous to such insanity, or sentenced on a conviction had previous thereto.

In Texas it is provided that the counsel for the

defendant has the right to open and conclude the argument upon the trial of a preliminary issue as to insanity, and no special formality is necessary in conducting the proceeding, but the court shall see that it is conducted in such a manner as to lead to a satisfactory conclusion.<sup>1</sup> When, however, upon the trial of an issue of insanity the defendant is found to be insane, all further proceedings in the case against him shall be suspended until he become sane; and should the defendant become sane, he shall be brought before the court in which he was convicted and a jury shall again be impanelled to try the issue of his sanity; and should he be found to be sane, the conviction shall be enforced against him in the same manner as if the proceedings had never been suspended. But when upon the trial of an issue of insanity it is found that the defendant is sane, the judgment of conviction shall be enforced as if no such inquiry had been made.<sup>2</sup>

In the administration of criminal law during the present century, since the passage of the act of 39 and 40 Geo. III., ch. 94 (July, 1800), frequent reference is made by the courts to the difficulties presented in attempting to treat the matter of insanity as a defence. On the one hand there is the necessity of protecting society, and upon the other is the humane treatment of the unfortunate class of persons afflicted with mental derangement. It has been said:<sup>3</sup> "The extent to which insanity defences are strained and abused has seriously impaired their legitimate value. No lawyer will deny this who has witnessed the increasing mistrust with

<sup>1</sup> Texas, R. S., 1879; C. C. P., Secs. 950, *et seq.*; Willson's Crim. Sts., pt. 2, 1888, Sec. 950, *et seq.*

<sup>2</sup> Texas, Willson's Crim. Sts., pt. 2, 1888, Sec. 950, *et seq.*

<sup>3</sup> 1 Crim. Law Mag., 1880, 432.

which a tender of them upon trial has been received. Although among the most equitable of defences, it has come to be regarded almost as a certainty, from the very offering of a plea of insanity, that the case must be a desperate one which admits of no other answer in bar to the indictment. Injustice is thus often done to an innocent person whose position before the law affords, in the judgment of his counsel, a legitimate ground for interposing this defence, and who must, therefore, at the outset overcome a certain popular distrust of its sincerity, which is not likely to be without reflection in the jury box."

It may be wise, however, as has been intimated,<sup>1</sup> for society to change the common law which forbade the punishment and execution of the insane, so that insanity shall be no longer a defence to crime. But the injury which respect for the administration of law would then suffer would be unimportant compared with that which would be done from the mockery of a trial when the essential element of fairness in the ability to understand the nature of the proceedings is absent from the defendant. The scene of the execution of the judgment of the law upon an insane prisoner is witnessed by but few persons, whose official duties require their presence; but at the trial of a person who is insane will be found the idle and curious crowd which fill a public courtroom. The want of uniformity in the statutes, to which reference has hereinbefore been made, indicate the difficulties which arise in the legal treatment of an insane offender, and some of the statutes in American States, in the attempt to avoid them, provide that when the defence of insanity is to be made it shall be pre-

<sup>1</sup> *Supra*, p. 55.

sented by way of a special plea. For instance, in Georgia<sup>1</sup> it is provided that whenever the plea of insanity is filed it shall be the duty of the court to cause the issue on that plea to be first tried by a special jury, and if found to be true the court shall order the defendant to be delivered to the superintendent of the asylum, there to remain until discharged by the general assembly. And in Indiana,<sup>2</sup> when the defendant desires to plead that he was of unsound mind when the offence was committed, he himself, or his counsel, must set up such defence specially in writing, and the prosecuting attorney may reply thereto by a general denial in writing.

In New York<sup>3</sup> also, whenever any person in confinement, under indictment for the crime of arson, murder or attempt at murder, or highway robbery, desires to offer the plea of insanity as a general traverse and his whole defence to such indictment, he shall present such plea at the time of the arraignment, and at no other stage of the trial but this shall such plea or defence be received or entertained, and the court before whom such trial is pending shall have power, with the concurrence of the presiding judge thereof, to appoint a commission to examine such person and to inquire and report to the court aforesaid upon the fact of his mental sanity at the date of the offence with which he stands charged. The commission aforesaid shall institute a careful investigation, call such witnesses as may be necessary, and for that purpose is fully empowered to compel the at-

<sup>1</sup> Georgia Code, 1882, Sec. 4299.

<sup>2</sup> Indiana, Rev. Sts., 1881, Sec. 1764; R. S., 1888; C. P., vol. 1, p. 1764.

<sup>3</sup> R. S., 1882, Banks & Bro., 7th ed.; L., 1874, ch. 446, Tit. 1, Art. 2, Sec. 30; 3 R. S., Banks & Bro., 8th ed., 1889, p. 2161.

tendance of witnesses. Upon the report of said commission, if the court before whom such indictment is pending shall find that such person was insane and irresponsible at the date of the offence with which he stands charged, the court aforesaid shall order his removal to some state lunatic asylum, there to remain for observation and treatment until such time as, in the opinion of a justice of the supreme court, it is safe, legal and right to discharge him.<sup>1</sup>

In Wisconsin<sup>2</sup> the legislature has provided, as a means of escaping the difficulties in the treatment of the defence of insanity, that when any person is indicted or informed against for any offence, and such person or counsel in his behalf shall at the time and before the commencement of the trial, claim or pretend that such person, at the time of the commission of such alleged offence, was insane, and for that reason not responsible for his acts, the court shall order a special plea, setting up and alleging such insanity, to be filed on his behalf with the plea of not guilty; and the special issue thereby made shall first be tried by the jury selected and sworn to try said cause; and if such jury shall find, upon such special issue, that such accused person was so insane, or that there is reasonable doubt of his sanity at the time of the commission of such alleged offence, they shall also find him not guilty of such offence for that reason; and, when such insanity is found, the jury

<sup>1</sup> It is also provided in New York that, whenever a person in confinement under indictment desires to offer the plea of insanity, he may present such plea at the time of his arraignment as a specification under the plea of not guilty. New York, R. S., vol. 4; Crim. Code, Sec. 336.

<sup>2</sup> Wisconsin, R. S., 1878; Supp., 1883, Secs. 4697, 4698, 4699; Sts., 1889, Sec. 4697 *et seq.*

shall also find whether such accused person has recovered from such insanity and is of sound mind at the time of such trial; and if they find that he has so recovered and is of sound mind, then such accused person shall be discharged and go at large. If the jury shall be unable to agree upon a verdict on the trial of such special issue, the court shall for that reason discharge them from the further consideration of such special issue as such, and unless such special plea be withdrawn by such accused person, or counsel in his behalf, the court shall forthwith order the trial upon the plea of not guilty to proceed, and the question of insanity involved in such special issue shall be tried and determined by the jury with the plea of not guilty. If on the trial of such special issue with the plea of not guilty the jury find such accused not guilty, for the reason that he was insane at the time of the commission of the alleged offence, they shall also find whether such accused person has recovered from such insanity and is of sound mind at the time of such trial; and if the jury find that he has so recovered and is of sound mind, then such accused person shall be discharged and go at large. The presumption of such accused person's sanity, at the time of the commission of such alleged offence, shall prevail and be sufficient proof thereof on the trial of such special issue, whether the same be tried alone or with the plea of not guilty, unless the evidence produced on such trial shall create in the minds of the jury a reasonable doubt of the sanity of such accused person at the time of the commission of such alleged offence.

If the jury, in Wisconsin, upon the trial of such special issue mentioned, shall find that such accused person was insane at the time of the commission of such alleged offence, and shall also find that he is still insane,

then the court shall order such insane person to be confined in one of the state hospitals for the insane, and the superintendent of such hospital shall receive such insane person upon such order, and confine and treat him in such hospital as other insane persons are kept and treated, or discharged, therein; and the expense thereof shall be borne by, and be a proper charge against the county, in which such insane person was indicted or informed against for such offence, and such county may be reimbursed therefor out of the estate or property of such insane person. But if, upon the trial of such special issue mentioned, the jury shall find that such accused person was not insane at the time of the commission of such alleged offence, then his trial upon the plea of not guilty shall at once proceed before the same jury; and the finding of the jury upon such special issue shall be final and conclusive upon the question of his insanity at the time when the alleged offence was committed; and no other plea or evidence thereon shall be allowed upon such trial, and the jury shall not again consider any matter embraced in such special issue in determining the guilt or innocence of such accused person, and in no case and at no time in the trial of such accused person shall the question of the insanity of such person at the time of the commission of such alleged offence be considered or determined by the jury, otherwise than upon such special plea setting up and alleging the same.

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