The position of the medical profession in regard to certificates of mental unsoundness and civil incapacity / by T.S. Clouston.

With the Author's Compliments.

THE

POSITION OF THE MEDICAL PROFESSION

IN REGARD TO

CERTIFICATES OF MENTAL UNSOUNDNESS AND CIVIL INCAPACITY.

BY

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(*Read before the Medico-Chirurgical Society of Edinburgh, 4th March* 1885.)

PRINTED BY OLIVER AND BOYD, EDINBURGH.

MDCCCLXXXV.

REPRINTED FROM THE EDINBURGH MEDICAL JOURNAL FOR APRIL 1885.

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FROM the earliest Greek times we have evidence that physicians have been called in to treat mental diseases in all civilized countries, but it is only in comparatively recent years that our profession has, in law and practice, been made the virtual judge as to what constitutes unsoundness of mind and incapacity for civil affairs.

It does not appear that in ancient Rome any formal proceedings were required for placing an insane person under suitable treatment, but for the appointment of tutors and curators for the *furiosi* and *mente capti* there were written laws and a formal procedure. Dr Sibbald says, "Careful provision was made for the treatment of the Roman citizen when he became insane." "The Romans looked on this condition as a disease which was to be cured, if at all, by ordinary medical treatment," but, "the evidence upon which a Roman magistrate declared a person to be furious was not the opinion of experts, but such evidence as showed *that the fact was admitted by the general voice of those to whom the circumstances of the case were well known.*"[1] That statement applies as a description of legal practice in appointing a guardian to an insane person and his property for at least 1500 years. The first recorded instance we have of medical knowledge being rendered available in a formal way to enable a court of law to come to a decision in regard to the existence of mental disease was when, in 1589,[2] fourteen persons condemned to death for witchcraft appealed against the judgment to the Parliament of Paris,

[1] Dr Sibbald, *Morison Lectures on Insanity*, *Journal of Mental Science*, July 1877.

[2] *Ibid.*, October 1877.

which named four commissioners—Pierre Pigray, the king's surgeon, and Messieurs Lerois, Renard, and Falaiseau, the king's physicians —to visit and examine these witches, and see whether they had "the mark of the devil upon them." The mode of diagnosis adopted by these gentlemen was this—"The visit was made in presence of two counsellors of the Court. The witches were all stripped naked, and the physicians examined their bodies very diligently, pricking them in all the marks they could find, to see whether they were insensible to pain, which was always considered a certain proof of guilt. They were, however, very sensible of the pricking, and some of them called out very lustily when the pins were driven into them." "We found them," continues Pigray, "to be very poor stupid people, and some of them insane. Our opinion was that they stood more in need of medicine than punishment, and so we reported to the Parliament, which, after mature counsel among all the members, ordered the poor creatures to be sent to their homes without inflicting any punishment upon them." In all respects, except their method of diagnosis, Pigray and his colleagues were to be congratulated. They stood, then, as our profession has almost uniformly done of late years, on common sense and scientific ground, disregarding the stereotyped legal views of the time, which largely reflected the popular opinions and the superstitious theories of the Church. Most of us think that this mode of formally calling to its assistance medical knowledge by the Parliament of Paris was a better method of arriving at the truth than the present British and American method of allowing each side to call in its own skilled evidence as to whether a man is to be adjudicated of unsound mind or not.

In England the first Act of Parliament relating to the insane was that of 17 Edward II. in 1324, and the first in Scotland was of Robert II. in 1371. The object of both of these was to provide that the king should have the custody of the lands of idiots and insane persons during their lives, rendering the same after their death to the right heirs. But there was no provision in those Acts, or in any subsequent lunacy statutes, for medical certificates or medical evidence to prove unsoundness of mind or civil incapacity, till the English Act of 1774 for the regulation of private madhouses (14 Geo. III. c. 49) made a medical certificate, in addition to the order of a relation, requisite for the admission of every private patient to those institutions. Paupers were by that Act to be sent to such places as received them on the authority of the parish officers alone. Thus it is just 110 years ago since the adoption of that system of medical certification of unsoundness of mind, which is now universally prevalent in the three kingdoms. Every statute relating to the placing of the insane in asylums or under private care, passed since that time, makes special provision for either one or two medical certificates in the case of every patient, private or pauper.

In England and Scotland the medical certificates required by the earlier statutes were not required to embody all or any of the facts on which the opinion was founded. The English Lunacy Act of 1845 for the first time made it an essential part of a lunacy certificate that it should contain specific facts indicating insanity observed by the medical man who signs it. Other facts indicating insanity communicated by others were provided for, but were not reckoned an essential part of the certificate, and can be put in or not at the discretion of the signer. The origin of this form of medical certificate, containing the chief facts on which the opinion was founded, was the English form of affidavit usually made by a medical man, or indeed any other witness, in regard to the lunacy of a person with property to be looked after, whose state of mind was being inquired into, previous to the issuing of a writ *de lunatico inquirendo* by the Lord Chancellor. Such affidavits always contained facts proving unsoundness of mind and incapacity for the management of property, duly sworn to, and were submitted to the Lord Chancellor as *prima facie* evidence of the insanity of the party, so that he might have proper grounds for issuing the writ for a formal inquiry. This inquiry is now always made by a Master in Lunacy or one of the Lords Justices. The lunacy certificates of England and Scotland, now required before a patient is placed in an asylum or elsewhere under treatment, are in form just a compressed and simple affidavit of such unsoundness of mind as requires care and treatment. All such lunacy certificates must be in the exact form prescribed in the schedules attached to the English Act of 1853 and the Scotch of 1857. In this absolute uniformity they differ from all the other medical certificates or affidavits required by the Lord Chancellor or Lords Justices, or by the various Acts relating to criminal lunatics or bankrupts, or those relating to persons of unsound and weak mind requiring judicial factors in Scotland.

The ancient and constitutional method of inquiring into the mental condition of a person with property, supposed to be incapable of managing it on account of unsoundness or weakness of mind, with a view of protecting that property, was and is practically the same in England and Scotland. It proceeded on the theory that the king had, as his prerogative, the custody of the lands of such persons. Before this prerogative was exercised a formal inquiry as to the civil incapacity of the supposed lunatic or idiot had to be made in England by a jury of 12 men. If he was found to be *non compos*, a person was appointed to take charge of his property, who is called in England his "Committee of the Estate," and in Scotland his Tutor. The process itself is called a Commission in England, and a Cognition in Scotland. In England this is still the ordinary process under which the means of the insane and idiotic who have property are taken charge of and used for their benefit, their persons being controlled and protected under the same pro-

cess by another person, who is called the "Committee of the Person." In Scotland the ancient process of cognition has gone almost out of use. It is a curious fact, and one strikingly showing how hard it is to get modern ideas embodied in some kinds of legislation, that though in England there have been at least fourteen Acts of Parliament passed relating to commissions, and at least five in regard to cognitions in Scotland, there is not a word in one of these Acts, from the first in 1324 to the last in 1868, about calling in the skilled evidence of medical men before the decision is arrived at by the proof, or in the preliminary inquiry. And this in spite of the fact that for at least the whole of this century the actual practice has been for medical evidence to be required at every commission in England and every cognition in Scotland. The Lord Chancellor never issues a writ *de lunatico* except on medical affidavits; the Masters in Lunacy who, on behalf of the Chancellor, hold the commission, never find a person insane except on medical testimony; and no commission is ever superseded, and the patient restored to the control of his affairs, except on medical evidence. In Scotland no cognition now ever takes place without medical evidence being required. Illogically enough the Lunacy Regulation Acts of 1853 and 1862, which embody the present law of England in regard to the insane who have property, make elaborate provision for the medical visitation, supervision, and control of the Chancery lunatics after they have been adjudged to be of unsound mind.

The Scotch process of appointing a *curator bonis* or judicial factor to manage the property of those who are incapable of doing so themselves, from mental unsoundness or mental weakness, as described in Thoms *On Judicial Factors*, is now the one in common use here. It has practically superseded the process of cognition. It can only be carried out on the production to a judge of Session, or to a sheriff if the property is small, of two medical certificates of the mental unsoundness and civil incapacity of the party for whom a curator is required, as the basis of the process. The necessity for medical evidence is a statutory provision in the appointment of a *curator bonis*, and not merely required by prescription, as in the processes of commission and cognition. The medical certificates required need not be drawn up in any set form. Like all statutory medical certificates in Scotland, they must be "on soul and conscience." The whole process is an admirable one in nineteen out of twenty cases, both for the insane and for their relatives. It is simple, implies no undue publicity, is cheap, and is easily set aside when the patient recovers. Its weak points are that it makes no provision for the custody of the person of the lunatic or idiot where such is needed, and that the process of further inquiry is a clumsy and uncertain one if opposition is made by the party or by any one on his behalf. Those defects ought, in my opinion, to be remedied in future legislation.

The English Act of 1774 recognised the scientific fact that in-

sanity is a disease, not only by requiring the medical certificates referred to, but also by providing that five Fellows of the College of Physicians, London, should be annually elected Commissioners in Lunacy for granting licenses to private asylums in Middlesex, which licensed houses those commissioners were to visit every year. The Scotch Act of 1815 recognised the same fact, by providing that the sheriff in his prescribed visits to asylums should be accompanied by a medical man, who in Midlothian and Lanark had to be one of four resident Fellows of the College of Physicians or the Glasgow Faculty respectively. These four Fellows of these colleges had also the power of independent visitation and inspection of the asylums, apart from the sheriff, in those counties.

The same fact was much more fully and clearly recognised throughout the great English Lunacy Acts of 1845 and 1853, both of which were the work of Lord Shaftesbury, and in the Scotch Act of 1857, introduced by Lord Moncreiff, which now with their amendments regulate the treatment of the insane in the two countries. The first of these provide that three of the six Commissioners in Lunacy are to be medical men, this having been secured by the energetic action in the House of Commons of Mr Wakley of the *Lancet*, and the last (the Scotch Act) that the two paid commissioners and the two deputy-commissioners are to be of our profession. All the certificates of insanity for placing patients under treatment must, therefore, under the present law not only be signed by medical men, but when acted on, must be submitted to other medical men, who, as Commissioners in Lunacy, have the power in England at least of saying whether they are valid or not.

All the numerous criminal lunacy Acts provide for medical certificates as to the mental condition of persons charged with crimes, or under sentence, who present symptoms of insanity, before any steps can be taken with regard to them. The English Act of 27 & 28 Vict., cap. xxix. sect. 11, in this way gives our profession virtual power in a life and death question, when it provides that if there is good reason to believe a prisoner under sentence of death is insane, the Home Secretary "*shall* appoint two or more physicians or surgeons to inquire into the insanity of such prisoner," and if they certify in writing that he is insane, the Home Secretary has no choice, but "*shall* direct by warrant under his hand" that the death sentence be not executed on the murderer, who must instead be removed to a criminal lunatic asylum. If he recovers there, the death sentence may then be carried out, but I need hardly say that no criminal lunatic was ever thus executed after his restoration to sanity.

There were in the United Kingdom 104,257 persons under certificate as insane at the beginning of 1884. For those 123,064 medical certificates had been required, or an average of about 6 certificates given by each practising member of our profession, and in

each case a certificate as to mental condition has to be given and sent to the commissioners by the physicians of the institutions in which the patients are placed after their admission. The new cases of lunacy in Scotland for 1883 amounted to 2607, and as each of these required two certificates, this amounts to a yearly creation for this purpose of 5214 new lunacy certificates, or over two to each Scotch practitioner yearly. To detain a patient in a Scotch asylum after the first three years, he must again be certified by the physician at the end of every year. And every one of the patients who recover every year must be discharged by medical authority, a formal judicial procedure being required along with certificates in the case of those civilly incapacitated by commission or under curatory. To this enormous amount of medical certification we must add the medical certificates granted for the appointment of judicial factors, the affidavits for the issuing of writs *de lunatico,* those needed for the criminal lunatics, for the transference of patients from one asylum to another, for the sick and friendly societies, the more informal certificates to employers, and the casual certification for all sorts of purposes. Still further to complete the facts which show the extent of the present responsibility of our profession in regard to the unsoundness and the soundness of mind of the country, we must take into account the 500 medical men who hold official appointments as commissioners, visitors, inspectors, medical superintendents, assistant medical officers, and consulting medical officers of asylums.

Thus, within a century, have those new and most important duties and high responsibilities been gradually devolved by the Legislature and by judicial procedure on our profession in regard to mental unsoundness and its resulting incapacity to manage property. We have become the virtual judges of every question in regard to insanity, quite apart from and above its treatment as a disease. We control the liberty of the subject *quoad* insanity. It is through us alone that a man can be deprived of all his civil rights and position, the enjoyment of his property, the society of his wife, the control of his children on this account, and through us he is restored back to his position in life again. Our power is none the less real nor our responsibilities less heavy that the technical "order" or "decision" for a man's being deprived of liberty or civil rights is in Scotland one given by a magistrate. If the magistrate cannot act except on our certificates, and cannot virtually refuse to act if our certificates are valid and uncontradicted, we are the real power at his back. As a matter of fact, the medical profession have not sought those great powers in regard to unsoundness of mind. Many distinguished men have strongly set themselves to stem the tendency to give us such power. Lord Westbury, reckoned one of the ablest judges of his time, said, when Lord Chancellor, that "the introduction of medical opinions and medical theories into this subject has proceeded upon the vicious principle

of considering insanity as a disease; whereas the law regards it as a fact, which can be ascertained in like manner as any other fact." Such protests have been utterly unavailing to affect recent legislation or procedure. Scientific fact has carried the day.

I am not aware that our authorized representatives were even consulted when the Legislature at those various times devolved on us these duties. I shall presently allude to the question whether we can evade or decline them. As it is, we as a profession have up to this time virtually accepted them. I am not at all sure, however, whether we have fully realized our position in regard to this matter. I doubt whether we have looked the thing fairly in the face, satisfying ourselves as to the principles of our position and our action, weighing our responsibilities, and calculating the risks we run. There are times when, in regard to such important questions, principles have to be inquired into, new departures made, and standing ground looked to. We are in the position of a man who has, without asking for it, gradually got into his hands the management of a whole department of State. While things worked smoothly and in a routine way he never asked himself any questions about why he came to be there. He simply did his duty to the best of his knowledge and ability. But when a crisis came, and things began to go wrong, and people said to him, "What business have you to do what you are doing?" he, if a wise man, sets himself to consider his position. It seems to me the medical profession has just now come to such a halting and considering time in its medico-legal position with regard to certifying insanity. Judges from the bench are describing the present lunacy laws and procedure as "shocking" and full of danger to the liberty of the subject. Juries are mulcting medical men heavily in damages for signing statutory certificates of insanity. The press cries out that something is wrong, uttering discordant and contradictory views, but still showing an uneasy feeling. The medical papers assure the profession that things are wrong, and must be put right. Questions and debates in both Houses of Parliament exhibit the combined ignorance and alarm of our legislators, and finally the Government promises a bill to put things to rights.

I hold most strongly that in regard to certain aspects of future lunacy legislation the medical profession is entitled to have a direct and controlling voice. That would simply be recognising the scientific fact that it is a disease. Though in Scotland we are not so dissatisfied with our lunacy laws and lunacy arrangements as they are in the South, and have not been subject to such periodic lunacy scares as have occurred there, especially among London journalists hard up for topics that will excite the public, yet it behoves us carefully to consider the matter, and know our own minds in regard to it. If legislation is carried out for England, the same principles will soon no doubt be applied here. If we are wise, and mean to make our influence felt, it will not do for

our medical corporations and our universities to show apathy or ignorance when a bill affecting a widespread disease, and the relationship of the profession to that disease, is passing through Parliament. To speak plainly, the lawyers have been able to shape former lunacy bills too much according to their views of mental unsoundness and civil incapacity, through the apathy of medicine. We hold the key of the position if we have the wit to use it. There are other bills than those about medical reform, infectious diseases, and vivisection, that we ought to be interested in. That disease of the brain, whose chief manifestation is derangement of man's reason, is surely one of these.

If the position of the profession in relation to mental disease has grown so vastly of late years, there can be no reason to question that it will continue to grow in the future. The advance of cerebral physiology and pathology is leading to advances in the early treatment of mental diseases by the family practitioner. There was a time when the mild forms of the disease were scarcely treated at all. As we all know, such treatment requires certain special arrangements that the treatment of no other disease requires. Mental nursing necessarily implies restrictions on the patient's power of action. It often implies the use of force to overcome resistance. To be effectual it constantly implies removal of the patient from his own house against his will. It may imply the forcible administration of food or medicines. To cure the disease, in short, the doctor needs to control the whole circumstances of the patient, irrespective of the patient's will. I am not now referring to the sending of patients to asylums and the treatment that may be adopted there, but to home and private house treatment by family physicians under the sanction of relations. Now, in regard to all this the profession is entitled to take the broad ground, that whatever is needed for a patient medically for his cure should be legal and unrestricted by any vexatious statutory provisions whatever, and should imply no undue risk to the doctor. We are already much better off in this respect in Scotland than they are in England, in having a provision of our law that for six months, with a view to recovery, a patient may be treated anywhere the doctor and the relatives think best, without any legal formality or word of technical insanity whatever, except a private letter of intimation to the Commissioners, if he be treated from home and his board paid for.[1] If treated at home, or in a house or lodgings paid for by him or his friends, no such intimation even is needed till after twelve months.[2] We must see that our present Scotch liberties in this respect are not interfered with by future legislation.

When a patient has to be formally committed for treatment to a hospital for the insane, his personal liberty is necessarily interfered with by strangers not acting like a private nurse under the direct orders of his relations. Therefore it seems to me that for this some

[1] 20 & 21 Vict., cap. lxxi. sect. 41. [2] *Ibid.*, sect. 43.

such system of formal medical certificates as the present must be continued. The only question is—Who is to give them? I am in favour of the present system of the whole profession retaining the power of granting such certificates instead of deputing it to special Government-paid officials. I do not even approve of one of the two certificates being granted by such an official; for if the family doctor had granted the first certificate in any case, and the Government official refused to grant the second, the former would be in a very unpleasant and dangerous position indeed. I contend, however, that the medical man who certifies a case of insanity should be in exactly the same position as a witness who has been summoned to a Court and gives evidence there in answer to questions asked. If he does not say what he knows to be untrue, and if he has no *mala fides*, the witness is protected by the Court from any consequences that may arise from his testimony. So should the doctor be in giving a truthful lunacy certificate.

Then arises the question—If two medical certificates in statutory form are given in regard to any case, is the sheriff to judge of the sufficiency of the facts indicating insanity contained in them, and grant or refuse the "Order" to receive the patient into the asylum, according as he thinks those facts sufficient or insufficient? At present different sheriffs act on different principles in regard to this vital matter. One acts judicially, another ministerially. I have known a sheriff refuse to grant an order because it was stated in one of the certificates (both of which contained abundant facts indicating insanity) that the woman had been confined the day before. Being a kind-hearted man, he thought it shocking to send any woman to an asylum the day after her confinement; and being the judge in the case, and there being no appeal, though there was imminent risk of the insane mother strangling her baby and jumping out of the window with not a soul to look after her, those risks had to be run. And I have received an order from another sheriff for the admission of a patient, when one of the certificates under "Facts indicating insanity observed by myself," stated, "I could discover no fact indicating insanity." There being an express clause in the Act absolutely prohibiting any patient being received into an asylum except on certificates containing facts indicating insanity observed by the certifier, I considered I could not admit the patient, notwithstanding the sheriff's order, and refused to do so. It is notorious that sheriffs, or rather the sheriff-clerks, do not see that the formal legal portion in the first parts of the certificate before "Facts indicating insanity observed by myself" is correctly filled in, which is just the part they ought specially to see to, in my opinion. In England a certificate is not valid except the certifier's exact medical qualification is put in. This is constantly omitted here, and yet the sheriffs sign the order. There is a formal English decision that if the patient is not designated and his residence put in, the certificate is invalid

and worthless. It is quite the exception for me to get a certificate where the patient is designated, except one signed by an old student of mine, who had remembered my drillings on this point.

There are two opinions given and certified to in every certificate. One is that the patient is "a lunatic," or "an insane person," or "an idiot," or "a person of unsound mind" (and, by the way, those expressions become in this way the statutory definition of legal lunacy); the other is that the patient is "a proper person to be detained under care and treatment." Both things should be taken into account by the doctor, each separately and distinctly from the other, before he signs. If we grant that the sheriff can judge of the sufficiency of the facts to prove the first, that of "unsoundness of mind," it is quite certain he is not in a position to judge as to second, viz., whether the patient is "a proper person to be detained under care and treatment." That is a medical question, which a medical man alone can solve, and one in which the law gives him no help whatever.

If one is to adopt the method of interpreting the meaning of a document from its contents alone, then the sheriff's order bears no proof within it that the sheriff has considered the facts in the certificates, or is satisfied with them. It simply says that "having had produced" to him a petition and certificates, he authorizes the transmission and reception of the patient.

I therefore conclude that the sheriff does not act judicially in granting orders for the reception of patients into asylums. He is merely bound to see that a petition, statement, and medical certificates are there in due form, and accurately filled in. His position ought to be defined in the next bill we have. I do not think he is properly qualified to say whether the "facts indicating insanity" do indicate it or not, that being a medical question, just as is the question of suitability for care and treatment. But what is the good of the sheriff's order in that case? It is "a mere farce," say some of our English brethren, "pretending to be what it is not, and taking the proper responsibility off the petitioner and medical men." I dissent from this very emphatically. I look on the provision for inserting "facts indicating insanity" as one affecting the doctor, to compel him to formulate the grounds for his opinion, and not one with which the sheriff has judicial concern. Before the present Scotch Act came into operation the medical certificates contained no "facts;" and yet, on the medical opinion that the patients were insane and should be admitted into asylums, the sheriffs granted orders for that purpose. No "facts" are required in the medical certificates for a man being deprived of the control of his property and a *curator bonis* appointed for him by a Lord of Session, and no "facts" are stated when the Secretary of State respites a man from the death sentence on account of insanity. The sheriff's order is most important, apart from its being a judicial decision as to the insanity of the patient. It secures that

personal liberty is not interfered with *quoad* lunacy, except on a magistrate's authority, that the papers are in statutory form, that everything is *bona fide*, and that the medical men who sign are on the Medical Register. It secures that amount of publicity in the whole transaction which is needed to give the public confidence in the working of the laws.

But while that is my opinion in regard to the sheriff's non-competency to review and judge as to the "facts" stated in the medical certificates, I am not to be taken as implying that therefore those facts are unimportant, or should be carelessly dealt with by men in signing their lunacy certificates. On the contrary, I would put them on higher ground than that they should be merely sufficient to "pass the sheriff." I would urge on my professional brethren that they should be sufficient to satisfy the more accurate demands of science. I would say that each case should be so carefully examined into, and the reasons for coming to the decision to certify the patient so clearly arrived at in one's own mind, that the writing down of the "facts" would be a mere formulation of the most important reasons for the conclusion already come to. "Is the patient insane?" "What evidence is there?" "What kind of insanity does he labour under?" "Is he a proper person to be detained under care and treatment?" "Why should he be so detained?" If one is able to answer these questions clearly in one's own mind, there is usually little difficulty in filling in the "facts." I would say that the chief things which require asylum treatment and imply medical certificates are danger to the patient or others without proper means of obviating such danger, disturbance of the public peace, offences against public decency, the necessity for care and treatment which cannot otherwise be got, the presence of such symptoms as can only be properly treated in a hospital for the insane, the failure of treatment otherwise, and the deliberate medical opinion that hospital treatment is best for the patient. As we all know, all sorts of considerations—social, monetary, and domestic—must be taken into account in deciding the question.

When the certificate is being prepared, we certainly cannot do so too carefully: one should look at the directions on the margin in each case, and read over every certificate before it leaves one's hands. To get "facts" to put down, one should first think of the marked insane delusions, then of incoherence of speech, then of suicidal or dangerous occurrences, then of shouting or outrageous conduct, then of incapacity to understand questions or to answer them sensibly, then of insane reasons assigned for conduct, then of changes from the natural character and conduct, then of abnormalities of appearance, facial expression or manner, then of negative signs, such as taciturnity and insensibility to impressions. Quote the patient's words, if possible. If we put our facts down in a pithy, dogmatic way, using definite but non-professional expressions, and if the process of diagnosis with subsequent certification is

founded on a fair knowledge of mental disease, I do not think we run much risk in signing certificates even in the present state of the law in Scotland.

I ought to have premised that before any medical certificate of insanity is signed under any circumstances, the necessity for it must be fully recognised by the patient's relations. They must, in fact, ask us to certify. In this a certificate differs from a medical prescription essentially in principle. After we are called in to a case, we do not ask whether we shall give strychnine or not, if we think the patient needs it. There are few circumstances where I should even press the relations of an insane patient to come to a conclusion about having him certified. They should be fully satisfied, and should initiate any action taken. Our duty is to state the risks involved, legal and social, the benefits to be derived from treatment under certificates, and our medical reasons so far as we can explain them. The position of a medical man in thus being requested and authorized to sign a medical certificate by a responsible relative or public authority undoubtedly entitles him to exemption from the risks that he would run if he initiated the process. He only, in fact, makes a formal statement of a medical opinion, founded on medical observation, and his reasons for it.

And now we come to the consideration of the question—What are the risks to a medical man who signs a good medical certificate of insanity after the sheriff has granted the order? There are risks undoubtedly, but not many in Scotland. Since our Lunacy Act of 1857 passed, there have been over 46,000 certificates signed, and as yet no medical man has been brought into Court for a certificate of lunacy. Considering that any man in this country may bring an action against any other man for almost anything real or imaginary, this immunity on the part of our profession in regard to a proceeding of such importance, and one which is apt to cause such irritation as the making a man legally into "a lunatic," is very remarkable. But can we avoid any risk whatever? I cannot see how we can do so. There are a few difficult cases where the necessity for certification may be so great, and yet the risk so apparent, that it is quite right to ask for a letter of indemnification against pecuniary loss from legal proceedings from the person who asks for the certificate. But I confess this is a proceeding that does not look well on the face of it, for it seems as if we were doubtful about the propriety of granting the certificate, and I only advise it in very exceptional and rare cases. In the case of pauper patients, it could scarcely be got. Yet an action brought against a parochial medical officer, who receives no special remuneration for his medical certificates, and no protection from the parish against loss from legal proceedings, is a possibility, and would be an especially hard thing. I am of opinion that this duty is of so responsible and onerous a nature that its remuneration should never be included in ordinary parochial work, but that a special fixed

salary should be attached to it. A perfunctory and careless mode of doing it is encouraged, and its importance not realized, if it is not paid for. I am sorry to say that the parochial boards of our larger towns are especially pennywise in this respect. It is not so in England. I think our General Lunacy Board and our medical corporations should make a representation to the Board of Supervision on this point.

It is in the case of the patients whose insanity is obscure, those whose power of self-control is great, those with only partial insanity, those whose insanity consists in foolish actions while their reasoning power is acute and their speech coherent, those in whom the mental unsoundness consists mostly in moral perversion, and those who labour under that form of insanity from drinking in which all the symptoms pass off quickly after being put under treatment,—it is signing certificates in the case of such persons where special precautions have to be taken and special risk is run. There are some people of means, too, whose dispositions have been so litigious, that they need to be very insane before any man will venture to sign lunacy certificates for them, and there are others with semi-insane suspicious relations in the same position. To meet exceptional cases, and place such persons under treatment, to save them from ruin, and to save their relations from manifold annoyances, I think there should be provided a formal process, by trial before a Court, similar to the process of cognition, but applicable for the object of placing of patient under treatment, cognition being only applicable at present where there is property to protect. Such a process would only be making lunacy laws conformable to the facts of disease. It is in some such cases that we, as a profession, are at present justified in absolutely declining to sign the ordinary statutory certificates. If such patients are dangerous or very threatening, the present Scotch procedure for placing dangerous lunatics under custody at the instance of the procurator-fiscal is the proper remedy. Many a suffering wife and relation, whose lives are constantly in danger from alcoholic maniacs, would do wisely to resort to this. The question of the patient's mental unsoundness and dangerous tendencies is then tried in open Court according to law. And no one runs any risk, or incurs any responsibility, but simply gives evidence in Court when called on to do so. I have had several patients under my care, where endless trouble was saved through their having been "fiscal cases." The publicity of such proceedings is disagreeable at the time, but it may save from worse things.

It has been proposed that very soon after a patient is sent into an asylum some Government official should see him, examine the papers, and if satisfied, should sign an "Order" which would then be the permanent authority for his detention, thus taking all responsibility and risk after that off the persons who placed him there. I cannot see that this would be any improvement on the present

procedure, which consists in the physician of the asylum sending a certificate to the Commissioners in Lunacy with the form of mental disorder within a week after admission in England, and within a fortnight in Scotland, and the subsequent visits of the Commissioners. The asylum physician thereby homologates the certificates and shares the risks of legal procedure, the cost of which in his case would be paid by the institution if he acted legally and *bona fide*. It is better to have an institution sued than an individual. No examination by an official would exempt from the risk of action for sending a patient to the asylum; and if by possibility the proposed official, not being able in the course of his one visit to make out the patient's insanity, and not having, like the physician to the asylum, who gives the certificate at present, the opportunity of seeing him on admission and every day after admission, if he should not be able to give his *imprimatur*, then the risk to the certifying medical men would be great indeed, for they would be virtually convicted of a wrong diagnosis by the man appointed to protect them from risk. At present no action can be brought against a medical man in Scotland for a certificate after twelve months from the time the patient has left the asylum,[1] so that the prolonged annoyance and expenses suffered by the medical men in the MacIntosh *v.* Smith and Lowe case could not occur under the present statutes.

If I had the shaping of future legislation, I should institute a provision that under certain exceptional circumstances even patients in asylums, who could show good cause to the Commissioners in Lunacy, should have the chance of a public formal inquiry for settling the question of their mental condition in a definite way once for all. We have patients who, having laboured under acute symptoms on admission, become partially recovered chronic grumblers, with the grievance that they are confined because they cannot get a fair open hearing or examination. Such a provision would satisfy that inherent sense of fair-play and justice which is seldom lost in the insane; and it would also satisfy some of the public better even than the Commissioners' visitation or calling in two independent medical men, as provided for by the Scotch law. The publicity involved in such inquiries is no greater than that involved in being insane, for whose friends and neighbours do not know all about a man's mental troubles? And if it were somewhat greater, it should be faced to avoid still worse evils. It is an enormous gain to make all lunacy proceedings above board, and to correct by law the natural but false shame that tends to concealment of everything connected with unsoundness of mind in a family. Our sheriffs' orders have done us much good in Scotland in that respect.

A very strong position in regard to unsoundness of mind has for some time been taken up by the *Lancet*, the oldest and not the

[1] 29 & 31 Vict. cap. li. sect. 24.

least influential of the weekly medical press. It is shortly this. "Our lunacy laws are utterly and radically bad. Our lunacy policy is wrong. The Commissioners in Lunacy are very inefficient. The position of medical men with regard to lunacy, and the present lunacy certificates for admission to asylums, is untenable. Asylums are conducted on wrong principles. Let the profession sign no medical certificates of insanity whatever under any circumstances. Let them treat lunacy as bodily diseases are treated by doctors, without reference to any medico-legal aspects of it. Let the state look after this. Don't submit to the indignity of submitting medical certificates to a magistrate."

This to many of us seems an impracticable position for a responsible organ of medical opinion to take up, even supposing the present lunacy laws are not what they should be. In the first place, the British public would have good right to say to the medical profession, if it acted on the advice of the *Lancet*, "You have no moral right to inflict on society the inconveniences and dangers that would result from a sudden stoppage of the working of the lunacy laws, and the gigantic lunacy arrangements of this country that you have helped to build up and assisted in carrying out for forty years. You have no right to put individuals to the annoyances that such action would cause. You, who owe your professional privileges to the law, are morally bound to carry out the present law while it exists." I tried by a letter to evoke from the *Lancet* a formulated statement of what it would propose instead of the present laws and arrangements, but failed. Its tone is a mixture of bitterness, disloyalty, and conscious "crying in the wilderness" on this matter, though I sympathize with its efforts to strengthen the purely medical position in regard to insanity. I cannot help feeling that it is unjust towards the lunacy laws, towards the commissioners, towards asylums, towards alienists, and, above all, towards that grand philanthropic movement to benefit the insane embodied in Lord Shaftesbury's labours in that cause which has on the whole had such great results. Would any physician who had been for years the trusted adviser of a family, be morally justified in refusing to certify, when requested to do so, a member of it who had become suddenly acutely maniacal, and for whom the means of treatment did not exist at home, because the lunacy laws were bad and because he ran some personal risk? Do we not all run risks every day in other ways? Would the family be able to distinguish the doctor's conduct if he so refused from that of a man who would not attend a case of typhus in the family for fear of infection? No doubt there is a strong feeling now in England, and especially in London, against signing certificates. Many medical men there will not do so under any circumstances. I heard the other day of an undoubtedly insane man, whose relations had gone to forty doctors in London, and they all had refused to sign a certificate for his being sent to

an asylum. I think this feeling will not subside for a time in regard to doubtful cases, but I have never heard of any real difficulty in getting certificates for obvious cases here in Scotland. And I don't think there ever will be any difficulty in such cases so long as the certificates can be paid for.

I cannot refer to one or two important trials that have lately occurred in London, because the decisions come to have been appealed against to higher courts, and they are therefore *sub judice*, but I can refer to what some of the English judges have lately said. Lord Coleridge some time ago expressed astonishment that the two medical certificate forms were on one sheet of paper, implying that the signer of the second certificate could see what the first contained. No doubt it is stated in the statutory form that each medical man must have seen the patient "separately from any other medical practitioner," but as a profession we never sanctioned that proviso, which it would be far more rational and better for the patient to reverse, and put "with another," for "separately from any other." I don't know any sort of case where a talk with a professional brother is more useful than before coming to the conclusion that a patient should be sent to an asylum. There is then every reason that exists for an ordinary consultation, plus special risks to the patient and to both doctors. All the medical reasons go in the teeth of the remarks of the Lord Chief Justice. His blame did not touch our consciences.

Baron Huddleston has lately presided at two lunacy trials, and in one he made some strong remarks about some of the present English proceedings being "shocking," and about the especial danger involved in that provision of the English Acts which admits of any one ("any pauper," as he said), not being a relative of the patient, or even connected with him in any way, signing the order of admission, which in England takes the place of sheriff's order here. I am of opinion that in England such "orders" of private persons will have to give way to a magistrate's "order." But the principle involved in Baron Huddleston's criticism applies to the question of who is to be the "petitioner" in our Scotch form. I always advise that no stranger, or other person not having a real relationship to the patient, should be the "petitioner." If there is no relative or guardian to be got, then let the inspector of poor, as the most convenient public official, be called in and act. Temporary arrangements can be made in any asylum for any patient being treated as a private patient, though technically a pauper. It is a bad principle for a hotel or lodging-house keeper, or other person with a mere casual relation to the patient, to be the petitioner. More lately, the learned Baron held that merely looking at a man through a carriage window was not a statutory "examination" of him by two justices, and this seems reasonable. It is most important for us as a profession to see ourselves as others see us, and whether we agree with them or not, to consider most attentively what the

judges who administer the laws under which we act say about us and them. We must remember that medical and scientific ideas about disturbance of the mental functions of the brain must necessarily be only partially intelligible to lawyers and to the public, and *vice versa,* as Sir James Stephen has strongly emphasised.[1] It seems to me, in reading lunacy trials, that their very rarity makes the judges inexpert with regard to them. It sounds ludicrous to hear a judge express astonishment at the existence and danger of statutory provisions that have existed for forty years, and have worked fairly well all that time.

Everything that has taken place in recent lunacy trials should impress on us as a profession the necessity of acting with deliberation in regard to lunacy certificates, of taking no more than our fair share of responsibility, of consciously thinking of the risks we run, of keeping within the letter and spirit of the law stringently in the minutest particular, and of declining to act when there are good grounds for doing so. We should go as little beyond our professional work, too, as possible. In the present temper of the public and of the judicial mind, it is better to be able to justify all we do on grounds of professional necessity. I do not think we can reasonably expect to be protected by the law against all risk in lunacy practice any more than in surgery or general medicine. All we can ask is that future legislation in regard to our relationship to mental unsoundness shall fully recognise it to be a disease which science and public necessity have made us the sole judges of. If the laws, the general public, or the judges, set up tests and definitions of insanity opposed to those of science, then we shall be justified in handing over the whole subject to them, to see what they can make of it, and ourselves declining to act as certifiers. I cannot say I see many signs of this. There is much talk, but few signs of action. We should, I admit, have some reasons for considering our position, if frivolous actions like those brought against the physicians to Bethlem Hospital and two other London practitioners, the other day, became common. In that case we should be justified in asking that actions in regard to lunacy certificates should be put into the category of criminal prosecutions, only to be undertaken by the public prosecutor, or by his leave, and not by private parties in civil suits.

Instead of lessening, our duties in regard to disorders of the mental functions of the brain will be likely to grow apace as time goes on and our knowledge increases. The area covered by the disease will increase, let the public protest as they will. Its beginnings and lesser degrees will be more and more recognised to be a factor in conduct and motive. It will be more clearly seen that "the will" is tempered by brain action, and that a man is often overmastered by the "tyranny of his organiza-

[1] *History of the Criminal Law of England.*

tion." We shall be asked, and are being asked, more and more to examine persons with the view of giving formal opinions as to their testamentary capacity before wills are made. Instead of having a man, in a doubtful state of mind, make a will, and then after his death have all his money squandered in a costly lawsuit to determine whether he was sane when he made it, we shall be asked to examine him and make a formal report of his testamentary capacity, which, with our grounds for the opinion, will virtually decide the whole question. Those who have a *bona fide* interest in the destination of a man's property after his death should have the right by law to have such a medical examination and such a report, if there is *prima facie* evidence of doubtful sanity or impaired mental capacity on his part, irrespective of the sanction of the testator. Few things in my professional life have given me more satisfaction than some examinations and reports of this kind that I have had to make, which have had the effect of doing justice and upsetting nefarious or improper influences that were being exercised to make men in weak or unsound mental conditions leave their means to the wrong persons. The first case of the kind I ever had to do with made a deep impression on my mind, where a report of my late friend Dr Elliot of Carlisle and myself, on the testamentary incapacity of a Cumberland statesman, had the effect, without any trial in a court of law, of squashing an improper will made, or about to be made, at the instigation of a person in attendance on him. I set myself to prepare a series of tests and medical matters to be inquired into in examining a testator in such circumstances, which my subsequent experience has enlarged, and which I have found of the greatest service. I once heard the late Sir John Holker say that he had never known, in his vast experience, a will upset, if made after a medical man had examined the testator as to his mental capacity, and if a respectable agent had drawn up the document, neither of them taking any benefit under its provisions. Why should we have to go into witness-boxes, after having been carefully primed with the facts bearing on one side of the case only, to give mere opinions on imaginary cases, which the other side easily neutralize by facts unknown to us before, when we might have examined into the whole facts during the testator's lifetime? I anticipate the time when no respectable agent will consent to draw out a will for any man about whom there can be the slightest doubt as to his full mental capacity, or even to draw out a will containing strange, unnatural provisions for any man, without a formal medical examination and report on his mental condition.

I believe, too, we shall be asked to report on and certify as to the mental condition of persons about to transact important business, to enter into engagements to marry, to assume important offices and positions in life, where there are circumstances in such

persons' lives or history pointing to doubtful mental stability, or even where there are strong hereditary tendencies to mental disease, far more than we have hitherto been. There is no doubt of this, that if we had such formal examinations and reports to make, we should become better medical psychologists, and study hereditary laws far more than we do now. A great advance would soon take place in our knowledge of cerebral mental function, and scientific conclusions would take the place of much educated guessing.

In regard to the question of the curability or incurability of any case of mental unsoundness, on which the greatest issues constantly depend, we shall no doubt be called on in future more frequently to give opinions for various purposes, and have to annex our reasons. The tenure of appointments, the receipt of pensions, the investment of money, the future arrangements and residence of families, the education of children, may all depend on medical opinion as to the curability of certain cases of insanity. I know a case now where the whole management of an estate is brought to a standstill because I can't say effectually that the owner is incurable. If the law would give force to my opinion, by a specific provision that it was to be taken in such a case, the agent could act more freely for the benefit of the patient and his family. I have another case where, if a certificate of causation and incurability from me had any legal sanction, a man would get a good pension, instead of running the risk of being dismissed from his office. There is a very large question of lunacy policy and expenditure of public money, the solution of which depends on the curability or incurability of pauper patients. Other large cities will have to follow the example of London, and build cheaper institutions for the incurable portion of their pauper lunatics, their idiots and imbeciles, instead of making never-ending extensions of the present more costly asylums, in the vain hope of thus providing for such persons. To remain in a certain kind of asylum, therefore, will probably in the future depend on a medical certificate of curability, or, at all events, of being capable of receiving benefit from medical treatment, while the entrance to the other kind of institution will depend on a medical certificate of incurability; and this will need the sanction of new legislation.

I have no time in this paper to enter on the question of responsibility for crime on account of mental disease, and the general view of the medical profession as to the present unsatisfactory mode in which medical opinions and knowledge are brought out in Court. We shall never get out of the present most unedifying and sometimes scandalous partizanship and tendency to contradict each other in the witness-box till we are appointed by the Court impartially to examine the prisoners, with access to all the facts on both sides, and make a formal report to the judge.

There is a great social question looming in the future, and already

a practical one in some of the American states, and I believe in one or two countries of Europe, in which our reports in regard to the curability or incurability of mental disease may determine whether there are or are not grounds for divorce. Many publicists of weight have expressed the opinion that absolutely incurable insanity in either of the parties should be a valid ground of divorce if the other party desires it.

To be able to do the duties required of them under the lunacy statutes, to give opinions on civil incapacity, to guide individuals and families in regard to those momentous questions I have spoken of, to give their patients the benefit of the latest scientific knowledge in treating mental diseases, medical men now entering the profession should be required to show some practical acquaintance with this department of medicine. The Royal University of Ireland has taken the initiative in this matter. It cannot be that the other medical licensing bodies will lag far behind. If our profession had been as well instructed in insanity and lunacy law as they are in midwifery there would have been fewer lunacy lawsuits. It is a matter of much regret that the General Council of Medical Education has not taken this important question up.

An improvement in the lunacy laws will not alone be sufficient to allay the public distrust, for that partly rests on ignorance, and public enlightenment will only follow the enlightenment of the profession in this matter.

EDINBURGH : PRINTED BY OLIVER AND BOYD.