Guernsey (R. S.)

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OF THE NEW YORK BAR.

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JURIES AND PHYSICIANS ON QUESTIONS OF INSANITY.*

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In relation to trials in courts of law, when the defence of insanity is interposed, the question has been frequently discussed, or we may say *urged*, by physicians, as to the propriety and promotion of the ends of justice and humanity of having *physicians only* to pass upon the question instead of a common jury, as in other cases.

In this discussion jurists have taken very little or no part, feeling satisfied, perhaps, that the law, as it now stands in England and America, in regard to such trials, is in a better form to ascertain the truth and carry out the design of *all* human laws—the protection of society—justice to *all*.

In a late issue of the *Journal of Mental Science*, Dr. Henry Maudsley, the well-known author, has an article which was republished in the August, 1872, number of the *Popular Science Monthly*, that fairly presents the view taken by physicians on this very important subject.

* Read before the Medico-Legal Society of New York City, November 14th, 1872.

He says:

"The ground which medical men should firmly and consistently take in regard to insanity is, that it is a *physical disease;* that *they alone* are competent to decide upon its presence or absence; and that it is quite as absurd for lawyers or the general public to give their opinion on the subject in a doubtful case as it would be for them to do so in a case of *fever.*"

The reasons for the law as it stands on this question are too little known among all classes of community.

As the law now is and has been for centuries, it allows and *calls in* the help of *experts* to aid in its own due administration. This is required in all questions arising in which there is supposed to be a peculiar knowledge or skill in any particular vocation, in any science, or art or matter requiring superior knowledge. This rule is applied to questions arising in which the *medical profession* are supposed to have superior knowledge, and insanity is one of these questions upon which physicians are allowed to testify as to their opinion of the case under certain circumstances. The principle of allowing experts to testify as to their *opinion* established the maxim that "Every person should be believed in his own art."

The *opinion* of a witness is in no case evidence to be considered by a court or jury, except when the premises upon which he founds his conclusions cannot be understood by the court or jury without a study or knowledge on the special subject, or without the *aid* of the knowledge of persons whose skill is superior to their own. In order to be competent to testify as an expert, which means qualified to give an *opinion* in courts of justice on a statement of facts presented, an extra knowledge of the particular science, skill, trade, or business, or other matters requiring special knowledge must be shown. A witness of this character is not confined to the general rule, that he must state *facts* only, and leave the *conclusions* to be drawn from these facts to be determined by a court or jury, under oath he can give *his opinion.* These opinions or conclusions of judgment which make up such opinions of experts are the same in substance as the verdict of a jury or judgment of a court, which is nothing more than the opinion of such

jury or court as to what is established by the facts in the case. This conclusion or opinion, as is that of an expert, is given under the sanction of an oath. There is this difference, however, in the two cases; the court or jury is under oath while they are making up their opinion upon the facts in the case, and these facts upon which the opinion is predicated are also submitted to the minds of the counsel and parties. The facts were also given by the common witness under oath, upon which the jury or court makes up an opinion as to the credibility of the witness as well as of the weight of his statements. A juryman can have no private opinion, so far as his verdict is concerned. The oath he takes is "to try the issues joined between the parties and a true verdict give, according to the *evidence*." All he can do is to apply his general knowledge in weighing and applying the facts or professional opinions as they are presented to him by the several witnesses. The *expert*, on the other hand, comes to the results constituting his opinion, which is to be received in evidence, from his own private study, observation and reflection, and though the facts upon which his opinion is based may be called for by the counsel, yet from the very nature of the case it is not to be expected that the jury or court will understand them. The opinion of an expert is the private judgment of the witness given under oath. Such testimony is regarded as of great importance, but from its peculiarity and the crude shape under which it may come before the court or jury, it is to be received with great caution. As the same kinds of guards cannot be thrown around the formation of the opinions of an expert as are brought to bear upon a jury, and the opinions of experts cannot be subject to the severe scrutiny that other evidence undergoes, this kind of evidence is not of the clear and positive character or of the value of that of *facts*. The general rule of law, as expounded by the courts, as regards the testimony of experts, is plainly expressed in the language of the court in the case of Brehm *vs.* Great Western Railroad Company, in N. Y. Supreme Court (34 Barber, page 256) as follows:

"Great respect should be paid to the opinion of such a class "of witnesses, but they are no more *controlling* than those of

" any other body of men *when speaking upon subjects which lie* " *within the range of common observation and experience.*"

In the case of the People *vs.* Bodine, in N. Y. Court of Errors (1 Denio, p. 281), the Court held that the opinion of a physician is not admissible upon a question respecting which unprofessional men can as well draw conclusions. Thus, where a corpse was found partially burned and certain portions of the body covered with loose clothing were not burned, the opinion of a medical man that the person must have been dead before the fire broke out, as otherwise the covering would have been disturbed, was held *inadmissible* testimony.

In the case of Wilson *vs.* People (2 Parker's New York Criminal Reports, p. 619) the Court held that the question whether a wound was caused by a blunt instrument or not is not a question for scientific opinion, and a surgeon could not be allowed to give his opinion on that point.

The N. Y. Court of Appeals, in Kennedy *vs.* People (5 Abbott, N. S., p. 147), held that the opinions of the medical witnesses as to the position of the body when struck, inferred from the nature of the wound they had examined, were not admissible as evidence.

According to the rule above stated and illustrated, should the question of *sanity* or *insanity* of a person be passed upon exclusively by physicians? This question may best be answered by inquiring into the *standard* by which the subject is to be measured. This standard must be the *average man*, and hence what we call *common sense*—that is, a due regard to the usual institutions and habits of mankind. It is now undisputed that the brain is the seat of the mind, and that insanity is regarded as emanating from the brain, and hence may be caused by a physical disease affecting that organ. It is, of course, oftentimes very difficult to decide in any given case whether any marked peculiarity is the result of a very active and one-sided development of the brain or of actual disease. The general principles on which all decisions of this question must be based are: That when any feeling, passion, emotion, or even a special aptitude, becomes absolutely ungovernable, so as to make its subject regardless of his own interests or of the well-being of his friends—when, as it were, it absorbs the *whole*

being so as to blunt the reason and conscience, and urges on to a manner of life and to special deeds that are repugnant to the average institutions of mankind—then we have reason to suspect the existence of insanity. Although the average sentiment and experience of mankiud may be an indefinite standard by which to test the sanity of an individual, it is the same standard by which physicians are to judge of it, and the same as that by which they judge that any internal organ of the body is diseased. How is it that a physician can ascertain whether his patient is suffering from dyspepsia or not? Obviously only by comparing the symptoms that the patient exhibits and the feelings of which he complains with the symptoms and feelings experienced by the average of persons who are free from dyspepsia. In precisely the same way he becomes informed of the existence of disease in all organs of the body that are hidden from actual inspection or physical examination. The brain is enclosed by a bony covering, and cannot be inspected during life, except in some cases of injury. Diseases affecting the brain can, therefore, only be studied through the general effects, symptoms and comparisons with other persons.

The law presumes every man to know the consequences of his own acts, and is therefore responsible for them.

The questions to be decided in trials where the defence is insanity are:

(1.) Was the accused insane at the time of the commission of the offence?

(2.) Was the insanity to such a degree as to render the accused irresponsible for the particular act?

(3.) Is the evidence sufficient upon which to acquit the accused on the ground of insanity?

These questions are so blended that it is impossible to separate them without taking the case *entirely* from the jury. The first one has little or no relevancy apart from the second, and the second stands upon the third, and *all* are to be measured, whether by physicians or jury, by the same standard—*the common sense of and experience among men.*

In the case of the People *vs.* Lake (12 N. Y., 358), in New York Court of Appeals, the court say:

"Upon principle it may be doubted whether strictly medical

"witnesses should *ever give an opinion* upon the general ques-
"tion of the sanity or insanity of a prisoner, as that is a ques-
"tion for the jury. It is in a sense testifying to the very point
"the jury must decide—the general merits of the case, espe-
"cially upon a preliminary inquest to try the fact of insanity"
(Many English and American authorities are cited to sustain that position).

In criminal cases, in order to absolve the party from guilt, a higher degree of insanity must be shown than would be sufficient to discharge him from the obligations of his contracts.

In the trial of Abner Rogers for murder, in Massachusetts, Chief-Justice Shaw stated the rule to be, that "a man is not to
"be excused from responsibility if he has capacity and reason
"sufficient to enable him to distinguish between right and
"wrong as to the *particular act* he is then doing, a knowledge
"and consciousness that the act he is doing is wrong and crimi-
"nal, and will subject him to punishment. In order to be
"responsible he must have sufficient power of memory to recol-
"lect the relation in which he stands to others, and in which
"others stand to him—that the act he is doing is contrary to
"the plain dictates of justice and right, injurious to others, and
"a violation of the dictates of duty. On the contrary, although
"he may be laboring under partial insanity, if he still under-
"stands the nature and character of his act and its conse-
"quences—if he has a knowledge that it is wrong and criminal,
"and a mental power sufficient to apply that knowedge to his
"own case, and to know that if he does the act he will do
"wrong and receive punishment, such partial insanity is not
"sufficient to exempt him from responsibility for criminal acts.
"If, then, it is proved to the satisfaction of the jury that the
"mind of the accused was in a diseased and unsound state,
"the question will be whether this disease existed to so high a
"degree that for the time being it overwhelmed the reason,
"conscience and judgment, and whether the prisoner in com-
"mitting the homicide acted upon an irresistible and uncon-
"trollable impulse; if so, then the act was not the act of a volun-
"tary agent, but the involuntary act of the body, without the
"concurrence of a mind directing it" (2 Greenleaf's Evidence,
"§ 372.)

The only insanity that the law, as above stated, recognizes as an excuse for crime has been termed "intellectual insanity" (Taylor's Med. Jurisp.).

In McNaghten's case (10 Clark & Fin, 210; also 2 Greenleaf's Evidence, § 373), the House of Lords, among other questions relating to this subject, propounded to the twelve judges of England the following question:

"Can a medical man, conversant with the disease of insanity, "who never saw the prisoner previous to the trial, but who "was present during the whole trial and the examination of all "the witnesses, be asked his opinion as to the state of the "prisoner's mind at the time of the commission of the alleged "crime, or his opinion whether the prisoner was conscious, at "the time of doing the act, that he was acting contrary to "law, or whether he was laboring under any, and what delu-"sion at the time?"

The question was answered by Chief-Justice Tindal, in which all the other judges concurred (Mr. Justice Maule absent), as follows:

"We think the medical man, under the circumstances sup-"posed, *cannot* in strictness be asked his opinion in the terms "above stated, because each of these questions involves the "determination of the truth of the facts deposed to, which it is "for the jury to decide, and the questions are not mere ques-"tions upon a matter of science, in which case such evidence "is admissible. But where the facts are admitted or not dis-"puted, and the question becomes substantially one of science "only, it may be convenient to allow the question to be put in "that general form, though the same cannot be insisted upon "as a matter of right."

The rule is and the N. Y. Supreme Court have so held (People *vs.* Thurston, 2 Parker's Criminal Reports, p. 49), that "a medical witness may give his opinion on a hypotheticar "statement of facts, and it will be for the jury to judge whethel "the supposed facts so stated correspond with the facts as "proved."

In the case of the People *vs.* Lake (12 N. Y., p. 358), the opinion of the court says:

"A medical witness, who has been present during the whole "trial, and has heard all the evidence, but no knowledge of

" the prisoner, cannot, if the evidence is objected to, give his opin-
" ion as to the state of the prisoner's mind at the time of the com-
" mission of the alleged offence. In such a case, before the ques-
" tions upon matters of science can arise, the witness must deter-
" mine in his mind upon the truth of the evidence which he
" has heard, which is not a matter of science, but of fact for
" the jury. But he may be asked whether such and such
" appearances were symptoms of insanity, and whether such a
" fact, if it existed (and which has been sworn to), is or is not
" an indication of insanity. Questions of this nature can be
" answered without blending mere matters of science with
" those of fact only, upon which the jury are competent and
" required to pass" (a large number of English and American authorities are cited in support of this rule). * * *
" But where a medical man, conversant with the disease of
" insanity, has had sufficient previous opportunity, by *his own*
" *observation*, to become acquainted with the personal habits,
" conduct and appearance of the accused, upon authority I
" think he may be asked the general question, and give his
" opinion as to the sanity or insanity of the prisoner. In such
" cases it might be impossible for him to communicate to the
" jury every fact and circumstance, and all the details of con-
" duct, habits, and appearance, and the other particulars upon
" which he had formed his conclusions, and of course he may
" be questioned as to these, and as to his experience, skill, &c.,
" but if he is conversant with the disease, and has sufficient
" opportunity to ascertain the state of the prisoner's mind,
" and has formed an opinion, I think that opinion may be evi-
" dence for the jury."

A witness *not a professional* expert, is *not competent* to express a *general opinion* upon the question whether an individual was sane or insane, though when examined as to what *he himself witnessed* in regard to such individual, he may state the impression produced on his mind by what he observed (N. Y. Court of Appeals, O'Brien *vs.* People, 36 N. Y., 278; Clapp *vs.* Fullerton, 34 N. Y., 190), but he must state, if required, the facts from which his opinion is formed, so that the jury can judge of the value of his opinion (Culver *vs.* Haslam, 7 Barber, 314; Rambler *vs.* Tryon, 7 Serg & Rawle, Penn., 90; Clapp *vs.* Fullerton, 34 N. Y., 190).

In the McNaghten case, before cited, one of the questions propounded was:

"What are the proper questions to be submitted to the jury, "when a person alleged to be afflicted with insane delusion re- "specting one or more particular subjects or persons, or is "charged with the commission of a crime (murder for example), "and insanity is set up as a defence?"

The Judges answered:

"The facts of each particular case must of necessity present "themselves with endless variety, and with every shade of dif- "ference in each case, and it is their (the Judge's) duty to de- "clare the law upon each particular case, on facts proved "before them, and after hearing argument of counsel thereon. "They deem it at once impracticable, and at the same time dan- "gerous to the administration of justice, if it were practicable, "to attempt to make minute applications of the principles in- "volved in the answer given them by your Lordship's ques- "tions." * * * "If the accused were conscious "that the act was one which he ought not to do, and if that "act was at the same time contrary to the law of the land, he "is punishable, and the usual course, therefore, has been to "leave the question to the jury, whether the party accused had "a sufficient degree of reason to know that he was doing an act "that was wrong, and *this course, we think, is correct*, accompa- "nied with such observations and explanations as the circum- "stances of each particular case may require."

An expert must have some extra knowledge; this must appear by his own statement, under oath, but the degree of skill that he must have is practically in the hands of the jury, as they are to weigh his opinions, that are given by him, in connection with his proved standing in his profession. It is therefore very important that each side should obtain the best experts possible. The *number* allowed to be examined on each side is equal, and is in the discretion of the Court.

The opinion of one expert as to whether a certain state of facts was enough to justify another expert in the formation of an opinion is not admissible (People *vs.* Hartung, 17 How., N. Y., p. 151). Neither can an expert be allowed to express a

doubt as to the insanity of a person (Sanchez *vs.* People, 22 N. Y., 147).

The duty and responsibility of an expert on questions of insanity is very important to the community, and should perhaps be more thoughtfully regarded by the medical profession and the general public. Physicians are mostly inclined to excuse many wrong acts of individuals on grounds of disease. In their arguments against the present mode of trial they claim that many persons are now convicted of crime when they should only be treated for disease (see the article by Dr. Maudsley before referred to). Juries are inclined in a too great degree, perhaps, to take the opinion of a physician of good reputation and standing as to the insanity of an individual (and none will be called for the accused unless he will so testify). This is hard to overcome by contrary testimony of experts, even if it can be obtained at all on behalf of the State, and if there is any doubt in the minds of the jury, they legally (?) give the accused the benefit of the doubt—thus practically refusing to decide "when doctors disagree."

There is no question that arises in the administration of the law where expert testimony may be less necessary, and where it should be less controlling on the jury, and where the common observation and experience of men should prevail over all theory, as in cases of alleged insanity.

The moral responsibility of *juries* in criminal cases is very great. *They* have the power to *acquit* the accused without regard to the evidence or the judge's charge, and the only restraints upon such a verdict in the United States are their own feelings and a regard for public opinion, and a proper sense of the general wellfare and safety of the community. That well known constitutional provision founded by the common law that "no person shall be subject for the same offence to be "twice put in jeopardy of life or limb," prevents another trial or *any review* by Writ of Error or otherwise of the act of a court or jury, when a person is tried for a crime and found "*not guilty.*" If he is found *guilty, he* can have a review of the proceedings, but the *State* has no right to have a review of a verdict of "*not guilty.*". Such verdict of a jury is supreme and final as to the offence for which the accused was tried

(People *v.* Corning, 2 N. Y. Reports, p. 9; 4 Blackstone's Com., p. 361). In criminal cases, therefore, the jury may be regarded as the barometer of the moral sense and general intelligence of the community which they represent and are morally bound to protect. Any and every person, tried by a jury for any crime beyond petit larceny, may be acquitted on the plea of "*moral insanity*" (that is an incapacity to distinguish right from wrong), which latter theory was introduced into medical jurisprudence by a peculiar class of *metaphysical writers*, and not by *jurists* or *legislators*. (Of late, "moral insanity of the jury" would seem to be the most proper verdict which the public should pronounce on some of their acquittals.) The defence of "moral insanity" has, nominally, had very poor success in courts as an excuse for crimes. In cases of murder or attempts to murder, under certain circumstances, the plea of *insanity* has been quite a success in the United States within the past few years, and if it would be more so if placed under the exclusive control of the medical profession, its immediate results by increase of crime might more strikingly show the absurdity of a milder policy towards criminals. As it has been of late, it shows the unsafety to the community of allowing a murderer to afterwards run at large under any circumstances—not so much to protect society from the same person, but as an example to deter others from giving way to similar impulses.

If any change is suggested in the present mode of trial by jury in criminal cases (which is now guaranteed by a constitutional provision) the question of insanity should be taken from a legally *irresponsible jury* and in *all* cases placed in the hands of a *responsible judiciary*, with the same rules of evidence as at present.