COMMENT

HISTORICAL NOTES ON THE LAW OF MENTAL ILLNESS IN NEW SOUTH WALES*

I. ENGLISH LAW OPERATIVE IN NEW SOUTH WALES

A. *The Property of Lunatics*

In the early period of English historical development, the King's prerogative in the estate of idiots was regarded as a valuable right. It is pointed out in Pollock and Maitland's *The History of the English Law* that the King "is morally bound to maintain idiots out of the income of their estates but still the right is a profitable right analogous to the Lord's Wardship of an infant tenant."[1] The statute *De Praerogativa Regis,* which declared but did not create the royal prerogative,[2] was the earliest enactment relating to the property of lunatics. Pollock and Maitland[3] considered that it originated in the reign of Edward I, but it was reprinted by Ruffhead as two Acts, 17 Ed. II (1339) St. I, cc. 9 and 10, which reference has since persevered.[4] The effect of the statutes was to require the King "to provide that the lunatic and his family are properly maintained out of the income of his estate and the residue is to be handed over to him upon his restoration to sanity or should he die the King is to take nothing to his own use".[5]

The former statute declared that:

> The King shall have the Custody of the Lands of natural Fools, taking the profits of them without Waste or Destruction, and shall find them their Necessaries, of whose Fee soever the Lands be holden. And after the Death of such Idiots he shall render it to the right Heirs, so that such idiots shall not aliene, nor their Heirs shall be disinherited.[6]

The other was in these terms:

> Also the King shall provide, where any, that beforetime hath had his Wit and Memory happen to fail of his Wit, and there are many *per lucida intervalla,* that their Lands and Tenements shall be safely kept without Waste and Destruction, and that they and their Household shall live and be maintained competently with the Profits of the same, and the Residue

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* The abbreviations *H.R.A.* and *H.R.N.S.W.* where used in these footnotes relate respectively to the *Historical Records of Australia* and the *Historical Records of New South Wales.* Quotations to manuscripts in the Mitchell Library and New South Wales State Archives collections are separately acknowledged and identified with catalogue reference numbers.

[1] F. Pollock and F. W. Maitland, 1 *History of English Law* (2 ed. 1903) 481.

[2] See *Ex parte Grimston* (1772) Amb. 707 *per* Lord Apsley, C.; *Oxenden* v. *Lord Compton* (1793) 2 Ves. Jr. 261 *per* Lord Loughborough, C., and *In re W. M.* (1903) 3 S.R. (N.S.W.) 552 at 569 *per* Walker, J.

[3] *Loc. cit.*

[4] H. S. Theobald, *The Law Relating to Lunacy* 1.

[5] Pollock and Maitland, *op. et loc. cit.*

[6] Theobald, *loc. cit.*

> besides their Sustentation shall be kept to their Use, to be delivered unto them when they come to right Mind; so that such Lands and Tenements shall in no wise be aliened; and the King shall take nothing to his own Use. And if the Party die in such Estate, then the Residue shall be distributed for his Soul by Advice of the Ordinary.[7]

In his monumental *History of the English Law*, Sir William Holdsworth states that Blackstone mentions that the income of idiots' estates was at an early period a source of royal revenue.[8] Later, however, the King's prerogative in the matters both of lunatics and idiots was delegated to the Lord Chancellor so that the law relating to the property both of lunatics and of idiots up to the time of the foundation of the colony of New South Wales had been developed in the Court of Chancery.

The old Acts of Edward II formed the basis of the law of lunatics' property in New South Wales, being in force for ninety years in the colony.[9] In all respects, the law so far as it affects property of the mentally ill (if we might use the modern term taken from the current Mental Health Act of New South Wales,[10] and not the older terminologies) is of very ancient origin. On the other hand, statute law affecting the custody and treatment of the mentally ill is much more modern, being chiefly developed since 1800.

B. *The Custody and Treatment of Lunatics*

Though in 1377 the Priory of St. Mary of Bethlehem, founded in 1247, was seized by the Crown as an Alien Priory and turned into a lunatic asylum, as far as we have been able to discover, it was not the subject of any statute before 1782, when, 22 Geo.III, c.77, an Act "to render valid and effectual certain articles of agreement between the Mayor and commonalty in citizens of the City of London, Governors of the Possessions, Revenues and Goods of the Hospital of Edward King of England the Sixth, of Christ, Bridewell and St. Thomas the Apostle, and of the Hospitals of Henry the Eighth King of England, called the House of the Poor, in West Smithfield, near London, and of the House and Hospital called Bethlehem, and the Presidents Treasurers and Governors of the said several hospitals", was passed. The agreement referred to in this Act probably was a Deed of Covenant of 27th December 1546, by which Henry VIII granted that the Mayor, Commonalty and Citizens should be Masters and Governors of the House or Hospital called Bethlehem, and on 13th January, 1547, Henry VIII issued the Letters Patent which ratified the Deed of Covenant.[11] However, neither in Holdsworth[12] nor in Pollock and Maitland,[13] nor in *The Story of Bethlehem Hospital from its Foundation in 1247*, written in 1914 by Mr. E. G. O'Donohue, who was then the chaplain to the hospital, nor in Dr. Jones' book on the development of the lunacy laws in the eighteenth century[14] is there any indication of the authority by which people were confined in "Bedlam". This was probably justified by virtue of the royal prerogative.

Patients in Bedlam were liable for their own maintenance unless they were paupers, in which event the responsibility for their maintenance fell, between the period of the enactment of the Tudor Poor Laws, upon the Parish of Settle.

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[7] *Id.* 2.
[8] W. S. Holdsworth, *A History of English Law* (7 ed. 1956) vol. 1, 474.
[9] Being expressly repealed by the Lunacy Act of 1878.
[10] Act No. 45, 1958.
[11] Quoted in E. G. O'Donohue, *The Story of Bethlehem Hospital from its Foundation in 1247, infra.*
[12] *Op. cit.*
[13] *Op. cit.*
[14] Dr. Kathleen Jones, *Lunacy, Law, and Conscience: 1744-1845.*

ment. According to Dr. Jones: "Up to the middle of the seventeenth century, 'Toms o' Bedlam' — discharged patients with a recognisable badge which gave them licence to beg in order to pay their arrears — were a familiar sight in towns and villages throughout England."[15]

It might have been expected that the great Elizabethan Poor Law Statutes may have made some provision for the insane and mentally deficient. In 1597, by 39 Eliz.I, c.3, an Act for the Relief of the Poor; c.4, an Act for Punishment of Rogues, Vagabonds and sturdy beggars; c.5, an Act for erecting of capital hospitals, or other charitable Uses, mis-employed, and to reform them and by an Act of 1601, 43 and 44 Eliz.I, c.2, for the Relief of the Poor, very detailed provisions were made, requiring paupers to work, preventing begging, setting up work houses, preventing paupers moving from their parish of settlement so as to become a charge on the rates of other parishes, and generally laying down a system of parochial poor relief that was still continuing up to the foundation of the colony of New South Wales.

Shakespeare wrote "King Lear" somewhere between 1601 and 1608. It will be remembered that in that play Edgar takes upon himself the disguise of a "Tom-o' Bedlam" and describes the lot of the pauper lunatic in the England of the early seventeenth century when he calls himself "Poor Tom . . . who is whipp'd from tithing to tithing and stock'd, punish'd, and imprison'd". Nearly 150 years after the Elizabethan Poor Laws came the Act 17 Geo. II, c.5,[16] directed, as Dr. Jones points out,[17] to a wide variety of "anti-social persons". Under the provisions, for instance, a woman who gave birth to a bastard child outside her parish of settlement was ordered to be publicly whipped. The preamble to the Act stated that: "The Number of Rogues, Vagabonds, Beggars and other idle and disorderly Persons, daily increases, to the great Scandal, Loss and Annoyance of the Kingdom". And by s.2 a great number of different categories of individuals were deemed to be rogues and vagabonds within the true intent and meaning of the Act. They included:

> All Persons going about as Patent-gatherers or Gatherers of Alms, under Pretences of Loss by Fire, or other Casualty; or going about as Collectors for Prisons, Gaols, or Hospitals; all Fencers and Bearwards; all common Players of interludes; and all Persons who shall for Hire, Gain, or Reward, act, represent, or perform, or cause to be acted, represented, or performed, any Interlude, Tragedy, Comedy, Opera, Play, Farce, or other Entertainment of the Stage, or any Part, or Parts therein, not being authorised by law; all Minstrels, Jugglers; all Persons pretending to be Gypsies, or wandering in the Habit or Form of Egyptians, or pretending to have Skill in Physiognomy, Palmestry, or like craft Science, or pretending to tell Fortunes, or using any subtil Craft to deceive and impose on any of His Majesty's subjects, or playing or betting at any unlawful Games or Plays; and all Persons who run away and leave their Wives or Children, whereby they become chargeable to any Parish or Place; and all Petty Chapman and Peddlars wandring abroad, not being duly licensed or otherwise authorised by Law; and all Persons wandring abroad, and lodging in Alehouses, Barns, Outhouses, or in the open Air, not giving a good Account of themselves; and all Persons wandring abroad and begging, pretending to be Soldiers, Mariners, Seafaring Men, or pretending to go to work in Harvest; and all other Persons wandring abroad and begging.

Section 20 of that Act provided:

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[15] *Id.* II. It may be noted here that the statute 39 Eliz. I c. 3 is the source of the appeal to Quarter Sessions in New South Wales—see s.122 of the Justices Act.

[16] An Act to amend and make more effectual the Laws relating to Rogues, Vagabonds and other idle and disorderly Persons, and to Houses of Correction.

[17] *Op. cit.*

> And whereas there are sometimes Persons, who by Lunacy or otherwise, are furiously mad, or are so far disordered in their Senses that they may be dangerous to be permitted to go abroad; Be it therefore enacted by the Authority aforesaid, That it shall and may be lawful for any two or more Justices of the Peace, where such Lunatick or mad Persons shall be found, by Warrant under their Hands and Seals, directed to the Constables, Churchwardens and Overseers of the Poor of the Parish, Town, or Place, or some of them, to cause such Person so to be apprehended, and kept safely locked up in some secure Place, within the County or Precinct where such Parish, Town or Place shall lie, as such Justices shall under their Hands and Seals direct and appoint; and (if such Justices find it necessary) to be there chained, if the last legal Settlement of such Persons shall be in any Parish, Town, or Place within such County or Precinct; and if such Settlement shall not be there, then such Person shall be sent to the Place of his or her last legal Settlement by a Pass, *mutatis mutandis*, as aforesaid, and shall be locked up or chained, by Warrant of two Justices of the County or Precinct to which such Person is so sent, in Manner aforesaid; and the reasonable Charges of removing, and of keeping, maintaining, and curing such Person during such Restraint (which shall be for and during such Time only as such Lunacy or Madness shall continue) shall be satisfied and paid (such Charges being first proved upon Oath), by Order of two or more Justices of the Peace, directing the Churchwardens or Overseers where any Goods, Chattels, Lands, or Tenements of such Person shall be, to seize and sell so much of the Goods and Chattels, or receive so much of the annual Rents of the Lands and Tenements as is necessary to pay the same; and to account for what is so seized, sold or received, to the next Quarter-Sessions; but if such Person hath not an Estate to pay and satisfy the same, over and above what shall be sufficient to maintain his or her Family, then such Charges shall be satisfied and paid by the Parish, Town or Place to which such Person belongs, by Order of two Justices directed to the Churchwardens or Overseers for that Purpose.

This was evidently the first statute to deal with the *custody* of the mentally ill, the previous practice having been to treat such persons as if they were paupers. Its provisions were, moreover, restricted to "dangerous lunatics", the harmless still being left to be dealt with under the Poor Laws.

We have the authority of Vol. 1 of *English Local Government; English Poor Law History: Part 1 The Old Poor Law* by Sidney and Beatrice Webb,[18] for the assertion that at first no special provision for the class of pauper lunatics was thought necessary. Of their treatment the Webbs say:

> Nothing gives a worse impression of the eighteenth century poorhouse or workhouse than the presence in them, intermingled with the other inmates, of every variety of idiot and lunatic. Of all the horrors connected with this subject we need not dwell — the chaining and manacling of troublesome patients, the keeping of them in a state almost of nudity, sleeping on filthy straw, the mixture of melancholics, and persons merely subject to delusions, with gibbering and indecent idiots, the noisy with the quiet, the total lack of any proper sanitary arrangements.[19]

The Webbs then incorporated a report dated as late as 1806 from a Gloucestershire magistrate in which he said there was hardly any considerable parish

> in which there may not be found some unfortunate human creature of this description who, if his ill-treatment has made him phrenatic, is chained in

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[18] At 300.
[19] *Ibid.*

> the cellar or garret of the workhouse, fastened to the leg of a table, tied to a post in an outhouse, or perhaps shut up in an uninhabited ruin or if his lunacy be inoffensive, left to ramble half-naked and half-starved through the streets and highways, teased by the scoff and jest of all that is vulgar, ignorant and unfeeling.[20]

At this period, however, the "better managed" parishes started to send their noisy, dangerous or refractory lunatics to private madhouses, paying for them at the rate of nine shillings, twelve shillings or even fifteen shillings per week.[21] By 1807 there were, throughout England, nearly 50 private madhouses; and the existence of these had led to an Act of 1774 (14 Geo. III, c.49), for their regulation. The statute manifested the need for controlling madhouses or asylums in which lunatics were confined, which had become so apparent and so overdue that arrangements were made for licensing them and controlling them along lines that find a reflection even in a statute as modern as the Mental Health Act of 1958 in New South Wales. By the Madhouses Act, made perpetual by 26 Geo. II, c.91, powers of control over private madhouses or asylums were vested in a Committee elected by the College of Physicians in London and Middlesex, and in other parts of England in Committees elected by the Quarter Sessions.

The only English statute relating to the persons of lunatics which was indisputably in force in New South Wales was 6 Geo. IV, c.53 — a purely procedural law.[22] At the time the colony of New South Wales was established, the law of the mentally ill was to be found in the Royal Prerogative, in the statutes declaratory of it, in the common law writs and in the decisions of the Court of Chancery.

II. LUNACY AND CRIMINAL LAW

The early distinction drawn between the idiot and the lunatic is notable and emphasizes a difference in attitude on the part of the law to the mentally deficient as compared to the mentally disturbed. That distinction is referred to as late as *Hadfield's Case*[23] in 1800, which led to the passing of the statute 39 and 40 Geo. III, c.94, and had an interesting effect on the development of the law in New South Wales. The distinction was apparently lost after that date in the criminal law. If one turns to the important catena of Australian cases on the law of mental illness, *Porter*,[24] *Sinclair*,[25] *Sodeman*,[26] *Stapleton*[27] and *Brown*,[28] one sees no reference to the distinction. Yet two New South Wales Acts of 1939[29] do deal with people who would have fallen within the terms of the first and not the second of the English statutes. The earlier legislation in New South Wales leading to the Lunacy Act of 1898[30] and the Mental Health Act of 1958[31] contains no reference to the distinction between idiots and lunatics and for all purposes legislatively they were, in that legislation and in the application of the M'Naghten Rules, treated the same.

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[20] *Id.* 301.
[21] *Ibid.*
[22] "An Act for limiting the time within which Inquisitions of Lunacy Idiocity *(sic)* and *Non Compos Mentis* may be traversed and for making other Regulations in the proceedings pending a traverse."
[23] (1800) 27 St. Tr. 1281.
[24] (1933) 55 C.L.R. 182.
[25] (1946) 73 C.L.R. 316.
[26] (1936) 55 C.L.R. 192.
[27] (1952) 86 C.L.R. 358.
[28] (1960) A.C. 432.
[29] Acts Nos. 17 and 19, 1939.
[30] Act No. 45, 1898.
[31] Act No. 45, 1958.

However, increasing psychiatric knowledge resulted in 1939 in the passing of the Mental Defectives (Convicted Persons) Act, No. 19 of 1939, an Act which has neither been at all successful nor much used, no adequate provisions having ever been made for its proper implementation. That Act defines mental defectiveness as being "a condition of arrested or incomplete development or of degeneration of mind from whatsoever cause arising";[32] a mentally defective person includes "a convicted person not being an insane person within the meaning of the Lunacy Act of 1898 in whom there exists mental defectiveness so pronounced that he requires supervision and control for his own protection and for the protection of others".[33] The Child Welfare Act of 1923[34] made no provision for mentally defective children, but by Part IX of Act No. 17 of 1939[35] special provision was made for the establishment of homes for the reception, detention, maintenance, education and training of mentally defective children, the definitions of mental defectiveness and a mentally defective child being on all fours with those in the other Act.

In *Beverley's Case of Non Compos Mentis*[36] there is a discussion as to the criminal responsibility of the lunatic or the mentally defective, which may explain why it was so late before any specific provision was made to deal with the case of persons who were found not guilty of crime but who were insane. At a time when the only punishment for felony or murder was death, the view was taken that it was not just to execute the person who was insane at the time of the offence:

> because the punishment of a felon is so grievous 1. To lose his life. 2. To lose his life in such an odious manner, for he shall be hanged between heaven and earth as unworthy of both. 3. He shall lose his blood as to his ancestry . . . and as to his posterity also . . . 4. His lands. 5. His goods and in such case the King shall have *annum, diem, et vastum,* to the intent that his wife and children shall be ejected, his houses pulled down, his trees eradicated and subverted, his meadows ploughed, and all that he has for his comfort, delight, or sustenance, wasted and destroyed, because he has in such felonious manner offended against the law.[37]

Then the report goes on to say that the punishment of a man who is deprived of reason and understanding cannot be an example to others and, further, "no felony or murder can be committed without a felonious intent and purpose;" that the lunatic or mentally defective cannot have a felonious intent. Coke goes on to point out that there were four manners of *non compos mentis*:[38] 1. idiot or fool natural; 2. he who was of good and sound memory, and by the visitation of God has lost it; 3. the lunatic who sometimes is of good and sound memory and sometimes *non compos mentis;* 4. by his own act, as a drunkard. Coke also points out that there is a distinction between he that was of sound memory and becomes, by the visitation of God, of unsound memory, and the idiot from birth, for he never had any sense or understanding to contract with any man.

This distinction was retained apparently into the early nineteenth century. The distinction is referred to in *Hadfield's Case,*[39] a case historically of the greatest importance in relation to the development of the law of mental illness and crime in New South Wales. The same distinction is found in the eighteenth chapter of the "Charter of Justice"[40] which authorises "the said Supreme Court

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[32] Section 2. [33] *Id.* [34] Act No. 21, 1923.

[35] Also called the Child Welfare Act—An Act to consolidate and amend the law relating to children and young persons.

[36] (1603) 4 Coke's Reports 123b.

[37] *Id.* 1246.

[38] *Ibid.*

[39] (1800) 27 State Tr. 1281.

[40] This was the third so-called "Charter of Justice" in the legal history of New South Wales, the two preceding "Charters" being in 1787 and 1814. The third "Charter"

of New South Wales to appoint . . . guardians and keepers of the persons and estates of natural fools, and of such as are or shall be deprived of their understanding or reason by the Act of God, so as to be unable to govern themselves and their estates".[41]

James Hadfield was tried on 26th June, 1800, at the Court of King's Bench. On 15th May, 1800, Hadfield fired a pistol at George III at the Theatre Royal in Drury Lane. He was charged with high treason. Opening the case to the jury the Attorney-General said that he apprehended that:

> According to the law of this country, if a man is completely deranged, so that he knows not what he does, if a man is so lost to all sense, in consequence of the infirmity of disease, that he is incapable of distinguishing between good and evil — that he is incapable of forming a judgment upon the consequences of the Act which he is about to do, that then the mercy of our law says he cannot be guilty of a crime.[42]

Later the Attorney-General said:

> In the case of idiots — of those who are afflicted by the absolute privation of reason, so that the person knows not what he does and never has known —a man of that description stands excused because Heaven has not blessed him with that use of the faculty of reason which enables him to distinguish between right and wrong.[43]

Later he said:

> My Lord Chief Justice Coke, in laying down the law upon this subject, is very clear and very precise, he states, in his Pleas of the Crown, that he that is *non compos mentis*, and totally deprived of all compassings and imaginations, cannot commit high treason by compassing or imagining the death of the King; . . . but it must be an absolute madness, and a total deprivation of memory.[44]

After Erskine, who was appearing for Hadfield, had called thirteen witnesses, Lord Kenyon intervened and said: "Mr. Erskine, have you nearly finished your evidence?" Mr. Erskine said: "No, my lord, I have twenty more witnesses to examine."[45] The Lord Chief Justice then, after some discussion, said:

> Mr. Attorney-General, you have heard the facts given in evidence; to be sure such a man is a most dangerous member of society. . . . It is impossible that this man with safety to society can be suffered, supposing his misfortune is such, to be let loose upon the public.[46]

The Attorney-General having said that he certainly had no reason to imagine that this was a coloured case, the Judges intervened and took it into their own hands to stop the case, Lord Kenyon saying:

> The prisoner, for his own sake, and for the sake of society at large, must not be discharged; for this is a case which concerns every man of every station, from the king upon the throne to the beggar at the gate; people of both sexes and of all ages may, in an unfortunate frantic hour, fall a sacrifice to this man, who is not under the guidance of sound reason; and therefore it is absolutely necessary for the safety of society that he should be properly disposed of, all mercy and humanity being shown to this most unfortunate creature.[47]

The Attorney-General said:

> I most perfectly acquiesce in what your lordship has said.[48]

Erskine intervened:

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consisted of Letters Patent of 13th October, 1823.

[41] *H.R.A.* IV/I, 509 at 518.

[42] (1800) 27 State Tr. 1281 at 1286.

[43] *Ibid.*

[44] *Id.* 1287.

[45] *Id.* 1353.

[46] *Id.* 1354.

[47] *Ibid.*

[48] *Id.* 1355.

> We, who represent the prisoner, are highly sensible of the humanity, justice and benevolence of every part of the Court; and I subscribe most heartily to the law as it has been laid down by my learned friend the Atorney-General; most undoubtedly the safety of the community requires that this unfortunate man should be taken care of.[49]

The Attorney-General then having said:

> It is laid down in some of the books that by the common-law the judges of every court are competent to direct the confinement of a person under such circumstances.[50]

Lord Kenyon pointed out:

> At present we can only remand him to the confinement he came from; but means will be used to confine him otherwise, in a manner much better adapted to his situation.[51]

Then one of the junior counsels in the case adverted to the fact that Hadfield was in charge of the jury. Mr. Garrow, of the English Bar (afterwards a Baron of the Exchequer), one of the junior Crown counsel, gave himself one moment of immortality when he said:

> Would it not be for the benefit of posterity if the jury would state in their verdict the grounds upon which they give it, namely that they acquit the prisoner of this charge, he appearing to them to have been under the influence of insanity at the time when the act was committed? There would then be a legal and sufficient reason for his future confinement.[52]

The jury thereupon found the prisoner not guilty, he being under the influence of insanity at the time the act was committed.

Within a matter of a few weeks, Act 39 and 40 Geo. III, c.94, an Act for the safe custody of Insane Persons charged with Offences, was passed. In the preamble it stated that:

> Persons charged with High Treason, Murder or Felony, may have been or may be of unsound Mind at the time of committing the Offence where with 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,[53]

and then went on to provide 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 specifically 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,[54]

and further:

> and if they shall find that such person was insane at the time of the Commission of such Offence, the Court before whom such Trial shall be had shall order such person to be kept in strict Custody, in such Place and in such Manner as to the Court shall seem fit, until His Majesty's Pleasure shall be known; and it shall thereupon be lawful for His Majesty to give such Order for the safe Custody of such person during his Pleasure, in such Place and in such Manner as to His Majesty shall seem fit.[55]

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[49] *Ibid.*
[50] *Ibid.*
[51] *Id.* 1356.
[52] *Ibid.*
[53] 28th July, 1800.
[54] Section 1.
[55] *Ibid.*

This provision, which became s.4 of the New South Wales Dangerous Lunatics Act of 1843 (7 Vic. No. 14), was carried over into s.65 of the 1898 Act[56] and s.23(3) of the Mental Health Act of 1958. There are a few verbal differences between s.1 of 39 and 40 Geo. III, c.94 and ss.23(3) and 23(4) of the Act of 1958, the principal difference being that under the 1958 Act, if a person is found not guilty on the ground of mental ill-health, he is to be confined in a prison, because the Governor has no power to confine him anywhere else; whereas the statute of 150 years earlier gave the Crown a discretion as to where he should be put.

In 1808, by 48 Geo. III, c.96, an Act for the better care and maintenance of lunatics, being paupers or criminals in England, came the first legislative provision for public mental hospitals. This Act arose out of the problem created by *Hadfield's Case*[57] and the hurried statute passed to meet the situation that arose there. It also showed very clearly the effect of the Poor Laws in the limitation of its application. The preamble to the statute said:

> Whereas the Practice of confining such Lunatics and other insane Persons as are chargeable to their respective Parishes in Gaols, Houses of Correction, Poor Houses, and Houses of Industry, is highly dangerous and inconvenient: And whereas it is expedient that further Provision should be made for the care and maintenance of such Persons, and for the erecting proper Houses for their Reception, and also for erecting additional Buildings adjoining or contiguous thereto for the Reception of other Lunatics: And whereas it is also expedient that further Provision should be made for the Custody of insane Persons who shall commit criminal Offences.

The obligation of erecting lunatic asylums was given to Justices at Quarter Sessions, the expenses to be defrayed as county rates; the Justices being empowered to borrow money, to acquire land, to build, to enter into contracts and to sue. By s.17, Justices were given power by warrant to remove lunatic paupers into the asylums, and the parish chargeable was required to pay the asylum a weekly allowance for them; overseers of the poor in parishes were liable to a penalty for neglecting to give to the Justices information of lunatic paupers. Section 19 provided that, instead of locking up and chaining lunatics who fell under the provisions of statute of George II, to which we have referred,[58] they were to be sent to the asylum of the county or to a house licensed under the Madhouses Act; if the legal settlement of the lunatic could not be discovered, the Justices were to send him to the lunatic asylum in the county where he was discovered. Lunatics directed to be detained during His Majesty's pleasure by virtue of the Act of 1800, could be detained in these asylums and Justices were given power to inquire into their settlement and to make an order for their maintenance from their parish of settlement. In 1819 it was provided that a pauper was not to be removed to an asylum without the order of two Justices, assisted by a medical practitioner.[59]

The Act of 1808 and its amendments in 1811, 1815 and 1824 and the Act of 1819 were repealed by the Act of 1828, 9 Geo. IV, c.40, an Act to amend the laws for the erection and regulation of county lunatic asylums and more effectually to provide for the care and maintenance of pauper and criminal lunatics. Some of the provisions of this Act, in a developed form, are found in New South Wales in the Mental Health Act of 1958. The requirement of visitors in the 1828 Act is the legislative parent of Part 9, containing ss.35 and 36 of the Mental Health Act. This Act, which repealed all the earlier statutes, expressly provided that it was not to extend to the Royal Hospital of Bethlehem. It retained the

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[56] Act No. 45, 1898.
[57] *Supra.*
[58] 17 Geo. II, c. 5, *supra.*
[59] 59 Geo. III, c. 127.

Poor Law form of the earlier statutes. Another Act of 1828, an Act to regulate the care and treatment of insane persons in England, 9 Geo. IV, c.41, repealed all the earlier Madhouse Acts and gave the government control through a board of fifteen Commissioners appointed by the Home Secretary, of whom at least five were to be physicians. In the country, control was to be exercised through the Justices and visitors appointed by them.

The provision that "every certificate upon which any order shall be given for the confinement of any person (not a parish patient) . . . shall be signed by two medical practitioners . . . who shall have separately visited and personally examined the patient to whom it relates"[60] was found, substantially in that form, in s.9 of the Lunacy Act of 1898. For most purposes, the Mental Health Act of 1958 still requires the separate examination by two doctors because, though the certificate of one is usually sufficient under s.12 to authorise admission to and detention in an Admission Centre, the patient has to be examined as soon as practicable after admission by two medical practitioners separately and apart from each other, and it is only after two agree that the person is mentally ill that he is brought before the Stipendiary Magistrate. If two do not agree that further observation and treatment in a mental hospital is necessary, the person is to be discharged.

III. THE LAW OF MENTAL ILLNESS IN NEW SOUTH WALES

On 2nd April, 1787, the first Governor of New South Wales was issued with his commission by which he was given a great number of powers necessary for the foundation of a new colony, and among those was one specifically directed to the position of the mentally ill in these terms:

> And whereas it belongeth to us in right of our Royal Prerogative to have the custody of ideots and their estates and to take the profits thereof to our own use finding them necessaries and also to provide for the custody of lunaticks and their estates without taking the profits thereof to our own use. And whereas while such ideots and lunaticks and their estates remain under our immediate care great trouble and charges may arise to such as shall have occasion to resort unto us for directions respecting such ideots and lunaticks and their estates Wee have thought fit to entrust you with the care and committment of the custody of the said ideots and lunaticks and their estates and Wee do by these presents give and grant unto you full power and authority without expecting any further special warrant from us from time to time to give order and warrant for the preparing of grants of the custodies of such ideots and lunaticks and their estates as are or shall be found by inquisitions thereof to be taken by the Judges of our Court of Civil Jurisdiction and thereupon to make and pass grants and committments under our Great Seal of our said territory of the custodies of all and every such ideots and lunaticks and their estates to such person or persons suitors in that behalf as according to the rules of law and the use and practice in those and the like cases you shall judge meet for that trust the said grants and committments to be made in such manner and form or as nearly as may be as hath been heretofore used and accustomed in making the same under the Great Seal of Great Britain and to contain such act and convenient covenants provisions and agreements on the parts of the committees and grantees to be performed and such security to be by them given as shall be requisite and needful.[61]

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[60] 9 Geo. IV, c. 41, s.30.

[61] *H.R.N.S.W.* I pt. 2, 64. Identical provisions were contained in subsequent Commissions: for example Governor Hunter *H.R.N.S.W.* II, 113, Governor Bligh *H.R.N.S.W.* V, 631.

There, for some time, the power remained. Judge-Advocate Bent did not include a suggestion for a Lunacy department in his many proposals for the constitution of a court of civil jurisdiction. The Letters Patent of 1814[62] establishing such court made no provisions affecting lunatics and the matter seems only to have been raised in 1820 when Field, J., in writing to Commissioner Bigge said:

> Although the equitable jurisdiction of the Supreme Court is given by the present charter in very general words, yet I think . . . that the custody of Idiots and Lunatics which the Governour at present has under his commission, should be transferred to this chancery as the whole is included in the courts of equity at Calcutta and Colombo.[63]

In this proposal the Commissioner concurred,[64] yet 4 Geo. IV, c.96, though investing the newly constituted Supreme Court with "Jurisdiction in all cases whatsoever"[65] remained silent on the specific authority of the Court in matters of lunacy.

Very early in the history of the colony machinery had to be set in motion for the care of the mentally unfit, and as early as 1805 juries were called to make inquiry as to whether a person was a lunatic or not. On 18th October, 1805, one Charles Bishop was found to be incapable of governing himself, his chattels and tenements.[66] In 1810 a board of three surgeons replaced a jury in finding Alexander Bodie labouring under such serious mental derangement as to justify the Governor in appointing Committees of his estate.[67] This board evidently continued in operation but it did not replace the inquest by jury, as one writer has suggested,[68] for the jury procedure was clearly in evidence in the civil jurisdiction of the Judge-Advocate's Court. Jonathan Burke McHugo, super-cargo of the brig "*Active*" was examined in February, 1812, by two surgeons[69] who certified that he suffered from a "severe mental derangement".[70] Judge-Advocate Bent thought it advisable to proceed by information, rather than petition as the lunatic had no relatives in the colony and the appointment was a matter of "mere discretion" on the Governor's part.[71] This procedure was adopted after issue of a Commission "in the nature of a writ *de Lunatico Inquirendo*"[72] under the territorial seal and a "respectable jury"[73] of twelve[74] men was assembled. They found that "the said Jonathan Burke McHugo is at the time of taking this Inquisition of an unsound mind and doth enjoy lucid Intervals so that he is not capable of the government of himself his tenements goods, and Chattels, and that he hath been in the same state of lunacy for the space of Three Weeks last past and upwards; but how or by what means the

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[62] These were the second "Charter of Justice"—*H.R.A.* IV/I, 77.
[63] *Id.* at 861.
[64] Report of the Commissioner of Inquiry, on the Judicial Establishments of New South Wales, and Van Diemen's Land, 21st February, 1823, 55.
[65] *H.R.A.* IV/I, 647 at 648, section II.
[66] *Sydney Gazette*, 24th November, 1805. This was one of the very early examples of the summoning of a jury in New South Wales. The twelve "good and lawful men" having said "on their oaths" that Bishop was a lunatic, the Governor committed his estate to John McArthur and Samuel Marsden "they having voluntarily accepted the same from motives of humanity".
[67] Quoted in *The Dawn of Australian Psychiatry* by Professor John Bostock, 1951, privately printed, Mitchell Library, Q362.2/B, at 17.
[68] *Id.* 18. This seems to have been an assumption drawn by the writer from the appointment of three surgeons by Governor Macquarie in Bodie's case.
[69] What is probably the first certificate of lunacy of two medical practitioners is preserved in the State Archives: Walsh and Redfern to Campbell: 1st February, 1812, Colonial Secretary, In-Letters Bundle 6, CS8, 18.
[70] *Ibid.*
[71] *Id.* Bent to Macquarie, undated, 21.
[72] *Id.* Report of the Inquisition, 4th February, 1812, 30.
[73] *Id.* Bent to Macquarie, undated, 25.
[74] *Id.* Report of the Inquisition, 4th February, 1812, 31.

said Jonathan Burke McHugo so became Lunatic the Jurors aforesaid know not, unless by the visitation of God".[75] The Governor accordingly appointed Committees of McHugo's estate. As early as 1811 the first mental hospital was founded at Castle Hill[76] by Governor Macquarie. The far-sighted humanity of this Viceroy is seen in the instructions which he gave to the Superintendent of the asylum.[77] In summary, they were that he should "pay the most particular attention to the cleanliness and comfort" of the inmates and not allow the keepers "to exercise any unnecessary severity" towards them. The food for the lunatics was to be "properly dressed and regularly served out to them at the proper hours"; a "good garden" was to be cultivated to ensure a constant supply of vegetables "particularly potatoes and cabbages"; and strict compliance was to be made with the directions of the surgeon in charge of the asylum. A report was to be furnished to the Governor every month. This standard was not maintained: the Castle Hill establishment was closed and transferred to "a wretched hired Building without outlet of any kind"[78] at Liverpool, the rent of which was paid "out of the Military Chest", prompting Governor Bourke in 1835 to propose the urgent construction of a permanent building at the expense of the colony. Until 1843 the successive asylums were regulated first by the law of England for the time being and then, in the years following 1828, by the English law operative immediately prior to the passing of 9 Geo. IV, c.83, subject to the directions of the colonial government.[79]

The first New South Wales statute dealing specifically with the persons of the mentally ill was the Dangerous Lunatics Act, 7 Vic. No. 14,[80] which was not passed until 1843, though there had been an earlier Act dealing only with property rights, the Imperial Acts Adoption Act, 5 Wm. IV, No. 8, which adopted the English Persons Under Disability Act,[81] amending the law relating to the property belonging to idiots, lunatics and persons of unsound mind. The want of statutory authority was emphatically brought to official notice by the recovery of damages against a magistrate who had made an order with government approbation with regard to the estate of an alleged lunatic.[82] Governor Gipps in his message to the Legislative Council on the passing of the Act observed that the measure was necessary "that no uncertainty may remain as to the course of proceeding which is to be adopted, in respect of the custody of insane persons".[83] The same Act in addition to dealing with those who had been found not guilty on the ground of insanity, went on to make provision for the safe custody and prevention of crimes being committed by persons insane and provided that if any person should be discovered and apprehended under circumstances denoting a derangement of mind and a purpose of committing suicide or some crime for which, if committed, such person would be liable to be indicted, it was lawful for any two Justices of the Peace, before whom such person was brought, to call to their assistance any two legally qualified medical practitioners and if, upon view and examination of the said person and upon proof provided by the two medical practitioners that in their opinion he was a dangerous lunatic or a dangerous idiot, or upon any other proof, the

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[75] *Ibid.*

[76] A very thorough account of this and subsequent mental hospitals and their conditions is contained in Bostock *op. cit.*, 18ff.

[77] Quoted in Bostock, *op. cit.*, 21, from a manuscript source in the Mitchell Library, Sydney.

[78] *H.R.A.* I/XVII, 631.

[79] Governor's Despatches (Mitchell Library A 1233) 43.

[80] "An Act to make provision for the Safe Custody of and prevention of Offences by Persons dangerously Insane and for the Care and Maintenance of Persons of Unsound Mind."

[81] II Geo. IV and I Wm. IV, c. 65.

[82] *H.R.A.* I/XXIII, 287.

[83] *Ibid.*

Justices were satisfied that he was, then it was made lawful for the Justices to commit[84] him to some gaol, house of correction or public hospital there to be kept in strict custody until discharged by order of two Justices of the Peace (one of whom was to be one of the Justices who signed the warrant for his custody) or by one of the Judges of the Supreme Court of New South Wales, or until he was removed to some public lunatic asylum by order of the Governor. Nothing in the Act was to prevent friends and legal officers seeing the insane person or dangerous idiot at all reasonable times. If further provided that if any relative or friend should enter into a recognizance for the peaceable behaviour and safe custody of the idiot or lunatic before two Justices of the Peace or the Court of Quarter Sessions, or one of the Judges of the Supreme Court, then power was given to release him to that person's care and protection.

The requirement of evidence of two medical practitioners carries over into many sections, including the power of the Governor to direct persons under sentence of imprisonment or transportation to be removed to a lunatic asylum and, in s.3, to direct insane persons committed for trial to be removed to a lunatic asylum. Section 5 of the Act provided for the release of persons where two legally qualified medical practitioners certified that he or she was not an insane person or a dangerous idiot and was able to go at large with safety. A certificate to that effect signed by them, if sent to the visiting Justice, or in his absence to the keeper of the gaol or house of correction, was to be transmitted forthwith to the Governor, who was then required to order liberation. Section 7 of the Act brought to the colony of New South Wales the provision about visitors, in that it required that five visitors were to be appointed to each lunatic asylum within the colony, one of whom was required to visit each asylum at least once in every week and to make reports to the Colonial Secretary. Two of the visitors were to be appointed by the Legislative Council according to the Act as first passed, but Lord Stanley censured this severely as a "usurpation . . . by the Legislature of administrative functions"[85] and ordered its suspension until the Governor should have recommended its repeal to the Council.

Though the title of the Act extended merely to dangerous lunatics, s.11, obviously borrowed from the 1828 English Act,[86] made provision for any insane person to be received into a lunatic asylum, so that on the application of one or more of the relatives or guardians of any insane person, if the application was signed and sanctioned in writing by one of the Judges of the Supreme Court and on receiving the certificate of two legally qualified medical practitioners that they had examined and found such person to be of unsound mind, the Governor was given power to direct that such person be received into such lunatic asylum as the Governor might appoint. A form of medical practitioner's certificate was first prescribed by Rules of Court of 3rd July, 1867.[87] There being no Poor Law in New South Wales[88] the cost of removal and maintenance of insane persons was to be defrayed by the colony, provided that no insane person being a convict confined in any asylum should be supported out of any funds of the colony either locally or generally. Relatives were given power to agree with the Superintendent for maintenance in the lunatic asylum of lunatics and idiots. It may be noted that the Poor Laws did have an indirect effect on the development of the lunacy legislation of the colony through the

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[84] This was the first time that Magistrates and Justices in the Colony were invested with such power. Governor Gipps thought this justified charging maintenance of the dangerously insane against public funds of their respective districts of residence. The Council declined to sanction this proposal. *H.R.A.* I/XXIII, 288.

[85] *H.R.A.* I/XXIV, 58.

[86] *Supra*, 9 Geo. IV, c. 40.

[87] Quoted in F. H. Linklater, *The Statutes Relating to Equity and Lunacy and in Force in New South Wales* (1879) 200.

[88] *Vide, Regina* v. *Schofield infra.*

practice which English Justices of the Peace, Overseers of the Poor and Churchwardens had adopted of farming out poor lunatics to private asylums. But the indirectness of their operation in the colony was emphasized by Dowling, C.J., with whom Burton and Willis, JJ., agreed, in *Regina* v. *Schofield*[89] when he said: "We must take judicial notice that there are no Poor Laws in this Colony, and no poor in the legal sense of the word".[90]

This Act was amended by the Dangerous Lunatics Act, 9 Vic. No. 4,[91] and again by 9 Vic. No. 34[92] and later, in 1868, by 31 Vic. No. 19,[93] which, for the first time, set up lunatic reception houses and gave power to justices to commit lunatics to the reception house instead of to a gaol, house of correction or public hospital. The same Act gave authority for the establishment of privately conducted licensed lunatic asylums and gave the Governor power to commit a lunatic to such a licensed house, provided that this was not to be done in the case of prisoners under sentence or persons under committal for any criminal offence. In this, the influence of the English Act of 1774[94] is apparent and clearly shows the influences to which Dr. Jones referred in the comment which appears earlier,[95] especially in the long chain of sections dealing with licensing, the keeping of records and medical case books, the reporting of escapes, death, discharge or removal, to the Colonial Secretary, and the monthly inspections by visitors appointed for that purpose. It may be mentioned that 31 Vic., No. 19 followed at least three earlier attempts to amend the Lunacy Laws. In 1862 the Legislative Council purported to pass "An Act to Regulate Private Lunatic Asylums" but the Assembly rejected this on the grounds that it should have originated in the lower Chamber.[96] A further Bill introduced into the Legislative Assembly in 1863 was discharged without having been read.[97] In 1865 a "Lunatics Further Protection Bill" was put forward, but when it came before the House, Forster moved:

> That the Question be amended by omitting all the words after the word "That", with a view to inserting in their place the following words:— 'the Law regulating admission to Lunatic Asylums requires to be amended, and that a Bill for the purpose ought to be introduced with as little delay as possible (2) That an Address be presented to the Governor, respectfully acquainting His Excellency with the purport of the foregoing Resolution'.[98]

The Speaker having overruled the amendment for impropriety in proposing to present an address to the Crown regarding a Bill yet before the House, the original question was put and negatived.

The combined effect of s.5 of 31 Vic. No. 19 and s.11 of 7 Vic No. 14 concerning the Governor's power to order the removal of a person to an asylum gave rise to a very significant clash between the judiciary and the administration in 1874. Sir Hercules Robinson, the then Governor, made a short visit to Fiji and announced that he would not appoint an Administrator in his absence. This decision appears to have irritated Sir James Martin, the Chief Justice, who evidently expected that he would be sworn in as Lieutenant-Governor. Perhaps he intended to force a resolution of his grievance by refusing to give his certificate for the admission of one McNamara to an asylum, on the grounds that

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[89] (1838) 1 Legge, 97.
[90] *Id.* at 101.
[91] "An Act to alter and amend an Act intituled. An Act to make provision for the safe custody of and prevention of offences by persons dangerously insane and for the care and maintenance of persons of unsound mind," 1845.
[92] For a summary of the objects of this Act, see *H.R.A.* I/XXV, 119.
[93] "An Act to amend the Law for the care and treatment of the Insane."
[94] 14 Geo. III, c. 49.
[95] *Supra* n. 14.
[96] Legislative Assembly, Votes and Proceedings, 1862 (I), 581.
[97] *Id.* 1863-1864 (I), 1024, 1400.
[98] *Id.* 1865-1866 (I), 98.

such certificate would be useless in the Governor's absence. Writing to the Minister for Justice, who had demanded an explanation, the Chief Justice said:

> It . . . very plainly appears (1) that the *Governor* is the person to order the removal of the lunatic to an asylum (2) that he is to take this course only *if he shall think proper* which implies the exercise by him of his own personal judgment and (3) that he alone is the person to determine to what asylum or licensed house the lunatic is to be sent. As I am officially informed that the Governor is absent from the Colony and as I know that until he returns or an Administrator is sworn in the supposed lunatic referred to by you in your letter cannot be legally sent either to an asylum or to a licensed house I have deemed it right not to deal at present with the papers submitted to me . . . If it be contemplated by the Government as I infer by your allusion to this responsibility to send anyone to a lunatic asylum without *the express personal sanction of the Governor* given by him *after a personal examination of the facts* there is the greater reason why I should not be giving my sanction while the Governor is away and the Government is committing so great a violation of the law.[99]

A very vigorous exchange of feelings between the Minister and the Judge ensued, the tone of which may be gathered from the closing lines of the Minister:

> I have not desired, and in no portion of my letter have I attempted, 'to instruct the Judges *how* their duties are to be performed'. On behalf of the Government I called your attention to the duties imposed by law upon the Judges in the matter under review, and pointed out the line of separation between such judicial duties and executive authority, and it cannot be asserted that the Government have 'no concern' in this matter. I may, however, point out that you have taken upon yourself to instruct the Government in the performance of duties with which a Judge of the Supreme Court has 'no concern'.[100]

The Minister then referred to Hargrave, J., who not only volunteered to sign any certificate of admission required in Lunacy, but trenchantly criticized the refusal of the Chief Justice to perform the duty which the Act imposed:

> As to the *legality* of my declining to delay my reports, &c., *after official notice* of the Chief Justice's claim, I consider that as a Judge of the Supreme Court my oath requires me not only to perform every judicial duty 'without fear, favour, or affection', but also without any 'denial or delay' &c. The 44th section of Magna Charta, and the 29th section of Henry the 3rd Charter, have always been the great rule in all questions of judicial duty, and forbid all postponements of 'justice or right'. . . . As to the construction of the words used in the 11th section of the 7th Vic. No. 14, and 5th section of 31st Vic. No. 19 — I cannot concur in the Chief Justice's construction of the words "*if he shall think proper*" as implying any other duty in the Governor than as in the numerous other matters in various statutes and in the general administration of Government, which require the approbation of the Governor to the final action of the Executive authority.[101]

There can be no doubt that Hargrave, J., was right in his view and that the Judges must of necessity have supplied their certificates whether the Governor was in the colony or elsewhere.

Before considering the next major enactment in the Lunacy Act of 1878, three smaller statutes may be mentioned. The first was 11 Vic. No. 27 of 1847, an Act "to render valid the acts and appointments of parties as . . . Committees of the persons and estates of Lunatics under orders made by the Primary Judge

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[99] Papers transferred from the Attorney-General's Department to the Mitchell Library, Sydney (A 1537-3), 148 and 149, 5th October, 1874.

[100] *Id.* 141, 9th October, 1874.

[101] *Id.* 142, 26th October, 1874.

in Equity". The next, 13 Vic. No. 3 of 1849 amended the law "in respect to the safe custody of persons dangerously insane and the care and maintenance of persons of unsound mind", and the last, 24 Vic. No. 19 was "to make better provision for the custody and care of Criminal Lunatics". The Legislative position before 1878 was very far from satisfactory and was described as a "barbarous and cruel system . . . the darkest blot in our character as a community".[102]

The decision of the Full Court in *In the matter of Mackenzie Bowman*[103] may also be noted here. It arose from s.6 of 22 Vic. No. 14 "An Act to expedite Suits and Proceedings in Equity and to facilitate the despatch of Business in the Supreme Court in Banco" (1858). The material part of the section provided that "the Supreme Court may be holden before and by the Primary Judge in Equity . . . for the exercise of the jurisdiction of the Court in cases of lunacy, and over the persons and property of such as are of unsound mind". Counsel sought to show that this meant that the Primary Judge's decisions in Lunacy were final and could not be subject of appeal. The Court did not accept the submission, holding that the jurisdiction of the Full Court had not been taken away nor transferred to the Primary Judge, "but simply the Primary Judge is enabled equally with the Court to hear lunacy cases". So there was an effective appeal to the Full Court, the procedure of which followed that exercised in England by the Lord Chancellor at the time of the "Charter of Justice".[104] Accordingly, appeals in Lunacy were in the nature of rehearings.[105]

The Lunacy Act of 1878, 42 Vic. No. 7,[106] was a comprehensive and detailed statute which made elaborate provision for the care of the mentally ill and of their estates and, in the form of its consolidation by the Lunacy Act of 1898, laid down the pattern of lunacy law in New South Wales for the next eighty years. The statute at once expressly repealed all prior colonial Lunacy legislation with the exception of s.6 of 22 Vic. No. 14, which was however repealed by the necessary intendment in s.92 of the 1878 Act. In *In re W. M.*[107] the Full Court was called upon to determine whether the combined effect of the 1878 and 1898 Acts was to cut down the Court's jurisdiction in Lunacy to that expressly or by necessary implication conferred upon it. It was argued that, as 17 Ed. II cc.9 and 10 were, to the extent of their operation in the colony, repealed by the 1878 Act, the powers conferred by clause XVIII of the "Charter of Justice"[108] were impliedly taken away. The Court held that the statute of Edward II was declaratory only of the common law and that its colonial repeal had no effect on the "Charter of Justice", or its extended provisions pursuant to 9 Geo. IV, c.83. In the judgment of Owen, J.:

> I cannot see that the Lunacy Act of 1878 repeals or takes away the general powers of the Court. So far as the Court is concerned, it only substitutes a new mode of enquiry by petition to the Court itself, for the old mode of

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[102] Edward Pratt to the Colonial Secretary, 28th March, 1866, Parkes' Correspondence N-O-P, 547—Mitchell Library, Sydney (A926). Dr. F. Campbell, Superintendant of Tarban, Gladesville, felt by 1866 that the Government should be aware of "the signal and complete revolution which I was the first to effect in this colony and this Hemisphere in the general management of lunatics with all its happy concomitants and consequences, and with such completeness as almost to obliterate the very memory of former barbarities and cruelties". Letter to Parkes, 29th September, 1866, Parkes' Correspondence, Vol. 9, 148 at 150—Mitchell Library, Sydney (A879).

[103] (1867) 6 S.C.R. 399.

[104] Of 1823. See n. 40 *supra.*

[105] *Ex parte Fosbery* (1904) 4 S.R. (N.S.W.) 74.

[106] This enactment is supposed to have received keen sponsorship by Dr. Manning then President of the Intercolonial Medical Congress of Australasia—"Lunacy Legislation in the Australian Colonies" Armstrong in the Report of the Second Session of the Congress for 1889, 877 at 879.

[107] (1903) 3 S.R. (N.S.W.) 552.

[108] See n. 104 *supra.*

> enquiry by commission *de lunatico inquirendo*. I, therefore, am of opinion that the powers conferred on the Court by the Charter of Justice still remain vested in the Court as fully under the new process as under the old process by commission.[109]

Thus, the statutes did not affect the jurisdiction of the Sovereign as the fountain of justice; and, as to the commitment to custody of the persons of lunatics, it only cut down his prerogative right to take the property of lunatics regarded as derelicts and to put the proceeds in his privy purse. Counsel's contention for a total repeal was, in the view of Walker, J., a confounding of jurisdiction with procedure: the alteration in the mode of exercising the jurisdiction was an entirely different thing from repealing the jurisdiction itself.[110]

Section 4 of the 1878 Act is repeated verbatim in the 1898 Act.[111] It retained the criminal procedure by providing that, upon information on oath before a Justice, if it appeared that any person was insane and without sufficient means of support or was wandering at large or was discovered under circumstances that denoted that the person was likely to commit some offence against the law, the Justice was given power by order under his hand to require a Constable to apprehend that man and bring him before two Justices. Constables finding persons so wandering or under such circumstances were given power, without any order, to apprehend and take persons before two Justices.[112] Section 5 of the 1878 Act is also repeated verbatim in the 1898 Act[113] and uses the same procedure of the information on oath to a Justice in the case of persons deemed to be insane, not being taken proper care of, or being cruelly treated. Any constable could give that information upon oath to a Justice who was empowered either himself to visit and examine the person and make inquiry into the case, or to order under his hand some medical practitioner to visit and examine him and report in writing to the Justice his opinion. If it appeared upon such personal visit, examination or inquiry by the Justice or upon the report of the medical practitioner that the person was insane and not under proper control and care or was cruelly treated or cruelly neglected by any relative or other person having charge of him, the Justice was to require any constable to bring such person before two or more Justices. Both Acts contained a provision requiring the Justices before whom such person was brought to call to their assistance any two medical practitioners who had previously examined such person apart from each other and had given the requisite special certificate.[114] The Justices were to proceed in all respects as if such person were brought before them in a Court of Petty Sessions and were given power to direct him to be removed into some hospital for the insane or licensed house and to be received into and detained there accordingly. The power of the Supreme Court to find persons insane was preserved.[115]

The Governor was given power to appoint hospitals[116] and to grant licences for houses and premises for the reception[117] and temporary treatment[118] of

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[109] At 567.
[110] At 569.
[111] S.4 (1).
[112] "Conceive a gentleman of education and refinement, of a very sensitive nature, and as gentle as a child, suddenly arrested by two policemen in uniform, at a time when (whatever he may have been previously) he was certainly to all appearance quiet and sane, removed to a felon's prison, put into a strait waistcoat, and thrust into a black cell for three days and three nights. Is it any wonder that he becomes a raving maniac, even without the supposition of there being any mental derangement in the first instance?" A comment on an actual arrest, in Parkes' Correspondence, N-O-P, 549—Mitchell Library, Sydney (A926).
[113] S.5.
[114] S.6 in each Act.
[115] S.14 (1878), s.16 (1898).
[116] S.17-18 (1878), Part II (1898).
[117] S.24 (1878), s.31 (1898).
[118] S.45 (1878), s.52 (1898).

the insane and to declare wards of any hospital[119] to be wards for the temporary reception of the insane. The detention of insane patients in reception houses, gaols or public hospitals beyond fourteen days was prohibited[120] unless the medical officer certified that the person was not in a fit state to be removed or would be benefited by remaining therein, in which event the removal was postponed. Justices were given power to order the discharge of a person from any reception house, gaol or public hospital as an insane patient on receipt of a certificate from the medical officer that he was of sound mind or might, with safety, be discharged to the care of a relative or friend.[121] Both the 1878 and 1898 Acts[122] made provision for hospitals for the criminally insane, and in substance, repeated the terms of the English Act of 1800[123] and the New South Wales Act of 1843[124] as to persons charged with offences who were acquitted on the grounds of insanity. Provision was also made for an Inspector-General to be appointed by the Governor-in-Council to visit and report on hospitals and licensed houses,[125] with power to order the removal or transfer of patients,[126] or their entire discharge.[127] The person signing an order or request for a patient's admission could similarly obtain his discharge,[128] unless the patient were dangerously or physically unfit.[129] Statutory procedure for declaring persons insane and for the appointment of Committees of their estates was included in Part VII of the two Acts.

By the 1878 Act all the machinery necessary to constitute a separate Lunacy jurisdiction was provided. In particular, by s.105 there was to be a Master in Lunacy to undertake the general care, protection and management or supervision of the management of the estates of all insane persons and patients in New South Wales. He was to supervise the duties of all committees and he was to take care of, collect and administer the property and estates of all insane patients. Supplementary powers were contained in ensuing sections of Part VIII of the Act. Arthur T. Holroyd, being Master in Equity, automatically took the position of Master in Lunacy on 16th May, 1879, but his staff of clerks was not appointed until August of that year and the office was not in full working order until early in 1880.[130] The greatest immediate advantages which Holroyd saw in the new administration were the saving of expense of the old procedure by writ *de lunatico inquirendo* and the circumvention of the previously prohibitive costs of recovering property of insane patients when of less value than one hundred pounds.[131]

The Lunacy Amendment Act (No. 39 of 1934) for the first time authorised the reception of voluntary patients into hospitals for the insane and into licensed houses. If a person was desirous of submitting himself for treatment, he had to apply in writing to become a voluntary patient and receive the assent of the Inspector General, and he could not be detained for more than seven days after having given notice to the Superintendent of his intention or desire to leave. This was, as far as we have been able to discover, the first introduction into the law of New South Wales of the principle of opening the doors of mental hospitals to those who voluntarily desired to go there for treatment, and the conse-

[119] S.48 (1878), s.55 (1898).
[120] S.49 (1878), s.56 (1898).
[121] S.51 (1878), s.58 (1898).
[122] Part V in each Act.
[123] 39 and 40 Geo. III, c. 94.
[124] 7 Vic. No. 14.
[125] Part VI in each Act.
[126] Part VI (2) in each Act.
[127] S.87 (1878), s.96 (1898).
[128] S.84 (1878), s.93 (1898).
[129] S.86 (1878), s.95 (1898).
[130] Legislative Assembly, Votes and Proceedings, 1880-1881 (2), 51.
[131] *Id.*, 52.

quent addition of s.24A to the 1898 Act has led to much wider provisions for the admission and detention of voluntary patients, which are found in Part VI of the Mental Health Act of 1958.

We have referred earlier to the Mental Defectives (Convicted Persons) Act of 1939. Where a mentally defective person has been convicted and sentenced for offences in respect of which penal servitude or imprisonment for a term of two years or upwards may be imposed, or wilful and obscene exposure of the person, the Minister may request the Inspector-General of Mental Hospitals to cause the prisoner to be examined by two legally qualified medical practitioners, separately and apart from each other. The Minister is then empowered to direct an inquiry before a Magistrate and if upon that inquiry the Magistrate is satisfied that the prisoner is a mentally defective person within the meaning of the Act, he is empowered to order that the prisoner be detained in an institution during the Governor's pleasure. This period, though it may run concurrently, may also exceed any term of imprisonment to which the prisoner has been sentenced. The right of appeal to Quarter Sessions is preserved. Under this Act once an order is made, if an appeal to Quarter Sessions or to the Supreme Court is unsuccessful, then, by s.5, the prisoner is kept as long as the Minister likes to keep him. If it appears from medical or other evidence that it is no longer necessary in the interests of the patient or of the general public that he should be further detained, or if an application is made by a relative or friend who is able to furnish satisfactory evidence that he is suitable to undertake the custody and care of the patient and is financially in a position to provide for his welfare, the Minister may recommend to the Governor that the patient be discharged, subject to such conditions as the Minister may think fit to impose. Provision is made for return to the institution of a person who has been dealt with under this Act in the event of his committing a breach of any of the conditions of his discharge or in his own interests or those of the public. The administrative control of institutions under this Act is vested in the Comptroller General of Prisons. A mentally defective person becoming insane during his detention is removed from that control to a mental hospital.

The Child Welfare Act[132] of the same year made express provision for mentally defective children whose cases called for segregation and special treatment, along lines which are not dissimilar to the Mental Defectives (Convicted Persons) Act. Even in those provisions one sees the two medical practitioners requirement of separate and apart examinations re-enacted by s.45.

The need for some provision to obtain finality in cases where a person charged with an offence had been found to be mentally ill and confined in a mental hospital led to the enactment of the Lunacy Amendment Act (No. 38 of 1946). The provision, which is now found in s.26 of the Mental Health Act of 1958, gave the Attorney-General a discretionary power "if he is of opinion that the question whether a patient is fit to plead if put upon his trial should be determined by a jury", by order under his hand, to "direct that the patient be removed from the hospital . . . to some gaol . . .". The order was stated by ss. (2) to be a sufficient warrant for the patient's removal from the hospital to the gaol. The Attorney-General was further empowered to order that a jury of twelve persons be empanelled for trial of the issue of fitness to plead, such issue to be tried at a time and place appointed by the Attorney-General before a Judge of the Supreme Court or Chairman of Quarter Sessions. The jury of twelve was to be empanelled from thirty-six men summoned in accordance with procedure adopted at a criminal trial where, upon trial on an indictment, a question was raised whether the accused was fit to plead. If the jury found the patient unfit

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[132] Act No. 17, 1939.

to plead, he was to be returned to the hospital from which he was removed; and if they found him fit to plead, he was to be returned to the gaol; and if a bill were found against him he was to be placed upon his trial. At the trial of the issue, the patient was entitled to give evidence on oath or to make an unsworn statement. It was also provided that if the jury found that the patient was fit to plead and he was placed upon his trial, he should be entitled to set up the defence of insanity or, to use the later terminology, mental illness. The Act also made provision for the case where a person was found fit to plead but no bill was found against him, in which event the Attorney-General was bound to issue a certificate to the Judges of the Supreme Court, any one of whom could thereupon by warrant, under s.358 (1) of the Crimes Act,[133] direct the gaoler to discharge him from custody.

These particular "fitness to plead" provisions came into existence as the result of public agitation in the case of Boyd Sinclair. On 24th September, 1935, Sinclair, who was just 17, shot dead the driver of a taxi cab. Roughly six months later Sinclair was arrested by the police and charged with murder, but a week after that he was certified as insane and the charge was not proceeded with. Some nine years after he had been in a mental hospital, an application was made to the then Chief Judge in Equity, Nicholas, J., to determine Sinclair's sanity. The Judge held that, by s.99 of the 1898 Lunacy Act, under which the application was made, he had no jurisdiction, Sinclair being a person who had been placed for trial in the Criminally Insane Division under s.67 of the Act. As a result of that decision, an amendment was introduced in 1944 by Act No. 38 of 1944, by which it was provided that if a Judge received information on oath or had reason or cause to suspect that any person who had been removed from any gaol, reformatory, prison or penal establishment or other place of confinement and was confined in any hospital for the insane or for the criminally insane, was of sound mind, the judge was given power to order that such person be brought before him for examination, and if on examination it appeared to the judge that the person was of sound mind, the judge was empowered to issue an order that the person be removed to the gaol, etc., or to some other gaol or place of confinement to be dealt with according to the law. A further application under this section was made again to Nicholas, CJ. in Eq., who said that he was unable to hold that Sinclair was of sound mind. Apparently Sinclair's condition was such that from time to time he had outbreaks of disturbances and at other times was rational. The Chief Judge in Equity, however, was of opinion that Sinclair should be brought to trial without further delay, and, if that were not possible, that some means should be found of establishing his guilt or innocence. This led to the 1946 amendment of the Lunacy Act and to Sinclair's subsequent conviction for murder, a jury having found that he was fit to plead.[134]

The first leucotomy provisions were introduced into the Lunacy Act of 1898 as s.179A by the 1952 amendment,[135] and are now found in ss.108, 109 and 110 of the Mental Health Act of 1958. As was said by Cardozo, J., of the United States Supreme Court, "Every human being . . . has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages".[136] In the case of the person who is quite sane, no question can usually arise, except in the way of exceeding the limits of a permitted operation. Sometimes the problem arises of an unforeseen extension of the type dis-

[133] Act No. 40, 1900.
[134] The High Court appeal is reported in (1946) 73 C.L.R. 316.
[135] Act No. 31, 1952.
[136] *Schloendorff* v. *New York Hospital* (1914), 211 N.Y. 125 at 129.

cussed in Taylor's *Medical Jurisprudence*,[137] where the learned author cites the example of a compulsory amputation of a leg following a mishap in the operation causing some damage rendering this inevitable. At the same place, Taylor refers to an unreported case where the plaintiff, who was a nurse, alleged that she had expressly forbidden the removal of both ovaries though she had consented to the removal of one, in which case the plaintiff was unsuccessful. In Halsbury's *Laws of England*,[138] *Beatty* v. *Cullingworth*[139] is noted in a footnote to an assertion that a surgeon who performs an operation or part of an operation without his patient's express or implied consent is guilty of a trespass.

Though the principle itself seems clear enough, there is very little authority on the proposition and it was doubtless this that led to the 1952 amendment which applied to "Leucotomy, electro-convulsive therapy, electro-narcosis therapy, insulin shock and such other operations or medical or therapeutic treatments to which the Governor by proclamation may apply the provisions of this section". The 1958 Act does not state the matter in so much detail but gives the same effect by referring to "leucotomy and such other operations or medical or therapeutic treatments".[140] The power to apply these treatments is limited to those which the Governor may by proclamation declare shall be an operation or medical or therapeutic treatment in respect of which the provisions of the section shall apply. The consent of the Director of State Psychiatric Services is a necessary condition before the section operates and the Director is not authorised to give his consent unless he is satisfied that the operation or treatment is necessary or desirable for the safety or welfare of the patient or is a reasonable and proper type of operation or treatment, and in the case of leucotomy or any other operation in respect of which a Consultative Committee has been constituted, the Consultative Committee had recommended an operation. Notices are required to be given in respect of the latter group, stating the name of the patient, the nature of the operation or treatment and the time within which disapproval may be expressed by certain relatives. If disapproval is unjustifiably or unreasonably expressed, the Director may refer the matter to the Master for enquiry and determination, and any person who appears to the Master to be interested in the matter may be heard in person or by counsel. There is an appeal to the Full Court of the Supreme Court from any order of the Master. Apparently the legislature inserted these very marked limitations to ensure that these operations would only be performed after due consideration and in the proper cases, though there is an express provision giving the Superintendent of a Medical Hospital, where he is of the opinion that the delay incurred in obtaining the consent of the Director would endanger the life of any patient power to himself perform the operation or apply the treatment or consent to it being done by some other doctor, but he is required forthwith to report in writing to the Director.

The original section dealing with operations, as originally inserted in the 1952 Act, was varied somewhat, as we have pointed out, in 1958. By s.109, electro-convulsive therapy, electro-narcosis therapy and insulin shock and such operations and medical or therapeutic treatments as the Governor declares in accordance with s.109(1)(b) can now be performed, notwithstanding that the patient or any other person legally entitled to consent to the operation has not consented thereto; but before this can be done, the Superintendent has to determine in writing that the operation or medical or therapeutic treatment is necessary or desirable for the welfare or safety of the patient proposed to be operated on or treated or is a reasonable and proper type of operation or treatment to be

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[137] A. S. Taylor, 1 *Medical Jurisprudence* (11 ed. 1957) 65.
[138] 26 Halsbury, *Laws of England* (3 ed. 1952) "Medicine and Pharmacy" 18.
[139] (1896) not reported.
[140] S.108.

performed upon or applied to the patient. As ancillaries to these powers, which give very wide rights over the persons of human beings and may in one instance permit quite serious mutilating operations, and in the other instance the subjection to very unpleasant and painful treatments, proclamations have to be laid before both Houses of Parliament and lie on the Table for fifteen sitting days, during which time if either House of Parliament disallows the proclamation it shall not take effect. Furthermore, by s.110 (3), no action, claim or demand shall lie or be made or allowed by or in favour of any person against Her Majesty, the Director, the Superintendent or any member of a medical staff or a medical practitioner referred to in ss.108 and 109 in respect of any damage or loss or injury sustained or alleged to be sustained by reason of the enactment of those sections; or the giving of any consent by the Director or a superintendent; or as a result of any operation or treatment performed or applied in accordance with the provisions of those sections.

The very wide terms of s.110 (3) might seem on the face of them to exclude an action for negligence and it one day may have to be determined by the courts whether an operation negligently performed, resulting in damage or loss or injury is one performed according to the provisions of ss.108 and 109. On one reading of the sections, there is an absolute protection to the surgeon, but on another reading, they could not be held to extend to assist the negligent surgeon who failed to take due care in the conduct of an operation to which the sections apply. Before leaving this particular aspect of the matter, the interesting case of *Marshall* v. *Curry*[141] in the Nova Scotia Supreme Court, in which the judgment of Chisholm, C.J., contains a detailed examination of *Beatty* v. *Cullingworth*,[142] also contains a close review of the American cases decided up to that date. The Chief Justice, from his examination of the cases, said that these propositions of law find support:

> 1. That in the ordinary case where there is opportunity to obtain the consent of the patient it must be had. A person's body must be held inviolate and immune from invasion by the surgeon's knife, if an operation is not consented to.
> 2. That such consent by the patient may be express or implied. If an operation is forbidden by the patient, consent is not to be implied.
> 3. That consent may be implied from the conversation preceding an operation or from any antecedent circumstances.[143]

And further:

> I am unable to see the force of the opinion, that in cases of emergency, where the patient agrees to a particular operation, and in the prosecution of the operation, a condition is found calling in the patient's interest for a different operation, the patient is said to have made the surgeon his representative to give consent. There is unreality about that theory . . . . I think it is better, instead of resorting to a fiction, to put consent altogether out of the case, where a great emergency which could not be anticipated arises, and to rule that it is the surgeon's duty to act in order to save the life or preserve the health of the patient; and that in the honest execution of that duty he should not be exposed to legal liability.[144]

It was, no doubt, because of the existence of the first three rules which Chisholm, C.J., enunciated that the legislature regarded it as necessary to insert the leucotomy provisions and the electro-narcosis provisions into the Mental Health legislation in New South Wales. Some day a question might arise in respect of a patient too mentally deteriorated to be able to give consent and

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[141] (1933) 3 D.L.R. 260.
[142] *Supra.*
[143] At 274.
[144] *Ibid.*

perhaps with no relatives, who for instance has a condition from gangrene such that, unless his leg is amputated, he is certain to die and where the problem may arise as to the obligation of the surgeon either to let him die or perform an operation which he might not be entitled to perform because it is not one of those in respect of which a proclamation is in existence under the Mental Health Act. In a world in which there is a developing concept of tortious liability, such a case, if it ever arose, might present difficult problems.

IV. THE MENTAL HEALTH ACT, 1958, OF NEW SOUTH WALES

The Mental Health Act, No. 45 of 1958, while making essential changes to the Law of Lunacy as previously effective — even relegating the very word "lunacy" to limbo — maintains many links with earlier law. So, 48 Geo. III, c.96 and 9 Geo. IV, cc.40 and 41 obviously grounded respectively the provisions for suspected lunatics wandering at large, for visitors and for two medical certificates, even though those statutes probably were never adopted as law in the then Colony of New South Wales. According to Dr. Jones[145] 14 Geo. IV c.49, another Act which probably did not apply directly in New South Wales, established five important principles in lunacy legislation. All of these have been reflected in the Lunacy Act, 1898, of New South Wales and basically maintained in the Mental Health Act, 1958. The principles were:

(1) Licensing by a public authority of private institutions run for profit;
(2) notification of the reception into such institutions of a person alleged to be insane;
(3) visitation by Commissioners, whose method of appointment was prescribed by parliament;
(4) inspection to insure that those wrongfully detained were released, and that those rightfully detained were treated with humanity;
(5) supervision by the medical profession.

To trace the current provisions, s.11 of the Mental Health Act provides for the licensing of various hospitals, that is, all private institutions run for profit; s.11 (7) of the same Act requires the keeping of records and the furnishing to the Director of State Psychiatric Services of the prescribed particulars in connection with the admission, treatment, discharge, removal, absence or death of every patient; ss. 35, 36 and 102 provide for visitation of institutions; ss.14 and 17, as well as other sections, ensure the release of persons who cease to be mentally ill; and ss.8 and 11 (6) provide for supervision by the medical profession.

At the same time, the 1958 Mental Health Act introduced into the law of New South Wales quite a number of new concepts. Of those, however, the most notable are represented by the change from indefinite certification to certifications which, in the first instance, are temporary only and for not more than six months. By s.12 of that Act the first admission and detention is to an Admission Centre which, though it may stand physically on the grounds of a mental hospital, is legally not part of it, and in some instances this can be done on the opinion of one medical practitioner only. As soon as practicable after admission the Superintendent has to cause the person to be examined by two medical practitioners, separately and apart from each other. Unless they recommend that further observations and treatment in a mental hospital or an authorised hospital are necessary, the person is to be discharged. If they recommend that further observation and treatment in a mental hospital or authorised hospital

[145] *Op. cit.* 39.

are necessary, the Superintendent of the Admission Centre is required to bring the person as soon as conveniently may be before a Stipendiary Magistrate, who is required by s.12 (9) to hold an inquiry and is empowered to direct that such person be detained in an Admission Centre or admitted to or detained in a mental hospital or authorised hospital for such period not exceeding six months as may be specified. The Act provides for the setting up of Mental Health tribunals consisting of a psychiatrist, a medical practitioner and a barrister or solicitor before whom, at the expiration of six months, all temporary patients are to be brought, and it then becomes the function of the Tribunal to determine whether the patient should be re-classified as a continued treatment patient and detained for further observation or treatment, or as a temporary patient for a further period not exceeding three months, or to order his discharge. All continued treatment patients are required to be examined by the medical superintendent, either directly or through someone else, at prescribed intervals. Section 18 preserves the power of the Supreme Court, where a judge receives information on oath or has reason or cause to suspect that any person who is not mentally ill is detained, to order the Superintendent to bring the person before him for examination, and if it appears on the examination of the person and of the Superintendent and of the medical or other witnesses that the person is not mentally ill, the judge may order his immediate discharge.

One can in no sense regard the Mental Health Act of 1958 as representing the final legislative provision in this field. In the report of the Royal Commission on the Callan Park Mental Hospital, 1961, it was stated:

> It is a common phenomenon that social and legal thinking lags behind that of the medical specialist in his own sphere. For instance, the heading of Part I of the Lunacy Act No. 45 of 1898 commenced with the words: 'Proceedings by which persons of unsound mind may be placed under restraint'. *The Australian Digest*, Volume 13, under the heading 'Lunacy', contains no reference to treatment but to the 'confinement and restraint of lunatics'. This, of course, followed the tradition of the Act of 1744, 'an Act to amend and make more effectual the law relating to rogues, vagabonds and other idle disorderly persons and to houses of correction' (17 Geo. II, Ch. 5), which Act, by s.20, gave power to Justices to lock up and chain 'lunaticks' in a secure place. This secure place was almost invariably a gaol or house of correction (*Lunacy Law & Conscience;* Jones; 1956. International Library of Sociology and Social Reconstruction, p.30). Fortunately in this State there has been a legislative departure from that point of view by the Mental Health Act No. 45 of 1958 which abandons the terminology of lunatic asylums and lunatics and the idea of lunatic asylums as primarily places of restraint and confinement, and substitutes the idea of mental hospitals being places of treatment and the mentally ill person as one requiring care, treatment or control for his own good or the public interest.[146]

That report indicates some of the difficult problems that mental hospitals have to face, because it is not possible for anybody to be received into one except by virtue of a legal authority; even in the case of the voluntary patient, who must, either by himself or by certain specific relatives, sign the appropriate form without which it is illegal for him to be a patient and, *a fortiori*, in the case of the compulsory patient. This must inescapably put the mental hospital into a legal pattern in which it has some attributes at least of a place of confinement. It is pointed out in the same report that the mental hospital

> has to care for patients, to treat them, and if possible to rehabilitate them.

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[146] At 35.

> It also has an obligation to a community which in its attitude lags far behind medical thinking in this field, because, while some patients have anti-social or dangerous tendencies, they are a very small proportion of the whole, and the public regards them as being a bigger proportion than they really are. This means that, while the process of the further education of the public to accept the mental hospital continues, the mental hospital has to protect the community, not only against the anti-social or dangerous patient, but also against the community's own commonly-held fear (albeit unjustified) of mental patients generally.[147]

It is a frequent view that the mentally ill have no rights, and that mental illness is to be seen in terms of "black and white", which it certainly is not. That point of view is seen in legal attitudes towards legislation dealing with the care of the mentally ill, because, in the case of the great majority of mental patients, it may fairly be asserted that the great need in respect of them is legislation directed towards their rehabilitation rather than towards their restraint.

At the present time, as far as the authors of this article are aware, there is no legislation dealing with the rehabilitation of former mental patients. The professional lawyer still thinks of the treatment of mental patients in the terms that "so-called mental diseases are still regarded by mankind with fear, aversion and ostracism".[148] He might well oppose the widening of the concepts of the treatment of mental disease as representing impingements on the liberty of the subject, to be dealt with by way of *habeas corpus* or action for malicious prosecution or false imprisonment;[149] whereas it may well be that the true view is that a mental hospital is a place in which, to use the words of Dr. Cunningham Dax, Chairman of the Mental Hygiene Authority of Victoria, "a patient should be followed all the way through from his leaving the community and, wherever possible, back into the community. Having treated and resocialised the patients, you should give them industrial therapy and freedom, until they are once again ready to go out to the community. All this should be part of the general programme for the promotion of mental health and the prevention of mental ill health; using all available community facilities to enable it to be carried out."[150] That is known as the concept of the therapeutic community in a mental hospital and, as stated by the Royal Commission to which we referred, such concept "is affected by the fact that, in the present state of human knowledge, some degree of custodial care is required for certain patients. Obviously, the patient who, if released, would be a danger to himself, his family or to the public must be prevented from leaving. That this problem exists is the common view of everyone but the claim is that, with proper treatment and proper rehabilitative factors operating and with a more enlightened and more informed public opinion, the custodial problem can be reduced to an absolute minimum."[151] The very statement of the problem in a legal system of our type does underline the very serious legal difficulties which sociological and medical changes are bringing about in this area of the law. It may well be that within the next few years we will have to see new Mental Health legislation separating off the mentally defective from the mentally disturbed — the few anti-social cases from the great majority of harmless ones — and making provision for adequate rehabilitation. This would be in addition to amendments of a substantial kind which may become necessary in such provisions as the

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[147] *Id.* at 37.

[148] *Action for Mental Health*, a report by the U.S. Congressional Joint Commission on Mental Illness and Health (1961), 66.

[149] *Cf. Notes on the Mental Health Act*, 1958 by the Hon. Mr. Justice F. G. Myers in *The Bar Gazette* (N.S.W.) No. 3, 3.

[150] At 36.

[151] *Ibid.*

Social Services Consolidation Act,[152] which now denies any pension rights to the mentally ill, the Arbitration Acts,[153] which make no adequate provision for differential payments to the physically or mentally disabled and the Aged Persons Homes Act[154] which may well require extension to deal with certain types of mental patients, senile or not, who ought to be placed in institutions intermediate between the mental hospital and the community. These actual and possible developments will require most serious attention by, and pose severe challenges to, legal thinkers in changing their concepts of the position of the mentally ill.

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[152] (Commonwealth) Acts Nos. 22, 1951 and 107, 1952: Social Services Act 1947, as amended.

[153] (Commonwealth) Conciliation and Arbitration Act 1904, as amended. (N.S.W.) Industrial Arbitration Act, 1940, as amended.

[154] (Commonwealth) Act No. 47, 1957, as amended.

* Of the Supreme Court of New South Wales, Royal Commissioner appointed to enquire into certain matters affecting Callan Park Mental Hospital, 1961.

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