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MEDICO-LEGAL INSANITY AND THE HYPOTHETICAL QUESTION[1]

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Both of these terms should be abolished. The hypothetical question should never be allowed in any court of justice. The determination of the mental condition and responsibility of the criminal should be the province of medical men and of no one else. Why should physicians be asked to pass upon legal responsibility? Their opinion in legal matters is not considered of any value by the lawyers. It is time that medical men took a stand, and by decisive action, that they alone are competent to decide upon the presence or absence of mental disease. It is as absurd for lawyers or for the general public from which a jury is constituted to give their opinion in a doubtful case of mental disease as it would be in a doubtful case of pneumonia or appendicitis or cancer.

The question of insanity, as such, should be taken from "a legal, irresponsible jury," as Dr. Henry Maudsley calls them, and placed in the hands of a medical commission, whose decision would be final. If the judge who happens to preside over trials of capital cases should have a daughter afflicted with mental disease, about whose diagnosis, including the form of disease and responsibility, two physicians disagree, would he take his daughter and the two disagreeing physicians before a jury of laymen to determine which one was right and to ascertain the form of his daughter's disease and the degree of her responsibility? Certainly not. And yet such is the procedure which we witness almost daily in our courts of justice.

From a recent article on "Expert Testimony" by Dr. William A. White I gather the following:

"Strangely, and for what reason I know not, the expert who is not permitted to say that the defendant is sane or insane, because that sacred duty resides with the jury, is permitted to say whether in his opinion the defendant was responsible or irresponsible at a certain time. . . . The principles which I advocate are that the criminal, and not the crime, should be made the matter of prime consideration, and that the sentence, or better the decision of the court, should be calculated to cure the social illness as it has been shown to exist in the conduct of the defendant. All cases of

[1]Read before the medical staff of Pub. Health Hosp. No. 36, Parker Hill, Roxbury, Mass., February, 1922.

[2]Secretary, Massachusetts State Board of Insanity, 1914-15-16. Member American Institute of Criminal Law and Criminology, etc.

pneumonia are not treated alike just because the disease happens to be pneumonia. The patient is treated and allowances have to be made for age, previous condition of health, of resistance, etc. The patient is treated, and not the disease, and it is as illogical to sentence the person who has committed a certain offense to a specific term of imprisonment as it would be to decide, when a patient is admitted to the hospital, the day upon which he shall be discharged. Theoretically, I believe the jury should be limited to a determination of the facts, that is, in a criminal case have to pass only upon whether the accused did or did not commit the anti-social act as charged. If he is found guilty, then it is the right of the state to prescribe the treatment which, after careful consideration by those skilled in such matters, seems best calculated to have the best results in the end."

Keedy says, in a recent article on "Criminal Responsibility," that

"Mental disease constitutes a medical problem, and the diagnosis and symptomatology of it should be determined by a physician. Criminal responsibility, on the other hand, is a legal question, and the rules for determining such responsibility should be fixed by law and determined by the legal profession."

This suggests that a law should be passed fixing criminal responsibility; that is, if medical opinion states that there is a mental disease, then should the accused by held responsible? Perhaps at first the law should state that no man shall be tried who is suffering from an incurable mental disease or a chronic mental disease, or that no man shall be tried who at the time of the commission of a crime was suffering from mental disease. We have somehow got to do away with the question of responsibility, which is the root of all evil in medical testimony. For, as one physician says, "If a man has a mental disease, who can determine how far he is responsible?" It cannot be determined by physicians in hospitals for mental diseases, for if these patients are responsible, they should be taken out and tried and punished, which is never done because it is universally recognized that a patient suffering from mental disease in a hospital is not responsible for his acts. Therefore, why should a person suffering from mental disease outside of a hospital be any more responsible for his acts? If medical opinion is that a man who has broken the law or who has committed an overt act is suffering from mental disease, whether serious or not, that person should be committed to a hospital for mental diseases, and should not be tried, convicted and sentenced to prison or executed.

Buckham, of London, as long ago as in 1883, said:

"If it is considered imperatively necessary that the judges should determine the question of insanity by some 'precedent' or 'legal maxim,' so as legally to control responsibility, then in the name of consistency change the law, so that the expensive farce of calling experts shall be

abolished. While the question is sanity or insanity, let it be determined by medical experts who alone are competent judges of that fact."

Dr. William Wood, of London, in 1852, proposed verdicts of "Guilty with extenuating circumstances," and said, by way of illustration:

"It is the immorality of the act, rather than the act itself, which deserves punishment, and this can only be estimated by weighing carefully all the circumstances which have led to its perpetration, and amongst these the most important of all is the mental condition of the accused."

He gives many instances of where the example of executions obviously had no effect in deterring other criminals. He gives the case of a man who killed the President of the Republic (France) on the 14th Sept., 1851. The jury brought in a verdict "Guilty of murder with extenuating circumstances"; and Jobard, the assassin, was condemned to hard labor for life. (Jobard was pronounced a monomaniac.)

In 1852, the judges of the House of Lords of England laid down as the established law of the land that an offender, even under the influence of insane delusion, was still punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law. Comparatively few, even of the inhabitants of asylums, but know the difference between right and wrong and are able to appreciate the consequences of their acts.

There are certain types of individuals who certainly have an irresistible impulse to destroy themselves; we will say, to cut their own throat. This is usually condoned by society, but if the same individual should have just as strong an irresistible impulse to cut some one else's throat, the chances are he would be punished by the law. It is by no means uncommon to hear a burst of indignation at the acquittal, on the ground of insanity, of some unhappy being whom society believes is a fit object for the law's vengeance.

Herbert Harley, in a recent paper on "Segregation vs. Hanging," relates a case where the state expert of Illinois testified that one Zagar, who was being tried for murder, was sane, although previously he had been committed to the Cook County Psychopathic Hospital where the same expert, Dr. Neymann, recorded a diagnosis of paranoid dementia præcox. Harley says:

"In this case the public demanded a conviction and a hanging. It got both. The public is not consciously bloodthirsty, but assumes that hanging of individuals of this sort is an effectual way to prevent crime. If the execution of brutal murderers had the effect which it is intended to have,

I would offer no objections, but the deterrent influence of dramatic punishments may be entirely lost on the particular individuals in which it is most needed. It is of little value to the community to hang one Zagar and have new Zagars coming on continually. Punishment does not restore the murderer's victim to life. Punishment and all the vast machinery of the law are worthless if they do not anticipate and prevent crime."

The prevention of crime implies the ability to recognize dangerous symptoms in the individual at a time prior to commission of a serious offense. Since the Psychopathic Laboratory of the Municipal Court of Chicago was established, there have been more than twenty-five instances of brutal murders committed by young men who were indexed in the laboratory files as individuals with dementia præcox and low intelligence. A person with dementia præcox may have normal intelligence but abnormal emotional or affective characteristics which are registered in conduct. The person of normal affectivity does the right thing more because it is natural for him to do so than because he fears punishment. The type of dementia præcox with keen intelligence produces burglars, automobile thieves, pickpockets, counterfeiters, and yeggmen. The unfortunate individual who is both mentally and morally defective is almost certain to break down under the stresses imposed by modern competitive living. The dementia præcox type with defective emotions often get a reputation for bravery. They go to gallows with apparently little concern. Every attempt at correction, which in the normal is effective in inducing good behavior as a habit, with them is only another step downward. It does little good to hang them. The public undoubtedly expects hanging and they have little compunction about hanging one who has brutally taken a life; but we do not control this situation by hangings. The sense of security the public thus feels is wholly unwarranted. The present right and wrong test is of no practical value. It gets us nowhere in our fight for society's right to be saved. The difference between right and wrong, as obvious to the normal person as the difference between black and white, is entirely an acquired sense in the case of the mental defective—the person born without a conscience. Not much longer can we hang these degenerates and feel that we have done all that is necessary. It is possible now to identify them after the commission of a minor offense. The law will have to deal with them eventually, and the only effective way is to isolate them before they have had an opportunity to kill.

Henry Howard, M. R. C. S. L., England, in 1882, wrote:

"A man has but one mind and that mind, a unit, either is or is not insane. We might as well say that a man has a partial typhoid fever as to

say that he is partially insane . . . Dr. Hammond gives a tabulated statement of 700 cases of post-mortem appearances collected from the idiot asylums, in only sixty of which were the appearances normal.

"I must not overlook the fact of how difficult it is to find even two experts agree upon a man's mental state when he is accused of crime. At the trial of Guiteau only one expert, Dr. Spitzka, attempted a scientific explanation of the phenomenon on trial, and he was insulted—most grossly insulted—by the district attorney, and called a veterinary surgeon because he was a student of morphology and zoology. . . .

"Each man's moral responsibility depends upon his conscience, and each man's conscience upon his education; consequently what would be morally wrong in one man would be morally right in another. For instance, what would be morally right for the Jew would be morally wrong for the Christian, and vice versa. The same with the Catholic and non-Catholic."

On December 6, 1881, Hugh Heyvern was hanged, and on January 6, 1882, Professor Osler, then of McGill University, exhibited to the members of the Montreal Medical-Chirurgical Society the left hemisphere of Heyvern's brain. His paper was published in the Canadian Medical and Surgical Journal of Montreal, in February, 1882, and was entitled "On the Brains of Criminals, With a Description of the Brains of Two Murderers." In this paper he says:

"Mentally and bodily we are largely the result of an hereditary organization and the environment in which we have been reared.

"Heyvern had previously been in jail more than twenty times, and may be taken as a good representative of the criminal class. The skull was somewhat ovoid in shape, dolicho-cephalic, the forehead rather low and retreating."

He then goes on to compare Heyvern's brain with the type of brain which Professor Benedikt of Vienna notes as the criminal's brain, and finds much in common, dwelling most on the confluence of many of the principal fissures, and in many other ways Heyvern's brain was found to conform to Benedikt's cases.

Howard quotes Kiernan as saying:

"An epileptic may perform an act apparently premeditated, and may appear to know the exact legal consequences of this act, and yet the act be the result of disease."

In speaking of Heyvern, he says:

"It is only natural for a man to try to escape from prison. The insane in lunatic asylums all over the world try every day to escape, and frequently successfully.

"Every day there are examples in lunatic asylums of insane persons committing crimes which they have premeditated. Premeditation is no more a proof of man's sanity than is the right and wrong test which has

so long disgraced our statute books. If knowledge of right and wrong be the test of insanity, then one-third at least of all those in asylums all over the world should be set at large."

Howard asked Dr. Osler two questions: First, did he recognize the brain of Heyvern to be abnormal? To which he answered yes.

"Society likes excitement. It delights in a good, well-hunted-up and well-discovered scandal, but it fairly gloats and gormandizes over a murder. The more brutal the murder the better for society. As a rule it does not care a row of pins for the victim. In the case of Hugh Heyvern, he murdered a fellow-prisoner namel Salter. Society, when Salter was sentenced for crime, shouted 'It served the scoundrel Salter right!' But when Heyvern killed Salter, society forgot about the villain and thirsted for the blood of Heyvern. So society could not rest until it had the blood of Heyvern. Society was also excited about this time about Guiteau, who killed President Garfield, so it cried out with a loud voice, 'Whoever stands between Heyvern and death is the friend of Guiteau.' So society worked itself up to a boiling point; nothing could cool it down but the blood of Heyvern. Then society got another terrible shock. It heard that a criminal lawyer of great repute was going to defend Heyvern on the plea that he was an imbecile. So society literally boiled over and declared it would not be balked."

Dr. Howard, who was expert for the defense, says:

"Society never did listen to reason, and my efforts were of no use, for society had made up its mind; I tried to make them understand that, to a very great extent, society was itself responsible, and that society never attempted to make a scientific investigation and find out what was the cause of crime. The criminal code of today is just where it was 2,000 years ago.

"I said over and over again that I assumed Heyvern did know right from wrong, as the majority of insane persons knew right from wrong, but that the knowledge of right and wrong did not constitute sanity or responsibility. The Montreal paper at this time said, after Guiteau had been found guilty, 'Why the man doesn't pretend to be insane!'—as if an insane man did pretend to be insane.

"Guiteau's brain showed teratological and pathological defects. The former finding in the case of Heyvern proved him to be an imbecile."

A bill was introduced in the House of Commons in 1874 with the view of amending the law on homicide. A committee was appointed to take evidence. Lord Justice Blackburn told the committee, "We cannot fail to see that there are cases where the person is not clearly responsible and yet knows right from wrong." He then gave an instance, such as we frequently see. Sir A. Cockburn, Lord Chief Justice of England, stated to the committee.

"As the law as expounded by the judges in the House of Lords now stands, it is only when mental diseases produce incapacity to distinguish

between right and wrong that immunity from the penal consequences of crime is admitted. The present bill introduces a new element: the absence of power of self-denial. I concur most cordially in the proposed alteration of the law, having been always strongly of opinion that, as the pathology of insanity abundantly establishes, there are forms of mental disease in which, though the patient is quite aware he is about to do wrong, the will becomes overpowered by the force of irresistible impulse; the power of self-control when destroyed or suspended by mental disease becomes, I think, an essential element of responsibility."

Charles Follen Folsom, M. D., in a book privately printed in 1908, on the subjects of Criminal Responsibility and Limited Responsibility, gives the history of many cases which are familiar to the readers of this article. In summing up the case of Jesse Pomeroy, he says:

"Among the experts who have seen Pomeroy and consider him irresponsible, there are two opinions on this point: First, that punishment would have no effect upon him or upon others of his class; second, that punishment would deter them from crime. But the same thing might also be said of a considerable proportion of the inmates of our insane asylums."

In summing up the case of Charles Julius Guiteau, who killed President Garfield, he says:

"The verdict of the jury has met with almost universal approval, and many of the insane in asylums who feel that their own safety depends upon the maintenance of a high standard of responsibility there agree with the jury. Others think otherwise. The Pocasset murderer, for instance, says that the protection of society would be just as much influenced by one's walking out and stepping on an ant as by hanging Guiteau.

"Guiteau has been observed chiefly while on trial for his life and at a decided disadvantage. Even if he were shamming, as I think he was to a certain extent, that is as characteristic of the insane as of the sane. It seems to me to belong to that class of insane criminals who do least harm to society after their crime by being secluded for life in a criminal lunatic asylum without trial, if that is practicable in our country."

In summing up the case of Marie Jeanneret, Folsom says:

"If we could eliminate from our nosology and more particularly from our jurisprudence the term 'moral insanity' we should confer a boon on the medical profession and the world at large like that which came from abolishing Jonathan Edwards' 'original sin.' Of course, it was not many years ago that all men were criminals according to our present standard. Some of us, through centuries of breeding, have outgrown the grosser forms of crime; but the criminal instinct is well nigh universal. What can organized society do in the matter for its safety, or even its very existence, but first and foremost maintain a high standard of responsibility and at least keep its own head sound?"

On the case of Sarah Jane Robinson, who was indicted for six murders, and who was finally sentenced to confinement in prison for life,

Dr. Folsom says, "She murdered in cold blood after mature deliberation and cool planning; and she kept the portraits of her victims always with her in jail and put upon them the flowers that were sent to her."

He also gives in detail the case of Jane Toppan, who was found insane and is now an inmate of one of our state institutions.

In 1906 E. P. Evans wrote a book on "The Criminal Prosecution and Capital Punishment of Animals," which was the result of a revision and expansion of two essays entitled "Bugs and Beasts Before the Law" and "Modern and Mediæval Punishment,' which appeared in *The Atlantic Monthly* in August and September, 1884. It seems that at one time in our history animals which were in the service of man could be arrested, tried, convicted, and executed like any other member of his household. In 1386 a sow who had killed one of her offspring was executed in the old Norman city of Falaise. In 1394 a pig was hanged at Mortaign for having sacrilegiously eaten a consecrated wafer. In 1314 a bull belonging to a farmer in the village of Moisy escaped into the highway, where it attacked a man and injured him so severely that he died a few hours afterwards. The ferocious animal was seized and imprisoned, and after being tried and convicted was sentenced to be hanged; and the execution took place at Moisy-le-Temple on the common gallows. In 1389 the Carthusians of Dijon caused a horse to be condemned to death for homicide; and as late as 1697 a mare was burned by the decision and decree of the Parliament of Aix.

When we executed a feeble-minded or *non compos* person or an insane person, such as a Guiteau or a Czolgosz, we have not advanced beyond the custom of seven hundred years ago when they executed animals for crime who were as responsible as many of these individuals and who had in many instances been taught to know the difference between right and wrong, as many of our animals do know what is right and what is wrong for them to do. And the effect of such punishment as is meted out by society at the present time to these medically irresponsible individuals is no more deterrent than it was to those animals.

Mr. Evans states:

"If it could be conclusively proved, or even rendered highly probable, that the capital punishment of an ox, which had gored a man to death, deterred other oxen from pushing with their horns, it would be the unquestionable right and imperative duty of our legislatures and tribunals to re-enact and execute the old Mosaic law on this subject. In like manner, if it can be satisfactorily shown that the hanging of an admittedly insane person, who has committed murder, prevents other insane persons from

perpetrating the same crime, or tends to diminish the number of those who go insane in the same direction, it is clearly the duty of society to hang such persons, whatever may be the opinion of the alienist concerning their moral responsibility."

As it stands today, a man, if he knows the difference between right and wrong when he commits a crime, or if the prosecution can show that he had mentality enough to premeditate and plan the crime, or that he was not the victim of an irresistible impulse, or that he was so far responsible that he knew the consequences of his act and that he would be punished, is usually found guilty, no matter what the medical testimony may be as to his sanity. The medical expert may testify that he is suffering from dementia præcox, from manic depressive insanity, or some other form of mental disease—that he may be hopelessly insane; but if any of the above questions are answered in the affirmative, he is usually convicted by the jury and sentenced by the judge. This means that we have made little progress since the Dark Ages when they used to tie the insane to the pillars of the church and whip them and beat them. Is there anyone who has had the care of the insane that for a moment doubts that half or more of the inmates of any insane hospital know the difference between right and wrong, or that they are not amenable to punishments and rewards? And who has had any experience with the insane but has found many who would deliberately premeditate and plan for escape, for assault, or for another purpose? If this is true, then for every assault by one inmate which results in the death of another inmate or officer of a hospital, the offender should be taken out and tried for his life and executed, as much as the man in the community who is suffering from mental disease. And every insane patient who plans or premeditates to get the property of another, be it food, clothing, or something more valuable, should be immediately brought before the courts and tried in every case, because they are capable of premeditating, they are capable of planning, and they do gain by their peculations. Does this not mean that the medical man and not the lay jury should have the decision in cases of the mentally ill? The time is soon coming when society is going to wake up and realize that revenge does not get us very far, but that intelligent handling and disposition of the abnormal individuals in our community will be the solution of the question of the increase in both crime and insanity.

As I said before, the medical profession must stand firmly on the only ground it can occupy, and the law must yield to medicine and bring its rules into agreement with modern science. The first step in

this direction was taken last year by the governor and legislature of Massachusetts, when the following law was passed:

(Chap. 415.)

AN ACT PROVIDING FOR AN INVESTIGATION BY THE DEPARTMENT OF MENTAL DISEASES AS TO THE MENTAL CONDITION OF CERTAIN PERSONS HELD FOR TRIAL.

Be it enacted, etc., as follows:

Chapter one hundred and twenty-three of the General Laws is hereby amended by inserting after section one hundred the following new section:

Section 100A. Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the district attorney and to the attorney for the accused, and shall be admissible as evidence of the mental condition of the accused. (*Approved May 20, 1921.*)

This law will, I believe, discourage the prosecution or the defense from employing paid experts. It will also save the state the expense of many trials and keep from suggestible readers the newspaper notoriety and details which are so vicious in their results. I believe few juries will seriously consider a paid expert's testimony when they have before them the report of a commission which, as part of its duties to the state, renders an opinion unprejudiced and unbiased.

At present there is no place to send the defective delinquents who constitute a large number of the recidivists in our state's prison and jails. Until the state provides a proper school for the education and improvement of this class, many of them will have to be sent to the prisons; but the judges and juries will know with what they have to deal and can handle these cases more intelligently. Punishment, as Mercier says, in a moral imbecile arouses in him only a sense of injustice, of injured innocence, and of rank vindictiveness. He can never be made to understand that retaliation upon him is justifiable. With moral defects there are usually intellectual defects. The primary purpose of punishment is to inflict pain upon the offender in retaliation for pain he has inflicted. This is not appreciated by the defective.

The Hypothetical Question

Now a few words on the hypothetical question and the uncertainty of verdicts with the prevailing practice of presenting cases hypothetically to the expert. To even an experienced expert they are often misleading. They are not supposed to be prepared even by experts. They are usually prepared by lawyers, who are not skilled in medicine and who know nothing of the disease about which they are talking. And if, in preparing the hypothetical question, the lawyer so desires and commands skilled assistance he has plenty of time to choose his words and dexterously combine them. They are then sprung upon the expert, who may have to remember a question of several pages in length and is obliged to answer it by one word, yes or no. Could anything be any more unfair to the defendant or to the prosecution or a greater travesty on justice? Let us hope that the hypothetical question will be ruled out of the courts of Massachusetts, as it has virtually been in some of the courts of New York.

Mr. Henry W. Taft, of New York, on January 13, 1921, delivered an address before the Bar Association on the subject of Will Contests and the legal and medical features connected therewith. In this address he made the following statements:

"The testimony of medical experts, so common in contested will cases, based upon hypothetical questions, is dismissed as not of a character to create an issue for a jury. In two cases in the Third Department, the Appellate Division set aside a verdict against wills based upon such evidence, and not only that, but ordered the wills to be admitted to probate; and this was done for the express reason that the issues should never have been allowed to go to the jury solely upon the testimony of expert witnesses. In a case which I tried within a few years, three of the most eminent alienists in this city had testified that the testator, who had suffered from a stroke of apoplexy indicating a lesion of the brain and had committed suicide, was incompetent to execute a will. The Surrogate directed a verdict in favor of the proponents at the close of the contestant's case, which was unanimously sustained by the Appellate Division, without opinion. A motion made for leave to go to the Court of Appeals was denied with this significant memorandum *par curiam,* that 'if the Court of Appeals does not consider the law settled by its numerous decisions on the question of the "degree of proof required to carry an issue of fact to the jury" application can be made to it to permit an appeal in this matter. We are satisfied that our decision was within the limits of their decision.' The question of the sufficiency of proof to carry the case to the jury was thus with a faint trace of judicial defiance raised. The Court of Appeals did grant leave to appeal, but after argument affirmed the judgment, thus in effect deciding that the uncontradicted testimony of three eminent medical experts as to testamentary capacity, did not rise to the dignity of evidence creating a conflict requiring submission to a jury."

In connection with the same subject, Mr. Taft made the following statements:

"An address on will contests would be incomplete without some observations upon the rules of evidence especially affecting them, and first I deal with medical expert testimony already alluded to.

"The process of eliciting from medical experts answers to hypothetical questions concerning mental capacity has come to be a highly artificial and a wholly unconvincing performance. Both juries and the courts largely ignore such evidence, seeking for a basis for their deductions evidence showing objectively capacity of a testator to attend intelligently to his own current affairs. The refinements of the medical science applied as they are to facts postulated in an interminable question prepared by counsel, interest them chiefly as intellectual gymnastics. They usually dismiss the learned medical disquisitions with ill-concealed amusement. Many years ago Surrogate Rollins said that an expert physician was called as a witness because his pre-ascertained views met the necessities of one of the litigants; and he added that the gist of the question propounded to them to establish insanity was, 'If the person whose mental condition is the subject of inquiry is of unsound mind, is he sane or is he insane?'; and that on the other hand, on cross-examination the question asked by opposing counsel resolved itself into the interrogatory, 'But if on the contrary this person of whom you are testifying is of sound mind, is he insane or is he sane?' This is now substantially the vice of courts. Thus the Appellate Division has held that 'the proof of experts based upon a hypothetical question in opposition to proof showing . . . intelligence, scarcely, if at all, raises an issue for the jury.' And the Court of Appeals in effect has held, as we have already said, that the uncontradicted evidence of three medical experts does not constitute a scintilla of proof requiring the submission of a case to a jury.

"And so this kind of evidence has become an excrescence upon our court procedure. This situation ought to be of serious moment to the medical profession, which may well consider whether its dignity and usefulness is not being impaired by the slight respect paid to views asserted to be based on established principles of the medical science. The juridical method by which courts seek to determine whether a man is competent to make a will is quite different from the theoretical process of the medical expert witness. It resembles more the process which alienists themselves adopt in examining a living patient; for they rely upon concrete objective symptoms ascertained by tests which experience teaches them to apply. In other words, they have a process corresponding to cross-examination, by which they seek to ascertain the truth. But medical men, testifying as expert witnesses, make deductions from assumptions embodied in hypothetical questions, being asked to accept statements of lay witnesses as to symptoms which in their day to day practice they would not think of accepting without subjecting them to the tests referred to. It is impossible for the medical profession by theoretical expositions to change the judicial process of investigation. It is too firmly imbedded in our jurisprudence. Furthermore, while it is not infallible, scientifically it is subject to less weighty objections than an investigation based on the artificial hypothetical

question process. But whether it is so or not, it is certain that the conflict between the two methods is ineradicable; and the unfortunate condition remains that by the present system litigants are subjected to burdensome expense, and the time of courts and juries is unduly occupied with evidence which, in the main, is treated with scant respect."

At a meeting of the New York Psychiatrical Society, on February 2, 1921, Mr. Taft made an address bearing on the above issues, viz., the character and value of medical expert testimony and the inutility of hypothetical questions. The matter was discussed by the society and the general sentiment as expressed was to the effect that the hypothetical question was an ineffective method of bringing out expert evidence, and one which reflected discredit upon medical expertness and medical science generally.

The possibility of eliminating or modifying the use of the hypothetical question was discussed and finally the matter was referred to the Committee on Medical Expert Testimony in Relation to Hypothetical Questions, who made the following recommendations:

First: The New York Psychiatrical Society disapproves of the practice of using set hypothetical questions as a method of bringing out expert medical testimony.

Second: The Society recommends that the attention of the medical profession and particularly of psychiatrists and neurologists be called to the above, quoted decisions of the highest court which indicate that any evidence which physicians may give as experts and which is based upon a hypothetical question, has no value in court, the consequence being that the employment of medical experts in cases wherein this method of producing evidence is used, is a waste of time and money and may involve to the physician a loss of disgnity and self-respect. Specifically we recommend the subject be brought to the attention of the Medico-Chirurgical Association, the N. Y. Neurological Society, and the American Neurological Association.

Third: The Society recommends that measures be taken to secure a joint committee of lawyers and physicians for the object of finding out whether any way can be devised by which medical expertness can be affectively used in cases in which an individual's mental and physical state can not be determined by objective evidence furnished to the expert (provided that is not being done or has not been done).