This provision of new occupation would constitute a considerable part of the work of an association for males, and would require the co-operation of the asylum medical officers in indicating when such changes were necessary.

In still other cases the homes are undesirable, from the characters of the family or from the associations or associates to which the patient would return. Numerous examples of this kind might be quoted.

The return to a home ruled by a drunken parent is obviously undesirable, and often the parents are themselves eccentric or peculiar, exercising a prejudicial influence on the patient; in other instances there are incompatibilities of temper from the same cause.

The patients have sometimes committed acts in the commencement of their insanity which have drawn the attention of the neighbourhoood to them, so rendering their future residence there uncomfortable.

In others, companionships outside of the home circle have been formed which have led to irregular habits, from which they can only break free by removal from these causes of temptation.

In all these circumstances the duty of the Society would consist in finding work, and, if possible, improved influences in other localities.

These are the principal lines on which assistance to the male convalescents would be needed, and in the short time at my disposal I am only able to mention them, trusting that in the discussion by those present acquainted with the subject various examples will be adduced more forcibly illustrating them than I could do without an unwarrantable monopoly of the time and attention you have so kindly given me.

Protection of Medical Men by the English Lunacy Law. By A. Wood Renton, Esq., Barrister-at-Law.

Section 330 of the Lunacy Act, 1890, re-enacting section 12 of the Lunacy Acts Amendment Act, 1889, provides as follows:—

(1). "A person who before the passing of this Act* has signed, or carried out, or done any act with a view to sign or carry out, an order purporting to be a reception order, or a

* The Act, save as otherwise expressly therein provided, came into operation on 1st May, 1890. (Sec. 3.)

medical certificate that a person is of unsound mind, and a person who, after the passing of this Act, presents a petition for any such order, or signs, or carries out, or does any act with a view to sign or carry out, an order purporting to be a report or certificate under this Act, or does anything in pursuance of this Act, shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground, if such person has acted in good faith and with reasonable care.

(2). "If any proceedings are taken against any person for signing or carrying out, or doing any act with a view to sign or carry out, any such order, report, or certificate, or presenting any such petition as in the preceding subsection mentioned, or doing anything in pursuance of this Act, such proceedings may, upon summary application to the High Court or a judge thereof be stayed upon such terms as to costs and otherwise as the court or judge may think fit, if the court or judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care."

My object in the following pages is to consider on general principles and without reference to *nisi prius* decisions how far this section protects the medical profession in its relation to the English Lunacy Law, and in what manner this protection is to be invoked.

I.

It will be observed that subsection (1) is partly retrospective and partly prospective in its operation. It extends to (*a*) any person who *before* the passing of the Act, *i.e.*, before 1st May, 1890, has signed or carried out, or done any act with a view to sign or carry out, *an order purporting to be a reception order* or *a medical certificate that a person is of unsound mind*, and (*b*) any person who *after* the passing of the Act presents a *petition* for a reception order, or signs, or carries out, or does any act with a view to sign or carry out, *an order purporting to be a reception order*, or *any report or certificate* purporting to be a report or certificate under the Act, or *does anything in pursuance of the Act*.

In its *retrospective* operation, the subsection protects a medical man who has carried out or done any act with a view to carry out an order purporting to be a reception order.*

* "Reception order" means an order or authority made or given before or after the commencement of the Act for the reception of a lunatic, whether a pauper or not, in an institution for lunatics or as a single patient and includes an urgency order. (Sec. 341.)

A few hypothetical cases will illustrate the scope of this clause.

(α) A, the superintendent or manager of an institution for lunatics, being a medical practitioner, receives B into his asylum, or sends C, one of his subordinates, to bring him there, under a reception order. A is within the subsection. (β) A is not a medical practitioner, C is. Under the circumstances set forth in the previous illustration, C is within the subsection as well as A.* (γ). A or C employs mechanical restraint for the purpose of B's detention with safety to himself or to the other patients, or for the purpose of his surgical or medical treatment. As a reception order impliedly authorizes detention, and as detention must mean both safe detention and detention under treatment, it might be argued that this is an act "done with a view to carry out" the reception order.

Again, the signing or carrying out or doing any act with a view to sign or carry out a medical certificate that a person is of unsound mind is within the retrospective part of the subsection.

Illustration.—A, a medical practitioner acting in good faith and with reasonable care, examines an alleged lunatic *with a view* to certify as to his mental condition for the purposes of a reception order, but on such examination *does not certify* that the alleged lunatic is of unsound mind. A is protected by the subsection.

The *prospective* sweep of the subsection is very wide. It extends to petitions, reception orders, medical certificates, all the reports and certificates prescribed by the statute or the rules, and generally to everything *done in pursuance of the Act.*

In order to obtain the protection conferred by subsection 2, a medical man has to satisfy the court that *there is no reasonable ground for alleging against him a want of good faith or reasonable care.* If he succeeds in doing this, the court may stay any civil or criminal proceedings taken against him upon such terms as to costs or otherwise as may seem just. The meaning of the clause in italics is deserving of the most careful consideration. It has not yet (so far as I am aware) been judicially interpreted, and therefore the following propositions are submitted with some diffidence.

In determining whether or not a medical man has acted in

* In the present paper, the protection of *medical men* alone will be considered.

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good faith and with reasonable care, the court will have regard, not to the facts which were before him when he acted, but to all the circumstances brought forward by the medical man and by his opponent for judicial consideration under sec. 330, *subs.* 2.

It will not, I think, be sufficient for the applicant to say—"Never mind the issue of events. Never mind the plaintiff's counter-statements. Look simply to the facts which were *before me* when I signed this certificate. My conduct was *bonâ fide* and reasonable, having regard to the information which was then within my reach." He must be able to go further. He must be able to say—"Take all the circumstances disclosed by myself and my opponent. They show that I acted in good faith and with reasonable care."

This view of the law is supported by the words of the subsection. The court or a judge must be satisfied that there *is* no reasonable ground for alleging want of good faith or reasonable care. It is further supported by the object of the subsection, which was to protect persons putting the Act in force from proceedings shown on preliminary inquiry to be vexatious or unfounded, and it derives not unimportant corroboration from the judicial interpretation of an analogous clause in the Patents Act of 1883. In an action for the infringement of a patent the plaintiff is required to deliver with his statement of claim particulars of the breaches of which he complains; the defendant is required to deliver particulars of the objections on which he means to rely, and it is provided that "on taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant, and they respectively shall not be allowed any costs in respect of any particulars delivered by them unless the same is certified by the court or a judge to have been proven, *or to have been reasonable and proper*, without regard to the general costs of the case."* Now, the construction of the words "reasonable and proper" was considered by Mr. Justice Stirling in the case of *The Germ Milling Co. v. Robinson.* (1886, 3 *Patent Office Reports*, 254.) "I must be satisfied," said his lordship (p. 260), "having regard to what knowledge I have acquired in the conduct of the case, that the particulars . . . are reasonable and proper. I conceive it is no part of my duty either to put myself back into the position in which the advisers (of the parties) were when they framed these particulars, or, on the other hand, to carry myself forward by having additional

* Sec. 29, subs. 6.

evidence brought before me. . . . The tree must lie where it falls, for better or for worse." Now, observe, this is the construction put upon the word *reasonable* in the case of a statutory provision *limiting the rights of parties. A fortiori* will this construction be adopted in the case of a statutory provision which *greatly enlarges the rights* of one of the parties to an action? An alleged lunatic frequently sues the medical man whose certificate brought about his confinement, not so much to get damages as to establish his sanity in the eyes of the world. It seems unlikely that the court will deprive him of this right unless reasonably satisfied that his action is vexatious or, at least, unfounded.

The words "want of good faith" have no technical legal signification, but are to be taken in their ordinary acceptation, and mean simply want of honesty in belief, purpose, or conduct. The old fallacy that asserted the existence of a distinction between *legal* and *moral* fraud has now been swept out of the region even of forensic argument,* and a strong reaction against metaphysical subtleties has set in. "Fraud, in my opinion," said Mr. Justice Wills, in *ex parte* Watson (21 Q.B.D., 301), "is a term that should be reserved for something dishonest and morally wrong; and much mischief is, I think, done, as well as much pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions." In *re Avery* (36 Ch. D., 307) Mr. Justice Stirling and the Court of Appeal used language equally emphatic. The special point on which the decision turned was the meaning of that clause in the Patents Act, 1883, which provides for the revocation of letters patent granted "in *fraud* of the rights" of the petitioner. "I have not," said Mr. Justice Stirling, "to deal with a statute nearly 300 years old, like the *Statute of Monopolies* of James I., nor with one in which there is any context to fix the sense in which the word ('fraud') is used. It would be wrong in judgment to construe such a word in an Act passed little more than three years ago" (the date of this decision is 1887), "and in the absence of a context imperatively demanding such a construction otherwise than in accordance with the ordinary meaning of the English language, and consequently as involving dishonesty or grave moral culpability on the part of the person obtaining the patent." The last indications that we shall give of the direction in which this current of judicial opinion is running are from the bankruptcy law and the Bills of

* *Cf.* Derry v. Peek, 1889, 14 App. Cas., 337. Glasier v. Rolls. 42 Ch. D., 436. Angus v. Clifford, 1891, 2 Ch., 449.

Exchange Act. Section 48, subs. 2, of the Bankruptcy Act, 1883, preserves from avoidance for preference the rights of any person making title in *good faith* . . . through or under a creditor of the bankrupt. This subsection means that a person taking a preference from a bankrupt *must not be conscious himself* of an intention to favour one creditor above another (*Butcher v. Stead*, L.R. *v*, H.L. 849). Under the Bills of Exchange Act, 1882 (sec. 90), "a thing is to be deemed to be done in good faith where it is, in fact, done *honestly*, whether it is done negligently or not." "This provision," said Mr. Justice Denman, in *Tatam v. Hasler* (23 Q. B. D., 345), "is obviously founded on the distinction pointed out in *Jones v. Gordon* (2 App. Cas., 616) by Lord Blackburn between the case of a person who was honestly blundering and careless and the case of a person who has acted not honestly, that is, not necessarily with the intention to defraud, but not with an honest belief that the transaction was a valid one. . . . Lord Blackburn there . . . says, 'If the facts and circumstances are such that the jury, or whoever has to try the case, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions because he thought in his own mind, "I suspect there is something wrong, and if I ask questions and make inquiry, it will be no longer my suspecting it, but my knowing it," I think that is dishonesty.' That," added Mr. Justice Denman, "is the dishonesty to which the Act refers where the word *honesty* is used."

The argument from analogy, herein before set forth, is, in my opinion, a strong one. It seems unlikely that the judicial interpretation of sec. 330 of the Lunacy Act, 1890, will give rise to a new and counter current of authority, and it will in all probability be sufficient for a medical man to show that he has *acted honestly in fact.*

The words "reasonable care" mean such care as it was reasonable to expect that a medical man of ordinary skill would have taken under the special circumstances of each case.

This proposition rests on the well-known doctrine of "the external standard," which is as old as Justinian. "The standards of the law," says the younger Holmes ("Lectures on the Common Law," p. 108), in a passage which every student of jurisprudence should learn by heart, "are standards of general application. The law takes no account of the infinite varieties of temperament, intellect and education, which make

the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is that when men live in society a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours —no doubt his congenital defects* will be allowed for in the courts of heaven—but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect. His neighbours accordingly require him at his proper peril to come up to *their* standard, and the courts which they establish decline to take his *personal equation* into account."

In determining whether or not a medical man has acted with reasonable care, the court will not take his "personal equation" into consideration. It will not allow him to say: "My temperament is impulsive; my powers of diagnosis are not great; my judgment is not sound. I acted with all the care that it is *reasonable to expect from me.*" It will require him to show that he acted with the care which an average member of his profession might reasonably have been expected to exhibit under the same set of circumstances. Nothing less than this will be sufficient; nothing more is necessary.

The words "reasonable care" have not yet, apparently, been judicially defined. But here again the argument from analogy comes to our aid, and I think that it is conclusive in favour of the proposition above stated. I will give a few examples.

(*a*). "*Reasonable and probable cause*" *for detaining a ship* (39 and 40 Vic., c. 80, sec. 10). The proper question to be left to the jury is whether the facts in connection with the ship, which would have been apparent to *a person of ordinary skill*, who had had, and had used, all means of examining and inquiring about her, would, in the opinion of the jury, have given *such person* reasonable and probable cause to suspect the safety of the ship . . . and so to detain her for survey (*Thompson v. Farrer*, 9 Q. B. D., 372).

(*b*). "*Reasonable expectation*" (Bankruptcy Act, 1883, s. 28, sub. s. 3). A person who begins business without capital and

* Of course these words mean defects falling short of insanity.

with a mortgage on all his assets and afterwards becomes bankrupt has contracted his debts without *reasonable* or probable ground of expectation of being able to pay them (*Ex parte White*, 14 Q. B. D., 600).

(*c*). What is known among patent lawyers as *the ordinary workman test* is the best illustration that I can give of the application of the doctrine of the external standard.

An inventor receives from the Crown a limited monopoly, the object of and the consideration for which are that he should make a full disclosure of "the nature of his invention" and the means whereby it is to be performed. The document in which this disclosure is made is the complete specification, and the courts of law have to determine no question with greater frequency than whether the disclosure contained in the complete specification is sufficient. In answering this question what is called "the ordinary workman test" is applied. That test is as follows:—Will the directions in the specification enable the processes described therein to be successfully followed out without the exercise of further inquiry, experiment, or invention by any careful workman having a competent degree of knowledge upon the subject matter to which the patent relates? The person on whose ability to understand a specification its sufficiency depends is neither, on the one hand, simply an uninstructed member of the general public, nor, on the other hand, an eminent specialist or scientific workman, but the workman of ordinary skill and information on the subject.*

Mutatis mutandis, the last illustration is strictly relevant to the matter in question. The point on which a medical practitioner, seeking the protection of sec. 330 of the Act of 1890, must satisfy the court is that he exhibited the care, the knowledge, and the skill, not of "a member of the general public" on the one hand, nor yet of "an eminent specialist" on the other hand, but of an ordinary professional man *undertaking the act which is the subject of judicial inquiry*. It should be noted that if a medical practitioner, having no theoretical or practical grasp of the pathology of mind, takes upon himself to sign a certificate of insanity, he *may* be held legally bound to exhibit the care, not of the ordinary general practitioner, but of the ordinary alienist.

(*To be concluded.*)

* *Cf.* the language of Jessel M. R. in Plimpton v. Malcolmson, 1875, L.R., 4 Ch. D., at p. 568.