Although jurisdiction to grant declaratory judgments in state tax cases may be found to exist, the present Congressional policy against permitting undue interference with both state and federal taxing agencies would dictate that the highly discretionary power[32] to grant declaratory relief should be exercised only under unusual circumstances. If such restraint is not practiced, another amendment to the Federal Declaratory Judgment Act may be forthcoming.

Guardian and Ward—Insanity Proceedings—Power of Judge to Appoint Guardian ad Litem in Hearing to Determine Competency of Prisoner —[New York].—Pursuant to a statute an inmate of a woman's detention house was transferred to an asylum for mental defectives on the authorization of the prison physician and two competent examiners.[1] At the expiration of the penal sentence, the superintendent of the asylum applied in accordance with another statute to the local county court for authorization to detain the inmate because she was still mentally defective.[2] The latter statute provided that the county judge should select two qualified examiners, including at least one psychologist, to determine the mental competency of the prisoner, and that he should issue a detention order if satisfied that the prisoner is incompetent. In the present case the judge appointed a guardian ad litem for the prisoner and directed the asylum to pay the guardian's fee. The appellate division upheld the order of the county judge.[3] On appeal to the court of appeals, *held*, that the county judge had power neither to appoint a guardian ad litem nor to direct payment of his fee. Order reversed. *Matter of Naylor*.[4]

Had the present proceeding been one to procure the original confinement of a person alleged to be mentally incompetent, the judge could have appointed a guardian ad litem. Authority is expressly granted by statute in New York[5] and in most other states. But it is not clear whether American courts possess this power apart from statute.[6] Under English common law the custody and control of the person and property of lunatics and idiots were in the Crown, which delegated the jurisdiction to the chancellor.[7]

[32] Cf. United States Fidelity & Guaranty Co. v. Koch, 102 F. (2d) 288, 294 (C.C.A. 3d 1939); Automotive Equipment Co. v. Trico Products Corp., 11 F. Supp. 292, 295 (N.Y. 1935); Borchard, Declaratory Judgments 99 et seq. (1934).

[1] N.Y. Cons. Laws (McKinney, Supp. 1940) c. 43, §§ 438, 439.

[2] N.Y. Cons. Laws (McKinney, 1929) c. 43, § 440; N.Y. Cons. Laws (McKinney, Supp. 1940) c. 43, § 451.

[3] Matter of Naylor, 259 App. Div. 962, 20 N.Y.S. (2d) 4 (1940).

[4] 284 N.Y. 188, 30 N.E. (2d) 468 (1940).

[5] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, 1926) § 207.

[6] Grinnell, A Suggested Rule for the Consideration of the Supreme Judicial and Probate Courts in Regard to Guardians ad Litem, 23 Mass. L. Q., No. 3, at 10, 13 (1938); Chase v. Chase, 216 Mass. 394, 397, 103 N.E. 857, 859 (1914). But for the opposite view see Madden, Persons and Domestic Relations § 233 (1931); Singer and Krohn, Insanity and the Law 223 (1924).

[7] 1 Wharton and Stillé, Medical Jurisprudence 485 (5th ed. 1905); 1 Collinson, Lunacy 87 (1812); Singer and Krohn, Insanity and the Law 222 (1924). The statute of De Prerogativâ Regis (1324) recognizes this jurisdiction, "The king shall have custody of the land of natural fools, taking the profits of them without waste or destruction, and shall find for them their necessaries. . . . ."

Early texts attributed to the chancellor the power to appoint guardians ad litem to protect alleged idiots, but apparently this power was seldom if ever exercised[8] in a proceeding to determine competency, inasmuch as it was in the Crown's interest to have persons adjudicated incompetent in order to secure their property.[9] After the American Revolution the power passed to the people as represented by the state governments, and early cases reveal that the courts of New York and other states appointed guardians ad litem to protect alleged incompetents, without statutory authorization.[10]

The New York statute authorizing the court to appoint guardians ad litem seems to extend to the detention actions in the present case. Section 207 of the Civil Practice Act provides: "The . . . . court may appoint a guardian ad litem . . . . for an . . . . incompetent person, at any stage in any action or proceeding, when it appears to the court necessary for the proper protection of the rights and interests of such . . . . person except where it is otherwise expressly provided by law." The majority of the court in the present case, however, thought that the exception controlled because the detailed procedure of Section 440 of the Correction Law, under which the detention order was sought, did not provide for the appointment of a guardian ad litem. The minority pointed out that Section 440 did not expressly deny the judge that power. Further, Section 440 provided that "such judge if satisfied such prisoner is a mental defective . . . . " should issue a detention order; the "if satisfied" was construed by the minority to import a judicial hearing on the competency issue.

Regardless of the wording of the statute there may have been sound practical reasons for denying the county judge power to appoint a guardian ad litem. Two qualified examiners and the prison physician had passed upon the inmate's sanity before she

[8] A distinction can be made throughout the history of the law between the readiness of courts to appoint a guardian ad litem where an incompetent's property rights are at stake and where the incompetent's personal (civil) rights are in issue. The courts usually have been ready to protect an incompetent's estate from the actions of third persons. At an early stage in the common law even these rights were not protected. Thus Coke in Beverley's Case, 4 Co. Rep. 123b, 125b, 126a (1603), states that it is commonly said to be a "great defect in the law, that no tutor is assigned to them by law, who may protect them, and principally their inheritance." Later, however, where a party to a civil suit was alleged to be incompetent, the court would, upon evidence, assign to him a guardian ad litem for the immediate suit although he had not been adjudicated an incompetent. 1 Collinson, Lunacy 355 (1812). In Wilson v. Grace, 14 Ves. Jr. *172 (1807), the court said that it was customary to appoint a guardian ad litem to protect estates of persons allegedly incompetent. On the other hand, where the incompetent's personal rights were concerned no guardian was appointed. In Earl Ferrers' Case, 19 How. St. Tr. 886 (1760), the earl, charged with murder, pleaded insanity (and he was undoubtedly insane). The court refused to allow him to be represented by his own counsel, but instead forced him to conduct his own pleadings. Collinson states that in proceedings to determine incompetency an idiot was never allowed to appear by attorney because it was supposed that idiocy could be detected by the normal person, and that lunatics were allowed to have their counsel present to traverse the inquisition (a finding of lunacy by committee and jury) only with the Chancellor's special permission. 1 Collinson, Lunacy 171–73 (1812).

[9] Poor people were seldom declared incompetent inasmuch as the motive for incompetency proceedings was to secure a guardian who would prevent the incompetent's estate from being dissipated to the hurt of the incompetent, his heirs, his next of kin, and his overlords. Indigent insane went their way unnoticed by the law.

[10] See Sporza v. German Savings Bank, 192 N.Y. 8, 84 N.E. 406 (1908).

was transferred to the asylum;[11] presumably she had been under constant observation and the superintendent of the asylum had certified her incompetent when applying for the detention order. But these added medical examinations seem as remote from a judicial determination of insanity (to which a citizen appears entitled before losing his freedom) as is the physician's examination that is commonly made before civil insanity proceedings are instituted. Neither the qualified examiners nor the superintendent observed the alleged incompetent outside the state institutions, and neither reached his conclusion under the supervision of a judicial officer. Nevertheless the state might feel that by her criminal act the alleged incompetent had already demonstrated that she was a bad social risk.[12] There is at least an apparent difference between continuing the confinement of one who has been in an asylum and causing the confinement of one who has been at large in society.

There are strong reasons, on the other hand, for giving the court in the present situation power to appoint a guardian. The proceeding is of great consequence to the inmate, for should she be pronounced insane her entire legal status changes. She becomes a ward of the court and her civil rights are suspended both as to her person and property.[13] She is incarcerated for an indeterminate period.[14] Her only means to secure release is through habeas corpus proceedings in which she must rebut the presumption of continuing insanity.[15] Hence, it seems unwise to compel the trial judge to represent the interest of both the inmate and the state. That a lawyer is useful in mental competency proceedings is shown by the fact that until the recent amendments to the New York Criminal Code, commissions to advise New York trial judges as to the sanity of a criminal defendant pleading insanity had to contain a lawyer.[16] The lawyer can observe whether (1) "experts" are qualified; (2) the judge follows the rules of evidence; (3) the experts confine themselves to legal (rather than medical)

[11] N.Y. Cons. Laws (McKinney, Supp. 1940) c. 43, §§ 438, 439.

[12] An incompetent of a dangerous sort may be arrested and detained on suspicion of being mentally deranged without a judicial proceeding. See 10 A.L.R. 488 (1921); 45 A.L.R. 1464 (1926).

[13] Singer and Krohn, Insanity and the Law 223 (1924).

[14] Some New York criminal lawyers advise clients who are insane "to take their medicine and obtain a definite relatively brief sentence in prison rather than a wholly indeterminate (probably life) incarceration in an asylum." Glueck, Mental Disorder and the Criminal Law 439 (1925). The conditions of such an asylum are more disagreeable to the average convict than is confinement with sane prisoners. In People ex rel. Cirrone v. Hoffmann, 255 App. Div. 404, 8 N.Y.S. (2d) 83 (1938), a prisoner who had been transferred from a prison to an asylum on the ground that he was an incompetent alleged that confinement in the asylum was cruel and unnatural punishment in that his associates were of low mentality. He was returned to the prison when it was shown that he was not subnormal.

[15] People ex rel. Romano v. Thayer, 229 App. Div. 687, 242 N.Y. Supp. 289 (1930); 1 Collinson, Lunacy 52 (1812).

[16] 1 N.Y.L. 1936, c. 460, at 1167. This act has been repealed and a new commission set up. The advice of the Assistant Corporation Counsel of New York City to this new commission as to cases in New York City is the only role of the lawyer under the new act. N.Y. Crim. Code (McKinney, 1939) § 659.

definitions of incompetency;[17] and (4) the testimony of the experts is palatable to the judge.[18]

Though a court may possess power to appoint a guardian, an alleged incompetent has no right apart from statute to have a guardian furnished him in a proceeding to determine competency. Such a proceeding is civil in nature so that constitutional guarantees of counsel for an accused are inapplicable.[19] The common law accorded no protection here and even impoverished defendants in criminal trials were not granted free counsel until the nineteenth century. Since New York has not modified the common law in this respect, an inmate for whom a detention order is sought could not even under the minority opinion in the present case *demand* as of right the appointment of a guardian ad litem.

Whether the court in the present case had power to order the representative's fee to be paid out of the funds of the asylum is a separate question. A court has no power in the absence of statute to command payment for the reasonable value of the guardian's services.[20] Section 207 of the Civil Practice Act, which the minority construed to authorize appointment of a guardian in the present case, provides that "the court may fix the fees and compensation of such guardian. . . . . Such fees and compensation shall be payable from the estate or fund, or from the interest of the ward therein. . . . ." This wording does not appear to authorize fees to be paid from the funds of the institution. In fact the compensation clause indicates that the section was not intended to apply to an action for a detention order. In an original action brought by a public officer to confine a person alleged to be mentally incompetent, the New York statutes do not expressly authorize the court to order a guardian's fee to be paid by the state or a state agency. Such authority, however, may be found by a liberal interpretation of provisions of the Mental Hygiene Act[21] and this authority could be held to extend to the fee in the present case.

[17] The attorney may be "helpful" in preventing departure from the statutory criteria in favor of an inquiry based upon more enlightened psychiatric principles such as the "unity" of the mind. Glueck, Mental Disorder and the Criminal Law 276 (1925). However archaic the statutory tests may be, it seems important that the commissions apply them so that courts will respect their determinations. Mitchell, Psychiatry and the Criminal Law, 21 A. B. A. J. 271, 273, 274 (1935).

[18] The reports prepared by the psychiatric experts under the Massachusetts Briggs Law have been criticized on this ground. Tulin, The Problem of Mental Disorder in Crime, 32 Col. L. Rev. 933, 962 (1932).

[19] Cf. Sporza v. German Savings Bank, 192 N.Y. 8, 84 N.E. 406 (1908), which stated that there was no right to jury in civil cases (such as insanity) except where granted by statute.

[20] The history of the right of the indigent accused to counsel presents a comparable problem. For decades, the defendant in a criminal trial in New York had the right to attorney and yet the attorney was not paid for his services. People ex rel. Hadley v. Board of Supervisors of Albany County, 28 How. Pr. (N.Y.) 22 (1864). Payment was finally authorized by the addition of § 308 of the Code of Criminal Procedure in 1892. Even today, attorneys selected to represent indigent criminal defendants in most southern states are allowed no compensation.

[21] N.Y. Cons. Laws (McKinney, 1927) c. 27, § 77; cf. N.Y. Crim. Code (McKinney, 1939) § 662.