ASPECTS OF THE LEGAL STATUS OF THE
INSANE IN MEDIEVAL ENGLAND

A Thesis

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for the Degree Master of Arts

by

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ABBREVIATIONS USED IN NOTES


C. C. R.          Calendar of Close Rolls [1272-1461]. 40 vols.

C. I. M.          Calendar of Inquisition Miscellaneous (Chancery). 7 vols.


C. R. R.          Curia Regis Rolls. 15 vols., in progress.

C. U. P.          Cambridge University Press.


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CHAPTER I

INTRODUCTION

Our society has yet to resolve many of the problems faced by its mentally incompetent citizens. Lawyers debate the legal rights of the inhabitants of mental institutions and questions as to the liability of the insane criminal persist. The insane in medieval England encountered difficulties determined by the nature of their society. This paper will examine legal procedures used to deal with the insane and legal attitudes toward mental incapacity. We will concentrate on the status of the insane landholder; legal remedies available to those who suffered due to alienations of land by the mentally incompetent; and the liability of the insane before the criminal law.

Contemporary legal documents referred to the insane in general as non compos mentis (or, in law report French, de non sane memoire), meaning "not of sound mind." Among those to whom this rubric was applied were idiots or natural fools. These individuals bore their incapacity from birth and remained defective throughout their lives. This condition was described as fatuitas or, in French, idiocie. Such words as fatuus, stultus, idiota signified people suffering from permanent disability; French equivalents included sote or fol nastre.
In contrast to the permanently incapacitated were those afflicted temporarily. The lunatic (lunaticus), as opposed to the idiot, was said to enjoy "lucid intervals." The law treated the lunatic as it would anyone of full mental faculty during these periods of sanity. The madman or maniac also fell into this category. Furiosus, frenseticus, or demens suggested his uncontrolled behavior. It was also recognized that serious illnesses, such as ague, could cause bouts of temporary insanity.

In the course of this paper we will see the law often considered the incapacity of the insane as analogous to that of the child: in a sense, minors were non compos mentis because of their mental immaturity, just as were the insane because of their mental insufficiency. Mentally incompetent adults were often spoken of as quasi infantes.

We have based this study on medieval English records and documents in print. This limitation is not prohibitive because large amounts of printed data are available. Administrative documents in particular have been printed in extenso. Indeed, because of their bulk, in searching collections of Chancery documents one is forced to rely on the editor's indexes. On the other hand, the mountains of English judicial records are much less accessible to students on this side of the Atlantic; editors of plea rolls and court proceedings have been selective out of necessity. Nonetheless, primary source material in print is quite sufficient for a study of this scope. But, because of the need to rely on indexes and the selective nature of printed judicial materials, one is unable to draw statistical conclusions with
any real degree of precision.¹

For wardship, the calendars of Chancery documents were especially useful. These concise sequential summaries of patent and close roll entries are key sources for the administration of royal lands as are the results of fact-finding commissions printed in the Calendar of Inquisitions Miscellaneous. These collections are comprehensive but are English summaries rather than transcripts in the original languages. For the real actions and criminal cases the Curia Regis rolls are available for the first quarter of the twelfth century in fifteen volumes. These are untranslated transcripts from the rolls, excellent sources for civil as well as criminal pleas. Proceedings in eyre as well as further editions of pleas heard by royal courts at Westminster have been printed by the Selden Society, although their contribution is only a beginning. Pardons, enrolled usually on the patent rolls, occasionally on the close rolls, are highly informative for criminal cases.

During the fourteenth century, collections of law reports, called Year Books in later centuries, became very popular among lawyers.² These reports, in French, are preoccupied with procedure and the arcane science of pleading to the extent that verdicts are often omitted. They are particularly valuable for showing lawyers in action. These law reports, many of which are printed in the Selden and Rolls Series volumes, were very useful on the workings of the writs of entry and real actions in general.

Contemporary law books provide yet another source of information. Glanvill has little to say about crime but is very useful on
the writ of right; he devotes one-fourth of his treatise to it. Bracton's great work was used, in the edition of the Latin text by G. E. Woodbine. S. E. Thorne is preparing a revised edition, based on Woodbine's text with additional notes and translation; only one of the three volumes of text has appeared. Two law tracts from ca. 1290, called Britton and Fleta, are especially important with regard to the origins of the king's wardship of idiots.

In this paper, we shall limit our attention largely to the thirteenth and fourteenth centuries. In order to discuss wardship and the insane, it will be necessary to look briefly at the wardship of underage heirs during the twelfth century. After this, there will be a discussion of the royal prerogative in relation to custody of mentally incompetent heirs, with illustrations from the later thirteenth to the end of the fourteenth centuries. In examining remedies for alienation of land by the insane, we will look at the development of the writs of entry during the thirteenth century with some examples from the fourteenth, including law report information. The third chapter will concentrate on the formative period of the criminal law—especially the thirteenth century—with attention to the Anglo-Saxon background and its relation to mens rea doctrine.

This paper will deal almost exclusively with legal aspects of insanity, rather than attempting a broader social analysis. Furthermore, common law will be considered, to the exclusion of canon law, continental civil law, or the Roman law background. Needless to say, these subject areas would repay investigation; in their relation to the problems of the insane, these fields of legal history, like the
common law, have been virtually ignored. It seems to us that, especially considering the paucity of other sources, legal studies must serve as prolegomena to any more general history of the insane during the Middle Ages.

The first chapter is concerned with the king's claim to wardship of all idiots who hold land by military tenure. Following a general discussion of wardship and the feudal system, we will consider the origins of the king's claim and analyze the royal administration of the lands of idiots, with reference to documents and reconstructed "case histories." We will also look at methods for determining idiocy.

Idiots were not deemed capable of managing their lands in their own right. A persistent rationalization for the king's interest in their custody was the concern that the idiot would alienate his lands without realizing the consequences, to the detriment of his heirs. In the second chapter, following a general discussion of the earlier real actions, we will discuss the development of new remedies, called the writs of entry. One in particular, alleging entry dum fuit non compos mentis, protected the interests of heirs whose ancestors had granted away lands while insane. Some actual cases of the use of this writ and other actions in which insanity was used to invalidate alienations of land will then be considered.

In the third section, after some background on early criminal law, we will examine the law regarding insane criminals. Then, procedure—in particular the pardoning system—will be discussed. Because of the limited sources available, the main concern here will be
with homicide. General principles, in relation to the doctrine of mens rea, will be briefly summarized, with reference to Anglo-Saxon as well as common law.
NOTES TO CHAPTER I

1 For example, royal grants of wardships of idiots to third parties are far more common in the latter half of the fourteenth century, according to the indexes of the Calendar of Patent Rolls. Because of the unevenness in emphasis of the indexes, however, one should be reluctant to make too much of this disparity. Regarding criminal records, civil pleas far outnumber criminal in the printed sources. This imbalance is due, at least in part, to the small percentage of the whole that is in print. General conclusions on insane criminals are difficult to draw because of this fact.

CHAPTER II

THE KING'S WARDSHIP OF FEUDAL

HEIRS NON COMPOS MENTIS

Feudalism, as introduced to England by William the Conqueror, was an organized system of precarious land tenure wherein fiefs were held of lords by vassals in return for military service on horseback. The personal bond between lord and vassal, as evidenced in the ceremony of homage and fealty, harkened back to ancient Germanic custom. Grants of land helped to defray the considerable costs of fielding mounted knights when this sort of warfare replaced combat on foot. In England, tenure by knight service involved certain rights which pertained to the lord, beyond the tenant's military obligation. These appurtenances, known as the incidents of tenure, included the lord's right to wardship. This right was especially significant with regard to tenants whose heirs were idiots and, hence, incapable of doing their knight service and managing their affairs.

Wardship allowed the feudal lord to have custody of the lands of his deceased tenant if that tenant's heir was a minor. In addition, the lord, as guardian, claimed wardship of the heir's body, which brought the concomitant right to sell his marriage, provided the marriage was not demeaning. A male heir remained in the custody of his lord until he reached the age of twenty-one. Wardship was profitable for the guardian because in addition to marriage, which
might bring a considerable price, the lord enjoyed the profits of the vassal's fief as long as the heir remained in his custody. These rights of the lord were considered proprietary: he could sell them and, especially in the case of a wealthy heir, they might be very valuable indeed.  

While the lord enjoyed these perquisites he was also expected to maintain the young heir from the profits of the lands, in a manner suitable to his station; to discharge the debts of the deceased; and to see to the education of the ward. He could not waste the lands, subject to forfeiture of the wardship.

The right of a feudal lord to wardship of his feudal heirs under-age developed during the twelfth century. In 1100, either the widow of the deceased or a relative served as guardian. This was clearly stated in the Coronation Charter of Henry I, of that year. However, in 1176 the Assize of Northampton provided that the lord of the fief should keep a minor heir in wardship. Indeed, in the same chapter where wardship was discussed, the Assize stated that the heir of a free-holder should, upon his ancestor's death, remain in seisin of the fief. Should the lord attempt to prevent the heir from taking possession, the latter might bring the newly-established possessory action of mort d'ancestor. This writ impaneled a jury to decide, before the king's justices, whether the demandant's ancestor was seised—that is, in peaceful possession—of the fief on the day of his death and whether the demandant was, indeed, his next heir. If the answers to both these questions were affirmative, the demandant was installed in the tenement. This document indicates the close connection between
wardship and the heritability of knight's fees.  

When fiefs became heritable as a rule, it was inevitable that on occasion an underage heir would inherit. If, as has recently been argued, the military fief was not fully heritable until about 1200, earlier in the post-Conquest period a lord might have avoided granting land to a tenant unable to perform the required services—such a minor would be unable to fight on horseback—simply by granting to someone else not necessarily related to the deceased tenant, who could do them. Thus, according to Professor Thorne, in the early years following the introduction of feudalism to England, when a tenant died and his fief reverted to his lord, the lord was free to regrant to whomsoever he chose; this is the actual meaning of "reversion." Of course, if the deceased had a capable and dependable heir it would have been natural simply to enfeoff him and, in the course of the twelfth century, progressive enfeofments of sons of fathers whose fathers also had held the fief would create a "more proprietary interest" in the land holding. If, indeed, the tenant's son's right to inherit the tenement developed alongside the lord's right to wardship, the profitable nature of wardship may be interpreted as a sort of compensation for the services unrenderable to him by a tenant underage whose homage he was now compelled to accept. And, in the context of this argument, one can see that the idiot heir, incapable of rendering military service, posed problems for the lord similar to those of the minor heir.

In the area of wardship, as elsewhere, the king asserted prerogative rights which set him apart from his subjects. As the greatest feudal lord, he too had wardships of the lands and bodies of
his under age tenants. But his right was grander in scope: if a
tenant in chief died leaving an infant heir, the king claimed, in
addition to the custody of the heir's body, wardship of all the lands
held by the deceased, whoever his other lords may have been, and hence
their profits.\footnote{11}

By the latter half of the thirteenth century, we see the king
asserting a more ambitious claim. He claimed the wardship of the
lands and bodies of all idiots and natural fools. This right per-
tained not only to those who held of him in chief but to idiots
further down the feudal ladder who may not have held any lands of the
king at all. This aspect of the royal prerogative is not mentioned at
all by Glanvill (writing about 1189), although in his section on ward-
ship he does discuss the king's right as chief lord of all lands of
anyone who holds of him, whether they hold lands of others or not.\footnote{12}
Bracton, in his comprehensive treatise written about 1255, also does
not mention this valuable and certainly noteworthy right, although he
does state that among the articles of the eyre is an inquiry as to
whether there are any minors who ought to be in the king's wardship.\footnote{13}
However, the king's guardianship of idiots is discussed in two later
treatises, those known as Britton and Fleta. Britton, an epitome of
Bracton's compendious work, was composed around 1290 in the French
language of the rising class of professional lawyers.\footnote{14} Fleta, written
in the 1290's, likewise pared away much of the bulk of Bracton's Summa
and, like Britton, included legislative innovations of Edward I.

Thus, the genesis of this royal claim would seem to lie somewhere
between 1255 and 1290.
Britton has this to say on the subject:

And whereas it sometimes happens that the heir is an idiot from his birth, whereby he is incapable of taking care of his inheritance, we will that such heirs, of whomsoever they hold, and whether they be male or female, remain in our [i.e., the king's] custody, with all their inheritances, saving to every lord all other services belonging to him for lands held of him, and that they so remain in our wardship as long as they continue in their idiocy. But this rule shall not hold with regard to those who become insane by any sickness.\textsuperscript{15}

The author refers specifically to idiots from birth (\textit{sot nastre}) and excludes those insane as a result of some illness (\textit{par acune maladie}), presumably because such insanity may be only temporary. He distinguishes idiocy or permanent derangement from mental incompetence of only temporary duration.

\textit{Fleta} clearly states the same principles, distinguishing between born fools and those who lose their wits later in life:

It is the custom to appoint guardians for the lands and persons of idiots and fools for the whole of their lives, and this has been lawful and permissible because of their inability to rule themselves, being adjudged ever to be, as it were, below full age. But because they were suffering many disherisons by reason of such wardships, it was provided and generally agreed that the king should have the perpetual wardship of the persons and inheritance of such idiots and fools from whatsoever lord they held their lands, provided that they were idiots and fools from birth—though not if they became so later—and that the king would marry them and preserve them from any disherison, with this proviso, however, that the lords of the fees and others interested should lose none of their rights, for example, to services, rents, wardships up to the age of legal majority, according to the nature of the fees, to reliefs and such like.\textsuperscript{16}

A document called \textit{Praerogativa Regis} expresses the king's concern with wardship of the mentally incompetent. The Records Commission
included it in its edition of the statutes of the realm, amidst a
group of forty-seven "Statutes of Henry III, Edward I, or Edward II of
Uncertain Date" located between the statutes of Edward I and II;\(^{17}\) in
other printed editions it was labeled a statute of 17 Edward II. But,
as Maitland has convincingly shown, such appellation is incorrect: the
document is not a statute but more probably "a tract written by some
lawyer in the early years of Edward I."\(^{18}\) The document, enumerated in
eighteen chapters by the editors, deals with various royal concerns:
the king's right to prerogative wardship of any minor heirs who hold
any land of him (c.1) and to marriage of all heirs in his ward (c.2);
the royal right to primer seisin: that is, no heir of a tenant-in-chief
may enter his fief before an inquisition has been taken and he has done
homage and paid relief, during which interval the king claims profits
of the land (cc.3, 15);\(^{19}\) the king will assign dower to widows whose
husbands held in chief, even if the heir is of full age (c.4); restric-
tions on marriages of any women who hold in chief (cc.4, 5, 7) and
alienations of lands held of the king (cc.8, 9); he claims wreck of
sea and great fish (c.13);\(^{20}\) his rights to escheats of lands of
Normans (c.14)\(^{21}\) and year, day and waste of the lands of convicted
felons (c.18).\(^{22}\) The provisions contain no substantial legislative
innovations. Rather, they appear to be statements of diverse aspects
of the royal prerogative.

Chapters eleven and twelve are especially noteworthy:

11. 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.

12. Also the King shall provide, when any, that before time hath had his wit and memory happen to fail of his wit, as there are many [with lucid intervals], 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 besides their sustenance 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 [within the aforesaid time] be aliened; and the King shall take nothing [of the profits] to his own use. And if the party die in such estate, then the residue shall be distributed for his soul by the advice of the Ordinary.23

Here the distinction between idiocy—permanent mental incapacity—and lunacy characterized by "lucid intervals" is clearly stated. The king shall have wardship of the lands and bodies of the former for the idiot's lifetime.24 The conditions are similar to those governing wardship of minors: the guardian will have the profits of the lands but must commit no waste and must support the ward. Upon the death of the idiot, his heir shall inherit. These rules shall apply whether land is held in chief or of anyone else. The rationale is especially significant: the king claims this right in order to ensure that, due to the idiot's lack of judgment, his heirs shall not be disinherited by unreasoned alienation of the tenement. Here the law treats the idiot's lack of reason as analogous to the incapacity of the child. But the document does not tell us why the idiot's mesne lord, who would have a more immediate concern and kept his minor tenants in wardship, could not assume custody of his tenant in such cases.

The king will also supervise the care of lunatics—that is those temporarily insane—but only while they are not in command of
their reason. He will see that they and their families are sustained from the profits of the lands and will take nothing for himself. If the lunatic dies "in such estate," the residue beyond support of the family will be given to the Church. Again, the ostensible reason is to prevent irrational alienations of land.

Maitland's date for the initial exploitation of these important rights is the early years of Edward I. He also suggests that their origin is to be explained by reference to the case of Robert Walerand and his heirs. Walerand was a royal justice and one of the king's familiars throughout Henry III's reign. Maitland's theory is that Walerand, because he had no son and his next heir (his brother's son) was an idiot, preferred to have the custody of his lands vested in the hands of the king, at the expense of his mesne lords, of whom some may have been his enemies. Maitland supports this explanation by referring to Britton:

This rule [that the king shall claim the wardship of idiots] was laid down by the common assent of the great lords of the realm and by the provision of Robert Walrand, in whose heir and the heir of his heir the statute first took effect.

Therefore, we may conclude that the king's right was the product of "legislation in which Robert Walrand took part," promulgated toward the end of the reign of Henry III. We shall examine further on some relevant cases in relation to the problem of this date.

This interpretation raises some interesting questions. If the king's right is a novelty--as indeed it seems to be--we might inquire as to the customary practice with regard to wardship of idiots prior to this provision. It is possible that relatives of the mentally
incompetent heir would have taken charge of the administration of the estate during the lifetime of the idiot or lunatic. More probably, however, the mesne lord would have claimed the wardship, in keeping with the idea that the idiot's incapacity is analogous to that of the infant. Fleta, in the passage quoted above, wrote that idiots and fools customarily had guardians. Who these would have been is not clear. Note, however, that the English translation, stating that such guardians were appointed, is not accurate: the Latin text says only that custody by guardians was the usual practice. Fleta does, however, draw the analogy between the mental incompetent and the child.

But the comparison is imperfect, because among Walerand's holdings were lands held of the king, large grants received after the victory at Evesham. If the procedure governing the wardship of idiots followed that of the wardship of minor heirs, the king could have claimed right according to his prerogative as chief lord, as discussed above. Instead, statutory action is taken to insure that he may do so. This legislation is passed, according to Britton, with the consent of the great lords. This would have been necessary if the king was assuming a right—and a profitable right, for we must remember that the wardship of an idiot heir and the taking of profits from his lands would last the idiot's lifetime—previously held by the lords themselves. That they would have yielded such a lucrative right, whether at the urging of Walerand or not, is logically explained only if we assume that the lords felt that the king would be better able to prevent alienation by mentally incompetent heirs. Such alienations would concern these lords partly because they feared loss of services
and incidents as a result of ill-counseled grants by their tenants because they feared that future heirs, should they be idiots, might alienate to the disherison of their own descendants.

Unfortunately, the printed records tell us nothing about the procedure followed prior to the king's assumption of the right to wardship of the lands and bodies of idiots. However, records do indicate that the king was concerning himself with the lands of idiots as many as twenty years earlier than Maitland had suggested. Because wardship was treated as a chattel, the guardian could alienate his rights in the wardship to a third party. Such grants made by the king were recorded on the patent rolls, as in this case from 1253:

Delivery to John de Lessinton of Richard de Newhus, an idiot, with his wife, to keep so long as the said Richard live; and for their sustenance the king has committed to him his land of Newhus of the inheritance of the idiot, which land by judgment of the court the king has retained in his hands for the security of the heirs; on condition that the said John do not waste, diminish or in any way alienate anything thereof to the loss or disherison of the heirs, but that, after the death of the said Richard, it revert to his heirs free and quit of the said John and his heirs.

In August of the same year William Heyrun received a royal mandate to deliver a castle with its appurtenances into the hands of the queen so that John de Lexington might assume custody. This document implies that Richard held the castle of William; because of Richard's idiocy (the document describes him as fatuus), John was to serve as guardian of these lands and the castle.

The king made a similar grant, this dated 7 September 1265, of lands held by a mentally incompetent tenant:
Commitment, during pleasure, to John de Pising, king's serjeant, of the lands and goods of Savary (Saffredi) de Hauekeswell, to the use of the said Savary; on testimony before the king by Roger de Leyburn that he is non compos mentis. Mandate to John de Sandwicco to deliver them to him.  

This appears to be a clear record of custody granted to a third party because Savary was incompetent to manage his affairs for himself.

A third grant, again from the reign of Henry III (1267), added the stipulation that it would be valid only so long as the ward remained mentally incapacitated:

Commitment of Master Godfrey Giffard, king's clerk, kinsman of Thomas de Solaris, of the said Thomas and his lands and goods of the said Thomas, who is not compos mentis as appears by testimony made before the king; until the said Thomas recover from his infirmity.  

These examples do not necessarily invalidate the interpretation of the king's custody of idiots as being based upon Robert Walerand's personal interest in the future of his own lands. They do indicate, however, that the king was asserting his rights in the lands of idiots substantially earlier than has previously been supposed. Whether these rights were the result of statutory action or only exceptional assertions of royal prerogative—perhaps due to the social unrest of the 1250's and 1260's—which served as precedents for the piece of legislation reflected in the tract Praerogativa Regis, we are unable to say.

Before proceeding further to discuss the king's wardship of idiots during the fourteenth century and problems which arose in the exercise of this aspect of royal prerogative, we shall look more
closely at contemporary methods for determining idiocy and lunacy. Principle concerns were that the tenant was unfit to care for himself and, more important, that he might alienate lands without appreciating consequences which could be detrimental to his family or to his lords. 38

Inquisitions, carried out locally pursuant to royal mandate, generally decided questions of mental incompetency. Thus, for example, we see a commission appointed in 1350 by a letter patent directed to three men "...to find, by inquisition in the county of Buckingham, whether Robert Fitz Neel be an idiot." And two weeks later a fourth man is associated with the commission. 39 In 1354 two men were directed

...to examine the state of William de Hothom, who is said to be an idiot, and, if they find that this is the case, to make inquisition in the county of York whether he has been an idiot from his birth or from some other time, and, if so, from what time, whether he enjoys lucid intervals and what lands he holds.40

The patent rolls preserve a similar order, dated 1360:

Commission to the king's clerk Geoffrey de Aston to personally examine Roger de Kyngeford who is said to be an idiot and not sufficient for the rule of himself or his lands, and enquire by oath of good men of the county of Warwick whether he be one, and if so whether from his birth or from what time, whether he has lucid intervals and whether he has alienated any lands, what lands still remain to him and who has occupied these and taken the issues and profits of them.41

If the result of such an inquisition established that the person in question was indeed an idiot, the chancellor, in whom the king vested his jurisdiction over the lands of idiots, was empowered
to grant the custody to a third party, sometimes with the stipula-
tion of a yearly sum to be paid to the king from the profits of the
lands, as we shall see below. Such a grant would be composed by the
Clerk of the Custodies and enrolled in the patent rolls. These
enrollments are the major source of information for the king's adminis-
tration of the estates of idiots. Such references to lunatics are
virtually non-existent, however, because the king's jurisdiction over
them was not profitable.

We may assume that the local inquisition into idiocy was
procedurally similar to another important inquisition regarding
rights to wardship. When there was a question as to the age of a ward
who claimed to have attained legal majority, a jury of neighbors from
the heir's county was impaneled to give their information. The
justices usually relied on local knowledge because there was no
official recording of births until the sixteenth century.

As with the determination of ages, so in questions of idiocy
the facts would in many cases have been obvious. A child may clearly
appear to be well under twenty-one years of age just as a person may
obviously be mentally deficient. Many results of inquisition simply
state that the person in question was an idiot or otherwise non compos
mentis, according to testimony presented to the king. Such informa-
tion could be related to the king by his justices, as when Roger de
Leyburn, royal justice, informed the king that one Savary de Hawkswell
was non compos mentis. Or the local escheator could take inquisi-
tion ex officio, as did Henry de Prestwood, escheator in county
Gloucester, in 1358. He informed the king that John Coof was "a natural fool non compos mentis." On the other hand, a 1358 inquisition into an alienation of land made twenty years earlier found Henry Franklin was not an idiot from birth but had only become insane "five years before the taking of this inquisition." Again, in cases such as these the justice would have been able to rely on knowledge of the neighborhood. Such knowledge would have been especially reliable where a child was born severely retarded or a person had lost his wits and publicly exhibited behavior which betrayed this fact.

At times, however, the king ordered commissions to bring the alleged idiot before his council. Possibly, these were cases in which greater doubt was involved, although this may have been standard procedure by the mid-fourteenth century. In 1350, the chancellor ordered two men "to take John Warre of Rolleston, who is said to have been an idiot from his birth, and bring him before the council at London for examination as to his state." A 1362 inquisition into the inheritance of an idiot stated that John, son and heir of Robert de Panes, had been found to be an idiot "by examination before the council." The patent rolls record a grant of the wardship of lands of John Hott, "which have come into the king's hand because the said John is an idiot, as has been found by examination made of his person in Chancery by John Knyvet, the chancellor, and others of the council..."

An especially interesting case shows the actual "test" that might be used to establish idiocy. After the appointed guardian of
Emma, an alleged idiot, ignored a writ directing that he bring her into chancery to be examined before the council, the king commissioned three officials to examine her at Lincoln:

The said Emma, being caused to appear before them, was asked whence she came and said that she did not know. Being asked what day that Friday was, she said she did not know. Being asked how many days there were in the week, she said seven, but could not name them. Being asked how many husbands she had had in her time she said three, giving the name of one only and not knowing the names of the others. Being asked whether she had ever issue by them, she said that she had had a husband with a son (ad filium), but did not know his name. Being asked how many shillings there were in forty pence, she said she did not know. Being asked whether she would rather have twenty sivler groats (grossos) than forty pence, she said they were the same value. They examined her in all other ways which they thought best and found that she was not of sound mind, having neither sense or memory nor sufficient intelligence to manage herself, her lands or her goods. As appeared by inspection she had the face and countenance of an idiot.54

The questions asked of Emma were of a practical, everyday nature. Her examiners were not concerned with abstract reasoning or problem-solving, but with the simple question of whether or not she was capable of managing her affairs. Also noteworthy is their reference to her physical appearance.55

There were no complex psychiatric tests for insanity. A person suspected of being incapable of caring for himself (or herself) and his lands, as often evidenced by careless alienations, was investigated by royal officials. If he was found to be insane—whether by local inquisition or examination at Westminster—the king assumed wardship of lands and body, which he often granted to a third party. Royal zealousness in this area is fully understandable, given the
profitability of this important right. However, not all inquisitions found that the person in question was indeed mentally incompetent to the point of being incapable of managing himself and his lands. Such a conclusion could also be reached regarding a person who was previously judged insane but by petition was able to reverse the judgement. Some such cases will be discussed below.

Having now discussed the procedure and general criteria employed to determine insanity, we shall examine some "case histories," reconstructed from printed documents. These cases will serve both to illustrate the standard procedures and stipulations under which wardships were administered and granted by the Crown to third parties and also the sorts of problems which would arise.

On 6 January 1334, the king granted to Thomas de Bradeston a manor formerly held by John de Westcote whose heir, also named John, was an idiot. Later the same month John de Ravenesholme, "king's yeoman," received a grant of another portion of the inheritance of John the heir. Both grants stipulated that the grantee "find fitting sustenance for the heir out of the issues of the lands" and stated that the grant was to be valid only so long as the lands remained in the king's hand by reason of the idiocy of the heir: that is to say, should John die, his heirs would inherit and the two grantees vacate these lands; or, should John regain his sanity, the grantees would be ejected. Chancery received in early February an extent or assessment of value, taken by the king's escheator, of the lands inherited by John the idiot, which had been ordered on 21 January. The same John
de Ravenesholm received an additional grant "of the issues and profits of the lands which were earlier granted to him as guardian from the day on which they were taken into the king's hands." In early July of the same year the king appointed a commission to appraise, "by the oath of men of the county," the goods of the late John de Westcote. Although no reason is given, this is further indication of the king's interest in the administration of the estates of idiots. No further documents have been found on this case and, if it was indeed typical, we may assume that on the death of John the idiot, his heir, if he had one, would enter and enjoy peaceful seisin of the inheritance. If he had no heir, the land, unburdened of the king's hand by the idiot's death, would escheat to John's mesne lord.

In the case above, the grantee received the right to all the profits of the lands, beyond the requirements of the sustenance of the heir. Alternatively, the grant of wardship might specify that a certain sum was to be paid to the king yearly. Beyond this rent and the support of the ward, we assume that the appointed guardian took the remainder to his own use. All wardship is by nature profitable to the guardian and, at any rate, it is difficult to imagine anyone assuming the office if he was not to derive any profit from it.

The guardian, in addition to supporting the idiot, was not to commit waste or destruction of the lands of his ward, or he was liable to forfeiture of the wardship. We should not be surprised to find that this rule was at times broken. As a result of an inquisition which determined that Robert, son of Simon de Tothale, "has been
fatuous and an idiot from the king's [Edward III] twentieth year," on 18 June 1360 the king granted wardship of Robert's lands to Roger Grote. The patent rolls show that by 8 February 1361 Roger had died; the lands having been wasted and destroyed "in diverse manners," the king

...committed the keeping of them to Henry Ewene and Alice his wife, the said Robert's sister, to whom the inheritance cannot descend...so that they keep the lands without waste and destruction, and find sustenance for the said Robert and his children...61

Then on 6 November 1363 John de Ardern and Edmund Fitz John were commissioned

...to make inquisition in the county of Buckingham touching alleged wastes committed by Henry Ewene and Alice, his wife, in the lands and houses of Hampslap of the inheritance of Robert de Tothale, an idiot, in the king's hand by reason of the idiotcy and in the keeping of the said Henry and Alice by appointment.62

Not until 1 March 1361 do we learn that:

Whereas the king has found by inquisition that Henry Ewene and Alice, his wife, have committed waste of the lands, houses, woods and gardens in Hampslap of the inheritance of Robert son of Simon de Tothale, which are in the king's hand by reason of the idiotcy of the said Robert,...he has committed the keeping of the said lands to Robert son and heir of the said Robert for such time as they remain in the king's hand, on condition that he commit no waste and find fit sustenance for the said Robert son of Simon, his wife and children.63

Just as there was the possibility that the guardian might unjustly commit waste, so was it possible that he might not support his ward. A commission, dated 8 May 1335, was instructed to inquire in Lincolnshire as to the lands of the inheritance of John de Brewes, an idiot as found by inquisition, because it was alleged that, since
the death of John's mother, "...there have been divers alienations of these [lands] and wastes of houses and exiles of tenants made to the disherson of the heir and the depression of his tenants, and to the king's prejudice."64 The king had assigned the wardship of the lands in Lincolnshire to John de Cobham in August, 1358 for the rent of 20 l. yearly, in addition to finding "reasonable maintenance" for the heir, his wife, and children. In letter close dated 20 October 1358, the king ordered John de Cobham to pay Joan, wife of John de Brewes, 20 marks twice yearly, at Martinmas and Whitsuntide, with the threat that if he failed to do so, he would lose the wardship. This order was made because "Joan has complained that John de Cobham has not ministered anything to her, to John or to their children for the time that he has had that wardship..."65 The guardian apparently ignored this order, however, because in a mandate of 8 May 1359 we learn that he had paid nothing as yet. For this reason, the king granted to Joan "...power to distrain herself or by her servants in the said manor and its members for any arrears due in the future until she be satisfied of the same."66 Perhaps this provision was effective for we hear no more complaints. But a letter dated 20 June 1361 to the escheator in Lincolnshire announced a bizarre development:

Order to remove the king's hand and not be intermeddle further with the lands of John son and heir of John de Brewosa, taken into the king's hand by reason of his alleged idiocy; as by examination before the council he is not an idiot.67

Two later documents indicate that John de Brewes had indeed regained his senses; he was no longer in the custody of a guardian.
The case of John de Brewes was not the only one in which a person previously thought to be mentally incompetent was found upon examination to be sane. A patent roll entry of 17 May 1354 records that, because John atte Berton was an idiot "so that he was not sufficient for the rule of himself and his lands and goods," the king had commanded the escheator in county Southampton

...to view the said John and examine him circumspectly upon all matters whereby he could be certified of his state, and nevertheless to enquire by the oath of good men whether the said John, being in the same state, had alienated lands and goods, what lands were left to him, and of whom the lands, alienated and not alienated, are held and by what service, and who was the next heir; and by the inquisition it was found that the said John had been an idiot for sixteen years, always in the same state without lucid intervals, that there came to him by inheritance by the death of his father James de la Berton...

The king committed these lands to a guardian, Thomas de Mussenden, with the usual stipulations regarding waste and sustenance. In addition, the guardian was to pay a "fixed rent." But John brought suit claiming that he was not at that time nor at the time of the escheator's inquest an idiot and requesting that his lands be restored to him, along with "the issues thereof while in the king's hands." In response, the king ordered the escheator to examine John in the presence of Thomas and to establish by inquisition whether John was an idiot and if so whether from birth or some other time and whether he enjoyed lucid intervals.

...and on its being found by the personal examination as well as by the inquisition that the said John from his infancy until his completion of the age of twenty-one years and more was of sound mind, having no kind of idiotcy, but, because of a
great fright and excessive grief because of his father's death, he afterwards sustained almost total loss of memory and remained in that state for three years, although with occasional lucid intervals, after which he recovered and his memory was restored and remained so for more than five years before the date of the said inquisition, and thereupon the king by writ commanded the said Thomas to restore to the said John his lands with the issues received by him, and not to intermeddle further therewith.

This situation suggests a problem that would certainly have been inevitable, considering the lack of any medical or psychiatric standards for determining idiocy. And perhaps the escheator was a bit over-anxious in claiming this wardship for the king. The document does state, however, that over five years passed between John's "excessive grief" at the death of his father and the original inquisition, which raises the suspicion that the escheator's mistake may not have been entirely bona fide. Also significant is the king's order to return the issues taken by Thomas from John's land during the guardianship, an admission that compensation was due for the misunderstanding.

In another interesting case, a landholder was wrongly found to be an idiot on two separate occasions. In 1365, a commission was appointed to find by jury inquest whether Roger, son of Richard Stanlak, was an idiot. Roger, having been found to be an idiot from birth and taken into the king's custody, the escheator in Berkshire, John Froille, was ordered in 1374 to bring Roger before the chancellor and justices at Westminster. They ruled that he was no idiot and on 5 December of the same year ordered the sheriff to remove the king's hand from the premises. But in 1377, the first year of the reign of Richard II, a new escheator (named Nicholas Somerton)
was at work in Berkshire. An inquisition, taken *ex officio* by Nicholas, recorded an alienation of land made to John Maris by Roger, son and heir of Richard Stanlak, who is here referred to as "an idiot from birth." And on 2 October of the same year, the king granted custody of Roger's lands to Roger atte Wode, because Roger the heir had been "found to be an idiot by inquisition taken from Nicholas Somerton, escheator in that county." Roger atte Wode was to have custody for as long as such custody pertained to the king and was not required to pay any rent in return; he was also expected, as usual, to "find for the said idiot a sufficient maintenance according to the rate (*juxta ratam*) of the premises." However, a letter patent revoked this grant on 18 May 1378. John Maris and two others had brought suit, stating that they had legally acquired lands from Roger the alleged idiot, but had been removed as a result of Nicholas's inquisition. Their suit had led to the king's order, in December, 1377, that Roger the guardian come before the king in chancery to show cause why the grant of wardship to him should not be revoked. But he did not come and "...it was decreed in Chancery by the advice of the king's justices and serjeants, after inspecting the enrollment of the writ of 5 December, 47 Edward III [1374], that the seizure cease, and the letters patent [dated 2 October] be revoked."

The problems which arose in this case seem due to two factors. The first escheator, John Froille, originally found by inquisition that Roger was an idiot. This was reversed at Westminster, nine years later. A second escheator, however, conducted another inquisition, which is referred to in the grant to Roger atte Wode. At the
suit of petitioners whose landholdings were distributed by the king's exercise of his prerogative, chancery referred to its earlier judgment and the grant of wardship was abrogated. Confusion may have arisen with the change in local officials. And, again, perhaps the confusion reflected over-zealousness among one or other of the escheators in attempting to secure the wardship for the king. But this case may merely reflect a "borderline" case of idiocy. Perhaps Roger was of sufficiently low intelligence to give honest investigators the impression that he was mentally incompetent or perhaps bizarre behavior caused his neighbors to doubt his sanity. The king's officers at Westminster, however, must have been assured that, however deficient he might have been, Roger was, indeed, capable of taking care of himself and his lands.

If the foregoing case suggests honest confusion, on occasion the king's jurisdiction over idiots provided the opportunity for downright deception. A report from an inquisition dated 30 April 1362 lists lands held in chief by William Wanting, who had recently died. His heir was his sister Joan, "who is of the age of twenty-one years and more [and] is an idiot entirely without sense..." Keeping of her lands was temporarily assigned to John de Estbury, escheator in Berkshire. In 1363, the king granted wardship of these lands to Walter de Wight, "king's yeoman." Ten years later, as related in a document dated 14 December 1373, Joan had inherited additional lands, the keeping of which was assigned to Thomas Winterborn, Joan's uncle. These were not held in chief. Wardship of Joan's body was granted to William de Monte Acuto, earl of Salisbury,
who was to support her from the issues taken by Thomas. Then in a patent roll entry of 26 February 1374, we learn that Walter de Wight had sold his guardianship to John de Estbury, the escheator whose inquiry began this case. John then proceeded to obtain royal permission to acquire Joan's land from her—such permission was required for alienation of lands held in chief—whch he received by judiciously not mentioning that Joan was an idiot. John also acquired land recently descended to Joan due to the death of her uncle, Thomas de Winterburn. In response to these acquisitions, the king seized all land "because Joan, when brought before council and examined, was found to be incapable of managing her affairs." The case ended with a grant of the wardship of Joan's lands to Thomas Goioun, "her kinsman," for a farm of 20 l. yearly. Additionally, the king pardoned John "his tresspass, deception and contempt" for a 20 l. fine. Thus, John de Estbury escaped rather lightly for his bold chicanery and Joan was recommitted to another guardian.

One final case suggests the potential for abuse, or even treachery, that could arise from the king's attempts to assign wardships of idiots. On 4 November 1382, a writ was addressed to the escheator in Norfolk, to inquire into the state of Emma, widow of Edmund de Beston. She was alleged to have alienated the greater part of her lands since becoming an idiot. The inquisition, taken on 20 November at Bishop's Lynn, reported this information:

Emma late the wife of Edmund de Beston is an idiot, unable to manage herself, her lands or her goods. She has alienated no lands in the escheator's bailiwick since she has been in that condition. She
was personally examined before him and found to be an idiot; but she has not been so from birth, but during four years and more, having been suddenly deprived [of her senses] by the snares of evil spirits in May 1 Richard II [1378]. She has no lucid intervals, but always remains in the same condition.

On 7 December the king assigned wardship of the lands and body of Emma to Philip Wyth of Lynn. The document expressed doubts, however: although the king had been informed "on behalf of the said Emma that she is of sound mind, he gives evidence to the above inquisition till the contrary is proved." The escheator then responded that he

...went to Bishop's Lenne and inquired of Henry Bette, the mayor, where Emma dwelt; but he refused all information and help, but secretly warned Lawrence de Elyngham, with whom Emma dwelt, so that the doors of the house where she dwelt were kept firmly closed. The escheator ordered Lawrence on the king's part to deliver the body of Emma, which he refused and hindered as far as he could, so that the escheator could not deliver her to Philip.

Next, a writ ordered Philip, the assigned guardian, to bring Emma to Westminster to be examined in Chancery, this because the king had heard that she was not insane. A petition from Emma argued not that she was of sound mind, but that her wardship had been assigned collusively:

Petition of the said Emma stating that her guardianship for life was granted to the said Philip through his desire of her goods, by force of an office surreptitiously found before the escheator and privily taken by persons procured by [a promise of] having part of her goods on a surmise of her idiocy; and that he is so greatly indebted both to her and to others that he has no means of payment out of his own goods, but only out of hers, whereby she is like to be brought to naught and her goods wasted and destroyed. She prays that her guardianship for life, with all her lands and goods, may be committed to the twelve most sufficient persons of
Lenne who are not related to either party, and that the letters patent to Philip may be cancelled.

Threatened with an enormous fine of 300 l., the mayor of Bishop's Lynn, with two executors of her husband's will and Lawrence de Elingham and John Lok, were commanded to deliver Emma and her land in the guardianship of Philip, or show cause why not.

As to showing reasonable cause, they say that the escheator took no lawful inquisition, nor did he cause Emma to come before him, nor was she examined before him in person as supposed by his return; she is not an idiot, but of sound mind, knowing good from evil and evil from good, and enjoys [lucid] intervals. Further, the said Philip, to whom the wardship of the body of the said Emma and of her lands and goods, if any, has been granted on the said inquisition made by conspiracy between him and the escheator, is an evil man and needy, having foolishly wasted the goods which were his, so that he is become overwhelmed in poverty and debts to many men and goes about any means of gaining goods, caring not how or from whom so long as he gets them. Further, the present king and his progenitors have made our town of Lenne a free borough by their charters, and have granted firmly and permanently (firmum et stabilem) to the mayor and burgesses that they may have and use all such liberties and customs as the city of Oxford has and uses. On this point Henry de Betele, mayor of Lenne, though unworthy, signifies that if any burgess or the wife, son or daughter of a burgess within the town is an idiot from birth or from a certain time or is overwhelmed by disease or old age or is of unsound mind so as to be unable to manage himself, his lands or chattels, the mayor and aldermen for the time being, together with the sufferer's nearest friends and relations, have been wont from time immemorial to provide for his management, guardianship and maintenance, without intervention of the king, his progenitors or any person in their name within the liberties of the town of Lenne.75

Finally, however, the king commissioned four men to examine Emma at Lincoln. The record of their examination has been presented above: Emma was, in fact, an idiot.76

It is impossible to conclude to what extent abuses resulted from the practice of placing idiots and their lands in the custody of
guardians. Certainly unscrupulous manipulators were able to take advantage of the system and it is equally certain that many mentally deficient individuals suffered at their hands. Still, however, the aim of the law was praiseworthy: people considered incapable of taking care of themselves were provided with guardians whose rights over the property of their wards were limited and whose responsibilities were clearly stated. The king was able to bring to bear the administrative resources at his disposal to see that the rules were not ignored. We have seen cases in which complaints addressed to the king led to positive action. Furthermore, it cannot be said that the motivation behind the Crown's exercise of this facet of its prerogative was purely pecuniary. The wardship system addressed the king's interest in the services incumbent on military tenures and especially the problems posed by subdivision or alienation of fiefs by tenants not fully aware of what they were doing. Such problems were of direct concern to the idiot's mesne lord and, of course, to the idiot himself.

Nonetheless, in its interest in preventing irrational alienation of land, the law seemed to be concerned more with the rights of the idiot's heirs than with his own well-being. In the next chapter we shall examine the remedies available to the heirs of idiots, whose lands had been alienated by mentally incompetent ancestors.
NOTES TO CHAPTER II


2 Besides wardship, the other incidents of tenure by knight service included homage and fealty, payment of aids, relief, escheat and forfeiture, and the lord's right to sell the marriages of his wards. A good recent summary of the incidents is A. W. B. Simpson, An Introduction to the History of Land Law (London: O. U. P., 1961), pp. 15-20.

3 This discussion of wardship is limited to military tenures, namely knight service and grand serjeancy. The best general introduction to wardship and marriage is P & M, I, pp. 318-329. For socage tenure generally (the most common of the non-military free tenures) see P & M, I, pp. 291-296; regarding socage tenure and its rules governing wardship, see P & M, I, p. 321.

4 This principle is stated in Magna Carta (1215), c.6. Eng. Hist. Docs., III, p. 318.

5 Right to wardship, as opposed to rights in land, is a chattel interest. This principle is clearly stated in a Year Book entry for Hilary Term, 11 and 12 Edward III (R. S. v. 31b, pt. 6), p. 405: "...garde nest qe chatel."

6 "If a widow survives with children under age...the guardian of the land, and of the children, shall be either the widow or another of their relations, as many seem proper. And I order that my barons shall act likewise towards the sons and daughters and widows of their men." Coronation Charter of Henry I (5 August 1100), c.4. (Eng. Hist. Docs., II, p. 401). "Item, if any freeholder has died, let his heirs remain possessed of such 'seisin' as their father had of his fief on the day of his death; and let them have his chattels from which they may execute the dead man's will...And if the heir be under age, let the lord of the fief receive his homage and keep him in ward so long as he ought to...And should the lord of the fief deny the heirs of the deceased 'seisin' of the said deceased which they claim, let the justices of the lord king thereupon cause an inquisition to be made by twelve lawful men as to what 'seisin' the deceased held there on the day of his death. And according to the result of the inquest let
restitution be made to his heirs..." Assize of Northampton (1176), c.4. (Ibid., p. 412).

7 Note that scutage, money payable by the tenant in lieu of knight service in person, does not become regular practice until mid-thirteenth century. Simpson, An Introduction to the History of Land Law, p. 8. Such an alternative to knight service would, it seems to me, have negated objections to enfeoffing underage heirs on the grounds of inability to perform knight service.


10 See P & M, I, pp. 511-526 on legal aspects of kingship, where the rights of the Crown are seen as "intensified private rights."

11 P & M, I, p. 322; Simpson, Introduction to the History of Land Law, p. 19. When a tenant died holding land of various lords, none of whom was the king, "each of them got the wardship of the tenement that was holden of him." As to wardship of the heir's body, "the general rule traced back the title under which the dead man held the various tenements and preferred that lord from whom, or from whose ancestors, the most ancient title was derived." P & M, I, p. 320.

12 Glanvill, (p. 84) rationalizes the rule thus: "quia dominus rex nullum potest habere parem multo minus superiorem." For general information on Glanvill, see Hall's introduction to his edition.


15 Britton, II, 20. The French text: "Et pur ceo que aucune foiz avent que acun heir est set nastre, par quie il ne est mie able a heritage garder, voloms nous que teus heirs, de qi que il unques tienent, madles ou femeles, demurgent en nostre garde oveke touz leur heritages, saveu a chescun seignur touz autres services qi ly appendent de terre tenue de ly, et issi remaignent en nostre garde, taunt cum il durent en lour sotie. Et ceo ne voloms nous mie de ceux qi deveignant fous par aucune maladie."
16 Fleta, II, p. 21. The Latin text: "Solent enim tutores terras ydiotarum et stultorum cum corporibus eorum custodire suo perpetuo, quod licitum fuit et permissum eo quod se ipsos regere non nouerunt, nam semper iudicabatur infra etatem vel quasi. Verum, quia plures per huiusmodi custodiam ex heredaciones conpaciebantur, prouius fuit et comuniter concessum quod rex corporum et hereditatem huiusmodi ydiotarum et stultorum sub perpetuis custodiam optineret, dum tamen a natuitate fuerint ydiote et stulti, secus autem si tarde, a quocumque domino tuerunt, et ipsos maritaret et ex omni exhere-dacione saluaret, hoc tamen adjecto quod dominis feodorum et aliiis quorum interfuerit, vt in serviciis, redditiwis et custodiis vsque ad legitimam etatem, secundum condicionem feodorum, releuiis et huiusmodi nichil iuris deperiret."


18 Frederic W. Maitland, "The 'Praerogativa Regis,'" English Historical Review 6 (April, 1891): 368.

19 This right was also recognized in the Stat. of Marlborough, 1267, 52 Henry III, c.16. (Statutes of the Realm, I, p. 24). When the inheritance is not held of the king, the lord is not to disturb the heir's seisin. The lord's seisin--called "simple seisin"--is purely formal when compared to the king's right to "primer seisin." P & M, I, pp. 310-311.

20 Wreck of sea had been claimed by the king at least since Bracton's time. Bracton, II, p. 331.

21 The document cites as precedent examples wherein Henry III claimed escheats of Norman lands "and gave them to be holden of the chief Lords of the Fee, by Services due and accustomed thereunto."

22 The king was entitled to waste the felon's lands for a year and a day, after which they were returned to the lord. This was a "very ancient right." P & M, I, p. 351.

23 See the Appendix for the Latin text, where I have filled out the abbreviations. Likewise, I have modernized capitalization of the editor's English translation.

24 This distinction is clearly evident in a Year Book note from 1309: "Note that if an infant under age is born fool (fol nastre), the king shall have a wardship all his life; but it is not so in the case of a lunatic ("Mæs s'il soit lunatick il n'averia point"): per BEREFORD, C. J." Year Books 2 & 3 Edward II (S. S. v.19), p. 151.

26. Ibid., pp. 369-370.


28. Because of his role in the baronial conflicts and close connections with the king, Walerand doubtless had many enemies. He supported the royal cause consistently and "pronounced the sentence of disinherenctance on all who had taken up arms against the king at Evesham." (D. N. B., XX, p. 489). As to his loyalty to the king, he is described by Powicke (The Thirteenth Century, 2nd ed., London: O. U. P., 1962) as "a highly trusted and intimate servant of the king," "faithful" and "redoubtable," and a "sturdy royalist."

29. Britton, I, p. 243. Holdsworth writes that the lord was originally entitled to the wardship, which right passed to the Crown "by virtue of some statute or ordinance of the latter end of the reign of Henry III." History, I, p. 473.


31. See below, note 75, on borough practices, which differ from feudal procedures in providing for family custody.

32. These grants included "most of the lands of Hugh de Nevill." D. N. B., XX, p. 489.

33. The statute Quia Emptores (1290) sought to prevent alienations by tenants which would deprive their lords of incidents and services. For example, if a tenant granted away his tenement in sub-infeudation, his lord would lose rights to wardships and escheats that were previously incidental to his lordship of the tenement. The statute provided that henceforth all such grants would be by substitution rather than subinfeudation. Perhaps the introduction of the king's prerogative wardship of idiots also reflects concern for the problem of alienations by tenants to the detriment of their lords. See Milsom, Foundations, pp. 97-100 on the statute and it purpose.

34. C. P. R., 1247-58, p. 206. According to the Calendar, this grant was endorsed by "R. Walerand" himself.

36 C. P. R., 1258-66, p. 448.

37 C. P. R., 1266-72, p. 96.

38 It will be observed that the following examples of inquisitions and commissions to determine mental incapacity come from the fourteenth century. Few earlier references were found among the printed documents. It is not possible to say what sort of procedure for determining insanity was followed during the later thirteenth and fourteenth centuries. The absence of specific information suggests an informal system wherein the king was informed by relatives or local officials of cases of insanity. Such information may certainly have led to inquisitions—the records of which are not extant—similar to those to be discussed.

39 C. P. R., 1348-50, p. 533.

40 C. P. R., 1354-58, p. 70.

41 C. P. R., 1358-61, p. 403.


43 Ibid.

44 The distinction between idiocy and lunacy is apparent in this document: "...although John de Staynford be out of his mind and insufficient to rule himself and his lands, it is adjudged by due examination before the king in chancery that he is no idiot, wherefore the keeping of his lands ought not to pertain to the king by reason of his royalty, and the said John Copley and John Woderoue of Yorkshire have mainperned in chancery under a pain of 20 l. that John de Staynford shall not alien his lands, nor commit waste therein." C. C. R., 1381-85, p. 503.

45 This inquisition was initiated by the writ de etate probanda. A recent article on the subject is that by Sue Sheridan Walker, "Proof of Age of Feudal Heirs in Medieval England," *Medieval Studies* XXXV (1973): 306-325.

46 Ibid., p. 307.

47 C. P. R., 1258-66, p. 448.
In response to this information, the "tenements of John Coo of Lassyndon were taken into the king's hand," as C. I. M., III, p. 97 relates. This latter document also included a detailed description of John's lands and their value, as was usual. Escheators were royal officials who took notice of lands which reverted to the king within the counties to which they were appointed.

A statement from a Year Book suggests that this may have been standard procedure: "When the King understands that there is an idiot, the King causes him to be sent for to be examined before the King's Chancellor or some other person, and if he be found a lunatic, still the King does not seize, but takes an inquest as to whether he has been an idiot and a lunatic (sot et fol) from his birth or with lucid intervals..." Year Book 16 Edward III (1342) (R. S. v. 31b, pt. 12²), p. 238.

Unfortunately, the results, if recorded, are not in print.

Sir Anthony Fitzherbert, a judge who wrote extensively on English law, writing in the early sixteenth century defined an idiot as "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding or reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool." Quoted in S. Sheldon Glueck, Mental Disorder and the Criminal Law (Boston: Little, Brown, and Co., 1925), p. 128.

The relevant documents are C. I. M., II, p. 334 and C. P. R., 1330-34, p. 493 (two entries), 524, 581.

Other grants which allowed the grantee to take the profits without rendering anything to the king: e.g., C. P. R., 1350-54, p. 61; C. P. R., 1377-81, p. 26; C. P. R., 1381-85, p. 447. In one case (C. C. R., 1381-85, pp. 529-530) the king granted lands "not
exceeding the value of 20 l. a year," the grantee "rendering nought to the king" and required to provide maintenance for the idiot and "answer at the exchequer for the surplus, in case [the lands] be worth more."

58 E.g., a grant which required that 6 l. be paid yearly at the Exchequer. C. P. R., 1292-1301, p. 501.

59 To waste is to damage or allow to deteriorate land such that is loses its value.

60 The relevant documents are C. P. R., 1938-61, pp. 429 and 543, C. P. R., 1361-64, pp. 69 and 450, C. P. R. 1364-67, p. 223, and C. I. M., III, pp. 235-236.

61 C. P. R., 1358-61, p. 543.

62 C. P. R., 1361-64, p. 450.

63 C. P. R., 1364-67, p. 223. Following the replacement of Henry and Alice by Robert, son of Robert the idiot, this case has a rather odd postscript. In answer to a petition from Alice, whose husband was now dead, a writ was jointly directed to the escheator and the sheriff, ordering an inquisition. This inquisition supplied the following information: "Robert son of Robert Barre of Tothale being infuriated (in toto furiousus) and Robert his father fought with drawn swords on May 2nd in the above year [1365]. Robert the father was wounded in the right arm and hit on the head with a stone, but not to the peril of death. All this was done by Robert the son in fury induced by fear of his father, who is possessed by an evil spirit (ductus est per spiritum maledictum)," (C. I. M., III, pp. 235-236). Although I have not ascertained the reason for Alice's petition—the quarrel is officially no longer any of her business, as she is no longer a guardian—it is tempting to conjecture that, as the elder Robert's sister she was seeking to impugn the credibility of her nephew, perhaps with the view of regaining wardship of her brother. Whether her motives were sisterly or merely pecuniary I would not venture to guess. For another case involving allegations of waste, see that of Robert de Panes, an idiot in the custody of one Thomas Moigne: C. P. R., 1361-64, pp. 171, 206, 318, 430, 438, 448; C. I. M., III, p. 205.

64 C. P. R., 1354-58, pp. 235-236. Other documents on this case are C. C. R., 1354-60, pp. 362 and 472-473; C. P. R., 1354-58, p. 646; C. P. R., 1358-61, pp. 197-198; C. C. R., 1360-64, pp. 189, 273-274, 502-503.

66. C. P. R., 1358-61, pp. 197-198. Distraint involved the right to seize chattels or land of equal value to the unfulfilled obligation (in this case the money due Joan from John) only as a means of compelling the person distrained to render what was due. See P & M, II, pp. 575-578.

67. C. C. R., 1360-64, p. 189.

68. C. P. R., 1354-58, pp. 44-45.

69. The relevant documents are C. P. R., 1364-67, p. 202; C. I. M., IV, p. 6; C. P. R., 1377-81, pp. 26, 238.

70. One should not, it seems to me, go too far in attributing the escheator's attempts to secure the wardship as evidence that royal policy was generally one of methodical exploitation of this valuable right. The number of wardships granted "rent-free" argue against such an interpretation.

71. Another case of mistaken idiocy: an alleged idiot appeared "before the justices and others of the council learned in the law, and upon examination it seemed to them that he was no idiot, but of sound memory." C. C. R., 1385-89, p. 180.

72. The relevant documents are C. P. R., 1361-64, pp. 186, 340; C. P. R., 1370-74, pp. 379, 418-419.


74. This information is from an especially extensive entry in C. I. M., IV, pp. 125-128.

75. I have been unable to locate the reference to Oxford "liberties and customs." However, records from Hereford and Bristol indicate that in some boroughs at least, the king did not have wardship of idiots: Borough customs, Hereford (cap. 71): "...And if any of our fellow-citizens allege that any testator or other person alienating tenements is in any way not of sound mind or an idiot, in such case and the like, our chief bailiff, in full court, having assembled the executors of the testator or the citizens nearest [of kin] to him, shall examine them secretly and separately to the number of twelve; and if they agree, upon examination, then the bailiff shall publicly make known their verdict, and if they do not agree, the majority shall be believed. And on the decision of the court, if it be found that such persons were of sound mind and not insane, the judgment shall be made and the justice done as it behoves. But if he be
not of sound mind, it shall be done concerning the tenement, if any be bequeathed, as is aforesaid of children who may be defrauded [i.e., guardians will be appointed by the bailiff on advice of citizens to manage goods, tenements, chattels]. And of idiots in the same way, unless they have father or mother living who claims to look after and guard them, and then they shall be given up to them in preference to others, provided that the manner of the delivery and every circumstance touching the same shall be enrolled in the court rolls for fear of defrauding or disherison which may happen to such persons (1486)." Borough Customs, vol. 2 (S. S. v. 21), pp. 156-157. Bristol II, cap. 14:
"...And concerning the insane (de hominibus dementibus), the mayor shall take their goods and chattels and deliver them to the next of kin to be kept until they are restored to sanity. And the next of kin must provide a guardian for the bodies of such insane persons, that no harm or mischief may happen to them and that they do no harm to others (1344)." Ibid., p. 150.

76 See above, pages 21-22.
CHAPTER III

ALIENATION OF LAND BY PERSONS NON COMPOS MENTIS

We have seen that the idiot was not considered fit to hold land by military tenure in his own right. Instead, the king stepped in and claimed wardship of all lands held by idiots. He did not restrict his claim to lands held in chief. One reason for this practice was the fact that the idiot, like the minor, was unable to care for himself. Another persistent justification for the exercise of this right was the concern that the idiot might alienate his lands not understanding the consequences, to the detriment of his heirs. Thus, wardship was a precautionary measure to protect the idiot and his heirs from his lack of reason. We shall see in this chapter that insanity on the part of the grantor was grounds for invalidating a grant of land.

To understand the legal remedy which alleged a specific defect in a tenant's title, based on a grant made while the grantor was non compos mentis, we must first consider briefly the other real actions. We shall do this in the chronological order of their inception.

Before the creation of the expeditious possessory assizes by Henry II, the two forms of the writ of right (breve de recto) were the only remedies available to demandants in real actions.² The
crucial development in the real actions was the gradual gathering into the king's hands of jurisdiction, at the expense of seignorial courts. Of the two forms of the writ of right, the writ of right patent would generally be used when the disputed land was held of a lord other than the king. If the demandant claimed to hold in chief, the case would be heard by the king's court. If not, the lord's court tried the case. The Crown asserted its interest in seeing that justice be done to free-holders in private courts by means of the praecipe from the writ of right. This writ would go directly to the sheriff of the county in which the disputed land lay and began proceedings in a royal court. It was available to demandants who, for various reasons, might not be able to receive justice at the hands of their mesne lord.

Although the difference between the two types was one of jurisdiction, in form they were substantially the same.\(^3\) In the writ of right patent, the king commanded the lord to do justice to the litigants, while the praecipe form commanded the tenant to render the land in question to the demandant or show cause before the king's justices why this should not be the case. Procedure, whether in the lord's or king's court, followed the same pattern. The demandant would formally state his claim--this statement was known as his "count"--in which he set forth his right to the land. His right was based upon possession, as evidenced by profit-taking and the receiving of rents and services by some ancestor.\(^4\) He had to meticulously trace the descent of this right through the various heirs, down to himself. The tenant, if he wished to defend his seisin, then made an equally formal denial. Judicial combat decided the issue: the demandant
produced a champion who swore that his ancestor had witnessed the seisin of the demandant's ancestor and the tenant, or his champion, swore that the oath of the demandant's champion was untrue. The resultant duel was the only means of settling the case until Henry II initiated the option of putting the question upon the grand assize, a jury of local knights. Recourse to the grand assize automatically brought the case before a royal court.

The question of greater right between the two parties was founded on the relative antiquity of the seisin from which the rival claims were derived. Thus, if the demandant's great-grandfather had been seised of the land and it had descended to his grandfather, whose seisin had been intruded upon by the tenant's father, these facts would be ascertained by the grand assize and the demandant would regain seisin. Very important, however, was the option of the defendant to have the case settled by battle or grand assize.

This option placed the tenant in a writ of right proceeding at a definite advantage. This must certainly have been a consideration when Henry II initiated the possessory assizes. These were, in contrast to the ponderous writ of right, especially expeditious. The question to be decided was clearly formulated in the writ to the sheriff.

The assize of novel disseisin protected in a royal court the freeholder who had been recently disseised unjustly and without judgment (iniuste et sine judicio). If the assize jury of twelve "free and lawful men" decided that, first, the demandant had enjoyed "free and peaceful seisin" and, second, he had indeed been disseised,
he was re-installed in the tenement immediately. Because the writ formulated these questions, no pleading was required. This remedy allowed no vouching to warranty or essoins, and the assize proceeded even if the defendant defaulted in appearance. In this way, the king provided an expeditious and efficient means of protecting seisin of free-holders against unlawful disseisin.

Similarly, the assize of mort d'ancestor protected the heir whose ancestor died in free and peaceful seisin. If the heir was prevented by his father's lord from taking possession of the tenement, he could bring this remedy. The assize jury would decide whether the demandant's ancestor was seised on the day he died and whether the demandant was the next heir of the deceased. If the answers to both of these questions were affirmative, the demandant was entitled to seisin. In such cases the demandant could not bring novel disseisin, which alleged disseisin, because he had never been seised. As with novel disseisin, this remedy was very expedient.

The development of the writs of entry continued to uphold the king's interest in protecting the rights of free-holders from unlawful intrusion. The writ of entry sur disseisin supplemented the earlier possessory assizes. Novel disseisin was applicable only where both parties—disseeor and disseisee—were alive. This writ of entry, however, could be brought by the disseisee against the heir of the disseisor and in this form became a "writ of course" in the fall of 1205. Within a generation its scope was broadened to include the heir of the disseisee. Thus, in the early thirteenth century this writ was available when one of the parties had died, in
cases for which novel disseisin would otherwise have been suitable.

The doctrine of "degrees" governed the allowable "distance" from the original disseisin. The allegation of unlawful entry could employ up to two "connecting words:" for example, the demandant (D) could claim that the tenant (T) had no entry save per (through) X, cui (to whom) Y had demised the land. This Y would have been the disseisor of D or his ancestor in this case. Or, in other cases, D might claim that T had no entry save per X, who had disseised D or his ancestor and demised to T. Where the writ formulated the allegation using both per and cui, the writ of entry was said to be "in the cui." If only per was specified, the writ was "in the per." Thus, the maximum "distance" was four hands or degrees: the disseissee (being D or his heir), the original disseisor (Y), his heir or feoffee (X), and X's heir or fooffee, who was the defendant, T.

However, statutory action soon crossed this upper limit. In 1267 the Statute of Marlborough provided that the demandant, in cases where the disseisin occurred at some point more remote than the fourth hand, need only allege that T had no entry save post (after) some disseisin committed by some Z, who disseised D or his ancestor. In this case, D was not required to trace the various intermediate feofments--as one would in a writ of right--by which T came to possession; per's and cui's were not mentioned. With the abandonment of the doctrine of degrees, a writ of entry in the post could serve the same function as the writ of right and this innovation soon brought about the death of this venerable form.
The writs of entry sur disseisin employed the flexible praecipe quod reddat form, followed by the demandant's allegation of disseisin (related to the tenant by the words per, cui, or post), and brought the case before a royal court. Soon we see the development of other writs of entry which do not claim a violation of seisin as the basis for the demandant's right. These remedies, which used the same format as the writ of entry sur disseisin, alleged some specific defect in the tenant's title.

For example, a widow laying claim to lands of her inheritance which her husband had alienated could bring a writ of entry after he died because during his lifetime she was legally unable to speak against him (cui in vita sua contradicere non potuit). This was called the writ of entry cui in vita\(^{17}\) and the question to be decided was whether T came to the land per X, who might have been the demandant's former husband. Or T might have received the land per X cui Y, being the demandant's husband, had alienated. After 1267, this remedy was available in the post as well. In all cases, the question to be decided was whether the original alienation involved land which the wife had brought with her into the marriage and whether the husband had alienated it. If he had, the action allowed his widow to void the grant, which she was forbidden to do during his life.\(^{18}\)

Another early form was the writ of entry ad terminum qui praeteriit. This action lay for one who claimed to have let to the tenant for a term of years and, the term having expired, sought to eject him. The tremor or his feoffee might in such a case deny that there had been any stipulation as to years. This action provided an
alternative to the writ of right, whereby the termor or his foefee might successfully defend by battle a possibly unjust claim.

Other writs of entry soon after these provided a remedy for the demandant who claimed that an alienation by himself or an ancestor—which alienation was the source of the current tenant's seisin—was invalid because the grantor was for some specific reason incapable of making a valid gift. Of those actions based upon the incapacity of the grantor there were three.

The writ of entry dum fuit infra etatem could void a grant made by a tenant while under age (infra etatem). Upon reaching full age, a tenant, by military tenure (who perhaps had been in wardship), could reclaim land he had previously alienated. This action was available in the per, cui, or after 1267, in the post. The logic behind this rule is apparently that just as one under age is physically and emotionally immature and, therefore, must be cared for (either by parents or guardian), so he may not possess the intellectual maturity to make grants of his land with a full realization of the consequences of the alienation. Thus, the infant's incapacity is his assumed lack of sound judgment. However, the minor heir in wardship was legally capable of making a feoffment.19 Only if he (or his heirs) sought to do so in court could the gift be invalidated.

Another action against entry which was based on the incapacity of an alienator was the writ of entry sine assensu capituli. This action lay for a bishop, abbot, prior, master of hospital, or prebendary who sought to reclaim land alienated by his predecessor without consent of their convent or chapter.20 Here the incapacity of the
grantor was his lack of full authority to make the grant.

The third sort based on the incapacity of persons—and the one which is of direct concern to us—was the writ of entry *dum fuit non compos mentis*. This action alleged that a grant of land was made "while [the grantor] was not of sound mind." Here the defect in the tenant's title, as alleged by the demandant, was that either he or one of his predecessors came into the land as a result of a grant made by the demandant or an ancestor while the grantor was insane.21

The availability of this action, in the *per, cui, or post* is a clear statement that the law was willing to recognize as invalid alienation of land by individuals incapable because of lack of mental awareness. We shall gain a more complete understanding of the working of this action and its full legal meaning by examining actual thirteenth and fourteenth century law cases involving alienations of land by the mentally incompetent.

In a typical case a demandant claimed that an ancestor had alienated the land in question while he was not of sound mind. Or the demandant might allege that he himself made the invalid alienation. If, however, the demandant claimed that an ancestor had made the grant, he had to be prepared to show that he was that ancestor's heir and, therefore, had a right to bring the action against the tenant. The tenant may have received the land directly from the grantor, in which case the writ read as follows:

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Rex vicecomiti salutem. Praecipe tali (T) quod iuste reddat [to D] [lands named], in quas idem talis (T) non habet ingressum nisi per talem patrem (vel alium antecedentem praedicti talis) praedicti D cuius heres ipse (D) est, qui illas ei dimisit dum non fuit
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compos suae mentis (vel dum non fuit compos sui nec sanae mentis), ut dicit. Et nisi fecerit, et idem talis (D) fecerit te securum de clamore suo prose-quendo, tunc sommone per bonos summumores praefatum talem quod sit coram justitiariis nostris ad primam assiam cum in partes illas venerint, ostensurus quare non fecerit. Et habeas ibi summumores et hoc breve.
Teste etc.22

Here the writ orders the tenant to return the lands to the demandant whose father (or another ancestor) demised the land while non compos mentis to the same tenant. Note that the demandant is heir (heres) of the allegedly insane grantor. If the tenant does not give up the land to the demandant, he will be summoned before the king's justices to show why he has not done so. The question as formulated in the writ, to be decided by a jury of knights of the neighborhood, is whether or not the tenant received the land from the demandant's ancestor while that ancestor was insane. If this is found to have been the case, the tenant loses and is liable to a fine and the demandant regains seisin.

However, the tenant as defendant, rather than addressing the question as formulated in the writ, may plead that, for example, he received the land not from the insane ancestor, but from some other named third party. If he follows this course, the jury will decide this question of fact, and, should the tenant's exception be found to be true, the demandant will lose the suit and be liable to fine for prosecuting a false claim. Or the tenant may plead that the demandant is not, in fact, the heir of the allegedly insane grantor, and may perhaps not even be related to him at all. Should this be proved, the demandant loses. In cases of entry, as in all suits initiated by writ, the defendant could defend himself by attacking any of the writ's words
or phrases as inaccurate or untrue.

The exemplary writ presented above alleged entry in the *per.* For entry in the *cui* the writ would vary only in this manner: instead of "in quas T non habet ingressum nisi per [demandant's ancestor named] etc." the key phrase was: "in quas T non habet ingressum nisi per X cui Y [D's ancestor] dimisit dum fuit non compos mentis, etc."23 For a claim based upon entry in the *post,* this variation:

...in quas idem T non habet ingressum nisi post dimissionem quam idem X inde fecit Y dum idem X non fuit compos mentis etc.24

With both these variations the issue in question was also whether some ancestor of the demandant (or possibly the demandant himself) made a grant while *non compos mentis* which either directly (in the *per* or *cui*) or indirectly (in the *post*) was the source of the tenant's title.

The records of the Berkshire Eyre of 1248 provide an instructive example of a case initiated by a writ of entry *dum fuit non compos mentis.*25 Two men, John and Adam, together with Matilda, Adam's wife, and Margery, Matilda's sister demand of the Abbot of Reading a messuage with appurtenances in Reading, in which the Abbot had no entry except through (*per*) Bartholomew Capellanus to whom (*cui*) Roger Blik demised while not of sound mind. Roger was the maternal uncle (*avunculus*) of John and brother of Matilda and Margery, whose heirs they were (*cujus heredes ipsi sunt*). The Abbot came and denied (*deffendit*) the right of the demandants. Though admitting entry in the messuage through Bartholomew, he claimed in his defense that Roger was in fact of good memory and sane (*bone memorie et compos mentis sue*)26 when he enfeoffed Bartholomew. The Abbot brought forward a charter
which testified to the feofment and offered to put himself upon the verdict of a jury of the vill (ponit se super juratam ville), as did the demandants. The jury stated on oath (super sacramentum suum) that when Roger enfeoffed Bartholomew he was, indeed, of sound mind. Thus, judgment was that the Abbot go free (sine die) and John and the others gain nothing and be at the mercy of the court for prosecuting a false claim. In this case, with the tenant admitting his entry as stated in the writ, the question was not whether the grant was made but whether the grantor was in command of his mental faculties when he made it. This was the question presented to the jury and its answer decided the suit.

An allegation that a grant of land was made while the grantor was insane provided a convenient means for an heir of the grantor to challenge the alienation. In a Year Book report from 21 Edward I (1293), one Clement, son of Adam, brought a writ of entry dum fuit non compos mentis based on a charter of feofment by his father to one "B" made while he was not of sound mind.27 The tenant (B) pleaded that Adam had come before a court and formally recognized the grant by levying a fine before the justices.28 B's attorney questioned whether Clement could justifiably bring the action

...inasmuch as we think that the Court would not allow a Fine to be levied in this Court by a person of unsound mind or under age, or by any other person who was unfit to levy a Fine in the King's Court...

Clement responded that

...the seisin which B had, he had by Adam our father at a time when he was of unsound mind; wherefore that seisin was void in itself, and consequently the recognizance made on that seisin was void...29
Because of this, Clement, offering averment, pleaded that B must answer his writ. B refused to do so and the justices ruled that he was "undefended" (nun defendu); Clement recovered seisin and his opponent was "in mercy for his non-defence." The judges clearly stated the principle that

...a thing [viz. the charter made by Adam] based on a bad foundation, is intrinsically worthless. So it seems to us that the Fine levied on the charter which was void in itself by reason that it was executed when Adam was of unsound mind can not hold good or be a bar [to Clement's action].

Here the Court upheld the plea of the heir that his ancestor's grant was invalid due to mental incompetency; this right was upheld even against the Court's record of a recognizance.

However, in a similar case from the same Year Book a son (one "A") brought a writ of entry based on the seisin of his father, claiming that his father granted away the land dum fuit non compos mentis to one "B." B, as defendant, pleaded that A should have no action because the grant had been recognized before the justices by the levying of a fine. The tenant's attorney pleaded that the acknowledgment made in court should serve as a bar to the demandant's action. Mettingham, a royal justice, stated this rule:

Where a man comes into Court by warrant to make an acknowledgement, the condition of the person is judged of by inspection; that is to say whether he be or be not in a state to make the acknowledgement; but where he comes of his own free will to enter on the Roll a charter previously made, or to enter an acknowledgement on the Roll, there he is received without his condition being ascertained.

In this case, where A's father did not come into court by any order or in response to any warrant, the implication is that the recognizance
should not be a bar, because the justices had not inspected A's father. Unfortunately, no judgment was recorded here. However, the cases just related confuse Mettingham's clearly stated distinction. In the suit brought by Clement, the tenant's plea that the charter of feofment had been recognized in court was ruled invalid because its author's sanity was questionable. But Adam, Clement's father, had appeared in court in response to a writ of Warranty of Charter and, according to the rule stated above, would have been examined. Thus, it seems that the record of the court should have been sufficient to bar Clement's action. Perhaps these cases are evidence of the confusion that might arise when supposed idiocy was not clear to the justices. Furthermore, although it is impossible to say how many cases involving idiocy a justice would hear in the course of his career, one suspects that their relative infrequency posed problems for courts which were not fully aware of precedents or procedures to be followed.

Both of the above cases turned on the question of whether the court could assume that, because a fine was levied before the justices, the cognizor was not insane. The dispute was whether the existence of the recognizance was an ipso facto bar to the grantor's heir, and the question of insanity did not go to a jury.

Of course, questions involving insanity other than the general issue as formulated in the writ (that the grant of land in question was made while the grantor was non compos mentis) could go to a jury, as in this dispute over warranty. In a suit on a writ of entry cui in vita of 1317, one Emma, as demandant, claimed land alienated by Osbert, her husband, against Richard of London and his wife. The writ
alleged that Richard came to the land through John of Lambourne to whom Osbert leased. Richard vouched to warranty John, the grandson and heir of John of Lambourne, and produced a charter by the elder John binding John of Lambourne and his heirs to warrant. Younger John acknowledged that his grandfather made the charter but said he might not be bound to warrant because his grandfather was insane when he made it ("Iohannes auus suus tempore confectionis predicte carte non fuit compos mentis sue"). Thus, the question of insanity in this case involved not the validity of the original grant by Osbert or the validity of John the grandfather's grant to Richard. The jury was to decide only whether younger John was bound to warrant, according to the disputed charter, the seisin of Richard. They said:

...upon their oath that the aforesaid John, grandfather of John son of John of Lambourne, was in his right mind at the time when the aforesaid charter was made. So it was adjudged that the aforesaid Emma recover her seisin thereof against the aforesaid Richard and Joan, and that the same Richard and Joan have of the aforesaid John's land to the value etc. And the same John is in mercy etc.36

So John was indeed bound to warrant the grant of his ancestor and--presumably because he did not deny his grandfather's seisin which had led to the grant to Richard and Joan and to the charter of warranty--Emma recovered seisin from the tenants. The record clearly shows that John had to compensate Richard and Joan with lands equal in value to those he was bound to warrant.37

Writs of entry were not the only real actions in which proved insanity could invalidate a grant. In 1298 an allegation of novel disseisin involved insanity on the part of the disseissee.38 One Joanna brought the assize against Henry of Pontefract and his brother
John, alleging disseisin of her free tenement. John appeared and said
he claimed nothing of her lands; Henry denied disseisin but instead
stated that he entered by the enfeoffment of Joanna. In his defense
he put forward a charter made by her. Joanna then denied Henry's
right, despite any charter, and put herself upon the assize. The
juror's response was very informative:

The jurors say on their oath that the aforesaid
Johanna, whilst she was laid up with a serious illness
so that she was out of her mind, made the aforesaid
charter and letter, and they say that, when she got
better, she came to the aforesaid tenement and found
her tenants in the said tenement and her status in no
way changed, but it was said to her that she was said
to have made the aforesaid deeds, and these she there
denied altogether. And asked whether the witnesses
named in the deed were present when it was made, they
say that they were not. And they definitely say that
the aforesaid Johanna was in such a state of body and
mind that she could make no enfeoffment by which the
same Henry could have the free tenement. And they
say that the aforesaid Johanna was in good and peace-
ful seisin of the aforesaid tenements until the afores-
said Henry and John unlawfully etc. disseised her
thereof with force and arms. Therefore it is awarded
that the aforesaid Johanna is to recover her seisin of
the aforesaid tenements by view of the recognitors. 39

Henry and John then made fine with the king: because the disseisin
was perpetrated vi et armis, they were liable to imprisonment "until
[they] bought off the king's displeasure." 40 The court also assessed
damages of ten shillings. 41

A suit initiated by a writ of right could also be reduced to
a question of insanity. In 1214, Robert Mauluville claimed against
Roger Mauluville one bovate of land with appurtenances in Raunton as
his right, repeating the required formula. 42 Roger denied Robert's
assertion and said that Robert had granted (dedit) the land to him,
according to a charter he had made. He then offered, as defendant, to put himself on the grand assize, seeking that recognition be made as to which of the two had greater right. But Robert, acknowledging the charter, claimed that "when the charter was made, he was not in control of himself nor did he know his mind." At that time Robert said he was in the care of the same Roger, who was his uncle. During his infirmity Roger apparently extorted the charter from him (cepit cartam de eo). Thus, although no verdict is recorded, the assize was to decide whether Robert made the charter in full possession of his mental faculties.

We may conclude that grants of land made by the insane were voidable upon the establishment of the mental incompetency of the grantor. An alienation made while insane could fall within the scope of the assize of novel disseisin or the writ of right. During the thirteenth century, however, the precisely formulated writs of entry dum fuit non compos mentis gradually supplemented novel disseisin in such cases, especially because novel disseisin only lay for the disseissee, not his heirs. This remedy also lost its original efficiency as time limits were extended, and became gradually less effective as thirteenth century lawyers mastered its intricacies and learned to exploit the growing number of available exceptions. In addition, because the assize protected seisin wrongful or rightful, judges "could not withstand the temptation of doing substantial justice."43 The venerable writ of right became a relic after 1267, when writs of entry in the post effectively superseded it.
The general rule was the sensible one that if a person made a gift while not of sound mind, he (or his heirs if he had died) should be able to void that gift by proving insanity at the time of the gift. This is analogous to the position of the infant, who upon reaching maturity could invalidate a gift made while infra etatem. As with the infant, so with the idiot or lunatic: if he is incapable of understanding his act, his act may be reversed in court.

The law followed the principle that mental awareness of the act of giving is necessary for a valid gift. As Bracton wrote,

...regulariter tenendum quod nullus donationem facere potest qui donationi consentire non possit, sicut nec furiosus nec mente captus nisi gaudent dilucidis intervallis, ut sicut ille qui est infra etatem.44

Nonetheless, the grant of land made by an idiot would stand until he or, more likely, his heirs sought to invalidate it. A demandant had to prove he was indeed heir of the grantor in order to bring a writ of entry dum fuit non compos mentis. Nor could the king as guardian, so far as the records show, step in and summarily seize lands alienated by an idiot in his wardship.45 Thus, in protecting the interests of insane landholders, the real actions provided remedies based on the inability of the mentally incompetent to make valid gifts. However, such gifts were challengeable only by those who could prove direct interest in the land at stake.
NOTES TO CHAPTER III

1 In actions for recovery of land the plaintiff is the defendant (petens) and the defendant the tenant (tenens).

2 On the writ of right, see Glanvill, Books I-III; Milsom, Foundations, pp. 103-114; Simpson, An Introduction to the History of Land Law, pp. 24-27.

3 Milsom, Foundations, p. 106.

4 Ibid., p. 108.

5 P & M, II, p. 63. The tenant "can choose between two modes of trial. He can insist that the whole question of better right, involving, as it may, the nicest questions of law, shall be left all in one piece to the knights of the neighbourhood; and then, if he fears their verdict, he can trust to the God of battles..."

6 Novel disseisin was probably initiated in 1166, at Clarendon (P & M, I, pp. 145-146), mort d'ancestor ten years later (see the Assize of Northampton (1176), c.4. Eng. Hist. Docs., II, p. 412); P & M, I, p. 147.

The other two of the four "petty assizes:" the assize utrum, which decided whether land was lay fee or free alms; the assize of darrein presentment, a possessor's action involving the right to advowsons.

7 The possessor's assizes, unlike the writ of right, allowed no essouns or vouchers to warrantry. Essouns--allowable delays in court appearance based on illness, service in the king's army, etc.--could cause a suit to drag on literally for years. See Glanvill, pp. 7-17 on essouns and writ of right. A tenant, as grantee, in a real action could "vouch" his lord, as grantor, to warrant his title. The warrantor in court must then defend the tenant's title. If he failed in his defense, the demandant received the land and the warrantor was bound to compensate his grantee with land of equal value. For a detailed account of these procedures, see S. J. Bailey, "Warranties of Land in the Thirteenth Century," Cambridge Law Journal 8 (1942-44):274-299 and 9 (1945-47):82-106 and "Warranties of Land in the Reign of Richard I," Cambridge Law Journal 9:192-209.

The solemn nature of the writ of right is underscored by its willingness to postpone judgment for years if necessary, pending appearance
of both parties in court; judgment on a writ of right was absolutely final between the two parties to the suit.

8"Novelty" was defined by royal ordinances. During the thirteenth century, the period of limitation grew increasingly longer, until in 1275 a day in 1242 was chosen, which limit remained in effect until the reign of Henry VII. P & M, II, p. 51. On novel disseisin generally, see P & M, II, pp. 46-56; Milsom, Foundations, pp. 116-119.


11Ibid., p. 64.

12This useful scheme for understanding a rather thorny doctrine is from Milsom, Foundations, p. 122. On writs of entry generally, see Holdsworth, History, III, pp. 12-29; Milsom, Foundations, pp. 119-129. Holdsworth discusses all the various forms of writs of entry in detail. My presentation is based largely on his.

13The general rule (on the demandant's side) was that the right to bring this writ was hereditarily transmissible, although there was some doubt as to whether in stating his claim the demandant could go as far back as the seisin of his grandfather's grandfather. P & M, II, p. 70.

14"It is provided also that if the alienations for which a writ of entry used to be given are made through so many degrees that that writ cannot be had in the form previously used, the plaintiff shall have a writ for recovering seisin without mention of the degrees, into whosoever hands the thing shall have come through such alienations, by original writs to be provided for the purpose by the king's council." Statute of Marlborough, 1267, 52 Henry II, c.29. (Eng. Hist. Docs., III, p. 392.)

15P & M, II, p. 66.

16Milsom, Foundations, p. 123.

17Do not confuse this "cui" with the "cui" used in defining the degrees in the writ.

18Other similar remedies are cui ante divortium which is essentially identical to cui in vita, substituting divorce for the
husband's death, and *causa matrimonii praelocuti* for the woman who
gave land to the man whom she intended to marry. Holdsworth, History,
III, p. 22.


21 An important, and logically consistent, point is that in
order to question the grant, insanity at the time of the alienation had
to be proved: a lunatic may make a valid gift while enjoying a lucid
interval. Insanity after the fact was not sufficient grounds. See
below, note 44.

22 I have modified slightly, for greater clarity, Bracton's
example (IV, p. 36). My translation: "The king to his sheriff,
greeting. Order to T that he justly render to D certain specified
lands, in which T has no entry save per the father (or other ancestor)
of the aforesaid D whose heir D is, which ancestor demised those lands
to T while not of sound mind, as he says. And if he does not do so,
and D has given security for prosecuting his claim, then summon by
good summoners the aforesaid T to be before our justices at the first
assize when they come to those parts in order to show why he has not
done so. And have there the summoners and this writ. Witnessed etc."
The example from the "Bodleian" register of writs of ca. 1320 (*Early
Registers of Writs* (S. S. v. 87), p. 289) is substantially the same,
although somewhat abbreviated.

23 *Early Registers of Writs* (S. S. v. 87), p. 289, from the
"Bodleian" register.

24 Ibid. The "Luffield" register, in the same S. S. volume,
does not include an example in the post. Considering its date
("substantially a Register of the middle 1260s," ibid., p. xlv),
this is not surprising.

25 The Roll and Writ File of the Berkshire Eyre of 1248 (S. S.
v. 90), pp. 186-187. See appendix for this case. On p. 105 of the
same volume is another case of entry non compositum, this in the
*per*. In this case, the tenant produced a charter of feoffment and
offered to put himself upon the country to decide the sanity of the
maker of the charter (the mother of one of the demandants). In this
case final concord was reached.

26 "Memory" is often referred to in this context, in documents
in French as well as Latin.
27. Year Books 21 & 22 Edward I (R. S. v. 31, pt. 2), pp. 218-223. The same case is discussed in the same Year Book, pp. 228-231.

28. Fines, or final concords, were royal records of private conveyances, levied before the king's justices. The practice, begun in 1195, of dividing the fine into three parts lasted for over three hundred years. Both parties received a copy and the third part—the "foot"—remained with the custos brevium of the Court of Common Pleas (he is first mentioned in 1246).


30. Ibid., p. 223. "...chosse fete sur mauveys fundement ne vaut pas guuvers en sey; dunt yl semble a nus ke la fin leve sur la chartre ke fut voyde en sey, par la resone, ke ele fut fete qant Adam fut hors de memorrye, ne put lu tener ne barre estre...."

31. Ibid., pp. 144-147.

32. Ibid., p. 146.

33. Ibid., p. 218.

34. In a case from 1279, the existence of the Court's record of a fine was sufficient "proof" that the grantor was sane at the time. Gilbert and William sought lands taken into the king's hand because of the idiocy of Richard; Gilbert claimed Richard had granted them to him and vouched a fine levied between them before the king's justices. Gilbert then "prays judgement, inasmuch as the aforesaid fine was levied before such wise men, the justices of the bench, who well knew how to weigh up if the same Richard was in his right mind or not, whether the same Richard or anyone in his name can ask for the aforesaid manors or claim anything of right in the same on account of any illness coming later." Richard's friends, speaking for him, say that when Richard levied the fine he was ydeotus and still is, and offer proof by the country. Nonetheless, however: "Afterwards before the king and his council, because it is discovered that the aforesaid fine was solemnly levied before the aforesaid justices and it is not to be presumed that it was in any way levied before them in the actual presence of the same parties if either of the parties was under age or an idiot, and it is not usual for the wisdom of the judges to be enquired into by the country, it is awarded that the aforesaid Gilbert and William go thereof without day and have a writ to the sheriff for
getting their seisin of the aforesaid manors etc." Select Cases in
the Court of King's Bench Under Edward I, I (S. S. v. 55), pp. 49-50.


36 Ibid., p. 192. "...super sacramentum suum quod predictum
Iohannes auus predicti Iohannis fillij Iohannis de Lambrumur fuit
compos mentis sue tempore confectionis carte predicte. Ideo considera-
tum est quod predicta Emma recuperet inde seisinam suam versus
predictos Ricardum et Johannem et iidem Ricardus et Johanna habeant de
terra predicti Johannis ad valenciam etc. Et idem Iohannes in
misericordia."

37 Validity of charters was apparently questioned fairly often
on the grounds that the maker was mentally unsound. A sort of formula
is seen in the Curia Regis rolls for stating that the grantor of the
charter was not in fact insane: e.g., in 1223 the jurors in a dispute
over an advowson said that one "Andreas donum illud et cartam illam eis
fectit in plena sanitate sua at quod idem Andreas postea fuit itinerans
de loco in locum et loquens et itinerans eques et pedes etc." (C. R. R., XI, pp. 21-22); or, of one Juliana: "post cartam illam
factam fuit ipsa [fuit] itinerans de loco in locum et in bono sensu et
in bona memoria..." (C. R. R., XII, p. 501). The references to
public appearances by the allegedly insane no doubt lent greater
credibility to the jury's testimony.

38 Select Cases in the Court of King's Bench Under Edward I, III
(S. S. v. 56), p. 66. See Appendix.

39 Ibid. Here Johanna's madness was caused by some physical
illness. Although insanity brought on by sickness or extreme fever was
a valid legal "excuse," severe illness was not in itself enough to
assume the sort of insanity that could invalidate a transfer of land.
This distinction is clear in a report from 1275: "When Thomas de
Boulton at Yarpesthorp was labouring under an infirmity from which he
did not recover before his death and wanted money, he sold his manor
of Swynton to the prior of Malton; although the said Thomas was in
extremis he was of sound mind" (C. I. M., I, p. 304).


41 See P & M, II, pp. 44-45 on the tortious nature of novel
disseisin.

42 C. R. R., VII, p. 296. See Appendix.

44 Bracton, II, p. 52. "It is regularly held that no one can make a gift who cannot give the consent requisite for making it, as one who is a lunatic [or] insane (unless he enjoys lucid intervals) or one under age." Translated by S. E. Thorne.

45 The Crown may interfere, however, in cases of fraud or deception perpetuated upon idiots (see case related in chapter I, pp. 30-1); royal justices may also apparently prevent a fine from being levied by an idiot, although, as we have seen, they were at times less than scrupulous in the examination of the cognizors.
CHAPTER IV

CRIME AND THE INSANE

Insanity played an important role in the system of landholding. The king held in wardship the lands and bodies of idiots during their lives and provided a specific remedy to those dispossessed of their rightful holdings due to alienations made by persons non compos mentis. The mental condition of the accused was taken into account in deciding the fate of criminals. The law provided for exemption from punishment on the grounds of insanity by means of the royal prerogative to grant pardons.

Anglo-Saxon law concerned itself mainly with the regulation of the system of emendations that governed the relationship between the wrong-doer and the victim and his family. With regard to homicide, for example, a striking feature of the Anglo-Saxon "dooms" was the careful stipulation of wergilds, the amount of money (which varied according to social status) for which the slayer was liable to the kin of the slain. If the wergild was not paid, the blood-feud resulted. But, although the relationship between the two families was most important, the king was not totally unconcerned: in addition to rendering compensation (bót) to the wronged party, the wrong-doer also paid wite to the king. Capital punishment was not unknown, especially prior to the period of the Danish invasions. But during these troubled
times, "crimes that had ceased to be emendable became emendable once more." 3

During the twelfth century administrative and procedural innovations greatly altered the old system of criminal law. 4 For certain grave crimes the king could now impose capital punishment, for others less serious he might assess mutilation or a fine. This change in emphasis was especially clear with regard to homicide: it was by the later twelfth century a capital crime and the kin of the slain might no longer claim any compensation at all. 5 The concept of the King's Peace as the special sanctity that pertained to his person and surroundings--the violation of which, for example, by fighting in his house, was cause for punishment--was extended to the entire realm. Thus, he claimed jurisdiction over certain crimes or "felonies" as Pleas of the Crown. These included homicide, mayhem, wounding, false imprisonment, arson, rape, robbing, burglary and larceny. All were punishable by loss of "life or member" and disherison. 6 The former wrong against an individual victim and his family had been reconstrued as a crime against the Crown as the representative of the community and guardian of law and order.

Procedurally, an important aspect of the older law retained its force. Henry II initiated the practice whereby local juries, each functioning as a sort of grand jury, were to present to the justices in eyre the names of everyone suspected of having committed a crime. 7 This presentment then led to proceedings against the suspects. However, criminal prosecution could still be initiated by the injured party. The kinsman of a dead man, for example, could "appeal" an
alleged murderer before the king's justices: this formal accusation of felony was known as the appeal, as distinct from indictment by presentment, and should not be confused with an appeal from one court to a higher jurisdiction. In this way, the law provided for the right of the wronged party to bring a suit against a wrong-doer in addition to the king's right to bring a charge of felony.

We shall be concerned with the legal status of the insane criminal and will see that under the common law he was eligible for the king's pardon to exempt him from punishment. It has been calculated that during the thirteenth century as many as nine out of ten of all pardons granted for felonies were granted for homicide. Among the printed plea rolls which provide instances of crimes by the insane, homicides (including suicide) far outnumber all other felonies. It is tempting to infer that the issue of insanity was not often raised in relation to other crimes. Furthermore, we might suggest that insane people, especially idiots, were less likely or less able to commit certain felonies which required criminal intent, such as rape or larceny. At any rate, because more information is available, we shall concentrate on homicide and suicide, keeping in mind that the king could, and no doubt did, grant pardons for any felony, at his discretion.

During the thirteenth and fourteenth centuries the common law distinguished three categories of homicide: culpable, justifiable, and excusable. Culpable homicide was punishable by death and involved the intention to do serious harm to the victim. The killing was typically spontaneous, as in a bar-room brawl, although culpable
homicide also included premeditated murder. There was no legal
distinction between murder and manslaughter until the early sixteenth
century: both were equally culpable.\(^{11}\)

In a few cases, homicide was justifiable, such as carrying
out a legal death sentence or slaying a thief caught red-handed or
other "manifest felon."\(^{12}\) In such cases, the killing was not
felonious and no pardon was needed. Third was the category of
excusable homicide. This included accidental homicides, killings in
self-defense, and slayings by infants and the insane. In contrast,
excusable killing, though not felonious, required pardon.\(^{13}\) Thus, an
insane killer could have presented his insanity as an excuse and sought
the king's pardon. But, although the law admitted that he deserved
pardon, he could not go free without it: the king's justices would
not acquit him.\(^{14}\) He could expect the pardon \textit{de cursu}; it was highly
unlikely that a criminal whose insanity was attested by the jury would
undergo punishment.

An important aspect of the system of pardoning was its attempt
to protect the rights of the kin of the criminal's victim. In
granting a pardon the king pardoned only his own suit, as will be
clearly seen below in the actual charters of pardon. The kin could
bring an appeal even after the defendant, accused by indictment, had
been pardoned by the king. And the king could not exempt an insane
criminal from prosecution if an appeal was pending or in progress.

In practice, however, successful prosecution of an appeal
after pardon by the king was very unlikely, and actual appeals of this
kind were very rare indeed.\(^{15}\) Public opinion would probably have
opposed such a move and the same sentiment embodied in the law, allowing leniency for the insane, might certainly have been shared by the potential appellors. Out of court money settlements were also an alternative to prosecution of an appeal but these too were apparently rare in cases of excusable slaying. Thus, the king's pardon was effectively sufficient to exempt the insane criminal from punishment as the result of an appeal.

Conviction for felony led to loss of life or member, escheat of lands to the mesne lord, and forfeiture of chattels to the king. In cases of excusable homicide, we would not expect these penalties to be imposed upon the insane criminal who had received pardon. However, after the 1330's, forfeiture of chattels of pardoned excusable slayers became the common practice.¹⁷ This practice, which certainly implied some degree of culpability, is difficult to explain and may, indeed, be due to an oversight rather than conscious change in policy.¹⁸ To what extent confiscation provided significant revenues to the Crown we are not able to say.

Before discussing the procedure followed to obtain a pardon, we shall look at contemporary distinctions and definitions applied in cases of criminal insanity. Here, as we have seen above, there were not any hard and fast rules. Rather, it seems that each case was examined on an individual basis.

Insane criminals were often described as acting in a sort of bestial fury. Bracton characterized this sort of madman, in his discussion of acceptable exceptions in civil cases and distinguished him from one who enjoys "lucid intervals:"
A peremptory exception for the tenant, based upon the character of the demandant, is available if the demandant is frenzied (furiosus) or not of sane mind such that he is unable to discern or is entirely lacking in discretion. Such are not far distant from beasts (brutis) which lack reason, nor ought an act be valid which is done when such are permanently mad. Some indeed are from time to time able to enjoy lucid intervals while others are perpetually mad. What deed has been done by such persons, at times during which they were enjoying lucid intervals, will be judged as if it were done by others, whether they appeared mad or not. 19

A pardon from 1278 informs us that one Alexander committed homicide per furiam while he was mad (furiosus). 20 Another pardon, this one from 1285, stated that one James slew Eva "in a fit of madness" (furia envectus) 21 and a response to an inquisition described a man who hanged himself in similar terms (furore ductus). 22 A man who killed five others was said to have done so per insaniam 23 while a woman who in 1371 killed another by striking her on the head with large tiles was simply non compos mentis. 24 A coroner's roll, in French, leaves a rather graphic image of a suicide by a woman who was mad and ran into the Thames ("fut arage et corut en sa ragerie a Tamise").

At least some such cases of wild insanity may have been brought on by some other illness. Those who became violent while suffering from ague or delirium were not held responsible. 25 In one case the authorities expressed concern as to the advisability of releasing a killer from prison: of a man who killed his wife and two children in a sudden frenzy, although he had apparently regained his wits, an inquisition found that "it cannot be said that he is so far restored to sanity as to be set free without danger, especially in the heat of summer." 26 Another record described a man, one among a
band who was tried for attempting to rescue a friend from the gallows, as a lunatic: "from time to time he enjoys lucid intervals" ("per tempora autem gaudet lucidie intervallis").

In crime as in wardship there was a distinction between the permanently afflicted and the temporarily insane. Lunatics were fully eligible for pardon if the jury stated that the crime was committed during a fit of madness and not during a lucid interval. Here, as in all cases of insanity, it was up to the jurors to decide.

In criminal cases, we have found a relatively small number of references to idiots. One case of 1212 involving an idiot (de quodam stulto) mentions that "he confesses himself a thief, while really he is not guilty." In another case, William Pilche, an idiot, was pardoned for the death of Augustine le Fevere,

...as it appears by testimony of Robert de Stokeport, coroner in the county of Lancaster, and other trustworthy persons that the said William was passing along the high road by night when he was met by the said Augustine, in the disguise of a terrible monster uttering groans and refusing to speak though abjured in God's name, on account of which the said William rushed upon him as a monster and killed him.

Because of its prerogative nature, there was no set procedure for obtaining pardon. The main procedural distinction was whether or not the accused sought pardon before trial. If he did, he or his friends were more responsible for taking the initiative; if the accused actually appeared in court they were less so.

Although the king could summarily grant pardon in cases where the circumstances were notorious, in most cases the first step after arrest toward obtaining pardon was to have an inquisition commissioned
by the king. Such a commission could be purchased for a reasonable sum, although sometimes an influential friend could see that it was appointed. Commissioners were assigned and a writ sent to the local sheriff, directing him to summon a jury. The jury of twelve local men then stated the facts of the case, as in 1285 when the jurors related the circumstances of a slaying by a sick clerk of one of his brothers. They described the killer as "being by the sickness rendered frantic and mad" and the deed as having been done "by the instigation of the devil." He was imprisoned because of his madness.

During the later thirteenth century, if an inquisition found that the accused had killed while insane, he could be released on bail pending trial, as in 1275 when a mother imprisoned for killing her children was released

...in bail to twelve men of her kindred, or others of that county, if they will mainpern to have her before the justices at the first assize when they come to those parts to stand to right if anyone wish to speak against her in this behalf, as the king learns by the testimony of Walter de Helyun and Henry de Shotesbrok that she slew her aforesaid children when out of her mind by mischance and not by felony or of malice aforethought.

A similar order, from the year 1278, added the proviso that the mainporners were to see to it that the accused, who had hanged his daughter, would not injure anyone in the future. This order for delivery in bail was followed up by the king's order to the sheriff to deliver all the accused's goods and chattels to the mainporners for his maintenance.

An inquisition which found insanity could also lead directly to pardon before trial, rather than bail. In a case already
mentioned above, an idiot received his pardon on the testimony of the
coroner of the county and of "other trustworthy persons."\(^{37}\) The
statute of Gloucester (1278), however, ended the possibility of
pardons as a result of preliminary inquests in cases of homicide by
misadventure or in self-defense. Henceforth, the accused was to
appear before justices in eyre or of gaol delivery and "put himself
upon the county for good and ill."\(^{38}\)

In cases that came before the courts, the insanity of the
accused, rather than the identity of the slayer, was the question to
be decided by the jury.\(^{39}\) The insanity of the killer and the circum-
stances of the crime were treated as matters of local knowledge.
Hurnard relates an unpublished case which illustrates the jury's
statement of the facts:

...Richard Russel...was presented as having
killed his wife through insanity; he appeared and
put himself on a jury, which said that he had been
entirely out of his mind when he found her asleep
in the house and, wanting to wake her, called her
without immediate response, so that he took an axe
and struck her on the head. He was remanded to
gaol and pardoned on the grounds that the slaying
had been by mischance.\(^{40}\)

The jury stated that the killing was "by mischance" (per infortunium),
thus associating insane homicide with accidental homicide, because of
its non-deliberate nature. The phrase "remanded to gaol and pardoned"
indicates standard judicial procedure.

We have already said that even in cases of clear insanity the
justices, as a rule, did not acquit. When the criminal's madness had
been established he would be returned to custody and the justices
themselves, in the first half of the thirteenth century, would recommend
mercy to the king. Their recommendation would generally be enough to
insure the king's pardon: either an informal instruction to the
justices or the sheriff that the prisoner be released or, more often,
a formal pardon, as recorded on the patent rolls, for which chancery
fees would have to be paid.\textsuperscript{41} By the time of Edward I, however, the
prisoner, after remand to custody, was expected to "sue the king for
grace" himself. This application, for which there was a fee, would
cause the king to send for a record of the case, by means of a writ of
certiorari, which showed that the accused has been remanded awaiting
the king's grace (\textit{ad gratum}).\textsuperscript{42} It was highly unlikely that the king
would fail to grant pardon if the records of the justices showed that
the accused was insane when he committed the act.\textsuperscript{43} In this sense the
discretion of the jurors—in finding the accused insane—was very much
greater than that of the king or his justices. Pardon followed such a
verdict as a matter of course, with the intermediate steps, although
costly, essentially formalities.

The actual charters of pardon for insane criminals usually
contained information as to the reason for pardon, as well as the
proviso that the person pardoned stand to right if appealed. One
example, from 1251, suggested that some sort of compensation was also
due to the victim's kin:

\begin{quote}
Pardon to Emma Hereward for the death of Maud
daughter of Emma Wolurich, a child of three years,
whom she killed through madness, on condition that
she make peace with the relatives and stand her trial
if any will proceed against her.\textsuperscript{44}
\end{quote}

Another pardon, dated 1300, omitted the usual reservation stipulating
its recipient's liability to appeal:
Pardon to Robert de Clipston, in Northampton gaol for the death of Simon de Burgo Sancti Petri, as it appears by the record of Roger de Brabazoun and William Inge, justices appointed to deliver that gaol, that he is a lunatic and has been one for fourteen years, and killed the said Simon in a fit of fury.45

After obtaining pardon, the next step was to show it to the justices in eyre who would invite any would-be appellor to step forward and bring his appeal. If no one did so, the recipient of the pardon was said to have been granted "firm peace," which was irrevocable.46

The right to pardon may not, in the case of the insane killer, necessarily have been enough to insure his freedom. He might still have presented a threat to the safety of the community. A commission was appointed in 1276 to investigate the case of Richard de Cheddestan, imprisoned at Norwich for having killed his wife and two children six years ago.47 The original jury had decided that Richard was in a mad frenzy at the time of the slayings. This second commission reported that he was now "sufficiently sensible" but expressed concern as to whether he could safely be released, especially considering the heat of the summer. The record does not say whether Richard had sought pardon, to which he was clearly entitled, after the first verdict; this commission may have been in response to such a request. At any rate, the case shows that imprisonment was an option available in cases of dangerous homicidal tendencies.

Indeed, it may have been the only available option in cases where no one was willing to assume responsibility for the release of a dangerous criminal. More often, however, the king probably handed
over those not of sound mind into the custody of their relatives and friends, in the same manner that they were released on bail. Thus, his custodians as mainpernors would have been liable to a penalty or fine if they failed to keep control of him. We have found no cases indicating how this was done, although a report of an inquisition from 1259 mentions a man living with his wife who was kept in bonds for fifteen years because of his insanity. There is no reference to any crime, however. During the fourteenth century, it was in the interest of a madman's heirs to see that he behaved properly, since, as we have been, even though insane, and by implication not responsible for his actions, the criminal would forfeit his chattels.

In addition to the question of what was to be done after pardon, the system presented other problems to the mentally incompetent criminal. If an idiot or raving madman, for example, had no friends or relatives willing to act on his behalf, he might never know to request an inquisition for bail or pardon. Likewise, he might have been oblivious to the requirement that he bring his case to the attention of the king after remand ad gratiam; he might remain in gaol indefinitely. Or he might flee from justice altogether and be outlawed, which also required pardon. Severe mental incompetency would have most likely have revealed itself in court, to the benefit of the accused. If he was unable to plead, however—whether because he was mad or a deaf-mute—he might conceivably have been suspected of refusing to plead, in which case the court asked whether he was "mute of malice, or by the visitation of God." Intransigent refusal to put oneself upon the country was punished by peine forte et dure, in
which heavy weights were loaded upon the body as an incentive to plead.\textsuperscript{51} The costs involved in securing pardon might have been an impediment in some cases. Chancery fees were 18s. 4d.\textsuperscript{52} and, in addition, the accused might have to pay a fine to the king—in some cases as much as 20 marks.\textsuperscript{53} Further costs would also have been incurred if a prisoner needed advice or representation.

The need for pardon does not in itself necessarily imply some degree of guilt. The insane killer was not convicted of felonious homicide and then pardoned. Rather, the jury related the circumstances and established the insanity of the accused. The justices heard this verdict and recorded their belief that he deserved the king's mercy. Thus, the king agreed not to pursue his right to prosecute the wrong, although he could not infringe on the rights of potential appellors to do so. But the development during the fourteenth century of a law requiring forfeiture of chattels even by the insane does carry with it a stain of culpability; it must be interpreted as a sort of punishment.

The harsh system of including excusable homicides in the system of pardoning—rather than excluding them by means of acquittal—seems to indicate a desire by the Crown to bring all crimes before the king's justices lest any felons escape punishment. The accused must answer to the king himself, who must then be satisfied that the perpetrator is deserving of mercy. It also stressed the accused's secondary responsibility to the victim's family, who might seek compensation or punishment.
Insane crimes in general were probably relatively rare in medieval England. The criminal records involving the insane which we have found deal almost exclusively with homicide. Therefore, the question of which other crimes were pardonable when committed by the insane is difficult to answer.

In 1225, Richard of Brent, accused of larceny, denied the charge and put himself upon the country:

And the twelve jurors and the townships of Brent, South Brent, Limpsham, and Burnham say that they do not suspect him, save of a fowl which he took in his madness when he was lunatic ("in fure tempore quo fuit lunaticus"). Therefore let him be under pledges until more be known.  

Unfortunately, this case tells us nothing about larceny because, although subject to fits of lunacy, Richard was apparently innocent.

Likewise, this short record, dated 1212:

The king is to be consulted about an insane man ("de quodam stulto") who is in prison because in his madness he confesses himself a thief, while really he is not guilty.

Here the king was to be consulted, not to grant a pardon, but to ascertain what to do about an idiot who had done no wrong. Why he was in prison, however, the record does not say.

Arson, in order to be felonious, required the presence of criminal intent, of deliberate wrong-doing. If it was accidental, it was not a felony. Thus, in cases of insanity which led to careless conduct it seems that the law, just as it recognized the "accidental" nature of homicide by the insane, would have been reluctant to punish. We have found no cases of arson involving the mentally incompetent among the printed sources.
In fact, in only one sort of crime other than homicide are we able to draw conclusions from the printed sources. This is suicide and we are perhaps justified in calling it a "crime" only because of the forfeiture of chattels which normally accompanied it. In Bracton's opinion, the insane suicide was not to be disinherited nor his chattels forfeited. 58 A mad woman of London killed herself by running into the Thames River. The record stated clearly that she did not forfeit her chattels:

And because the court saw by inspection of the coroner's roll, and also by the jurors who witnessed to this, that she was in such a state that she could not forfeit those chattels because of her illness, the sheriff was commanded etc. that those chattels should be given in alms for the soul of the same Joan, and the King would concern himself no more with those chattels etc.59

An inquisition from 1278, although not a suicide because the man subsequently died from the fever which caused his madness, spoke of a self-inflicted wound in terms of criminality. William le Stoyle wounded himself with a knife "through frenzy and not by malice and felony." 60 The implication is that a normally "malicious and felonious" deed was not so because of the fever-induced insanity. According to this distinction, we would not expect forfeiture, especially since, if the analogy is extended, forfeiture for homicide by the insane did not become the rule until the reign of Edward III. 61

A record from 1286 speaks of the chattels of John le Chapman who drowned himself while mad as forfeited to his lord. But the calendar mentions a letter from John's wife seeking to "expedite the business...relating to her husband's goods," implying they will be
released to her. In 1284, the king sent the following mandate to his sheriff and coroners in York:

Order to cause Aldusa, late the wife of John de Baln, to have all the goods and immovable chattels of the said John, which were taken into the king's hands because John hanged himself, as the king has granted them to her because he learns by inquisition taken by the sheriff and coroners that John hanged himself in a fit of madness at Mukfield in Elmete.

Thus we may conclude that during the thirteenth century at least, the law distinguished suicide by the insane from that by the mentally "normal." Suicide, like homicide, was judged according to the mental state of the slayer. The king did not take the chattels of the mad suicide, a potentially valuable right. In the fourteenth century, when insane killers began to forfeit their goods, we have not found sufficient evidence to make a similar statement with regard to suicide.

In conclusion, we shall say a few words about the mental element in crime as it was appreciated in medieval England. The idea of absolute liability—that the result of an action, not the intention of the perpetrator, is the basis of punishment—may be contrasted with a mens rea doctrine. The latter is reluctant to punish in the absence of criminal intent. Our law today, which allows, for example, the so-called "insanity defense," is, of course, much concerned with the state of mind of the criminal in assessing blame. We consider this to be a more humane approach to criminal law.

Anglo-Saxon law was closer to an idea of absolute liability than that of the thirteenth century, although the absoluteness should not be overstressed; we have seen that the older law was often mild
in its punishment of wrongs. The central concern of Anglo-Saxon
criminal law was not assessing blame and punishment, but compensation
of the wronged party. In seeking to placate victims--potentially
violent avengers--the law concentrated on their rights.

For example, Anglo-Saxon law extended liability to wrongs
which by our standards would certainly be exempt. The *Leges Henrici
Primi*, written in the early twelfth century and based upon the laws of
Cnut, state that if a man "...cannot lawfully swear that a person
was not through his agency further from life or nearer to death, he
shall pay appropriate compensation, according to the facts of the case." Circumstances to which this rule would apply included one's responsi-
bility for the death of another who was killed while on one's errand
or while answering a summons to one's house; death caused by weapons
which had been set down by their owner; or if a house "or other thing"
entrusted to someone caused that person's death. In summary, "...it
is a rule that a person who unwittingly commits a wrong shall wittingly
make amends."

Yet, these harsh-sounding doctrines were qualified, in the
Leges themselves. Judges were to use compassion in fixing compensa-
tion in such cases. Likewise, among the laws of Aethelred (ca. 1000),
circumstances beyond the actual deed were to be considered:

...in forming a judgement, careful discrimina-
tion must be made between age and youth, wealth and
poverty, health and sickness, and the various ranks
of life, both in the amends imposed by the ecclesiastical
authority and in the penalties inflicted by
the secular law. And if it happens that a man com-
mits a misdeed, involuntarily or unintentionally,
the case is different from that of one who-offsends
of his own free will, voluntarily and intentionally; and likewise he who is an involuntary agent in his misdeeds should always be entitled to clemency and to better terms, owing to the fact that he acted as an involuntary agent.70

Thus, some degree of leniency was characteristic of Anglo-Saxon law, even though it is generally considered more harsh than its descendant, the common law.

During the twelfth century especially, canon law ideas of the moral nature of guilt influenced the developing common law.71 If sin originates in the mind—with a sinful thought—there can be no sin without mental awareness. Stricter liability gave way somewhat to a conception of blame based more upon the intention of the actor. The criminal law of the thirteenth and fourteenth centuries thus evolved procedural means of exempting accidental wrongs and crimes by the young and the mentally incompetent from punishment.

The reasoning behind lenient treatment of the insane was similar to that of children. Like the insane killer, the infant deserved but needed a pardon. Both apparently did not possess the mental sufficiency deemed necessary to establish the requisite criminal intent.72 There is, of course, a great deal of difference between the mental immaturity of a healthy child and the mental deficiency of an insane adult, but the law treated both in the same manner. Indeed, by including homicide by the insane, by infants, and by accident within the category of excusable homicide, the mens rea idea is clear. The lunatic who strangles his wife in a fit of blind frenzy, the child who pushes his friend out of a tree while playing, and the carter whose oxen trample a drunk in the dark are all treated
equally by the law. None caused death deliberately, that is, with a full understanding of what they were doing and its consequences.

At the same time that the king was instituting new criminal procedures, in which serious wrongs became increasingly the concern of the community as a whole at the expense of the old laws stressing compensation and conciliation between two private parties, the common law of crimes reflected its archaic ancestor. Aggrieved parties could still bring appeals—the jury of presentment did not abrogate this procedural right. And the old stricter standards of liability, though now rationally and morally obsolete, survived in the king's belief, codified in 1278, that all excusable crimes had to be fully tried before they could be excused. The insane wrong-doer, whose affliction was once an ancillary concern of the law, would not yet be acquitted, might suffer inconveniences in securing his pardon, and during the fourteenth century would lose his chattels if he had committed homicide. But nonetheless, the law would not have him executed, mutilated, or heavily fined. In this respect, the criminal law, like the laws of real property, recognized the special status of its insane subjects.
NOTES TO CHAPTER IV


2 The bōt for homicide was the wergild. P & M, II, p. 451.

3 Ibid., II, p. 452.


5 Ibid., II, p. 459. Maitland informs us that a "modern statute was required to give the parentes occisi a claim for damages in an English court." (This was Lord Campbell's Act, Statute 9-10 Victoria, c.93).

6 Ibid., II, p. 470.

7 "...inquiry shall be made throughout the several counties and throughout the several hundreds through twelve of the more lawful men of the hundred and through four of the more lawful men of each vill upon oath that they will speak the truth, whether there be in their hundred or vill any man accused or notoriously suspect of being a robber or murderer or thief, or any who is a receiver of robbers or murderers or thieves, since the lord king has been king..." Assize of Clarendon (1166), c.1 (Eng. Hist. Docs., II, p. 408.)

8 Hurnard, King's Pardon, p. 246. Her figures are based upon the numbers of pardons enrolled on the patent rolls. She points out (pp. 53-54) that these numbers are "by no means" reliable for estimating the total number of pardons for homicide. It seems reasonable, however, that the figure of around 90 percent may be taken as roughly accurate. Hurnard's book, cited often in the pages that follow, is particularly valuable because of her use of unprinted court records. Her study compensates somewhat the limitations imposed by our reliance upon printed sources.
We should perhaps mention that civil actions far outnumber criminal among the printed sources and crimes by the insane represent only a quite small percentage of the latter.


J. M. Kaye, "The Early History of Murder and Manslaughter," Law Quarterly Review 83 (July 1967): 370-371. Note, however, that Thomas Green has recently argued ("Societal Concepts of Criminal Liability for Homicide in Medieval England," Speculum 47 (October 1972): 669-694) that although the law made no formal distinction between murder and manslaughter before 1390, petit juries were unwilling to convict for "deliberate but of a sudden" killings and reserved the full harshness of the law for "planned and stealthily perpetrated" homicides. In order to circumvent what society considered an unjust extension of capital punishment, juries resorted to acquittals and especially verdicts of self-defense, the latter often elaborate--and, according to Green, concocted--explanations of the inability of the accused to escape his own death except by killing his assailant. See also Maitland, "The Early History of Malice Aforethought," Collected Papers, I (Cambridge: C. U. P., 1911), pp. 304-328, for a discussion of this basic element of the distinction between murder and manslaughter.

See Hurnard, King's Pardon, p. 68 for more on this distinction.

Although Walker (Crime and Insanity in England, I, pp. 25-26) states that the earliest case of acquittal was in 1505, Hurnard (King's Pardon, pp. 166-167) found two earlier unpublished cases (J. I. 1/376, mm.50, 80 and J. I. 1/1109, m. 18) which ended in acquittal. In both cases the killers were clearly mad; in the former a woman threw her infant into a well. In the latter a man decapitated a woman who refused to sleep with him, proceeded to run about the neighborhood announcing he was a pig and then got under a trough; later he sewed the woman's head back to its body. The jury stated he was mad both before and after the deed. These acquittals are, however, "exceptions which prove the rule."

Hurnard, King's Pardon, p. 331.

Ibid., pp. 330-331.
17. Ibid., pp. 147-148. An earlier record, dated 1240, implies this policy was older: the king grants that the heirs of Savary de Boun, non composit mentis, shall not be disinherited if "through the madness of the said Savary any misfortune happen to himself or any other by him..." C. P. R., 1232-47, p. 238.


22. C. I. M., I, pp. 604-605. The inquisition also described him as "freneticus."


26. C. I. M., I, pp. 589-590. (Cited by Hurnard, King's Pardon, p. 161). For another reference to the maddening affects of summer heat, see ibid., p. 397 where a suicide had been "afflicted with frenzy at times in summer in the three preceding years..."


28. Hurnard, King's Pardon, pp. 165-166. The word "lunatic" (lunaticus) crops up from time to time in the records: e.g., C. R. R.,
During the thirteenth century, as the eyre became less frequent, special judicial commissions were appointed periodically to deliver gaols. Chancery enrollments beginning in 1220 show commissions of one or more justices charged with deciding the cases of prisoners being held at specific gaols. Ralph B. Pugh discusses gaol delivery in extenso in Imprisonment in Medieval England (Cambridge: C. U. P., 1968), pp. 255-277 (earlier history) and 278-294 (later history). For an example of a pardon granted in 1297 on the record of justices of gaol delivery, see C. P. R., 1292-1301, p. 250.

A complete historical account of bail up to 1275 is Elsa de Haas, Antiquities of Bail (New York: AMS Press, 1966).
44 C. P. R., 1247-58, p. 100.

45 C. P. R., 1292-1301, p. 493. The calendar may have omitted a phrase that was present in the pardon.

46 Hurnard, King's Pardon, pp. 61-62.


49 C. P. R., 1258-66, p. 46.

50 Walker, Crime and Insanity in England, I, p. 220. Because of this peculiar incapacity, deaf mutes were eligible for pardon. John Legat received pardon in 1297 for homicide, on testimony that "he is and from birth has been deaf and dumb, and therefore, according to law and the custom of the realm, cannot put himself upon the county." C. P. R., 1292-1301, p. 250.


53 Hurnard, King's Pardon, p. 42.

54 One would assume the total number of such cases to be lower simply because of the lower population. As for the relative number, it is probably impossible to say.


56 Ibid., p. 66.


58 Bracton writes that suicide is a felony only if one kills oneself to escape punishment for a crime (II, p. 424). In other cases this was the rule: "Si quis autem taedio vitae vel impatientia
doloris alicuius se ipsum interfecit, successorem habere poterit:
talis non amittit hereditatem sed tantum bona mobilia, sed bona eius
mobilia confiscantur."

59 Year Book 14 Edward II (1321): The Eyre of London, I
(S. S. v. 85), p. 93.


61 However, an inquisition returned from 1283 does imply
forfeiture of chattels. One Thomas, "afflicted with frenzy," killed
himself with a knife. Two men were ordered "to do what is usual as
to the chattels of the said Thomas." If nothing was usually done, no
such order would be necessary. C. I. M., I, p. 377.

62 Ibid., p. 397.


64 We have found no evidence that the question of whether all
suicides may be in a sense mad was raised in the Middle Ages.

65 Percy H. Winfield argues this view in "The Myth of Absolute

66 Plucknett, Early English Legal Literature, p. 40.

67 Leges Henrici Primi, ed. and trans. L. J. Downer (London:

68 Ibid., 90, 11a (p. 283). The Latin: "Legis enim est: qui
inscienter peccat, scienter emendet..." (p. 282).

69 Ibid., 90, 11d (p. 285).

70 VI Aethelred, c. 52 and c. 52, §1. A. J. Robertson, ed., The
Laws of the Kings of England from Edmund to Henry I (Cambridge:
C. U. P., 1925), p. 107. The laws of Cnut endorse the same principle
in similar terms (II Cnut, c. 68). Ibid., pp. 207, 209.

71 The canonists stressed that "the mental element was the real
criterion of guilt and under their influence the conception of subjec-
tive blameworthiness as the foundation of legal guilt was making itself
strongly felt." Sayre, "Mens Rea," p. 980. Albert Lévitt also stresses
theological influences in "The Origin of the Doctrine of Mens Rea,"

72 See A. W. G. Kean, "The History of the Criminal Liability of Children," Law Quarterly Review 53 (July 1937): 364-270. Children, unlike the insane, might have suffered punishment if malice and intent were proved. Eventually, in the late sixteenth century, age limits were set. Under seven, there could be no liability; between seven and fourteen, the child could be punished if there was proof of malice.
CHAPTER V

CONCLUSIONS

This survey has considered the mentally defective within the feudal system and found that landholders non compos mentis were deemed unfit to hold land in their own right. The king supervised administration of the custody of idiots, specifying and enforcing rules for their care. The rationale for this practice was the concern that fiefs would be alienated or seisin disturbed; mentally incompetent feudal tenants might suffer as a result of their own lack of reason and were also at the mercy of swindlers. The mentally unfit feudal tenant posed a threat to the system of land tenure based on service and the king, at the top of the feudal pyramid, interfered to preserve order within the system. Although in a real sense the king's powers were no more than the intensified private rights of the highest feudal lord, his administrative and legal powers, as exercised with respect to mentally unsound landholders, also represented the beginnings of a conception of public responsibility for the insane.

The heirs of mentally unsound landholders were concerned that lands might be irrationally alienated before they could inherit. The law provided specific remedies for the victims of such alienations: charters of feoffment could be negated if it was proved that the grantor was non compos mentis when the grant was made. This rule was
subject to abuse because it provided a convenient means for questioning the validity of land grants. But questions of disputed insanity were submitted to trial juries whose testimony was relied upon to decide the issue.

Criminal law took account of the mental condition of accused lawbreakers, just as the Church stressed the mental element in defining sin. Rational man possesses the capability of choosing between right and wrong; this trait alone separates man from beast and is the basis for holding the criminal liable for his illegal actions. But the insane person--whose rational faculties are either defective or deranged--is incapable of making this choice. The king, taking this fact into consideration, was willing to pardon those who did wrong, although he could not exempt the insane criminal from appeal by the victim or his kin. This feature of the law was a survival of the Anglo-Saxon laws of compensation; in practice, its effect on insane criminals was negligible.

One must conclude that the legal status of the mentally incompetent in medieval England was, if not privileged, at least protected. It was recognized, both in land law and criminal law, that the insane should not suffer the consequences of actions they were unable to rationally choose or avoid. The king provided for the care of feudal landholders non compos mentis by granting wardship to third parties. The use of pardon rather than acquittal may seem circuitous and potentially unjust because of the arbitrary nature of the king's perogative. Mentally unsound landholders were at time preyed upon by greedy manipulators. But it still must be appreciated that the law
accorded its insane subjects special consideration and treatment—this in an age better known for its violence than for its compassion.

Only one must not look to law books and legal records to understand past social conditions. Although the common law appreciated that the mentally unsound were deserving of special treatment, it is certain that they were likely to experience a harsh and perhaps cruel existence. Whether looked after by his family or an appointed guardian, care of the insane person would not, in many cases, have been very pleasant: if he was especially active, binding and beating were a common means of pacification. In some cases at least, idiots were simply kept among the livestock. Unless a guardian was willing to pay for medical or religious services, one suspects that treatment was more concerned with calming symptoms than finding cures. Cruelty or kindness depended on the guardian's attitudes; the mental condition of many insane people no doubt rendered them peculiarly defenseless.

Systematic incarceration of the insane was a product of the Enlightenment. During the Middle Ages confinement was very sporadic and the mentally ill were hospitalized with other sorts of patients. St. Mary of Bethlehem Hospital in London, founded in 1247 and better known as Bedlam, included the insane among its patients after around 1400. By the mid-sixteenth century it was still the only mental institution in England. As we have seen, insane criminals were at times imprisoned, especially if they were considered violent and no one was willing to assume responsibility for them. Evidence shows that sustenance of prisoners was often haphazard and starvation not
uncommon. As one would expect, conditions were generally harsh; insane inmates were certainly less able than others to protect themselves from abuse or negligence.

Despite the crude treatment that was often inflicted upon the insane, medical knowledge was well-developed during the Middle Ages. For example, Bartholomew Anglicus, the Franciscan encyclopedist, devoted a section of his extremely popular *De proprietatibus rerum* (ca. 1230-50) to the treatment of the mentally ill. He recommended occupational therapy and music, the avoidance of over-work, and binding only to prevent self-injury. He does not mention evil spirits or devil possession in his discussion. Another perhaps less effective treatment, advocated by Hildegard of Bingen, involved "shaving the patient's head and washing it in the water in which agrimonia has been boiled, while the hot herbs themselves are bound in a cloth first over his heart and then upon his forehead and temples." Humoral etiology was also well-known in medieval Europe, having been received from Hippocrates via Galen. Each of the four humors, corresponding to the four elements, produced different physiological effects. Over-abundance of black bile, for example, caused melancholy, while yellow bile, if subjected to excessive heat, became unnatural black bile (auster melancholy), one symptom of which was mania.

Although theoretically sophisticated, medieval medical knowledge was probably of doubtful benefit to the mentally ill. Furthermore, complicated treatments would probably have been available only to the wealthier strata of society. A comprehensive social history of the insane during this period has yet to be written. It seems
reasonable to assume, however, that further research will reveal the generally pitiful condition of these unfortunate individuals during the Middle Ages.

References to medical theories as to causes and treatments of insanity are virtually non-existent among legal documents. The few references to the summer's heat are exceptional. Just as references to scientific knowledge are rare, so are references to superstitious explanation. One exception was the case of a madman who, in 1366, fought his son "with drawn swords." He was described as possessed by an evil spirit ("ductus est per spiritum maledictum"). Despite this example, however, explanations based on possession by the devil were apparently rarely recorded, even in cases of the most ghastly crimes. This is not to say that such explanations were not common; lawyers simply cared more about consequences than explanations. They took a practical approach—as seen in their examinations for idiocy—concerned with the problems raised by insanity rather than with medical analysis.

The essential attitude of the law toward the insane was one of concern for the practical consequences of their mental deficiency. Although pragmatic in motivation, appreciation of these problems and attempts to cope with them indicate a basically humane outlook. Considering the age in which they were working, the lawyers and judges of medieval England developed quite effective methods for dealing with these problems.
NOTES TO CHAPTER V

1 Stanley Rubin, Medieval English Medicine (Newton: David & Charles, 1974), pp. 126-127. Note also the reference (see above, p. ) to a man "kept in bonds for fifteen years because of insanity" (C. P. R., 1258-66, p. 46). Rubin mentions a man who was thought to be possessed by a demon (p. 94). He was found, according to the Life of St. Victor of Lincoln, "lying bound with his head, hands and feet tied to large stakes in the ground." Beating had the dual aim of pacifying the victim and purging stubborn demons.


6 The only modern study on this subject is Pugh, Imprisonment in Medieval England.

7 Rubin, Medieval English Medicine, pp. 197-198. A portion from the 1535 printed edition of Bartholomew's work, dealing with humoral pathology, is found in Hunter and Macalpine, Three Hundred Years of Psychiatry, 1535-1860, pp. 1-4.

8 Perhaps Bartholomew was taking a cue from the pacifying effect of David's harp-playing upon Saul, when the latter was beset by evil spirits. 1 Samuel 16:14-23.

9 Lynn Thorndike, A History of Magic and Experimental Science, vol. 2 (New York: MacMillan, 1923), p. 142. Agrimonia is a common yellow-flowered herb of the rose family. Hildegard was a famous twelfth century ascetic, whose visions and oracles were known to
Becket (Ibid., p. 126). She also suggested a cure for insanity using a magnet: the stone was moistened with the patient's saliva, then passed across his forehead while an incantation was repeated (Ibid., p. 143).


11 One wonders that the timeless nature of the problems faced by the mentally incompetent would not yet have provoked inquiry into their place in medieval society. Greater understanding of these problems might certainly lead to deeper appreciation and more humane attitudes toward the insane in our own society while furthering our knowledge of an only slightly explored aspect of life in the Middle Ages. Neaman's book (note 10 above) is a broad introduction to the subject, including medical, literary, and legal discussions, in addition to social history. Her book is directed at a popular audience, however. (She includes references to such books as William Blatty's sensational The Exorcist and Ken Kesey's One Flew Over the Cuckoo's Nest in her bibliography.) Medical and psychiatric histories are abundantly available. A recent literary study is Penelope Doob, Nebuchadnezzar's Children: Conventions of Madness in Middle English Literature (New Haven: Yale University Press, 1974). Church law and attitudes would also certainly be worthy of careful investigation.

12 See above, pp. 72, 77. Perhaps these references reflect knowledge of the fact that excessive heat could cause a lust melancholy, manifested as mania.

13 C. I. M., III, pp. 235-236. This case is discussed above, pp. 24-25 and n. 63.
11. Rex habet custodiam terrarum fatuorum naturalium, capiendis exitus earumdem sine vasto et destruccione, et inveniet eis necessaria sua, de cujuscumque feodo terre ille fuerint, et post mortem eorum reddat eas rectis hereditibus, ita quod nullatenus per eosdem fatuos alienentur vel eorum heredes exheredentur.

12. Item habet providere quando aliquis qui prius habuit memoriam et intellectum, non fuerit compos mentis sue, sicut quidam sunt per lucida intervalla; quod terre et tenementa eorumdem salvo custodiantur, sine vasto et destruccione, et quod ipse et familia sua de exitibus eorumdem vivant et sustineantur competenter, et residuum ultra sustentacionem eorumdem rationabilem custodiatur ad opus ipsorum, liberandum eis quando memoriam recuperaverint; Ita quod predicte terre et tenementa, infra predictum tempus, non alienentur; Nec Rex de exitibus aliquid percipiatur ad opus suum, et si obierit tali statu, tunc illud residuum distribuatur pro anima ejusdem, per consilium ordinariorum.


A Case of Alleged Entry Dum
Fuit Non Compos Mentis

Johannes le Josue, Adam le Venur et Matillis uxor ejus et Margeria soror ipsius Matillidis petunt versus Abbatem de Rading' unum mesuagium cum pertinenciis in Rading,' in quod idem Abbas non habet ingressum nisi per Bartholomeum Capellanum cui Rogerus Blik avunculus ipsius Johannis et frater predictarum Matillidis et Margeria cujus heredes ipsi sunt illud dimisit dum non fuit componentis sue etc.

Et Abbas venit et deffendit jus ipsorum Johannis Matillidis et Margerie et bene cognoscit quod habuit ingressum in predictum mesuagium per predictum Bartholomeum set dicit quod predictus
Rogerus dum fuit bone memorie et compos mentis sue inde feofavit predictum Bartholomeum per cartam suam quam profert de feofamento et que hoc testatur, et quod ita sit ponit se super juratam ville et Johannes et alii similiter. Et xij juratores ville dicunt super sacramentum suum quod predictus Rogerus quando feofavit predictum Bartholomeum de predicto mesuagio fuit bone memorie et compos mentis sue et cartam predictam ei inde fecit. Et ideo consideratum est quod predictus Abbas inde sine die et Johannes et alii nichil capiant per breve istud set sint in misericordia pro falso clamore.


_A Case of Novel Disseisin_

_Involving Insanity_

Coram Rege Roll, No. 155 (Trinity 1298), m. 34d.

Assisa venit recognitura si Henricus filius Ricardi de Pontefracto et Iohannes frater eius iniuste etc. disseisierunt Iohannam filiam magistri Henrici de Pontefracto de libero tenemento suo in villa de Pontefracto et Fery Bryggge post primam etc. Et vnde queritur quod disseisierunt eam de vno mesuagio, duabus acris et vna roda terre et dimidia acra prati cum pertinenciis etc. Et predictus Iohannes venit et dicit quod nichil clamat in predictis tenementis nec aliquam inuiram seu disseisinam fecit. Et de hoc ponit se super assisam etc. Et predictus Henricus dicit quod ipse non intrauit in predictis tenementis per diseis inam, immo, per feoffamentum predicte Iohanne filie predicti magistri Henrici, et profert cartam predicte Iohanne et similiter quamdam litteram factam cuidam Willelmo de Batelay ad ponendum ipsum Henricum in seisinam de eisdem tenementis, que hoc idem testantur. Et de hoc ponit se super assisam. Et predicta Iohanna dicit quod, qualemcumque cartam et litteram predictus Henricus profert, ipsa nunquam statum suum mutuit nec ipse per predictum feoffamentum vnum in seisina fuit nec aliquem statum liber tenentis in eisdem habuit. Et de hoc ponit se super assisam etc. Iuratores dicunt super sacramentum suum quod predicta Iohanna, dum in graui detenta fuit infirmitate ita quod inmemor sui fuit, fecit predictas cartam et litteram, et dicunt quod, cum conualescebat, venit ad predictum tenementum et inuenit tenentes suos in dicto tenemento et statum suum in nullo mutatum, set quod dictum fuit ei quod fecisse debuerat predicta scripta, que ipsa omnino ibidem dedixit. Et requisiti si testes nominati in scripto inter-fuerunt confectioni illius, dicunt quod non. Et precise dicunt quod predicta Iohanna fuit in tali statu corporis et memoris quod nullum
feoffamentum facere potuit, per quod idem Henricus liberum tenementum habere potuit. Et dicunt quod predicta Iohanna fuit in bona et pacifica seisina de predictis tenementis quousque predicti Henricus et Iohannes ipsam inde inuiste etc. vi et armis disseisiuserunt. Ideo consideratum est quod predicta Iohanna recuperet seisinae suam de predictis tenementis per visum recognitorum. Et Henricus et Iohannes capiantur etc. Postea predicti Henricus et Iohannes finem ficerunt cum domino rege per duas marcas, et reciprocutur per plegiagium Hugonis de Eskryk' et Thome Elys de Pontefracto de comitatu Ebor.' Ideo preceptum est vicecomiti quod supersedeat de capcione etc.

Dampna x s.

--From Select Cases in the Court of King's Bench Under Edward I, I (S. S. vol. 55), p. 66.

A Case on a Writ of Right
Involving Insanity

Curia Regis Roll, No. 112 (1214), m. 8.

Notingh'. Robertus Mauluvell' petit versus Rogerum Mauluvell' j. bovatam terre cum pertinencii in Rauton' ut jus suum, unde ipse fuit saisiertus ut de feodo et jure tempore Johannis regis capiendo inde expleta ad valentiam v. solidorum etc.; et Rogerus per atornatum suum [venit] et defendit jus suum; et dicit quod idem Robertus dedit ei terram illam pro homaggio et servicio suo per cartam quam inde eificent et que hoc testatur; et preterea offert ponere se in magnum assisam domini regis; et petit recognitionem fieri utrum ipse majus jus habeat tenendi terram illam de ipso Roberto ut illam quam ei dedit an idem Robertus in dominico. Et Robertus venit et bene concessit cartam illam; et dicit quod, quando carta illa facta fuit, non fuit potens sui nec scivit sensum suum; et dicit quod tempore illo fuit ipse in custodia ejusdem Rogeri ut avunculi sui, qui, quando alii amici sui relinquuerant eum pro infirmitate sua, ipse cepit cartam de eo; et petit considerationem curie si donum illud stabile esse debeat; et offert j. marcam pro habenda inquisitione si carta illa facta fuit tempore predicto vel in potestate sua.

--From C. R. R., VII, p. 296.
BIBLIOGRAPHY

Original Sources

Publications of the Public Record Office:


Calendar of Close Rolls [1272-1461]. 40 vols. (Only Calendars through the early years of Richard II were consulted.)

Curia Regis Rolls. 15 vols., in progress.

Calendar of Inquisitions Miscellaneous (Chancery). 7 vols. (Only the first five volumes (to 1393) were consulted.)


Calendar of Patent Rolls [1232-1575]. 68 vols. (Only consulted through 1370s.)

Publications of the Selden Society (91 volumes, in progress):

Court Records and Other Legal Documents


Bateson, Mary, ed. Borough Customs. 2 vols. Vols. 18 (1904) and 21 (1906).


*Year Books (In Chronological Order by Regnal Year)*


Year Books published in the Rolls Series:


Medieval Laws and Law Treatises:


Fleta. Edited by H. G. Richardson and G. O. Sayles. Selden Society, Vols. 72 (1953) (Prologue, Books I and II) and 89 (1972) (Books III and IV). Two more volumes are planned, the first including Introduction and Indexes, the other the final portion of the text.


Other Sources:


Secondary Sources

Law and Administration:


Henderson, E. F. "The Date of 'Prerogativa Regis'." English Historical Review 5 (October, 1890): 753-754.


Other Secondary Sources:


