

A treatise on the law of idiocy and lunacy : to which is subjoined an appendix, containing the practice of the Court of Chancery on this subject, and some useful practical forms / By A. Highmore, solicitor.

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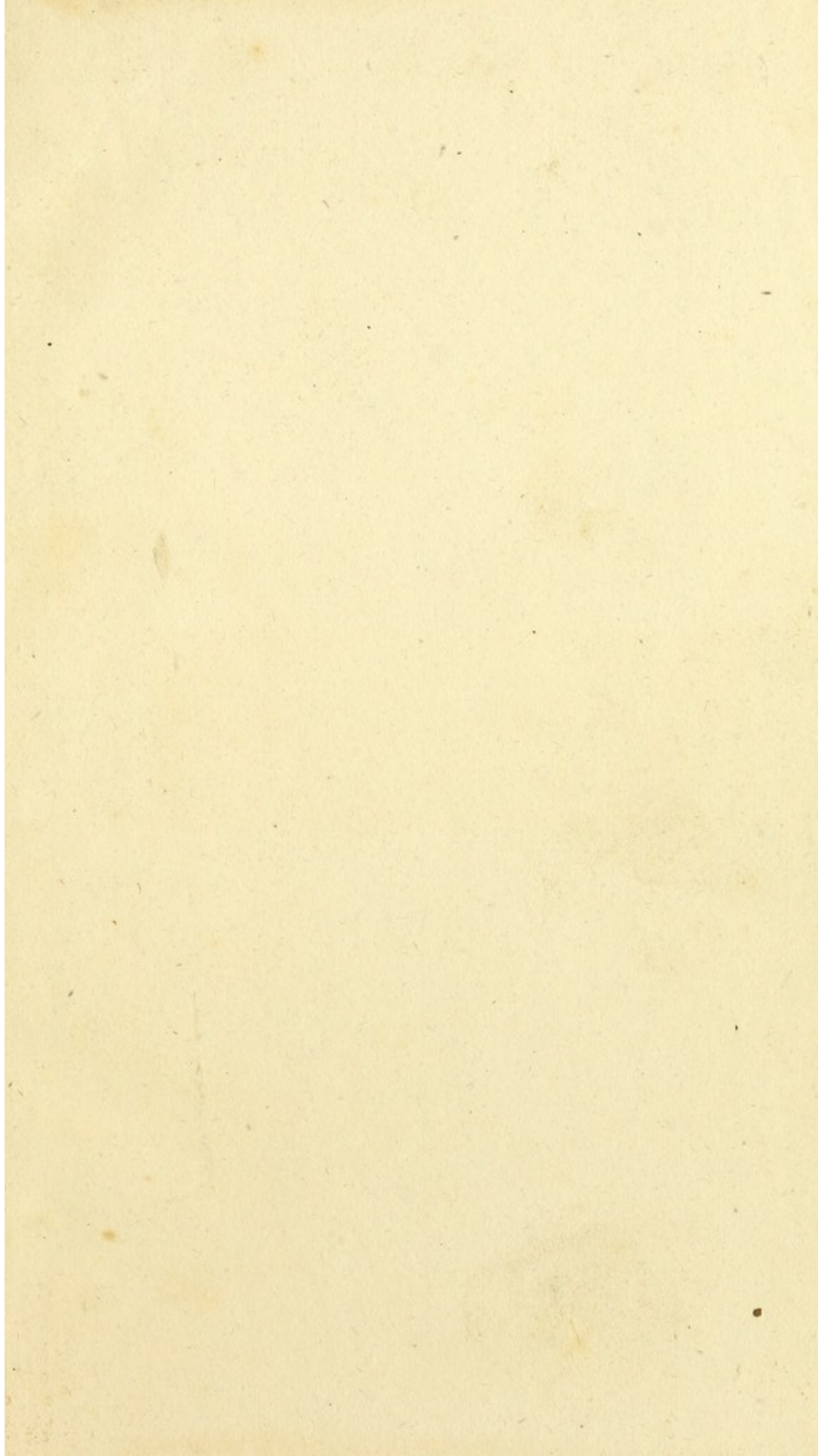


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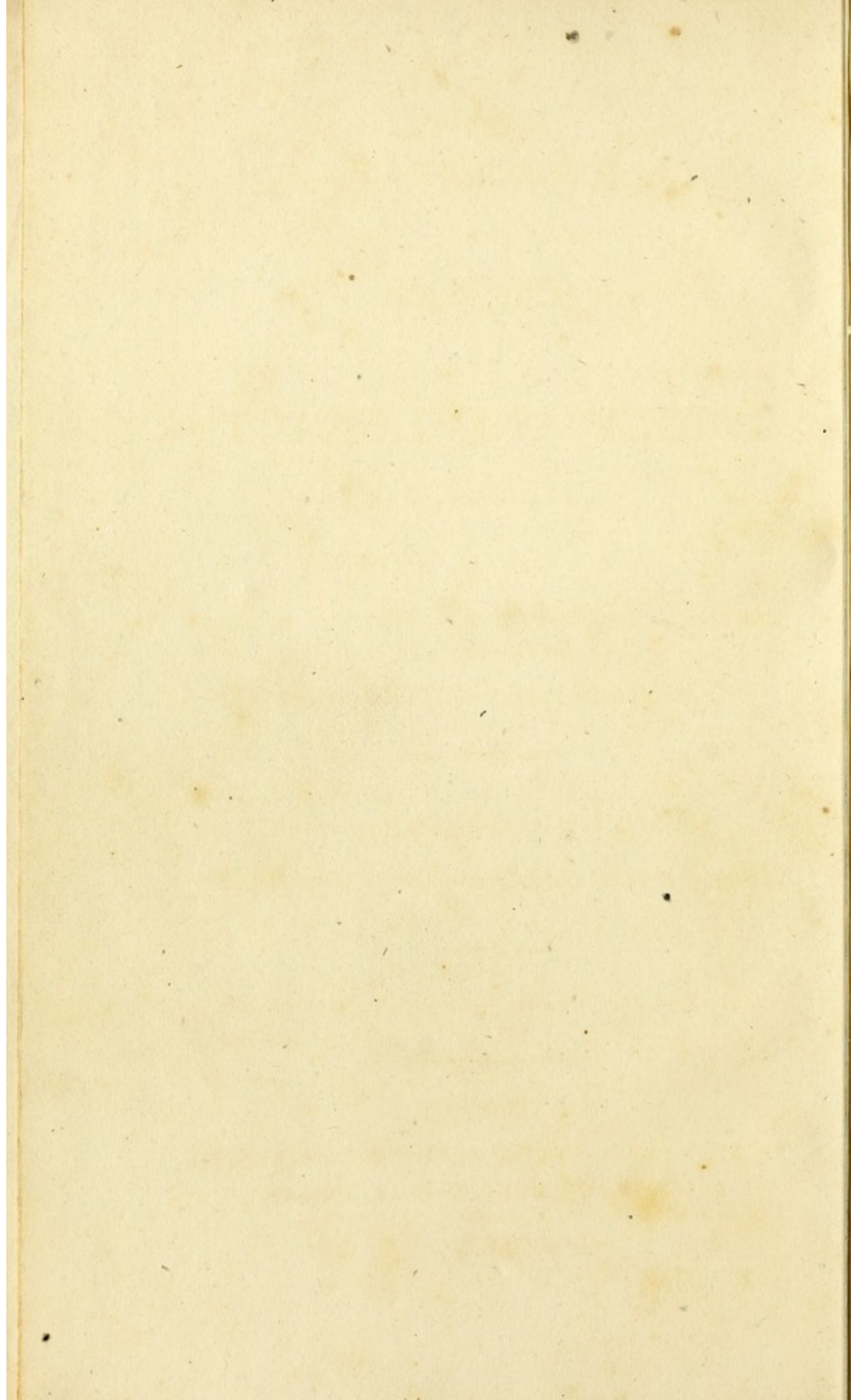
A. O. Jones





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A
T R E A T I S E
ON
The Law
OF
I D I O C Y A N D L U N A C Y ;

TO WHICH IS SUBJOINED

A N A P P E N D I X,

CONTAINING THE PRACTICE OF THE COURT OF CHANCERY
ON THIS SUBJECT,

AND SOME USEFUL PRACTICAL FORMS.

BY A. HIGHMORE, SOLICITOR.

Author of the Law of Mortmain, Law of Excise, &c. &c.

EQUUM EST UT QUI SE REGERE NON POTEST, REGATUR ALIUNDE.

GROTIUS.

LONDON :

PRINTED FOR J. BUTTERWORTH, FLEET-STREET;
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P R E F A C E.

IN compiling the ensuing pages I have endeavoured to form such a brief arrangement as should concisely bring the whole matter readily to view, and facilitate an immediate reference to the subject connected under its principal heads; but I have not always succeeded to my wish in the compression; and am not without some fears that a more able architect will charge me with having mingled orders which he would have kept distinct, and omitted ornaments which would not have weakened the fabric: but if I escape without stronger censure I shall not be ashamed;

if the work can be amended, the student and myself may profit by the lash of criticism.

I have ventured to avoid what is an essential in professional writings, the names of recent cases ; if I have suppressed this source of reference with inconvenience to the reader, he must accept the apology of delicacy which the subject offers, and will be apprised, from this and from the brevity with which some of the cases are mentioned, that my chief design is, to lead him to search the reports themselves rather than to rest upon the summary here given of the determinations ; and to facilitate his search I have endeavoured to give all the references with accuracy.

It will appear by this work that the infirmities on which it treats arise either from a defect at birth, or from constitutional

tional

tional or accidental evils, sickness, violent impression, or some passion too highly inflamed. In all of these causes, except those of birth or accident, it is not perhaps incorrect to assume, that in most maniacal cases a predisposed and radical nervous irritability forms an easy prey to the fatal malady; the patient “experiences
“great torment from a preternatural
“acuteness; an increased no less than an
“impaired sensibility induces a state of
“disease and suffering (a).”

The life of an idiot which has no intervals, and the tardy recovery of a lunatic from his paroxysms, offer examples alike distressful to shew how little ground there is to boast of human power—or vanity—or greatness, and how effectually our aspiring pride may be crushed by a visita-

(a) Paley's Nat. Theol. 522.

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tion permanent in one case, and seldom thoroughly recovered in the other!

A state of ideotism is less deplorable, though not less shocking than that of madness: ideots are afflicted with no turbulent passions; they are innocent and harmless, and often excite pity, but never occasion fear;—the absolute naturals owe their wretchedness to a wrong formation of the brain, or to accidents in their birth, or the dregs of a fever, or other violent distempers (*b*). But the case of a lunatic, whose morbid affection arising from either of the melancholy causes before-mentioned, not only awakens every concern, but excites every sentiment of horror! we have seen the most critical eye, which once penetrated the inmost chambers of science, driven from its pre-eminence, and rolling

(*b*) Orrery's Swift, 196.

its wandering glare upon the empty shadows of the passing clouds;—we have seen men, whose mighty names have justly emulated the glories of renown, subdued to the coercion of those who once dared not to trace their distant footsteps;—we have seen the prey of keen disappointment, and the more awful sway of religious enthusiasm, thus wreck the helm of human happiness, and frustrate the fairest voyage of life!

Debarred from all the illuminations of the social compact, they are at once excluded from the reception and communication of its blessings; furnished with every organ they are nevertheless afloat in the sea of existence, without a port of destination, or a compass for their course; and the mind, which to all other human beings affords a resource when the world

fails of its allurements, is to them the source and seat of their calamity !

Food, which is commonly an unremitted cause of enjoyment, is frequently to them the object of aversion ; as often cast away, as imperiously demanded ; or loathed in the very moment in which it is grasped with tumultuous violence !

The affections, which once were the solace and spring of their happiness, become the objects of their ungovernable rage ; the very furies of their contempt and scorn !

The rational man provides for his necessities and has pleasure in this pursuit— he restrains the transient enjoyment of superfluities, that his laudable acquisitions may become the fruits of more permanent

manent comforts ; but the idiot and the maniac have necessities for which they know not how to provide, they have vague pursuits unaccompanied by means and undirected to an end ; they can reap no fruit, for they have neither planted nor pruned the branches !

If they were content to vegetate, their paroxysms of agony might be soothed ; but mere instinctive existence raises them not to the level with the brute, who knows how to prevent becoming loathsome to himself. Philosophers have said, that there is more difference between man and man than between man and some other animals—the maniac is like neither ; moon-struck and viewless, he is a non-descript of human horror ! Fixed in the chain that surrounds him, he is incapable of improvement, the same yesterday, to day, and till death ! He acquires nothing,
and

and has nothing to lose—born to the highest inheritance, he sinks to the lowest abyss!

It is a self-evident truth that sanity or insanity are two qualities of the mind equally invisible with the mind itself; and as we do not know the minds of other men, except by their words, or their exterior actions, neither can we discover in any other manner the dispositions of the same mind.

But amongst the actions, which are as it were the natural signs of the affections of the soul, there are two kinds, the one so personal, so attached, so inherent, so closely united to the person, that it is impossible to suppose them to be his without recognizing his sanity and capacity (*b*).

The difficulty of decisions in cases of

(*b*) 2 Evans Pothier, 539.

this nature must be obvious to every one ; the Court has to pronounce, not upon one of those questions of state which relate to the birth or condition of parties, exterior qualities written in public registers, preserved in authentic muniments, and of which the principal proof is derived from the authority of the Law itself, but upon one of those doubtful and difficult questions, of which the only subject is an invisible quality, that frequently conceals itself from the most enlightened witnesses, an interior disposition, of which acts and writings are only an obscure and imperfect image ; in a word, when it is to decide upon the state of the mind much more than upon that of the body (*d*). Hence, in the perusal of the following work the reader will certainly be enabled to add a considerable wreath of praise to the merit

(*d*) *Ibid.* 553.

of the English Law; which he will find uniformly exerted with unabating diligence and tenderness in administering to the protection of the most afflicted part of the community; and in carefully securing them against injury from their own hands, and injury from the self-interest of others; he will view the guardianship of this jurisdiction, vested in the first estate of the realm, and then delegated to the Judge whose office it is to preside over the highest Court of Equity, a delegation consonant to the tender regard of the Crown for the welfare of the people and to the delicate situation of the afflicted objects of its care; where their personal and pecuniary rights can be discussed and protected with peculiar attention, and the interests of their families at the same time preserved; where the severity of the principles of Courts of Law is mitigated and relaxed, and a more liberal and expanded judgment

judgment is pronounced upon a cool investigation of all the circumstances of the case.

It is a source of great satisfaction to these and to all other suitors of this Court, that its jurisdiction is generally committed to men who have already passed through a long course of general practice; or whose eminence has raised them to the highest seat in one of the Courts of Common Law; where their learning and integrity have signalized their official duties; and have finally transplanted them with an enlarged experience to this first tribunal of the Crown; men who have thus gradated through all the honours of their profession are become ennobled by their talents, and hand to their posterity a well earned fame surpassing the blazonry of their ancestors.

When I reflect that it is by the critical eye of such men, these pages may chance to be inspected, I tremble for my own fame; but as I know their candour, I venture to trust myself in their hands—hands in which the great interests of the nation are intrusted may well be supposed to give protection to an individual.

A. H.

Easter Term, 47 Geo. III

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A TREATISE
ON
THE LAW OF LUNACY.

CHAPTER I.

DEFINITIONS.

IDEOT is defined by Dr. Johnson to be a fool—a natural—a changeling—one without the power of reason. Ideotism is folly; natural imbecility of mind.

A man not of sound memory is explained by Littleton to be *non compos mentis* — amens — demens—furiosus lunaticus fatuus stultus, or the like. *Non compos mentis* is the most sure and legal.

Lunatic is one whose imagination is influenced by the moon: a madman. Lunaticus, qui gaudet lucidis intervallis, in Beverley's Case (*a*).

Non compos mentis is of four sorts:

1. Ideota, from his birth by a perpetual infirmity (*b*).

(*a*) 4 Co. 124.

(*b*) Co. Lit. 247; F. N. B. 530; 2 Ves. sen. 408.

2. He that by sickness, grief, or other accident, wholly loses his memory and understanding (*c*).

3. One who hath lucid intervals, and is therefore non compos so long as he has not understanding.

4. One who, by his own intemperance, for a time deprives himself of his memory and understanding, as he that is drunken (*d*); but this sort of non compos affords no privilege to himself, or his heirs; and a descent does not take away the entry of the ideot.

As lunatics are affected or governed by the moon, so epileptics were anciently called lunatics; because the paroxysms of that disease seem to be regulated by the changes of the moon (*e*).

Mad persons are called lunatics from an ancient but now almost exploded opinion, that they are much influenced by that planet (*f*): a much sounder philosophy hath taught us that if there be any thing in it, it must be accounted for not in the manner which the ancients imagined, nor otherwise than what the moon has in common with other heavenly bodies, occasioning various alterations in the gravity of our atmosphere, and thereby affecting human bodies. However, there is a

(*c*) 4 Co. 124.

(*d*) 1 Inst. 247.

(*e*) Galen de diebus cri-

ticis, l. 3.

(*f*) 3 Gwillim's Bac. Abr.

526.

considerable reason to doubt the fact; and it is certain that the moon has no perceivable influence on our most accurate barometers (*g*).

One, made idiot by sickness, which Lord Hale called *Dementia accidentalis vel adventitia*, and which he again distinguished into a total and a partial insanity, from its being more or less violent, is such a madness as excuseth in criminal cases; and though the party in every thing else be entitled to the same protection with an idiot, and though his disorder seem permanent and fixed, yet as he had once reason and understanding, and as the law sees no impossibility but that he may be restored to them, it makes the king only a trustee for his benefit without giving him any profit or interest in his estate (*h*).—17 Edw. II. ch. 10.—1 Bl. Com. 304.

Sir W. Blackstone defines a lunatic or *non compos mentis*, to be one who has had understanding, but by disease, grief, or other accident, has lost the use of his reason (*i*); but that a lunatic is indeed properly one who hath lucid intervals, sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon: but under the general name of *non compos mentis*, which Sir Edward Coke says is the most legal name, are comprised not only lunatics, but

(*g*) Rees's Cyclop.

lim's Bacon Abr. 526.

(*h*) Hale P. C. 30; 3 Gwil-

(*i*) 1 Bl. Com. 304.

persons under frenzies, or who lose their intellects by disease; those who grow deaf, dumb, and blind, not being born so; or such, in short, as are judged by the Court of Chancery incapable of conducting their own affairs (*i*).

Fitzherbert (*k*) defines an idiot to be one who cannot count twenty pence, or tell who his father or mother were, or how old he is—or that hath no understanding or reason—what shall be for his profit, or what for his loss: but if he have such understanding that he knows and understands his letters, and to read by teaching or information of another man, then it seems he is not a fool nor a natural idiot, which seems more properly to belong to one who has had no understanding from his birth, and is therefore, by law, presumed never likely to attain any (*l*).

The same rules of judging of insanity, prevails at law and in equity, though Sir W. Blackstone seems to point at a difference (*m*): for if a return to an inquisition, state the party to be incapable of managing himself and his affairs, from the weakness of his mind, a commission of lunacy will not issue, the Court of Chancery having never gone further from the ancient returns, which were *lunatic vel non*, than in allowing returns of *non compos*

(*i*) 1 Inst. 246.

(*k*) P. 233.

(*l*) 1 Bl. Com. 302.

(*m*) 3 P. W. 130; 2. Atk.

27; 1 Com. 304.

mentis, or insane memories ; or since the proceedings have been in equity, of unsound mind, which amounts to the same thing. *Non compos mentis* is now indeed the proper technical term, being legitimated by several acts of parliament (*n*).

A person born deaf and dumb, is *prima facie* within the definition of idiot, but daily experience proves him otherwise (*o*).

Lunacy is a partial derangement of the intellectual faculties, the senses returning at uncertain intervals (*p*).

Madness is a total alienation of mind (*q*).

These defects must be unequivocal and plain, not an idle frantic humour, or unrecoverable mode of action, but an absolute dispossession of the free and natural agency of the human mind (*r*).

A memory which the law holds to be sound, is, when a testator has understanding to dispose of, or a mind to manage his estate with judgment and discretion ; which is to be collected from his words, actions, and behaviour at the time, and not from his giving a plain answer to a common question (*s*).

Thus a will obtained in *extremis*, or upon any

(*n*) 3 Atk. 168 ; 2 Ves. 407 ; 3 B. Abr. 525.

(*o*) 1 Hale 34.

(*p*) 1 Hale 31 ; 4 Bl. con. 24.

(*q*) 1 Hale 30. 4 Co. 124.

(*r*) 8 St. Tr. 322 ; 1 Hale C. 4 ; O. B. 1784, 257.

(*s*) 6 Co. 23 ; 1 Ch. Rep. 13 ; 1 Fon. Eq. 70.

importunity, or guiding the hand, may be set aside. 8 Vin. Abr. 167. pl. 7.—1 Fon. Eq. 71.

Although Courts of Equity, in judging upon the point of insanity, are governed by the rules of law, yet if a man by age, or disease, is reduced to a state of *mental debility*, which, though short of lunacy, renders him unequal to the management of his affairs, the courts will, in respect of his infirmities, if the demand in question be but small, appoint a guardian to answer for him, or to do such acts as his interest, or the rights of others, may require (*t*).

Lord Chancellor Thurlow said, he was not against the practice of finding a man lunatic who was by the infirmities of age, rendered unequal to the management of his affairs (*u*); but the more usual course is to appoint him a guardian, or some person, to act for him in the receiving and managing his property.

Weakness is not such a defect as will ground a commission of lunacy or ideocy (*x*); for a man may be weak as to figures, and not so as to his estates. Lunacy is a distemper occasioned either by disorder or accident; and to one of these two cases commissions were formerly confined; but at length this part of the prerogative, this paternal care was enlarged and extended to one who is *non compos*

(*t*) 3 P. W. 111.

4 Bro. 100; 1 Fon. Eq. 64.

(*u*) Pre. Cha. 229; Gilb. 4; (*x*) 2 Ves. sen. 408.

mentis: but here it stopt; and this, at least, a Court of Equity insists must be found to entitle any one to a commission; and therefore, though a Jury find that one is incapable of managing his affairs, yet such a finding is insufficient: they must find him to be of unsound mind. A man may be of weak understanding, and of no resolution of mind; but this is not sufficient to ground a commission: if he never was of better understanding, perhaps a commission of ideocy might lie; but query.—If it be objected that he may be imposed on in disposing of his estate by will, it is answered that fraud and imposition upon weakness is sufficient to set aside a will of *real*, much more of personal estate. There was a case in Lord Hardwick's time, where, though one could not be proved a lunatic, yet from the imposition on his weakness, the court relieved against a deed obtained from him: immediately after the decree, the grantee got a release of the decree from him; against this also the court relieved; and it was said, that Lord Hardwick ordered that he should not execute any future deed, but with consent of the court.

A person found a lunatic by a competent jurisdiction abroad, may be so considered in England (*y*).

But as it is of considerable importance to ascertain, with some precision, the nature of that sus-

(*y*) 2 Ves. jun. 586.

pension of general lunacy, called a *lucid interval*, I know of no writer who has defined it with more accuracy or elegance than Mr. D'Aguesseau, the Advocate General of France, in his pleading in the case of the Princes De Conti before the parliament of Paris. — See Evans's Pothier, v. 2. p. 668.

“ It must not be a superficial tranquillity, a shadow of repose, but on the contrary, a profound tranquillity, a real repose ; it must be, not a mere ray of reason, which only makes its absence more apparent when it is gone, not a flash of lightning, which pierces through the darkness only to render it more gloomy and dismal, not a glimmering which unites the night to the day ; but a perfect light, a lively and continued lustre, a full and entire day, interposed between the two separate nights, of the fury which precedes and follows it ; and, to use another image, it is not a deceitful and faithless stillness, which follows or forebodes a storm, but a sure and steadfast tranquillity for a time, a real calm, a perfect serenity ; in fine, without looking for so many metaphors to represent our idea, it must be not a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked, as in every respect to resemble the restoration of health. So much for its *nature*.

“ And as it is impossible to judge in a moment of
the

the quality of an interval, it is requisite that there should be a sufficient length of time for giving a perfect assurance of the temporary re-establishment of reason which it is not possible to define in general, and which depends upon the different kinds of fury, but it is certain there must be a time, and a considerable time. So much for its *duration*.

“ These reflections are not only written by the hand of nature in the mind of all men, the law also adds its characters, in order to engrave them more profoundly in the heart of the judges.”

“ An action may be sensible in appearance, without the author of it being sensible in fact; but an interval cannot be perfect, unless you can conclude from it, that the person in whom it appears is in a state of sanity; the action is only a rapid and momentary effect, the interval continues and supports itself; the action only marks a single fact, the interval is a state composed of a succession of actions.

“ And to have a sensible proof of this, let us examine the case of those, who are only affected upon one or two principal points: one person is always seeing precipices, another supposes the people want to stop him; one transforms himself into a beast, another, by a folly still more outrageous, believes himself to be God. If you do not introduce these subjects, they appear reasonable as to every thing else;

else; put them upon these points, they immediately discover their weakness. The madman who believed that all the merchandize which came into the port of *Pyreum*, was consigned to him, could still judge very reasonably of the state of the sea, of storms, of signs, from which he might hope the safe arrival of vessels, or apprehend their loss. The person of whom *Horace* has given so ingenious a picture, who always thought he was attending at a shew, and who, followed by a troop of imaginary comedians, became a theatre to himself, in which he was at the same time both the actor and the spectator, observed in other respects all the duties of social life :

Cætera qui vitæ servaret munia recto

More, bonus sane vicinus, amabilis hospes, &c.

“ Yet, who could suppose that such persons were in a condition to make a testament ?

“ If it was true that a proof of some sensible actions was sufficient to induce a presumption of lucid intervals, it must be concluded, those who allege insanity could never gain their cause, and that those who maintained the contrary could never lose it. For a cause must be very badly off, in which they could not get some witnesses to speak of sensible actions. Now, if from thence alone you were to draw the inference of lucid intervals, and supposing them sufficiently proved, should conclude

clude that the testament ought to be presumed to have been made in one of those intervals, there could never be any doubt of success. The consequence would be absurd, the principle therefore cannot be true.

“ You see, Sirs, what a lucid interval is; its nature is a real calm, not an apparent one; its duration must be sufficiently long to admit a judgment of its reality. Nothing can be more distinguishable than a reasonable action and an interval. The one is an act, the other is a state; the act of reason may subsist with the habit of madness, and if it were not so, a state of folly could never be proved.”

“ The nature of mere insanity, which being commonly the effect of temperament, is rather a weakness of organs, an habitual evil, than an accidental malady. It is otherwise with respect to fury, which may have a temporary cause, which is sometimes cured and frequently suspended; and, to make use of the elegant terms of the author of the factum, distributed by *Madame de Nemours*, in 1673; ‘ Infirmity of mind, particularly when it is the effect of temperament, is not cured by succeeding years; they only serve to fortify the complaint, which may even be considered incurable, being a privation which can never return to being and existence.’ This was applied to the insanity of the *Abbé d’Orleans*.”

“ Two different states divide all men, if you except

cept the really sage (z). The one are deprived entirely of the use of reason, the others make a bad use of it, but there is not sufficient reason for declaring them to be in a state of folly; the one are destitute of the light of reason, the others have a feeble ray, which conducts them to a precipice; the former are dead, the latter ill; these still preserve an image, and a shadow of wisdom, which is sufficient for filling in an ordinary manner the common duties of society, they are deprived of a real sanity of mind, but can lead a common usual kind of life; the others have even lost that natural sentiment which binds mankind together by the reciprocal performance of certain duties. Let us apply ourselves to this last character, which is the most sensible of all, and to which the application is the most easy.

“ A sane person, in the sense of the law, is one who can lead a common and ordinary life; an insane person is one who cannot even attain the mediocrity of these general duties. *Mediocritatem officiorum tueri et vitæ cultum communem et usitatum.*

“ But amongst those whom their weakness places below the last degree of men of common understanding, the jurists distinguish two kinds.

“ The one only suffers a simple privation of rea-

(z) The word *sage*, being used in the *French* language to express both the elevation of wisdom, and a common state of sanity, has an effect in this discussion, which cannot easily be retained in translation.

son ; the weakness of their organs, the agitation, the levity, the almost continual inconstancy of their minds, place their reason in a kind of suspension and perpetual interdiction, and cause them to have the denomination of *mente capti*, in the laws, and in the writings of the jurists.

“ In the others, the alienation of mind is less a natural weakness than a real malady, frequently obscure in its cause, but violent in its effects, and which, like a wild beast, seeks continually to break the chains that bind it, and it is this malady which properly bears the name of fury.

“ The former, says *Baldus*, have an obscure and concealed fury, the latter have a striking and manifest insanity.

“ The last are in a state of drunkenness, of transport, of frenzy. The first approach rather to the state of insanity, an extreme decrepitude, their reason, like that of an infant or a dotard, is imperfect or worn out, but they are both equally incapable of making a testament, because in the one reason is almost extinct, and in the other it is tied and bound by the violence of their complaint.

“ If these two states agree in this point, they are nevertheless distinguished by separate characters.

“ The state of fury is more violent, but it sometimes admits the hopes of cure.

“ The state of mere insanity is more tranquil, but it is almost always incurable.

“ The

“The one is susceptible of paroxysms and intervals, it rises all at once, it diminishes in the same manner,

“The other has not intermissions so marked, because the cause which produces it, that is to say, the weakness and debility of the organs, is nearly equal and uniform.

“Finally, a declared fury is so obvious and evident that it would be superfluous to distinguish the degrees of it, with reference to the incapacity of the testator, because it is certain that all furious persons, as long as their fury continues, are absolutely incapable of making a testamentary disposition.

“On the contrary, mere weakness of mind is more susceptible of degrees, and of considerable differences; the incapacity increases and diminishes, in proportion to these degrees, and these differences: but who can fix them in general, who can mark precisely the frontiers, the almost imperceptible limits, which separate insanity from sanity, who can number the degrees, by which reason declines and falls into annihilation?

“This would be to prescribe the limits of that which is illimitable, to give rules to folly, to be bewildered with order, to be lost with wisdom. The doubtful and uncertain point, at which reason disappears, and where incapacity becomes evident and manifest, can only be fixed by the particular circumstance of each individual case.”

CHAP. II.

THE CUSTODY.

ON the first attack of lunacy or other occasional insanity, while there may be hope of a speedy restitution of reason, it is usual to confine the unhappy object in private custody, under the direction of the nearest friends and relatives (*a*): and the legislature, to prevent all abuses incident to such private custody, has thought proper to interpose its authority by stat. 14 G. III. c. 49. continued by 19 G. III. c. 15. and made perpetual by 26 G. III. c. 91. for the regulation of private madhouses.—*See postea*.

But when the disorder is grown permanent, and the circumstances of the party will bear such additional expence, it is proper to apply to legal authority to warrant a lasting confinement.

The King's prerogative, in this case, is well founded, and well recognised, upon the principles of equity and justice (*b*); and therefore the legislature hath invested him with the custody of the lands of ideots, during their lives, and of lunatics, during their lunacy, for their own use.

(*a*) 1 Bl. Com. 304. 1 Vern. 9.137; 2 Cha. Ca. 70.

(*b*) 17 Ed. 11. c. 9; Finch 239; 2 Wms. 544. 638; Ca. 95, 6; F N. B. 531, 2; 4 Co. t. Talb. 143.
 †26; Hob. 153; 3 Mod. 44;

At the making of the statute of Magna Charta, 9 Hen. III. the King was not possessed of this prerogative; for if he had, this statute would have provided against waste, &c. committed by the committee—the guardianship was vested in the lords, or others, according to the common law—ideots from nativity were then accounted only as infants within age, therefore the custody of them was perpetual so long as they lived, for their impotency was perpetual (*c*): and the lord of whom their land was held, failing of a tenant to do him service, therefore took the wardship of him, as he did the custody of a minor.

It is certain that the King exercised this prerogative before Stat. of 17 Edw. II. De prer. regis; for it appears to have been exercised by Ed. I. (*d*) And it is as clear that when Bracton wrote about the end of the reign of Hen. III. that the King had not possessed it. Hence it follows, that it must have been given to Edw. I. by some statute not now extant (*e*). And it appears by the Mirror agreeing with Fleta, that this prerogative was granted by common consent: and this is acknowledged by Stamford.

It was anciently held that the King took to his own use, and therefore might demise at a rent, all the possessions of a natural fool, not of any other ideot, during his ideocy (*f*); but not that which he

(*c*) Fleta 1. 11; Bract. 5; (*e*) Mirr. Fleta 4. 125.

Cowell's Inst. 1.

(*f*) 21 Ed. III. Stam. Pr.

(*d*) Erit. c. 66. 167.

34; 1 H. VII. 24.

had title to by entry or action : and therefore upon office, finding that the ideot's ancestors died seised of an estate tail, it was sufficient to traverse the dying seised, for that only entitled the King.

As it was presumed that natural fools could never attain any reason, their guardians, on this pretence, anciently took the care of their lands in fee (*g*) ; but, as many others also suffered by this kind of disherison, it was provided 17 Edw. II. c. 10, and generally conceded, that the King should have the custody of the bodies and inheritances of ideots and fools in fee (*h*), whilst they were so from their birth, (yet otherwise if they lately became so) under whatsoever lord they held ; and should give them in marriage, and save them from all disherison (*i*) : yet, with this addition, that he should not deprive the lord of his services, reliefs, and the like, until the ideots were of lawful age.

It seems to have been the general practice for the lord to commit the custody of the ideot's land, to another, for he is not liable to a forfeiture (*h*) ; but this was disallowed after the above statute ; unless some special custom could be shewn which authorized it (*l*) : and it was held in this case, that the committee could not bring an action in his name ;

(*g*) 1 Bl. Com. 302.

(*h*) Shep. Ct. Keeper, c. 22.

(*b*) Fle. l. 1. c. 11. s. 10. 172.

(*i*) 4 Co. 148 ; 3 Gwillim's
Bac. Abr. 529.

(*l*) Fut. 16. Eas. 16 Jas. I.
Drury v. Fitch.

being only as a servant appointed by the lord to keep possession for one who could not keep it for himself (*m*); and this doctrine seems to have been founded on Beverley's case (4 Rep. 126), where it was agreed, that the idiot might have a *quare impedit* in his own name, which was afterwards recognised.

The principle of vesting in the crown the person and property of idiots, is also well-founded in the general principle of the monarchical part of the British constitution; for as the social compact is mutual by allegiance on the one hand, and protection on the other, so those who are incapable of allegiance, seem to claim that protection which, though they cannot purchase by their persons, is yet contributed for by their possessions, and called for by their imbecility: and Fitzherbert says, the King, by the law of right, is to defend his subjects, their goods and chattels, lands and tenements, and therefore, in the law, every loyal subject is taken into the King's protection: hence the King ought to have him, who cannot defend or govern himself, nor order his property, in his custody, and to rule him and his property.

Thus the King, by his prerogative (*n*), has the sole interest in him, of granting the estate of an idiot,

(*m*) Dyer, 25, 302; Noy, 27.

(*n*) Edward III.

to whom he pleases without any account (*o*): but it is otherwise in cases of lunacy; for there the grantee takes nothing to his own use, but must give security to account to the lunatic if ever he shall come to be capable, or else to his legal representatives:—this distinction has been carefully regarded, and it has been determined with great precision, that a jury may find a person an idiot, without adding “from his nativity,” or for any number of years: for the law does not allow of any other ideocy, than from birth. The grant of the person of an idiot couples an interest with a trust during the ideocy, and therefore it descends to the executor of the grantee (*p*).

The object of thus vesting the lands and goods of idiots and lunatics in the crown by statute, *de prerogativa regis* (*q*), was founded upon the most benevolent principle, to protect them from waste and destruction, that they and their household, or family, may subsist and be competently maintained out of its profits, and that any surplus might be preserved for their use upon their recovery; hence it is that the lands cannot be aliened within that time, nor can the King seize any part of them to his own use, but is bound to repairs (*r*): and if the party happen to die during his indisposition, the residue which was

(*o*) Moor 4. 2 Mod. 43.
8 Rep. 170.

(*p*) 2 Mod. 41.

(*q*) 4 Co. 127. 17 Ed. II.
c. 10.

(*r*) 3 Atk. 309. Stamf. Pr.
Reg. c. 9. f. 35.

formerly applied, by the advice of the ordinary, in masses for his soul, is now paid over to his administrator or executor (*s*).

The Court of Wards, where these cases were once cognisable, and which was established by 32 Hen. VIII. c. 46, A.D. 1540, was abolished by stat. 12 Car. II. c. 24. A. D. 1660.

Thus it appears, that though the custody of the idiot, and of his property, vests in the King, yet the freehold remains in himself and for his use: but he is, nevertheless, wisely restrained from alienation, and if he were to convey any part of his estate, the King, by *scire facias*, against the alienee would re-seize it (*t*). Provided such alienation was made after inquisition found, from which time only the King's interest accrues: yet it has been held, that to prevent incumbrances, this finding has relation back to the time of the idiot's birth(*u*). But, if a person had once understanding, and became a fool by chance or misfortune, the custody of him was not given to the King (*x*), and if he had so much knowledge as to measure a yard of cloth, number twenty pence, or rightly name the days of the week, he was not accounted an idiot, and th King had no prerogative. But in a case, where there was a general finding,

(*s*) Reg. 266. 32 Hen. VIII. c. 46. (*u*) 8 Rep. 170.
 (*t*) 13 Eliz. Dyer 302. 2 4 Rep. 124.
 Rep. 125. (*x*) Staundf. Prer. 9.

and afterwards it was said, for so many years, and not from his birth (*y*), it was held to have been from his birth, and the latter words to be surplusage, and the King's prerogative took place.

The King is thus rendered by the law the grand keeper and trustee of the persons and fortunes of ideots and lunatics, for their protection and maintenance during their lives, and at their deaths to render the estates to their heirs—so that they themselves cannot waste it, nor their right heirs be disinherited by their unfortunate situation (*z*).

There is a great difference between an ideot and a lunatic, in the stat. of Edw. II. which says, that the King shall have the interest and custody of ideots (*a*); but when it speaks of lunatics, it says, that the King shall provide that their lands be safely kept without waste, and they and their household be maintained; as in Beverley's case (*b*).

The cases of infants, and ideots or lunatics (*c*), though often coupled, are by no means similar, upon the whole view of them; and therefore I have wholly avoided offering any parallel, and have endeavoured to avoid drawing a simile of one to the other: besides, it is to be considered, that the

(*y*) 3 Mod. 43.

(*a*) 17 Ed. II. stat. 1. c. 9.

(*z*) Bro. Id. 4, 5, 7. 2 Hen. c. 10.

VII. f. 3. 4 Co. 126. 8 Co.

(*b*) 4 Co. 127. 2 Ed. 124.

170. 1 Hen. VII. f. 24. Dyer Co. 4.

302. Reg. 266.

(*c*) 1 Vern. 9.

Crown takes the one as a trust, though coupled with an interest, and the other purely as an interest service and duty owing to him, and which comes to the King in point of tenure; and therefore the King may grant the custody of a ward *cum acciderit*, but there can be no such grant of the custody of an idiot:—if the emolument and advantage that by law are vested in the King, in the case of idiots, could be separated from the trust, then clearly it might be transferred, and there has not been any such grant since the making the stat. of Edward: and the inconvenience is apparent; for if a grantee makes an infant excutor, or dies intestate, what shall then become of the custody of the excutor?

The distinction, established by statute, between the King's interest in the lands of an idiot and lunatic, is advanced in the books which speak of this matter: and, on this foundation, it has been resolved, that the King may grant the custody of an idiot, and his lands to a person, his heirs and excutors (c), and that he had the same interest in such an one as he had in his ward, by the common law. But the King cannot grant the custody of the body and lands of a lunatic to one to take the profits to his own use (d).

(c) Bro. Id. 45. Dyer 25. Moor. 4. pl. 12. And. 23. 4 Co. 127. Co. Lit. 247. (d) 3 Mod. 43. Skin. 5. 177. pl. 7. 2 Show. 171. pl. 164. Vern. 9. Moor 4. pl. 12.

In whatever county a lunatic happens to be, the care of him devolves upon that county (*e*).

Where the custody of a son, who had committed acts of extravagancy and disorder when he was drunk, was committed to a friend by the father, and after his death continued by the mother, at whose death the son was discharged by a *hominereplegiando*, the Court held that the Trustee had no right to retain possession of the estates and rents to which the son was entitled, in order to convey them to persons to whom they were devised over in the event of his lunacy: and there appearing an undue contrivance to effect this, he was ordered to pay costs of suit. Barnard. 358 (1740).

While the lunacy of any person is in question (*f*), the Court will make a provisional order as to his effects, 'till that point is determined; and will stop the removal of the lunatic (*g*); and this is perfectly consistent with the general supervision vested in the Crown in such unhappy cases.

Lord Chancellor King, upon a regular application, sent a messenger to stop a lunatic at St. Alban's, who was on her road to Scotland, conducted by her husband's nearest relation (*h*); and ordered a commission to be issued, and the rents of her estates to be remitted hither.

(*e*) 2 Ves. jun. 382.

(*g*) Amb. 82.

(*f*) 3 Atk. 635.

(*h*) Ibid.

A *caveat* may be entered against issuing a commission of lunacy ; and, on hearing the question, a personal examination in Court will be ordered (*i*); and if upon the whole the lunatic gives coherent and rational answers about his estates and property, though he may be deficient in other subjects, and particularly as to the commonest question of figures, this weakness will be deemed no foundation for a commission. But this is not conclusive, further applications may be made, perhaps he may grow worse and worse, and at last become *non compos mentis*.

Where the property of a lunatic is too small to bear the expences of a commission, the Court, on petition for a reference to the Master, to enquire the state of her fortune, and a proper maintenance, will make such an order, upon proper affidavits, without any reference for payment of dividends for the two ensuing quarters (*h*).

There are many similar instances on the register's book.

And where imbecility of mind proceeded in a great degree from epilepsy (*l*), Lord Ellenborough ordered a physician to consult with those already employed, and afterwards in the most tender manner, to find the means of visiting the patient, without alarming her ; for the purpose of determining

(*i*) 2 Ves. sen. 408.

(*l*) 8 Ves. 66. (1803).

(*h*) 4 Ves. jun. 793. 2 Dickens, 634.

whether she was in a state of mind to manage her own affairs, and in the mean time restrained her from executing any power of attorney.

If a beneficed clergyman becomes lunatic, his living is not vacated thereby, so as to let in the patron to a presentation : but it is most adviseable for his next relations to see that the duty be properly supplied ; otherwise the churchwardens may, *ex officio*, apply for a commission of lunacy, and with the permission or approbation of the bishop of the diocese, obtain a sequestration, and employ a fit person themselves, as a curate ; or the bishop, or his archdeacon, may appoint a curate.

In the case of *Hall v. Warren* (*m*), after the finding under the commission, the living, which was in the diocese of London, was sequestrated ; and the incumbent soon afterwards died.

The object of the ordinary in sending out his sequestration, is, that the cure should not remain unsupplied, and to preserve its profits (*n*) ; which, as in cases of death, or during suits, is for the benefit of the successor, so in cases of lunacy are, upon the principles stated in another part of this work, for the incumbent upon his recovery.

The persons appointed sequestrators have a duty somewhat similar to that of a Committee (*o*) ; first

(*m*) 9 Ves. 605.

(*o*) Wats. 30.

(*n*) God. ap. 14.

giving bond for their fidelity to the Ecclesiastical Judge in gathering the profits, and rendering a true account; they cannot maintain any action at law for tithes in their own name (*p*); but only in the Spiritual Court, or before the Justices of the Peace, where they have power by law to take cognizance. in passing their accounts, they are allowed out of the profits a reasonable sum, according to their trouble in gathering the tithes, and for supplying the cure, and in maintaining the incumbent and his family.

If upon recovery he is dissatisfied with their measures, his proper remedy is in the Spiritual Court; and if he files a bill in equity, the bishop must be a party (*q*).

Upon an information in the King's Bench against a physician, for assaulting and beating an alderman, under pretence that he was a lunatic, for imprisoning him until he procured him to execute a letter of attorney to his wife, by colour of which he disposed of 1,000*l.* in value, apparently to his own use; it appeared also that he had debauched his wife, handcuffed the husband, given him several strong purges in the night, and carried him out at one or two o'clock in the morning bare-headed when it rained. He was sentenced to stand in the

(*p*) Johns. 122. Bunb. 192.

(*q*) Bunb. 192.

pillory,

pillory, to be sent to the house of correction in Southwark, to be whipped naked, and to be kept at work there for a year; to be fined 600*l.* and to find sureties for his good behaviour during life.—
Rex v. Dr. Fellows, E. 12 Ann. Fortes. 166.

CHAP. III.

THE COMMISSION.

THE King's prerogative being re-established, we pass on to the process by which his authority is exerted.

By the old common law the writ *de Ideota inquirendo* issued from the Chancery to the Escheator of the county, or to the Sheriff; and there is a distinct writ in the register to enquire and examine the ideot himself directed to the Escheator.

These writs were returnable into Chancery (a), and the ideot in person, or by his friend, might come into court, or sue out a writ to certain persons to produce him in that court, or in the council; and if he was there found not to be ideot or lunatic, the former writ and return became void.

The revenue arising to the Crown from these writs, and from this custody, has been considered as a hardship upon private families; and so long since as in 18 James I. it came under consideration of parliament, to vest this custody in the relations of the party, and to settle an equivalent upon the Crown in lieu of it: but the instances are very few, if any, of oppressive exertion of this power, since it seldom

(a) F. N. B. 232. 9 Rep. 31.

happens that Juries have found a man an ideot *a nativitate*, but only *non compos*, from some particular time (*b*); which, as we have already suggested, has an operation very different in point of law.

The question of ideocy is tried before the Escheator or Sheriff, by a Jury of twelve men, and if they find the party *purus ideota*, the profits of his lands, and the custody of his person may be afterwards granted by the Crown to some subject who has interest enough to obtain them by application to the Court of Chancery. The jurisdiction which the Chancellor has generally, or perhaps always exercised in these cases, is not necessarily annexed to the custody of the Great Seal, (*c*) for it has been declared by the House of Lords, "that the custody of ideots and lunatics was in the power of the King, who might delegate the same to such person as he should think fit:" and upon every change in the person of the lord-keeper, a special authority, under his Majesty's sign manual, is granted to the new chancellor or keeper for this purpose: and for this reason no application by petition, or otherwise, on the subject of lunacy, can be heard by the Master of the Rolls, except he sits for the Chancellor (*d*).

(*b*) 1 Bl. Com. 303.

(*c*) 2 Atk. 553.

(*d*) Dom. proc. 14 Feb.

1726. 3 P. W. 109. Christian's

1 Bl. Com. 303. note. 1 Dick-

ens xxxiii.

Hence

Hence it is that no appeal lies from the Chancellor's orders upon this subject to the House of Lords; but to the King in Council: for after the jurisdiction of the Court of Wards was taken away (e), that of ideots and lunatics reverted back to the Court of Chancery, to which it originally belonged.

The method of proving a person *non compos*, is very similar to that of proving him an ideot (f). It has been found preferable to proceed by a commission, rather than the ancient writ; and therefore the first step which is necessary, is to present a petition to the Lord Chancellor, verified by proper affidavits, stating the situation and tenor of conduct, with some medical opinion thereon, tending to shew, beyond a doubt, the insanity of the party: upon this petition a commission is ordered to be passed, under the Great Seal, to inquire into these facts, in the nature of the writ *de Ideota inquirendo*; this is the foundation of all the subsequent steps—all which are carefully detailed in the appendix to this work.

It is necessary to proceed upon the commission without delay; in order that it may not appear that it was applied for in order to answer any sinister purposes: for to keep a commission without executing it for any length of time, may be of dangerous consequence; to terrify and distress the party

(e) 2 Atk. 553.

(f) 1 B. Com. 304.

or his relations, or perhaps to make him obedient to improper government (*g*); and therefore, it being also a contempt of the court, will be superseded with costs.

And as it frequently happens that some of the relations take the charge of the person and effects of a lunatic (*h*), the Court, upon application by the heir at law, for a restitution, will make a provisional order as to the property, and direct that the lunatic should be produced on the next, or some subsequent day, for the inspection of the Court.

When a man is found to be an idiot from his birth, by office (*i*), if he supposes it false, he may apply in person to the Court, and pray to be examined whether he be idiot or not; or his friends may sue a writ out of Chancery, returnable there, to bring him into Court for that purpose (*h*); and if he be then found not to be idiot, the office found, and the whole examination and the commission become void, without any traverse, or *monstrans de droit*, or other suit. The same doctrine holds as to lunacy, though the consequences are different (*l*).

And here it may not be improper to remark, that no affidavit can be read which is sworn before the petitioner himself (*m*); and any petition founded

(*g*) 2 Atk. 52. Barnard.
356.

(*h*) 3 Atk. 635.

(*i*) 9 Co. 31.

(*k*) F. N. B. 532.

(*l*) 3 Atk. 635.

(*m*) 3 Atk. 813.

thereon, will be dismissed with costs out of his own pocket. At common law it is always objected to and discountenanced, and equally so in equity, from the inconvenience which would arise if such a practice were suffered.

A person found lunatic by a competent jurisdiction abroad, may be so considered here (*n*); and if he be a mortgagee, within 4 Geo. II. c. 10. he will be ordered to convey (*o*). And if a lunatic subject of this country, be resident abroad, or be carried thither, a commission may be issued, and evidence of his insanity, by affidavit of persons knowing him, must be procured to aid the finding him lunatic, besides the other proper evidence of his lunacy. But an inquisition in England is not a sufficient foundation for a grant of lands of a lunatic in Ireland; there must be an inquisition and a finding there under the Great Seal of Ireland for that purpose (*p*).

The standing orders are, that a Jury of the county or neighbourhood shall be returned; which *prima facie* carries an evidence that he is supposed to be resident in some county in England; but, notwithstanding this is the common form, and what is usual and ought to be done in common cases, that does not determine that in all cases of necessity it must be so.

(*n*) 2 Ves. jun. 587-8.

(*o*) 1 Ves. 298.

(*p*) 1 Schoal's Rep. 301.

Hil. 1804.

These commissions *de lunatico inquirendo*, have long since superseded the old writs; but there is no precedent of a writ to the Escheator to inquire of lunacy, for he was an officer of the county, to inquire of the revenue of the Crown; and therefore where the lands came to an alien, or on forfeiture, or on death of a tenant *in capite*, to the King, where the guardianship came to the Crown, the writ went properly to the Escheator, because it was for the King's profit and interest. But in the case of a lunatic, where the King is to take no profit to himself, but merely a right arising from the care, the King, as father of his country, is to take of all his subjects not capable of taking care of themselves, there should be no writ to the Escheator, who was not a proper officer for that purpose.

It is true, that in all writs to the Escheator, there is a direction that he should go to the party, but is not to found his return thereon, for he is to have a Jury besides: whereas the writ to the Sheriff in those instances, in Fitzherbert and the Register, does not direct the Sheriff to go to the person: the reason for which difference does not appear: but whatever was the ground, the commissions have put that out of the case, for they direct him not to go to the person, but to make the inquiry (*q*).

(*q*) Reg. 19.

The ground of turning these writs into commissions, was, that as it stood by law as to lands of aliens, or on forfeitures or guardianships, where the Crown was to have the custody, they might be by writ to the officer of the King, or to Commissioners; and as they might be to the one or the other, and the commissions were more large, they fell into that method.

The forms are various, so that nothing arises from them to shew the law to be, that the lunatic or idiot must be in England. There can be no good reason why, if any subject having an estate in England, happens to be idiot or lunatic, but is out of the kingdom, there can be no inquiry *here*: no inquiry can be made beyond sea; for it is not to be executed by the Commissioners only (*r*), as in taking an answer, or assigning a guardian, which may be executed beyond sea (*s*); but there must be a Jury to inquire the fact, which must be of a county in England; then, if no inquiry could be here, both the person and his property would be in a very unfortunate case; and also the King, as to his prerogative. As to ideots the King has an undoubted prerogative; and that prerogative has prevented a great many proceedings for the care of ideots, and has occasioned a jury to find the contrary in many cases,

(*r*) Ambl. 109.

(*s*) Amb. 112. 3 Gw. B.
Abr. 527.

to avoid that. But if any one can convey the idiot beyond sea, the King cannot have the benefit of the land and person as he ought ; and as to lunatics, it would deprive them of that care and protection they are entitled to from the King, which he is bound by his regal authority and power to exert ; for then no such commission would issue, or care be taken, which would be very unfortunate (*t*).

If the Commissioners and Jury are satisfied by clear evidence, that the party is a lunatic, they will find so without inspection ; if not satisfied without it, they will make no verdict or return that he is not ; and there it must rest, nor can any effect arise from it. Nor is this conclusive, for if he is beyond sea, and is of sound mind himself, the laying hold of his lands is notice to him, that such proceedings are against him, and he may come and appear, or any person opposing the commission in his behalf will be heard, and if insisted on, and reasonable evidence laid, he must be then inspected. The nature and circumstances of such a case warrant a commission, and the common forms of these orders is not evidence of the strict confined rule of law that cannot be exceeded. As to what Lord Chancellor said in Beverley's case, the reason given there, is not, according to Lord Hardwick, the right or true reason, for there would be no fruit of such a com-

(*t*) 2 Ves. jun. 405. *Exparte Southcot.*

mission against a dead person (*u*); and it may issue into the county where the absent lunatic's property chiefly lies, and where chief part of the inquiry in consequence lies, rather than to any distant county on the coast, nearest to the place whereto he is gone.

Ideocy may be tried by inspection, because it may be discerned (*w*); but lunacy cannot without a commission.

The Commissioners and Jury have a right to inspect the person of the lunatic, and examine him before them: they do not always cause him to be brought before them, unless a considerable doubt was raised on the evidence as to his sanity; but they have a right to require it, without the prior order of Court; and if the persons in whose custody he is, refuse to produce him, the Court will censure them, and direct them to pay costs (*x*); and commit them to the Fleet prison for contempt (*y*): and a habeas corpus lies to bring him up for that purpose.

The Court denied a commission against a person of very weak mind (*z*), but denying a commission does not thereby exclude all relief against any deed or will improperly obtained.

(*u*) 2 Ves. sen. 406.

(*y*) 1 P. W. 701.

(*w*) Skin. 5.

(*z*) 2 Ves. sen. 407, 408.

(*x*) 2 Ves. sen. 401. 1751.

If the heir, upon whom lands descend, be lunatic at that time (*a*), the laches of himself and of his friends of suing livery do not hurt him: otherwise if he had been *sanæ memoriæ*, since the death of his ancestor.—Burcher's case.

The Commissioners may summon witnesses, as incidental to their office (*b*); and, on application to the Court, they will be ordered to attend, if they otherwise decline.

(*a*) Hob. 137.

(*b*) 6 Ves. 784.

CHAP. IV.

HABEAS CORPUS.

UPON a Habeas Corpus to bring up the body of a lunatic, the practice is the same as on any other habeas corpus (*a*): and the liberty of the subject being concerned, no indulgence, by first taking out a rule to return the writ, is to be granted: the return must be made, or the person produced immediately, or an attachment issues.

Where a person was too infirm and weak to be brought into Court upon a Habeas Corpus, granted upon a representation of her being in the hands of improper persons, who were suspected of using artifices with her, in order to the obtaining a will from her when she was under very improper circumstances of mind to make one, and was too much under their influence, even if her understanding and memory had been more perfect and less disordered by intemperate drinking, a rule was made to shew cause why an information should not be exhibited against them for the misdemeanours charged in the affidavit, and that certain medical and other persons should have continual access to her, but she died the next day (*b*).

(*a*) 2 Stra. 915.

(*b*) Rex v. Wright, 1 Geo. III.
Burr. 1099.

Time for the return has been enlarged on the affidavit of a physician, that the lunatic was not fit to be brought into Court, and that the relations were about to apply for a commission ; but the Court refused to grant access to the lunatic, unless that application were made on behalf of a person entitled to ask it (*c*).

But the Court have the power of committing any one who has the care of the person for not producing him (*d*).

Access was denied to a person entitled to an appointment, though merely to see the capacity of executing it (*e*).

(*c*) 3 Bur. 1363.

(*e*) 6 Ves. 7.

(*d*) 1 P. W. 701. 1721.

CHAP. V.

OF EXECUTING AND RETURNING THE
COMMISSION.

THE general rule is, that the return must be a clear and unequivocal answer to the commission: as, if the commission were to inquire whether A. was a lunatic, or enjoyed lucid intervals, so that he was incapable of governing himself and his own affairs; a return, that he is from weakness of mind incapable, and has been so for certain years, but how he became so they know not, is a void return: that he is not always in his senses, like other men, and that it arises from fear and provocation (*a*); or, is not of sufficient understanding to manage his own affairs; or so weak in judgment and understanding as not to be capable of marrying, &c. and this for twenty years past; or not a lunatic, but incapable, &c.; these are all void, for they do not find by express words that he was or was not a lunatic:—the general words are of unsound mind (*b*).

By the statute, an incapacity for marriage is made the consequence of a person's being found a lunatic (*c*); as the act uses the word lunatic only,

(*a*) 3 Atk. 168, 9.

many years is a good return.

(*b*) 3 Atk. 168.

2 Ves. 408.

(*c*) Finding ideocy for so

it would be of dangerous consequence to add a different sort of lunacy here, and under the act. There must be an absolute finding; and they cannot find an inference only without finding a positive fact.

On a writ of dower, it was insisted that the party was *ideota* (*d*), and pleaded that she was *sanæ mentis*. Sound mind is of certain signification, and known in our law; and you cannot, in pleading say, that a man is *lunaticus*, but *non sanæ mentis*. Here it would be impossible upon the inquisition to know what to plead; and if the court should break that great land-mark, that a person to be a lunatic must be found to have some degree of unsound mind, they would not know how to stop.

The commissions are framed in analogy to the writ *de ideota inquirendo* (*e*); and if the inquisition is whether A. is a lunatic, they cannot find him an idiot; and there must be a new commission.

The court, though desirous of maintaining the prerogative of the crown in its just and proper limits, yet, at the same time, is cautious of making precedents on its records of extending that authority, so as to restrain the liberty of the subject, and his power over his own person and estate, further than the law will allow.

(*d*) 2 Sand. 352.

(*e*) 3 Atk. 169.

The prerogative, and the rule of law, are in this respect still the same, and cannot be altered but by parliament; for it is only the form of *returns* that is changed by the court.

If the return departs from the direction of the commission it is void; but though it differ in words, yet if there are equivalent words, it will not be such as to quash it; for it is not a variance in words, but in the sense and meaning, that will quash it.

The uniform language of returns is, *lunatic*, or *non compos*, or *insane memory*; and they are ordered to continue so: and a considerable distinction has been always preserved between insanity and weakness.

A precision is materially necessary; for a finding that the party was worn out with age and incapable, is bad; because she might be bedrid and yet not insane: a weakness of mind may create incapacity of governing from violence of passion, and from vice and extravagance; and yet not be sufficient under the rule of law and constitution of this country to found a commission: possibly the law may be too strict, and in some cases it might be useful that a curator or tutor should be set over prodigal and weak persons, as in the civil law.

Being *non compos*, of unsound mind, are certain terms in law, and import a total deprivation of
sense;

sense ; now weakness does not carry this idea along with it : but courts of law understand what is meant by *non compos*, or insane, as they are words of a determinate signification. Lord Coke's definition is, that they are persons of non sane memory.

The term *non compos mentis* is used in the statute of limitations (*f*), which has relation to the time of the removal of the disability ; this term is therefore legitimated by this and several statutes ; and, like many other expressions, has been sanctioned by acts of parliament to a particular sense, which before may have borne a different meaning.

Lunatic is a technical word coined in more ignorant times, under an imagination, that the parties were affected by the moon ; but it has since been discovered by philosophy and ingenious men, that their derangement is owing to a defect in the organs of the body.

Thus the reason of the Court enlarging the manner of finding, was to avoid the difficulty of obliging the jury to find express lunacy, because they might think it more a case of ideocy, which was equally a case that called for the care of the Court.

The grant of the custody of an ideot, is not limited during the ideocy, for that is deemed per-

(*f*) 21 Ja. I. c. 16. s. 7.

petual ; nor has it ever been extended to the executors of the grantee, but ceases with his death.

Finding that a party was idiot for any number of years past is repugnant ; for ideocy implies *a nativitate*, which is the reason it is tried by inspection, whereby it may be discerned ; this is not the case with lunacy, which cannot be discerned in its lucid intervals, which constitutes the grand distinction between them (*g*).

In Lord Wenmon's case they delayed, because of the consequences of finding ; but on an inquisition of lunacy, they found him a lunatic immediately(*h*).

Every return to an habeas corpus, and also to a commission, must contain such a certainty as shall be unequivocal, and not leave the matter in doubt ; it being for the purpose of informing the Court as to facts, whose duty it is to declare the law arising therefrom ; and also to apprise the opposite party of what is meant to be proved, that he may have an opportunity of answering or traversing it ; for the facts are traversable—the law is not traversable. If the return be certain on the face of it, that is sufficient, and the Court cannot intend facts inconsistent with it, for the purpose of making it bad : if presumptions were to be allowed, cer-

(*g*) Skin. 5.

(*h*) 3 Atk. 170. 4. 1744.

tainty in every particular would be necessary, and no man could draw a valid and sufficient return(*i*)

A return finding the lunacy, but omitting to state whether the person had any lucid intervals, is not an objection to it in point of form(*h*): but it seems best to refer to the day when any act of lunacy was committed, and shew whether there were any lucid intervals since; and the secretary said this was the usual practice. Where there is any mis-behaviour in the execution of the commission, the court may quash it and issue a new commission (*l*).

In producing evidence upon executing the commission, it should be considered by the solicitor, that not only insanity is a fact, but it is an habitual fact, a disposition, a permanent affection of the mind which is to be proved (*m*): and as habits are only acquired by reiterated acts, they are hardly ever proved, except by a long succession, a continuity, a multiplicity of actions, of which it is impossible to have any other proof than the testimony of those who have been intimate and attentive observers of them.

Most acts of insanity are positive (*n*); a single action may sometimes suffice for a perfect proof of

(*i*) Doug. 154.

(*m*) 3 Atk. 6.

(*h*) Rex v. Lyme Regis.

(*n*) 2 Evan's Pothier, 593.

(*l*) 5 Ves. junr. 450. 1800.

folly, because there are some acts which bear so marked a character of illusion, of derangement, of alienation of mind, that it is impossible for a man in his senses to commit them; and though a person in a state of insanity may perform sensible actions, yet a sensible person cannot commit a distinguished act of folly (o).

(o) 2 Evans's Pothier, 598.

CHAP. VI.

OF CONTROVERTING THE COMMISSION.

A Commission of lunacy may be controverted by petition to supersede it, to traverse it, or for an issue to try the fact at law.

The *traverse of an inquisition* is matter of right at law, by 2 Ed. VI. c. 8. s. 6. (a) and is no favor, but *de jure* (b); and carries the fact to be tried at common law: it is a short process, stating the inquisition, and taking the common traverse upon it, and the Attorney-General joins issue; the verdict, or finding, must be correspondent to the issue (c).

An inquisition is always admitted to be read, but is not conclusive evidence, because it may be traversed (d).

Where there is any mistake in the execution of the commission, it must be examined into, and the Court, if they see cause, may quash it, and direct a new commission; but there is no *melius inquirendum*, for that is only grantable on the part of the Crown, which cannot traverse as the subject can; and therefore the Court directs a new commission.

(a) 2 Ves. jun. 833.

(c) Ibid. 452.

(b) 5 Ves. jun. 450, 452.

(d) 2 Atk. 412.

If at the second inspection, the lunatic appears better than he did at the first, and this does not prove him to be fool or mad-man, the finding must be accordingly.

Fitzherbert N. Br. shews, that it is a common method to inquire by inspection, after an inquisition returned; and there have been many cases of that sort; but if upon inspection the Chancellor is at all doubtful, there ought to be some better method of determining it, and the statute of Edward VI. seems to be made for that purpose.

“ If any person be, or shall be, untruly found lunatic, &c. all persons grieved, or to be grieved by any office or inquisition, shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have the like remedy and advantage as in other cases of traverse, upon untrue inquisitions or offices founden.”

But, although the party is thus entitled to traverse, he must come to Chancery for leave to suspend the custody (*e*).

To try the question by an issue, is of greater expence than a traverse: a traverse is binding upon the lunatic, but not upon him to whom the grant of the custody of the land was made, who claims as a purchaser. It would certainly be productive

of great mischief if this grant were suspended on slight grounds: but the Court have always exercised that right on serious and well-grounded applications; and if any thing has been done already, it will abide the event of the traverse.

There is no case where an idiot has traversed by attorney; though many where a lunatic has: and therefore an idiot appears in Court in *propria persona*, when he asks leave to traverse, but a lunatic does not: and there ought by 18 Henry VI. c. 7. to be a month's time between the return of the inquisition and the grant of the custody of the land (*f*), in order that parties may have time to come in and tender such traverse.

In all these inquisitions they are not conclusive; for the parties may bring actions at law, or file bills in equity, to set aside conveyances; therefore it is better to bind the party to abide the issue of a traverse (*g*).

When the Court thought it a hard case in ideocy, the custody was not granted without leave to traverse the inquisition—by Lord Chancellor King: and peculiar circumstances will guide the Court in this discretion; as, the expence and income, where an estate lay in the West Indies, of changing the

(*f*) 3 Atk. 5, 6, 7. 1743. Show. 199. S. C. Skin.

(*g*) Trem. P. C. 653. 4 Co. 45, S. C. Fanes's Ents. 652. Sadlers. 8 Co. 168. Jones, 198.

management (*h*); and where a person was found lunatic under two inquisitions, and the Court would not allow a traverse of the second (*i*).

Not only the lunatic, but his heir, is bound upon the traverse (*h*): or it would have been a very fruitless act of parliament. A trial by inspection is the proper trial by the Lord Chancellor, as to the person: when there has been a solemn trial in the lifetime of the lunatic, who is bound himself, to say that, after his death, when he cannot appear in person, and cannot be inspected by a Jury, it should still be open to a traverse by the heir at law, carries a great absurdity with it.

The alienee of a lunatic may traverse on inquisition, as well as the lunatic himself (*l*): suppose both of them traverse, and he is found a lunatic at the time of the alienation (*m*); the alienee is certainly bound. It is said that he is bound, because he is a party to the first, but that the heir at law shall not; which would be a manifest injustice; and still stronger in the case of ideocy, where the Crown grants the custody and profits of the estate during the idiot's life: the idiot dies, and according to the doctrine attempted, the heir at law might come in and traverse the ideocy:—but the executor of an idiot cannot have an account against the grantee

(*h*) 3 Atk. 185. 1744.

(*l*) Ibid. 312.

(*i*) Ibid. 284.

(*m*) Amb. 706.

(*k*) 3 Atk. 308.

for the profits incurred during the grant from the Crown.

The lunatic is bound, and cannot traverse the inquisition when he recovers his senses. If the grantor was really a lunatic at the date of his grant, it is absolutely void ; and if void, so as not to pass the estate, it is void, so as not to bar an entail.

But a common recovery might have a different operation from a deed to lead the uses ; for a common recovery will bar the entail, though there be no deed to lead the uses, because it is in respect of the satisfaction of estate in value which creates the bar : yet if such a deed as this does not pass the estate, then the deed can have no operation, as a recovery of an estate in satisfaction. But a letter of attorney, executed by the lunatic, which is a deed, though revocable, yet is very different from a common recovery ; and therefore every thing done in pursuance of it is void : as was determined in *Whitworth and Cholmely, 1744.*

But if he be found, not a lunatic, only a weak man, and the deed was obtained by fraud or imposition ; the Court must, on a bill filed after his death, take it exactly in the same light as it stood before his conveyance ; if the alienee gained no right by this deed, he can convey nothing to the trustee under the order of Court ; therefore the heir at law is not injured.

But if the entail is barred, those uses are not existing, and no prejudice can arise from the conveyance directed by the Court.

A conveyance made to a trustee for the lunatic, is good—but will not bar any right which the heir at law might appear to have on a trial at law (*n*).

The Committee cannot join issue on a *scire facias*, to traverse the commission; but it must be in the lunatic's own name (*o*).

If, upon a traverse, the party be found not a lunatic, at the time of the commission issuing; or it be superseded before any part of the property could vest in the Crown, no costs will be allowed to the party taking it out, however meritorious their intention: for there is no fund out of which the costs can be taken (*p*).

An order on a petition in lunacy, cannot be made for sale of real estates to pay debts; so as to prevent a bill by creditors (*q*):—it must be done by bill.

The proceedings on the commission are on the law side of the Court, and can only be redressed, if erroneous, by writ of error in the regular course of law (*r*).

When a lunatic traverses the inquisition, he is

(*n*) 3 Atk. 313.

(*q*) 2 Ves. jun. 556.

(*o*) 2 Sid. 124.

(*r*) 3 Bl. Com. 427.

(*p*) 2 Ves. jun. 832.

to be considered as a defendant, opposing the title found for the Crown, without setting up any in himself, as he must do in a petition of right: and the record must be carried down to trial by the prosecutor of the commission; for the lunatic cannot be deemed a plaintiff, and so have power to delay the Crown: and if illness prevents his appearing at the trial, and a verdict pass for the Crown, on no defence, the Court will grant a new trial(s).

Rex v. Roberts.

A lunatic having made a different appearance(t), on the second time of his being inspected, was allowed to traverse the inquisition, and the grant of the custody was suspended.

Upon the return of the traverse to the inquisition, finding that the party was a lunatic at marriage, and at taking the inquisition, but at the time of a verdict directed as to the fact, was not a lunatic, the commission was superseded; but the court doubted the propriety of such a double issue. *Ex parte Ferne (u)*.

An entire stranger, and having no interest, cannot traverse a commission (x): the Court has never been in the habit of discouraging any fair and reasonably provident application with regard to the

(s) 2 Stra. 1208.

(u) 5 Ves. jun. 832.

(t) 3 Atk. 7.

(x) 6 Ves. 579.

situation of a person allowed to be a lunatic, if he is more pressed in the execution of the commission than a tender and humane consideration of his circumstances would authorise, or of a person not allowed to be lunatic, but made the object of a commission. The law has provided that no person shall be in such a situation deprived of his liberty and the administration of his affairs, until the fact is ascertained by a proceeding admitted to be *ex parte*, which the law supposes may collect mistake (*y*); and therefore has given a right to certain persons to traverse the inquisition. See 2 Ed. VI. c. 8. s. 6. And as the true interest of lunatics is not consulted by persons, who act upon their own views of the sanity or insanity formed upon occasional conversations, and come too rashly to the Court without sufficient inquiry, yet it is the duty of the Court not to censure too hastily any application upon a subject so very important as this; but costs will be granted, if pressed for by the other side.

A person who has entered into any contract with a lunatic (*z*), is deemed to have such an interest as to entitle him to traverse the commission; for such a person having become a *bona fide* owner in equity of his property, must necessarily be aggrieved by the finding, and he may shew that the party never was lunatic (*a*) — Lord Eldon.

(*y*) 5 Ves. 450; 832.

(*a*) 9 Ves. 610.

(*z*) 7 Ves. 252; 1802.

Where a person having, for several years since the date of the finding (*b*), with the knowledge of all persons who had any interest in, or feeling about, the management of his affairs, done all the acts the most sane man is entrusted to do; and with regard to his amusements, occupations, mode of life, and every circumstance belonging to the question of sanity, been permitted for years to act at his own discretion, without any providing, and so long as a particular topic is not mentioned, his family permitted him to act without restraint, is scarcely to be deemed lunatic. There are persons who are insane upon particular points, who, if these points are not touched upon, act discreetly in their own affairs, and even as trustees for others; still it may be wise not to quash commission issued against them, but give them the right of trying the facts by a traverse.

It may be quashed or traversed for not having been executed in the county near his abode, and competent notice given of it (*c*).

There is no part of the duty, said Lord Eldon, Ch. (*d*), that occurs in the exercise of this jurisdiction, more unpleasant, and requiring greater caution, than that of determining when a commission

(*b*) 9 Ves. 610.

(*d*) 11 Ves. 10. (1805.)

(*c*) Ibid.

should be superseded; for though you may, upon evidence, arrive at a safe conclusion, establishing lunacy, it is very difficult to determine when the mind is restored; depending upon the circumstance, whether the party is led to those topics upon which it was affected. In the case of Mrs. B———(e) Lord Thurlow said, that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before: and that should be proved by evidence as clear and satisfactory. I cannot agree to that proposition, either as to property, or with reference to such a case as this (f); for suppose the strongest mind, reduced by the delirium of a fever, or any other cause, to a very inferior degree of capacity, admitting of making a will of personal estate, to which a boy of the age of fourteen is competent, the conclusion is not just, that, as that person is not what he had been, he should not be allowed to make a will of personal estate. There may be frequent instances of men restored to a state of mind, inferior to what they possessed before; yet it would not be right to support commissions against them. On the other hand, if lunacy has been satisfactorily established, particu-

(e) 3 Bro. C. C. 411. *Atty v. Parnther.* (f) *Ex parte Holyland.*

larly where there is a tendency to do great personal harm, to others, I ought to be sure, by the evidence of persons having competent knowledge upon the whole of the subject, that there is an absence of that disorder; and that those tendencies may not be brought forward, when it may not be generally known, that there is any providence of the law thrown over the individual.

There may be considerable evidence of the recovery; but if the whole nature of the case has not been stated to the physician, who swears that he has frequently seen the petitioner, and believes him to be of sound mind; unless he can go further, and state that the ground of the opinions of those medical gentlemen who thought otherwise, was laid before him, that he has had an opportunity of considering it, and the result of the whole is, that just and accurate as those conclusions were, or inaccurate upon his own conclusion, satisfactorily formed, the present state of the party is as he represents it; unless the affidavit comes with some such exposition, though the conclusion may be right, not having those particulars before me, I cannot try the truth of the inference. The question may be, whether the existence of the commission may not be necessary, in order to secure to the party the utmost comfort and happiness he is capable

capable of enjoying.—An issue was therefore directed.

It is understood that if an idiot has title to land, either by entry or action, and has it not in possession, the King does not seize it (g).

(g) Broke's Abr. tit. Ideots.

CHAP VII.

THE COMMITTEES.

SECTION I. *Who may take these Offices.*

IN the case of ideots and lunatics the civil law agrees with ours, by assigning them tutors to protect their persons, and curators to manage their estates. For if a man, by notorious prodigality, was in danger of wasting his estate, he was esteemed *non compos*, and committed to the care of curators or tutors, by the prætor (*a*); and, by the more ancient laws of Solon, such prodigals were branded with perpetual infamy.

But with us, when a man, on an inquest of ideocy (*b*) has been returned an unthrift, and not an ideot, no further proceedings have been had. The propriety of the practice seems to be very questionable, says Sir William Blackstone (*c*). It was doubtless an excellent method of benefiting the individual, and preserving estates in families: but

(*a*) Potter Ant. 1, 26.

(*c*) 1 Com. 304.

(*b*) Bro. Abr. Ideot 4.

it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. *Sic utere tuo, ut alienum non lædas*, is the only restriction our laws have given with regard to economical prudence; and the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are, perhaps, not a little conducive towards keeping our mixed constitution in its due health and vigour.

The Lord Chancellor (*d*), rather than the Court of Chancery, after the commission is returned, usually commits the care of the lunatic, with a suitable allowance out of his estates for his maintenance, to some friend or relation, who is then called the *Committee*.

To prevent sinister practices, the care of his person is not committed to his heir at law, because it is his interest that the lunatic should die. But, it hath been said, that there lies not the same objection against his next of kin, provided he be not his heir (*e*); for it is his interest to preserve the lunatic's life, in order to increase the personal estate, by savings which he or his family may hereafter be entitled to enjoy (*f*).

(*d*) 2 Dickens, 555.

(*e*) 3 Brown, 510.

(*f*) 2 P. W. 544, 638. 1 P.

W. 262.

But

But this rule of not appointing the next of kin (*g*) entitled to the estate in remainder to be committee of the estate, has not of late years been adhered to.

The distinction upon which, in the cases referred to in the margin, that rule was considered not applicable to the next of kin, from their interest in the probable increase of the personal estate during the life of the lunatic, is not satisfactory. To those upon whom the suspicion, which was the foundation of that rule, could attach, immediate gain is a stronger temptation than the hope of future advantage, subject to disappointment, not only by the casualties of life, but also, where the state of the lunatic admits it, by the liberal application of his income for maintenance.

The heir at law is generally made the manager or committee of the estate, it being clearly his interest, by good management, to keep it in condition: accountable, however, to the Court of Chancery, and to the *non compos* himself if he recovers; or otherwise to his administrators (*h*).

If the Chancellor acts improperly, in granting such custodies, the complaint lies to the King in council (*i*).

The statute (*h*) which gave the guardianship of

(*g*) 7 Ves. 591.—1802.

(*i*) 3 P. W. 108. Br. 267.

(*h*) 1 B. Com. 304.

(*k*) 17 Ed. 11. st. 1. c. 9.

ideots' lands to the King, on his finding them maintenance out of the profits, extended not to copyhold lands, for the prejudice that would thereby accrue to the lord; but yet all alienations made by an ideot of his copyhold lands, after office found, may be avoided by the King (*l*).

And it hath been holden, that though the King cannot have the custody of an ideot or lunatic copyholder, on this account, yet the lord of a manor *de communi jure* (*m*) hath not the custody of the lunatic's lands, but there must be a special custom to warrant it (*n*).

But it has been resolved that the lord shall have the custody of one *mutus et surdus*, without alledging any custom; for otherwise he would be prejudiced in his rents and services, which reason extends as well where there is no custom as where there is; and the same reason seems to apply to a lunatic (*o*).

Although the King hath the sole direction of these cases, yet a private person may confine a friend who is insane; and bind and beat him in such a manner as such unhappy cases often require (*p*).

So power is given by statute to the magistrates to

(*l*) 4 Co. 126. Co. Cop. 152.
3 Ba. Abr. 532.

(*m*) Noy 27. Hob. 215.

(*n*) Lutw. 373.

(*o*) Cro. Ja. 105; Evers
and Skinner.

(*p*) 2 Roll. Abr. 546.

confine *vagrants* insane. 12 Anne, c. 23. rep. by 13 G. II. c. 24, and finally repealed by 17 G. II. c. 25. But see *postea*.

The custody of a lunatic may be granted to a feme covert (*q*), though she be not *sui juris*, but under power of her husband; and where it was granted to husband and wife, she being next of kin, and died, the husband's right determined: for the grant was joint, and a mere authority without interest (*r*.) (1735.)

A trustee under a will may continue the person of the lunatic in the same custody as he found him in, unless he discover acts of cruelty and oppression, want of necessaries, &c. and he may retain the profits of an estate for persons to whom they were devised over in the contingency of an intermediate person being lunatic, if he prove to be so (*s*): and if any connivance be proved to keep him out of his estate, by setting up his lunacy, and he be not so, costs of suit will be ordered.

A devise by will of the custody of a lunatic, niece to one who was no relation, is absolutely void: the father himself could not make such a will (*t*), though he might dispose of the guardianship of his child during minority; yet, after twenty-one years of age, he has no such power.

(*q*) 3 P. W. 111. n. rester, 143.

(*r*) Ca. Eq. Talb. c. 143; (*s*) Barnard. 359.
Wyatt Prac. Reg. 56; For- (*t*) 2 P. W. 638.

The same person may be committee of the person and of the estate, except the heir at law, to whom the court never commits his person (*u*).

In selecting the proper persons to fill these offices, the prudent caution of the Court has generally been guided by the principle of uniting interest with duty, as already stated (*x*): and if there is any strong aversion, however groundless, in the disordered mind of the lunatic, against a party proposed as committee of his person, this will be regarded by the Court, whose endeavours are to make these unfortunate people as easy as possible.

The Court never grants the custody of the person to two committees (*y*), for this has been found to occasion suits and expence: but there is no objection to any one who will have a share in the personal estate.

A person named committee by the Court (*z*), suffered the lunatic to dwell with the committee of his estate, who was his uncle, during thirty-two years.—On a petition from one of the next of kin to remove him, and to lessen his allowance, the Court refused both, declaring that the uncle, from the length of time, in which he had shewn him the ut-

(*u*) 3 Brown, 510; 2 P. W. (*y*) Ibid. 638.

638.

(*z*) 2 P. W. 263; 3 P. W.

(*x*) 2 P. W. 637; 6 Ves. 108—110.

427.

most tenderness, was the properest guardian; that the allowance contributed to his comfort; and that he had long been in that unhappy condition. Yet in the eye of the law a lunatic is never to be looked upon as desperate, but always at least in a possibility of recovering; and then the benefit and comfort to be guarded by the court, where no creditor complains, are for his benefit, nor for any next of kin, all of whom he may survive.

The bankruptcy of the committee of the lunatic's person is a sufficient cause for his removal from the management of the friend destined for his maintenance (*a*). But the mere custody of the person will not be changed if the Master find that, for the comfort of the lunatic, it should be continued.

Although it is unusual for a brother to petition to be committee, and that a receiver be appointed for the estate, on the refusal of the heir at law, who, with the brother, is the only next of kin, and not able to give the requisite security; yet the Court has appointed the brother committee of person and estate, with restriction not to receive; and referred it to the Master to appoint a receiver, to account and pay to the accountant-general, after the necessary maintenance (*b*).

This guardianship shall not be committed to any

(*a*) 2 Ves. jun. 2; Wyatt, P. R. 276. (*b*) Amb. 104.

that will make gain of it, or who is concerned to outlive the lunatic, as being nearest of blood, and entitled to the administration; and the allowance must be liberal and honourable for his maintenance (c); but there is no instance of any allowance to the committee for his trouble.

And the choice of the Court as to the committee of the person is generally influenced by the sex of the party, as well as by other circumstances (d).

The next of kin and expectants are not to be considered, but the lunatic is to have every comfort which his circumstances will admit (e).

If the lunatic be a married man, his wife must have the commitment of his person, and an allowance suitable to his estate and rank. His estate must be accounted for; and if he die without issue, a moiety goes to her as is usual (f).

The grant to a committee does not extend to his executors or administrators; nor is it assignable (g).

And if a wife be insane (h), and her husband has the care of her, the Court, in taking account of dividends of her separate estate, as directed

(c) 2 Fon. Eq. 244; 10 Ves. 2 P. W. 262.

104.

(f) 1 P. W. 702.

(d) 2 P. W. 635; 1 Fon.

(g) 1 Vern. 9.

Eq. 59.

(h) 4 Brown, 409. (1793.)

(e) 1 Ves. jun. 297;

against the husband, will order due consideration to be had of his extra expence of maintaining her.

By the custom prevalent in the province of York, before the statute of 12 Car. II. c. 24 (*i*), for abolishing the Court of Ward and Liveries, and for appointing guardians by will, &c. a tutor might be assigned to a child unborn, as also to an idiot or lunatic. But this statute gives no power to the father to appoint a guardian to his child, being idiot or lunatic, after he shall be twenty-one years of age (*h*). Therefore, although the father be within that age, yet he may grant the custody of his child, but cannot demise or devise his land in trust for him directly; but he may do it obliquely (*l*); for by appointing the custody, the land follows as an incident given by the law to attend it (*m*).

A will or appointment made solely upon this act, need not be proved in the Spiritual Court; for the appointment being by statute, the Temporal Courts shall be judges of it, and the words of such appointment may be, “I commit my children to the power of A. B.”—or, “I leave them in his hands. I leave them to his government, regimen, administration, &c.” (*n*) Under this ap-

(*i*) Swin. 212.

(*m*) 1 Vent. 207.

(*h*) Sect. 8, 9.

(*n*) Swin. 216.

(*l*) Vau. 178; 3 Mod. 24.

pointment, the Ecclesiastical Court cannot intermeddle with the body (o).

But this guardian takes place of all others, and being made after the model of a socage guardian, and coming in place of the father, hath not a bare authority, but an interest joined with his trust (p) as necessary to the performance of it, but not an interest for himself. He can only lease at will, and not for years, for he is himself only tenant at will (q).

A defendant having become impaired in his mind, after the decree, a guardian was appointed for him, by whom he might produce books, &c. (r) (1756).

And where the committee was one of the plaintiffs in a suit with the lunatic, the Court referred it to the Master to appoint a guardian to answer and defend (s).

The Court will not appoint a Master in Chancery committee (t), on the score of public policy. He would probably have to pass his own accounts. Upon the fair influence that the character of one Master in matters of account would have upon the

(o) 3 Keb. 834.

89, et seq.

(p) Vau. 181. 3; 2 P. W.
123.

(r) 1 Dickens, 286.

(s) Ibid. 187.

(q) Cro. El. 678. 734;
8 Mod. 312; 4 Burn. Ec. L.

(t) 6 Ves. 427. (1807).

mind and judgment of another Master, the conclusion must be, that the appointment of them, as receivers and committees, a situation in which third persons are to enter into conflict with them, never could obtain a satisfactory administration of justice. Though private persons may put them in the character of executors, the property of suitors is not by the judgment of this Court to be put into the hands of its officers.

The office of committee of the person is given for the sake not of the committee, but of the lunatic; and the allowance is to be given for the purpose of attaching him to the lunatic; therefore where it appeared that the person proposed had engaged to give to another 3-4ths of the savings of the profits, it was reason why the Court would not appoint him (*u*).

In the reign of Hen. VIII. (*x*), Dr. Pace, Dean of the Cathedral Church of St. Paul, London, becoming a lunatic, was retained in the custody of the Archbishop of Canterbury, and this was established in the Court of Wards, since abolished, upon precedents shewn, in preference to the Crown (*y*).

(*u*) Ibid. 428.

(*x*) Dyer.

(*y*) Brydall, 112.

SECTION II. *The Principle thereof.*

What Lord Hardwicke said on a different subject well applies to the case of any trustee, and particularly to that of a committee. By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable disobedience; his omission of his duty is his own default, and he must bear such a proportion as is suitable to the loss arising from his particular neglect.—A Court of Equity can lay hold of every breach of trust, let the person be guilty of it either in a public or private capacity. The tribunals of this kingdom are wisely formed, both of Courts of Law and Equity, and so are the tribunals of most other nations; and for this reason there can be no injury, but there must be a remedy in all or some of them (z).

In general the Court of Chancery looks upon trusts as honorary, and a burden upon the honour and conscience of the person entrusted; and not undertaken upon mercenary views (a).

Hence it is, that no allowance is ever made to them for their trouble; they are supposed to have regard for the lunatic and his family, and are often his relations, or at least friends, who undertake the

(z) 2 Atk. 421.

(a) Ibid. 60

care upon charitable and affectionate motives ; and the nearer is the relationship, so much less is the ground for any such allowance.

His next of kin have no power to consent, for it is the interest of the lunatic which the Court regards ; and though they may be next of kin at the time, yet he may outlive them, and his personal estate go at his death into other hands.

But if there be great trouble in managing the estates, he may petition for an increase of maintenance, without any report from the Master, which will answer the purpose (*b*).

The comfort and maintenance of the lunatic (*c*), according to the limits of his income, out of which a liberal allowance is made, is the first concern of the committee, who in this respect may be esteemed the confidential agent of the Court ; and the imbecility of his charge should work a principle in his mind of extraordinary fidelity in the execution of his trust.

Some have considered him rather as a bailiff than a trustee, who, though entrusted with a considerable confidence, cannot injure the estate as a trustee could, who possesses the fee, and could fraudulently grant it : still there are moral and legal obliga-

(*b*) *Ambl.* 78 ; 178.

(*c*) 1 *Ves. jun.* 296 ; 6 *Ibid.* 8.

tions upon him, to which he is equally bound to adhere, in the fulfilment of a charge so responsible as this.

For, he cannot change the nature of the estate by converting money into land, or land into money; he cannot apply the produce for any sinister purposes; nor even for necessary repairs without a previous order (*d*); nor extend any part of the allowance for maintenance to any of the lunatic's family or himself, in preference to the comforts suitable to his condition and former station in life, as far as his fortune will admit; but he will be allowed for maintenance of the lunatic's son (*e*): and in every transaction the interest of the lunatic is to be his primary consideration, to which all other interests in being, or in expectancy, are to yield.

If any part of the estate is liable to forfeiture, or other peculiar conditions, the committee is bound to protect it against those events; and if he has not power, he is bound to apply for power to the Court.

He is chargeable for supine negligence (*f*); yet the proof must be very strong: if he be robbed, the loss will be allowed in his accounts, on proving it

(*d*) 10 Ves. 104; 11 Ves. 398.

(*e*) 1 Vern. 263.

(*f*) 1 Vern. 144.

upon his own oath, for he was to keep it but as his own (*g*).

The power of the committee is very limited; and therefore, when any extra step is desirable, he should make application to the court: such as that of granting leases and raising money, cutting timber, and the like. Otherwise he will be liable to the consequences of any adverse application against him for exceeding his authority (*h*); and also to the consequences of leading others into a bad title: it being a rule, which the Court itself observes in its decrees, from which he is never to depart, not to vary or change the property of a lunatic so as to affect any alteration as to the succession of it (*i*).

As the committee of the estate is vested only during pleasure, and has no interest, he cannot grant leases nor any ways incumber the estate without a special order of Court, where the profits are insufficient for the lunatic's maintenance; and can bring an ejectment and trespass only in the lunatic's name (*k*).

He cannot take up more money on a mortgage therefore, made by the lunatic while sane (*l*); nor

(*g*) 2 Ch. Ca. 2; 3 Ves.
365; Jones on Bailments.
Fon. Eq. 244.

(*h*) 2 Wils. 130; 1 Vern.
262; 2 Atk. 407.

(*i*) Anib. 81.

(*k*) 1 Vern. 262; 2 Wils.
130; 2 Sid. 125; Hob. 215;
Hut. 16.

(*l*) 1 Vern. 263.

be allowed for any improvements and buildings ordered by him the committee; and the heir will be let into them. But see *contra*, 2 Atk. 414.

The committee cannot present to a vacant benefice; for that right belongs to the Great Seal, and was asserted by Lord Talbot (*m*).

He cannot invest any surplus of the estate in lands, even in the lunatic's name. This, though with good design, is an exceeding of his authority; and were the lunatic insolvent at his death, this surplus should be applied in discharge of his debts; and such lands, thus purchased, would be liable notwithstanding the claims of the heirs at law. It is provided by the statute, that any surplus should be safely kept and delivered to him upon his recovery, or employed for his soul if he die; therefore now it belongs, in that event, to his next of kin, and any lands so purchased, would be decreed to be sold for their use (*n*).

But the interest of a fund in Court (*o*) belonging to the husband, who was in a state of imbecility, was ordered to be paid to the wife, for the maintenance of the family (*p*). (1792.) And in taking the account of a wife's separate estate, she being

(*m*) 1 Woodeson, 409; 3
Gw. B. Abr. 530.

(*n*) 2 Vern. 292.

(*o*) 4 Bro. Ch. Ca. 100.

(*p*) Ibid. 409.

a lunatic, regard will be had to the extra expence.

SECTION III. *The Security requisite.*

The Court, in order to exercise due vigilance over their agent, require, from the committee or receiver of the estate, the security of two responsible persons, in double the sum at which the amount of his receipts may be computed (q). And it is one of the duties of the Attorney General, to whom this part of the matter is referred, to see that they are proper persons, and their recognizance regularly executed and filed with the Clerk of the Custodies.

The amount is settled upon a general state of the lunatic's property, of which an inventory is made out at the time of executing the commission; by which the Attorney General sees what the outstanding personal estate and rents of the real estate amount to; and directs the amount of the security accordingly.

The persons, two or more, proposed to him as securities, must be approved by all the parties concerned, and allowed by him to execute the usual bond.

If any difficulty occurs in providing this security,

(q) 3 P.W. 111.

(for though the committee proposed and allowed may be the most upright, yet his connections may not perhaps be competent to meet so large a sum, as the outstanding estate, when doubled, may require,) it may be prudent to procure some of those who are indebted to the estate, to pay their debts into Court, on due notice to all parties. This will perhaps bring the amount within their power,

It seems also reasonable that as the committee proceeds to lessen the outstanding amount, by receiving and paying it into Court, or applying it as directed, he and his co-securities should be relieved as to the amount of their bonds: and on some particular circumstances the Court will be induced to grant that the bond be delivered up, and fresh securities taken (*r*). But the trouble and expence of such applications on every occasion when the receipts are diminished, would be a charge upon the estate, not very just or equitable, and are therefore discouraged but on very particular cases.

Even applications to change the security, when greater are offered, are not encouraged; for, though this may have the appearance of benefit to the estate, yet it may be of dangerous consequence: for if the bond were delivered up, and there happen to be a concealment of any part of the estate (*s*) on

(*r*) 2 Ves. sen. 673.

(*s*) 2 Ves. sen. 674.

taking the account, and the lunatic afterwards recover, he could have no remedy for that for the time past; and it is too frequent that those accounts are superficially taken, and it cannot always be otherwise.

In passing his accounts the committee must state what sums he has had in his hands from time to time; and cannot keep money without being liable to interest; and if he make considerable savings, he will be liable for interest thereon, unless any particular circumstances can be shewn that he did not use it; for he ought to have made interest of it (*t*).

And unless he pass his accounts regularly every year, he will not be entitled to his costs (*u*).

The King, or the Great Seal, cannot grant the custody of a lunatic's estate without account; but he may allow as great a salary for maintenance as the income of the estate amounted to (*x*).

Where the profits were allowed generally to the committee for the maintenance (*y*), and he gave security accordingly, at the lunatic's death his next akin filed a bill for relief; but the Court held that it was the same as if they had granted an allowance equal to the profits. The order was pleaded, and directed

(*t*) 1 Ves. jun. 156.

Abr. 530.

(*u*) Ibid. 296.

(*y*) 3 P. W. 104.

(*x*) 3 P. W. 110. 3 Ba.1

to stand for an answer, and that unless gross fraud could be proved, no relief could be expected. *Sheldon v. Aland*. J. 1731.

The right and interest in the profits, &c. of an idiot's estate, has relation back to the time of the office found, not from his birth: but the office shall relate back to his birth, so as to avoid all mesne acts done by him. But of this hereafter.

Land being held by an idiot, subject to services, or to mortgage, any person may make the tender for him in respect of his absolute disability; and the law, in this case, is grounded upon charity, and so in like cases (z).

If a committee cannot be procured, a receiver may be appointed, with a salary, upon giving the necessary security as a committee, and the property may continue in the original trustees; it is not material whether he is called Committee or Receiver (a). If this should become an established rule of practice, it will not be unfrequent for men to refuse to become committee, to whom no compensation for trouble is allowed, but some probable expence in extra costs; and yet use influence enough to be appointed Receiver, by which name they are to be allowed a salary or commission, on receiving and paying.

(z) Co. Lit. 205. b.

(a) 10 Ves. 622. (1805).

As soon as the committee has passed his accounts, it is his duty to present a petition to the Lord Chancellor, for leave to pay into Court the balance remaining in his hands. This petition is answered as of course; and an order is drawn up thereon. See Appendix.

All orders, as well as reports, ought to be filed with the Clerk of the Custodies; those upon which the Accountant General is to act, are drawn up by the principal Register of the Court: and this is procured by taking a duplicate of the order from the Secretary of Lunatics, one for the Register, and the other for the Clerk of the Custodies: and the Master gives a duplicate of his reports for the same purpose, one of which is filed in the Report Office, and the other with the Clerk of the Custodies.

SECTION IV. *The Duties and Power.*

One of the principal duties of the committee of the estate, is to take care of one rule of law, that neither the property nor its succession suffer any change, but to act always under the Court's direction, which has sometimes so ordered (*b*).

Where a purchase was made of real estate with the money of a person two years afterwards found

(*b*) Ambl. 80.

by inquisition to have been a lunatic at the time of the purchase, and it appeared that the finding was carried too far, by his incapacity having arisen from a distemper of apoplexy or palsy; for he should have been found incapable of managing his own affairs; evidence was received by the Court, that he lived with his own family after the paralytic disorder, as well as before, and was assisted in the management of his affairs by his only son and his steward, and at the time when the purchase was depending rode out to inspect the intended purchase: the purchase was maintained, as it appeared to have been a reasonable act.

There are many instances of apoplexy turning to paralytic disorders, which may at first affect only the members and organs of the body; and, by degrees, as the weight of the distemper increases, may affect the memory and understanding.—This act was done with the concurrence of his whole family, and it would be attended with numerous inconveniences, if, in such circumstances, the Court should alter the property; he having one son, who must have been heir to the real estate, if not otherwise disposed of, and entitled to the personal if he died intestate; and the Court ought especially to give the turn of the scale in favour of the heir (c).

(c) 2 Atk. 413. 1742. Lord Hardwicke.

Although

Although the Court will not order the personal estate of a lunatic to be turned into real estate, yet there have been applications for leave to lay out part of the personal in repairs and improvements ; and the Court has allowed it, if the next of kin, who, in case of the lunatic's death at that time, would be entitled to his personal estate, do not shew any reason against it : and such an order has been binding upon other persons who were not consenting to the order at the time it was made, but happened to be the next of kin at the time of his death (*d*).

Part of Lord Anandale's property consisted of estates in Scotland vested by Parliament in lands there, during his minority (*e*). He became lunatic, after the age of twenty-one years. He was found lunatic in England ; but there was no process of that sort in Scotland, and his steward managed his estate there as before. It was of material importance that all his property should be equally disposed of for his maintenance, and that the savings should be fairly applied ; and therefore, to effect this, it was ordered that it should be vested in the purchase of lands in a particular county in England, pursuant to his ancestor's will. The act only directed it to be laid

(*d*) Ibid. 414.

(*e*) Ambl. 80. 2 Ves. sen. 381. (1749).

out there, during his minority, which had expired.

It was plausible enough, that the same reason arose from his insanity ; but, on a very different consideration : the one might continue his whole life ; the other several years, which the legislature saw would end by computation of time : the interest of the trust estate ought to overbalance, and therefore the Court ordered the trustees to call it in, and the committee to sue in the lunatic's name, and the lunatic to execute a proxy, attested by the committee.

As to the application for money to be raised for his maintenance and personal debts ; between the produce of the two estates, the personal, in Scotland, at his death, being subject to a different rule of distribution from that in England ; the trust money being part of the ancestor's estate, and to be laid out in England, was to be considered in Chancery as an estate in England, and the interest from thence, though arising out of an estate in Scotland, yet, as it was a mere transitory thing arising on changeable securities, which might and ought to be called in, and was directed by the will to go as the profits of the land when purchased ought, was necessarily considered as part of his personal estate in England, to be so applied. Any other personal property

property he had in Scotland was considered as personal property there.

A proportion of maintenance and debts between the two estates, was therefore ordered.

Three thousand two hundred pounds produce of an heritable estate in Scotland, charged with incumbrances, sold under the act abovementioned, was remitted to England. The act did not dictate how it should be applied, leaving that to the Court of Session of Scotland, had they found him lunatic. It was therefore ordered to be considered as part of his real estate in Scotland, subject to all the incumbrances, and to be applied in discharging them.

In Grimstone's case (*f*), (1772), the custody of the estate had been granted to the heir at law, and a receiver had been appointed. Mortgages paid out of the savings were directed to be assigned to attend the inheritance. Upon the lunatic's death, the next of kin petitioned for the personal estate, and to have the mortgages considered as personal.

The Court declared the trustee, to whom the terms had been assigned, to be deemed a trustee for the next of kin, to the extent of the mortgage and interest, and an account to be taken.

Two points arose :

1. Whether the order was right.

(*f*) *Ambl.* 706. cited in 4 *Brown*, 238.

2. If wrong, that the Great Seal had no jurisdiction to vary it.

As to 1. — In the management of a lunatic's estate, the ruling principle is to do what is for the benefit of the lunatic. To lay it down as a rule, that all the savings out of the real estate shall, in all cases, go to the next of kin, is inverting the principle: the Court every day orders the savings to be laid out in repairs, and to discharge incumbrances on the real estate. The case of an infant differs from that of a lunatic, because he can dispose of personal sooner than he can of real estate; and yet, in many cases, the Court will order money of an infant, to be laid out in discharging incumbrances, and even in keeping up houses and gardens (*g*). It is frequent to order repairs out of rents and profits. If the mortgagee should enter, the rents and profits will be applied to the principal as well as to the interest; and therefore why should not the Court order this application?

Lord Macclesfield, in *Dormer's case* (*h*), ordered 200*l. per annum* to be applied to keep down debts: rents and profits are the fruits of the real estate; they differ very much from other personal estate; and it would be too hard upon the heir to improve the rent for the benefit of the personal estate. The case of an infant is different: for an infant has

(*g*) *Amb.* 708.

(*h*) 2 *P. W.* 262.

a personal interest to increase the personal fund, which is sooner subject to his disposition than the real estate ; and yet even in the case of infants the Court will order repairs out of the rents and profits. The first order was established.

2.—As to the jurisdiction, whether the court could vary a former order,

It was said, that acting in matters of lunacy under a special authority, the Chancellor had no power over the estate, except by the bond taken from the committee ; and when the lunatic is dead and the bond given up, the proceedings must be by bill in Chancery.

When a person is found a lunatic, the King alone can grant the custody of him by sign manual ; and therefore to save repeated applications, there is always a sign manual to the Chancellor on coming into office. This warrant is a special authority to make the grant, but extends no farther ; and the grant being made, the Chancellor then acts, not under the warrant, but as keeper of the King's conscience in the exercise of this branch of prerogative. If the warrant was granted to any officer of state, it would not enable that officer to act after the grant made, but merely to direct the grant : all appeals, and every exercise of prerogative, must be to the King in Council. Neither reason nor precedent warrant the position, that the jurisdic-

diction ceases with the death of the lunatic ; as in 3 Atk. 308.—It is a principle not only as to lunatics but infants, that no part of their property during their incapacity can be changed to the prejudice of the successor : it would not only be of prejudice to legal representatives, but in case of a will made before the lunacy, which is not revoked thereby, if the personal estate should, during the lunacy, be diminished, the legatees and even the creditors might suffer. See the preceding case of *Lord Anandale*, also *Degge's* case, 4 Brown 236. n. where the fine and charges of renewal of a freehold church lease for three lives, was paid by the committee, and allowed in his account of the personal estate by order, and the interest in the new lease ordered to be personal estate if he should die in his lunacy.

Where the Court had thought fit to order at the instigation of the next of kin and committee to cut timber, the produce was invested in the funds, and the question was, whether it was real or personal (*i*). The heir at law claimed this produce by the same right as if the timber had been standing ; as in *Grimstone's* case, and *Tullit's* case (*h*) ; and where cut by order of Court, this claim was substantiated by Lord Hardwicke, in *Lord Anandale's*

(*i*) 2 Brown, 510. Bromfield's case.

(*h*) Amb. 370.

case (*l*). In *Bevan's* case, Lord Apsley (1771) ordered the produce to satisfy specialty debts.

Where timber is cut without order, the property never changes; if cut by order, there is no reason for changing it on that account; unless a special order be made on circumstances; and all the cases do not shew what was done with the produce.

For the next of kin it was contended, that where ever it had been done by order, the produce had gone to the personal estate; but admitted that the Court can by decree change the property, where it would be for the benefit of the lunatic (*m*). In the cases of Grimstone, Clarke, and Shelly, the produce of timber went to the next of kin, by order, or in the residue.

In reply—No case decreed that the produce does not continue in the nature of timber. The lands by the statute are to be kept without waste, and in no wise to be aliened: the committee is a mere bailiff, and by 2 Vern. 92. personal laid out in land is to be considered personal, and go to the next of kin, in case of intestacy, and to executors if a will were made during sanity. It is different respecting infants and lunatics; as to infants, the Crown is the general guardian—but with respect to lunatics, it is a special authority: the case of the lunatic is

(*l*) 2 Ves. 381.

(*m*) 2 Atk. 407. 412. Gilb. 10.

therefore stronger than that of an infant, against altering the nature of the estate.

Lord Thurlow—According to the argument, the Court can on no account apply the timber to the personal use of the lunatic, so that it cannot apply it to the payment of debts, or even to preserve him from a jail, and this because the statute has said that their lands shall be kept “without waste or destruction, and shall in no wise be aliened⁽ⁿ⁾.” It is said that a lunatic is reduced to the situation of a tenant for life. I cannot assimilate in my mind, the situation of a lunatic with a mere tenant for life: the statute must be construed to mean that the lands shall be kept without destruction, in the same manner as the owner of them would keep them if he were of sound mind: if this be the true construction of the statute, I cannot distinguish between the case of a lunatic and an infant.

It is extremely clear, that at the death of the lunatic, this money was part of his personal property; it would have been considered as such upon a plea of *plene administravit*—it would have been so for the purpose of paying his debts:—it seems difficult to say how the heir at law can claim it against his personal representative. I doubt whether he can have any equity to recall it out of his hands; he cannot do so on any ground but upon some equity arising

(n) 3 Brown, 514. 1792.

from its having been improperly converted into personalty; and probably if a committee had wantonly and of his own head so converted it, the Court might have thought *that* such a fraudulent management and breach of confidence reposed in him, of the lunatic's property, as to raise an equity for the heir at law. Where a stranger cut timber of a lunatic, the Court thought, as there was no breach of confidence, it was like the case of a windfall, and that no equity arose to the heir at law. I think it impossible to say, that where the Court has, for good and substantial reasons, thought proper to change the nature of the property, I have no conception that in such a case any equity can arise to the heir at law. It is perfectly indifferent which way it falls, and therefore he can have no equity to recall it from the personal representative. The Court have thought proper to change the property, and they have done so, on reasons which exclude all hardships from the case of the heir; at the same time, I think that the Court ought to act with great care, and only in urgent occasions. Left undecided (*o*). The register's note is, That the timber having been cut down by order of Court, and for convenience of the lunatic, it was severed and became personal estate; and dismissed the petition: recommending a bill (*p*).

(*o*) 3 Bro. 515.

(*p*) 2 Dickens, 762.

The question here left undecided was afterwards, in 1793, more fully argued, upon a bill filed after the death of the lunatic, by his heir at law, Sir *Henry Oxenden*, against *Lord Compton*, his personal representative: on which Lord Chancellor Loughborough gave judgment in favour of the next of kin, that the produce of timber, felled on a lunatic's estate by the committee under an order of Court, is personal estate.

The question of changing the property was fully considered in the judgment then given for a new trial (*q*)—there being no equity.—1793.

The committee may exercise the same power in regard to cutting timber for repairs, as any discreet person who was the owner of it might do; and therefore, where money had been laid out from the personal estate in the purchase of timber to repair barns on the real estate, it was ordered to be made good (*r*); for it appeared, that this had been done merely with regard to the committee's own interest in the reversion, while there was on the estate timber proper for the purpose.

If timber be cut on the lunatic's estate, whether by order of Court or by the committee, and afterwards approved by the Court, the rule has been not

(*q*) 4 Bro. 231. 2 Ves. jun. Ludlow. 3 Bro. Ch. Ca. 510.
71. (1792.) Ex parte Bromfield.

(*r*) 2 Atk. 407. Ex parte

to change the property if any surplus remain, but to pay it to the heir at law. The principle of all the cases is, that where the property of the lunatic is concerned, the Court will not permit a wanton change of the circumstances of that property to change the rights of his representatives after his death; but the Court will support the committee in doing it, where it is manifestly for the lunatic's benefit.

The general rule is, that the estate of the lunatic is not to be altered, with this qualification, that, that rule must be properly understood that the real principle in managing a lunatic's estate is to do what is for his benefit; that if in all cases, all the savings of the real should go to the next of kin, it would invert the principle that the Court every day lays down, that those savings should be invested in repairs, and in discharging incumbrances on the real estate:—and if it were necessary to increase his allowance, the Court would cut down timber, not decaying, if it would render his state more comfortable.

The statute *De Prærogativa Regis* directs that the property shall be kept without waste, and the residue beyond maintenance shall be kept for the use of the lunatic, and be delivered to him when of right mind, so that it shall in no wise be aliened, &c.^(s) It is not possible to assimilate the case of a

(s) 17 Ed. II. c. 9, 10.

lunatic, tenant in fee, to that of tenant for life, impeachable for waste; for the latter has no property in the timber at all; and therefore, waste by him has a different construction from that waste mentioned in this statute, which only means without destruction, and does not hinder the committee, under the authority of the King, from making use of those opportunities which the property of the lunatic would enable him, if in possession of his senses, to make use of, to deliver himself personally from any pressing urgency.

It is said in *Grimstone's* case, that the Court has more power over the personal, than the real property of lunatics; and that the authority of the Court does not go to touch any part of the inheritance, or to diminish it, because it is to be kept without waste or alienation. It is clear in estimation of law, that at the death of the lunatic this money is part of his personal property.

Where a committee, or guardian, has abused his trust, with a view of changing the quality of the estate, to serve his own interest, there arises an equity to undo the tortious act; but there is no rule of equity upon a less ground than that. Perhaps the Court, where guardians or committees have, without order, taken upon themselves to change the property, will, particularly where there is a cause in Court, consider it as matter of fraudulent management,

nagement, for that is the ground upon which the Court must proceed. If it be cut down tortiously, it would be like the case of windfalls, and ought not to be restored by equity.

Considering it so, it is impossible where the Court, taking those precautions it always does, and ought to take, not to do it idly or unnecessarily, but for the benefit of the lunatic or infant, thinks proper to cut timber, and convert it, to conceive an equity to change the condition of that when become personal, and to replace it for the heir; for it is truly said, that being done for the benefit of the infant, it becomes indifferent whether it is for the benefit of the heir, or personal representative afterwards; and it cannot be recalled in either case: and as the cases are quoted, particularly that before Lord Bathurst, they have gone upon that idea, that where it is found to contribute to the interest of the party to make the change, that has been thought such a good reason for it, as to exclude all considerations of hardship, or an equity between representatives (*t*). Lord Thurlow.

The same doctrine was recognised in the following year (*u*); and as the reasoning was equally important, I cannot refrain inserting it also at length.

(*t*) 1 Ves. jun. 462.—1792. (*u*) 1793.

There is no equity between real and personal representatives (*x*); each must take what they find at the decease of the person entitled for life, in the condition in which they find it. The heir at law cannot be entitled to the produce of decaying timber, against the personal representative, for in that case he would receive a profit he never would have received, if the estate had continued untouched: besides, that in all probability he is, as possessor of the real, in possession of a benefit, in consequence of cutting the timber, by the improvement made thereby in what was left; for it might be annually deteriorating, and the growing timber lessening in value, so that the estate, but for this, would have been in a much worse condition, and the value of the timber would have been annihilated.

The stat. de prer. regis (*y*) does not commit the care of a lunatic's estate to the Court of Chancery, but to the Crown (*z*); it is not introductive of any new right of the Crown; the better opinion inclines that way, and the words of the statute put it past all doubt; its object was to regulate and define the prerogative, and to restrain the abuse of treating the estates of lunatics as the estates of ideots. The words "waste and destruction" are to be understood in the ordinary, not

(*x*) Oxenden and Compton, (*y*) 17 Ed. II. c. 10.
2 Ves. jun. 71. 4 Brown, 231. (*z*) Amb. 707.

in the technical sense of waste : there are cases in which to cut timber upon the estate of a lunatic would be no waste ; where it makes part of the rental, not merely where it is necessary for his sustenance ; but if it is part of the general rental, there is no doubt that it is the duty of the administrator to continue the usual management of the estate, and that which is suited to its circumstances. Where there are valuable woods of full-grown timber, fit for the navy, part of which the owner had been accustomed to cut, it would be a breach of duty in those who would have the administration of it, in case of lunacy, not to manage it in the same manner in which it had been managed before, and as he would have managed it himself, if capable. Thus the case of lunacy differs from that of a tenant for life, where this could not be done in any ordinary course of disposition.

The course of the statute has been, that the King has committed this care to a certain great officer of the Crown, not of necessity the person who has custody of the Great Seal, though it generally attends him, by warrant under the sign manual, which confers no jurisdiction, but only a power of administration, from whom an appeal lies to the King in council (a).

The general object of attention of the managers,

(a) 3 P. W. 108.

is solely the interest of the lunatic himself ; and with regard to the management of the estate, solely the interest of the owner, without looking to the interests of those who, upon his death, may have eventual rights of succession ; and nothing could be more dangerous or mischievous than for him to consider how it would affect the successors.

There will always be an emulation of each other ; and their speculations, if the administrator was to engage in them, would mislead his attention, and confine his observation as to the interest of the only person he is bound to take care of. The next of kin would contend for a short allowance ; the heir would have no interest to contend for a small allowance out of the rents and profits, but might have an emulation against the next of kin, and therefore when the next of kin would contend for a small allowance, the heir would insist on a large one : Therefore the Court have always shut out of their view all consideration of eventful interests, and considered only the immediate interest of the person under their care ; there would else be a constant running account between the personal and real estate.

There are many cases wherein it is necessary to apply personal to purposes relating to real estate ; as in repairs, &c. If it were necessary for the real to bring an action of trespass, which might run into great expence, if that was not to be paid out of the
personal,

personal, a great injury might be sustained ; and there is no instance of a charge in a receiver's accounts of what has been expended upon one estate, in order to charge it for the other.

If the Chancellor was constantly looking to the right and left, and weighing the probable interests of the representatives, the interest of the lunatic would be committed in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events ; therefore he is to administer the estate *tanquam bonus paterfamilias*, making any advantage fairly to increase and improve it, without engaging in risks and dangerous adventures, for those are not fit enterprises.

But whatever tends towards ordinary improvement, it is strictly the duty of the administrator to do, considering only the immediate interest of the proprietor of the estate ; but care must be taken that nothing extraordinary is to be attempted, or estate to be bought or interests to be disposed of. Any alteration of property is as far as possible to be avoided, consistently with the idea of preserving the interest of the proprietor : payment of debts is so much for his interest, and such pressing cases might be put, that the Chancellor would order the application of personal to any extent, as in *Grimstone's case (b)*.

(b) Amb. 706. ante.

Thus it may be for the advantage of the estate, and of the lunatic, to fell timber; the real estate is not detrimented, but ameliorated; and the fund of the personal is increased by something arising out of the real estate, the fair fruit of the real come to maturity, which if not then gathered would be lost.

It was said upon the reasoning in *Beverley's* case (c), that the power of a committee is like the power of a bailiff: suppose it cannot be raised higher: if a bailiff had cut timber without any authority, which would be very wrong conduct in a bailiff, and before it was converted into money the party die, there could be no doubt it would be personal assets: the heir could have no action against the personal representative: and though the bailiff might be answerable for his misconduct, there is no equity between the representatives upon the subject (d).

But the Court alters the property, if the interest of the lunatic requires it (e). Money may be laid out in improvements, in draining, inclosures, renewals attending landed estates, fines of copyholds, for non-payment of which the estate would be forfeited: mortgage debts of the ancestor, or of the lunatic, are to be discharged without distinction. In all these cases the Court makes an election for the lunatic, as he would have done if in his senses.

(c) 4 Co. 123.

(e) 2 Atk. 412.

(d) 2 Ves. jun. 74, 176, 261, 271.

Thus

Thus the rule is settled, that the benefit of the lunatic only is to be considered, not that of the representatives ; but that what is done with that view must be done with great temper, and not if uncalled for (that must be the qualification) and that neither party can have any foundation of equity to call upon the other to account for what the other has received.

The subject of reference in the case of the Marquis of *Anandale*, (1751) before Lord Hardwicke, was, not whether it would be for the benefit of the lunatic, but of the trust estate, to call in personal property from Scotland (*f*): the interest of the lunatic was then almost a nullity ; because, either way, it paid for his maintenance ; but the interest which moved, was the difficulty it would be attended with to the successor ; and in the result of the case it was clear that Lord Hardwicke's determination took a line, to do that which ought to be done with regard to his situation as a lunatic, without any regard to the contingent interests of those who probably would some time or other be his representatives (*g*).

On the same principle it is determined both at law and in equity, that where there is a confusion of rights, a debtor and creditor in the same person, there is an immediate merger ; but it is true in equity, though there may be that, which, if all

(*f*) 2 Ves. sen. 381.

(*g*) 2 Ves. sen. 77.

was reduced to a legal right, would of necessity operate as a merger, a Court of Equity acting upon the trust, will, on the intent express or implied, preserve them distinct; and that confusion of rights will not take place; as in case of infants entitled to an estate, and to a charge upon it, the rights remain distinct, because more beneficial. But, in cases of lunacy, the representative must take his interest as fortune has directed it, and has no equity to vary it; therefore if a lunatic die entitled to an estate, and also to a charge upon it, it is merged, and the heir takes the estate discharged (*h*): a trust term having been raised to secure the charge, does not alter the matter, for that remains inert, for the trustees have no discretion, unless required to act for the purposes of the trust (*i*).

By marriage settlement a sum was to be raised for younger children, and a further sum for them out of a further estate to be purchased (*h*): the testator died, leaving a son and daughter—the son became lunatic, and the daughter never received either sum, though the estate was purchased; the daughter died unmarried and intestate, leaving the lunatic her brother, and only next of kin: the lunatic died, and his next of kin and heirs were the same persons.

(*h*) Woodf. Ten. Law, 185. (*i*) Ibid. 261. 1793.
Hob. 215. Hut. 16 1 Wils. 130. (*k*) 4 Bro. 397. Ambl. 601.
2 Ves. jun. 261. S. C.

Held—this became a charge upon the lunatic's estate falling in to him as representative of his sister : where there is an union of rights, neither of them can be executed at law, but the Court of Chancery will preserve them distinct, if the intention so to do is either expressed or implied. Between an absolute, mere real and personal representative, no equity can arise (*l*).

The bill filed by the representatives of the lunatic and the sister against the committee was dismissed as to both sums.

So a bill was filed by a son, to set aside a settlement made by his father, a lunatic—the Court refused to let the house be demised, or the furniture to be sold, and the produce brought into Court, as the plaintiff did not consent (*m*). *Colman v. Croker*.

If a legacy be given to put a person into holy orders, and he become lunatic, it may be applied by the committee for his benefit in some other way, as in cases of infants (*n*).

Coal being found upon the estate, which was charged with mortgage debts, the committee was allowed to work the coal (*o*); the next of kin had an interest, the heir at law had no interest—it was deemed like cutting timber.

(*l*) Woodfall's Ten. Law, 185. (*n*) 1 Vern. 255. 5 Ves. 463.

(*m*) 1 Ves. jun. 160.

(*o*) 6 Ves. 128. (1801).

The general rule is, as to application of the property, the Committee will not be allowed for any monies expended, without previous order of Court, in repairs or improvements (*p*); though this rule was once relaxed, in a case which appeared fair and reasonable, and lately (1805) where the next of kin undertook to take a part of it upon themselves (*q*).

The Lord Chancellor cannot upon petition order part of the real estate to be sold for the payment of debts, in order to prevent the creditors filing a bill. *Ex parte Smith* (*r*).

Nor can he make a title by an order to sell leasehold estate for the same purpose; for he cannot make a lease absolute, but only during the lunacy (*s*). Lord Thurlow refused this for fourteen years together: for the tenant may be ejected by the lunatic if he recover: but he can order the application of personal estate to pay debts, as far as it will go, with rents of the leasehold estate. He cannot direct creditors to take the leasehold estate in execution: but if they will, he cannot restrain them. There is no instance of putting the lunatic in a state of absolute want.

The committee may bring an ejectment, but it must be in the lunatic's name (*t*); for the committee

(*p*) 11 Ves. 398.

(*s*) 8 Ves. 80. (1803).

(*q*) 10 Ves. 104. 6 Ib. 799.

(*t*) Hob. 215. Hut. 16.

(*r*) 5 Ves. jun. 556.

2 Wils. 130.

being only as bailiff, he cannot make leases of land, or take up money on mortgage (*u*).

And where in the service of the declaration, the tenant being a lunatic, and living with C. who transacted all his business, and would not admit access to him; upon an affidavit of this fact, and of having delivered it to C. the Court made a rule for the lunatic and C. to shew cause why that should not be good service, and that service of the rule on C. should be good also (*x*).

The committee cannot grant copyhold estates, but he himself may do so by his steward; the reason is, that the committee has no estate in himself (*y*).

(*u*) 1 Vern. 263. Woodfall 466.

(*x*) Sell. Prac. 174. Bar. 190. (*y*) Leon. 47.

CHAP. VIII.

RECOVERY OF THE LUNATIC.

IN case the lunatic recovers his senses, he must petition the Chancellor to supersede the commission (*a*): upon the hearing of which he should attend in person that he may be inspected by the Chancellor: and it is also usual for the physician to attend, or to make an affidavit that he is perfectly recovered.

But where a lunatic moved that he might be examined and make a settlement of his estate, the Court sent him to the Common Pleas to pass a fine, where he would be examined and the issue might be tried (*b*).

A lunatic is never to be looked upon as irrecoverable; his comfort is to be regarded, and not that of any representatives; and upon this principle hang all the determinations of the Courts, respecting the person and estate of the lunatic (*c*). It affords the most satisfactory reflection, while the mind is sane, to know that if it should ever be visited by this worst of all afflictions, not only the power and au-

(*a*) 1 Fon. Eq. 65.

(*c*) 2 P. W. 265. 3 P. W. 104.

(*b*) 1 Vern. 155.

thority of the Crown itself, but the grave wisdom of the courts of judicature, are immediately open for the protection of his person and property, upon principles of the greatest humanity and caution, to watch over the periods of imbecility, to provide for their necessities, and to render an account when the affliction shall be removed, with as scrupulous an exactness as the most anxious friend could be expected to do, and with as strong a sense of this obligatory duty as the most correct trustee.

A party born deaf and dumb, attaining twenty-one years of age, having given sensible answers in writing to written interrogatories, Lord Hardwicke directed the possession of the real estate and assignment of the personal to the party (*d*). 1754.

(*d*) 1 Dickens, 268.

CHAP. IX.

DEATH OF THE LUNATIC.

IF an idiot or lunatic die before office found, the power ceases, and no inquisition can be taken; for the commissioners are to judge and report the lunacy upon inspection, and the King can take no interest after his death, for his property vests in others (*a*).

But if an idiot die after office found, which vests the King, he seizes the lands, because he must render them to the heirs (*b*).

If a lunatic die, the order of reference to the Master does not abate (*c*); and any party may prosecute it and take out his report; and the Chancellor may make an order thereon (*d*).

If the proceedings under the commission were to abate by death, infinite would be the inconvenience; besides injury to the survivors: the whole must be concluded, and the Court will shew the most careful attention that every part of this important trust, executed under its direction, shall have been conducted with fidelity, as well to the parties entitled

(*a*) 4 Co. 428.

(*c*) 3 Bro. 238.

(*b*) Stam. Pr. Reg. c. 9. f. 24.

(*d*) Ambl. 706.

to the reversion, as to the unhappy object of its care during his life-time.

Upon his decease the heirs at law and next of kin must file their bill to have the property transferred, the report in the matter of lunacy not being of sufficient authority whereon to ground a decree (*e*); for the Lord Chancellor acts as a commissioner under a signet, to take care of lunatics, and it is not of necessity that the Great Seal has that appointment; it was once granted to a Lord High Treasurer—it could not consequently be considered as a *res judicata*. Upon the hearing of this bill, the Master will be decreed to enquire who are the next of kin and heirs at law, to advertise in the Gazette, and other papers, for them to come in and prove their affinity in time, and to make his report. (1779).

(*e*) 2 Dickens, 553.

CHAP. X.

COSTS.

NO costs are allowed to relations of a lunatic for their attendance before the Master, to check the accounts; although notice is always given to them for that purpose (*a*).

Solicitors employed in commissions of lunacy have a lien for their costs out of the fund of the lunatic's estate (*b*); without being obliged to come under a commission of bankrupt against the heir who took out the commission of lunacy. Committees have a lien, and the Courts have extended this lien, by ordering the Solicitor to stand in the place of the Committee (*c*).

Costs were given against a grantee of a deed, fraudulently obtained of a weak man, not lunatic, and against the Solicitor, who prepared it (*d*).

Courts of Equity have always exercised a discretion in giving costs—not upon any authority founded on arguments drawn from cases at common law, and the old acts St. Marlb. 52 Hen. III.

(*a*) 2 Ves. 25. Pr. Reg. 152.

(*c*) Amb. 103, 1750.

(*b*) 2 Ves. sen. 407.

(*d*) 3 Atk. 327.

&c. but from conscience and *arbitrio boni viri* as to the statute on one side or other, on account of vexation, &c. (*e*)

Where the persons having the custody of the lunatic do not produce him upon an order obtained, the Court will decree costs against them (*f*).

It may not be unseasonable to suggest a proper vigilance against the prevailing practice of allowing very high costs in these cases; as soon as fair compensation is made for needful disbursements and skilful attention, every care should be taken to avoid the increased aggravation to a family, already distressed by such a visitation as lunacy, of diminishing their resources of comfort. In the Appendix the reader will find a bill of costs of the whole proceedings.

Costs were given against a stranger for an hasty traverse of an inquisition (*g*).

(*e*) 3 Atk. 552.

(*g*) 6 Ves. 580.

(*f*) 2 Ves. 405.

CHAP. XI.

DISABILITIES INCURRED.

THERE is a general disability to perform legal acts incidental to the unhappy situation of an idiot or lunatic ; their incapacity is obvious ; but it is necessary the effects of it in many cases should be considered as they have occurred in the administration of justice.

I have endeavoured to compress them under the following heads:

1. Attornment.
2. Presentation.
3. Marriage.
4. Copyholds.
5. Testimony.
6. Actions and Suits.
7. Wills.
8. Trusteeships.
9. Contracts by Deeds, &c. *per pais*.
10. Fines and Recoveries.

SECT. I. *Attornment.*

A man deaf and dumb, and yet having understanding, may attorn by signs (*a*) ; but one that is *non compos* cannot attorn, for he has no understanding, and cannot agree to the grant (*b*).

(*a*) 26 Ed. III. c. 63.

(*b*) 18 Ed. III. c. 53. Co. Lit 315. a. 6 Co. 59.

Re-entry may nevertheless subject one to distress and action of waste, who of himself could not attorn; for if a man, *non compos*, be lessee for years rendering rent, and the lessor eject him, and make a feoffment, and afterwards the lessee re-enter, his liability must attach, although he was incapable of an attornment, for the re-entry revests all interests and estates (c).

SECT. II. *Presentation.*

A lunatic cannot present to a church, nor his committee (d): for where a lunatic is seized of an advowson, the Lord Chancellor, by virtue of the general authority delegated to him, presents to the preferment, whatever be its value; generally, however, giving it to one of the family:—this right, says Mr. Woodeson, was asserted by Lord Talbot, whose example was followed by his immediate and other successors (e).

As to a clergyman himself becoming lunatic see *ante*, pa. 25.

SECT. III. *Marriage.*

One of the incapacities established by the English law is want of reason, without a competent share

(c) 6 Co. 69.

(d) 1 Wood. Lect. 409.

(e) 3 Cruise Dig. 31.

of which, as no other, so neither can the matrimonial contract be valid (*f*).

It was formerly adjudged that the issue of an idiot was legitimate, and consequently that his marriage was legitimate; a strange determination, since consent is absolutely requisite to matrimony, and neither idiots or lunatics are capable of consenting to any thing: and therefore, the civil law judged most sensibly when it made such deprivations of reason, a previous impediment, though not a cause of divorce, if they happened after marriage; and modern resolutions have adhered to the reason of the civil law, by determining, as in *Morison's* case, before delegates, that the marriage of a lunatic, not being in a lucid interval, was absolutely void (*g*).

Formerly when such a marriage was maintained, if the lunatic died, his wife was entitled to dower; for his situation worked no forfeiture, and the King had only the custody of the inheritance in case of ideocy, and a power of providing for him and his family in case of lunacy (*h*); but, in both cases, the fee and inheritance being in the lunatic, his wife became dowable. But such a claim is now set at rest (*i*).

Persons accessory to the contriving the marriage of an idiot or lunatic, who is possessed of property

(*f*) 1 Bl. Com. 438. 1 Rol. Abr. 357. (*h*) Co. Lit. 31. a.

(*i*) Roper's Baron and Feme,

(*g*) Ff. 23. tit. 1. l. 8. T. 2. l. 16. 102.

which

which can alone be presumed to be the inducement to such an union, are acting in contempt, and are liable to an information at the suit of the Crown as the general guardian, and those who are assisting are also liable to be committed to prison, or to give good security, to appear and give evidence of the transaction, *Smart v. Taylor*. 9 Mod. 98. But such a marriage is not a supersedeas to the commission (*h*).

It is not barely the having some part in the transaction relative to such a marriage that constitutes a contempt, but it is the being in some manner parties to the contrivance, to shew that they are in some degree criminal (*l*).

Upon a marriage with a feme lunatic, the Court of Chancery ordered all deeds and securities relating to her fortune, and all her jewels, to be lodged with one of the masters, in order to secure some provision for her if she should survive the husband, and for children if they should have any, and committed him to the Fleet prison for the contempt (*m*).

But if the marriage is afterwards held good in the Spiritual Court, as it may be by being consummated in a lucid interval; and, if upon inspection it appears that she is restored to her understanding, the hus-

(*k*) Cha. Prec. 203. 15 Viner, 15 Viner, 138-9.

138-9. Abr. Eq. 278.

(*m*) 1 Geo. I, Cha. Prec. 412.

(*l*) Barnard. 407. (1741).

band shall be discharged, and the commission be vacated (*n*).

It seems to have been a doctrine of the old law, that if the wife be an idiot, the husband would not be entitled to curtesy: so that if lands descended to a feme covert idiot, who had issue, and the husband have entered before office found(*o*), the King, by prerogative, and not the husband, by curtesy, would have been entitled: but it is agreed at present, upon principles of sound sense and reason, that an idiot cannot marry(*p*), she being incapable of consent to any contract; as the act after-mentioned invalidates the marriage, it of course determines any husband's claim. But this cannot apply to any curtesy in lands of a wife becoming insane after marriage.

But as it might be difficult to prove the exact state of the parties' mind at the actual celebration of the nuptials; and, considering that such persons are liable to be surprised into unsuitable marriages, which may be of pernicious consequences, and a great misfortune to their families, the legislature interfered in 1742(*q*), and enacted that if any person shall be found lunatic by any inquisition by com-

(*n*) Eq. Ca. Abr. 278. 263. 2 Bl. Com. 127.

Gilb Eq. 89. Pr. (h. 212.

(*p*) Roper, 59.

(*o*) Co. Lit. 306. Plowd.

(*q*) 15 G. II. c. 30.

mission, under the Great Seal, or person under a phrensy, whose person and estate, by virtue of any statute, shall be committed to the care and custody of particular trustees, shall marry before he or she shall be declared of sane mind by the Great Seal, or the major part of such trustees, every such marriage shall be null and void (*r*).

Notwithstanding this statute, it is held in the Ecclesiastical Court that dumb persons may contract matrimony by signs; and their marriage is lawful and available to all intents (*s*).

Now, to be within the prohibition of the statute, they must have been declared lunatic by commission (*t*): and whatever may have been the opinions or adjudications of former times, it needs no trouble of demonstration to shew that persons born deaf and dumb are necessarily ideots, or come within the least shade of lunacy. It may be that these disabilities are also added to the other privations; but they are rare cases. The skilful exertions of Mr. Braidwood, and of the conductors of the schools for the deaf and dumb, have proved that the human mind, although deprived of its two essential organs of knowledge, elicits as much intelligence as in other

(*r*) Until this act, persons Ves. 607.
 contracting matrimony during (s) Swin. Mat. Con. s. 15.
 a lucid interval, were bound, (t) 2 Burn. Eccl. 395.
 and the marriage was valid. 9

cases, when the web which envelopes is removed with a delicate hand.

If a marriage, under the disability of insanity or ideocy, be of no force, it follows that the issue will not be legitimate.

But it has been held in the Ecclesiastical Court, that though it hinders the contract of matrimony, it does not avoid that marriage which is already contracted ; that is, previous to the lunacy (*u*).

SECTION IV. *Copyholds.*

A lunatic cannot become a copyholder (*x*), because he cannot render any services, nor depute any other person ; and this incapacity saves him from forfeiture ; for having no will, no act can operate to that effect (*y*).

SECTION V. *Testimony.*

To determine exactly the credibility of a witness, and the force of evidence, is an important point in every good legislation. Every man of common sense, that is, every one whose ideas have some

(*u*) Just. Jur. Can. l. 2. tit. 12. Arn. Corvinus Jus. Can. l. 2. tit. 13. de Naptiis. (*x*) 1 Cruise Dig. 317.
 (*y*) Co. Cop. 59.

connexion with each other, and whose sensations are conformable to those of other men, may be a witness; there are no spontaneous or superfluous sentiments in the heart of man; they are all the result of impressions on the senses. Where those impressions are so violent as to disturb the common organization of the sensorium, and thus disconnect the usual arrangement of thought and memory, and conception, they must necessarily disqualify the testimony of any witness (z).

Therefore it is that all persons who are examined as witnesses, must be fully possessed of their understanding (a); that is, such an understanding as enables them to retain in memory the events of which they have been witnesses. Hence it is generally laid down, that persons of non-sane memory or wanting understanding, while under the influence of their malady, cannot be admitted as witnesses between other parties; for they do not possess the requisite share of understanding (b).

As to the commission itself, if a witness be produced who is not of competent understanding the adverse party may except against him, and the commissioners ought not to examine him. But if the prosecutors of the commission persist in his ex-

(z) Beccaria, c. 13.

(b) Co. Lit. 6 b. Pul. N. P. 293.

(a) Peake Evid. 81.

amination, the other commissioners must certify the matter to the Court, and make affidavit of the irregularity (c).

A commissioner may be a witness, but he must be examined before he qualifies himself (d).

And a person deaf and dumb, if of sense to have intelligence conveyed to him, may be a witness, and give his evidence by signs, through the medium of an interpreter (e).

The next of kin of a lunatic, having no interest in the property; even where the lunatic is intestate, and in the most hopeless state, a moral and physical impossibility, though the law would not so regard it, that he should never recover, even if he was in *articulo mortis*, and the bill was filed that instant, to perpetuate his testimony, the plaintiff could not qualify himself as having any interest in the subject of the suit. *Lord Dursley v. Fitzhardinge* (1801) (f).

SECTION VI. *Actions and Suits.*

There was a time when ideots, madmen, and such as were deaf and dumb naturally, were disabled to

(c) Wyatt Pr. Reg. 419.

Peake 83.

(d) Ibid. 422. 1 Vern. 369.

(f) 6 Ves. 260.

(e) Leach's Crown Ca. 455.

sue, because they wanted reason and understanding; but ^{ld} at this day they all may sue (g). The suit must be in their own name, but it shall be followed by others: they cannot sue or appear by guardian, *prochein ami*, or attorney, but always in person (h).

The statute of Westminster 2. c. 15. does not extend to ideots.

Indeed if he be a minor he must sue by guardian: and if adult, an attorney has been allowed (i).

The lunatic ought generally to be party to a suit (k); but this was overruled in a bill filed for relief against a debt assigned by the lunatic without consideration; for this would have been to stultify himself. He may be party to a suit to enforce an agreement, entered into before the lunacy, for there the above objection does not arise (l): it is as needful to make the lunatic a party as an infant, where the suit is for his own benefit: but in case of an ideot, it is otherwise, for the former may recover, and is then entitled to have his estate at his own disposal.

(g) Bract. l. 5. 420. Brit. 39. Fl. 6. 17.

(h) 33 H. VI. 18. F. N. B. 27. G. Co. Lit. 135. b. 2 Inst. 390.

(i) 4 Co. 124 b. Palm. 520. 2 Saund. 235.

(k) 1 Ch. Ca. 113.

(l) Ibid. 153.

The distinction is, that where he may be led to stultify himself, there he is not to be a party: in other cases he may be a party.

If a person who is in the condition of a lunatic or idiot (*n*), though not found so by inquisition, is made a defendant, the Court of Chancery, upon proper information of his incapacity, will direct a guardian to be appointed: and if a lunatic be sued, a committee must be assigned to defend the suit (*o*).

Informations are sometimes exhibited by the Attorney General, on behalf of idiots and lunatics, construing them as under the peculiar protection of the Crown; not only to secure their property, but also against their committees for an account (*p*).

Lunatics generally sue and answer by their committees (*q*).

If he be not named a party in the bill or information, it is commonly good cause for demurrer.

Bills for these purposes were frequently brought by the Attorney General in the nature of an information (*r*): and it was formerly held that the lu-

(*n*) Mitf. Eq. pl. 95. 3 P. 542. 2 Dickens, 748.

W. 111.

(*q*) 1 Dickens, 233. 1 Ch.

(*o*) Vern. 106,

Ca. 153.

(*p*) 1 Ch. Ca. 112, 153.

(*r*) Finch, 135.

4 Bro. 559. 3 Gw. B. Abr.

natic should not be a party under the old principle of not stultifying himself (*s*): but it has since been held, that he must be a party by his committee to a bill, and not an information, because he may recover, which differs from the case of an idiot (*t*). These bills are now established in equity, where it is held that this maxim of law is to be understood of acts done by the lunatic in prejudice of others, that he should not be admitted to excuse himself on pretence of lunacy; but not as to acts done by him in prejudice of himself, for this can have no foundation in reason and natural justice (*u*).

If a lunatic and his committee be defendants, and the latter refuse to put in an answer for him, the plaintiff must proceed against the lunatic, and apply to the Great Seal to appoint a new committee. 2 Dickens, 490, (1772.)

And though weakness or other imbecility, and drunkenness, may not be sufficient to support a commission of lunacy, yet the Courts of Law and Equity will relieve against acts fraudulently procured in such situations, the cases of which are very numerous: for if a man is deprived of the use of his reason, his act can by no means be a serious and

(*s*) Pr. Reg. 232. 1 Eq. Ca. Abr. 279. (t) 1 Dickens, 378.

(*u*) 1 Fon. Eq. 60.

deliberate

deliberate consent, and without this no contract can be binding by the law of nature (*x*).

A dumb man has been ordered to answer a bill, and also interrogatories (*y*); but one dumb and senseless, so that he cannot instruct his counsel to draw his answer, shall not be put to answer (*z*); but where a man was deprived of memory by age, and almost *non compos mentis* (*a*), he was ordered to answer by guardian, the demand in question being of small amount, otherwise the appointment of a committee would have been the most regular practice.

The custody of the land of a copyholder who was a lunatic, was committed by the lord to J. S. and a trespass was done upon the land; and the Court ruled that the action should be in the lunatic's name, for there was no interest gained by this commitment, the committee being only as a bailiff, having no interest but for the profit and benefit of the lunatic, and as his servant; and it is contrary to the nature of his authority to have an action in his own name; for the interest, and the estate, and all the power of suits is remaining in the lunatic: and it was ruled that a lunatic shall have a *quare*

(*x*) 1 Fon. Eq. 65.

(*y*) H. Ch. 124.

(*z*) Toth. 140. Carey Rep.

132. Wyat Pr. Reg. 292.

(*a*) Ibid. 3 P. W. 111.

impedit in his own name. *Cocks v. Dawson* (b). The same rule applies as to ejectments, for he cannot grant leases (c).

At common law idiots, who, for want of legal discretion, are incapable of appointing an attorney, must appear in person: but where an idiot appeared by her friend, she assigned for error, that being idiot, she had previously appeared and defended the action by attorney (d).

The Courts of Common Law will not discharge a defendant out of custody on filing common bail on affidavits that he had become insane since the arrest; nor if insane at the time of the arrest: nor will they discharge the bail put in above, if he become insane, and a commission of lunacy be found since the commencement of the action (e).

It is a good defence to an action on a deed that defendant was a lunatic at the time (f). This seems to militate against the rule in *Beverley's* case, that a man shall not be allowed to stultify himself; but, on the subsequent authority of *Smith*

(b) 1 Sid. 125. Hob. 215. Hut. 16. Poph. 141. (e) 2 T. Rep. 390 (1788.) 4 T. Rep. 121 (1790.) Tr. 13 G.

(c) 2 Wils. 130. Woodf. 348. III 6 T. Rep. 133. 1 Tidd 184.

(d) Co. Lit. 135. b. 2 Inst. 390. F. N. B. 27. 2 Saund. 335. (f) Bill. N. P. 172. Stra. 1104. 4 Co. 123. 1 Tidd 595.

v. *Carr* (1728), when Chief Baron *Pengelly* admitted it; and on considering *Thompson v. Leach* (g), the Court suffered it to be given in evidence, upon which the plaintiff was nonsuited. But it has since been held (9 Wil. III.) that such bonds are void, because the law has not appointed any act to be done to avoid them, and the only reason why the party cannot plead *non est factum* is, because the cause of nullity is extrinsic, and does not appear on the face of the deed (h).

The old rule that a man shall not be able to stultify himself by pleading insanity to any act, has been since much controverted, and from its great inconveniences much restrained: and such a plea was advised in *Smith v. Carr*, and *Thompson v. Leach* (i).

These were cases at common law; although the principle on which Courts of Equity in general relieve, appear to entitle the lunatic to relief, there are no cases in which the plea of *non compos* by himself, before inquisition, has been allowed; on the contrary, in *Bonner v. Thwaites*, it is said that the Chancery will not retain a bill to examine the point of law (h).

A new trial was granted by the Court of Chan-

(g) 1 Vern. 198.

(k) Tothill 130. 1 Fon. Eq.

(h) Salk. 675.

48.

(i) Str. 1104. 2 Ventr. 198.

cery, where that Court had directed an issue, and that the jury should indorse the *postea* at what time the lunatic became so: and they found that the person was not insane at all (*l*). Although the chief evidence was of lucid intervals, and all agreed that she was habitually insane: and on the second trial a verdict was found accordingly.

In a suit in the Ecclesiastical Court, by the administrator for a legacy, if the defendant plead a release from the deceased legatee, and the administrator would avoid it by an allegation of lunacy or ideocy; that fact must be tried there, and no prohibition will lie, because that Court has a jurisdiction of the original matter: according to the rule *non est consonum rationi, quod cognitio accessorii in curia Christianitatis impediatur, abi cognitio causæ principalis ad forum Ecclesiasticum noscitur pertinere* (*m*).

In addition to the general jurisdiction of the Court of Exchequer in matters of equity, a special jurisdiction is conferred upon it by several statutes, such as, *inter alia*, the 29th Geo. II. c. 31. enabling lunatics and others to surrender leases, in order to renew the same (*n*).

The committee applies by petition or motion in a

(*l*) 3 Bro. 453.

12 Co. 65. Buls. 211.

(*m*) Reg. Orig. 58. 2 Inst.

(*n*) 1 Fowler, 3.

493. Cro. Ja. 269, 348.

summary way ; and upon hearing all parties, an order is made for his surrender, without levying any fine, and to accept for the lunatic a new lease, similar to the former, as the Court shall direct.

The fine advanced by the committee for the new lease, and all incidental charges, are to be paid out of the estate, and are deemed a charge upon the leasehold estate, together with interest, as the Court shall direct.

The renewed leases are liable to all the same uses and trusts, to which the former leases were invested.

Ideots and lunatics are incapable by themselves of instituting suits in the Exchequer (*o*).

But they appear in their proper names, and put in their answers, and defend by their committees (*p*), who are appointed guardians for that purpose as a matter of course ; and if it happens that an ideot or lunatic has no committee, or the committee has an interest opposite to that of the person whose property is entrusted to his care, an order may be obtained for appointing another person as guardian, for the purpose of defending the suit. So if a person in the condition of an ideot or lunatic, though not found such by inquisition,

(*o*) 1 Fowler 18.

(*p*) *Ibid.* 211, 332, 410.

is made a defendant, the Court, upon proper information of his incapacity, will direct a guardian to be appointed (*q*).

If a bill is brought against a lunatic, stating him to be such, it is a motion of course to apply for a commission to assign him a guardian, and to take his answer by such guardian; but if the bill does not state the defendant to be a lunatic, in that case an affidavit, or other evidence will be required, to shew the defendant's lunacy, before he can be permitted to answer by guardian (*r*).

The like practice applies with respect to ideots, and to those persons who by age or infirmity are reduced to a second infancy (*s*).

His answer may be referred for scandal: but it being upon the oath of a guardian, he, and not the lunatic, is liable to pay the costs, or rather the counsel, who signed such an answer (*t*).

By the statute of limitations, 21 Jac. I. c. 16. persons becoming *non compos* are entitled to bring their actions within as many years after their recovery as others are limited to after the cause of action accrues (*u*).

(*q*) Mitf. on Plead. 94.

(*t*) Ibid. 465.

(*r*) 1 Fow. 478.

(*u*) 1 Tidd 16.

(*s*) Ibid.

SECT. VII. *Wills.*

The law which substitutes a testator in its place, which invests him with the power and character of a real legislature, which grants him the right to change, to discompose, to abrogate, the natural and favourable order of legitimate successions, requires at the same time from him both a capacity proportionate to the importance of his ministry, and a plenitude, and if we may so express ourselves, of a superabundance of will; and therefore it renders him capable of all kinds of contracts, previously to impressing him with capacity necessary for making a testament (*x*).

Hence it is that incapacity is of more importance in deciding upon the validity of a testament, than merely in determining upon the force and nature of a contract (*y*).

Ideots not having understanding are deemed incapable of making any will; this doctrine is to be understood of a mad or lunatic person, during the time of his infancy of mind (*z*); but such an one as hath lucid intervals, clear or calm intermissions, may, during the time of such quietness and free-

(*x*) Evans' Pothier 2. 587. (*z*) 3 Mod. 43. Swin. 8.

(*y*) Ibid. 589.

dom of mind, make his testament, and it will be valid (*a*).

The will of an idiot, though it were wise, sensible and reasonable, is nevertheless void ; as it seems impossible that it should be so, there is good ground for suspicion that it were not his,

But such an one as is of a mean understanding only, and of the middle sort between a wise man and a fool, unless he be so foolish, simple, and sottish, as to be made easily to believe things impossible, are not prohibited from making a will (*b*).

An old man who is become childish, or so forgetful as not to remember his own name, cannot make a will ; so also a drunkard, who, by excessive intoxication, is deprived of the use of reason and understanding, during that time, may not make a will (*c*) : for the qualification of a valid will is a sound and perfect memory ; such a reasonable memory and understanding as shall enable him to dispose of his estate with reason (*d*) : but if his understanding be only obscured, his memory troubled, and not clean spent, he is not incapacitated (*e*).

One deaf and dumb by nature, has been deemed

(*a*) 34 H. VIII. c. 5. Br.
Cust. 50. Swin. 37. et seq.
Co. Lit. 89. Law of Test.
39. 4 Burn Eccl.

(*b*) Swin. 80.
(*c*) 2 Co. 6. 23.
(*d*) Swin. 53.
(*e*) Ibid. 83.

incapable of making any will ; but the observation suggested under the subject of marriage, relative to this disability (*f*), which is now better understood not to be an affection of mind, may, it is presumed, be sufficient to correct this doctrine ; and it has been established, that one who is so by accident, may, by writing or signs, make a will ; a person that is so by nature, may make signs also, if ideocy or lunacy be not added to his infirmity.

To make a valid will, it is not sufficient that the testator have memory to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason : which the law calls sound and perfect memory (*g*).

And by the civil law these persons are disabled from making wills, because the integrity and perfectness of mind, and not health of body, are requisite qualifications : and these they are admitted to have during lucid intervals (*h*).

The disqualification of ideocy and lunacy to make any devise, is a common law disability ; and what shall be said to be a sane and perfect memory

(*f*) Ante.

4 Burn Eccl. 44. 1 Powell on

(*g*) 6 Co. 23. Moore 760. Devises, 146.

Dyer 72. Peake 375. 1 Cha. (*h*) Swin. 76.

Rep. 18. Law of Test. 89.

at the time of the devise, is a question to be determined at common law (*i*).—It is founded on the actual incapacity of the party to do any act relating to the disposition of his property: it is therefore necessary that every one must be of good and sane memory at the time of disposing of his property (*h*).

One principal evil meant to be remedied by the framers of the clause in the stat. of frauds, 29 Car. II. c. 3. s. 5. relative to the *attestation* of wills, was the secret and private manner in which wills were executed previous thereto, and the frauds consequential thereupon; with a view to check which, the clause introduced a third ceremony to be observed in the making of wills; namely, that the signing of the instrument should be “attested,” &c.

In the application of this word “attested” to the act of executing the will, the legislature has been considered, in the construction of it, as having called the attention of the person attesting to *three* several objects; one of which applies to the testator himself, the other two to the instrument. First, that which relates to the testator, is with regard to his sanity; an attention to which in the witnesses, is a necessary inference, as well from the nature of the transaction, as from the objects of the statute.

(*i*) 6 Co. 23. b.

(*h*) Cro. Jac. 497. Dyer 148. b.

The name of the instrument necessarily imports, that there must be a capacity of disposing in the devisor at the time of executing thereof; and that is so essential to its validity, that a formal declaration of his sound and disposing mind is become the introductory clause in such instruments. In the construction of this statute, therefore, it has been held that the legislature, when it required the witnesses to attest the signing, must, by implication, have required them to attest the capacity of signing; for it was not merely the abstract act or form of signing that the legislature required as *one* necessary solemnity to the constitution of a devise, for an idiot or lunatic might put his name to an instrument, and yet be perfectly ignorant of its contents; but the legislature, in the word "*signing*," comprehended another idea, namely, signing an instrument intending it to be a will, consequently the mental power or capacity of willing was necessary, as well as the corporal power of putting the mark or name, to constitute a signing.

The business then, of the persons required by the statute to be present at executing a will, is not barely to attest the corporal act of signing, but to *try, judge, and determine*, whether the testator is *compos* to sign (*l*). In equity, therefore, the sanity of the devisor

(*l*) *Harris v. Ingledew*, 3 Will. 93. *Cannd. Arg.* 23.

must be proved, which is *one* reason why a will can never be proved as an exhibit, *vivâ voce* in Chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that Court, never to establish a will unless all the witnesses attesting are examined; because the heir has a right to a proof of sanity from every one of *them*, whom the statute has placed about his ancestor.

In conformity with this doctrine, it was said by Lord *Hardwicke*, in the case of *Wallis* and *Hodgeson*, that it had been determined over and over, that the *devisee* must shew the devisor to have been of sound and disposing mind when a will was to be established as to real estate; proving that it was well executed, according to the statute of frauds and perjuries, was not sufficient (*m*).

But Lord *Hardwicke* added, in the last case, that if they could have produced evidence on the part of the plaintiff, of any act having been done under the will relating to the real estate, he would have dispensed with the rule, being a mere matter of formality. *Sed quære.*

And a will was set aside after forty years possession under it, upon account of the *insanity* of the devisor, although in prejudice of a purchaser (*n*).

(*m*) *Wallis v. Hodgeson*, on Bill of Exceptions, 1 Atk. 56. (*n*) *Squire v. Pershall*, 8 Vin. Abr. 169. Pl. 13. Powell on Devises, 68-71.

The *onus probandi* of a testator's lunacy lies on the heir who would invalidate the will (*o*); and it is sufficient for the party who pleads the insanity of the testator's mind, to prove that he was in that situation at any time previous to the making his will; although he do not prove this condition at the very time of making it. The reason, says Swinburn, is, that it being proved that he was once mad, the law presumes him to continue so, unless the contrary be proved; as it presumes every one to be honest, until the contrary be proved; and being proved, then he which is evil to be evil still: so every man is presumed to have the use of his reason, until the contrary be proved, which being proved, then he is presumed to continue still void of it, unless he were so, for a short time, and in some peculiar actions, and not continually for a long space, as for a month or more; or unless he fell into some phrenzy, upon some incidental cause, which is afterwards removed; or unless it be a long time since he was assailed with the malady; for in these cases he is not presumed to continue in his former furor or phrenzy (*p*).

Yet it is a hard and difficult point to prove a man not to have the use of understanding or reason (*q*); and therefore it is not sufficient for a witness to de-

(*o*) 6 Cruise Dig. 15.

(*q*) Ibid. 77.

(*p*) Swin. 78.

pose that the testator was mad, or beside his wits unless a sufficient reason can be given to prove this deposition: as that he saw him do such acts, or heard him speak such words, as a person having reason would not have done or spoken.

The sane memory for making a will is not at all times, when the party can speak yea or no, and hath life in him, nor when he can answer to any thing with sense: but he ought to have judgment to discern, or be of perfect memory, otherwise the will is void (*r*).

Wills manifestly improper, are not on that account merely to be set aside, as of insanity (*s*). The giving more to a younger than to an elder son, or any inaccuracy in devising a remainder over, if both sons should die *with* issue, instead of *without* issue, were not evidence on which to say that the testator was *non compos*. *Burr v. Davall*.

The superior courts deny prohibition to the Ecclesiastical court against granting probate of a will, upon a suggestion of *non compos mentis* of the testator (*t*); for without probate the executor cannot sue for debts, which might thereby be lost, and the will remain unperformed; and the statute of Henry VIII. never intended to lessen the jurisdiction of the Ecclesiastical Court.

(*r*) Swin. 77.

(*s*) 8 Mod. 59.

(*t*) Salk. 552.

A bill will not lie to perpetuate the testimony of subscribing witnesses to the will of a person since become a lunatic, and yet living (*u*): although it could be no prejudice to the testator, nor would it prevent the will from being revoked, if he should recover; but it was no will until death, and this would be to perfect what was no effectual act; had it been maintained, he need not be a party, for nothing was prayed against him.

In the case of Mr. *Greenwood*, who had conceived that his brother intended to have poisoned him; this was the leading source of his infirmity. He afterwards pursued his profession; but this idea was uppermost in his mind; and under that impression he made his will, excluding him from the reversion of his fortune.

Lord Kenyon, upon proof of insanity, declared the will invalid, abstracted from the justice of the disherison.

An executor, who takes not any beneficial interest, is a competent witness to prove the sanity of the testator (*x*).

Persons of these disabilities seldom make wills from the suggestion of their own minds; they are generally imposed upon by those amongst whom they have the misfortune to be placed; and there-

(*u*) 1 Vern. 105.

(*x*) Woodf. 493.

fore the conduct of those around them, as well as the imbecility of their own minds, is generally the subject of inquiry in courts of justice. But the cases which require the greatest attention, which frequently baffle the understanding of the most acute, and for the proof or decision of which, no certain rules can be laid down, are those of wills made by persons, who, though in sound health and full vigour of body, have the misfortune to labour under that mental derangement, which prevents them from forming just and accurate notions concerning the conduct of human affairs. Unlike the idiot, who seems deprived of all reasoning faculties, the madman appears to reason, and unless when the predominant idea, which always possesses these unhappy persons, intervenes, he frequently appears to reason right; in so much, that many instances must have occurred to the experience of all who have been in the habit of attending courts of justice, where persons who have been proved to demonstration, to be utterly deprived of reason, have passed to common and casual observers as people of extraordinary talents and abilities. The reasoning of Lord Thurlow in the case of *Atty v. Parnther*, is very applicable here. See pa. 151 et seq.

Many questions have been raised upon the execution of a will during a lucid interval (*y*); and

(*y*) 9 Ves. 610. Swin. pt. 2. s. 3. Orphan's Legacy, pt. 1. c. 8.
that

that being proved, the will has been held valid and effectual, to all intents and purposes, for the conveyance of real and personal estate, as if the testator had never been deranged.

If the exact date does not appear, so as to fix it during a lucid interval, yet, unless it express an apparent mixture of wisdom and folly, it ought to be accepted for a lawful testament (z).

All proceedings, founded upon a will, which is afterwards disproved for ideocy or lunacy, necessarily fall ; and in actions for account, *audita querela* lay for the defendant in such cases (a).

When a will is carried to the Ecclesiastical Court to be proved by the executor, and any disability attaches to the testator at the time he signed it, tending to impeach its validity, the practice is, for a proctor to enter a caveat, which prevents the probate passing in the common form : he is then required by the executor to shew what interest he has in the estate ; on his shewing this interest, and declaring that he opposes the will, the executor propounds the same, signifying that it will be proved by attesting witnesses, and files an allegation of the *factum* of the will and of the testator's competence at the time of its execution ; he then exa-

(z) Vasq. de Success. l. 1. s. 9. Swin. 38. (a) Dyer 203.

mines his witnesses, which the opposing party may cross examine; and assigns the cause for sentence, which passes, unless the opposing party files his allegation of facts, shewing the incapacity; upon which he proceeds to examine his witnesses, who may in like manner be cross examined by the executor. Neither party see the depositions till publication is decreed; after which either party may set the cause down for hearing, and the validity, or invalidity of the will is then pronounced, and the probate decreed or rejected accordingly.

If an executor become lunatic, the Ecclesiastical Court grant administration, with the will annexed, to such person as the Court of Chancery appoint to be committee during the lunacy.

SECTION VIII. *Trusteeship, and Offices of Trust.*

The natural incapacity of an idiot or lunatic for any office of confidence or trust is obvious; but the inconveniences are manifold where it happens that trustees of lands or mortgages for others become unable, even with the direction of the *cestui que trust*, to execute any conveyance to other persons (b); this was a subject which called for the provision of

(b) 4 Geo. II. c. 10.

the legislature ; and to remedy an evil of such great magnitude, it was enacted, that such persons, or their committees in their name, by direction of the Court, signified by an order made upon the hearing of all parties concerned, on the petition of the persons for whom they were seised in trust, or of the mortgagor, or persons entitled to the monies secured upon any lands whereof such lunatic was seised by mortgage, or of the persons entitled to the redemption, to convey such lands in such manner as the order shall direct ; and such conveyance shall be as valid, as if such lunatic were of sane mind, and had executed the same.

And all such lunatic trustees, and mortgagees, or their committees, are compelled to obey such order, by executing such conveyance as trustees of sane memory are compellable to convey, surrender, or assign their trust estates, or mortgages.

It has been held, that the Court of Chancery has no authority, on petition, to order a trustee, becoming a lunatic, to convey the legal estate (c) ; it can only be by bill filed : there may be evidence in the Master's office of his being ill ; but there is no reason to denominate him a lunatic : it would be taking, upon affidavits, the cognizance of the state of his mind and legal capacity, which, in courts of justice,

(c) 2 Ves. jun. 587, 8.

is to be established by inquest ; there may be cases where his execution of a deed cannot be obtained, and in that case the execution by a committee may be sufficient ; but this can only be done by taking out a commission first, and then the Court will order the lunatic and his curator to join in the conveyance (*d*).

The heir of a mortgagee became lunatic, and being resident in *Hamburgh*, was found *non compos* by the proper jurisdiction there, and a curator or guardian was appointed there, for managing his affairs.—Held, that the Court here was bound to take notice of that, and that he was a mortgagee within this act, and that, on payment of the mortgage debt, he should convey to the mortgagor (*e*).

But the Court will not go into the question, unless a grant of the custody be shewn (*f*).

It is doubtful whether the words of this statute include all lunatics, as well such as are at large as those of whom custody has been granted by the Great Seal (*g*.) It may not be great presumption to say, that if this doubt had not been started, the language of the statute would have appeared sufficiently general.—It seems also to be doubted, whether it

(*d*) Ambl. 80.

(*g*) Ambl. 80. 3 Ba. Abr.

(*e*) 1 Ves. jun. 298. (1749). 541.

(*f*) Ibid. 382.

extends to such of whom a curator has been appointed abroad (*h*).

If a trustee be of unsound mind, though no commission hath issued to find him so, and under an impression of weakness he refuse to transfer stock, under 36 Geo. III. c. 90. the Court will order the transfer (*i*). *Simms v. Naylor*, 1798.

This act was made to procure the transfer of stock, and payment of dividends of trustees' absent or becoming bankrupt, or when they cannot all be found; and where the stock stands in the name of any lunatic or committee, who might be absent beyond sea, or die intestate, and it become uncertain whether they be living or dead, the Great Seal may order the transfer by the Accountant General, or Secretary of the Bank of England, to any new committee, or otherwise, and to pay the dividends as the order shall direct; and the Bank is indemnified for so doing.

A lunatic resident abroad, under judicial proceedings there, is not held to be within the statute (*k*).

Under this head it may be observed, that an idiot or lunatic cannot be an *arbitrator* (*l*), for he has not judgment to make any award: nor can he be an *attorney or solicitor*, for he has not skill to conduct the affairs of others, having none to conduct his own (*m*).

(*h*) Ambl. 80.

(*i*) 4 Ves. jun. 360.

(*k*) 8 Ves. 316.

(*l*) Arb. Re div. c. 4. 19.

(*m*) Brit. c. 126.

Neither can he be *essoigner*; but it was held, that he may be a steward of copyhold estates, and all his acts, *ex officio*, are held good (*n*): in this case there seems to be a wise leaning in favour of others, for if a lord should himself be so unwise as to appoint a lunatic to be his steward, it would be a very unfair consequence that all the admissions and surrenders, powers, attornments, relinquishments of dower, &c. taken before him, should be invalid, and therefore involve whole families in confusion: and it is upon the same principle, that if a *Judge*, the highest office of trust under the Crown, should become lunatic, all legal acts done before him, would be maintained (*o*).

SECT. IX. *Contracts, by Deed, &c.*

The faith of every contract rests upon the capacity of the contracting parties; this is a step beyond their fidelity to each other; it is of the essence of the contract not so much that it is valid, as that the parties were in a sufficient capability to bind themselves (*p*): for, every alienation of a man's right, all contracts between man and man, all leagues between princes, &c. ought to be done with sound

(*n*) Mir. c. 2. s. 30. Sheph. Guide, 115.

(*o*) Brydall 65.

(*p*) Grot. bel et pa.

judgment;

judgment ; therefore the acts of the will, that are expressed by overt signs, are to be understood as acts of a mind endued with reason, of which a man distracted is wholly deprived, and therefore incapable of performing any profitable things (*p*).

All promises and contracts are built upon this principle (*q*) ; and so also is the case of oaths, which should never be used but with great deliberation.

One criterion of a valid contract is, that both the contracting parties can have redress against each other ; if either party are by incapacity at the time out of the reach of full remedy, it is of natural justice that their contract should be void. A mental derangement operating upon particular subjects, should, with regard to those subjects, be attended with the same effects as a total deprivation of reason ; and that, on the other hand, a partial disorder, operating only upon particular subjects, should not, in its legal effects, have an influence more extensive than the subjects to which it applies ; and that every question should be reduced to the point, whether the act under consideration proceeded from a mind fully capable, in respect of that act, of exercising a free, sound, and discriminating judgment ; but in case the infirmity is established to exist, the

(*p*) Brydall 59.

(*q*) Grot. l. 2.

tendency of it to direct or fetter the operations of the mind, should be in general regarded as sufficient presumptive evidence, without requiring a direct and positive proof of its actual operation. Where the existence of derangement is shewn in general, the partiality of its operations in the particular instance should be manifestly and incontestibly proved, in order to prevent the application of its general effect (r).

This suggestion is offered, because the distinction must always be made as to contracts by lunatics, whether they were made in a lucid interval.

The unfortunate malady which affects the persons who are the objects of our present attention, necessarily works that incapacity in them as to invalidate all their contracts, and to favor the interposition of equity and law in annulling and avoiding acts which, if suffered to remain binding, might confirm their own ruin, and that of their families.

This part of our subject is perhaps of the most importance, and has been viewed in various lights by the decisions of the Courts, which have distinguished between acts done *in pais*, and those upon record, as fines, &c.

An agreement of a lunatic cannot of course be carried into a specific execution (s); but the change

(r) Evans' Pothier 2. 28.

(s) Sugden 87. 1 Ves. 82.

of the condition of a person entering into an agreement by becoming lunatic, will not alter the right of the parties; which will be the same as before, provided they can come at the remedy. As if a legal estate is vested in trustees, a Court of Equity will decree a specific performance, and the act of God will not change the right of the parties; but if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and leave it at law. *Owen v. Davies.*

Although weakness or other imbecility, and drunkenness, may be sufficient to support a commission of lunacy, yet the courts of law and equity relieve against acts fraudulently procured in such situations (*t*):—for if a man is deprived of the use of his reason, his act can by no means be a serious and deliberate consent, and without this no contract can be binding by the law of nature: and any conveyance made by a person of weak understanding, though not lunatic, may be set aside (*u*).

Lord Hardwicke refused to set aside a contract made by a party who was drunk at the time; as there did not appear to have been any unfair advantage taken, and the agreement was reasonable in itself (*x*). But in an earlier case, Lord Chief Justice

(*t*) 1 Fon. Eq. 65. (*u*) 1 Ves. 19. (*x*) 2 Vern. 189.

Holt held that a person might shew, in opposition to the validity of a bond, that he was made to sign it when he was so drunk that he did not know what he did (*y*).

They have, however, been deemed capable of purchasing; and although they recover their senses, cannot wave the purchase (*z*); and if they then agree to it, their heirs cannot set it aside. If they die during their lunacy or ideocy, then their heirs may avoid their purchase; as the King has the custody of ideots, he may, upon office found, annul it; and after a lunatic is found so by inquisition, his committee may vacate it (*a*).

If the contract be just, and the consideration *bona fide*, and part of it paid, the Court will order a specific performance of it; and though an agreement be only partly executed, yet if the parties have all acted upon it, this will take it out of the statute of frauds; for it is fraudulent in one party to contract and lead the other on, and then withdraw from his performance (*b*).

The mutual consent necessary to constitute the validity of any contract, implies capability in the

(*y*) Bull. N. P. 192.

(*z*) Sugden 292.

(*a*) 2 Bl. Com. 290. 6 Lit.

3. a. Co. Lit. 247 b. 2 Vern.

412, 678. 1 Eq. Ca. Abr. 279.

(*b*) 1 Ves. 297, 441. 1 Bro.

417. Præ. Cha. 519. 1 Atk. 12.

3 Atk. 4. 1 Vern. 151, 473.

2 Vern. 455.

contracting parties, without which, as the basis of the contract, the agreement becomes void, on principles both of law and justice (*c*). Every principle of virtue is founded on this capability, for there can be no account where the rational principle is deranged. Every moral obligation, and every rule of public and private duty is also built on this foundation, and where that is not found, the happiness and welfare of society being in danger of interruption, the human ceasing to be governed by those ties which unite and govern the social compact falls to the level of the brute, and being equally, or in some cases more fierce, requires more coercion or confinement; and as in this unfortunate state the mutual obligations of every contract and right of expectation of one side, and the knowledge of that expectation on the other, cannot be accomplished, it becomes impossible that an idiot should enter into any valid contract, or any person with him, and that such as have been entered into with lunatics, can only be maintained in lucid intervals (*d*)

To prevent and relieve, as much as possible, the forlorn situation to which human nature is thus reduced in these afflicting cases, the common law of England, sanctioned by its early Parliament, has vested in the Crown, as a part of its most splendid

(*c*) Puff. L. Na. Grot. Bel.P. (*d*) Paley 1. 142.

and dignified ornament, the tender care of those, who, thus born under its allegiance, cannot yield any of the services of subjects, or bring into the common stock any of their personal aid; and as incapable of virtues, can only ask to be forgiven and protected from their vices; and while incapable of industry and activity, to manage and increase their own talent, rely upon the Crown for the custody, the safety, and the comfort, of their persons, and the preservation of their property.

Courts of Equity will not only sustain contracts completed by a lunatic while sane, but, under circumstances, will enforce performance of such as were entered into before, but were not completed at the time of his lunacy; for the change of the condition of a person entering into an agreement, by becoming lunatic, will not alter the right of the other parties (*e*).

Where the lunacy, alledged at the time of the agreement, was denied, and a sum tendered in confirmation of the contract, it was, on motion for directions, desired that the receipts might be general, or in pursuance of the order. And the Court said, they might give such receipts as the defendant desired, it could not harm the lunatic, being only the committee's acts: nor should it prejudice them on the hearing (*f*).

(*e*) 1 Ves. 82.

(*f*) Wyatt, Pr. Reg. 273.

A bill was filed by a lunatic and his committee to set aside a settlement which had been obtained from him before the issuing the commission of lunacy, but subsequent to the time when he was found lunatic; and the bill charged several acts of insanity and distraction, previous to the making of the settlement, and issuing the commission, and that the commission was still in force. To this bill the defendant demurred, for it was against a known maxim of law, that any person should be admitted to stultify himself, &c.

But the Court overruled the demurrer, and said, that the rule was to be understood of acts done by the lunatic to the prejudice of others, that he should not be admitted to excuse himself, on pretence of lunacy, but not as to acts done by him to the prejudice of himself: besides here, the committee is likewise plaintiff, and the several charges of lunacy are by him in behalf of the lunatic: and it has been always holden, that the defendant must answer in that case; and so he was ordered to do here, though the settlement was not unreasonable in itself, being only to limit the estate in question to the defendants the uncles, on failure of issue male of the lunatic, with power for the lunatic to charge the same with considerable portions for his three daughters, with a power of revocation. *Rid-ler v. Ridler* (g).

(g) 3 Ba. Abr. 539. 2 Vern. 414. 1 Eq. Ab. 279. pl. 5.

A lady

A lady subject such a *furor uterinus* as to produce temporary derangement, with lucid intervals, was the legatee of stock for her separate use (*h*): her husband received the dividends by a power executed by her. An issue was directed from Chancery, whether the lunatic, when she executed the power, was not found so. A new trial was prayed, and Lord Thurlow said, There is an infinite, nay, almost an insurmountable difficulty in laying down abstract propositions upon a subject, which depends upon such a variety of circumstances as the present must necessarily do: general rules are easily formed, but the application of them creates considerable difficulty in all cases in which the rule is not sufficiently comprehensive to meet each circumstance which may enter into, and materially affect, the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, and that at the period of time such mind acted, that it ought to act efficiently; but this rule goes very little way towards that point which is necessary to the present subject; for though it be true that a mind in possession of itself ought, when acting, to act efficiently, yet it is extremely difficult to lay down, with tolerable precision, the rules by which such state of mind can be tried. The course of procedure, for

(*h*) 3 Brown, 443. *Atty v. Parnter*.

the purpose of trying the state of any party's mind, allows of rules. If derangement be alledged, it is clearly incumbent on the party alledging it to prove such derangement; if such derangement be proved or admitted to have existed at any particular period, but a lucid interval be alledged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alledging such lucid interval, who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement.

The evidence in such case applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act; for, from an act, with reference to certain circumstances, and which does not of itself mark the restriction of that mind, which is deemed necessary in general to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general, as that the party who had confessedly laboured under a mental derangement was capable of doing acts binding on himself and others.

The argument urged (by the Solicitor General),

that after the removal of the disease, when the morbid affection no longer obscures or vitiates the judgment, the mind will labour under a languor and debility, which, with reference to its former sound and unaffected state, might render its exertion and decisions very unequal and inferior, carries along with it weight; for I agree that the inferiority of mind would in itself be a degree of evidence to shew that the disorder was not rooted out; the convalescent state would incline to look forward to the removal of the disorder, but would not of itself shew that the disorder was removed. It might allow of the party doing sound and discreet acts; but it would certainly require such acts to be watched and examined with jealousy: nothing could be more dangerous than to try the state of the mind by individual acts, in those cases, in which the disorder is, as it is most frequently, insanity *quo ad hoc*; at the same time, though partial insanity does frequently prevail, it must be watched always with infinite care, and it seems scarcely possible to extract from any particular case of this kind, that which will apply to any other.

In *Coglan v. Coglan*, the judges seem to have thought that there was a clear interval, and this was proved by persons in the habit of watching the patient. Such persons can best prove whether the derangement had entirely ceased, or whether there

was

was a perfect interval. By a perfect interval, I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture ; a mind relieved from excessive pressure ; but an interval in which the mind having thrown off the disease, had recovered its general habit.

In *Greenwood v. Greenwood*, the question turned upon this ; whether a mind sound to general purposes, in the doing of a particular act, being influenced by a false imagination, an unreasonable persuasion was not sufficient to avoid such act. A question of so great extent involves serious consideration.

The present case, however, is free from all difficulties of that kind, for there is clear and distinct evidence of the party having been, at one period, mentally incompetent. The woman who attended her, was hired to attend, and did attend her, as an insane person ; the medical man who attended her, proscribed for her as such. Nor is there any contradiction in the evidence in this case : they who represent her as having talked reasonably, about her property, certainly apprehend that such short effort of her mind made her capable of disposing, and that the disposition to her husband was proper ; they did not mean to circumvent a weak mind ; but I think they scarcely watched the means with sufficient attention : their characters are not impeached.

It is, however, an agreed point, that she was once undoubtedly insane. But it is said, that this particular disease, *furor uterinus*, ought to be deemed a bodily disease ; but if it were, and the effect of it produced this constant habitual derangement of mind, it comes to the same end. The jury, however, would not act upon this ; the evidence does not prove it ; and the medicines administered were not applicable to such complaint : the jury were to try this question, with reference to the effect of an instrument, revocable in its nature ; and therefore the directions, as to the time, were necessary.

Nothing can more circumstantially mark an habitual derangement, than the conduct of the husband with Mr. A ———. It is impossible to overlook what was the opinion of the husband ; therefore it comes to the question of a person habitually deranged ; and whether there was between the paroxysms of the disorder any clear, decided, lucid interval, I think it would be extremely dangerous to all property to say in such a case. The verdict is clearly wrong in saying, that she was not insane at all, as all the witnesses agree that she was habitually insane ; but whether there was a clear lucid interval, is a much nicer question.

Upon a new trial, the jury found for the plaintiff.

Atty v. Parnther.

So likewise it was held, that if one who becomes

non compos mentis by accident, be disseised, and suffer a descent, and afterwards recover his memory and understanding, yet he shall never avoid the descent: and so it is *à fortiori* of one that hath lucid intervals (*i*).

If an idiot contract for necessaries in housekeeping, he is bound to pay for them (*h*).

The right and interest in the profits of an idiot's estate, has relation back to the time of the office found, not from his birth (*l*): but the office shall relate back to his birth in some respect, viz. to avoid all mesne acts done by him: for the King has the custody of an idiot, not in respect of any seignior, but *jure protectionis suæ regis*, because his subject is not able to govern himself, nor the lands and tenements which he has; and his protection begins by the office found: and by statute Ed. III. c. 9. the King shall take the profits from the time that he is charged with the finding of the idiot and his family necessaries, and that is after the office found.

If therefore the King should grant, to one that intrudeth upon the possessions, or takes the person unlawfully, that he would not prevent them, such a grant would be void: for these are acts of justice

(*i*) Co. Lit. 247.

(*l*) 8 Co. 170. 1 Fon. Eq.

(*h*) 1 Roll. Abr. 357. 2 Sid. 55.

and offices of a King, which he cannot put off, *cessat regnare si non vis judicare*; and in this matter he is never supposed by law ill affected, but abused or deceived; for *eadem presumitur mens regis quæ est juris* (m).

A devise to charitable uses by a lunatic, is not aided by 43 Eliz. c. 136.

Many that have capacity to take have no ability to enfeoffe—ideots, madmen, deaf and dumb, and blind, from their birth: the testaments of these may be avoided (n). But any one deaf, dumb, and blind, if he hath understanding and sound memory, and express his intention by signs, may enfeoffe.

If lands fall by descent to a man that is *non compos*, during his incapacity, his heir may enter instead of him, for he cannot plead his insanity (o): and if he makes a feoffment, he cannot enter and reclaim by writ *dum non fuit compos mentis*, for he cannot be allowed to stultify himself, but his heir at his death may have such writ, and thereby avoid the deed (p).

If an ideot make a feoffment in fee, he shall, in pleading, never avoid it, by saying that he was an

(m) Hob. 155.

(o) Co. Lit. 24. b. Reg. 228.

(n) Co. Lit. 42. b. Brac. 100.

(p) Ibid. 247. b.

120. Brit. 88. Fl. 11. 10.

ideot at the time of his feoffment, and so had been from his nativity ; but upon an office found for the King, the King shall avoid it for benefit of the ideot (q).

So it is of a *non compos mentis* by accident, and of him who enjoys lucid intervals, if an estate be made during his lunacy : for the parties themselves cannot be received to disable themselves ; yet a jury may find the truth.

But if any of them aliene by fine or recovery, this shall not only bind himself but his heirs also (r).

Several opinions were entertained relative to this doctrine of alienation, or other act of a man that is *non compos* (s).

1. That he may avoid his own act by entry or plea.

2. By writ, and not by plea.

3. By writ, or plea, of which opinion was Fitzherbert.

4. And Littleton is of opinion, that neither by writ nor by plea, nor otherwise, he himself shall avoid it, but his heir (in respect his ancestor was *non compos mentis*) shall avoid it by entry, plea, or

(q) Co. Lit. 247. b. F.N.B. 202. n. 4 Co. 124.
202. Brit. 28. 66. &c.

(s) Co. Lit. 247.

(r) Stamf. Pr. 34. F. N. B.

writ; and herewith the greatest authorities of our books agree: and was so resolved in Beverley's case; but this holdeth only in civil cases.

Although they cannot stultify themselves, yet all contracts with them after office found, are at the peril of those who deal with such persons: and if the commission be superseded or discharged, the lands revert to the lunatic, but this must be at the suit of the committee (*t*).

A grant of persons out of their right mind, whom we call non-sane memory, or *non compos mentis*, is avoidable; it may be avoided at any time, by entry, action, &c. if they deliver it with their hand, as in a feoffment, and themselves make livery, or a gift of goods, and deliver them in person. But if they deliver it not with their hand, as a grant of rent, advowson, &c. or a feoffment by letter of attorney, &c. it is merely void, and nothing passeth; for the power is void, so as they may have a trial or assize, and remain tenant to the lord, and therefore shall be in ward, notwithstanding any feoffment (*u*).

The mere execution of a deed is absolutely void as against his heir, who may plead the disability, though the lunatic cannot plead it himself (*x*).

(*t*) 3 Ba. Abr. 539.

Sho. Par. Ca. 153. 1 L. Ray. 313.

(*u*) Comb. 468. 2 Vent. 4 Rep. 125. a.

204. 3 Mod. 304. 310. (*x*) Touch. 204.

So of a grant made by one that hath no understanding, as if he be born dumb, deaf, and blind (*y*): but one dumb, or born dumb and deaf, may make a good grant; for divers may have understanding by their sight only, although they be dumb and deaf.

Yet it is said, such grants and surrenders are void *ab initio*, and the heir may maintain trespass against the grantee for distress for a rent charge: but if the distress had been during the life of the grantor, it could not have been avoided (*z*).

Livery and seisin bar the lord of his escheat; for though it might be avoided by the heir, because he was privy in blood, yet it could not be avoided by one who was only privy in estate (*a*).

In every good feoffment there must be a good feoffor able to grant; a feoffee able to take; and a thing grantable: therefore, whosoever is disabled by the common law to take, is disabled also to make a testament, gift, grant, or lease; and many also who have capacity to take by such conveyances, have no ability to grant them; as idiots, &c. (*b*)

All grants, gifts, &c. made by deed *in pais* by

(*y*) Perk. 5. s. 25. Jenk. 304. 8 Finch. 102.
 222. Carter 53. Finch. 102-3. (a) 4 Cruise, Dig. 20.
 Touch. 204. (b) 4 Com. 291. Cruise,
 (z) Perk. p. 21. 3 Mod. Dig. 20.

those who are *non sanæ memoriæ*, are good against themselves; but voidable by their heirs, executors, or those that have their estate (c). But if it be by fine, it is good and unavoidable, for that is done of record, and binds themselves and all under them (d). Of this more hereafter.

But a rent charge, granted by a lunatic, may be avoided by the heir, and held to be discharged (e).

A surrender by *non compos* is likewise void; but the contingent remainder is not destroyed (f). The cases of infants and *non compos* are parallel in all things, except that the latter cannot stultify himself to avoid his grant. The reason why feoffments of infants and *non compos* are voidable only proceeds from the solemnity of livery of seisin in the sight of the country, which takes notice of the notorious alteration of the possession; but contra of a deed, which may be delivered in a private manner.

The word *dimisit* in the writ *dum*, &c. means only a feoffment with livery by himself, for feoffments and fines were the ancient conveyances, and the only ones used in those days.

It is not for defect of right that a *non compos*

(c) Co. 123.

(f) Carth. 435. 2 Salk. 427.

(d) 1 Inst. 247. 2-483. 1 Ld. Ray. 313. Com. 45.
5 Rep. 111. 124.

Show. 150. 2 Ch. Ca. 103.

(e) Shep. Abr. Tit. Ideot. 2 Vern. 189. Shep. Guide, 118.

cannot avoid his own feoffment ; but by reason of his personal incapacity, that no man shall be able to stultify himself (*g*). *Thompson v. Leach.*

This is founded on the doctrine laid down by Lord Coke (*h*): Every deed, feoffment, or grant, which any man *non compos mentis* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law, that no man of full age shall, in any plea to be pleaded by him, be received by the law to stultify himself, and disable his own person : because, when he recovers his memory, he cannot know what he did when he was *non compos*.

If the common law had given a writ of *non compos mentis* to him who has recovered his memory after alienation, certainly the law would have given him remedy for maintenance of himself, his wife, children, and family, although he recovered not his memory, but continued *non compos mentis*.

Those who are privies in blood may shew the disability of their ancestor, and those in representation the infirmity of their testator or intestate ; but those who are only privy in estate, or tenure, cannot do it ; therefore, if donee in tail, being *non compos*, make a feoffment in fee, and die, without issue, the remainder-man shall not enter or take ad-

(*g*) 1 Ray. 313. Comyn. 45. (*h*) 4 Co. 123. 1 Ja. 1. Carth. 435.

vantage of the disability of the donee : the same law holds as to the lord by escheat ; if his tenant, being *non compos*, makes a feoffment in fee, and die without heir, he shall not avoid it. [But it is otherwise as to fines, of which hereafter].

The avoiding these acts is founded upon the words of the statute (*i*), “ after the death of such ideots, he shall render it to the right heirs, so that such ideots shall not alien, nor their lives shall be disinherited.” The method by which the ideot of full age might avoid them was, if he was found ideot by *à nativitate*, and had aliened his lands by *Scire facias* against the alienee, whereby the lands were seised into the King’s hands, and the inheritance re-invested in the ideot : for the King could not render them to his right heirs, nor have possession to his own use, unless by the office and seizure such conveyance be destroyed : and that doth not impugn the maxim of the common law : for in this case the ideot, in no plea that he can plead, shall disable or stultify himself ; but all this is found by office by the inquisition, and verdict of the King’s suit ; and such office when found shall have relation to *à tempore nativitatis* to avoid all mesne acts done by the ideot, as feoffments, releases, &c.

Wherefore after office found all gifts made by

(*i*) 17 Ed. II. c. 9.

him, of his goods or chattels, and all bonds, are utterly void: and if he be sued upon any such bond, or writing, the King, by his writ, so long as the office stands in force, reciting the office, shall send a Supersedeas to the justices where the suit is commenced.

Although the King cannot have the custody of his copyhold land, that being an estate for life by the common law, and would be of great prejudice to the lord of the manor (*k*); yet an alienation thereof by the idiot, after office found, is void (*l*). So alienations, &c. before office found, shall be avoided afterwards, because no laches shall be accounted in the King, nor any prejudice accrue to the idiot for not suing the office before.

But if he die before office found, no office can be found afterwards, and the King cannot be entitled, by the language of the writ.

The same principles apply to the case of lunatics, as to alienations; though the King has a different interest; for, as to the idiot, *Rex habebit custodiam*; and as to the latter, who may recover, *Rex providebit*; and the principle is, that the King may provide, that he who wants reason, shall not aliene his lands, nor waste his goods (*m*). *Beverley's Case*.

(*k*) Hard. 434. Sty. 21.

(*m*) 4 Co. 123.

(*l*) Dyer, 302.

The principles in this case have been the guide to subsequent discussions and determinations, and were recognised in *Thompson v. Leach*, above-mentioned, to render void a deed of surrender, with the distinction already noticed between a feoffment and livery, *propriis manibus* (n) : and that which is void, *ab initio*, cannot pass any estate to the surrendree or grantee.

It was argued in *Thompson v. Leach*, that the cases of lunatics and infants go hand in hand, and the same reason governs both ; their acts are void, because they know not how to govern themselves, and they have a remedial writ to avoid their own intention (o) ; which would seem to enlarge the determination in *Beverley's* case, where the deed was avoided by any other person than himself.

It seemed to be assumed, that when a lunatic recovers, he may, like an infant, consider his acts done during his incapacity, and avoid them by shewing his indisposition by the visitation of God, as well as pleading duress from man, to avoid compulsory acts (p).

But the Court determined, That the grants of infants and persons *non compos* are parallel both in law and reason, and there are express authorities

(n) Car. 433.

(p) 3 Mod. 308.

(o) F. N. B. 202. Reg. 238.

that a surrender made by an infant is void, therefore a surrender made by a person *non compos* is likewise void (*q*). Some have endeavoured to distinguish between a deed which gives only authority to do a thing, and such as conveys an interest by the delivery of the deed itself; that the first is void, and the other voidable. But the reason is the same to make them both void, only where a feoffment is made by an infant it is voidable because of the solemnity of the conveyance. If *Leach* had made a feoffment in fee, there had still remained in him such a right, which would have supported the remainder in contingency.

The surrender was therefore void, and all persons might take advantage of it; and this decision was affirmed on error in the House of Lords (*r*), (1690).

The boundary is so narrow and strait between a person who is *non compos*, and who is so weak as to require the caution of a near relation not to sign any writing or paper whatsoever, that it ought not to overturn the equity of an heir at law, because some of his writings go so far as to give such instances as amounted to ideocy or lunacy. There cannot be a greater instance of weakness than such

(*q*) Cro. Car. 502.

(*r*) 3 Mod. 310. Ca. Adj. 150.

a caution; it is like a nurse warning a child not to go near the water for fear of being drowned. Besides, in the case of *Sir J. Lee*, it was proved that he was addicted to drinking likewise, which added to his natural debility; that he was almost dark; that one eye was entirely gone, and but a small glimmering of light from the other. They had married him without his so much as knowing he was so, or even without the decency of making a previous proposal to him, which is one of the strongest marks of weakness, and liability to imposition ever met with. His repeating scraps of Latin, and reading classic authors, is no proof of sanity, because what a person learns in his youth leaves a lasting impression, and the traces of it are never entirely worn out.

The inquisition had not evidence sufficient to find him lunatic, but the Court pronounced him weak upon these circumstances, and a conveyance of his estate, under this unfortunate situation, was deemed the more vulnerable from the grantee having such a power over him, that his name only would quiet him: its provisions also were objectionable; it restrained him, during life, from taking any fine or leasing, without reserving the full rent; and the deed was not to be revoked by him, but in the presence of three particular persons, or their executors or administrators. Thus he was made to disinherit his heir in favour of persons who were

no relations ; for whom he had never declared any kindness, nor had they merited any at his hands.

A voluntary settlement, and the grantor himself so fettered that he was not able to raise one shilling, and as much confined as if it had been a marriage settlement for a valuable consideration. Had there been no such power of revocation, that would have been almost of itself a reason to have set the deed aside ; therefore, for form's sake, one was inserted : but there was no proof that he was acquainted with any of the gentlemen named, or how could he have got them all together, or forced them if they refused ? Neither draft nor deed were read to him, but one part was executed, not left with him, how could he remember the revocation ? The grantee took it away with him, which amounts to the same as if it had been an absolute conveyance, without any power of revocation at all : besides, it contained reservations of annuities to the attorney, &c.

It is true, if a man be not insane, but only weak, he may do an act which will bind him ; there cannot be two rules of judging in law and in equity, upon the point of insanity.

As to the possibility of his having any intention to disinherit his heir, yet if that intention can be traced up to fraud and imposition, this will fetch back and revest it in his heir, with a saving to his creditors.

creditors. The deed was ordered to be delivered, and the grantee to pay costs. And it was declared, that an attorney or solicitor cannot excuse himself, by alledging that he only followed instructions, from preparing a fraudulent deed, and therefore he was also directed to pay costs (s). (1741.)

The distinction raised by Lord Coke in *Whittingham's* case (t) between privies in blood and privies in estate, avoiding the acts of their ancestor *non compos*, was denied to be authority in the subsequent case of *Thompson v. Leach*, where (u) it was said that this distinction was founded upon no manner of authority, but was only his extra-judicial opinion; for there is no reason to be given why privies in estate should not avoid such acts done by their ancestors, as well as privies in blood, because the incapacity of the ancestor goes to both.

A contract and purchase, at a lucid interval, eight years before the inquisition, when the party was accustomed to buy and sell, was avoided, for the inquisition took a retrospect of seventeen years (x); but the party had liberty to traverse the inquisition; but, where it was done before the inquisition, with the approbation of his only son, the Court maintained it, but he must be a party, *sed secus* of an idiot (y).

(s) 2 Atk. 327. 2 P.W. 205. (x) 1 Cha. Ca. 113.

(t) 8 Co. 42.

(y) 2 Atk. 414. 1 Cha. Ca.

(u) 3 Mod. 307.

153.

There is a difference between a will and a deed obtained from a weak man, and upon misrepresentation or fraud; this is not a sufficient reason to set aside such a will in equity; but a deed which is not revocable, as a will, ought to be set aside (z). (1725.)

Where a weak man gives a bond, if there be no fraud or breach of trust in obtaining it, equity will not set it aside only for his weakness, if he be *compos mentis* (a). Neither will the Court measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity. But a breach of trust is of itself evidence of the greatest fraud, because a man, however careful otherwise, is apt to be off his guard when dealing with one in whom he reposes a confidence; and on such ground the Court will relieve against such a bond. *Lord Cha. Talbot* 1734.

Thus it appears, in the words of Sir W. Blackstone (b), that idiots and persons of nonsane memory, &c. are not totally disabled, either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. The King indeed on behalf of an idiot may avoid his grants or other acts. He then proceeds to trace

(z) Ca. Eq. Abr. 406. (a) 3 P.W. 130.
2 Vern. 700 2 P. W. 270. 203. (b) 3 Com, 291.

the progress of the opinion of Lord Coke, of a man pleading his own disability (*b*).

In the time of Edward I. *non compos* was a sufficient plea to avoid a man's own bond, and mentions the writ above stated (*c*). But under Edward III. a scruple began to arise whether a man should be permitted to *blemish* himself by pleading his own insanity (*d*); and afterwards a defendant in assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied, on terms as the manner then was, that he was out of his mind when he gave it, the Court adjourned the assise; doubting whether, as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it (*e*).

Under Henry VI. this way of reasoning, (that a man shall not be allowed to disable himself by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument, upon a question whether the heir was barred of his just right of entry by the feoffment of his insane ances-

(*b*) Co. Lit. 247.

(*d*) 5 Ed. III. 70.

(*c*) Brit. c. 28. Co. 66.

(*e*) 35 Assis. pl. 10.

tor (*f*). And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason (*g*), the maxim that a man shall not stultify himself, hath been handed down as settled law (*h*), though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain (*i*).

And clearly the next heir or other person interested, may, after the death of the idiot or lunatic, take advantage of his incapacity and avoid the grant (*k*).

And so too, if he purchases under this disability, and does not afterwards, upon recovering his senses, agree to the purchase; his heir may either waive or accept the estate at his option (*l*). For these persons are under the protection of the law; which will not suffer them to be imposed upon through the imbecillity of their present condition; so that their acts are only binding in case they be afterwards agreed to when such imbecillity ceases.

Yet the guardians or committees of lunatics, by statute 11 Geo. III. 20. are empowered to accept of surrenders and to renew in their right, under the directions of the Court of the Chancery, any lease

(*f*) 39 H. VI. 42.

(*g*) F. N. B. 202.

(*h*) Lit. s. 405. Cro. E.

398. 4 Rep. 123. Jenk. 40.

(*i*) Comb. 469. 3 Mod.

310. 1 Eq. Ca. 279.

(*k*) Perk. L. 21.

(*l*) Co. Lit. 2.

for lives or years, and apply the profits of such renewal for the benefit of such lunatics, their heirs or executors.

The want of this power was frequently detrimental to them and their families, and always prejudicial to the persons entitled to the renewal.

All fines and premiums thereon are, or so much as shall remain unapplied at the lunatic's death, to be considered as real estate, unless the lunatic shall have been tenant for life only, and in that case as personal. Sect. 3.

In like manner where lunatics are interested in or entitled to leases for lives or years, they, or their committees, are empowered under the direction of any Court of Equity to surrender the same, and take new leases of the same premises, upon the terms of the lease surrendered, or otherwise as the Court may direct (*m*).

And the fine and charges thereon shall be advanced by the committee out of the lunatic's estate, or may be made a charge thereon with interest; and the new lease is to be held upon the same trust as the former.

In a bill filed to avoid a lease, on account of lunacy of the lessor deceased, the Attorney General must be a party (*n*).

(*m*) 29 G. II. c. 31.

(*n*) Finch 135.

The Court will not interfere to set aside a contract made fairly and without notice of the purchaser's insanity (*o*), especially where the finding upon a traverse was general and not precise as to the day of the contract, as in *Fernes'* case (*p*); where nothing in his conduct excited any suspicion of his situation, but on the contrary he appeared intelligent, understanding the business, and conducting himself with singular propriety. The Court's interference must depend upon circumstances, and no general rule can be laid down upon it. With regard to purchases that have not been completed, and cases in which it is possible to replace the parties, there is no reason why the Court should not interfere to administer its ordinary equity; as it can do that in general in a much better way than a Court of Law; even supposing that Court would consider the mere law of the case in the same way as this Court would. But there may be other cases in which the inconvenience would be so great, that this Court will leave the party to law. The inconvenience of carrying back the finding is extremely great, if that is to be followed through all the legal consequences; assuming it to be the legal consequence, that every act of the lunatic subsequent to that time is absolutely void, nothing can be

(*o*) 9 Ves. 478.

(*p*) 5 Ves. 832.

more inconvenient than for this Court to give effect to that legal consequence; setting aside every dealing in the course of his trade; giving an account of all he lost; the parties who have dealt with him to take the chance of the transaction, being a losing one and make it good; and the transaction being strictly void, this court acting upon that, and though the parties cannot be replaced, obliging them to refund; though producing the great injustice, that they cannot have that for which the money was paid, or cannot have it in the same manner. That would be most inequitable and unjust, and if this was the principle, must be acted upon in all cases where the lunacy is carried back ten or twelve years.

There is no ground for a Court of Equity to advance a remedy where it is impossible to exercise the jurisdiction, so as to afford any chance of doing justice to the other party. Where this Court does interfere, it endeavours to put the parties in the same situation; that is, where the contract is void. Bill dismissed with costs.—Grant, Master of the Rolls, 1804.

All acts done during a lucid interval are to be considered done by a person perfectly capable of contracting, managing, and disposing of his affairs at that period (*q*): this has more frequently occurred

(*q*) 9 Ves. 610.

upon wills, and they have always been established ; it must be the same as to contract, or any disposition of property : if he had made an absolute conveyance, it would have been good, if made in a lucid interval. In the inquiry as to competence, evidence should be found of his manner of life at the time, the history also of the contract, and the circumstances of the negociation. Something material to the competence may arise or result from the very mode in which the negociation was conducted : but it is for a jury to determine what was the degree of efficiency and competence of his mind at the time.

And, general lunacy being established, the proof is thrown upon the party alleging a lucid interval ; and must establish, beyond a mere cessation of the violent symptoms, a restoration of mind, sufficient to enable the party soundly to judge of the act : this is an enquiry much more fit for examination, *vivá voce*, before a jury, than upon written depositions.

If there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit.

These principles were laid down by Sir W. Grant, Master of the Rolls, who sat for Lord Edon, C. (1804) in a case where a bill was filed for a specific performance of a contract, over-reached by a com-
mission

mission of lunacy, the plaintiff not having traversed the inquisition, an issue was directed, whether the defendant was a lunatic at the execution of it; and if so, whether he had lucid intervals, and whether it was executed during a lucid interval; the difficulties in executing the contract, which was for the sale of an estate vested in the lunatic, viz. that the price was to be fixed by persons to be nominated, not appearing strong enough to preclude the previous inquiry with a view to performance, the plaintiff being willing to take the title.

A lunatic, who is lord of a manor, may grant copyhold tenures for any time, according to the custom of his manor, as any other person may do, and the estates made by him are unavoidable (g). Though this was formerly held, it admits of considerable doubt, from the principles since established.

In respect to copyhold estates, every Lord of a manor who is in lawful possession, and has a lawful estate in a manor, may make voluntary grants of copyhold lands, which will bind succeeding lords (h). If therefore a lord labours under any personal disability, such as ideocy or lunacy, he may, notwith-

(g) Shep. 109.

Ten. 196. Calth. Read. 48-9.

(h) Co. Cop. s. 34. 4 Rep. 1 Cruise Dig. 314.

23. b. 8 Rep. 63. b. Gilb.

standing, make copyhold grants, provided they are warranted by the customs of the manor: but he must be in possession at the time of the grant.

And his steward may make voluntary grants, notwithstanding the subsequent disability of the lord, who appointed him. (*i*).

The Committee cannot grant, having no estate in the manor, but the steward may, according to its customs (*h*). Yet the steward may be restrained by order from any such grant, without the privity of the Committee, nor until the Court have been acquainted with it: this is offered as a caution, as the steward's grant is good in law.

But, notwithstanding all the preceding arguments, great injury frequently happened to persons of unsound minds, and their creditors were delayed in obtaining their demands, for want of sufficient power to apply their property in discharge of their debts and engagements; an act was therefore passed in 1803 (*l*), directing that the Great Seal being entrusted with the care and commitment of the persons and estates of lunatics in England and Ireland, shall have power to order their freehold and leasehold estates to be sold, or charged and incumbered by way of mortgage or otherwise, as shall be found

(*i*) 1 Cruise Dig. 317.

(*l*) 43 G. 3. c. 75.

(*h*) Ley, R. 47.

most expedient for raising such sums as shall be necessary for payment of their debts, and for performing their contracts or engagements, and the costs attending the same; and to direct the committee to execute such conveyance, and procure such admittance, and make such surrender of copyhold lands, as the Great Seal shall direct.

S. 2. Any surplus monies to be so raised, are to be applied in the same manner, as the estate sold would have been applied before this act.

S. 3. And all powers of granting leases of lands, vested in the lunatic for a limited estate only, may be executed by the committee, under direction of the Court.

S. 4. And, in order to encourage buildings, repairs, or improvements, the Great Seal may direct the committee of the estate to make such leases of the freehold, copyhold, or leasehold estates, according to his interest, and the nature of the tenures thereof, for such terms and conditions as the Great Seal shall direct.

S. 5. All such acts done by the committees, by order of the Great Seal, shall be as valid and binding against the lunatic, and all persons claiming under him, as if he were of sound mind, and had done the same.

S. 6. But this act is not to subject any lunatic's estate to debts or demands of creditors, otherwise

than as they are now liable to by due course of law ; but only to authorise the Great Seal to make such orders, when it shall be deemed for the benefit of the lunatic.

SECTION X. *Fines.*

Notwithstanding the words of the Statute of Edward III. are general and emphatical, yet if a lunatic alienes by fine or recovery, it shall bind him (*m*) :— for it is held necessary to distinguish between their acts done *in pais*, and those solemnly acknowledged on record (*n*) ; neither the lunatic himself nor his heirs, or executors, can vacate any act of his done in a Court of Record (*o*) ; for it then becomes matter of record which cannot be avoided by a bare averment of *non compos*, from the inconvenience which would ensue ; and such averment is against the office and dignity of a Judge, who ought not to take any cognizance of a fine, or recognizance of such a person : yet when it is once received, it shall never be reversed, because the record and judgment of the Court being the highest evidence in the Law, the conusor is presumed to be at that time capable

(*m*) Cro. El. 187. 398. Co. (n) 2 Ba. Abr. 197.
Lit. 247. a. 4 Co. 123. 2 Inst. (o) 4 Co. 124. Bro. Fines 79.
483.

of contracting, and therefore the credit of it is not to be contested, nor the record avoided by an averment against the truth of it(*p*).

So it is in the case of a fine by an idiot, no office finding him idiot *à nativitate* will be sufficient to reverse the fine(*q*); for that were to lessen the judgment in Courts of Record, by trying them by other rules than themselves: and this fine will supersede the King's prerogative (*r*).

And as fines ought not to be taken from lunatics and ideots, so neither from old doating men who have lost the use of their reason; but if they be weak or infirm through age or sickness, that will be no sufficient cause to refuse them(*s*): ideocy may be judged of by the Justices on levying the fine; and if they do admit them, and a fine be levied by such persons, the fine is said to be good and unavoidable.

But a purchase under value by a lunatic was set aside notwithstanding deeds, fines, and recoveries(*t*).

The same capacity for a deed is required for a fine(*u*); and any person who hath capacity to take by grant, or may be a grantee by deed, may take by fine and be a conusee therein(*x*).

(*p*) 3 Ba. Abr. 197.

(*t*) 2 Vern. 678.

(*q*) 4 Co. 126. And 193.

(*u*) Touch. 56.

(*r*) Crompt. 117.

(*x*) Ibid. 7.

(*s*) West Fines. S. 4. 3 Ba. Abr. 197.

But from the doctrine laid down in the preceding pages, which tends to show the deed on which the fine is founded to be in many cases avoidable, it seems difficult to reconcile the distinction between that and the fine and the consequences which will ensue; for if the fine is not avoidable, a fraudulent grantee will be in by the fine but not by the deed; and if the inquisition has relation back to the birth of an idiot, or to any number of years of a lunatic, and therefore avoids his acts, it seems that the Judge, at the levying of the fine, and the Inquisition of Lunacy operate as opposing jurisdictions.

If an idiot or lunatic levy a fine to the King and declare the uses of it, he is bound, that being part of the operation of the fine (*y*).

However tenacious Courts of Law have been of the authority of their records, and have even maintained a fine, when duly recorded, acknowledged by an idiot, yet in Equity relief has been granted to the remainder-man against a fine, even against a purchaser (*z*): and though in case of fraud it does not set aside a fine, yet considering those who have taken it under such circumstances as trustees, decrees a reconveyance of the estate to the persons prejudiced by the fraud; and though it does not

(*y*) 2 Co. 58. 10 Co. 42. (*z*) Tothill 42. 2 Vern. 678.
Hob. 224.

distinctly appear to be the practice in the case of fines levied by idiots and lunatics, yet from the argument in *Day v. Hungat*, such may be inferred to be the rule of proceeding (a).

Although a fine duly levied is as effectual and binding in a Court of Equity as in a Court of Law, because it is one of the common assurances of the realm, and was originally instituted for the purpose of securing those who were in possession of lands (b); yet if any fraud or undue practice appears to have been used in obtaining a fine, the Court of Chancery has then a power of relieving against it, as much as against any other conveyance; for although it might be extremely improper and inconvenient to admit of an averment in a Court of Common Law, against a fine obtained by fraud, because it would be dangerous to permit the evidence of a record to be questioned in any case whatever; yet as there is a method in which relief may be given in cases of this kind, without contradicting the principles of the Common Law, it is highly proper that a Court of Equity should adopt it, and the Lord Chancellor appears to have exercised this jurisdiction as early as the reign of Queen Elizabeth (c).

(a) 1 Roll. Rep. 115. 2 Vern. 307.—1 Vez. 289. Præ. Cha. 150. Fore Eq. 1. 53.

(c) *Day v. Hungate*, 1 Roll. Rep. 115. *Welby v. Welby*, Totbil 99. 13 Vin. Ab. 373.

(b) 5 Cruise Dig. 244.

The Court of Chancery however does not absolutely set aside a fine so obtained, nor does it send the party aggrieved to the Court of Common Pleas to get it reversed ; but it considers all those who have taken an estate by such a fine, with notice of the fraud, as trustees for the persons who have been defrauded, and decrees a re-conveyance of the lands, on the general ground of laying hold of the ill conscience of the parties, to make them do that which is necessary for restoring matters to their situation. But with respect to any technical error in a fine, or irregularity of the commissioners who have taken the acknowledgment of it, it is a matter only cognizable in the Court of Common Pleas, because a fine, being of the same nature as a judgment, is properly examinable in that court only where it is entered (*d*).

In what cases *laches* shall prejudice an idiot, or *non compos mentis*, some have taken a difference between a bar of his right and a bar of his entry ; for in case of bar of his right, his laches shall not prejudice him but in such special case, if he becomes of unsound memory he shall shew that he was *non compos*. For if he be disseised and the disseisor levy a fine, he is not bound thereby, but may en-

(*d*) Wright v. Booth, Totbill Eq. 259. 1 Vezey 289.
101. St. John v. Turner, 1 Ab.

ter ; for the *stat. de modo levandi fines* (18 Edw. I.) which is but a declaration of the Common Law, bars not only all parties and their heirs, but all other persons of full age out of prison and of good memory, and within the four seas, on the day it was levied, if they do not put in their claim or enter within a year and a day.

So by 4 Hen. VII. c. 24. If a man levies a fine with proclamations, and at the time levied he who had the right was *non compos*, and afterwards recovers his memory, he ought to pursue his action or make his entry within five years after he becomes of sound memory, and in pleading shew that he was *non compos* at the fine levied and all the special matter : but if he never recover his memory the heir may have his action or enter when he will, for he is excepted out of the body of the act, and is not bound to make any entry or bring any action within any time, but the party himself if he recovers : and in such case the lord by escheat will take advantage of the *non compos* of his tenant. For if the tenant is disseised and the disseisor levies a fine, the disseisee being then *non compos*, the disseisor takes back an estate to himself in fee, and afterwards the disseisee dies without heir, the lord by escheat shall take advantage of him against his disseisor :

So, if a collateral warranty descends upon one *non compos* which he might have avoided by entry :

but

but an idiot or *non compos* by their laches shall be barred of their entry; and therefore if they are disseised and the disseisor dies seised, it shall toll their entry; but after their death their heir may enter and take advantage of the infirmity of their ancestor, and his laches, which should prejudice himself, shall not prejudice his heir of his entry. For Littleton saith, no laches can be adjudged by the law in him who has no discretion in such case (e).

The feoffment spoken of by Lit. 247, means any other conveyance *in pais*; but fines or other assurances of record are not implied in this.

The note in 2 Vern. 678. seems imperfect, as appears by the Register's Book, of 24th June, 1711 (f). It was said, that although a person be found lunatic with a retrospect of several years; yet if any conveyances are executed by a lunatic after this time, they shall not be set aside as to good uses; and yet they are looked upon as bad, and the effects and a recovery bad where the uses are bad:

But there was a fine in that case, and therefore the lunatic was bound; as it must be supposed, when he was examined, with regard to the fine, that he was capable of levying.

Where the ordinary time limited by St. H. VII. and Ja. I. as to fines is gone by, and the person suing,

(e) Lit. 3.

(f) 3 Atk. 310.

or his ancestor, was within the exception, the lessor of the plaintiff should be prepared with proof of it (*g*). The disability should be shewn to have existed at the time when the fine was levied or the title accrued, and to have continued till within the time of limitation (*h*), for when once the Stat. has begun to operate, no subsequent disability will prevent its progress (*i*).

If a tenant in tail levy a fine, the issue in tail, though a lunatic at the time, is barred for ever by it, because he is a privy and out of all the savings of 4 H. VII. c. 24 (*k*).

The act of 23 El. c. 3. does not bar a lunatic or other *non compos mentis* of his writ of error, for reversing a fine so that he or his heirs, pursue such writ within seven years after his incapacity is removed; and if he dies pending the suit, his heir may proceed within one year after the seven years (*l*).

Ideots, lunatics, and generally all persons of non-sane memory, are incapable of levying fines; and the statute *de modo levandi fines* expressly directs, that persons of this description shall not be permitted to acknowledge a fine (*m*): but still, if the Judges or Commissioners allow them to levy a fine, it can never afterwards be reversed by any averment that

(*g*) Peake 311.

(*h*) 6 East 80.

(*i*) 4 T. Rep. 300.

(*k*) 3 Co. 91.

(*l*) Brydall 98.

(*m*) 5 Cruise Dig. 94.

the cognizors laboured under any of those disabilities, because the record and judgment of the Court being the highest evidence in the law, the cognizors must be presumed to have been capable of contracting at the time, and therefore no averment can be admitted to the contrary : and it is said that even a declaration of the uses of a fine by an idiot or lunatic will be good⁽ⁿ⁾.

One Henry Bushley, a monstrous and deformed cripple and idiot, was taken from his guardian, and carried to a place unknown, where he was kept in secret, until he had acknowledged a fine of his lands before Justice Southcot, to one Bothome, and had declared the use of the fine to Bothome and his heirs^(o).

Henry Bushley was afterwards found by Inquisition to have been an idiot, *a nativitate*, and upon an action brought by a person who claimed under Bothome, the idiot was sent out of the Court of Wards upon a man's shoulders, to be shown to the Judges of the Court of Common Pleas. Lord Chief Justice Dyer said, that the Judge who took the fine was not worthy to take another : but notwithstanding this, and although the monstrous deformity and ideocy of Bushley was apparent and visible, yet the fine stood good.

⁽ⁿ⁾ 4 Rep. 124.

^(o) 12 Rep. 124.

It was moved as a doubt in the Court of Wards, whether this fine should not enure to the use of the ideot and his heirs ; for although it was agreed, that the fine, being of record, bound the ideot, yet it was contended, that the deed executed by the ideot, was not sufficient to direct the uses of the fine ; but it was resolved, “ That for as much as he was enabled by the fine as to the principal, he should not be disabled to limit the uses which are but as accessory (*p*).”

One Hugh Lewing, who was an ideot, and so found by office, levied a fine, and declared the uses of it by indenture. It was resolved in the Court of Wards by the Lords Chief Justices Wray and Dyer, that both the fine and declaration of uses should stand good, as neither Hugh Lewing nor his heirs could aver that he was an ideot : and it was said by the Court, that they would sooner suppose the office found to have been erroneous, than bring a judicial act into question, or the judgment of the Court in which the fine was levied (*q*).

A complaint was made to the Court of Common Pleas, by Thomas Cust, supported by many affidavits, setting forth, that Johanna Lister, one of the cognizors, in a fine lately levied, had for some years past been disordered in her senses, and was so

(*p*) 2 Rep. 58 a. Hob. 224.
Vide infra.

(*q*) Hugh Lewing's Case, 10
Rep. 42. Winch 106.

at the time when the said fine was levied. The Court thereupon made a rule to shew cause why the fine should not be vacated, and for John Hancock, one of the Commissioners, (who, with two others took the fine by *dedimus potestatem*,) to answer the matters in the affidavits. Upon an enlargement of the rule, the Court recommended it to them to produce the said Johanna Lister, who resided in Yorkshire, and accordingly she was brought into Court: and being examined by the Lord Chief Justice, appeared to be a person of good capacity, and very well to understand the intent of a fine, and the deed declaring the uses thereof, which was in favour of her husband, with whom she had lived many years, and upon whom she was desirous to settle her estate, and prevent its descending to the said Thomas Cust, her nephew and heir at law. The Court discharged the rule, with costs of the application, and the expences of the said Johanna's journey to Westminster, to be paid by Cust (*r*).

Ideots, lunatics, and, generally, all persons of non-sane memory, are disabled from suffering common recoveries, as well as from levying fines; though, if an idiot or lunatic does suffer a common recovery, and appears in person, no averment can afterwards be made that he was an idiot or lunatic. But if he appears by attorney, I presume such an

(*r*) *Lister v. Lister*, Barnes 218.

averment would be admitted, upon the same principle that an averment of infancy may be made against a warrant of attorney, acknowledged by an infant for the purpose of suffering a common recovery, as the fact of ideocy may be tried by a jury, with as much propriety as the fact of infancy (*s*).

Although no averment of ideocy or lunacy can be made against a recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted, to invalidate a deed to make a tenant to the *præcipe*, for suffering a common recovery; and the recovery has, in that manner, been set aside (*t*).

(*s*) 5 Cruise Dig. 397.

(*t*) Sir B. Wentworth's case, Ibid.

CHAP. XII.

PAROCHIAL SETTLEMENT.

THE settlement of ideots has been formerly compared to that of bastards, and so fixed at the place of birth (*a*); but this was over-ruled by Lord Holt, who held there is no difference between an ideot and any other poor child. The case of a bastard differs, because he has no father, or none that the law looks upon as such; and therefore in 18 Eliz. c. 3, the parish of his birth is bound to maintain him.

The children's settlement during infancy cannot be divided from the father's; where he gains a settlement he gains it for all his family; and if he die and his widow marry, they go with her for nurture, and so follow the settlement of the second husband until they be seven years of age, and then the children return to their own father's settlement.

(*a*) Salk. 427, 485, pl. 43, 528.

CHAP. XIII.

OF VAGRANTS.

THE Stat. 17 Geo. II. c. 5. (1744) which empowers Magistrates to take care of lunatics, upon complaint of outrages committed, relates to vagrant lunatics only, who are strolling about, and does not extend to persons of rank and condition, whose relations can take care of them properly (*b*).

Two justices of the peace are authorised by warrant to cause such vagrants to be apprehended and kept safely locked up in some secure place within the county or precinct, and to be there chained, if they find it necessary, if their last legal settlement shall be there;—and if it shall not be there, then to pass them thither, and two justices there may in like manner order them to be confined and chained: and the expences of their maintenance are to be defrayed out of their goods and chattels to be seized and sold by the justices warrant to the churchwardens or overseers; or by receipt of so much of their rents as may be necessary; and they are to render an ac-

(*b*) 2 Atk. 52.

count to the next Quarter Sessions; and if the parties have not property sufficient, then the expences are to be defrayed by the parish.

This act is provided not to infringe the right of the Crown, or the Great Seal, &c. concerning lunatics, or to prevent any friend or relation from taking them under their own care and protection.

And a recognizance for surety of the peace is not forfeited by confining a person who is mad or even blind, and by such coercion as may be necessary (c).

There cannot be any doubt that in cases not provided for by this act, any man may seize and bind and imprison a madman, to prevent him doing mischief to himself or to others, or to any property (d); for the necessity of avoiding greater inconvenience, is a good plea in law; like that of killing a thief, or burglar, in defence of his person or house.

(c) 22 Ass. 56. 2 R. A. 546. (d) Hob. 96. Moor v. 22 Ed. IV. 5. 1 Leach's Haw. Hussey. P. C. 259. S. 23.

CHAP. XIV.

CRIMINAL ACTS.

SECTION 1. *In general.*

THE disabilities which we have seen to arise out of the incapacity of the unfortunate objects of this work, proceed from the principle of protection which the law affords them;—and this protection is farther extended even where their wild indiscretion has led them to violate the laws themselves. They are forgiven for they know not what they do!—

They ought not to be prosecuted for any crime because they want knowledge to distinguish between good and evil (*e*).

Ideocy being a defect from birth is generally to be protected from punishment; but lunacy, which is a partial derangement, the senses returning at uncertain intervals, the offender is only protected from punishment for acts done during the prevalence of the disorder (*f*); for he is then sufficiently punished

(*e*) 1 Inst. 247. 3 Inst. 4. 108. (*f*) 1 Hale 31. 4 Com. 24.
Haw P. C. 1.

by his madness, which prevents him from affording by punishment any example to others (g) : no guilt, which is the gist of criminal process, can attach to any person while he is incapable of reason or design ; and as the evil intention is the implication of every offence, and therefore the charge of every indictment, a deficiency of will is held to excuse the overt act ; for there is no human mode of trying the secret motive but by the overt act : if therefore the overt act is proved it is perfect justice to imply the motive which cannot be proved ; for confession is not to be the means of conviction, it is the extreme of the doctrine that a man cannot stultify himself.

Any crime committed by an idiot or lunatic can arise only from defective or vitiated understanding ; it would be unjust therefore to render him chargeable with his own acts—*furiosus furore solum punitur.*

If a man in his sound memory commits a capital offence, and before his arraignment becomes insane, this will stay the arraignment, because he is unable to plead under proper caution and advice (h).

If after the arraignment and plea he becomes insane, his trial will be stayed, for he is then incapable of making his defence.

If by some oversight, or by means of his gaoler,

(g) Co. Lit. 247.

(h) 1 Haw. P. C. 2.

he plead to the indictment and is put upon his trial, and it then appear to the Court that he is insane, the Judge in his discretion may discharge the Jury of him, and remit him to prison to be tried after his recovery : and this caution is more essentially necessary *in favorem vitæ* where any doubt appears upon the evidence touching the guilt of the fact committed ; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his insanity at the time of the fact, then upon the same favour of life and liberty (*i*), it is fit it should be proceeded in at the trial in order to his acquittal and enlargement from justice ; for by reason of his incapacity, he cannot act *felleo animo* (*h*).

If it were doubtful, at his trial, whether he were lunatic or not, that question was first tried by an inquest of office to be returned by the Sheriff of the county wherein the court sat ; and if they found that the party only feigned and still refuse to answer, he was dealt with as one who stood mute.

Every person of the age of discretion is presumed to be of sane memory until the contrary appear, which may be either by the inspection of the Court, and by evidence given to the Jury who are charged to try the indictment (*l*).

(*i*) Hale's Hist. ch. 35. 36. (*l*) 1 Hale 33. 5. 6. Tr. per pais
 (*h*) 3 Ba. Abr. 528. 14. O. B. 1783-4. 3 Ba. Ab. 81.

Or it being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a *venire* awarded returnable *instanter* in the nature of an inquest of office (*m*); and this method in cases of importance, doubt, and difficulty, the Court will in prudence and discretion adopt.

If after a man be tried and found guilty he lose his senses before judgment, that shall not be pronounced (*n*).

If after judgment he becomes insane he shall not be ordered for execution: for had he been of sound mind he might then have offered something in stay of execution (*o*); an argument which also applies to all the former proceedings.

It is therefore an invariable rule when any time intervenes between the attainder and award of execution, to demand of the prisoner what he hath to alledge, why execution should not be awarded against him; and if he appears to be insane, the Judge in his discretion may and ought to reprieve him (*p*).

If the punishment were less than death and were inflicted upon a prisoner deprived of reason, it would be unproductive of one of the great ends of

(*m*) Fost. 46. Kel. 13.

1 Lev. 61. 1 Sid. 72, &c.

1 Hale 35. Sav. 50. 6.

(*n*) 1 And. 154.

(*o*) 1 Hale, P. C. 34.

(*p*) 4 Bl. Com. 395.

punishment, the correction of the criminal ; and to prevent his doing further mischief to society (*q*).

Human tribunals are only justified in introducing the pain and evil of punishment when it is likely to prevent that greater degree of evil which would result from the unrestrained commission of crimes. Indeed in the bloody reign of Henry VIII. a statute was made to authorise the trial of a lunatic in his absence, charged with high treason, and to sanction his execution, if convicted, as though he had his perfect mind (*r*) ; but this act was wisely repealed by 1 and 2 P. and M. c. 10.

But if a lunatic hath lucid intervals he shall answer for what he does in those intervals, as if he had no deficiency (*s*) : yet this may be avoided by his not being suffered to go at large : it was the doctrine of the ancient law that lunatics might be confined till their recovery, without waiting the forms of a commission or other special authority from the Crown (*t*) ; and now by the act for confining vagrants (17 Geo. II. c. 5.) already mentioned this is provided for.

If one who wants discretion commit a trespass against the person or possession of another, he

(*q*) Beccaria, c. 12.

(*s*) 1 Hale, P. C. 31.

(*r*) 33 Hen. VIII. c. 20.

(*t*) Bro. Abr. Corone 101.

shall be compelled in a civil action to give satisfaction for the damage (*u*).

The great difficulty in all these cases, is to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him: or where notwithstanding some defects of this kind he still appears to have so much reason and understanding as will make him accountable for his actions, which Lord Hale distinguishes between and calls by the names of total and partial insanity: and though it be difficult to define the indivisible line that divides perfect and partial insanity, yet, he says, it must rest upon circumstances duly to be weighed and considered both by the Judge and the Jury, lest on the one side there be a kind of inhumanity towards the defect of human nature, or on the other side too great an indulgence given to great crimes: and the best measure he can think of is this; such a person, as labouring under melancholy distempers, hath yet ordinarily as great understanding as a child of fourteen years hath, is such a person as may be guilty of felony or treason (*x*).

Imbecillity of the plaintiff is generally no good

(*u*) 2 R. Abr. 547. 3 Ba. 141. Brownl. 197. Noy 129. Ab. 131. B. Cor. 6. Hob. Cro. Ja. 467. 1 Ha. 15. 16. 20. 134. Co. Lit. 247. 289. Plow. 4 Comm. 22. 2 Comm. 291. 364. 2 Inst. 284. 414. Poph. (x) Hal. Hist. P. C. 30.

objection

of sanity; this is the common disposition of nature; reason is the lot of man, it is that which distinguishes him from other animals; a man without reason is little more than an organized body, which only retains the shade and figure of a man: his state is a kind of prodigy and monster in nature: hence arises that common presumption that every man is in a state of sanity; that insanity ought to be proved, but that a proof of sanity is not necessary: nothing is more difficult than to prove the fact of insanity; it is not only to combat a natural presumption; it is also to render an invisible and interior quality sensible and visible. It is with this precaution that the plea of insanity can only be set up in excuse for substantiated crime (*b*).

SECTION II. *Suicide.*

Upon the principles already laid down, a person who loses his memory by sickness, infirmity, or accident, and kills himself, is not *felo de se* (*c*); otherwise if he kills himself in a lucid interval (*d*). So if he give himself a mortal stroke while he is *non compos*, and recover his understanding and then die, he is not *felo de se* (*e*); for though the death

(*b*) Evans's Pothier 2. 589. (*e*) Plowd. Com. 260. Shel-

(*c*) 3 Inst. 54. Hal. Hist. ly's case. Heydon's case. Brad.
P. C. 412. L. 3. 2. 2. Fleta. L. 1. c. 36.

(*d*) Ibid 102.

complete the homicide, the act must be that which makes the offence. But it is a vulgar error that none of sane mind can be *felo de se*, and that whosoever kills himself must be *non compos*; for if he be *non compos* as to other acts, that sole act shall not denominate him *non compos* (*f*).

And here I cannot but take notice of a strange notion which has unaccountably prevailed of late, that every one who kills himself must be *non compos* of course; for it is said to be impossible, that a man in his senses should do a thing so contrary to nature and all sense and reason.

If this argument be good, self-murder can be no crime, for a madman can be guilty of none; but it is wonderful that the repugnancy to nature and reason, which is the highest aggravation of this offence, should be thought to make it impossible to be any crime at all, which cannot but be the necessary consequence of this position, that none but a madman can be guilty of it. May it not with as much reason be argued that the murder of a child, or of a parent, is against nature and reason, and consequently that no man in his senses can commit it? But has a man no use of his reason because he acts against right reason? Why may not the passions of grief and discontent tempt a man knowingly to

(*f*) Comberb. 3. 1 Ja. 2.

act against the principles of nature and reason in this case, as those of love, hatred, and revenge, and such like, are too well known to do in others.

The same mode of reasoning may very easily be extended to excuse the blackest crimes ; for nothing can be so contrary to reason and nature, and to all the best interests of life and immortality, as the commission of them.

The decalogue forbids man to commit murder ; in which precept self-murder seems no less to be understood, than the murder of another ; though the individual has eluded the vengeance of offended justice, yet with a view to discourage the crime, our laws punish a son for having thus lost a father ; and a widow because she is thus unhappily deprived of her husband ; confiscation of the goods of the deceased, is depriving the survivors of their due (g). By adopting this remark I cannot be charged with defending suicide.

Montesquieu asserts that the English destroy themselves often in the very bosom of happiness ; that it is the effect of a distemper, connected with the physical state of the machine, and independent of every other cause. The civil laws of some countries may have reasons for branding suicide with infamy ; but in England (upon the principles gene-

(g) Beccaria.

rally adopted) it cannot be punished without punishing the effects of madness (*h*).

SECTION III. *Murder.*

Lunacy is an excuse for murder, for which a madman shall not lose his life, for no punishment of him can be any example (*i*). So an insane woman by killing her husband cannot commit petit treason, though the same act against the person of the Crown was held to be high treason; for the King is *Caput et Salus reipub's : et a capite bona valetudo transit in omnes*.

Besides, if a madman kill another he hath not broken the law, although he hath broken the words of the law, for he had not any understanding, but mere ignorance, which is the visitation of God (*h*).

A *feme covert* notwithstanding her killing either her husband or another, is nevertheless entitled to dower; the crime not being imputable to her (*l*).

In the state trials two cases are reported material to this subject.

Edward Arnold was indicted at Kingston, before Mr. Justice Tracey, for maliciously shooting at Lord

(*h*) Esp. des Lois v. 1. 1. 14.
ch. 12.

(*k*) God. Pl. Com. 19.

(*l*) Perk. 364-5.

(*i*) Hob. 90. 134. 3 Inst. 6.

Onslow. There was not a doubt that he was deranged, and particularly in relation to Lord Onslow himself, whose conduct he had very much misconceived. It appeared in evidence, that he had conceived a regular steady design, and had prepared the proper means for carrying it into effect. The Court admitted the proofs, but whether the act was done maliciously, &c. was to be deduced from the nature of the insanity on which the Jury were to decide: it was laid down that if he knew not what he did then he could not be guilty; but it was not every kind of partial insanity that would excuse him, but such a deprivation of reason as made a man know no more than a brute, or an infant. This exposition of the law has never since been controverted, but has been adopted in subsequent decisions.

The Jury found him guilty, but he was not executed: he was reprieved at Lord Onslow's request, and remained in prison thirty years.

The case of *Lord Ferrers*, before the House of Lords, who had killed Mr. Johnson, was, that he was occasionally insane—the murder was deliberate—but he was not punished, for it was proved that he did not know what he did, and was incapable, from fits of insanity, of judging of the consequences of his actions. It was urged upon the authorities of Coke and Hale, that it was not necessary to have a complete possession of reason, but a sufficient degree

gree of it to comprehend the nature of the action, and to discriminate between moral good and evil, to warrant the judgment of the law taking place. He was found guilty, it appearing that at the time he committed the fact he had capacity of mind sufficient to form a design and to know its consequences.

SECTION IV. *Treason.*

The protection of the person of the Monarch has ever been dear to the people of England; it has, from the earliest times, and never was more sincerely than at the present day, been surrounded with laws which have been established by universal consent, and with affections accompanying the graver obligations of allegiance and fidelity—the elevated station of the Crown as the first estate of the realm, the *caput et salus reipublicæ*, has been guarded by such a rampart as must prove impregnable while the sanity of the people remains unimpaired, and the final visitation of Heaven is suspended—the *bona valetudo quæ transit in omnes* must be lost at its source, and its channels become dry, before its banks can fall in and its barriers be rooted up!

But the charge of the worst of crimes, the murder of the King, must yet be tempered with discretion; the law, though jealous of the least approach to this offence, will spare in its deliberation the con-
dign

dign punishment it deserves, when insanity accompanies the crime : for in our ideas of great crimes there should be nothing arbitrary (*m*).

In the jealous and violent reign of Hen. VIII. even this mild humanity of the English law was forgotten ; he was resolved to establish himself in absolute power, and to compel his council to aid his designs, in which the parliament were in some acts not inclined to oppose his wish. In one of these we find them yielding to criminal vengeance in the punishment of lunatics for high treason (1541) (*n*).

It was suggested in the preamble to the statute that lunacy was falsely contrived to delay the punishment ; and therefore directed that a Special Commission should be issued from the Chancery upon the certificate of four Counsel to enquire of the treason, upon which a Jury should be impanelled to try the offence in the lunatic's *absence*, and if found guilty he was to be punished as if of sane memory.

If the lunacy followed the attainder or conviction, punishment was alike to ensue : attainders by common law were declared as effectual as those by parliament ; and the King's benefit of uses was saved : saving also the rights of all persons, except those attainted.

(*m*) Beccaria.

(*n*) 33 H. VIII. c. 20.

But

But the sounder understanding of the law gave a better protection to the prerogative and person of the Crown.

In the subsequent reign the principle of natural justice was declared to be the law of England, namely, that a lunatic cannot be punished as an example to others (o).

The ancient law was, that if a madman had killed, or offered to kill the King, it was held for treason, and so it appeared by Alfred's law before the conquest, and is recognised in Beverley's case (p); but by stat. 25. Edw. III. stat. 5. c. 2. and by force of the words "compassing and imagining the death (q)," he that is *non compos* and totally deprived of all compassings and imaginations cannot commit high treason by compassing or imagining the death of the King; but it must be absolute madness and a total deprivation of memory, without which he could not be found guilty by this statute, and the ground on which the act of Hen. VIII. was justified was to guard against its being made a pretence and excuse; but it was seen by the more humane disposition of after times that the exhibition of so miserable an object as insanity, in the act of receiving the vengeance of offended justice, was more likely to produce very serious effects than to excite example, the

(o) Co. Lit. 247.

(q) 3 Inst. 6. b.

(p) 4 Co. 126.

express purpose of which sprung from a nobler cause, *ut pœna metus ad omnes perveniat.*

This matter was therefore cleared by the statute of 1 and 2 Ph. and Mary, c. 10, which directed that all trials for any treason shall be had according to the due order and course of the common law, and not otherwise, saving to all persons other than offenders, and such persons as claim under them, all such rights as they had at the time of committing such treasons or at any time before.

The most recent case in which lunacy was effectual to excuse a man guilty of treason was that of James Hadfield in 1800, who was indicted and tried at Westminster-hall before a Special Commission, for having on the 15th of May, maliciously and traitorously encompassed, imagined, and intended to put the King to death, by “buying and procuring a certain quantity of gunpowder and leaden bullets with which he loaded a pistol, and having so armed himself repaired to Drury-lane Theatre, and there discharged the same at the person of the King.”

He had formerly been deranged, and for that cause had been discharged from the army. But it was urged, that on the day of this fact he was sufficiently sane as to warrant the credit of guilt as stated by Lord Hale, that the degree of sound mind necessary for the discharge of a continued duty is very different from the state of mind necessary to combine

combine guilt as to one deliberate act: and the principles already laid down of lucid intervals giving validity to contracts were likewise urged; but that the degree of sanity necessary to give validity to a contract was not necessary to enable a Jury to pronounce guilt; for the distinctions between right and wrong are deeply engraved in the mind, and the traces of that distinction are never totally erased while the mind has the capacity of retaining any thing.

It was proved that the prisoner, at the moment of the audience rising on his Majesty's entering his box, got up above the rest, and presenting the pistol loaded with slugs, fired it at the King's person, and then let it drop. He had sat in his place nearly three-quarters of an hour before the King entered, and he appeared to be in a situation where a good aim might be taken, standing *upon* the second seat from the orchestra in the pit; he took sufficient time to take a deliberate aim by looking along the barrel as a man does who takes his aim: when he was apprehended, he said, "this is not all, this is not the worst that is going forward;" and said to the Duke of York, "God bless you—you are a good fellow, you are his Royal Highness the Duke of York," who afterwards recognized him to have been one of the orderly men of dragoons attendant upon his Highness at the battle of Famars—said

“ he knew perfectly well his life was forfeited—
 “ that he was tired of life, and regretted nothing
 “ but the fate of a woman who was his wife, and
 “ who would be his wife a few days longer as he
 “ supposed ;” these words he spoke calmly, with-
 out any apparent derangement, and so continued—
 he repeated that “ he was tired of life, that his plan
 “ was to get rid of it by other means ; he did not
 “ mean any thing against the life of the King, he
 “ knew the attempt alone would answer his pur-
 “ pose.”

It also appeared in evidence that he had in the morning shewed a pair of pistols to a friend, alledging that he had bought them for his young master, and that after cleaning them he should make a profit of four shillings, and left one of them with him, lest both should frighten his wife, and appeared then to be perfectly cool and collected, though in lower spirits than usual.

In the defence (by Mr. Erskine) those cases were relied on where insanity has been held to invalidate contracts, wills, &c. that Lord Hale calls insanity, a total deprivation of memory, but this could not mean merely recollection ; for a man may forget, whether he be a subject and bear an allegiance to his King, and yet not be a lunatic, on many occasions he is possessed of a subtle memory ;—strong passions, violent emotions, gusts of fury, are not insanity ;
 that

that is, when the mind is under the influence of delusions operating upon them, whose reasoning proceeds upon something which has no truth, no substance nor foundation, but is vainly built upon some morbid image formed in a distempered imagination. Confirmed maniacs have been found to reason consistently on various topics, and will frequently baffle the least suspicion of their insanity until some one unexpected point discover the vulnerable state of their mind.

Two cases were stated of this nature; in one upon a prosecution against the keeper of a mad-house for illegal and malicious detention; when after a long examination, in which the case was almost confirmed, at the sudden appearance of Dr. Simmons upon the bench, the witness proclaimed him to be God and the Saviour of the world. The other case was similar against Dr. Munro; the indictment was laid by a Mr. Wood, who gave his evidence very consistently till the sudden appearance of Dr. Beattie struck upon the chord of his insanity. He was permitted to ask the witness what became of his amour with a princess? He replied, that she was imprisoned in a lofty tower, and their correspondence was interrupted, as all her letters fell into the water which inclosed the place of her confinement. Wood preferred a second indictment, and all the most ingenious cross examination could

not extort from him a single acknowledgment that he recollected any thing of this imaginary correspondence: not that his fancied love was extinguished, but, that he was determined against a second defeat upon the same grounds.

On these cases it was contended that insanity is capable of assuming and exhibiting the appearance of sanity, except when it amounts to a degree of absolute frenzy; and it was allowed that if a man commits with premeditation, for that must always be included, a criminal act under the dominion of mischief and malice, he would in law be responsible, although as to other things he might be actually insane; because in what he does then he is not under the dominion of his malady; where the party is under that dominion, the case is exactly the reverse.

During the time that Hadfield was acting under the impressions adduced in evidence he discoursed very reasonably, and had his perfect recollection while he imagined he was acting under the command of Heaven: and there was no evidence of his having associated with seditious persons who might have inflamed his mind. The almost deadly wounds which had disordered his brain—his frequent confinement in fits of insanity—his general character, boiling with loyalty and attachment to the royal family—his mixing his own madness with that of Truelock, a cobbler, whose committal for insanity

was

was produced—all, and many other particulars, shewed him to be *non compos mentis*.

This defence was supported by evidence that proved the prisoner to have been a private dragoon of the 15th regt. in 1793, and wounded in the action on the 18th of May, near Lisle—left for dead on the field—carried to the hospital in a state of insensibility—afterwards called himself King George, and when he saw himself in a glass felt his head for his crown—when he was recovered sufficiently to be in the garden his comrades called him King George; he replied, that was all over now and done away with, and appeared quite sensible. That three of his wounds had probably penetrated his skull and injured his brain, and after injuries of the brain from wounds there frequently follows the loss of some particular sense—sometimes the loss of sight or of hearing—sometimes a loss of memory followed by insanity, and if that immediately follows and continues for two or three years it becomes permanent; it may not be constant, but will be excited by particular causes and circumstances; it often happens that a person thus affected is at one moment perfectly rational and seemingly in the full exercise of reason and all the powers of the mind, and at the next moment the paroxysm follows. That when common questions were put to him he answered correctly, but when any were put which

related to the subject of his lunacy, on religion, and on his crime, he answered irrationally : That paroxysms come on periodically ; the approach of hot weather has often this effect, but are more frequently produced by something in the state of health, or by some external circumstance oppressing or leaving violent or sudden influence on the mind, or by the food or manner of life. That on account of his insanity he had been discharged from the army—had since been necessarily confined to his room for ten days, and had been in various fits of bawling and hallooing out, they came on with the hot season, and at the changes and full of the moon ; he then called himself a Prince, Jesus Christ, and sometimes God : his dejection gave signs of the fit's approach, that then his eyes stared, he was very surly. That on the 11th of May he was growing worse—said “Jesus Christ was a damnation blackguard”, and often repeated that he was “going a long way and had a great deal to do” ; on the 13th said on his return home that “he had been to see God, that the Virgin Mary was a bloody whore, that Jesus Christ was a damned bastard, and God was a thief” : that he went out again, drank a part of a pot of beer, and returned home in the evening using similar indecent expressions ; after supper said he “was ordered to go into the garden to pray for three hours between nine and twelve o'clock, and that there he was to see
God:”

God": called himself God Almighty's servant, and was going to build a house in White Conduit fields where he was to live with the cobbler Truelock; that he was to be God and Truelock to be Satan." That about one or two in the morning he suddenly jumped out of bed, and referring to his child, a boy of about eight months old, of whom he was usually remarkably fond, said he was going to dash his child's brains out against the bed-post; said, "God damn his little eyes I will kill him," that God had ordered him to do it: on his wife screaming and his friends coming in, he ran into a cupboard and said he would lie there, it should be his bed, and God had said so, in doing this he had upset a kettle of water, and said "he had lost a great deal of blood." In the morning he denied that he had got up or awaked during the whole night—shook his fist at his wife and said he would murder her. In the following day he repeated his former expressions about God, and the Virgin Mary, and Jesus Christ, and during the next night had frequent startings in his sleep, and appeared much worse in the morning, said he had seen God in the night, that the coach was waiting, and that he had been to dine with the King. Spoke very highly of the King, the Royal Family, and particularly of the Duke of York, went out to his master's work shop, and returned to dinner at two, but would not eat any, said "he did not need meat, and
could

could live without it ;” asked for tea between three and four o’clock, talked of going to be made a member of the society of Odd Fellows, repeated his irreligious expressions and then went out ; this was the afternoon on which he went to the theatre : that when in his right mind he was a very tender and attentive husband, and even when he was deranged his wife could manage him : that ever since his return from France he had been annually deranged from the beginning of spring to the end of the dog days : on the 13th of May he said “ he was a prophet, and that he must eat no more as the Lord Jesus Christ had forbidden him.”

From this evidence the Lord Chief Justice Kenyon held that being deranged immediately before, it was not very likely that in the interval he had recovered his senses ; if they were to run into nicety, proof might be demanded of his being insane at the very moment when he committed the act : that there was no reason to believe that he was a rational and accountable being when perpetrating the deed.

The jury concurred with the court in this opinion and gave their verdict to be recorded thus :—“ Not guilty, it appearing to us that he was under the influence of insanity when the act was committed.”

It was agreed that he should not be discharged ; he was therefore re-conducted to Newgate until he could be otherwise disposed of.

Conse-

Consequent to this trial, the legislature passed an act in the July following (*r*), declaring that in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that he was insane at the time of committing the offence, and shall be acquitted, the jury shall find specially whether he was insane at that time, and declare whether he was acquitted by them on account of such insanity; and the court shall then order him to be kept in strict custody, as they shall think fit, until the King's pleasure be known; and the King may then give such order for his safe custody as he shall think fit: and so in all like cases before the passing that act:—which warranted the detaining of James Hadfield.

Sect. 2. And if any person indicted shall be insane, and be so found by the jury upon arraignment, or appear so to them upon the trial, the court shall direct such finding to be recorded, and order him into strict custody until the King's pleasure be known; if any such person be brought up to be discharged for want of prosecution, the court may order a jury to be impannelled to try his insanity, and on their so finding, the court may order his confinement in like manner, and the King may give such order as he shall think fit.

Sect. 3. And in order to prevent crimes by

(*r*) 39 and 40 Geo. III. c. 94. (1800.)

lunatics, if any person shall be discovered and apprehended under circumstances that denote a derangement of mind and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, and if any justice of peace shall commit him as a dangerous person suspected to be insane, such cause being expressed in the warrant, he shall not be bailed, except by two justices, one of whom shall be the first mentioned, or by the Quarter Sessions, or Great Seal.

Sect. 4. Insane persons having at different times endeavoured to gain admittance to the King by intrusion in his usual places of residence, it was therefore provided, that if any person who shall appear to be insane shall endeavour to gain such admittance, and there may be reason to apprehend that the King's person may be endangered, the Privy Council, or one of the principal Secretaries of State, may order his confinement; and the Great Seal may issue a commission to enquire into his sanity, and whether the King's person may be so endangered, and direct the sheriff to summon a jury accordingly; and if they shall find him so insane, the Great Seal may order his confinement so long as there shall be reason to apprehend danger to the King's person; and afterwards enquire into his recovery and direct him to be discharged absolutely or conditionally, or under restrictions as shall seem meet.

In consequence of this act, the Judges have remanded prisoners, who have been found to be lunatics, to their prisons, until his Majesty's pleasure be known, where they have remained under the care of the keepers, and have been attended by such medical skill as the county has afforded; but their number is now greatly increased, which has justly excited the farther attention of the legislature.

CHAPTER XV.

OF COUNTERFEITING INSANITY.

THE regular method of investigating the plea of insanity (*a*), offered in excuse for crimes, or in delay of punishment, was by an inquest impannelled for that purpose, as in the case of *Somerville*; and if the finding was that he be lunatic only by covin or dissimulation, he was then tried upon the principal matter; and not condemned to *peine forte et dure* as in cases of felony: but if he would not answer directly, being of sane memory, he was condemned upon a *nil dicit* and received judgment: if he were found lunatic, his trial was deferred. And it was fully agreed that if he plead the general issue not guilty, and afterwards upon evidence come and not speak directly, yet he was not deemed lunatic having once answered directly.

So a felon upon his arraignment appeared to be mad; and the same process was adopted (*b*).

(*a*) Savil 50.

(*b*) 1 Anderson, 107.

CHAPTER XVI.

OF REGULATING MADHOUSES.

A *Habeas Corpus* having issued out of the Court of King's Bench to the keeper of a private *mad-house* to bring up the body of a person confined there, it was moved to return the writ, offering an affidavit of the physician, stating, that he had recommended her to the care of that house where she was still in custody, and that from the time of her being so placed there she had appeared and was still in his judgment a lunatic; and was then in so disordered a state of mind as not to be fit to be brought into court; and that he had been informed and believed that a commission of lunacy would shortly be issued against her, which had been deferred on no other account than because of the late minority of her grand daughter and next of kin, who was then come of age as he believed.

Lord *Mansfield* proposed to use this affidavit as a reason for enlarging the time to return the writ, instead of actually filing the return at that time. This method was adopted, and the court enlarged the

the

the time, being well satisfied by this affidavit that the lunatic was not in a condition fit to be taken out of the care and custody of those to whom her person was entrusted, and who were upon the point of obtaining a proper legal authority for what they were doing; which, however intended for her benefit and advantage, had not yet obtained that strict *legal* sanction that they were now in a regular pursuit of.

This was followed by a motion for a rule for liberty of access and inspection of the lunatic, to see that she was properly treated; but as it did not appear that this motion was made on behalf of any person who had the least pretension to demand this privilege; the court rejected it. Anno 1761 (a).

Many great and dangerous abuses having frequently arisen from the state of madhouses kept for the reception of lunatics, for want of regulations with respect to the masters, the admission of patients, and the visitation by proper persons; and the law having been deficient for correcting such abuses, the legislature in 1774 passed an act for this express purpose (b).

Sect. 1. That if any person, upon any pretence whatsoever, conceal, harbour, entertain, or confine in any house or place kept for the reception of

(a) 3 Burr. 1363. Rex v. Clarke.
(b) 14 Geo. III. c. 49.

lunatics, more than one lunatic at a time without licence, except such as are committed by the Great Seal, shall forfeit 500l.

Sect. 2. The College of Physicians in London on the last day of September yearly shall elect five fellows to be commissioners for granting licences within London, Westminster, and seven miles thereof, and the county of Middlesex; two of them shall not have acted as commissioners for the preceding year; and none of them be capable of acting for more than three years successively.

Sect. 3. If a sufficient number of fellows qualified or willing to act as commissioners cannot be found, then the president and fellows are to elect one or more from among the licentiates.

Sect. 4. As often as any of them die, or refuse to act as commissioners, the president shall call a meeting of the fellows within fourteen days next after such death or refusal to elect another.

Sect. 5. The president of the college shall on the day of such election, or within ten days afterwards administer the following oath, and on refusal to attend and take the same he shall forfeit 5l. to the use of the college.

I *A. B.* do swear that I will faithfully and impartially execute all the trusts committed to me by virtue of an act of parliament made in the fourteenth year, &c. and that I will not directly

or indirectly give notice, or cause notice to be given to the keeper or person having the care of any house or place licenced for the reception of lunatics of the time of visitation of such house or place,—So help me God.

Sect. 6. The commissioners may meet in the hall or other convenient place in the college.

Sect. 7. The treasurer of the college shall be treasurer, and a secretary to be chosen, who shall take the oath prescribed.

Sect. 8. They shall meet annually on the third Wednesday in October, or within ten days after, to grant licences for one year from the 20th of November following, notice of which shall be given three times in the London Gazette, which licences they are required to grant to all persons who shall desire the same, on a stamp of 5s. value, paying, where the number of the lunatics shall not exceed ten, 10l.—and where they shall be above ten, 15l. and no more, and 6s. 8d. to the secretary on each licence.

Sect. 9. No one licence shall authorise any one to keep more than one such house, nor any licence be in force longer than one year.

Sect. 10. No commissioner shall be interested in keeping any such house on pain of 50l.

Sect. 11. The president shall summon the first meeting after their election, by notice left at their houses.

Sect. 12. Any two commissioners may call a meeting in like manner.

Sect. 13. The chairman shall have the casting vote.

Sect. 14. The commissioners, or any three of them, either by themselves or with their secretary, are required once at least in every year, and whenever required by the Great Seal, or Lord Chief Justice of the King's Bench or Common Pleas, to visit and inspect all such houses so licenced within the hours of eight and five in the day time, or at any other times within those hours as any three or more of them shall think necessary, and shall have power to continue in such house, and examine the persons confined as lunatics therein for such time as they shall think proper:

Sect. 15. And take minutes of the state and condition of the houses, the care of the patients, and all such particulars as shall deserve their notice, with their observations thereon; all which, within one week, shall be entered by way of report in a register to be kept in the college, and signed by any three of them at their next meeting: but no minute which tends to impeach the character of such house shall be so entered unless it shall have been previously signed by three or more of the said commissioners present at such visitation; and if they discover any thing deserving of their censure or animadversion, they shall report it, and such part of their report,

and no more, shall be hung up in the censor's room for general inspection.

Sect. 16. If the master refuse them admittance he shall forfeit his licence.

Sect. 17. They shall cause an exact account of all their proceedings to be kept in their register at the college, in a strong chest, under the care of the beadle or housekeeper, to be locked up by their secretary.

Sect. 18. The president may inspect it at the college in presence of the secretary.

Sect. 19. If any person shall apply to any commissioner to be informed whether any particular person has been confined in any such licenced house, and the commissioners shall think it reasonable to permit such enquiry to be made, and sign such order directed to the secretary, he shall search upon his papers, and shall immediately acquaint him of the name of the keeper, and by whose direction and advice such person has been so confined.

Sect. 20. The treasurer is to pay the commissioners one guinea for each visitation and all reasonable expences incurred, and to keep an account to be lodged in the chest with the register, to be produced to the president and elects when required to be examined and settled by them; and signed by the president, &c.

Sect. 21. The keepers are required within three days after receipt of any patient (except such pauper lunatics

natics as may be sent there by parish officers) to send notice, addressed to the secretary, of his name and that of the physician, &c. by whose advice such direction was given : all which notices the beadle shall deliver to him within two days, and the secretary shall in two days after receipt thereof enter the same in the register ; and any keeper who shall admit, harbour, entertain, or confine any person as a lunatic without having an order in writing under the hand and seal of the physician, surgeon, or apothecary that such person is proper to be received into such house as a lunatic, or having such order and shall not give such notice to the secretary, shall forfeit 100l.

Sect. 22. No house not within the above limits shall be kept for the reception of more than one lunatic unless it shall be licenced by the quarter sessions of that county.

Sect. 23. The quarter sessions shall grant similar licences, and nominate two justices and one physician, as inspectors : two of whom, the physician being one, may visit in the day time as often as they think fit.

Sect. 24. Similar minutes of each visitation shall be sent by the clerk of the peace to the secretary as before directed ; the clerk of the peace shall keep accounts and the justices shall order payment of expences.

Sect. 25. The clerk of the peace shall take the secretary's oath.

Sect. 26. Any keeper refusing to admit such justices shall forfeit his licence.

Sect. 27. He shall give like notice to the secretary of the reception of any patient within fourteen days under like penalty of 100l.

Sect. 28. Keepers on having their licences shall enter into recognizance of 100l. with two sufficient sureties in 50l. each, or one sufficient surety in 100l. for good behaviour during such licence.

29. The Great Seal or either Chief Justice may require these visitors to inspect the houses so licensed, and report such matters as shall be directed; and may send for and inspect the register, and examine any persons concerned in the execution of this act as often as shall be thought necessary: and if they do not obey such order in two days, or shew sufficient cause to the contrary, they shall be deemed guilty of contempt.

Sect. 30. Nothing in this act shall extend to any public hospitals.

Sect. 31. It is declared that the act does not mean to give them any new justification from being able to prove that the patients are confined by such direction or advice, and therefore that in all proceedings under any *habeas corpus*, and in all indictments, informations, and actions for confining or ill-treating
ing

ing any person, the parties complained of shall be obliged to justify their proceedings according to the course of the common law as if this act had not been made.

Sect. 32. All penalties incurred within the above limits may be sued for in the courts at Westminster by the president in the name of the treasurer, within six calendar months, and shall be applied, except those any otherwise directed, one moiety to the informer, and the other to defray the expences of this act. And without those limits by the clerk of the peace for the county where the offence is committed.

Sect. 33. Actions limited to six months, and to be laid in the proper county—general issue or special plea may be pleaded, and this act and the special matter be given in evidence, and treble costs to the defendant if he recover.

Sect. 34. To be deemed a public act.

Sect. 35. To continue in force for five years.

1779. Continued for seven years by 19 Geo. III. c. 15.

1786. Made perpetual by 26 Geo. III. c. 91.

On mature consideration of the provisions of this act, it may not perhaps be deemed foreign to the design of this work to suggest a few remarks for the attention of those who are more immediately concerned in its operation; as also of those, who from their holding seats in the senate, may have it

in their power to call the attention of the legislature to some of its arrangements which may perhaps be thought to admit of emendation.

1. There is only one day in the year, viz. the third Wednesday in the month of October, or within ten days afterwards, which this act allows for the granting of licences in the London District, by section 8. Hence it is obvious, that the commissioners cannot grant any licence on any other day; wherefore a person well qualified with all the requisites of skill, conduct, and character, who might intend to open such a house within London or Westminster, or any part of the country within seven miles thereof, must be obliged to wait nearly twelve months before he can procure a legal licence; during all which time his connections are perhaps dispersed, the patients he might have expected are necessarily otherwise provided for, and they lose the benefit of such an accommodation; whereas by sect. 22, the justices at *any* quarter sessions are authorised to grant licences for such houses in *any* part of the country at a greater distance than seven miles from the capital.

2. It also appears by sect. 2, that the legislature have thought fit to place this confidence of granting licences for the London district in five commissioners, who are to be fellows of the college of physicians, and to be annually elected on the last
day

day of September ; three of whom, or more, are required by sect. 14 to visit and inspect the houses which they have licenced, either by themselves or with their secretary, *once* at least in every year ; or at any other times when they may *be required* so to do by the Great Seal or by either of the Chief Justices ; whereas by sect 23 the justices at the quarter sessions in the country, at the time of their granting any such licences are authorised to appoint two justices of the county and one physician to visit such houses as often as they think fit in the day-time.

There does not seem to be a well-grounded reason (with all deference) why the people labouring under the affliction of lunacy in the country should not be equally protected by as much medical skill there as in the metropolis ; especially as in all the great towns there are a very sufficient number of physicians and medical practitioners of eminence capable of this public confidence.

Two justices and one physician may not always be competent to the critical duty of such a visitation ; and still less so when their numbers are reduced to two, which the 23d section authorises ; and which in that case would probably be still further reduced to the single judgment of the physician, upon whom the justice of peace, his co-visitor, would most gladly rely.

Nor

Nor does there appear any sufficient reason why such frequent opportunities should be afforded in the country of procuring those licences, and that the London district, which is considerably the most populous, should be limited in this respect to only one day in the year.

3. The election at the college in London being annual, an opportunity is afforded for all the fellows in that district to add to their share of experience, the cases which during their year may pass under their inspection: this must be productive of considerable advantage to themselves and to the public; but in the country district this provision can seldom happen; and it is probable that the same appointment may be repeated from year to year, which confines the practice to a very few persons.

This visitation in the London district takes place once a year at the least, and oftener *if required*. Now this requisition is not made but upon some formal complaint, and the process for which is expensive, and must be attended with, and have taken its rise from, some very unpleasant circumstances, to avoid all which, parties are content perhaps to suffer inconvenience rather than to seek redress: this evil might easily be remedied by extending the authority given by the statute, and *requiring* them to visit once every month throughout their respective districts; or by creating a new institution of *inspectors*
of

of all lunatics, in whatever houses they may be resident, whether licenced for their reception or not; such *inspectors* might be vested with all the powers of examination, and to report to the Great Seal the result of their enquiries. This special commission should have power to enquire into the amount of the property of the unfortunate patients, as well as to the causes of their confinement, and their treatment by their keepers; to redress, by orders, any aggravations of their distress, or any needless confinement or coercion: from their reports (of which the relations of the party might be permitted to take copies unstamped) applications to the Great Seal might be founded, either for its interference in a summary way, or by commission. It will hence be obvious that from the different subjects of their investigation these *inspectors* must necessarily be chosen from among the clergy, the gentry, the legal and medical practitioners of each county; and their fees might be entered in a book, and discharged every quarter of a year by the public treasurer.

One of the reasons for throwing these expences upon the public treasury is not only to relieve the unfortunate individuals from them, but to give the *inspectors* a certainty for their claim whether the party be poor or not; this will aid their authority, and enable them to exercise it without waiting for the solicitation of the parties interested, which would

would be either protracted or relinquished according as they were in pecuniary circumstances to afford the incidental expence : and besides, insanity should be considered as a misfortune under the peculiar protection of the Crown, rendering to the state the same issues from its property, but being disabled from any of the emoluments of increase by commerce, by offices, or by honours, which are diffused to all other members of the community.

4. There is another circumstance which calls for the interposition of the legislature, and at this period more imperiously demands it, when the affliction of lunacy is well known to have increased, and its symptoms from various causes are germinated in families which for ages past have been strangers to its attack ;—I mean those persons who cannot be deemed paupers, and yet have not any estates of inheritance, but subsist upon salaries or a small personal property ; persons of circumscribed fortunes and their children ; the jurisdiction of the Great Seal is extended to all lunatics, as well for the disposition and protection of their fortunes as for themselves ; but common means of procuring medical assistance and maintenance in some of the licenced houses, or in private apartments, in addition to the costs of any application to the court, are so expensive, that their relations, already depressed with the affliction of the malady, are also injured
in

in so severe a degree in their current finances, that it would afford considerable alleviation to these evils if the visitors of either district were invested, with a power of drawing upon the public treasury for a certain limited sum in aid of what the patients friends could advance; these drafts might be so authenticated as not to be publicly seen, and might be discharged out of the article called *secret service*.

5. It would also be of singular benefit to lunatics and their families in such stations of life as have been mentioned, where their property is small, that all the proceedings of a commission or petition should be managed in a more summary way than is established by the present customary practice; the length and expence of which have deterred many from seeking the relief and protection of the court: there are unhappily lunatics of this description now in confinement at very serious expence to their relations, while stock remains in their names in the public funds with dividends accumulating thereon unclaimed, because of their incapacity to make the transfers or execute the proper powers; and which is of too small a value to defray the charges of procuring it. While the Court of Chancery, from the chair to the utmost extent of the bar, is filled with men of the first learning and liberality, it would be presumption in a common practitioner to suggest any line of practice by which these evils might be remedied,

remedied, although if the suggestion were deemed worthy of acceptance, his best assiduity would not be wanting in assisting to form any arrangement which would render the suggestion practicable.

6. It would also be highly acceptable to the public and would relieve many families from the great pressure of these cases, even where they are able to support the charge of a commission, that the Great Seal should revise and restrain the customary costs—many of the fees are considerably above a just compensation for the trouble or skill—many of the entries at the public offices through which the various documents are to pass, are charged at a great amount—the attendances required are numerous, but they might be consolidated—and the honour and the liberality of my profession would assuredly never be displeased at lending their hearty concurrence in alleviating rather than augmenting the miseries of mankind.

Some useful practical forms under this Act will be found in the Appendix.

APPENDIX.

THE PRACTICE.

THE first step towards procuring a commission of lunacy is to present a short petition to the Great Seal, stating the party's incapacity and praying a commission.

This petition must be supported by an accompanying affidavit, stating his situation clearly and without reserve, how long he has been deranged, with some incidents of his life, incoherent conduct and expressions, shewing unequivocal acts of lunacy; with affidavits of his physician and medical practitioners who have attended him.

The petition with the affidavits, are to be left with Thomas Carr, Esq. Secretary for this Department, who procures the order thereon; the petition and order are then to be left with the clerk of the custodies, who makes out the commission, and procures it to be passed under the Great Seal. Five commissioners are always named, but the attendance of three is sufficient.

The solicitor next proceeds to give notice thereof to the commissioners, who appoint a place and time of meeting

ing near the lunatic's residence, and issue a warrant under their hands and seals to the sheriff of that county or town, directing him to summon a jury of twenty-four men, and to meet accordingly.

If the witnesses will not attend voluntarily, the commissioners also sign and seal a subpoena to be served upon them; of whom the physician is generally one.

At the time of their meeting an exact state of the lunatic's property should be laid before them in writing; but this is not absolutely necessary; and an inquisition in blank is to be prepared on an open sheet of paper.

The oaths having been administered, the first commissioner explains the nature of the business to the jury; and the solicitor examines the witnesses to prove the lunacy, and the property if required: and the commissioners and jury sign the inquisition prepared as above-mentioned.

It must be engrossed on the following day upon parchment, and signed by the commissioners, and as many seals put thereon as there were jurymen who signed the inquisition on paper. It is afterwards to be left at the petty bag office and an office copy taken.

A petition is then presented to the Great Seal, praying the appointment of committees of the person and of the estate; and for a suitable allowance and maintenance of the lunatic; there is no objection to the uniting these objects in the same petition, where it appears that the property is small: this is left with the secretary for an order thereon; they are afterwards filed with the clerk of the custodies, who grants an office copy.

A copy of these, with a state of facts supported by affidavits and proposal, must be left with the master to whom the matter is referred, and before whom warrants
are

are to be taken out to proceed and to form his report thereon in the usual manner. When his report is signed and filed, application is made by petition to the court to confirm his report; this petition is lodged with the secretary and set down in the paper for hearing, and instruction given to counsel, &c. as in other cases.

The Court having made an order for the appointment prayed, the grant of the custody of the lunatic's person and estate may be obtained by delivering an affidavit of the property with the order and office copy of the commission and inquisition to the clerk of the custodies, who procures the attorney-general's direction respecting the amount of the security to be given by the commissioners for the estate on his taking the grant; and prepares a bond and affidavit of the sureties as to their sufficiency, as soon as the solicitor has furnished him with their names and abodes.

The solicitor attends them to execute the bond and swear the affidavit, and having made another affidavit of the attestation of these papers, they are left with the clerk of the custodies, with orders to make out the grant.

The next step is to apply for a maintenance, (if the first order does not direct an enquiry as to this particular) by a petition; and it is generally referred by the order to the same master; a copy of it, accompanied with a state of facts and proposal supported by affidavits, is laid before him, and if the estate is large he will require a scheme for the future establishment; on all which he frames a report; this report, when signed, is filed with the clerk of the custodies, who grants an office copy, on which the court is petitioned, as before, to con-

firm it, praying that the sum mentioned in the report as proper may be paid out of the lunatic's estate and allowed to the committee in passing his accounts; and the petition should also pray that the costs of all parties should be allowed and paid out of the estate.

The secretary draws up the order, and it is filed with the clerk of the custodies.

All orders as well as reports are filed with him. Those orders on which the Accountant-General of the Court of Chancery is to act are drawn up by the register from the order first obtained of the secretary, who therefore delivers duplicates, one for the register and the other for the clerk of the custodies: and those reports on which the Accountant-General is to act are filed in the report office of the court, and also with the clerk of the custodies, for which purpose the master likewise delivers duplicates.

By a general order of 1792 all receivers and committees are to pass their accounts once a year, and the masters are to certify at the 2d seal after Trinity Term the state of all those accounts in their offices. For this purpose the committees prefer a petition, stating their appointment, and that they are willing and desirous of passing their accounts, and praying to pass the same; an order is made accordingly, which is filed with the clerk of the custodies; a copy of the petition and order is left with the master, together with the account, and warrants are taken out to proceed thereon; when it is passed before him, the committee prefers a short petition to the Great Seal praying to be at liberty to pay into the Bank in trust in the matter, the balance reported due from him, and that the same may be invested in the purchase of
stock

stock for the benefit of the persons interested in the lunatic's estate.

When a lunatic dies, or recovers, the committee's final account is passed in like manner; and the master having reported thereon, the Court order that upon payment of the balance into the Bank their recognizances be discharged. Having been favoured with some original orders on these points they will be found at the course of this Appendix; and before I close this work I desire to express my thanks to several professional friends for their ready communications, as well in the Court of Chancery as also in the Ecclesiastical Court.

If the lunatic is possessed of property in the funds, a short petition, stating the commission and finding, and amount of his stock, praying a transfer to the Accountant-General may be presented, and an order is made without any attendance, and is drawn up by the register.

PRACTICAL FORMS.

Petition for a Commission.

In the matter of _____, a supposed lunatic.

To the Right Honble. the Lord High Chancellor of
Great Britain.

The humble Petition of _____ the
brother of _____ a supposed lunatic,
Sheweth,

THAT _____ of _____ in the
county of _____ Esquire, your petitioner's brother,
now is, and has for these three years last past, been
so far deprived of his reason and understanding that he
is rendered altogether unfit and unable to govern himself
or to manage his affairs, as by the affidavits hereunto an-
nexed appears.

Your petitioner therefore most humbly prays that
your lordship will be pleased to order that a
commission, in nature of a writ *de lunatico in-*
quirendo, may issue to inquire of the lunacy of
the said _____ directed to such person as
your lordship shall think fit.

And your petitioner shall ever pray, &c.

The

The Affidavit.

R. B. of, &c. maketh oath, that he knows and is well acquainted with Mary M. of and that he, this deponent, has had the said M. M. under his care as a lunatic from the day of in the year 17 until the day of now instant. And that during all the said time of her being under the care of this deponent she the said M. M. was as this deponent well knows in a state of lunacy.

Sworn at, &c. before me,

A. B.

A Master Extraordinary in Chancery.

R. B.

Filed day of

Add affidavit of physician and others as to life and incoherences.

Precept (on Paper unstamped).

BY virtue of a commission, in nature of a writ *de lunatico inquirendo*, under the Great Seal of Great Britain, bearing date at Westminster, the day of last, to us, whose names are hereunder written, and others in the same commission named, directed to enquire whether M. M. late of widow, and now residing at be a lunatic or not.

These are therefore to will and require you to cause to come and appear before us twenty-four honest and lawful men of the county of on Tuesday, the day of instant, by

of the clock in the noon of the same day, at the
 house of Mr. in the town of
 in the county of commonly called or known
 by the name or sign of the then and there upon
 their oath to inquire of the lunacy of the said M. M.
 and of all such other matters and things as shall be given
 them in charge by virtue of the said commission, and
 therefore fail not at your peril. Given under our hands
 and seals the day of in the 43d year
 of the reign of Geo. III. by the grace of God of the
 United Kingdom of Great Britain and Ireland, King,
 Defender of the Faith, and so forth, and in the year of
 our Lord 1803.

T. E. (Ls)

W. C. (Ls)

A. M. (Ls)

To the Sheriff of the county of
 his Under Sheriffs or Deputy.

Indorsement on the Precept.

THE execution of this precept appears in the pannel
 hereunto annexed.

The answer of

A. L.

and

Sheriff

P. A.

The Pannel.

Middlesex.—Names of the jurors to inquire according to the tenor of the precept hereto annexed.

W. B. of

D. W. of

&c. &c.

A Warrant to produce the Lunatic.

BY virtue, &c. these are to will and require you to produce before us the said C. D. at the execution of the said commission on, &c. (as in the summons) there to be examined touching the matters aforesaid, and you are to give him notice accordingly; as also to any other person or persons who are guardians of him, or trustees of his estate, that they appear in his defence, if they shall think fit. Given under our hands and seals, &c.

To Mr. L. M. or such other person
or persons as now have the said
C. D. in their custody or power.

This warrant is to be written on paper without stamp, to which put three seals, and procure the commissioners' signature thereto (their fee is one guinea each) then leave the warrant at the sheriff's office, with directions to summon the jury. The under-sheriff will summon sixteen or seventeen respectable freeholders to attend at the place and time mentioned in the warrant; if thirteen of whom attend, it will be sufficient.

*The subpoena to compel the attendance of Witnesses
before the Commissioners and Jury.*

BY virtue of a commission, in nature of a writ *de lunatico inquirendo*, under the Great Seal of Great Britain, bearing date at Westminster, the day of in the year of the reign of King George the Third, to us whose names are hereunder written, and others in the same commission named, directed to inquire whether of in the county of Esquire, be a lunatic or not. These are to will and require you, that you personally be and appear before us, at the house of A. B. commonly called and known by the name of the Assembly-house, situate at Hampstead aforesaid, on the day of instant, by ten of the clock in the forenoon of the same day, and there upon your oath to testify the truth, according to your knowledge, touching the lunacy of the said and of all such matters as shall be demanded of you by virtue of the said commission. Hereof fail not at your peril. Given under our hands and seals, the day of in the year of our Lord 1807.

Proceedings on taking the Inquisition.

In the matter of M. M. widow.

- 1 Read commission.
- 2 Witnesses ready to prove the lunacy and the property.
- 3 The lunatic ready.
- 4 The jury to be all sworn.

5 Com-

Affidavit by a Physician.

In the matter of M. M. widow.

S. W. of, &c. M. D. maketh oath and saith, that he this deponent did on the _____ day of _____ last attend Mrs. M. M. of _____ in the county of _____ at the house of Mr. H. at _____ in the county of _____ and who keeps a private house for insane persons. And this deponent saith, that he staid with the said M. M. half an hour, or thereabouts, and that to the best of his judgment and belief the said M. M. is a person of insane mind and understanding, and not capable of taking care of herself and her affairs.

Sworn at, &c.

S. W.

The Paper of Evidence.

Witnesses

Speaks as to visiting M. M. for last past, found her incoherent, bursting into fits of passion without cause, and incapacitated of managing herself or her own affairs.

Mr. A. D.

Speaks to knowledge of M. M. for last past, and during that time always considered her as deranged and why—and thinks her at present worse than ever, and incapable of managing herself or her affairs.

M. P.

State in this manner the outline of all the evidence intended to be adduced.

The

The Inquisition and Return.

Middlesex ss. An inquisition taken at the house of *C. M. situate in* _____ *street in the county of Middlesex, commonly called or known by the name or sign of the* _____ *in the said county, the* _____ *day of* _____ *in the 43d year of the reign of, &c. and in the year of our Lord 1803, before T. E. A. M. and W. C. Esquires, his said Majesty's commissioners, named and appointed by virtue of a commission, in nature of a writ de lunatico inquirendo, under the Great Seal of Great Britain, bearing date the* _____ *to them the said commissioners and others in the said commission named, directed to enquire amongst other things of the lunacy of M. M. of* _____ *widow, upon the oath of (the jurors' names) good and lawful men of the said county of Middlesex, who being duly sworn and charged upon their oath say, that the said M. M. is at the time of taking this inquisition a lunatic, having lucid intervals, and has been so from the* _____ *day of* _____ *so that she is not sufficient for the government of herself, her manors, messuages, lands, tenements, goods, and chattels.*

And the same jurors upon their oath further say, that what lands, tenements, or hereditaments the said M. M. at the time of taking this inquisition is seised of, or entitled unto *they know not—or state what is given in evidence.* And that the said M. M. hath not alienated any lands or tenements during her said lunacy to the knowledge of the same jurors. And the said jurors upon their oath further say, that the said M. M. is at the time of taking this inquisition also entitled to the capital sum of _____

of 10,000*l.* in three per cent. consolidated bank annuities, or what other personal property is given in evidence.

And the said jurors upon their oath further say, that *J. P.* of _____ is the nephew of the said *M. M.* and that the said *J. P.* at the time of taking this inquisition is of the age of *twenty-one* years.

In testimony whereof, as well the said commissioners as the jurors aforesaid have to this inquisition set their seals the day and year first above written.

T. E. _____ All the jury sign here

A. M. _____ 16 or more.

W. C. _____

To be written on unstamped paper brief-wise.

No seals are put on the paper inquisition, that being only signed.

N. B. Blanks are to be left for the words in italics sufficient to insert the facts which depend on the evidence produced.

*The Commissioners Return indorsed on the
Commission.*

THE execution of this commission appears by the inquisition hereunto annexed.

Petition to appoint a Committee.

In the matter of _____ a lunatic.

To the Right Honble. the Lord High Chancellor of
Great Britain.

The

The humble Petition of
 the only brother and next of kin of the said
 lunatic, and also his nearer heir,
 Sheweth,

THAT pursuant to your Lordship's order of the
 day of _____ last, made upon the petition of
 your petitioner, a commission in the nature of a writ *de*
lunatico inquirendo was awarded and issued, directed to
 certain commissioners therein named, to inquire of the
 lunacy of _____ of _____ in the
 county of _____ Esquire, who is the elder and
 only brother of your petitioner.

That the said commission hath since been duly ex-
 ecuted on the _____ day of _____ last past,
 before the major part of the commissioners in the said
 commission named, and thereby it is found that the said
 _____ is a lunatic, and does not enjoy
 lucid intervals, so that he is not sufficient for the govern-
 ment of himself, his manors, messuages, lands, tene-
 ments, goods, and chattels, and that he has been in the
 same state of lunacy from the _____ day of _____

And it was by the said inquisition further found that the
 said _____ the lunatic, had not alienated any
 lands or tenements during his lunacy, to the knowledge
 of the said jurors; and it was by the said inquisition
 further found, that the said _____ was pos-
 sessed of (here state the lunatic's property) and the jurors
 on their oath said that your petitioner
 is the only brother, and nearer heir of the said lunatic,
 and that the said lunatic is of the age of _____ years.
 That your petitioner is very desirous that the personal
 estate of the said lunatic may be duly taken care of in
 such

such manner as is necessary and usual in cases of this nature.

That with a view to lessen the said security, and for the safety of the estate of the said lunatic, your petitioner is desirous that the stocks so standing in the lunatic's name, in the books of the Governor and Company of the Bank of England, may be transferred to the Accountant-General of the Court of Chancery, in trust in this matter.

Your petitioner therefore most humbly prays your Lordship that the care and custody of the person and estate of the said lunatic may be granted to your petitioner he giving such security as is usual in the like cases, and that your petitioner may be ordered to transfer into the name, and with the privity of the said Accountant-General, in trust in this matter, the said sum of 3 per cent. consolidated annuities, and reduced 3 per cent. annuities, so respectively standing in the name of the said lunatic in the books of the Bank; and that your Lordship will be pleased to make such further or other order in the premises as to your Lordship shall seem meet.

And your petitioner shall ever pray, &c.

Petition

*Petition to refer it to a Master to inquire of a
Committee.*

In the matter of N. R. a lunatic.

To the Right Honble. the Lord High Chancellor of Great
Britain.

The humble petition of A. R. the mother of the
said lunatic,

Sheweth,

THAT in pursuance of your Lordship's order made in
this matter, bearing date the eleventh day of November,
1805, a commission in the nature of a writ *de lunatico
inquirendo* issued, bearing date at Westminster, the
fourteenth day of the said month, to inquire amongst
other things of the lunacy of the said N. R.

That by the inquisition taken at _____ in the
county of _____ on the execution of the said
commission, bearing date the 20th day of November,
1805, it was amongst other things found and declared
that the said N. R. was then a lunatic, and did not then
enjoy lucid intervals, so that he was not sufficient for the
government of himself, his messuages, lands, tene-
ments, goods, and chattels, and that he had been in
the same state of lunacy from the first day of September
then last past, but how, and by what means, he became
a lunatic the jurors knew not unless by the visitation of
God.

That your petitioner is desirous that a proper person
may be appointed under the order and authority of your
Lordship to take care of the person and estate of the
said N. R.

14th January, 1806.

Be it so; and let it be referred to Mr. one of the Masters of the High Court of Chancery; and let the said Master also inquire and certify who is the heir at law and next of kin of the said lunatic, to whom let due notice of attending the said Master be given, and after the said Master shall have made his report, such further order shall be made as shall be just.

ELDON, C.

Your petitioner therefore most humbly prays your Lordship that it may be referred to one of the Masters of the High Court of Chancery to inquire and certify who is, or are, the most fit and proper person or persons to be appointed committee or committees of the said lunatic's person and estate, or that your Lordship will be pleased to make such further or other order in the premises as to your Lordship shall seem meet.

And your petitioner shall ever pray, &c.

Order confirming the Master's Report for appointing a Committee, and referring it back to consider of a suitable Maintenance and Inquiry as to debts, &c.

Friday the day of in
the 46th year of the reign of His Majesty King
George the Third, and in the year of our Lord
1806, In the matter of C. D. a lunatic.

WHEREAS A. D. the mother of the said lunatic,
L. D. and F. D. the sisters of the said lunatic, did on
the

the first day of March instant, prefer their petition to me, stating, that in pursuance of an order made in this matter, bearing date the 11th day of November, 1805, a commission in the nature of a writ *de lunatico inquirendo* issued, bearing date the 14th day of the said month, to inquire amongst other things of the lunacy of the said _____ and that by the inquisition taken thereon, bearing date the 20th day of November, 1805, it was found and declared that the said C. D. at the time of taking the said inquisition was a lunatic, and did not enjoy lucid intervals, so that he was not sufficient for the government of himself, his messuages, lands, tenements, goods, and chattels, and that he had been in the same state of lunacy from the first day of September, 1805, but how and by what means he so became a lunatic the jurors knew not, unless by the visitation of God; and the jurors further found that the said lunatic had not alienated any lands or tenements during his lunacy to the knowledge of the said jurors. And that by an order made in this matter bearing date the 14th day of January, 1806, it was ordered, that it should be referred to John Ord, Esquire, one of the Masters of the High Court of Chancery, to inquire and certify who was or were the most fit and proper person or persons to be appointed committee or committees of the said lunatic's person and estate, and also inquire and certify who was the heir at law and next of kin of the said lunatic, to whom due notice of attending the said Master was to be given; and after the said Master should have made his report such further order should be made as should be just: and that in pursuance of the said order the said Master made his report, bearing date the 4th day of February, 1806, and
s
thereby

twenty-one, and if he should happen to die before he should attain that age, then upon trust to assign and transfer the said stocks and funds in or upon which the said 5000*l.* should be invested, and the unapplied dividends which should have arisen and should afterwards arise therefrom, unto or amongst all other the children of A. D. mother of his godson, in equal proportions, share and share alike, their respective shares thereof to be paid, assigned, or transferred to them as they should severally attain the age of twenty-one years; and if no child of the said A. D. should attain that age, then upon trust to pay, assign, and transfer the same to his next of kin in equal degree provided, and his will was that his said executors and trustees and the survivor of them, and the executors and administrators of such survivor upon a proper representation being made to them that it was necessary some allowance should be made towards the education of his said godson, should and might make such allowance as they in their discretion should think proper, and also for putting his said godson to any trade or profession out of the dividends arising from the respective sums to be invested in the stocks or funds for their benefit. And the said Master further certified that he found that the said R. P. and Q. Z. both proved the said will, and it had been admitted before him on behalf of all the parties that the said executors soon afterwards invested the said 5000*l.* in the purchase of four per cent. consolidated bank annuities, which together with the interest thereon, after discharging the expence of maintenance and education, was from time to time likewise invested in the purchase of like annuities, and that there was standing in their names the sum of

per cent. consolidated annuities, which constitutes the whole of the property the said lunatic is possessed of. And the said Master further certified that he found that the said lunatic having attained his age of twenty-one years in or about the month of April 1805, thereby became absolutely entitled to the aforesaid four per cent. consolidated annuities; and it having been proposed before him on behalf of the petitioners A. D. the mother, and of L. D. and F. D. the sisters of the said lunatic, that the said N. D. should be appointed committee of the said lunatic's person and estate, he had considered thereof, and no objection appearing to him thereto, he had approved of the said N. D. as a proper person to be appointed such committee. The petitioner therefore prayed that the Master's said report, bearing date the fourth day of February instant, might stand absolutely confirmed; and that the said N. D. might be appointed committee of the said lunatic's person and estate upon giving the usual security; and that it might be referred back to the said Master to inquire and certify what has been properly expended in the maintenance and support of the said lunatic from the date of the inquisition, and by whom, and what will be fit and proper to be allowed for the maintenance and support of the said lunatic for the time to come, regard being had to his circumstances and estate, with the usual directions in that respect, and that the said Master might inquire and certify what debts were due and owing by the lunatic, and to whom, and out of what fund the same (if any) should be paid and discharged. Whereupon I ordered all parties concerned to attend me on the matter of the said petition on the then next day of petitions, whereof
due

due notice was to be given forthwith, and the matter of the said petition coming on to be heard before me on this day accordingly in the presence of Mr. Benyon of Counsel for the petitioners, and of Mr. Cooke of Counsel for the next of kin of the said lunatic. Now upon hearing the said petitioners and the Master's report read, and what was alledged by the Counsel aforesaid, I do think fit and hereby order that the Master's said report, bearing date the fourth day of February last past, be confirmed; and I do think fit and hereby further order that the custody of the person and the care and management of the estate of the said lunatic be granted to the said N. D. he first giving such security as His Majesty's Attorney-General shall approve of for answering the said estate and accounting for the rents, issues, and profits thereof once in every year, or oftener if thereunto required, before the said Master; such security to be perfected on or before the second day of August now next ensuing, and in the mean time, and until such security shall have been perfected, the said N. D. is not to interfere in any manner in the affairs and concerns of the said lunatic as committee or otherwise, and in default of such security being entered into within the time aforesaid, I do think fit and hereby further order that it be referred back to the said Master to approve of some other proper person or persons to be committee or committees of the said lunatic's estate in the room of him the said N. D. and in that case after the said Master shall have made his report such further order shall be made as shall be just. And I do think fit and hereby further order that it be referred to the said Master to inquire and certify what is the situation of the said lunatic and the nature of his lunacy, and of

what the fortune of the said lunatic consisted at the date of the inquisition, and of what it doth now consist, and by whom the said lunatic hath hitherto been maintained, and what will be proper to be allowed for such maintenance and for his maintenance and support for the time to come, regard being had to his circumstances and estate. And I do think fit and hereby further order that the said Master do also inquire and certify what debts are due and owing by the said lunatic, and to whom, and out of what fund the same (if any) ought to be paid and discharged; and after the said Master shall have made his report such further order shall be made as shall be just: and let due notice of attending the said Master to be given to such person or persons as would be entitled to a distributive share or distributive shares of the said lunatic's estate in case he were now dead intestate.

ERSKINE, C.

N. B. By this order it appears that the heir at law was appointed committee of the person and estate, with the concurrence of the next of kin of the lunatic.

Petition that Stock in the Public Funds may be transferred to the Accountant-General in case this was omitted in the former Petition to appoint a Committee.

In the matter of A. B. a lunatic.

To the Right Honble. the Lord High Chancellor of
Great Britain.

The

The humble petition of C. B. Esquire, the son and heir at law of the said lunatic, or of the committee,

Sheweth,

THAT a commission having issued to inquire of the lunacy of the said A. B. he was by inquisition duly taken thereon on the day of found to be a lunatic.

That in pursuance of your Lordship's order a grant of the custody of the said lunatic's estate to L. M. passed the Great Seal on the day of

That part of the said lunatic's personal estate consists of 5000l. in three per cent. consolidated bank annuities now standing in his own name in the books kept at the Bank of England.

Your petitioner therefore humbly prays that your Lordship would be pleased to order that the Accountant-General, Secretary, or Deputy Secretary for the time being of the Governor and Company of the Bank of England may forthwith transfer the said capital sum of 5000l. in three per cent. consolidated bank annuities, now standing in the name of the said A. B. the lunatic, unto the Accountant-General of this honourable Court, in trust, in this matter, and that the said Accountant-General of this honourable Court may be ordered to declare the trust thereof accordingly; and that the said Accountant-General, Secretary, or Deputy Secretary, or one of the Cashiers of the Bank of England may be ordered to receive the interest

terest and dividends due on the said capital sum of 5000l. three per consolidated bank annuities, and pay the same into the Bank in the name and with the privity of the said Accountant-General of this honourable Court, in trust, in this matter, and that the said Accountant-General of this honourable Court may be also ordered to declare the trust thereof accordingly, &c.

And your petitioner shall ever pray, &c.

The order on this petition is made without any attendance, and is drawn up by the Register.

Petition for Committee to pass his Accounts.

In the matter of _____ a lunatic.

To the Right Honble. the Lord High Chancellor of
Great Britain.

The humble petition of _____ of _____ in
the county of Middlesex, Esquire, committee of
the estate of the said lunatic,

Sheweth,

THAT a commission having issued to inquire of the lunacy of the said _____ he was, by inquisition duly taken thereon the _____ day of _____ found to be a lunatic. That in pursuance of your Lordship's order made in this matter for that purpose, a grant of the custody of the said lunatic's estate, on the _____ day of _____ 1790, passed the Great Seal

Seal to your petitioner. That your petitioner, as committee of the said lunatic's estate, hath received and paid divers sums of money on account of the said lunatic, and his estate, and is desirous to pass his account thereof.

Your petitioner therefore humbly prays your Lordship, that it may be referred to the Master to whom this matter is already referred to take and pass your petitioner's accounts of receipts and payments of the said lunatic's estate from the time he was appointed committee thereof, and therein to make unto your petitioner all just allowances, and particularly an allowance of his costs of passing the said accounts, and all other his costs incurred in this matter.

And your petitioner shall ever pray, &c.

Form of the Committee's Account to the Lunatic's Decease.

An account of the estate and effects of R. W. Esquire, a lunatic, come to the hands of E. A. Esquire, the committee of the estate, from _____ to the _____ when the lunatic died, and of the application of such parts thereof as have been applied.

1797.

RECEIPTS.

April 29.—Received of J. S. for one year's net profits on the lunatic's capital in their partnership

concern to the _____ day of _____ 112 10 0

May

May 4.—Received of Messrs. S. half a year's rent of the lunatic's house			
in due last	30	0	0
Received from the partnership concern of W. R. and Co. the remaining moiety of the lunatic's capital in their concern, except which on taking stock was estimated to be the value of the lunatic's 1-5th share of the freehold premises belonging to that concern, and which they insisted should remain in their hands until a legal conveyance could be made to them thereof, they in the mean time paying lawful interest for the same	985	0	0
Received of S. L. final balance of his debt of remaining due to the lunatic on bond of 500l. with interest due on this balance from to this day	123	7	0

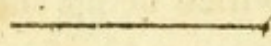
Dates.

PAYMENTS.

Paid S. W. a quarter's allowance for the maintenance of the lunatic's family	250	0	0
Paid R. L. bricklayer, for repairs of the house at	23	7	0

Paid

Dates. Paid the Sun Fire Office for one year's insurance of the lunatic's dwelling-house	4 5 0
Paid to the Chamberlain of London for one year's ground rent of the lunatic's premises in street	54 0 0
Paid sundry expences of the funeral of the lunatic, viz. [Set forth a list of each]	
Paid S. W. one quarter and six week's allowance for maintenance of the lunatic's family to his decease	
Advanced to his seven children for their mourning each	
Paid nurses and servants	
Paid the costs of the committee	
Paid the costs of &c.	



The Master's Report on passing the Committee's Account to the Lunatic's Decease.

In the matter of R. M. Esquire, a lunatic.
To the Right Honble. the Lord High Chancellor of
Great Britain.

IN pursuance of your Lordship's order made in this matter on the petition of E. A. of Esquire, committee of the estate of the said lunatic, bearing date the whereby I am directed to take and pass the
the

amounting together to the sum of _____ which I have allowed the said committee, and the same being deducted out of the said sum of _____ there remains in the said committee's hands to balance his said account the sum of _____ the particulars of all which said receipts, payments, disbursements, and allowances, as also the rents remaining in arrear, appear and are contained in the said account which is hereunto annexed. And the said committee having made affirmation of the truth of the said account, and produced proper vouchers before me, I have therefore allowed the same, and in testimony thereof I have set my name at the beginning and also at the end of the said account, and which said account is to be filed with and remain in the office of the Clerk of the Custodies, which I humbly certify to your Lordship.

Order on the Committee's Petition to pay in the Balance of his Accounts.

Thursday, the _____ day of _____
in the _____ year of the reign of His
Majesty King George the Third, 1803.
In the matter of _____ a lunatic.

UPON consideration this day had by the Right Hon. the Lord High Chancellor of Great Britain of the humble petition of _____ the committee of the said lunatic's estate, setting forth that a commission in the nature of a writ *de lunatico inquirendo* sometime ago issued to inquire of the lunacy of the said _____

and

and by the inquisition thereon taken it was found that the said _____ was a lunatic, and not sufficient for the government of himself, his messuages, lands, tenements, goods, and chattels. That by an order made in this matter bearing date the _____ day of _____

the petitioner together with _____ were appointed committees of the estate of the said lunatic; that in pursuance of the last mentioned order a grant issued under the Great Seal of Great Britain, dated the _____ day of _____ accordingly.

That the petitioner hath passed his accounts of his receipts and payments of the said lunatic's estate to Michaelmas 1806, and on the foot of the said account there is a balance of _____ due from the petitioner which he is desirous of paying into the bank in the name and with the privity of the Accountant-General of the Court of Chancery in trust in this matter; and therefore praying that the petitioner may be at liberty forthwith to pay the said sum of _____ into the bank, in the name and with the privity of the Accountant-General of the Court of Chancery in trust in this matter, and he may declare the trust thereof accordingly, subject to further order, and that the same when so paid in may be laid out in the name and with the privity of the said Accountant-General in the purchase of bank three per cent. annuities, and he may declare the trust thereof; subject to further order; whereupon it is ordered that the petitioner do pay the said sum of _____ into the bank with the privity of the Accountant-General of the Court of Chancery in trust in this matter, and it is ordered that the same when so paid in be laid out in the purchase of bank three pounds per cent. annuities, in the _____ name

name and with the privity of the said Accountant-General, in trust in this matter, and he is to declare the trust thereof accordingly, subject to further order, and for the purposes aforesaid the said Accountant-General is to draw on the bank according to the form prescribed by the Act of Parliament made for the relief of the suitors of the Court of Chancery, and the general rules and orders of the said Court in that case made and provided.

A Joint Petition that a Committee of a Lunatic deceased may be allowed to pay Interest on a Debt acknowledged by the next of Kin to have been due, and also to retain Sums advanced for the Maintenance of the Lunatic's Family, and also to retain for his own Compensation, and then to pay the Balance into Court, and that one of the next of Kin may be allowed Costs incurred by the personal Committee, and not included in a former Taxation.

In Chancery.

In the matter of R. W. Esquire, a lunatic.

To the Right Honble. the Lord High Chancellor of
Great Britain.

The humble petition of _____ the com-
mittee of the estate of the said lunatic ;
one of the sons, next of kin, and admi-
nistrators

having for a great number of years been paid by the said lunatic himself previous to his lunacy, and receipts taken by him from the said *parties* expressing it to be for such interest money, but the said *parties* not being able to produce regular securities for such three hundred and fifty pounds, the Master to whom this matter stands referred did not consider himself sufficiently authorised to allow such payments as interest for the same in your petitioner E. A.'s account, without the consent of all the then next of kin and representatives of the said lunatic, of whom one only (who had married a daughter of the said lunatic since his lunacy, and was at variance with the others of the said lunatic's family, and with the said *parties*) objected. And in consequence of such several payments of seventeen pounds and ten shillings were accordingly struck out of the credit side of your said petitioner's accounts who hath not been able to procure repayment of the same from the said *parties*.

And your petitioner E. A. further sheweth unto your Lordship, that the said lunatic's affairs were extremely intricate and complex; that his property consisted of leasehold estates at London and in the city of *London*—of money due on securities—of money remaining in partnership concerns in which the lunatic was formerly a partner, but which partnerships had under particular circumstances expired—of money, and of different interests in six distinct trading concerns in which the lunatic long after his lunacy continued a partner, and which interests were managed and regulated by your petitioner and the solicitor and agent to the said lunatic's estate. That those concerns were so conducted.

as to increase the income of the lunatic from about
to

per annum. That your petitioner E. A. after the accounts of those various concerns were settled by such solicitor and agent, received the rents, the interest money due on securities, the lunatic's proportion of the annual profits from the different trades, and the lunatic's capital invested in such trades, as the respective partnerships therein expired; during the space of years; to the amount on an average of per annum; and during the same period made the several payments on account of the estate to nearly the same amount; that for those purposes your petitioner was under the necessity of keeping extensive accounts, and also accounts with a banker in the said city of but is advised that in capacity of committee of the said lunatic's estate he is not intitled to any allowance as receiver, although your petitioner is no ways related to the said lunatic or connected with his family except as such committee.

And your petitioner E. A. further sheweth unto your Lordship, that on the decease of the said lunatic the trustees named in his will renounced the probate and execution thereof, and the next of kin of the said lunatic took out administration to his effects with the will and codicils annexed, and by a certain power of attorney bearing date the day of one thousand seven hundred and ninety-eight, under their hands and seals duly constituted and appointed your petitioner E. A. their true and lawful attorney in their names or otherwise howsoever to ask, demand, sue for, collect, get in, and receive all and singular

singular the goods, chattels, rights, credits, estates, and effects whatsoever of or belonging to the said lunatic then deceased, or unto them as administrators or administratrixes as aforesaid, for the purposes in such power mentioned.

And your petitioner E. A. further shews unto your Lordship, that since the decease of the said lunatic his representatives have been at variance and unable to settle his affairs, and he hath advanced to several of the said lunatic's family (who are entitled as his legal representatives and as legatees in such will to part of the testator's property) different sums of money towards their support and maintenance, many of them being in great necessity, and such advances never having exceeded their interest under the said will.

And your petitioner W. T. humbly shews unto your Lordship, that having upwards of thirty years since intermarried with the said lunatic's sister, the said lunatic by way of portion with her gave him a house and premises for carrying on his trade as a
in the said city of _____ which your
petitioner W. T. occupied for a great number of years
as his own property in virtue of such donation of
the said lunatic. That your petitioner W. T. hav-
ing at length occasion to remove from such dwelling-
house and premises, the same were sold, and the lunatic
received the purchase money thereof as a loan from your
petitioner W. T. and from that time to the period
of his lunacy regularly paid him interest for the
same at five pounds per centum per annum, always mak-
ing your petitioner give him receipts as for interest
thereof; that at the time of the lunacy the lunatic's
T 2 _____ wife

wife and children, who well knew the preceding circumstances, satisfied the other petitioner E. A. that such claim of interest was a just demand, and he hath continued payment thereof accordingly to your petitioner W. T. taking receipts for the same as due on account of interest, in like manner as the said lunatic had done during his sanity.

And your petitioner T. W. humbly shews unto your Lordship, that by your Lordship's order bearing date the day of one thousand seven hundred and ninety-eight, the costs and charges incurred by your petitioner in the matter of the committeeship of the person if the said lunatic were (with the costs of the other parties) referred to the Master to whom this matter stands referred to be settled; and the same when so settled were by your Lordship's order directed to be paid by the other petitioner E. A. out of the said lunatic's estate. That in pursuance of such order all the other parties carried in their respective costs which were settled and paid, but the costs of your petitioner T. W. from an error in the mode in which they were carried in, were not proceeded upon, and the Master having made his report on that order conceived it irregular again to proceed thereunder and make a separate report thereof; in consequence of which your petitioner T. W. has been unable to procure payment of his costs so directed to be settled and paid by your Lordship's aforesaid order.

26th July, 1800.

Let all parties concerned attend me on the matter of this petition on the next day of petitions. Hereof give notice forthwith.

Your petitioner E. A. therefore humbly prays your Lordship that out of the balance of

pounds

LOUGHBOROUGH, C.

so reported due

by the said Master from your petitioner on passing his final account as committee of the said lunatic's estate, your petitioner may be permitted to deduct the several annual payments of seventeen pounds and ten shillings each made to the said W. T. for interest during the time of your petitioner's being such committee. Also that your petitioner E. A. may be permitted to deduct out of such balance the several payments made by him for the support and maintenance of those branches of the lunatic's family who are his legal representatives or legatees under his will; and further to deduct from the aforesaid balance such sum of money as your Lordship shall think your petitioner E. A. reasonably entitled to as receiver of the lunatic's property in manner and under the circumstances before stated; and that after such deductions shall be so made, your petitioner E. A. may either, in virtue of the before-mentioned power of attorney, carry over the then balance to his account with the administrators with the will annexed of the said lunatic, or pay the same

into Court in the name of the Accountant-General, in trust in this matter, and that thereupon the recognizance entered into by your petitioner E. A. as committee as aforesaid may be vacated.

And your petitioner W. T. humbly prays your Lordship that the before-mentioned payment of seventeen pounds and ten shillings per annum so made by the said E. A. to your petitioner W. T. for interest as aforesaid, may be allowed to the said E. A. out of the balance in his hands, as your petitioner W. T. is advised he shall otherwise be involved in great expence and litigation respecting the same.

And your petitioner T. W. humbly prays your Lordship, that it may be referred to the Master to whom this matter stands referred to settle the before-mentioned costs and charges of your petitioner T. W. incurred in the matter of the committeehip of the person, and included in your Lordship's order of the day of one thousand seven hundred and ninety-eight, and that the same when so settled may be paid by the other petitioner E. A. out of the aforesaid balance remaining in his hands;—

Or that your Lordship shall be pleased to make such further or other order in the several premises as to your Lordship shall seem meet.

And your petitioners shall ever pray, &c.

N. B. On

N. B. On hearing this petition the Court referred it to the Master to see what payments had been made by the committee to any part of the family for their immediate necessity, which the Master might think proper to be allowed on vouchers. To allow all the payments made to W. T. but none to the committee as receiver, and the costs of T. W. were also referred; and the balance to be paid into Court forthwith.

*Petition of the Committee to Vacate his
Recognizance.*

In the matter of R. W. Esq. a lunatic.

To the Right Honble. the Lord High Chancellor of
Great Britain.

The humble petition of E. A. Esquire, the com-
mittee of the said lunatic's estate,

Sheweth,

THAT a commission having issued to inquire of the lunacy of the said R. W. he was by an inquisition duly taken thereon the day of
17 found to be a lunatic, and that in pursuance of an order for that purpose a grant of the custody of the said lunatic's estate to your petitioner passed the Great Seal on the day of and that your petitioner from that time to the death of the said lunatic in March, 17 acted as such committee of the said lunatic's estate, and passed all his accounts before the Master to whom this matter stands referred; and that on the final account taken before such Master there

of T. W. the lunatic's son, omitted to be taxed as therein mentioned; and that what should be found due for such costs be paid by your petitioner out of the said sum of _____ reported to be in your petitioner's hands belonging to the said lunatic's estate; and it was thereby further ordered that the said Master should take an account of the several sums of money paid by your petitioner for or on account of the interest of the said sum of _____ due to the said W. T. and also the several sums of money advanced and paid by your petitioner to or for the use and benefit of those branches of the family of the said lunatic who were his legal representatives or legatees under his will, and that the said Master should allow the same respectively with the costs aforesaid unto your petitioner; and it was thereby further ordered, that what the said Master should find to be due from your petitioner in respect of the said sum of _____ (after the several deductions aforesaid) should be paid by him into the bank, in the name, and with the privity of the Accountant-General of this Court, in trust in this matter, who was to declare the trust thereof accordingly, subject to your Lordship's further order.

That in pursuance of your Lordship's said order the said Master hath taken an account of the several sums of money so paid by your petitioner for or on account of the interest of the said _____ due to the said W. T. and hath allowed him the several sums of _____ so by him the said Master before disallowed as aforesaid, amounting together to the sum of _____ and the said Master hath also taken an account of the several sums of money advanced by your petitioner to or for the use and benefit of those branches of _____ of

the family of the said lunatic who were his legal representatives or legatees under his will, amounting together to the sum of

That the said Master hath also taxed the costs of all parties since the last taxation, and particularly the costs of the said T. W. omitted to be taxed as aforesaid, amounting together to the sum of which said sums of and making together the sum of the said Master hath allowed to your petitioner, and which is to be retained by him out of the said sum of (the balance remaining in your petitioner's hands on passing his final account before the said Master as committee of the said lunatic's estate) and the sum of being deducted from the said sum of leaves the sum of which the said Master found to be due from your petitioner, and was by him to be paid into the bank in the name of the Accountant-General of this Court, in trust in this matter, pursuant to the directions of your Lordship's said order, as by the said Master's report bearing date the last with the schedules thereunto annexed will appear.

That your petitioner in obedience to your Lordship's said order, and pursuant to the said Master's report, hath accordingly paid into the Bank of England (in the name of the said Accountant-General) the said sum of in trust in this matter, as by the said Accountant-General's certificate, dated will also appear.

12th March, 1805.

Let all parties concerned attend me on the matter of this petition on the next day of petitions. Hereof give notice forthwith.

ERSKINE, C. Your petitioner therefore humbly prays your Lordship that the bond or recognizance entered into by him on _____ for his your petitioner's duly accounting before the Master for all monies received by him as committee of the said lunatic's estate may be vacated and delivered up to him.

And, &c.

Petition of the next of Kin, Parties to a Suit commenced after Decease of the Lunatic to establish his Will, for the Balance of his Estate to be carried over to the Cause.

In Chancery.

Between J. W. and others Plaintiffs,
and
R. H. and others Defendants.

To the Right Honble. the Lord High Chancellor of
Great Britain.

The humble petition of R. H. &c. three of the defendants above-named,

Sheweth,

THAT R. W. late of _____ deceased, being possessed of considerable real and personal estate, and being then of sound and disposing mind made his last will and testament, bearing date on or about the _____ and afterwards made three codicils thereto.

That

That the said R. W. having several years afterwards become disordered in his mind, a commission in the nature of a writ *de idiota inquirendo* was, in or about the year _____ issued under the Great Seal of Great Britain, and he was by an inquisition duly taken thereon the _____ day of _____ found to be a lunatic; and in pursuance of an order for that purpose, a grant of the custody of the said lunatic's estate passed the Great Seal on the _____ day of _____ to E. A. as committee thereof.

That the said E. A. from that time until the death of the said lunatic in _____ 17 _____ acted as such committee, and passed all his accounts before the Master to whom the matter of the said lunacy was referred, and did during the progress of the said committeeship transfer divers capital sums of three per cent. consolidated bank annuities into the name of the Accountant-General of this honourable Court to the credit of the matter of the said lunacy, and also paid divers sums of money in cash to the said Accountant-General, to the credit of the said matter, which appeared to be remaining in his hands upon the balance of such account, and having passed his final account, and paid the balance thereof to the said Accountant-General, the recognizance of the said E. A. hath been since duly discharged.

That there is now standing in the name of the said Accountant-General, in trust in the said matter, the capital sum of _____ in three per cent. consolidated bank annuities, and also the sum of _____ in cash.

That the complainants filed their bill in this honourable Court in Michaelmas Term 17 _____ for the purpose of having

having the said will and codicils established, and the respective trusts thereof carried into effect, and they are now proceeding in the said suit, and your petitioners have appeared to the said bill, and taken an office copy thereof.

That your petitioner, together with J. W. and T. W. two of the said complainants, and also A. H. and M. T. two other of the defendants in this cause, are the only six surviving children and next of kin, and administrators with the said will and codicils annexed of the said R. W. deceased, the surviving executors therein named having renounced the probate thereof.

June 23, 1806.

Let all the parties concerned in the matter of this petition attend me on the next day of petitions. Hereof give notice forthwith.

ERSKINE, C.

Your petitioners therefore humbly pray that the said Accountant-General may be directed to transfer the said capital sum of _____ in three per cent.

consolidated bank annuities, in trust, in the matter of the said lunacy, to the credit of this cause; and that he may be also directed to lay out and invest the sum of _____ remaining in his hands as aforesaid, or so much thereof as this Court shall think proper in the purchase of like three per cent. consolidated bank annuities, and that the same may be added to the aforesaid capital, to the credit of this cause; and that the dividends of all the said capital sums as they shall become due and be received may from time to time be laid out in the said stock in accumulation of the aforesaid capital sum or sums to the credit of this cause.

And your petitioner shall ever pray, &c.

N. B.

N. B. Upon the decease of the lunatic it is necessary that a suit should be instituted in order to ascertain what debts were outstanding and what were due from him before the Court can order any distribution of his property brought into Court under the lunacy amongst his next of kin; and in order to have all the parties interested before the Court, a measure never done in so summary a way as by petition: therefore any one of them may file a bill against all the rest, and if they will unite in forwarding the object of the suit it may be carried through with great expedition and without much expence; particularly if the lunatic died intestate; or much time and expence may be prevented if they all except one unite as plaintiffs against that one only, which would obviate several answers, and greatly reduce the delay and expence in proceeding upon the reference under the decree.

Form recommended for the Order of a Physician on his advising a Patient to be sent to a Private Madhouse.

I, the undersigned W. D. of _____ doctor of physic (apothecary or surgeon as the case may be) do hereby, pursuant to the Statute of 14 Geo. III. c. 49. s. 21, certify that M. L. of _____ widow (or as the case may be) is a patient in a state of lunacy, and proper to be received into a house for the reception of lunatics; and I do therefore advise and order that (she or he) be forthwith conveyed to the house licenced and kept _____

kept for that purpose by A. S. situate in
street in the county of

Witness my hand and seal, this day
of 1807.

W. D. (Seal).

*Form of the Notice from the Keeper to the Secretary
of the Commissioners.*

Sir,

I, master and keeper of the licensed
madhouse for the reception of lunatics situate in
street, in the city or town of
in the county of do hereby, pursuant to
the Statute of 14 Geo. III. c. 49. s. 21. give you notice
that of in the county
of spinster, was on the day
of this instant received by me into my
said house as a lunatic patient by the direction of J. W.
of aforesaid, Esquire, and by the advice
and order of M. T. of in the county of
doctor of physic (surgeon or apothecary
as the case may be). Witness my hand this
day of 1807.

W. S.

To the secretary of the commissioners
for licensing houses for the reception
of lunatics, to be left with the bea-
dle of the college of physicians in
London.

Form

Form of a Petition to the Lord Chancellor, or either of the two Chief Justices, for an Order to inspect a Licenced Madhouse upon the Suggestion of Ill-treatment and unnecessary Detention of a Patient there.

To the Right Honble. the Lord High Chancellor of Great Britain.

The humble petition of C. L. of
Sheweth,

THAT A. L. spinster, the daughter of your petitioner, having been deemed in a state of lunacy, and proper to be received into a house licenced for the reception of lunatic patients under the Statute of 14 Geo. III. c. 49. was on or about the day of 1807, pursuant to your petitioner's direction in writing, and by an order under the hand and seal of W. D. of doctor of physick, both bearing date on or about the day of conveyed to and received into the house kept for that purpose by M. S. situate in street, in the county of where she is still confined.

That no commission of lunacy hath been prayed in this case, as she the said A. L. hath not any estate of inheritance or personal estate, but doth depend solely for support and maintenance upon your petitioner.

That a very considerable expence hath been already incurred to your petitioner in medical advice and assistance, and in the present maintenance of the said A. L.

That during the first three months of her confinement in the said house your petitioner and his wife had ready
access

access to her frequently, and were advised to encourage hopes of her recovery, but since that period all such access has been denied to them by the said M. S. or by his agents.

That your petitioner has regularly paid to the said M. S. the whole of his demand every week up to last.

That your petitioner hath reason to believe, and hath been credibly informed, that (here state some of the grievances complained of) or that she the said A. L. hath recovered since her residence in the said house sufficiently to be able to return home; and that by the tender attentions which would be devoted to her in your petitioner's family there is the utmost reason to infer that her recovery would be completed more readily than by her remaining for any longer time in the said house.

That your petitioner has reason to believe that the said M. S. or his agents, hath persisted in refusing access to the said A. L. in order to conceal her progressive recovery for sinister purposes.

Your petitioner therefore most humbly and earnestly prays

That your Lordship would be pleased to order that the commissioners appointed by the said act, or any three or more of them (or, *if in the country*, the justices of the peace and physician appointed at the General Quarter Sessions held at in and for the county of on day of for the purposes of the aforesaid act, or any two of them) to visit and inspect the aforesaid house licenced for the reception of lunatics at street, in in the county of of

of *James the 1st* and that they may be ordered to make report to your Lordship touching all the several matters herein before set forth, and such further and other matters as they shall think deserving of your Lordship's notice; and that your Lordship will be pleased to order that the registry kept by the said commissioners, or their secretary, at the college of physicians of London, of all reports, matters, and things touching the said licenced house, may be laid before your Lordship for inspection.

And that your Lordship would be pleased to grant to your petitioner such relief in the premises as the nature of the case requires and as to your Lordship shall seem meet.

And your petitioner shall ever pray, &c.

N. B. This petition must be supported by affidavits of the facts.

As the act gives a like jurisdiction to the Lord Chief Justice of the Court of King's Bench, and of Common Pleas the address of the petition may be varied accordingly.—To the Right Hon. Edward Lord Ellenborough, Lord Chief Justice of His Majesty's Court of King's Bench.—To the Right Hon. Sir James Mansfield, Knt. Lord Chief Justice of His Majesty's Court of Common Pleas.

The Petitioner's Bill of Costs.

In the matter of N. B. a lunatic.

The bill of costs of A. B. the mother, and the other relations of the lunatic, for suing out and prosecuting the commission of lunacy in this matter, and for the appointment of committee, &c.

Michaelmas Term, 1805.

Sept. 11. Attending Mr. J. B. and Mr. W. by appointment, conferring and advising as to the propriety of taking out a commission, which was determined on, and Mrs. B. and J. B. to be the petitioners, and taking instructions accordingly	0 13 4
Writing letter to Mr. W. on, &c. &c.	0 3 6
30th. Attending Mr. J. B. relative to the property, taking minutes thereof, advising with the trustees in whose names the stock stood, &c. &c.	0 13 4
Attending Mr. W. relative to his affidavit to support the same, and on Dr. W. for the same purpose, taking his instructions	0 6 8
Writing Dr. W. afterwards thereon	0 3 6
Drawing and ingrossing the same	0 4 2
Duty and paper	0 2 8
Attending him, reading over the same, and afterwards to the public-office to procure him to swear thereto	0 6 8
Paid oath	0 1 6
Drawing petition for commission	0 6 8
Engrossing same, paper, and duty	0 5 7
U 2	Attending

Attending to present same, and afterwards for answer	0 6 8
Paid for answer	0 15 0
Paid filing affidavit	0 4 9
Paid filing petition with clerk of the custo- dies	0 8 7
Attending for that purpose	0 6 8
Attending the petitioner, consulting as to ex- ecuting the commission, taking minutes of the relations, and age of himself and of the lunatic, &c.	0 6 8
Paid for commission	3 16 8
Solicitor's fee thereon	2 2 0
Writing the petitioner on the necessity of an affidavit to prove him to be the eldest bro- ther; and his age, and to attend to give evidence on executing the commission	0 3 6
Attending Mr. J. R. conferring as to the time and place to be appointed, and on the necessity of some evidence to prove him to be the heir at law, &c	0 6 8
Attending the commissioners severally to procure their appointment to execute the commission	1 0 0
Attending Dr. W. conferring thereon	0 6 8
Drawing and engrossing precept to the sheriff	0 5 0
Drawing and engrossing warrant to produce the lunatic	0 5 0
Drawing and engrossing five subpœnas for witnesses	0 15 0
Paid commissioners' fees on signing the same	3 3 0
Solicitor's fee thereon	1 0 0
	Short

Short copy of the precept to keeper	0	1	0
Attending the sheriff to fix with him the execution of the commission and to deliver him the precept	0	6	8
Attending after several witnesses, when it appeared that only A. B. C. D. and Dr. W. were necessary	0	13	4
Serving subpoenas on each person	0	5	0
Drawing the inquisition in blank	1	13	4
Being very long and special attending one of commissioners settling same	0	6	8
Fair copy	0	12	6
Fair copy to exhibit to the jury	0	12	6
Perusing writings and drawing account of the property as to extent			
Attending three commissioners, each three guineas	9	9	0
Paid coach hire for them and witnesses, and to bring the lunatic	1	11	0
Paid the sheriff	3	3	0
Paid seventeen jurymen	17	17	0
Paid summoning officer	2	2	0
Paid cryer	0	5	0
Bill of expences of commissioners, sheriff, jury, &c.	27	14	0
Attending, settling same, and taking receipt	0	6	8
Engrossing inquisition	0	15	0
Parchment and duty	0	8	6
Paid commissioners examining and signing same	3	3	0
Solicitor's fee thereon	1	1	0
To Dr. W. for his attendances	3	3	0
Paid filing same and for office copy	1	14	10

Attending for that purpose	0	6	8
Entering caveat against any person taking the grant	0	5	0
Attending thereon	0	6	8
Drawing and engrossing affidavit of the lu- natic's relations, &c.	0	12	8
Paid filing and copy	0	4	8
Writing Mr. J. B. on the execution of the commission for instructions as to further proceedings	0	3	6
Attending him thereon, conferring, &c. &c.			
Drawing petition for appointment of a com- mittee	0	6	8
Engrossing, duty, and paper	0	5	2
Attending to present same for answer	0	6	8
Paid answering	0	15	0
Paid filing with clerk of the custodies	0	8	8
Attending to file same	0	6	8
Copy for the master	0	2	6
Letters and messengers	0	5	0

Hilary Term, 1806.

Attending, consulting with Mr. J. B. as to the proceedings to appoint committees, and taking instructions for his affidavit as to next of kin, &c.	0	6	8
Drawing same fo. 5.	0	5	0
Drawing state of facts and proposal fo. 24, and copy for the master	0	16	0
Warrant on leaving copy and service	0	4	6
The like to proceed	0	4	6
Attending thereon	0	6	8
Engrossing Mr. J. R.'s affidavit, paper, and duty	0	4	4
Attending			

Attending him by appointment, and afterwards to procure him to be sworn	0	6	8
Paid oath	0	1	6
Warrant on leaving same C. and S.	0	4	6
The like to proceed on state of facts	0	4	6
Attending thereon, same allowed	0	6	8
Warrant on preparing report	0	4	6
Paid for copy draft, folio			
Close copy	0	3	4
Warrant to settle	0	4	6
Attending thereon and proceeded	0	6	8
Another warrant to settle	0	4	6
Attending Mr. R. as to the state of proceeding, and particularly as the persons to be sureties in case the Court should confirm the report and appoint him	0	6	8
Attending warrant to settle report	0	6	8
Warrant to sign same	0	4	6
Attending thereon and examining transcript	0	6	8
Paid for report and master's clerk			
Paid filing with clerk of custodies	0	13	2
Attending for that purpose	0	6	8
Drawing petition to confirm report, fo. 20	1	0	0
Engrossing same	0	13	4
Paper and duty	0	2	8
Copy for Lord Chancellor	0	6	8
Attending to present and afterwards for answer	0	6	8
Paid answering	0	16	0
Copy to serve and service			
Brief copy petition for counsel 4d. per folio			
Drawing observations	0	6	8
Copy	0	3	4

To Mr. Benyon therewith	1	3	6
Attending him	0	6	8
Attending court, petition in paper (each day)	0	10	0
Letters, &c.	0	2	6

Easter Term, 1806.

Attending court, petition heard, and order made	0	13	4
Letters, &c.	0	2	6

Trinity Term, 1806.

Paid for copy state of facts and proposal as to maintenance, fo.			
The like of affidavit in support of it			
Attending warrants thereon and proceeded	0	6	8
Paid for copy draft report, fo.			
Close copy			
Attending two warrants to settle same	0	13	4
Having been served with petition to confirm report brief copy for counsel			
Drawing observations 6s. 8d. and copy 3s. 4d.	0	10	0
To Mr. Benyon therewith	1	3	6
Attending him	0	6	8
Attending court, petition in paper (each day)	0	10	0
Paid for copy of bill of costs			
Attending warrant to tax same	0	6	8
Drawing this bill and copy for master			
Warrant on leaving C. and S.	0	4	6
Warrant to tax C. and S.	0	4	6
Attending thereon	0	6	8
Paid entering draft for costs	0	4	6
Letters and messengers	0	5	0

In the Matter of J. R. a Lunatic.

The Bill of Costs of J. R. the Committee of the Person
and Estate.

Hilary Term, 1806.

Paid for copy of state of facts and proposal for appointment of a committee, folio	
Attending warrant thereon	0 6 8
Paid for copy affidavit, folio	
Attending warrant on state of facts, same approved	0 6 8
Paid for copy draft of report, folio	
Close copy	
Attending warrant to settle same	0 6 8
The like same finally settled	0 6 8
Writing letter to the committee as to trans- ferring stock out of trustees' names to the Accountant-General and for instructions thereon	0 3 6
Attending the committee, conferring and advising as to procuring transfer of other property, &c. when it was determined to apply to the Chancellor thereon, and tak- ing instructions for petition accordingly	0 13 4
Drawing same	0 6 8
Engrossing, duty, and paper	0 6 0
Attending to present same and afterwards for answer	0 6 8
Paid answering	0 15 0
Paid for duplicate	0 11 2
Paid filing with clerk of custodies	0 12 6
	Attending

Attending for that purpose	0	6	8
Paid register for order	1	7	6
Attending examining and passing	0	6	8
Paid entering	0	7	6
Attending Accountant-General with the or- der bespeaking his direction for the trans- fer, and afterwards to procure same	0	6	8
Paid for same	0	5	0
Copying order for the trustees, folio 15	0	2	6
Writing to Mr. J. R. therewith, and with in- structions to get trustees to execute a power for same	0	3	6
Attending him, consulting thereon, when, &c. &c.	0	6	8
Having been served with a copy of petition to confirm the master's report as to com- mittee, perusing the same, and drawing observations thereon	0	6	8
Fair copy	0	2	6
Brief copy petition for counsel 4d. per folio To Mr. Cooke therewith	1	3	6
Attending him	0	6	8
Attending court, petition in paper, each day Letters, &c.	0	10	0
	0	5	0

Easter Term, 1806.

Attending court, petition heard, and order made	0	13	4
Paid court fees	0	13	0
Attending bespeaking, and afterwards to procure order	0	6	8
Paid for same	1	10	0

Paid

Paid filing with clerk of custodies	1	5	8
Attending for that purpose	0	6	8
Writing Mr. R. thereon, and for further in- structions	0	3	6
Attending him by appointment, consulting as to the security necessary before the grant could be obtained, also to the proceedings for maintenance, and taking instructions for affidavit of the property	0	6	8
Drawing and engrossing same, folio 6	0	8	0
Paper and duty	0	2	8
Attending him by appointment, reading same, and afterwards to procure same to be sworn	0	6	8
Paid oath	0	1	6
Attending at the bank, making the transfer to Accountant-General	1	1	0
Letters and messengers	0	5	0

Trinity Term, 1806.

Attending at the clerk of the custodies with order and affidavit, giving instructions for the grant, and paying the deposit 12l. 12s.	0	6	8
Solicitor's fee thereon	2	2	0
Attending Mr. R. by appointment, confer- ring on the further proceedings particularly as to the maintenance, and instructions for affidavit to support the proposal for the whole of the dividends to be allowed	0	6	8
Drawing affidavit and copy for him 1s. per folio			
Attending him, reading over same, confer- ring on the state of proceedings, taking			

minutes

minutes of debts due by the lunatic, and also as to maintenance for the time past, and finally reading over and settling affidavit	0	6	8
Engrossing same			
Duty and paper	0	2	8
Attending him by appointment to be sworn	0	6	8
Paid oath	0	1	6
Attending the Attorney-General several times	0	13	4
Attending him, reading and attesting his execution of the bond	0	6	8
Attending the two sureties for the same purpose, and afterwards to the public-office to get them sworn to the affidavit of justification	0	13	4
Paid two oaths	0	3	0
Attending to make oath of the affidavit of execution of the bond, &c.	0	6	8
Paid	0	1	6
Copying order for the master	0	2	6
Drawing state of facts and proposal as to maintenance, folio 20, and copy for master	1	0	0
Warrant on leaving C. and S.	0	4	6
The like to proceed	0	4	6
Writing letter to Mr. R. as to supposed monies in hands of the trustees, and as to applying same to Mr. W.'s demand for maintenance	0	3	6
Paid for the grant of the committeeship in addition to the 12l. 12s. already deposited	8	4	0
Solicitor's fee on getting the grant enrolled	1	1	0
Attending			

Attending warrant on state of facts and proposal as to maintenance, and proceeded when the master desired to know the state of the account with the trustees	0	6	8
Writing fully to Mr. R. thereon for instructions for applying to them for same	0	3	6
Attending him, conferring thereon, and the necessity of having their accounts, and as to the last half year's dividends due on the stock yet unreceived, &c.	0	6	8
Drawing and engrossing power to receive rents, &c. and duty	2	0	0
Attending execution thereof	0	6	8
Writing him for his determination as to settling with Mr. W. and as to the accounts and steps to be taken	0	3	6
Drawing further proposal 8d. per folio, and copy			
Warrant on leaving C. and S.	0	4	6
The like to proceed	0	4	6
Attending thereon	0	6	8
Warrant on preparing report	0	4	6
Paid for copy draft report	0	15	6
Close copy	0	3	0
Two warrants to settle	0	9	0
Attending thereon	0	13	4
Warrant to sign	0	4	6
Attending thereon	0	6	8
Paid for report and clerk	2	11	6
Paid filing and for office copy			
Drawing petition to confirm same and copying, folio 25	1	5	0
Engrossing same, paper, and duty.	0	11	0

Copy

Copy for Lord Chancellor	0	8	6
Attending to present same and for answer	0	6	8
Paid for answer	0	15	0
Copy to serve	0	8	4
Service	0	2	6
Drawing observations for counsel	0	6	8
Fair copy	0	3	4
Copy petition, three brief sheets			
To Mr. Cooke therewith and clerks	2	4	6
Attending him	0	6	8
Attending court, petition in paper, each day	0	10	0
Court fees	0	13	0
Attending to bespeak and procure order	0	10	6
Paid for same and duplicate			
Paid filing			
Attending for that purpose	0	6	8
Paid register for order			
Attending, examining, and passing same	0	6	8
Paid entering			
Copy for master	0	2	6
Drawing bill of costs and copy, folio.			
Warrant on leaving C. and S.	0	4	6
Two warrants to tax C. and S.	0	9	0
Attending thereon	0	13	4
Paid copy bill of costs of next of kin			
Attending two warrants to tax same	0	13	4
Paid for report of costs and duplicate			
Paid filing and for office copy			
Attending for that purpose	0	6	8
Attending register with same and order, and bespeaking, and afterwards to procure his certificate for sale of stock	0	6	8
			Attending

Attending Accountant-General therewith, giving instructions for sale	0 6 8
Paid for certificate	0 6 6
Attending M. R. the committee to the Ac- countant-General to identify him, and pass draft through the offices	0 6 8
Paid entering draft	0 4 6
Paid entering draft for costs	0 4 6
Letters, &c.	0 10 0
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Bill of Costs incurred on the Petition for the Allowance of Interest, Compensation, &c. ante.

In Chancery.

In the matter of R. W. Esq. a lunatic.

Bill of Costs of E. A. Esq. Committee of the said Lunatic,
taxed in pursuance of order dated 1807.

Instructions to prepare the petition of E. A. the committee, T. W. one of the sons and next of kin, and W. T. praying on behalf of the committee, that, &c.	0 13 4
Drawing same, folio 19	0 19 0
Engrossing and duty	0 9 0
Attending to lodge same with secretary of lunatics, and again to get it answered	0 6 8
Paid answering	0 16 0

Two

Two fair copies to serve	0	12	8
Service thereof on	0	5	0
Fair copy for Lord Chancellor	0	6	4
Drawing and engrossing affidavit of service thereof, duty and oath	0	8	2
Office copy thereof	0	5	10
Drawing and engrossing affidavit of W. T. in support of petition	0	8	1
Paid filing and for office copy	0	6	7
Drawing and engrossing affidavits of Mr. B. and duty and oath	0	11	8
Attending at public office to be sworn	0	6	8
Attending searching for any affidavits filed to oppose	0	6	8
Drawing brief for counsel to support petition	0	15	0
Two fair copies for counsel and brief of affidavits			
Two copies of petition to annex	0	12	8
To Mr. Richards and clerk	4	6	6
To Mr. Benyon and clerk	3	5	6
Attending them	0	6	8
Attending court, petition in paper, two days	1	0	0
Court fees	0	13	0
Attending secretary to bespeak minutes and settle same	0	6	8
Paid for same	0	2	6
Paid for order and duplicate	3	10	7
Two copies to serve—not allowed as they attended.			
Copy for committee of the estate	0	4	0
Perusing committee's accounts and vouchers, selecting therefrom those which related			

to this order in order to prepare a state of facts	0	6	8
Drawing state of facts, folio 10 at 8d.	0	6	8
Fair copy order for master	0	2	6
Warrant on leaving same, C. and S.	0	3	6
Three warrants to proceed, C. and S.	0	10	6
Attending thereon	1	0	0
Drawing bill of costs of the committee, folio 20	0	13	4
Warrant on leaving, two C. and S.	0	5	0
Warrant to tax, two C. and S.	0	5	0
Attending taxation	0	6	8
Paid for copy of W. T.'s bill of costs	0	5	0
Attending taxation	0	6	8
Paid for copy bill of costs of next of kin	0	4	0
Attending taxation	0	6	8
Drawing report	1	0	0
Warrant on draft thereof, two C. and S.	0	5	0
Warrant to settle same, two C. and S.	0	5	0
Attending thereon	0	6	8
Warrant to sign two C. and S.	0	5	0
Attending thereon	0	6	8
Paid for report	1	5	0
Transcribing same	0	10	0
Paid filing and for office copy	2	0	0
Attending filing and examining copy	0	6	8
Duplicate to file at report office and paid	1	12	0
Attending same	0	6	8
Postage of letters and carriage of parcels during the whole of the lunacy (four years)	3	0	0
Drawing statement relative to the next of kin and legatees, and copy for the master 8d. per fo.			

Attending with order to pay in balance at the Accountant-General's to bespeak his di- rection to a cashier	0 6 8
Attending paying in same	0 10 6
Drawing petition to vacate committee's recog- nizance, engrossing and duty	
Paid answering	0 16 0
Two copies to serve	0 10 0
Attending searching for enrollment of re- cognizance	0 6 8
Paid office copy thereof	0 9 0
Brief to counsel to move thereon	0 2 6
To Mr. Benyon and clerk	1 3 6
Attending him	0 6 8
Attending court thereon	0 10 0
Court fees	0 13 0
Paid clerk attending with enroll- ment	1 6 8
Paid for drawing order	1 9 0
Paid filing	0 10 0
Paid for order and duty	1 3 6
Paid duplicate	0 15 0
Attending register, examining and passing same	0 6 8
Paid clerk of enrollment vacating recogni- zance	0 5 0
Attending thereon	0 6 8
Postage of letters	0 3 0
Close copy report for the committee	0 6 8
Master's clerk on passing committee's ac- counts for four years, and for extra trou-	

ble on the accounts comprised in this report	5	5	0
Paid for office copy, cashier's certificate of investment	0	4	0
Attending Accountant-General for certificate of money laid out	0	6	8
Paid for same	0	8	0

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